

## Vermont State Ethics Commission



November 11, 2020

Sen. Jeanette White, Chair, and Members  
Senate Government Operations Committee

Rep. Sarah Copeland Hanzas, Chair, and Members  
House Government Operations Committee

Re: Proposed Code of Ethics

Please find enclosed:

- 1) The Vermont State Ethics Commission's draft code of ethics to be considered for statutory enactment.

Also enclosed are:

- 2) A memorandum addressing code application to non-judicial employees of the judicial branch;
- 3) An annotated version of the original July 2020 draft that was released for public input. The annotation includes **public comments received (in blue)** and **Ethics Commission responses, proposed revisions, and comments (in red)**;
- 4) Longer public comments in order received:
  - Vermont Judiciary
  - Public Utility Commission
  - Campaign Legal Center
  - Natural Resources Board
  - Coalition for Integrity
  - Vermont Public Interest Research Group

Please note that all the above documents are posted on the Ethics Commission website.  
<https://ethicscommission.vermont.gov/> .

**History:** During the 2020 legislative session, two bills, S.198 and H.634 were introduced asking the Ethics Commission to submit a draft code of ethics in November 2020. In February 2020 all currently serving state-wide office holders signed a letter in support of a statutory code of ethics. Because of the Covid-19 pandemic, neither bill reached the full House or Senate for a vote. Nonetheless, the Ethics Commission was asked by the House and Senate Government Operations Committees to proceed with the project. The Ethics Commission agreed and assured all that it would seek public input before submitting a draft code of ethics in the fall.

**Seeking Public Input:** During the summer of 2020, the Ethics Commission launched a public information campaign. It issued a press release to all Vermont media outlets. The release announced that the Ethics Commission was working on a draft code of ethics and that public input was sought to ensure that the proposal was fully vetted. The release prompted television and radio news stories. In addition, the Executive Director attempted to send copies of the press release, draft code of ethics, and request for comment to all state employees using available resources through the Department of Human Resources. It is unknown exactly how many state employees received the Ethics Commission materials and request for comments.

Some responses received reflected the official position of departments. One spoke on behalf of the Court Administrator. It asked that state employees in the judicial branch be excluded from ethics code coverage. The Judiciary's correspondence and the Ethics Commission memorandum addressing its separation of powers and other concerns is included herein. The Public Utility Commission asked that it be exempted from the code's applicability. Our annotation contains the Commission's response. Other entities or departments or agencies declined to submit suggestions or comments to the Ethics Commission, apparently waiting to do so as part of any legislative process. Most of the responses to the Ethics Commission's request for comment came from individual employees in state government. Others came from public interest groups. (Attached) One legislator submitted a comment.

Interestingly, the draft section receiving the most individual comments was "Post-Government Employment." Many commenters read the section to bar state employees from post-government employment in their fields. The language of that draft section spoke only of former public servants "representing" entities other than the State of Vermont before their former employers. However, the number of comments to that section showed that its intended meaning was not clear. It has been substantially revised. As part of that revision, it became apparent that two existing statutes, 2 V.S.A. § 266 and 3 V.S.A. 267 should be reviewed to see whether their provisions should remain or be changed.

**Process:** The Ethics Commission has taken the draft code released for comment, then annotated it with the comments received. After reviewing the comments, the Commission considered how to respond. Our responses and the rationale for revising parts of the code or leaving them unchanged were then inserted into the annotation. The annotation reveals some of the thought process leading to the revised proposed code. Some revisions came in direct response to comments and suggestions received. Others resulted from re-examination of the original draft informed by comments received and the questions they raised. The sections regarding conflicts of interest, gifts, and post-government employment were substantially revised. In short, the public input process was tremendously useful and greatly assisted the editing and drafting of what is submitted today.

The Ethics Commission is grateful for the opportunity to participate in what we hope will be the adoption of a statutory state-wide code of ethics for Vermont state public servants.

Respectfully submitted:

Larry Novins  
Executive Director

# Vermont State Ethics Commission

## 2020 Statutory Proposal: Draft Code of Ethics

November 11, 2020

### Introduction:

More than 40 states have adopted ethics codes by statute. Vermont has in law no state-wide ethics code for public servants. The Vermont State Ethics Commission intends this document to prompt discussion of a Vermont Ethics Code which can be adopted by statute. The provisions of this draft code below are taken or modified from:

- Provisions of other states' ethics codes,
- The Code of Federal Regulations and United States Code,
- The current State Code of Ethics (COE) adopted by the State Ethics Commission,
- Vermont statutes, and
- Governor Scott's Executive Order 19-17.

The suggestions herein are made with full knowledge that not all parts of this draft code of ethics will be deemed necessary at this time.

This draft code of ethics builds on the sources listed above. An ethics code should help public servants avoid conflicts of interest and promote faith in government. This draft code of ethics sets a baseline for acceptable and unacceptable conduct. Many states and the federal government have more comprehensive and detailed ethics provisions. They often represent responses to specific instances of unethical conduct. The Ethics Commission has not yet seen justification for such detailed, complex provisions for Vermont. This draft addresses core concerns of government ethics.

This draft code of ethics contemplates that Executive Orders, internal rules of the General Assembly, or administrative agency rules or policies of various parts of Vermont state government may be adopted imposing more specific or stringent ethics requirements. Whether this proposed code should apply to non-judicial employees within the judicial branch of state government is discussed in the accompanying memorandum.

The substantive provisions address the following topics:

- 1) Conflict of Interest
- 2) Unethical Conduct May Not Be Delegated
- 3) Appearance of Conflicts of Interest or Other Ethical or Law Violations
- 4) Preferential Treatment
- 5) Use of Position for Personal Gain
- 6) Use of Confidential or Non-Public Information
- 7) Use of Government Resources

- 8) Gifts
- 9) Statements Obligating the State of Vermont
- 10) Outside Employment and Activities, Post-Government Employment
- 11) Compliance with Law
- 12) Other Ethics Rules or Policies
- 13) Whistleblower Protections for Ethics Complaints
- 14) Ethics Education and Training

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## **Vermont State Ethics Commission Draft Vermont Code of Ethics**

### **Findings and Legislative Intent**

It is declared that high moral and ethical standards among state public servants are essential to the conduct of government affairs; that the General Assembly believes a code of ethics: will help public servants avoid conflicts between their personal interests and their public responsibilities, will improve standards of public service, and will promote and strengthen the faith and confidence the people of this state are entitled to have in the judgment, integrity, and impartiality of their public servants.

Public servants hold their positions as a public trust. Any effort to realize personal gain through official conduct is a violation of that trust. Public servants should be aware of how their conduct can breach that trust. This code of ethics does not prevent public servants from accepting other employment or following pursuits which in no way interfere with the full and faithful discharge of their duties to the state.

The Legislature recognizes that: public servants are drawn from society and, therefore, cannot and should not be without all personal and economic interest in the decisions and policies of government; citizens who serve as state public servants retain their rights as citizens to interests of a personal or economic nature; standards of ethical conduct for state public servants need to distinguish between minor and inconsequential conflicts that are unavoidable in a free society and conflicts which are substantial and material. The legislature further recognizes that state public servants may need to engage in employment, professional, or business activities, other than official duties, in order to support themselves or their families and to maintain a continuity of professional or business activity. They may need to maintain activities or investments, which do not conflict with the specific provisions of this code. The legislature recognizes that the activities of public servants should not be unduly circumscribed.

[Source: Wisconsin-modified]

\* \* \*

**Vermont State Code of Ethics  
Substantive Provisions**

**Applicability:**

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.”

**Exclusions:**

- I. This code of ethics does not apply to the functions of State Legislators that are protected by the Constitution of the State of Vermont. Vermont Constitution, Chapter I, Article 14.

**Chapter I Article 14. [Immunity for words spoken in legislative debate]**

The freedom of deliberation, speech, and debate, in the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

- II. This code of ethics does not apply to those exercising judicial power under Chapter II § 4, Judiciary as protected by Chapter II § 5 “Departments to be Distinct.”

**Chapter II § 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.

**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.

**Definitions**

**1) Conflict of interest:** “Conflict of interest” for a public servant means an interest, direct or indirect, financial or otherwise, of the public servant or such an interest, known to the public servant, of a member of the public servant’s immediate family or household, or of a business associate, in the outcome of a particular matter pending before the public servant or the public servant’s public body, or which is in conflict with the proper discharge of the public servant’s duties. “Conflict of Interest” does not include any interest that is no greater than that of other persons generally affected by the outcome of a matter (such as a policyholder in an insurance company or a depositor in a bank).

**2) Immediate family:** “Immediate family” as used in this section means: a person's spouse or civil union partner, domestic partner as defined in 17 V.S.A. § 2414(e)(1), sibling, child, or foster child, grandchild, parent, grand parent, or in-law, including a parent, sibling, child, or foster child, grandchild, or grandparent of a spouse or civil union partner or domestic partner. [Sources: taken from 2 V.S.A. 261, 8 V.S.A. § 2101, 3 V.S.A. § 30101, 17 V.S.A. § 2414.]

**3) Confidential information:** “Confidential information” means information that is exempt from public inspection and copying or is otherwise designated by law as “confidential.”

**4) Gift:** “Gift” means anything of value, tangible or intangible, that is bestowed for less than adequate consideration. [Sources: 3 V.S.A. § 1201(4)(a) and 2 V.S.A. § 261(6)(A)(ii).] Included within this definition are travel expenses such as travel fare, room and board, and other expenses associated with travel.

(a) Examples of “gifts” may also include:

- (1) a political contribution; [Source: 2 V.S.A. § 261(6)(A)(i)]
- (2) a meal or alcoholic beverage; [Source: 2 V.S.A. § 261(6)(A)(iii)]
- (3) a ticket, fee, or expenses for or to any sporting, recreational, or entertainment event; [Source: 2 V.S.A. § 261(6)(A)(iv)]
- (4) a speaking fee or honorarium, except actual and reasonable travel expenses; [Source: 2 V.S.A. § 261(6)(A)(v)]
- (5) a loan made on terms more favorable than those made generally available to the public in the normal course of business. [Source: 2 V.S.A. § 261(6)(A)(vi), 3 V.S.A. § 1201(4)(a), 2 V.S.A. § 261(6)(A)(ii)]

(b) Not Considered “Gifts:”

- (1) An item which would qualify as a “gift,” but which is not used, and which within 30 days after receipt, is returned to the donor, or for which the donor is reimbursed for its fair market value will not be considered a “gift;” [2 V.S.A. § 261]
- (2) anything given between immediate family members;
- (3) printed educational material such as books, reports, pamphlets, or periodicals;
- (4) a devise or inheritance.

[currently in 3 V.S.A. § 1201(4)(B) and 2 V.S.A. § 261]

5) “Person” as used in this chapter means: any individual, group, business entity, association, or organization.

## Rules

### 1) Conflict of Interest

a) Public servants confronted with a conflict of interest shall each time a conflict arises either:

- 1) recuse from the matter, or
- 2) prepare a written statement in detail sufficient to be understood by the public which shall:
  - A) describe the matter requiring action,
  - B) disclose the nature of the potential or actual conflict of interest, and
  - C) explain why good cause as set forth in subsection (d) below exists so that the public servant can take action in the matter fairly, objectively, and in the public interest.

b) **Request for Ethics Commission Determination.** Public servants or their supervisors may request that the Ethics Commission review a statement prepared under subsection (a) above to determine whether

- 1) a conflict of interest exists, and
- 2) if one exists, whether good cause as defined in subsection (d) below exists so that the public servant can take action in the matter.

