

To: Senate Committee on Government Operations
From: Teri Corsones, VBA Executive Director
Re: S. 171
Date: February 22, 2022

Thank you for the opportunity to comment on the recent amendments to S.171. My comments are limited to the applicability of S.171 to Vermont licensed attorneys and will focus on the following five proposed amendments designed to clarify that applicability.

1. Other Branches' Codes of Ethics

Section 1202(a)(2) provides that other branches of State government are not prohibited from adopting additional provisions regarding the ethical conduct of their employees or provisions which exceed the requirements of this Code of Ethics. We propose that an additional sentence be added to clarify that where there might be a conflict between competing provisions in codes of ethics, that the branch code of ethics applicable to the branch employee shall control. This could be accomplished by adding to the subsection: "Where branches have adopted provisions regarding the ethical conduct of their employees and any such provisions are in conflict with the requirements of this Code of Ethics, the former shall control".

Proponents of the Code of Ethics have repeatedly emphasized the need for a basic Code of Ethics to apply to all three branches, and that where there might be differences between the basic Code of Ethics and codes of ethics geared to specific situations in a particular branch, that the branch's rules of ethics should apply to those specific situations. This goal is achieved by adding the proposed sentence.

2. Consistency with the Vermont Constitution

Section 1202(a)(3) provides that the application of the Code of Ethics does not in any way abrogate or alter the sole authority of each house of the General Assembly to judge the elections and qualifications of its own members under Chapter II, Sections 14 and 19 of the Vermont Constitution. We propose that an additional sentence be added to clarify that the application of the Code should likewise honor Chapter II, Section 30 of the Vermont Constitution. This could be accomplished by adding a new subsection (4): "The application of this Code of Ethics does not in any way abrogate or alter the sole authority of the Vermont Supreme Court to exert disciplinary authority over judicial officers and attorneys at law under Chapter II, Section 30 of the Vermont Constitution."

3. Government Attorneys – Conflicts of Interest

Section 1203(b)(3) provides that a public servant who is a licensed attorney shall comply with the Vermont Rules of Professional Conduct regarding conflicts of interest or the appearance of a conflict of interest. We appreciate that the point we have made that the Vermont Rules of Professional Conduct already thoroughly address attorneys' conflicts of interest has now been acknowledged. We propose that an additional sentence be added to the subsection to clarify that where the the Vermont Rules of Professional Conduct for government attorneys apply and there is an inconsistency between the Code of Ethics and the Vermont Rules of Professional Conduct, the Vermont Rules of Professional Conduct

control. This can be accomplished by adding a new sentence to the subsection: “Where the Vermont Rules of Professional Conduct so apply and there is any inconsistency between the Code of Ethics and the Vermont Rules of Professional Conduct, the Vermont Rules of Professional Conduct shall control.”

4. Government Attorneys – Attorney Client Privilege

Section 1203(d) provides that nothing in the section shall require a public servant to disclose confidential information or information that is otherwise privileged under law, presumably referring in part to the attorney client privilege. Similar to the proposed addition regarding conflicts of interest, we propose that an additional sentence be added to clarify that the Vermont Rules of Professional Conduct should apply and control regarding the attorney client privilege. This can be accomplished by adding a new sentence to the subsection: “A public servant who is a licensed attorney shall comply with the Vermont Rules of Professional Conduct regarding the course of action the attorney may take when the attorney client privilege is involved. Where the Vermont Rules of Professional Conduct so apply and there is any inconsistency between the Code of Ethics and the Vermont Rules of Professional Conduct, the Vermont Rules of Professional Conduct shall control.”

5. Approved Continuing Ethics Education

Section 1205 requires mandatory ethics education and training. Vermont licensed attorneys are required to undertake at least two hours of ethics training every two years. This is more stringent than what the Code of Ethics requires (continuing ethics education with no prescribed time frame once every three years after an initial training.) Notably, neither the Vermont Bar Association nor the Vermont Judiciary are identified as approved continuing ethics education providers although both organizations have provided robust ethics trainings for attorneys and judicial officers, respectively, for decades. We propose that each be recognized as approved continuing ethics education providers in the bill. This can be accomplished by adding to line 19 in the section: “the Vermont Bar Association for attorneys at law, the Vermont Judiciary for judicial employees, . . .”

Conclusion

In conclusion, we maintain that the cleaner way to address ethics considerations for attorneys and judicial officers is by acknowledging that the Vermont Constitution grants the Vermont Supreme Court disciplinary authority over attorneys at law and judicial officers, including ethics considerations, and we maintain that the Vermont Rules of Professional Conduct have proven highly effective at addressing ethical complaints against attorneys for decades. We continue to request that the exclusion for judicial officers in the original version remain in S.171 and that the exclusion be extended to attorneys as well, given the Constitutional basis for the exclusion.

In light of the Committee’s desire to establish a basic Code of Ethics for all three branches notwithstanding the constitutional arguments above and the Judiciary Branch’s existing ethics rules and processes, in the event S.171 remains in its current form we urge the Committee to accept the five proposed amendments to clarify the points made above. Thank you for the opportunity to comment, and for all that you’re doing to ensure that all branches of Vermont government have basic ethics rules going forward.