

Vermont State Ethics Commission

Memorandum: Can the State Code of Ethics Apply to State Employees Working in the Judicial Branch?

During the drafting and public input phases, the question arose: Should public servants, other than judges, employed by the judicial branch be covered by the state code of ethics? Comments received were for and against.

Public servants throughout Vermont state government perform a myriad of tasks. They are accountants, information technology specialists, planners, and clerical staff. They interact with the public and with other state employees and actors. Their decisions and conduct can affect the public in a many ways. They hire and fire and supervise other employees. They negotiate contracts with service providers. They purchase furniture, supplies, computers, and computer programs. They select computers and computer programs. They provide technical support. They assure the security of their facilities. They maintain buildings. They furnish their facilities. They perform studies to inform policy decisions. They make rules and seek public input. They interact with the public daily. They design forms, seek funding, and manage budgets. They select individuals or companies to do business with. They have critical and fundamental duties to ensure that their departments or agencies comply with employment, anti-discrimination, and equal opportunity laws.

The public servants mentioned above work in all three branches of government, executive, legislative, and judicial. Their duties, regardless of which branch employs them, differ little, if at all. The ethical implications of their jobs are virtually identical: All serve the people of Vermont and must put the public interest ahead of personal interest. Whether employees have broad discretion or no discretion in their day-to-day duties, they are subject to the same pressures, distractions, and influences. The public expects them all to meet basic ethical standards. Because of their similar responsibilities to the people of the State of Vermont, which particular branch employs them is immaterial. A state-wide, broad-based code of ethics can guide them all. Having a consistent and independent source for ethics advice when they encounter ethical questions would benefit them all.

As released for public comment in July 2020 the draft code said,

“Unless excluded below, this Code of Ethics applies to all persons elected or appointed to serve as officers of the State of Vermont, all persons elected or appointed to serve as members of the general assembly, all state employees, all persons appointed to serve on state boards and commissions, and persons who in any other way are authorized to act or speak on behalf of the State of Vermont. This code refers to them all as “public servants.” (Emphasis added).

The draft code later quoted the applicable constitutional exclusions. They are repeated below.

As drafted, the code of ethics can apply to judicial branch employees who do not wield judicial power. The Court Administrator’s office comment proposed that the state code of ethics specifically exclude all members of the judicial branch. (See attached email comment) The suggestion referenced

separation of powers considerations and the judiciary's existing "robust" employee Code of Conduct and Employee Discipline with enforcement provisions for its state employees. This memo addresses both concerns and concludes that a state code of ethics can apply to non-judicial state employees in the judicial branch.

Separation of Powers

Chapter II of the Vermont Constitution "Plan or Frame of Government, Delegation and Distribution of Powers" creates the three branches of government.

Chapter II § 4 creates the judiciary. **"§ 4. [JUDICIARY]** The judicial power of the State shall be vested in a unified judicial system which shall be composed of a Supreme Court, a Superior Court, and such other subordinate courts as the General Assembly may from time to time ordain and establish."

Unlike the United States Constitution where separation of powers is implied, the Vermont Constitution explicitly states its separation of powers.

"Chapter II § 5. [DEPARTMENTS TO BE DISTINCT] The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others."

What is the judicial power under our constitution? "The judicial power, as conferred by the Constitution of this State upon this Court, is the same as that given to the Federal Supreme Court by the United States Constitution, that is 'the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.'" *In re Opinion of Justices*, 115 VT 524 (1949), citing *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 255, 55 L.Ed. 246, 252 (1911). It is "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." *Id.*, citing 1 Bouv. Law Dict. Rawle's Third Revision. Under the Vermont Constitution, the core function of the judicial branch, is its judicial power to decide cases. That power may not be exercised by the executive or legislative branches.