- c) Ethics Commission responses to requests under subsection (b) shall be in writing.
- d) As used in this section, good cause to proceed in the matter may include any of the following instances:
  - 1) the identified conflict or potential conflict is de minimis in nature,
  - 2) the action to be taken is ministerial or clerical,
  - 3) the conflict is amorphous, intangible, or otherwise speculative,
  - 4) the public servant cannot legally or practically delegate the matter.

**2) Unethical Conduct May Not Be Delegated:**

Public servants may not direct others to act in a manner which they themselves cannot. Public servants who have a conflict of interest shall not direct others to act to their benefit. Public servants, who because of a conflict of interest, recuse themselves from a matter may not in any way participate in or act to influence a decision regarding that matter.

**3) Appearance of Conflict of Interest or Other Ethical or Law Violations:**

Public servants shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this chapter.

Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

[5 CFR § 2635.101(b)(14) - Basic obligation of public service]

**4) Preferential Treatment:** Public servants in the course of state business shall act impartially showing no favor toward or prejudice against any person. Public servants shall not give or represent an ability to give preference or special treatment to anyone because of their wealth, position, or status, or because of any personal relationship with a public servant. When permitted by law and written policy or rule, public servants may give preference to designated individuals or groups.

**5) Use of Position for Personal Gain:**

Public servants shall not use their official positions for personal or financial gain.

**6) Use of Confidential or Non-Public Information:**

Public servants shall not use non-public government information or confidential information acquired during the course of state service for their own or anyone else's purposes or financial gain.

**7) Use of Government Resources:**

Public servants shall not make use of state materials, funds, property, personnel, facilities, or equipment or permit others to do so for any purpose other than for official state business unless the use is expressly permitted or required by law or by a written agency, departmental, or institutional policy or rule.

Public servants shall not engage in, or direct others to engage in work other than the performance of official duties during working hours, except as permitted or required by law, or by written agency, departmental, or institutional policy or rule.

[Modified from Iowa Statutes and E.O. 19-17.]

**8) Gifts:**

(a) Public servants may not

- (1) accept a gift under circumstances in which it can reasonably be inferred that the gift is intended to influence them in the performance of their official duties;
- (2) use, or permit the use of, the public servant's government position, or any authority associated with public office, to solicit or coerce the offering of a gift;
- (3) accept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the public servant is using the public servant's office for private gain;
- (4) accept a gift in violation of an applicable rule, policy, or executive order.

Sources: modified from 5 C.F.R. § 2635.201-205

(b) Prohibition on soliciting gifts. A public servant may not, directly or indirectly:

- (1) solicit a gift from a prohibited source; or
- (2) Solicit a gift to be given because of the public servant's official position.

(c) Exceptions:

(1) Gifts of \$20 or less. A public servant may accept unsolicited gifts having an aggregate market value of \$20 or less per source per occasion, provided that the aggregate market value of individual gifts received from any one person under the authority of this paragraph does not exceed \$50 in a calendar year. This exception does not apply to gifts of cash or of investment interests such as stock, bonds, or certificates of deposit. Where the market value of a gift or the aggregate market value of gifts offered on any single occasion exceeds \$20, the public servant may not pay the excess value over \$20 in order to accept that portion of the gift or those gifts worth \$20. Where the aggregate value of tangible items offered on a single occasion exceeds \$20, the public servant may decline any distinct and separate item in order to accept those items aggregating \$20 or less.

Source: 5 C.F.R. § 2635.204

(2) Gifts based on an outside or personal relationship. A public servant may accept a gift given by an individual under circumstances which make it clear that the gift is motivated by an outside, family relationship, or personal friendship rather than the position of the public servant. Relevant factors in making such a determination include the history and nature of the relationship and whether the person, family member, or friend personally pays for the gift.

Source: 5 C.F.R. 2635.204

(3) Gifts of attendance to training or similar events approved and determined to be in the interest of the public servant's agency or department.

Source: 5 C.F.R. § 2635

(d) As used in the section, prohibited source means any person who:

- (1) is seeking official action by a public servant's agency;
- (2) does business or seeks to do business with a public servant's agency or department;



- (3) conducts activities regulated by the public servant's agency;
- (4) has interests that may be substantially affected by the performance or nonperformance of the public servant's official duties; or
- (5) is an organization a majority of whose members are described in (1) through (4) of this subsection (d).

Source: 5 C.F.R. § 2635.203

#### **9) Statements Obliging the State of Vermont:**

Public servants shall not make unauthorized commitments or promises of any kind purporting to bind State government.

[VCOE, modified per 5 CFR § 2635.101(b)(12)]

#### **10) Outside Employment and Activities, Post-Government Employment:**

**(a) Current State Employment:** Public servants may not seek or engage in outside employment or activities that are inconsistent, incompatible, or conflict with their official duties.

Source: DHR policy 11.5, March 1996, 5 C.F.R. § 2635.802.  
<https://www.law.cornell.edu/cfr/text/5/2635.802>

#### **(b) Post-government employment: one or two-year restrictions:**

**(1) Executive officers:** Except as permitted by (c) below executive officers shall not, for one year after leaving state service, be an advocate for anyone, other than the State of Vermont, for compensation before the department, division, agency, board, commission, body, or office in which they served at the time of their termination of service, concerning any matter in which the State of Vermont has a direct and substantial interest.

#### **(2) Legislative branch public servants**

**(A) Legislators:** Except as permitted by (c) below, former legislators shall not be an advocate for anyone, other than the State of Vermont, for compensation, before the general assembly or any of its constituent parts, until the end of the biennial session following their departure from the legislature.

**(B) Legislative branch employees:** Except as permitted by (c) below, former legislative branch employees shall not, for one year after leaving state service, be an advocate for [language from 3 V.S.A. § 267] anyone, other than the State of Vermont, for compensation before the general assembly or any of its subparts or office in which they served at the time of their termination of service, concerning any matter in which the State of Vermont has a direct and substantial interest.

**(c) Exemption:** The limitations in subsection (b) set forth above do not apply to individuals providing information or services to the State of Vermont pursuant to contracts with the State of Vermont.

[Note: Adoption of this section will require amendment or repeal of 2 V.S.A. § 266 and 3 V.S.A. § 267.]

**(d) Permanent restrictions on representation on particular matters involving a specific party or parties.** Public servants shall not, after termination of their service or employment with the State, knowingly make with the intent to influence, any communication or appearance before any entity of the

State of Vermont on behalf of any person other than the State of Vermont in connection with any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, quasi-judicial, judicial or other proceeding

- 1) in which the State of Vermont is a party or has a direct and substantial interest,
- 2) in which the public servant participated personally and substantially as a public servant, and
- 3) which involved a specific party or parties at the time of such participation.

[Sources: 18 U.S.C. § 207(a)(1), 5 C.F.R. § 2641.201]

#### **11) Compliance with Law:**

Public servants shall comply with applicable state and federal laws and regulations including anti-discrimination and equal opportunity laws and comply with applicable governmental codes of conduct.

#### **12) Other Ethics Rules or Policies:**

Public servants shall comply with any other applicable rules or policies established by executive order, agency rule, or policy. Nothing herein shall prohibit branches of state government, agencies, or departments from adopting more stringent ethics provisions.

#### **13) Whistleblower Protections for Ethics Complaints:**

Consistent with 3 V.S.A. § 971 et seq., public servants shall be free to disclose waste, fraud, abuse of authority, violations of law, or violations of this or other applicable ethics codes to the Ethics Commission without fear of reprisal, intimidation, or retaliation.

#### **14) Ethics Education and Training:**

Mandatory ethics training. Within the first 120 days of public service public servants shall engage in ethics training which may be in person or on-line. Completion of ethics training shall be documented by the department where the public servant is employed. Public servants shall participate in continuing ethics education which may be in person or on-line at least once every three years thereafter.

Acceptable continuing ethics education providers are: The State Ethics Commission, the Department of Human Resources - Center for Achievement in Public Service (CAPS), the Vermont House of Representatives Ethics Panel for the House of Representatives, and the Vermont Senate Ethics Panel for the Senate. Copies of CAPS, House, and Senate Ethics training materials shall be provided to the Ethics Commission. On request, the State Ethics Commission may collaborate with or assist other providers.

## 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 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. <sup>1</sup> 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.

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<sup>1</sup> 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.

Larry Novins,  
Executive Director  
November 11, 2020

## Vermont State Ethics Commission 2020 Statutory Proposal: Draft Code of Ethics Annotated

Original Draft Released July 2020	Public Comment and Responses	Final Draft November 2020
<p><b>Introduction:</b> More than 40 states have adopted ethics codes by statute. Vermont has no ethics code in law. The Vermont State Ethics Commission intends this document to prompt discussion of a Vermont Ethics Code which can be adopted by statute. The provisions of this draft code below are taken or modified from:</p> <ul style="list-style-type: none"> <li>-Provisions of other states’ ethics codes,</li> <li>-The Code of Federal Regulations,</li> <li>-The current State Code of Ethics (COE) adopted by the State Ethics Commission,</li> <li>-Vermont statutes, and</li> <li>-Governor Scott’s Executive Order 19-17.</li> </ul>	<p><b>Comment #1:</b> -Vermont is not without ethics provisions in statute. There are some ethics provisions in statutes already. E.g., 10 V.S.A. § 6031 (Natural Resources Board) and 12 V.S.A. § 61. These cover some provisions of the proposed code. -Codes of Professional Conduct for lawyers and judges address ethics requirements for those groups. Referring to those codes may minimize “any conflicting ethical obligations that the Board, the District Commission, and their legal staff must follow.”</p> <p><b>Response:</b> Section 12, “Other Ethics Rules or Policies” makes clear that individuals may be subject to more than one ethics provision. For example, an attorney working in state government is subject to the Vermont Rules of Professional Conduct as well as rules or policies governing public servants. An attempt to list all other possible ethics provisions is not deemed appropriate in this proposed statute. All public servants should be aware of ethics provisions that apply to their professions, occupations, or positions held.</p>	<p>More than 40 states have adopted ethics codes by statute. Vermont has in law no state-wide ethics code for public servants. The Vermont State Ethics Commission intends this document to prompt discussion of a Vermont Ethics Code which can be adopted by statute. The provisions of this draft code below are taken or modified from:</p> <ul style="list-style-type: none"> <li>-Provisions of other states’ ethics codes,</li> <li>-The Code of Federal Regulations and United States Code,</li> <li>-The current State Code of Ethics (COE) adopted by the State Ethics Commission,</li> <li>-Vermont statutes, and</li> <li>-Governor Scott’s Executive Order 19-17.</li> </ul>



