

Dear Claire,

Thanks for asking me to comment on Senate Bill 8. Nothing in the comments that follow should be taken as opposition to the passage of S. 8. However, I think it can and should be improved with minimal effort by the Committee.

Here is how I think it could be improved:

1. Give the State Ethics Commission the mandate to develop a proposal to the legislature for a comprehensive and internally consistent ethics program for the State of Vermont.
2. Require the State Ethics Commission and **not** the Department of Human Resources to develop a proposed State Code of Ethics that is submitted to the legislature for final approval.
3. Suggest that State Ethics Commission use the resources of an ethics and compliance consulting firm (e.g., Navex Global, SAI Global, LRN, Ethisphere, OCEG, the Ethics Resource Council) in the development of a State Code of Ethics and a comprehensive ethics program.
4. There should be explicit protection against retaliation and other negative acts in connection with complaints filed with the Ethics Commission (and the Department of Human Resources, if it continues to be part of the ethics regime).
5. The Ethics Commission should be required to institute an ethics hotline that enables anonymous tips and complaints. (Otherwise, a significant amount of misconduct will go unreported.)

Explanation:

As currently drafted, the Bill splits jurisdiction for state ethics matters between the Ethics Commission largely for conflict of interest matters and the Department of Human Resources for everything else. Because the Code of Ethics almost certainly will contain provisions related to or overlapping with the specific prohibitions set forth in S. 8, it is more likely than not that jurisdictional conflicts will arise and inconsistencies in enforcement and interpretations.

The Bill contains no guidance, guidelines, or standards for the development of the State Code of Ethics or its enforcement. Unless it is purely advisory – meaning, we’d like you to follow these rules but won’t take any detrimental action if you don’t – the State Code of Ethics will have the force of law. Constitutionally, its promulgation and enforcement must comply with due process. To delegate all of this authority to the Department of Human Resources *carte blanche* is unwise.

Responsibility for developing and enforcing this Code should be given to the Ethics Commission, where it more properly belongs in the first place, with the proviso that the Commission obtain expert assistance in discharging this responsibility. The Commission would draft a Code in consultation with the appropriate legislative committees and submit it for final approval and adoption by the legislature.

It is even more problematic to require the Commission to refer complaints about violations of the Code of Ethics to the Department of Human Resources. There is no indication that the Department of Human Resources has any expertise in matters of governmental ethics that is better or different from that of any other department. Moreover, I wonder whether the Department has the resources to devote to the task of developing and enforcing a Code of Ethics.

I have taught courses on the development of codes of ethics, written them, and helped others develop them. There are many mistakes that organizations have made over the years, including (a) handing off the task to a lawyer and (b) starting from scratch as if no one else had ever done this. Unless expert consultants are brought in to help, I fear the result will be unsatisfactory and, worse, ineffective.

The Bill requires that the Commission conduct annual training in collaboration with the Department of Human Resources. It is good for the Commission to work with HR on this because HR typically has the experience, expertise, infrastructure, and resources for training. However, it should be clear that the Commission is responsible for the content of the training and may not delegate that to people who have no expertise in ethics training. (I can tell you stories!)

A few years ago, I led a team of experts that developed a proposal to the City of Dallas for an assessment of its ethics regime and a comprehensive training program. (We were a finalist but did not win the contract.) In that proposal, we proposed a three-phase project: 1. Assessment of the existing ethics program. 2. Development of Ethics-related Institutions and Training. 3. Post-implementation Assessment and Analysis.

The plan was to design the specific training modules and support institutions in response to what we learned from the assessment of the existing ethics program. Another key feature was the creation of a monitoring system to measure the effectiveness of training and to capture problems in real time.

The population of Dallas is over twice that of the State of Vermont. We don't need everything they need. But we need something.

I think vesting the Ethics Commission with the authority to create and enforce a comprehensive ethics program has the greatest probability of producing a satisfactory result.

The Basic Ethical Question

While I have the floor, allow me to say a word about the basic ethical question that should guide our thinking.

Whether we articulate it or not, the basic ethical question we ask whenever we select a professional, employee, or elected official for a position of responsibility is "Can I trust you?" This question has two parts:

1. Can I trust you to do a good job? This is the competency question. Do you have the knowledge, skills, and expertise needed to do the work? Will you apply yourself

diligently to the task? Will your work product meet basic standards of competency in this field (medicine, law, finance, engineering, legislation, administration, etc.)?

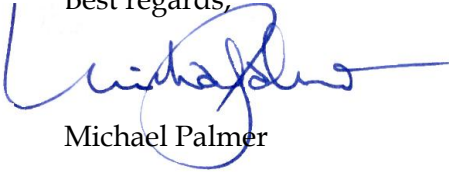
2. Can I trust you to be loyal to my interests? Will you put my interests ahead of your own or those of anyone else? Will you do for me what I would do if I had the time or necessary expertise to do it? Will you refuse to take advantage of the power and authority I am giving you for personal gain or to pursue your own agenda?

An effective organizational ethics program will assure that people at all levels in the organization are trustworthy, i.e., that they are both competent and loyal. Ethics programs also attempt to assure that people comply with all applicable laws.

We generally do not need to worry about the competency pole of the trust question. If someone is goofing off or doesn't have the knowledge and skills to do the job, most often will be evident before they are hired or elected or will become evident soon thereafter.

Thus, an ethics program should be concerned largely with assuring that we can trust our elected and appointed officials and employees to be loyal to the State's interests and not to use their positions for personal gain or to advance their own interests or those of anyone else, even if those personal interests do not obviously conflict with state interests, but especially if they do.

Best regards,



Michael Palmer

802 398 7737

mp@ethicsbydesign.com

ETHICS BY DESIGN



Build Trust
Assure Compliance
Prevent Fraud & Misconduct