The powers of the three branches of Vermont's government are not "hermitically sealed" from the others. See, *Hunter v. State*, 177 Vt. 339, 865 A.2d 381 (2004). "The constitutional provision that the legislative, executive and judiciary departments shall be separate and distinct so that neither exercise the powers properly belonging to the others does not mean an absolute separation of functions, since of necessity there must be a certain amount of overlapping or blending of the powers exercised by the different departments." *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 20 A.2d 117 (1941). Although the separation of powers doctrine does not contemplate an absolute division of authority among the three branches, it does ensure, at a minimum, that no branch will usurp the core functions or impair the independent institutional integrity of another. *Brady v. Dean*, 173 Vt. 542, 790 A.2d 428 (2001).

How are the limits on separation of powers determined? More specifically, can the Legislature apply a state code of ethics to state employees of the judicial branch? Would having non-judicial state employee public servants follow the same code of ethics as their counterparts in the other two branches violate the separation of powers? "The focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that may in some way pertain to another branch, but

whether the power exercised so encroaches upon another branch's power as to usurp from that branch its constitutionally defined function." *Hunter v. State*, 177 Vt. 339, 865 A.2d 381 (2004).

One factor to consider in a separation of powers inquiry is whether the independent institutional integrity of the judiciary is impaired. See, e.g., *In re D.L.*, 164 Vt. 223, 669 A.2d 1172 (1995) (holding inquests do not violate separation of powers).

The core judicial power, determining actual controversies arising between adverse litigants, is exclusively reserved to the judicial branch. Setting court administration standards is not. Five sections of the Vermont Constitution obligate the Supreme Court to adopt rules. In four of those five, the parameters of rulemaking involve a second branch of government, the Legislature. Chapter II § 30 requires the Supreme Court to adopt rules setting the terms and conditions of its exercise of appellate jurisdiction. Those rules may not be "inconsistent with law." Chapter II § 31 says lower court divisions into geographical area and function are "determined by law" meaning legislatively adopted statute "or by judicial rules adopted by the Supreme Court not "inconsistent with law." Chapter II § 38 addresses trial of issues before juries as "established by law" again, meaning statute, or "by judicial rules adopted by the Supreme Court not inconsistent with law...." And closest to this inquiry, Chapter II § 37 addresses the judiciary's "rule making power." "The Supreme Court shall make and promulgate rules governing the administration of all courts, and shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. Any rule adopted by the Supreme Court may be revised by the General Assembly." How judicial branch court administration is conducted is not exclusively determined by the judicial branch. It is shared. In many ways legislatively enacted laws, (see below) determine how the judiciary may act. Judicial rules are reviewed. This sharing is required by the Vermont Constitution and does not violate separation of powers.

The Supreme Court's administrative options and limits are, in part, defined by legislative enactments. Legislated requirements for the judiciary and its employees are set forth in Title 4 chapters 1, 3, 5, 7, 9, 10, 11, 13, 15, 17, 19. 4 V.S.A. § 3 requires the Supreme Court to adopt and promulgate a judicial code of ethics to be binding on judicial officers, i.e., those judges and magistrates who actually decide cases. Interestingly, there is no similar requirement for rules for state employees of the judicial branch. The Legislature by statute determined that court clerks and staff are "state employees." 4 V.S.A. § 691(a). The Legislature determined that judicial branch clerks and staff: are "subject to collective bargaining, are entitled to all fringe benefits and compensation accorded classified State employees who are similarly situated, subject to any statutory limits unless covered by a collective bargaining agreement under Chapter 28 of Title 3 chapter 28 [the Judiciary Employees Labor Relations Act]." *Id.* In 3 V.S.A. § 1012 of the Judiciary Employees Labor Relations Act, it was the Legislature that defined, "judicial employees' rights, duties and prohibited acts." Legislation can, without violating separation of powers principles, affect the judicial branch and its state employees. Legislatively decreed "rights, duties and prohibited acts" for state employees of the judiciary do not impair the institutional integrity of the judicial branch. Nor do they encroach on its core judicial function.