<p>The suggestions herein are made with full knowledge that not all parts of this draft code of ethics will be deemed necessary at this time.</p> <p>This draft code of ethics builds on the sources listed above. An ethics code should help public servants avoid conflicts of interest and promote faith in government. This draft code of ethics sets a baseline for acceptable and unacceptable conduct. Many states and the federal government have more comprehensive and detailed ethics provisions. They often represent responses to specific instances of unethical conduct. The Ethics Commission has not yet seen conduct that would justify such detailed, complex provisions for Vermont. This draft addresses core concerns of government ethics.</p> <p>This draft code of ethics contemplates that Executive Orders, internal rules of the General Assembly, or administrative agency rules or policies may be adopted imposing more specific or stringent ethics requirements.</p>	<p>Changes made to include considerations for including non-judicial employee within in the judicial branch.</p>	<p>The suggestions herein are made with full knowledge that not all parts of this draft code of ethics will be deemed necessary at this time.</p> <p>This draft code of ethics builds on the sources listed above. An ethics code should help public servants avoid conflicts of interest and promote faith in government. This draft code of ethics sets a baseline for acceptable and unacceptable conduct. Many states and the federal government have more comprehensive and detailed ethics provisions. They often represent responses to specific instances of unethical conduct. The Ethics Commission has not yet seen justification for such detailed, complex provisions for Vermont. This draft addresses core concerns of government ethics.</p> <p>This draft code of ethics contemplates that Executive Orders, internal rules of the General Assembly, or administrative agency rules or policies of various parts of Vermont state government may be adopted imposing more specific or stringent ethics requirements. <u>Whether this proposed code should apply to non-judicial employees within the judicial branch of state government is discussed in the accompanying memorandum.</u></p>
<p>The substantive provisions address the following topics:</p> <p>1) Conflict of Interest Response:</p>	<p>Response: Substantially amended, see amendment.</p>	

<p>2) Unethical Conduct May Not Be Delegated</p> <p>3) Appearance of Conflicts of Interest or Other Ethical or Law Violations</p> <p>4) Preferential Treatment</p> <p>5) Use of Position for Personal Gain</p> <p>6) Use of Confidential or Non-Public Information</p> <p>7) Use of Government Resources</p>		
<p>8) Gifts</p>	<p>Response: Substantially amended, see amendment.</p>	
<p>9) Statements Obligating the State of Vermont</p>		
<p>10) Post-Government Employment</p>	<p>Response: Substantially amended, see amendment.</p>	
<p>11) Compliance with Law</p> <p>12) Other Ethics Rules or Policies</p> <p>13) Whistleblower Protections for Ethics Complaints</p> <p>14) Ethics Education and Training</p>		

It is declared that high moral and ethical standards among state public servants are essential to the conduct of government affairs; that the General Assembly believes a code of ethics: will help public servants avoid conflicts between their personal interests and their public responsibilities, will improve standards of public service, and will promote and strengthen the faith and confidence the people of this state are entitled to have in the judgment, integrity, and impartiality of their public servants.

Public servants hold their positions as a public trust. Any effort to realize personal gain through official conduct is a violation of that trust. This code of ethics does not prevent public servants from accepting other employment or following pursuits which in no way interfere with the full and faithful discharge of their duties to the state.

The Legislature recognizes that: public servants are drawn from society and, therefore, cannot and should not be without all personal and economic interest in the decisions and policies of government; citizens who serve as state public servants retain their rights as citizens to interests of a personal or economic nature; standards of ethical conduct for state public servants need to distinguish between minor and inconsequential conflicts that are unavoidable in a free society and conflicts which are substantial and material. The legislature further recognizes that state public servants may need to engage in employment, professional, or business activities, other than official duties, in order to support themselves or their families and to maintain a continuity of professional or business activity. They may need to maintain activities or investments, which do not conflict with the specific provisions of this code. The legislature recognizes that the activities of public servants should not be unduly circumscribed. [Source: Wisconsin-modified]

**Comments:**

#1 Define “public servant. Distinguish between those hired, appointed, or elected.

Response: “Public Servant” is defined immediately below in “Applicability.” No need in this section on legislative intent to generally distinguish between those hired, appointed, or elected.

#2 Please add in a statement regarding the immense impacts of having ethical Supervisors and Managers in the leading of employees and having this standard will allow for no guessing when an employee notices something unethical.

Response: A recitation of all positive impacts of an ethics code is not deemed necessary to this proposed statutory draft.

-We need a statement to employees following leaders with questionable ethics – a powerful statement to say- report them!

Response: Section § 13, “Whistleblower Protections for Ethics Complaints” addresses this. Those who see unethical conduct should be able to report it without retaliation. However, mandating reports of unethical conduct is unrealistic. If enforced, a mandatory reporting requirement would essentially make violators of those, especially vulnerable employees, who do not report violations. Encouraging awareness and, where needed, reporting can come from various sources, formally or informally, and through ethics training.

A statement regarding having subordinates do the work for Supervisors or Managers to avoid conflict of interest needs to be included as unacceptable.

Response: This is covered by Section § 2 “Unethical Conduct may not be Delegated.”

-Make some way to encourage yet protect the reporter. Many times it is the Supervisor at issue.

Response: See below. This is covered by Section § 13, “Whistleblower Protections.”

It is declared that high moral and ethical standards among state public servants are essential to the conduct of government affairs; that the General Assembly believes a code of ethics: will help public servants avoid conflicts between their personal interests and their public responsibilities, will improve standards of public service, and will promote and strengthen the faith and confidence the people of this state are entitled to have in the judgment, integrity, and impartiality of their public servants.

Public servants hold their positions as a public trust. Any effort to realize personal gain through official conduct is a violation of that trust. Public servants should be aware of how their conduct can breach that trust. This code of ethics does not prevent public servants from accepting other employment or following pursuits which in no way interfere with the full and faithful discharge of their duties to the state.

The Legislature recognizes that: public servants are drawn from society and, therefore, cannot and should not be without all personal and economic interest in the decisions and policies of government; citizens who serve as state public servants retain their rights as citizens to interests of a personal or economic nature; standards of ethical conduct for state public servants need to distinguish between minor and inconsequential conflicts that are unavoidable in a free society and conflicts which are substantial and material. The legislature further recognizes that state public servants may need to engage in employment, professional, or business activities, other than official duties, in order to support themselves or their families and to maintain a continuity of professional or business activity. They may need to maintain activities or investments, which do not conflict with the specific provisions of this code. The legislature recognizes that the activities of public servants should not be unduly circumscribed. [Source: Wisconsin-modified]



<p><b>Applicability:</b>          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.”</p>	<p><b>Comments:</b>  <b>#1</b> I would like to see local elected officials included in the new code of ethics. Please consider this when drafting legislation.</p> <p><b>Response:</b> A code of ethics for local governments would be sound governmental policy. Some states’ ethics codes apply also to local governments. The Vermont State Ethics Commission has seen numerous instances revealing a clear need for an applicable code of ethics for local and municipal government. The few existing Municipal ethics policies appear insufficient to curb or correct unethical behavior. Almost all municipal ethics policies lack oversight or enforcement provisions. An ethics code for local governments is an issue worthy of discussion.</p> <p><b>#2</b> I am a 23 year classified state employee and VSEA member. State employees are governed by the department of human resources policies and our contracts. The legislature does not have a right to impose work rules upon us therefore the ethics code needs to remove 'all state employees" from your list of people over whom this applies.</p> <p><b>Response:</b> A statute is not a bargained work-place condition. State employees’ unions have a process for dealing with new laws that affect state employees.</p> <p><b>#3:</b> “and persons who in any other way are authorized to act or speak on behalf of the State of Vermont.? What about e.g. contractors?</p> <p><b>Response:</b> The active word in that section is “authorized.” Only the State can authorize someone to speak or act on its behalf. We know of no such authorization regarding contractors, but feel the language provides adequate notice of the breadth of State of Vermont ethics requirements. The primary target of this code is state government public servants. They should know that, unless authorized, they cannot speak for the State of Vermont.</p> <p><b>#4</b> As a recent returnee to Vermont, I’m pleased to see this effort. When I lived in Vermont before, I was elected to a local government position, and quickly learned that government ethics were a concern in my community. We subsequently adopted a municipal policy, and</p>	<p><b>Applicability:</b>          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.”</p>
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yet issues persist. I also have many concerns about ethics at the federal level these days.

Response: Whether an ethics code should apply to local government is discussed briefly above.

My initial expectation was that this would also apply to municipal officials. It reads as if it does not, which would merit clarification in the draft if it does; possible extension of the law if others have given similar input; or further education of citizens about local ethical issues and handling those. Still, feels more than apt to have such a statute at the Vermont State level. Please note that I did not review Governor Scott's EO 19-17 in making my comments.

Response: Whether an ethics code should apply to local government is discussed briefly above.

<p><b>Exclusions:</b></p> <p>I. This code of ethics does not apply to the functions of State Legislators that are protected by the Constitution of the State of Vermont. Vermont Constitution, Chapter I, Article 14.</p> <p><b>Chapter I Article 14. [Immunity for words spoken in legislative debate]</b> The freedom of deliberation, speech, and debate, in the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.</p> <p>II. This code of ethics does not apply to those exercising judicial power under Chapter II § 4, Judiciary as protected by Chapter II § 5 “Departments to be Distinct.”</p> <p><b>Chapter II Article 4. [Judiciary]</b> 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.</p> <p><b>Chapter II Article 5 [Departments to be distinct]</b> The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.</p>	<p><b>Comment:</b> #1 Hate speech needs to be excluded from this. Freedom of speech, when not so discourteous as to be hate speech and when not a cover for hate speech, shall not be foundation of accusation...</p> <p><b>Response:</b> Limitation on legislative deliberation, speech, or debate can come only via constitutional amendment. Speech limitations enacted by statute would invariably be subject to constitutional attack.</p> <p>#3 I have strong reservations about excluding a code of ethics from the Legislature and those exercising Judicial Power.</p> <p><b>Response:</b> The Vermont Constitution protects legislators’ and judges’ core functions. See below. The separation of power provisions in our state constitution mirror those of other states and the federal government.</p> <p><b>Comments:</b> #1 The Draft Code of Ethics contains two exclusions. The second exclusion states: “This code of ethics does not apply to those exercising judicial power under Chapter II § 4, Judiciary as protected by Chapter II § 5 ‘Departments to be Distinct.’” It then cites in full the two referenced constitutional provisions. It does not, however, explain: (i) why the language of these provisions prevents the legislature from imposing ethical obligations on those exercising judicial power; (ii) whether the exemption applies to all judicial branch employees; or (iii) if the exemption does not apply to all judicial branch employees, which employees are considered to be exercising judicial power and are, therefore, included in the exemption. Such explanations may provide additional clarity to the public and public servants about what is expected of judicial branch employees.</p> <p><b>Response:</b> Review of statutes governing the judiciary and imposing requirement on courts and judicial proceedings shows that the “judicial power” is exclusively reserved to the judiciary and cannot be used by the other two branches of government. The legislature is not barred from adopting ethical conduct standards for State of Vermont employees working for the judicial branch who do not exercise judicial power, notwithstanding the standards the Supreme Court itself sets.</p>	<p><b>Exclusions:</b></p> <p>I. This code of ethics does not apply to the functions of State Legislators that are protected by the Constitution of the State of Vermont. Vermont Constitution, Chapter I, Article 14.</p> <p><b>Chapter I Article 14. [Immunity for words spoken in legislative debate]</b> The freedom of deliberation, speech, and debate, in the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.</p> <p>II. This code of ethics does not apply to those exercising judicial power under Chapter II § 4, Judiciary as protected by Chapter II § 5 “Departments to be Distinct.”</p> <p><b>Chapter II § 4. [ JUDICIARY ]</b> 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.</p> <p><b>Chapter II § 5. [ DEPARTMENTS TO BE DISTINCT ]</b> The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.</p>
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Eventual enforcement of this code will be resolved later. See attached memorandum

#2 The Public Utility Commission fully agrees with the objectives of the Draft Code of Ethics and the inclusion of each of the provisions that are in that document. The PUC should be excluded from the Code's coverage as it has its own code of ethics which covers all in the Ethics Commissions proposed draft and is in some parts more restrictive. The PUC should be treated the same as the judiciary.

