

**From:** Valerio, Matthew  
**Sent:** Monday, February 7, 2022 10:53 AM  
**To:** Jeanette White <[JWhite@leg.state.vt.us](mailto:JWhite@leg.state.vt.us)>  
**Subject:** Ethics Commission bill (s.171)

Hello Sen. White:

I have been advised that your Senate Government Operations Committee has taken up S.171.

I have significant concerns regarding the constitutionality of the bill as this seems to apply potentially apply to lawyers unless the committee inserts an exemption for attorneys.

Simply put Ch.2, sec.30 of the Vermont Constitution vests the power to regulate and discipline lawyers solely within the purview of the Vermont Supreme Court. For the legislature to attempt to regulate the ethical responsibilities of lawyers would create conflicting requirements between the legislatively created commission and the Court-created, nationally derived Code of Professional Responsibility and its enforcement mechanism, the Professional Responsibility Board.

For reference, the Vermont Rules of Professional Conduct (RPC) are based upon the ABA Model Rules of Professional Responsibility. Those ABA Model Rules are drafted by an ABA standing committee, and subcommittees representing all aspects of the profession. They are the best and brightest in the legal profession and make decisions and rule recommendations based upon the evolution of years of legal precedent and debate going back hundreds of years.

As written S.171 definition of a conflict of interest in the bill is very different from a conflict under Court rules. In fact, S.171 seeks to adopt a definition of conflict that was abandoned in September 1999 when Vermont moved into the modern legal world and finally adopted the Model Rules of Professional Responsibility. The conflation of an "Ethics Commission Conflict," i.e., the mere appearance of a conflict, with the Court's RPC "actual conflict" rule with its well defined, litigated and understood rules and definitions would set the legal profession back 25 years in Vermont.

Further, if the standard of an S.171 conflict were adopted, it also calls for attorneys to respond by way of written public disclosure which would violate the Vermont Rules of Professional Conduct regarding clients confidences, the confidentiality of client matters, and the public disclosure of information acquired during the course of representation thereby subjecting the attorney to discipline by the Professional Responsibility under the Court RPC. Further, a violation of those Court Rules could subject the attorney to civil liability to his/her client.

In addition, inhibiting those who leave state employment as attorneys from taking a job against the state for a year may unconstitutionally restrict their right to employment in violation of the commerce clause, equal protection, and common benefits clauses. It particularly could limit State's Attorneys and Attorney's General from joining the defense bar as contractors. I would note that this practice is common and is also already governed by the Court's RPC.

Finally, the Vermont Supreme Court has long had a program in place to evaluate claims of misconduct under the Rules of Professional Conduct and has regulated private and government

lawyers consistently under that umbrella. This bill would seek to create multiple classes and subclasses of attorneys each playing by different rules depending upon who their employers are. That, Senator White, is a recipe for disaster as a practical matter. But it is also a recipe for lengthy, unnecessary litigation – something I am trying to avoid.

I would be happy to testify about these matters if you are interested in hearing from me in person (via Zoom).

I thank you for your anticipated consideration.

Best, Matt

Matthew Valerio, Defender General  
Office of the Defender General