Some powers granted to the judiciary by the constitution are not exclusive. Only the Supreme Court can grant or discipline attorney licenses. Yet, disciplinary authority over state employees who are attorneys is shared. The Supreme Court's authority over attorneys and their licenses does not preclude other branches of state government from setting rules for the conduct of their members or employees, many who are attorneys. The General Assembly's rules over its members including attorney members are separate from the rules the Supreme Court sets for attorneys. Attorneys who work in the executive branch are subject to the Supreme Court's rules and discipline against their licenses. Simultaneously,

they must comply with workplace rules, Department of Human Resource rules or policies, and department, agency, or executive order ethics requirements. Failure to comply with those rules may result in employment action against them, none of which implicates the Supreme Court's disciplinary power over them as licensed attorneys. Applying the state code of ethics to state employees of the judicial branch does not affect the Supreme Court's authority over them as much as defining clerks and staff as "state employees."

Applying a statutory state code of ethics to state employees of the judiciary is a practical reality of daily government. Some other states' codes of ethics apply to judicial employees and even elected judges. (See, Connecticut, Massachusetts, California.) Applying the state code of ethics to state employees working in the judicial branch does not impair the independent institutional integrity of the judiciary. The judicial branch can maintain its Personnel Policy, Code of Conduct and Employee discipline so long as it is "not inconsistent with law." A statutory state code of ethics does not conflict with judicial branch employee dictates. A state code of ethics does not usurp the core function of the judiciary.

A State Code of Ethics differs from employment rules or policies

The Ethics Commission's proposed code of ethics is intended to provide a consistent baseline for ethical conduct by public servants in state government. It is directed at public servants regardless of the position they hold. It is not an employment contract. Ethics code obligations and violations are separate and distinct from employment violations. A state code of ethics is not intended to supersede, replace, or be replaced by other ethics provisions.

Section 12 of the draft code of ethics, "Other Ethics Rules or Policies," recognizes that some state employees are or will be subject to other rules or policies specific to their positions in state government. Section 12 anticipates that some of those other rules or policies may be more restrictive. The presence of other ethics rules or policies does not render application of this state-wide code of ethics unnecessary. This code of ethics and other ethics rules or policies are complementary.

One example of an "other rule or policy" is found within the 111 page "Vermont Judicial Branch Personnel Policy" last revised in 1998. Part VII of that policy is the "Code of Conduct and Employee Discipline" for non-judicial employees. Its function mirrors the Department of Human Resources Personnel and Procedure Manual. <https://humanresources.vermont.gov/labor-relations/manual>. The judicial Code of Conduct and Employee Discipline for non-judicial employees is incorporated into the VSEA collective bargaining agreement with the judicial branch. The DHR Personnel and Procedure manual is incorporated into the VSEA collective bargaining agreement with the executive branch. The judicial code, like the DHR Personnel and Procedure manual, includes a non-exhaustive listing of prohibited conduct. Both specify disciplinary procedures and potential sanctions. (See Comments from Judiciary, attached). Both function as the basis of employer/employee disciplinary action. ¹ Judicial branch supervisors and program managers enforce the Vermont Judicial Branch Personnel Policy - Code of Conduct and Employee discipline when it is violated by their employees.

¹ Executive Order 19-17 serves a similar function for gubernatorial appointees. Enforcement for violations lies with the governor or governor's designated agent.

This draft state code of ethics does not restrict or interfere with the judiciary's ability to set standards for the conduct of its state employees. It does not affect the right of any branch to discipline its employees. Including judicial branch state employees with the rest covered by the ethics code, rather than excluding them, is consistent with the spirit and intent of the ethics code. It is consistent with judicial and legislative precedent. It provides judicial branch employees the same independent and disinterested venue to seek ethics advice. And, including judicial branch state employees sends to the public a message of state-wide consistency and recognizes that they, too, are public servants.

For these reasons, the Ethics Commission submits that this code of ethics can be applied to non-judicial employees employed by the judiciary.

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Executive Director
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