Response: Agencies and departments are free to adopt more stringent ethics provisions. See § 13, Other Ethics Rules or Policies. The legislature remains free to enact specific ethics requirements for specific parts of state government as it did for the Public Utilities Commission. No constitutional provision compels treating the PUC the same as those who exercise judicial power. Excluding any government entity which has its own ethics code (statutory or otherwise) can lead to a patchwork of ethics codes and eventually uneven enforcement. This draft code of ethics is more broad than the provisions which apply to the PUC. That reason alone argues against excluding the PUC from its coverage.

#3 Should this [Departments to be Distinct] be in quotes since "Departments to be Distinct" is in quotes later in the line? (and capitalized?)

Response: Revised above to use format as it appears in the Vermont Constitution online.

#5 Comments: Judicial Branch employees should not be included in code of ethics coverage.

As the Court Administrator's office wrote:

"As you rightly observe, Chapter II, section 30 of the Vermont Constitution vests broad authority in the Supreme Court to exercise "administrative control of all the courts of the state, and disciplinary authority concerning all judicial officers and attorneys at law in the state." Section 37 further provides that "[t]he Supreme Court shall make and promulgate rules governing the administration of all courts . . . ." Pursuant to this authority, the Supreme Court has approved a Code of Conduct and Employee Discipline applicable to all



judicial branch employees except judges, a Code of Judicial Conduct applicable to all judicial officers, and Rules of Professional Conduct that govern attorney conduct. None of these provisions is approved by the Joint Legislative Committee on Judicial Rules; they fall within the plenary constitutional authority of the Supreme Court over the administration of the courts and judicial and attorney discipline.

As we discussed, the draft Code of Ethics circulating for comment expressly states that it “does not apply to those exercising judicial power . . . as protected by Chapter II, § 5 “Departments to be Distinct.” This is, of course, a reference to the separation-of-powers provision contained in Chapter II, § 5 of the Vermont Constitution and an explicit recognition that the conduct and discipline of judicial officers fall within the authority of the Supreme Court and the broad scope of the Code of Judicial Conduct.

The draft Code of Ethics contains no similar exemption for all other judicial branch employees who are subject to, and governed by, the judicial branch Code of Conduct and Employee Discipline set forth in the Judicial Branch Personnel Policy. I would respectfully suggest that this omission be rectified by amending the draft Code of Ethics to provide that it “does not apply to employees of the Judicial Branch pursuant to Chapter II, § 5 of the Vermont Constitution, providing for the separation of the branches.” The reasons for this are two-fold. First, as a practical matter, the judicial branch Code of Conduct and Employee Discipline addresses nearly every subject covered by the draft Code of Ethics--except with greater specificity--and is equally robust in its protection of the public interest. Thus, the judicial-branch Code of Conduct declares that employment within the court system is “a public trust” and that proper conduct by its employees is essential to uphold “the values of impartiality, equity and fairness” that it represents.”

**Response: Section § 12 of this draft code contemplates that certain individuals or groups may be concurrently subject to other ethics rules or policies. Adoption of a code of ethics for state employees who work in the judicial branch does not conflict with a code of ethics adopted by the Supreme Court for them. It should be noted that some other states' codes of ethics apply to judicial branch state employees and even to judges who are elected. See attached memorandum.**

The judicial branch Code of Conduct sets forth a detailed, non-exhaustive list of required and prohibited conduct by judicial employees. The list spans ten full pages, and thus can only be briefly quoted and summarized here, as follows:

1. “Discriminatory behavior will not be tolerated or condoned. Discriminatory behavior includes any implicit or explicit action or behavior based on race, color, sex, religion, national origin, ancestry, age, disability, marital status, or sexual orientation . . . .”
2. “No employee shall misuse, falsify or alter court records or remove the records from a court or office without authorization.” Employees are required in this regard to “safeguard confidential information,” “refus[e] ever to use such information for personal advantage,” and “abstain at all times from public comment about pending court proceedings.”
3. “No employee shall conduct himself or herself in any manner which shall reflect negatively on the Court,” including the use of alcoholic beverages or illegal drugs while on duty.
4. Employees must refrain from “improper use of the property of the court” and “theft, misuse, or misappropriation of the funds or property of the court . . . will not be tolerated.”
5. Employees must “respect the rights of their co-workers.”
6. Employees must be courteous, “furnish accurate information,” and demonstrate “the utmost patience, impartiality and discretion when dealing with the public.”
7. “Every judicial branch employee shall avoid conflicts of interest in the performance of professional duties.” Within this mandate, are several additional specific requirements:
  - “No employee shall solicit or accept a fee, gift, or other valuable item . . . when . . . [it] has the appearance of being given or is given in the hope or expectation of receiving a favor or better treatment than that accorded other persons by the court.”
  - “No employee shall use their position to secure special privileges, favors or exemptions for themselves or others.”
  - “An employee shall not engage in any employment, activity or enterprise which may be determined by the employer’s supervisor incompatible or in conflict with

the duties, functions or responsibilities of the court by which he or she is employed . . . .”

- Employees shall not use their official authority to “interfere[e] with or affect[] the nomination or election of any candidate for public office” or solicit or coerce other employees to do so.

In addition to these specific rules of conduct, the judicial branch Code of Conduct and Employee Discipline sets forth a detailed set of disciplinary procedures for their enforcement as well as four levels of potential sanctions, ranging from an oral warning, to a written warning, to suspension without compensation, and finally to dismissal. The judicial branch Code of Conduct further specifies the mitigating and aggravating circumstances that may be considered in determining an appropriate sanction.

Thus, the judicial branch Code of Conduct and Employee Discipline subsumes nearly every subject more generally covered by the draft Code of Ethics, rendering the application of the draft Code to judicial branch employees largely unnecessary. Beyond that, as noted, the judicial branch Code of Conduct establishes an enforcement, adjudication and disciplinary process that falls squarely within the Supreme Court’s administrative authority over the courts. While the Ethics Commission has consciously refrained from including its own enforcement provisions in the current draft Code of Ethics, it is easy to conceive that enforcement would be the next logical step, which could lead in turn to direct conflict with judicial authority if judicial branch employees were subject to separate disciplinary and enforcement proceedings under the Ethics Commission. That, indeed, would be an invitation to a separation-of-powers conflict.

**Response: Other Vermont governmental entities or branches of government remain free to properly adopt ethics provisions for their employees. See e.g., Governor’s Executive Order, and House and Senate Ethics rules. Those provisions are complemented by the provisions of this code of ethics. This draft specifically states that other codes may be more stringent. Applying this code of ethics to state employees employed by the judiciary does not intrude on the judiciary’s constitutionally reserved authority to exercise “judicial power” to adjudicate cases or controversies or the judiciary’s specific**

authority to discipline lawyers and judges. That disciplinary authority is specifically granted by § 30 of the Vermont Constitution. Some Judicial rules are subject to review and change by the legislature. Judicial rules must be consistent with the law, i.e, Vermont statutes. See e.g. Vermont Constitution §§ 30, 31,38. If adopted into law, the judiciary will remain free retain its consistent rules. Rule-making authority for state employees who work in the judicial branch is not reserved to the judicial branch. See attached memorandum.

For these reasons, I would urge that the proposed Code of Ethics expressly exempt judicial branch employees, who are subject to rigorous ethical standards and disciplinary procedures under the judicial branch Code of Conduct and Employee Discipline and the Code of Judicial Conduct.

Although the procedures and forms for filing a complaint against a judicial ranch employee are accessible on the Judiciary website, the judicial branch Code of Conduct and Employee Discipline is not. I believe that it clearly should be, and I will take steps to see that it is. In the meantime, for your convenience, I have attached a copy of the Judicial Branch Personnel Policy; the Code of Conduct and Employee Discipline is contained in Part VII, starting on page 58. I would also note that the latest collective bargaining agreement between the Judiciary and the VSEA in Article 13 expressly incorporates the judicial branch Code of Conduct and Employee Discipline as a part of the agreement.”

Response: Section § 12, “Other Ethics Rules or Policies” incorporates concurrent applicability of other ethics provisions. The judicial branch in-house mechanism for imposing discipline on its state employees not exercising judicial power does not preclude application of this code. In some other states, ethics codes do apply to state

**Definitions**

**1) Conflict of Interest:**  
 (a) A “conflict of interest” for a public servant means an interest, direct or indirect, financial or otherwise, of the public servant or such an interest, known to the public servant, of a member of the public servant’s immediate family or household, or of a business associate, in the outcome of a particular matter pending before the public servant or the public servant’s public body, or which is in conflict with the proper discharge of the public servant’s duties. “Conflict of Interest” does not include any interest that:

(1) is no greater than that of other persons generally affected by the outcome of a matter (such as a policyholder in an insurance company or a depositor in a bank), or

(2) has been disclosed as required by law or applicable written policy and found not to be significant.

[Modified from COE and Exec. Order #79]

**Comments:**

#1 ... on Pages 3 and 4 there are references to “immediate family” but that term is nowhere defined. If you leave it as is the courts will have to decide who falls into that category. The most recent gun legislation (which is now an Act but I recall it as S.55) contains a definition that was repeated from somewhere else in statute. I’m only pointing this out for the sake of having you decide whether you want to be specific or are content with the courts determining that definition.

**Response:** “Immediate family” should be defined. See proposed revision.

#2 “What about when the conflict of interest is that one is an appointee by the governor and doing things the Guv wants you to do (so you keep your job, your interest) but it is antethical [sic] to the laws and purpose of an Agency?”

**Response:** The code outlines generally prohibited conduct. A public servant’s duty is to the State of Vermont. Individuals must determine how they will respond to directions to engage in unethical conduct. See § 2 “Unethical Conduct May not be Delegated,” and § 13, Whistleblower Protections for Ethics Complaints.

#3 “add the following statement to Section 1 : General Principals Public Servants shall treat colleagues, community partners, and the public with respect and shall not engage in language or conduct that is demeaning, demoralizing, dehumanizing, or otherwise unkind.

**Response:** No change made. Not every laudable goal can be easily incorporated into statute. Note: Section § 11, “Compliance with Law,” includes anti-discrimination laws.

The current code of ethics focuses primarily on financial gain/economic ethics and I think it may be an important addition to set forth in our ethics our guiding principal for how we treat each other, those we work with, and the public for whom we work on behalf of.”

