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MEMORANDUM

To: Brynn Hare

From: Patricia Gabel, Esq., State Court Administrator

Date: February 28, 2017

Re: House Bill Relating to Drug and DUI Treatment Dockets

Brynn, this memo is meant to explain the separation of powers issues I raised in my earlier Memo to you, which later became an exhibit before House Judiciary. I haven't had an opportunity to present the related testimony yet, but I believe I will be able to so next week.

In raising these constitutional concerns, the intent is not to question the wisdom of joint efforts between the judiciary and others agencies—public and private—to address the serious problems that the bill is meant to address. On the contrary, the correlation between substance abuse and crime, family dysfunction, and child neglect and abuse is well recognized by the Vermont Supreme Court, which has taken a number of steps, including treatment court docket initiatives in several counties, toward a collaborative approach.

There is a real, and constitutionally significant difference, however, between these efforts and the bill in question. The problem begins with the bill's fundamental premise of requiring the Chief Administrative Judge (now known as the Chief Superior Judge) to develop and submit a plan to the Legislature to achieve statewide access to treatment programs through a drug or treatment "docket" within the criminal division of each unit of the superior court, together with standards by which they will operate. A core constitutional function of the Supreme Court is to exercise "administrative control of all the courts of the state." Vt. Const., ch. II, § 30. One of the core aspects of "administrative control," in turn, is discretionary allocation of judicial resources.

As our Supreme Court has clearly stated: "The assignment and reassignment of judges among the territorial units is part of that administrative control." Ketcham v. Lehner, 149 Vt. 314, 317 (1988). Thus, whatever priorities may animate others, judicial control over "[c]ourt administration necessarily involves managing judicial resources with effects good and bad on the litigants who use our courts." In re Vt. Supreme Court Administrative Directive No. 17, 154 Vt. 392, 402 (1990) (rejecting constitutional challenge to Supreme Court's temporary moratorium on civil jury trials).

This is not a principle unique to Vermont. Many decisions from other states have invalidated laws that strike at a court's constitutional authority over the assignment of judicial resources and control of its civil and criminal dockets. See, e.g., Riley v. Martin, 262 S.E.2d 404, 407 (S.C. 1980) (holding that statute vesting Chief Judge of Court of Appeals with authority to requisition circuit judges to sit on Court of Appeals was "a clear infringement on upon the constitutional power of the Chief justice of the Supreme Court to assign any judge to sit in any court within the unified judicial system and therefore violates . . . the State Constitution"); People v. Joseph, 495 N.E.2d 501, (Ill. 1986) (holding that statute requiring assignment of judge to post-conviction relief proceeding who did not preside at original trial violated constitutional provision vesting "supervisory and administrative authority over all the courts" of the State in the Supreme Court); Solomon, v State, 364 P.3d 536, 548 (Kan. 2015) (holding that legislation which provided for election of chief judge by district court judges within each district in place of Supreme Court appointment constituted an "impermissible intrusion on the part of the legislative branch into the constitutionally mandated administrative authority of the Supreme Court").

While none of these cases considered exactly the same issue as here, each underscores the essential point: Any law setting judicial priorities for treatment dockets within the criminal division—or any specialized docket within any division of the superior court for that matter—must be in harmony with the Constitution's provision of a unified judicial system under the administrative control of the Supreme Court.

In light of these principles, a very strong argument can be made that the proposed bill, if enacted, would result in a massive infringement on the Supreme Court's constitutional authority by effectively requiring an assignment of significant judicial resources—including judges, administrative staff, and courtrooms—to a "treatment" docket within the criminal division of each superior court unit. There is, of course, no question that the Legislature may constitutionally

establish and fund subordinate jurisdictional courts, as it did with the family division of the superior court. To direct the Supreme Court, through its appointed Chief Superior Judge, to specifically allocate judicial resources to a particular kind of case within the family division, i.e., those involving defendants with drug or alcohol abuse amenable to treatment, is altogether different; it represents a level of legislative allocation of judicial resources, within the criminal division, on an unprecedented scale.

As noted, there are many areas of acceptable and even necessary overlap among the branches of government, including the work of drug and DUI treatment dockets that necessarily require the cooperative participation of the courts and the executive branch through the State's Attorneys. Efforts such as these must, however, be entered into voluntarily, with the due deliberation and the equal buy-in of each branch. The original legislation establishing the drug court pilot project established "initiative committees" for the purpose of developing appropriate policies and structures with the participation of judges, prosecutors, corrections officials, and public and private social service providers. See Act 128, 2002 Sess. (H.213). To comport with separation-of-powers requirements, any legislative initiative to fundamentally alter or expand the treatment docket requires the same regard for the independence of the coordinate branches.

Similar concerns inform other provisions in the bill. I will only mention two for now. As noted, the Supreme Court is the constitutional entity vested with administrative control of the courts. The Chief Superior Judge is appointed by the Court, and exercises delegated authority. Thus, apart from the more fundamental concerns expressed above, the bill's provisions directing the Chief Administrative Judge to undertake certain actions in developing the treatment docket infringes on the Supreme Court's authority.

The bill also purports to create a funding mechanism for the proposed expanded treatment docket, the Drug and DUI Treatment Courts Grants Board, which is charged with "seeking public and private-sector funding partners." The funding of judicial functions through institutionalized private donations raises fundamental ethical concerns for the specific judges involved and the judiciary as a whole. The Code of Judicial Conduct requires that judges act at all times in a manner that "promotes public confidence in the integrity and impartiality of the judiciary," Canon 2.A, and the appearance of integrity is equally crucial to public confidence. If funding of the treatment docket is provided by attorneys and law firms who practice in the very system they are directly

funding, a question arises as to the ability of the courts to remain entirely impartial in matters involving those attorneys and law firms. This is a very serious matter for the judiciary, and requires considerably more extensive review and analysis