

To: Senate Committee on Government Operations
From: Teri Corsones, VBA Executive Director
Re: S. 171
Date: February 9, 2022

Thank you for the opportunity to comment on S.171 proposing to codify a State code of ethics in 3 V.S.A. chapter 31. My comments are limited to the applicability of S.171 to Vermont licensed attorneys, with specific regard to the Vermont Constitution and to the Vermont Rules of Professional Conduct.

Vermont Constitution

The Vermont Constitution provides in relevant part: “The Supreme Court shall have administrative control of all the courts of the state, *and disciplinary authority concerning all judicial officers and attorneys at law in the State.*” Vermont Constitution, Chapter II Section 30 (emphasis added). The Vermont Constitution also provides in relevant part: “The Legislative, Executive, and Judiciary departments, shall be separate and distinct, *so that neither exercise the powers properly belonging to the others.*” Id., Chapter II, Section 5 (emphasis added).

The Supreme Court’s disciplinary authority concerning all judicial officers and attorneys at law is a unique provision in the Vermont Constitution; nowhere else in the document is disciplinary authority over a specific group of individuals cited. There is a provision in the Constitution regarding accountability where officers of government are concerned, however. Significantly, that provision singles out officers of government “whether legislative or executive” (not judicial) and noted that such officers are accountable to the people. Id., Chapter I, Article 6.

S.171 already properly provides in Section 1202(b)(2) that it does not apply to judicial officers. In keeping with the Supreme Court’s constitutional authority to discipline judicial officers and attorneys at law, I suggest that a similar provision be added to make clear that S.171 should also not apply to attorneys at law. This could be accomplished by substituting the phrase “those subject to the Vermont Supreme Court’s disciplinary authority under Chapter II, Section 30 of the Vermont Constitution” as a new Section 1202(b)(2) provision. That substitution would clarify that S.171 should not apply to judicial officers or to attorneys at law. That substitution would also ensure that one branch of government is not exercising a power properly belonging to another.

Vermont Rules of Professional Conduct

I’m not aware of any claims that the Vermont Supreme Court has been lax in exercising its disciplinary authority over judicial officers (through the Vermont Rules of Judicial Conduct) or attorneys at law (through the Vermont Rules of Professional Conduct). One need only review the 158 pages of the latter [VermontRulesofProfessionalConduct.pdf \(vermontjudiciary.org\)](https://www.vermontjudiciary.org/VermontRulesofProfessionalConduct.pdf) to recognize the painstakingly thorough, detailed and historic development of rules of conduct and ethics specifically geared to attorney’s duties as officers of the court. The body of rules is the result of decades of extensive public hearings, public comments and adjudicative processes.

Much commentary has been given about how attempting to apply general ethics standards to the unique duties that state employees who are attorneys must adhere to, whether as state’s attorneys, public defenders, assistant attorneys general, etc., is like “fitting a square head into a round hole”. The

framers of the Vermont Constitution likely had the centuries of experience that resulted in the unique rules of conduct and ethics for attorneys and judges in mind when they wrote that only the Vermont Supreme Court would have disciplinary authority over judicial officers and attorneys at law.

Commentary was also offered that the Secretary of State has authority over notaries public, including attorneys who are notaries public, and therefore there is precedent for alternative disciplinary authority. That is incorrect. The same constitutional argument was made when the notary public statute was introduced and the Secretary of State rightly acknowledged that only the Vermont Supreme Court (through the Professional Responsibility Board) has disciplinary authority over notary public attorneys at law.

Conclusion

In conclusion, I didn't hear in the testimony any examples of problems or issues with the current system for handling ethical complaints against attorneys. I heard many examples of problems and issues with attempting to apply S.171 to state employees who are attorneys. I respectfully submit that the most reasonable and straight-forward way to resolve the issue of the applicability of S.171 to state employees who are attorneys is to expand the current exemption for judicial officers to include attorneys at law. This would be consistent with the Vermont Constitution and would acknowledge the historic effectiveness of the Vermont Rules of Professional Conduct for handling ethical complaints against attorneys. Thank you again for the opportunity to comment.