**Definitions**

**1) Conflict of Interest:** “Conflict of interest” for a public servant means an interest, direct or indirect, financial or otherwise, of the public servant or such an interest, known to the public servant, of a member of the public servant’s immediate family or household, or of a business associate, in the outcome of a particular matter pending before the public servant or the public servant’s public body, or which is in conflict with the proper discharge of the public servant’s duties. “Conflict of Interest” does not include any interest that is no greater than that of other persons generally affected by the outcome of a matter (such as a policyholder in an insurance company or a depositor in a bank).

**2) Immediate family:** “Immediate family” as used in this section means: a person's spouse or civil union partner, domestic partner as defined in 17 V.S.A. § 2414(e)(1), sibling, child, or foster child, grandchild, parent, grand parent, or in-law, including a parent, sibling, child, or foster child, grandchild, or grandparent of a spouse or civil union partner or domestic partner. [Sources: taken from 2 V.S.A. 261, 8 V.S.A. § 2101, 3 V.S.A. § 30101, 17 V.S.A. § 2414.]

Response: Conflict of interest provisions above apply to interests “financial or otherwise.” “*Otherwise*” is general and for that reason is probably the better term. Again, the laudable sentiment of this comment does not easily translate into adoptable statutory ethics code language.

#4 “As mentioned above, 10 V.S.A. § 6031 sets forth the ethical obligations that apply to Board and District Commission members. Subsection (a)(2) thereof contains an enumerated list of conflicts of interest. As a result, the definition of “conflict of interest” in the Draft Code of Ethics is arguably broader than Section 6031. This breadth comes with both advantages and disadvantages. For example, one advantage may be that the definition of conflict of interest in the draft code may encompass more unethical conduct than Section 6031. However, one disadvantage may be that it provides less concrete examples of what actually constitutes a conflict and, therefore, it may provide less guidance to both the public and its servants. To address this disadvantage, the Board respectfully suggests the Commission consider: (i) including a nonexclusive list of potential conflicts of interest in the definition of “conflict of interest”; (ii) issuing some type of guidance document that helps elucidate what types of conduct meet the definition of “conflict of interest”; or (iii) putting together and posting to its website some training materials that provide the same level of elucidation.”

Response: The goal of this draft code of ethics is to provide immediate state-wide general guidance on acceptable versus prohibited conduct. Providing examples in statute of where it does and does not apply would result in a very long, detailed code and detract from its goal of providing general principles. Examples should be a part of ethics training.

#5 Additional specific examples or an additional guidance document would be helpful. Many Vermonters have second and third jobs and businesses and providing concrete examples would reduce ambiguities or misinterpretations. For example, I know of people that own rental properties, operate food trucks, sell maple syrup...

See proposed revisions to § 10 Post-Government Employment. Examples are best provided as part of ethics education. Issues

regarding outside employment can be very fact specific. As above, examples are best left to training.

#6 This does not give guidance if the nature of the interest is confidential. A hypothetical example is an EMT receives a baby from a mother under the Baby Safe Haven Law and later the mother comes before a board that the EMT is a member of. This also does not give adequate guidance about how an elected official, who does not have a supervisor, would go about disclosing an interest to the public, or how such an elected official would “sign” such a disclosure. It also does not discuss who would be responsible for the expense of making such a disclosure public (e.g. if it were a legal notice in a newspaper, who would pay?)

Response: Conflicts which cannot be described and disclosed without breaching a recognized confidentiality standard should trigger full recusal from any action with regard to the conflict.

Stop here

#7 The draft definition of conflict of interest specifically excludes “any interest that . . . has been disclosed as required by law or applicable written policy and found not to be significant”. One could interpret this definition to mean that if an elected state executive has a financial conflict of interest, but declares it on their financial disclosure forms, then the conflict of interest is no longer an issue. Using the concerning case of Governor Scott’s continued financial interest in his former construction company as an example: the Governor could argue that he has disclosed this conflicted interest, and though the Ethics Commission received a complaint regarding this conflict of interest, and agreed it was a conflict of interest, before removing that decision, and has therefore resolved the conflict, despite the evidence that the conflict of financial interests persists.

Response: This comment has prompted substantial revision.

See other states’ definitions of conflict of interest:

<https://www.ncsl.org/research/ethics/50-state-table-conflict-of-interest-definitions.aspx>

**2) Confidential information:** means information that is exempt from public inspection and copying or is otherwise designated by law as “confidential.”

**Comments:**

#1 The Board respectfully suggests the Commission clarify whether the phrase “exempt from public inspection and copying” is synonymous with information that is exempt from public inspection under Vermont’s Access to Public Records Law, 1 V.S.A. §§ 315-20.

Response: “Exempt from public inspection and copying” is not synonymous with the PRA. No need to make a change. Many Vermont statutes prohibit public disclosure of materials. E.g. 33 V.S.A. regarding juvenile matters; 8 V.S.A. regarding financial regulation; 26 V.S.A. (various sections) regarding regulated professions, and more. See, List of Public Records Exemptions by Subject Area: <https://legislature.vermont.gov/assets/Legislative-Reports/Public-Records-Act-Exemptions-by-Subject.pdf>

**3) Confidential information:** “Confidential information” means information that is exempt from public inspection and copying or is otherwise designated by law as “confidential.”



**3) Gift:** means anything of value, tangible or intangible, that is bestowed for less than adequate consideration. [Sources: 3 V.S.A. § 1201(4)(a) and 2 V.S.A. § 261(6)(A)(ii)] Included within this definition are travel expenses such as travel fare, room and board, and other expenses associated with travel.

(a) Examples of gifts may also include;

- (1) a political contribution; [Source: 2 V.S.A. § 261(6)(A)(i)]
- (2) a meal or alcoholic beverage; [Source: 2 V.S.A. § 261(6)(A)(iii)]
- (3) a ticket, fee, or expenses for or to any sporting, recreational, or entertainment event; [Source: 2 V.S.A. § 261(6)(A)(iv)]
- (4) a speaking fee or honorarium, except actual and reasonable travel expenses; [Source: 2 V.S.A. § 261(6)(A)(v)]
- (5) a loan made on terms more favorable than those made generally available to the public in the normal course of business. [Source: 2 V.S.A. § 261(6)(A)(vi), 3 V.S.A. § 1201(4)(a), 2 V.S.A. § 261(6)(A)(ii)]

(b) Not Considered "Gifts:"

- (1) An item which would qualify as a gift, but which is not used, and which within 30 days after receipt, is returned to the donor, or for which the donor is reimbursed for its fair market value will not be considered a "gift;" [2 V.S.A. § 261]
- (2) anything given between immediate family members;
- (3) printed educational material such as books, reports, pamphlets, or periodicals;
- (4) a devise or inheritance. [currently in 3 V.S.A. § 1201(4)(B) and 2 V.S.A. § 261]

Comments:

#1 What if the honorarium is donated to the Department instead of the individual?

Response: It would still be considered a "gift."

#2 A colon, not a semi-colon should follow "include" above.

Response: Good suggestion. Will be implemented.

#3 For first amendment reasons, political contributions should not be considered "gifts."

Response: It is in current statute 2 V.S.A. § 261. More analysis of this issue is needed.

#4 CLC recommends striking the term "political contribution" from the definition of a prohibited gift, and instead including "a lawfully reported political contribution" under the list of items not considered gifts. As written, the statute suggests that if a political contribution given after a public servant makes a policy choice the contributor likes (i.e., "as a reward for any official action"), the acceptance of that contribution violates the ethics code. Removing the otherwise lawful political contributions from the definition of prohibited gifts will prevent a constitutional challenge of a ban on political contributions from non-lobbyists.

Response: 2 V.S.A. § 261 currently classifies political contributions as "gifts." That statute does not distinguish between contributions lawfully reported or others not required to be reported. Nor does it distinguish gifts made to a campaign from gifts made directly to a candidate. Review of the language of 2 V.S.A. § 261 may be appropriate at some time. A "gift" of a political contribution is not prohibited by the definition. Section § 8 "Gifts" prohibits soliciting, or accepting gifts when it can be inferred they were made to influence persons in the performance of their official duties.

#5 A second comment is that a fairly real example of a gift might be provision/acceptance of below-market rate services from someone. I was frequently concerned about this in my small town, so much so

**4) Gift:** "Gift" means anything of value, tangible or intangible, that is bestowed for less than adequate consideration. [Sources: 3 V.S.A. § 1201(4)(a) and 2 V.S.A. § 261(6)(A)(ii)] Included within this definition are travel expenses such as travel fare, room and board, and other expenses associated with travel.

(a) Examples of "gifts" may also include:-

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- (3) a ticket, fee, or expenses for or to any sporting, recreational, or entertainment event; [Source: 2 V.S.A. § 261(6)(A)(iv)]
- (4) a speaking fee or honorarium, except actual and reasonable travel expenses; [Source: 2 V.S.A. § 261(6)(A)(v)]
- (5) a loan made on terms more favorable than those made generally available to the public in the normal course of business. [Source: 2 V.S.A. § 261(6)(A)(vi), 3 V.S.A. § 1201(4)(a), 2 V.S.A. §

261(6)(A)(ii)]

(b) Not Considered "Gifts:"

- (1) An item which would qualify as a "gift," but which is not used, and which within 30 days after receipt, is returned to the donor, or for which the donor is reimbursed for its fair market value will not be considered a "gift;" [2 V.S.A. § 261]
- (2) anything given between immediate family members;
- (3) printed educational material such as books, reports, pamphlets, or periodicals;
- (4) a devise or inheritance.

[currently in 3 V.S.A. § 1201(4)(B) and 2 V.S.A. § 261]

that I refused to even consider asking certain folks I interacted with in my town duties to provide me services since I often had no idea of what pricing might be for those irregular maintenance jobs.

Response: "less than adequate consideration" [above] covers below market rate services.

Comments:

#1 " Second, on Pages 3 and 4 there are references to "immediate family" but that term is nowhere defined. If you leave it as is the courts will have to decide who falls into that category. The most recent gun legislation (which is now an Act but I recall it as S.55) contains a definition that was repeated from somewhere else in statute. I'm only pointing this out for the sake of having you decide whether you want to be specific or are content with the courts determining that definition."

Response: See proposed definition of "immediate family" above.

#2 Because this definition includes "anything of value, tangible or intangible" and does not define what constitutes "adequate consideration," it risks covering at least two situations that the Commission may not have intended to cover. There are likely other, similar situations.

Response: "Adequate consideration" is a term of art meaning less than its value.

First, some entities, such as the National Association of Attorneys General, regularly offer scholarship opportunities for attorneys around the nation, including Vermont, to attend Continuing Legal Education Conferences. These scholarships frequently include conference registration fees, hotel rooms, airfare, and meal reimbursements for which the State does not have to give any consideration (to the Board's knowledge). Without these scholarship opportunities many attorneys would not be able to attend these conferences, which are limited to government employees.

Response: The gift definition what constitutes a gift. Section § 8, "Gifts," details which gifts are permitted or prohibited.

Second, state employees are sometimes asked to present at conferences or staff a booth to answer questions about their regulatory program. Such regulators frequently don't have to pay the conference registration fee, are often provided coffee, snacks and lunch (just like the rest of the attendees), and sometimes receive conference-wide giveaways such as pens and thumb drives.

