

**Vermont Supreme Court
Professional Responsibility Program
Office of Bar Counsel**

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March 31, 2022

Honorable Sarah Copeland Hanzas
Chair, House Committee on Government Operations
Via email only to scopelandhanzas@leg.state.vt.us

Re: S.171

Chair Hanzas:

Thank you for the opportunity to testify before the Committee earlier this week. Today, I write to respond to the "Conflicts of Interest Quick Chart" submitted by the Vermont State Ethics Commission.

The chart includes two examples in which the State Ethics Commission concludes that while the State Code of Ethics would apply to an attorney's conduct, the Vermont Rules of Professional Conduct would not. I am not aware of any authority for the State Ethics Commission to declare when the Vermont Rules of Professional Conduct **do not** apply to an attorney's conduct.

The Professional Responsibility Board's disciplinary jurisdiction is set out in Rule 5 of Supreme Court Administrative Order 9 (A.O. 9). The Board's jurisdiction extends to "[a]ny lawyer admitted in the state," A.O. 9, Rule 5(A)(1), as well as to "[a]ny lawyer not admitted in this state who practices law or renders legal services in this state." A.O. 9, Rule 5(A)(3). Thus, in the examples cited by the State Ethics Commission, the lawyer is subject to the disciplinary jurisdiction of the Professional Responsibility Board.

Turning to the examples, the chart indicates: "**Example #2:** A State attorney is assigned to negotiate a service contract with a small business, his roommate owns 10% of the business. Recuse under **CoE, NOT RPC.**"

In fact, the attorney's conduct *could* violate the Vermont Rules of Professional Conduct. It appears that the attorney has been assigned to the negotiation because the attorney is an attorney. So, the attorney would have a conflict of interest if the representation of the state agency would be materially limited by the lawyer's interest in the roommate's business success. See, *Vermont Rules of Professional Conduct, Rule 1.7(a)(2)*.

In addition, V.R.Pr.C. 1.4(b) requires a lawyer to provide a client with sufficient information to make informed decisions about the representation. Here, the failure to disclose the roommate's financial interest to the client might violate Rule 1.4(b).

Finally, V.R.Pr.C. 8.4(c) makes it professional misconduct for an attorney to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." In the example, depending on what the attorney does or does not disclose to the client about the roommate's financial interest in the transaction, the attorney might violate V.R.Pr.C. 8.4(c), including by omission. Indeed, Comment [5] to Rule 8.4 includes the following sentences:

- "[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers."

At the very least, if someone filed a disciplinary complaint against the attorney, the complaint would be reviewed pursuant to the procedures set out in A.O. 9.

From 2012 through 2021, I conducted the initial review of all complaints. Prior to that, I was the disciplinary prosecutor from 2000 to 2012 and was responsible for the investigation and prosecution of all complaints. I am confident that, in the scenario, the complaint would not be dismissed out-of-hand under a theory that the attorney was not subject to the Rules of Professional Conduct while negotiating a contract for an agency client. Rather, the Professional Responsibility Program would have questions for the attorney who is the subject of the complaint.

The chart also includes this: "**Example #1:** An attorney employee working for the Agency of Transportation is assigned to a hiring committee. One of the candidates for a job is the attorney's brother. **CoE, NOT RPC.**"

Again, it is not clear to me why the State Ethics Commission is able to conclude that the Rules of Professional Conduct would not apply. As an investigator or prosecutor, I would have several questions for the attorney if a complaint was filed. For example, what if the agency client asks the lawyer for legal advice related to the applicants? The conflict provisions of the Rules of Professional Conduct would apply and, as above, so would V.R.Pr.C. 1.4(b) and V.R.Pr.C. 8.4(c). As in the other example, the complaint would not be summarily dismissed under a theory that the attorney was not subject to the Rules of Professional Conduct while serving on the client's hiring committee.

In sum, I am writing to call attention to the concern that the State Ethics Commission does not have the authority to declare situations in which an attorney is not subject to the Rules of Professional Conduct and the disciplinary jurisdiction of the Professional Responsibility Board.

Respectfully,

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