Response: Section § 8 holds the answer. A "gift" of registration fees and meals that all at the conference receive would, most likely, not be barred by this section, unless the "gift" appears to be made with the intent to influence them in the performance of their official duties or is intended as a reward for any official action or inaction on their part." Sec. § 8.

Perhaps Section 8 of the Draft Code of Ethics sufficiently addresses each of these situations because in neither is there an apparent effort to influence public servants. However, and as stated elsewhere in these comments, it could be helpful for the Commission to publish some guidance or develop and post to its website some training materials to provide more assistance in understanding the proposed restrictions on "gifts."

Response: Training materials should address this concern.

#3 What about clothing?

Response: Clothing would be treated the same as any other gift.

#4 Capitalize "gift" in (b)(1) above.

#5 I would value more clarity around what constitutes a gift: 1) adding a value amount (e.g. more than \$5, you can accept a pencil) and 2) language around conference giveaways by sponsors (e.g. water bottle); are these gifts and should be declined?

Response: The definition of "gift" works. The problem is, which gifts are permissible, and which are not? See revisions to this section which include cash value limits.

	<p>A prohibition on all gifts would be a strong statement. It is clear, easier to comply with, monitor and/or enforce. Distinctions between items given to all attendees at a conference and items given to individuals are similarly easier to comply with. Still questions remain: What about gifts given to all legislators by groups? (coffee, donuts, etc.) Aren't they given to achieve good will, with an eye toward achieving legislative goals. Are they not given with the intent to influence public servants or as a reward for official action or inaction, at the very least indirectly?</p> <p>#6 Note: some states have minimum thresholds (e.g., \$5) for gifts. Other states categorize gift givers differently. For example, lobbyists and persons with business before an agency cannot give anything, but others might have a \$50 threshold. A reasonable limit on gifts takes care of, for example, a kid who gives a state trooper a snow globe because the trooper gave a presentation at the kid's school.</p> <p>Response: See revisions to this section.</p> <p># 7 Most states allow reimbursement of "necessary expenses" for when an employee, within the scope of official duties, is asked to present or speak at a conference or event. Usually the employee has to actually have a function at the event (i.e., make a formal presentation and not just be in the audience) and the reimbursement can only be those expenses that are 'necessary' to the appearance (i.e., transportation, registration fees, etc.). CA had a great case with an Oakland politician who said it was "necessary" for him to assist in regular 3-hour 'inspections' of the baseball stadium, but that the inspections had to occur during home baseball games and the 'inspection meeting' was always held in a luxury box.</p> <p>Response: Revisions to Section § 8.</p>	
<p>4) "Person" as used in this chapter means: any individual, group, business entity, association or organization.</p>		<p>5) "Person" as used in this chapter means: any individual, group, business entity, association, or organization.</p>

## Rules

### 1) Conflicts of Interest:

Public servants who are confronted with a conflict of interest shall take no action on the matter and, upon identifying the conflict of interest or potential conflict of interest, shall in writing disclose to their immediate supervisor or to the public in detail sufficient to be understood by the public, the nature of the interest, financial or otherwise, that gives rise to the conflict of interest, and sign a statement of recusal from future participation in the matter.

[Taken roughly from CT. Ethics Code, 1-86.]

#### Comments:

#1 "...this section states that when a public servant identifies a potential conflict of interest, one option he or she may take is to disclose that conflict in writing to his or her immediate supervisor. However, it does not state what the supervisor is supposed to do in response to the written disclosure. Presumably, the supervisor should evaluate the disclosure, determine whether there is an actual conflict of interest, and, if there is, evaluate whether the conflict can be resolved or whether the public servant must recuse him or herself from the matter. However, this is not detailed in the draft code and the only option appears to be recusal even when something short of recusal may resolve the conflict. Nor is it stated whether the supervisor is supposed to or is prohibited from taking additional actions, such as providing the disclosure to others, including but not limited to the public. Conversely, 10 V.S.A. § 6031(b) sets forth a more specific process that the Board and District Commission members must follow when a potential conflict of interest arises. Similarly, Vermont's Rules for Professional Conduct (applicable to attorneys only) contain several more specific provisions related to identifying, disclosing, and resolving conflicts of interest.

Response: The proposed revisions to this section should alleviate the concerns above.

Second, this section states that a public servant's written disclosure of a potential conflict of interest must be "in detail sufficient to be understood by the public." The way in which this clause is written leads to three questions. First, and as stated above, is the written disclosure to the public servant's supervisor subject to public inspection or is disclosure of its contents governed by Vermont's Access to Public Records Law, 1 V.S.A. §§ 315-20?

Response: Conflict of interest disclosures should be public records. They explain a conflict in detail sufficient so that the public can understand it. Disclosure increases government transparency. When public servants find good cause to proceed after identifying a conflict of interest, requiring a written record 1) raises awareness of the need for vigilance about conflicts, and 2) assists those who must determine whether a conflict of interest requires recusal from further action.

### 1) Conflict of Interest

a) Public servants confronted with a conflict of interest shall each time a conflict arises either:

1) recuse from the matter, or

2) prepare a written statement in detail sufficient to be understood by the public which shall:

A) describe the matter requiring action,

B) disclose the nature of the potential or actual conflict of interest, and

C) explain why good cause as set forth in subsection (d) below exists so that the public servant can take action in the matter fairly, objectively, and in the public interest.

b) Request for Ethics Commission Determination. Public servants or their supervisors may request that the Ethics Commission review a statement prepared under subsection (a) above to determine whether

1) a conflict of interest exists, and

2) if one exists, whether good cause as defined in subsection (d) below exists so that the public servant can take action in the matter.

c) Ethics Commission responses to requests under subsection (b) shall be in writing.

d) As used in this section, good cause to proceed in the matter may include any of the following instances:

1) the identified conflict or potential conflict is de minimis in nature,

2) the action to be taken is ministerial or clerical,

3) the conflict is amorphous, intangible, or otherwise speculative,

4) the public servant cannot legally or practically delegate the matter.

How much detail should it contain where the conflict may involve a public servant's reasonable privacy? Should I disclose the nature and extent of a disqualifying personal relationship when I can see that full disclosure mandates recusal?

Response: See revised Section § 8. When public servants determine for themselves that a conflict requires recusal, full detail for the disclosure is not needed for others to determine whether future participation in a matter can properly occur because it will not. Possible examples of conflicts raising privacy concerns could be: a personal relationship with an individual that raises a question about the propriety of the public servant's continued participation in a matter, or a conflict of interest disclosure of which would violate a recognized privilege or state or federal law. If the conflict results in recusal, there is no breach of privacy concern. Requiring written disclosure of conflicts only when there is good cause to proceed deters persons with conflicts of interest from engaging in conduct they can and should avoid.

Second, but relatedly, if the nature of the conflict can't be adequately explained without revealing otherwise privileged information (e.g., attorney-client communications, attorney-work product, communications covered by the spousal privilege, confidential medical information, or information protected by non-disclosure agreements, etc.), does that information have to be contained in the disclosure? Finally, does the phrase "in detail sufficient to be understood by the public" apply both to the public disclosure and the supervisor disclosure?"

Response: See above. The public should be able to know when its public servants proceed after identifying conflicts of interest, the nature of those conflicts, and why good cause justifies continued participation in the matter. Disclosure of conflicts of interest should be written in a manner so that the public can understand the disclosure. Disclosure should not be written using in-house shorthand.

#2 As written, this is one very long sentence. I would recommend rewriting as 2 or 3 sentences. This is an important rule and should be easily understood by everyone.

#3 The Ethics Code should refer to relevant employee policies, at a minimum those listed below. 5.2 Conflicts of Interest Arising from Employment (this narrowly addresses two relatives working for the State)  
[https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor\\_Relations\\_Policy\\_EEO/Policy\\_Procedure\\_Manual/Number\\_5.2\\_CONFLICTS\\_OF\\_INTEREST\\_ARISING\\_FROM\\_EMPLOYMENT.pdf](https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor_Relations_Policy_EEO/Policy_Procedure_Manual/Number_5.2_CONFLICTS_OF_INTEREST_ARISING_FROM_EMPLOYMENT.pdf)

Response: Section § 12 “Other Ethics Rules or Policies” refers to other codes or policies. “Nothing herein shall prohibit branches of state government, agencies, or departments from adopting more stringent ethics provisions.” There is no need to catalogue in the ethics code statute every other possible policy provision or rule that might apply to any public servant. Each agency, department, or other branch of government should inform its employees of the provisions, beyond the state code of ethics, that apply to them.

#4 In terms of possible missing items, nepotism is a concern to me at other levels of the government. I like the simplicity of the draft as it stands, but perhaps an example beyond what is in the definition ***Conflict of Interest*** would strengthen the avoidance of preferential treatment of family members.

Examples of conflicts are best provided in ethics training.

#5 the conflict is disqualifying, unless the supervisor seeks permission and approval from the Commission. The problem with empowering the supervisor is that many supervisors will just routinely allow the employee to act on the COI (often because it’s easier for the supervisor and/or the employee hasn’t fully disclosed the COI to the supervisor)

Response: This section is substantially revised, see revision.

<p><b>2) Unethical Conduct May Not Be Delegated:</b></p> <p>Public servants may not direct others to act in a manner which they themselves cannot. Public servants who have a conflict of interest shall not direct others to act to their benefit. Public servants, who because of a conflict of interest, recuse themselves from a matter may not in any way participate in or act to influence a decision regarding that matter.</p>	<p><b>Comments:</b></p> <p>#1 The sentence “public servants, who because of a conflict of interest, recuse themselves from a matter may not in any way participate in or act to influence a decision regarding that matter” should not be in this section, because it is unclear if it only applies when the public servant is considering delegating a matter to a subordinate, or if it always applies. If it always applies, it is likely to be overlooked because a public servant who is not considering delegating a matter will probably not read this section. Also, it is overbroad. A part-time or volunteer public servant would be prevented from coming before a board he/she is a member of on his/her own behalf, even after recusing him/herself.</p> <p><b>Response:</b> This section applies whenever a public servant must recuse from a particular matter. Part-time volunteers who recuse themselves because of a conflict are no different. They may not participate in or act to influence a decision in that matter.</p>	<p><b>2) Unethical Conduct May Not Be Delegated:</b></p> <p>Public servants may not direct others to act in a manner which they themselves cannot. Public servants who have a conflict of interest shall not direct others to act to their benefit. Public servants, who because of a conflict of interest, recuse themselves from a matter may not in any way participate in or act to influence a decision regarding that matter.</p>
<p><b>3) Appearance of Violation:</b></p> <p>Public servants shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this chapter.</p> <p>Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.</p> <p>[5 CFR § 2635.101 - Basic obligation of public service]</p>	<p><b>Comment:</b> Should this “avoid” section even be included in a statutory code?</p> <p><b>Response:</b> Yes. It is a fundamental precept of government service that avoiding the appearance of violations is necessary to promote and maintain public confidence in government. How and to what extent it may be enforced is a separate matter.</p>	<p><b>3) Appearance of Conflict of Interest or Other Ethical or Law Violations:</b></p> <p>Public servants shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this chapter.</p> <p>Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.</p> <p>[5 CFR § 2635.101(b)(14) - Basic obligation of public service]</p>



**4) Preferential Treatment:**

Public servants in the course of state business shall act impartially showing no favor toward or prejudice against any person. Public servants shall not give or represent an ability to give preference or special treatment to anyone because of their wealth, position, or status, or because of any personal relationship with a public servant. When required by law, public servants may give preference to designated individuals or groups.

[Comment: e.g. Affirmative action plans, or a statute giving a preference to a group like veterans. A public servant executing the statute may give preference to the target group, but otherwise act impartially and consistent with the statute. Modified from Current Code, and NIH Ethics Order, 5 CFR § 2635.101(b)(8).]

#1 As an example, would this prevent Departments/Agencies from issuing subgrants to “youth organizations” if not clearly specified in statute? Does this eliminate Department and Agency’s ability to work with vulnerable populations unless explicitly stated in statute?

Response: More specific language here is appropriate. This section is amended as above.

#2 Preferential treatment—this clause does not specifically outline preferential treatment in state government hiring practices. It is my observation that state managers (in my department, anyways) promote their personal friends frequently, and often pass over highly qualified candidates in favor of people with whom they are known to socialize. In my unit, we play a game—every time a management level position opens up we look at the org chart and see which known friend of the hiring manager is currently at a lower pay grade than the open position. This is how we know who will be promoted—regardless of any other qualified applicants. This practice of preferential treatment in state government hiring and promotions is contrary to public interest in that it often overlooks highly qualified and experienced candidates. Further, nepotism is demoralizing for staff and discourages highly skilled workers from remaining in state service. Currently, there is no system of accountability for managers who promote or hire their personal friends.

Response: Conflict of interest provisions would require disclosure of a conflict and a recusal unless “good cause” exists. This draft code of ethics has not contemplated anti-nepotism provisions.

#3 “...When a supervisor, manager, or executive forwards a name for hire, that position incumbent should attest that he or she does not have a social relationship with the candidate. If the person has a relationship (friend, provider of family childcare, etc.) that hiring authority should describe it. Candidates for jobs should attest to relationships with hiring authorities. When an individual states a personal relationship, the attestation should be investigated before the candidate receives a job offer. Job descriptions for supervisory, managerial, and executive positions and job classes should include such disclosure as a condition of employment. Failure to disclose such relationships should be considered misconduct. Evaluation forms

**4) Preferential Treatment:** Public servants in the course of state business shall act impartially showing no favor toward or prejudice against any person. Public servants shall not give or represent an ability to give preference or special treatment to anyone because of their wealth, position, or status, or because of any personal relationship with a public servant. When permitted by law and written policy or rule, public servants may give preference to designated individuals or groups.

should list ethical hiring as a performance expectation. All SOV employees should be made aware of this provision and given a clear path for confidential reporting. Reports of preferential treatment should be handled by staff outside of DHR or DHR staff who do not have working relationships with the department or agency.

**Response:** See responses above regarding conflicts of interest.

#4 Is there away [sic] to add language about **how racism violates ethics?** I'm aware that an Ethics Code of Conduct is or may be technically different than laws on Civil Rights. However, I seen even firsthand how racism ( especially the type of 'racism is hard to pin down unless it is expressed overtly but the effects are still traumatizing). For example, if one grew up in a home or had a parent(s) that was deeply prejudice or racist, that may subconsciously affect the child regardless of ones station, race or status in life. When "nurture bias" is added to social systems that may be or are intrinsically biased or racists, then that recipe is devoid of ethics. Thus ethics becomes *situational* instead of focused of one's consciousness or behaviors.

**Response:** As revised, Section § 11 incorporates anti-discrimination and affirmative action laws. Giving preferential treatment in violation of those laws would be a violation of the code.

I have coined a phrase that I call "**Vocational Nepotism**" as I've observed it, that is where Supervisors are actual friends and close associates of people whom they supervise. The issue of Supervisors being close friends or associates outside or even at work with supervisees is hard as that in of itself is not prohibited or bad, but when those relationships are used wrongly and/or to hurt or marginalize others that is damaging and I think it happens quite a lot.

Unwarranted favoritism often occurs when that is the case, in many social situations most often, due to lack of diversity and/or other factors, folks are generally speaking more comfortable with people of their own "race" ( or even class) therefore it stands to reason that the favoritism or Vocational Nepotism would statistically more likely than not, fall along racial lines.

Response: As noted above, giving preferential treatment, when violative of anti-discrimination laws, would be a violation of this code.

#5 How does this apply to management and labor dispute. In the cases I have had with the personnel department it has been implicitly bias in favor of management. The language use in finding had shown bias against all my statement. The choice for whether the accusations made against other public servant are investigated?

Response: It is hard to predict whether or when facts of a particular case might implicate the code of ethics.

#6 SOV, since the 80s, has had a flavor of Tammany Hall. Early in my tenure, SOV clarified nepotism to stop supervisors and managers from hiring family. Yet, I believe that public servants continue to hire based on friendships, with knowledge, skills and abilities a secondary consideration.

Response: As stated in the preface, this draft code of ethics is deliberately not detailed and not designed to anticipate or remedy every unfavored practice.

The Commissioner for the Department for Children and Families is a great example. He hired to surround himself with outside acquaintances or more likely friends. He has passed over people who understood the programs and organizations, and who demonstrated dedication in service to Vermonters. ESD staff sometimes accurately anticipate who will be hired when positions open.

My own organization engages in such behavior. People who socialize during lunch and frequently outside of the office receive preferential treatment. We are building cliques, one hire at a time. This issue is known and discussed among those without privilege of these relationships, but never addressed by management. At least in my unit, staff sometimes can anticipate who will be hired when positions open—typically for higher-level positions.

When you consider how to address preferential treatment, it's important to recognize that Vermont Department of Human Resources (DHR) needs to maintain amicable relationships with senior managers

of agencies and departments.[sic] If DHR is tasked to oversee this issue, it will face conflicts. Review of SOV preferential treatment allegations, therefore, should be assigned to avoid yet another ethical issue—decisions made to protect working relationships. I provide specific recommendations to address this issue:

- When a supervisor, manager, or executive forwards a name for hire, that position incumbent should attest that he or she does not have a social relationship with the candidate. If the person has a relationship (friend, provider of family childcare, etc.) that hiring authority should describe it.
- Candidates for jobs should attest to relationships with hiring authorities.
- When an individual states a personal relationship, the attestation should be investigated before the candidate receives a job offer.
- Job descriptions for supervisory, managerial, and executive positions and job classes should include such disclosure as a condition of employment. Failure to disclose such relationships should be considered misconduct.
- Evaluation forms should list ethical hiring as a performance expectation.
- All SOV employees should be made aware of this provision and given a clear path for confidential reporting.
- Reports of preferential treatment should be handled by staff outside of DHR or DHR staff who do not have working relationships with the department or agency.

**Response:** These may be good suggestions, but we decline to include them in statutory form in these general principles for government ethics.

#7 Favoritism is addressed in Section 4 of the Ethics Code but could be expanded and should include development of government assistance programs (what will be funded, who is eligible) and equitable notification of opportunities to all eligible parties. The Ethics Commission should seek input from the Executive Director of Racial Equity and Chief Performance Officer.

Response: Preferential treatment of individuals or groups, where permitted or required by law, is recognized and permitted by this draft code.

#8 I am writing to submit a comment on the draft Code of Ethics. The current draft does not acknowledge discrimination and the protected bases within Rule 4: Preferential Treatment. It is critical to acknowledge discrimination in regard to the protected bases as it relates to an ethical code of conduct for State employees.

Response: See above, and also see Section § 11, “Compliance with Law” which specifically incorporates anti-discrimination laws.

This can be amended by expanding on Rule 4 to include the federal and state protected bases of discrimination. Sample language to be included could be - “Public employees shall adhere to all laws and regulations that provide equal opportunity for all Vermonters regardless of race, color, religion, sex, national origin, age, disability, civil union/marital status, gender identity and sexual orientation.”

Response: See Section 11, “Compliance with Law” which is amended to specifically include anti-discrimination laws.

**5) Use of Position for Personal Gain:**

Public servants shall not use their official positions for personal or financial gain.

**Comment:**

#1 But that is what all appointees do. Their job tenures are short since gov tenures are short. They always are striving for personal financial gain and schmoozing into the next job and this often can be instead of than focusing on the job at hand. So it can seem that they are just in it for the future financial gain.

#2 A statement to the affect [sic] of parity, equity works here. For example. Supervisor works from home but does not allow employee to work from home. Supervisor has mobile phone for work but supervisee doesn't.

Response: This section uses general language to set a general principle. It does not attempt to address all possible scenarios or resolve employer/employee disparities.

#3 This section fails to mention it is perfectly proper for public servants to receive the salary and expense reimbursement provided for by law for the position they hold.

Response: Being paid for doing one's job is not considered "using the position" for personal or financial gain. Using a position as a stepping-stone for career advancement is not addressed by this provision. The intent of this section is to make clear that the holder of a government position may not use the trappings of that position to obtain benefits unavailable to others not holding that position.

#4 Or inflict harm onto others.

Section § 4 "Preferential Treatment" addresses showing prejudice against any person.

**5) Use of Position for Personal Gain:**

Public servants shall not use their official positions for personal or financial gain.

**6) Use of Confidential or Non-Public Information:**

Public servants shall not use or disclose non-public government information or confidential information acquired during the course of state service for their own or anyone else's personal or financial gain.

[Modified from current Vermont COE]

**Comments:**

#1 add "gain or entertainment/gossip."

Response: we should amend to add "their own or anyone else's purposes or financial gain."

**#2 Use of Confidential or Non-Public Information:**

Public servants shall not use ~~or disclose~~ non-public government information or confidential information acquired during the course of state service for their own or anyone else's personal or financial gain.

Response: Agreed "or disclose" can be deleted. In the context of this section it is unnecessary. One can "use" information without disclosing it. Mere "disclosure" of non-public or confidential information is governed by other statutes or rules and therefore not incorporated into this section. Section 11 "Compliance with Law" of this code would cover improper disclosure of non-public or confidential information set out in statutes or rules.

Public servants shall not use ~~or disclose~~ non-public government information or confidential information acquired during the course of state service for their own or anyone else's personal or financial gain for any reason except as directed in statute or regulation.

Response: No need to add "except as directed...." It is hard to envision a statute or regulation that permits use of non-public information or confidential information for anyone's personal gain or purposes.

Public servants have specific reasons to use confidential information, and must not use it for personal gain. They should not disclose it for any reason, except for those reasons written in statute (for example, my relevant statute says I can share information with other insurance regulators). I suggest making this a two-part rule and propose the above edits.

Response: After deleting "or disclose," no change made.

**6) Use of Confidential or Non-Public Information:**

Public servants shall not use non-public government information or confidential information acquired during the course of state service for their own or anyone else's purposes or financial gain.

**7) Use of Government Resources:**

Public servants shall not make use of state materials, funds, property, personnel, facilities, or equipment or permit others to do so for any purpose other than for official state business unless the use is expressly permitted or required by law or by a written agency, departmental, or institutional policy or rule.

Public servants shall not engage in, or direct others to engage in work other than the performance of official duties during working hours, except as permitted or required by law, or by written agency, departmental, or institutional policy or rule.

[Modified from Iowa Statutes and E.O. 19-17.]

**Comments:**

#1 “This section states, in part: “Public servants shall not engage in, or direct others to engage in work other than the performance of official duties during working hours, except as permitted or required by law, or by written agency, departmental, or institutional policy or rule.” The Board respectfully suggests the Commission explicitly state, if not stated elsewhere in Vermont statute, that this prohibition include campaign activities by both elected officials and non-elected public servants who support their candidacy.

**Response: As drafted this section prohibits campaign activities while on the job: They are not part of the performance of official duties during working hours. Limiting public servant campaign activities outside of working hours would violate First Amendment protections. Depending on the facts of particular cases, public servants who use their positions to have others engage in campaign activities outside of work could be violating Sec. 5 “Use of Position for Personal Gain.”**

#2 Although the beginning of the policy makes mention of a general desire to not prohibit actions that might technically be a conflict of interest, but are so minimal as to be insignificant, this general concept is not adequately carried through to this section. The section makes mention of “the use is expressly permitted or required by law or by a written agency, departmental, or institutional policy or rule.” But there may be no agency, department, or institution with authority over the public servant, as in the case of an elected official. Or the relevant entity may not have gotten around to adopting sufficiently inclusive policies and rules. Examples of minimal use of government resources would be making an occasional personal call on a government phone, because the nature of the construction of the government building blocks cell phone coverage. Or, responding to a personal email received on a government email address, because the sender did not know the public servant’s personal email address.

**Response: Executive Orders governing use of state property would satisfy this rule. Agencies or departments without a policy on use of government property should adopt one. They can be easily adopted.**

#3 This provision is worthless unless policies are clear. People in state government who see this provision and who want to use the office

**7) Use of Government Resources:**

Public servants shall not make use of state materials, funds, property, personnel, facilities, or equipment or permit others to do so for any purpose other than for official state business unless the use is expressly permitted or required by law or by a written agency, departmental, or institutional policy or rule.

Public servants shall not engage in, or direct others to engage in work other than the performance of official duties during working hours, except as permitted or required by law, or by written agency, departmental, or institutional policy or rule.

[Modified from Iowa Statutes and E.O. 19-17.]



computer to check the news or their private email may not respect the rest of the code with this in it.

Response: Indeed. Policies on use of state resources should be clear.

#4 Seen this abuse a lot. How does this interact with Personnel policy? Demonstration of applied consistency?

Response: This provision would apply to public servants, many of whom (e.g. elected persons) are not subject to personnel policies. As contemplated, requirements of this code of ethics and their eventual enforcement are separate and distinct from personnel policies.

**8) Gifts:**

Public servants shall not solicit, accept, or receive, directly or indirectly, from any person a gift under circumstances in which it can reasonably be inferred that the gift is intended to influence them in the performance of their official duties or is intended as a reward for any official action or inaction on their part.

[Modified from current COE. Note: E.O. 19-17 is more specific.]

**Comments:**

#1 NO GIFTS

**#2 Gifts:**

Public servants shall not solicit, accept, or receive, directly or indirectly, from any person a gift under circumstances in which it can reasonably be inferred that the gift is intended to influence them in the performance of their official duties or is intended as a reward for any official action or inaction on their part.

This one is extremely difficult for any state employee whose job entails travel or promotion of the state. In those circumstances, sitting down for a drink, whether coffee at breakfast or a beer in the evening, is part of the social fabric of our business culture. I would prefer to see this rule modified. It could be a “zero tolerance” rule, i.e. public servants shall not accept a gift under any circumstances – but that might not be reasonable for someone attending a convention, for example. In those cases, the business day starts at breakfast and ends after dinner – the three meal times are prime time for business development conversations. Perhaps a statewide policy that could be adopted by affected departments that would allow some leeway could be developed, with a de minimis rule. Absent that, any gift could reasonably come with the inference of intent to influence.

If in doubt, I would vote for the strict prohibition. I can afford to buy my own drink, and one for the other person.

Response: A “zero tolerance” rule would be simpler and would eliminate the appearance of coziness with those doing business with the state. See proposed revision.

#3 A zero tolerance of gifts is not realistic. How about a \$5.00 limit or a \$25.00 limit?. Really, not even a cup of coffee?

Response: Reasonable limits on gifts could be more realistic. But, how are limits assured? Would they involve monitoring or disclosure by public servants? In the long run, buying one’s own cup of coffee would be much easier than filling out disclosure statements.

#4 Is this necessary? If so, should it be person or group?

**8) Gifts:**

(a) Public servants may not

(1) accept a gift under circumstances in which it can reasonably be inferred that the gift is intended to influence them in the performance of their official duties;

(2) use, or permit the use of, the public servant’s government position, or any authority associated with public office, to solicit or coerce the offering of a gift;

(3) accept gifts from the same or different sources on a basis so frequent that a reasonable person would be led to believe the public servant is using the public servant’s office for private gain;

(4) accept a gift in violation of an applicable rule, policy, or executive order.

Sources: modified from 5 C.F.R. § 2635.201-205

(b) Prohibition on soliciting gifts. A public servant may not, directly or indirectly:

(1) solicit a gift from a prohibited source; or

(2) solicit a gift to be given because of the public servant’s official position.

(c) Exceptions:

(1) Gifts of \$20 or less. A public servant may accept unsolicited gifts having an aggregate market value of \$20 or less per source per occasion, provided that the aggregate market value of individual gifts received from any one person under the authority of this paragraph does not exceed \$50 in a calendar year. This exception does not apply to gifts of cash or of investment interests such as stock, bonds, or certificates of deposit. Where the market value of a gift or the aggregate market value of gifts offered on any single occasion exceeds \$20, the public servant may not pay the excess value over \$20 in order to accept that portion of the gift or those gifts worth \$20. Where the aggregate value of tangible items

#5 How does this apply to internal gift giving? I can see gift giving in both content as rewarding good work or gaining favor from a boss.

Response: Internal gift giving is indeed problematic. A subordinate who gives a supervisor a gift might do so hoping to advance his/her career. Perhaps enacting something similar to what is contained in 5 C.F.R. § 3635. Subpart C prohibits employees from: Giving or soliciting for a gift to another employee who is an official superior; or Accepting a gift from a lower-paid employee, unless the two employees are personal friends who are not in a superior-subordinate relationship. This draft code of ethics does not contemplate this degree of specificity.

#6 The Commission should include an exception for nominal gifts as well. Our suggestion is to allow unsolicited gifts valued at \$20 or less, provided that the total value of gifts from the same source is not more than \$50 in a calendar year. This exception will encourage compliance with the other gift restrictions by not prohibiting generally acceptable conduct.

See: <https://ask.fedweek.com/federal-government-policies/rules-gifts/> for See response to Comment #3 above.

Why not eliminate (c) completely? It causes too many problems. E.g. **NAAG scholarship, travel etc.?**

Source: [5 C.F.R. § 2635.203](#)

**Rather than personal relation gifts and training, etc., wouldn't it be simpler to just remove the part about gifts given because of the PS official position?**

<https://www.law.cornell.edu/cfr/text/5/2635.202>

See OGE letter re acceptance of research scholarship.  
[https://www.oge.gov/Web/OGE.nsf/News+Releases/D19C5B861A895776852585BA005BEF19/\\$FILE/66106c4b9df04e6393a17284dde3fe0f1.pdf](https://www.oge.gov/Web/OGE.nsf/News+Releases/D19C5B861A895776852585BA005BEF19/$FILE/66106c4b9df04e6393a17284dde3fe0f1.pdf)

offered on a single occasion exceeds \$20, the public servant may decline any distinct and separate item in order to accept those items aggregating \$20 or less.

Source: [5 C.F.R. § 2635.204](#)

(2) Gifts based on an outside or personal relationship. A public servant may accept a gift given by an individual under circumstances which make it clear that the gift is motivated by an outside, family relationship, or personal friendship rather than the position of the public servant. Relevant factors in making such a determination include the history and nature of the relationship and whether the person, family member, or friend personally pays for the gift.

Source: [5 C.F.R. 2635.204](#)

(3) Gifts of attendance to training or similar events approved and determined to be in the interest of the public servant's agency or department.

Source: [5 C.F.R. § 2635](#)

(d) As used in the section, prohibited source means any person who:

(1) is seeking official action by a public servant's agency;

(2) does business or seeks to do business with a public servant's agency or department;

(3) conducts activities regulated by the public servant's agency;

(4) has interests that may be substantially affected by the performance or nonperformance of the public servant's official duties; or

(5) is an organization a majority of whose members are described in (1) through (4) of this sub-section (d).

Source: [5 C.F.R. § 2635.203](#)

<p><b>9) Statements Obligating the State of Vermont:</b></p> <p>Public servants shall not make unauthorized commitments or promises of any kind purporting to bind State government. [VCOE, modified per 5 CFR § 2635.101(b)(12)]</p>	<p><b>Comments:</b></p> <p>#1 This statement seems to fly in the face of setting up contracts.</p> <p><b>Response: A contract made by someone with authority to contract is an authorized commitment or promise and would not violate this provision.</b></p>	<p><b>9) Statements Obligating the State of Vermont:</b></p> <p>Public servants shall not make unauthorized commitments or promises of any kind purporting to bind State government. [VCOE, modified per 5 CFR § 2635.101(b)(12)]</p>

**10) Post-Government Employment:**

While in State service, public servants shall not seek or negotiate in any manner employment that potentially or actually conflicts with their official government duties and responsibilities.

One-year restriction. Public servants shall not, for one year after leaving state service, represent anyone, other than the State of Vermont, for compensation before the department, agency, board, commission, or office in which they served at the time of their termination of service, concerning any matter in which the State of Vermont has a substantial interest.

Permanent restrictions on representation on particular matters. Public servants shall not, after termination of their service or employment with the State, knowingly make with the intent to influence, any communication or appearance before any entity of the State of Vermont on behalf of any person other than the State of Vermont in connection with a particular matter:

- (a) in which the State of Vermont is a party or has a direct and substantial interest, and
- (b) in which the former public servant participated personally and substantially while in public service.

[Source: 18 USC § 207, a criminal statute].

**Comments:**

#1 A statement having to do with leaving state government with inside information of upcoming growth opportunities – the state employee cannot begin , go into a contract or receive a grant for one year after leaving state service. This would be like having inside information.

#2 This appears to be in the wrong paragraph. It begins with Post-Government, and the very next line states while in state service. I recommend this be in a paragraph dealing with while in state employment.

Response: Since this covers current, potential future and actual future employment, the title of this section should be changed. "Outside Employment and Post-Government Employment?"

**Comment:**

#1 This paragraph is confusing. Are you stating that you cannot be paid in an other job, after you leave the state? Or are you stating that you cannot get a job with a state contractor?

#1 "Does this mean that we could not ever get a job with a partner organization that tries to influence (through public comment, offering feedback, applying for grants or contracts) our former program? While I fully support strong ethics rules, this seems extremely limiting. What if we lost our jobs in a reduction of force, or simply sought other work? Would we not be able to work in the area in which we have the most expertise because we could not "influence" the state in that topic area or on any project we had worked on? Perhaps "influence" and "particular matters" needs more defining.

Response: See, proposed revision: Goal: clarify that post-government employment is not limited, only some post-state employment advocacy is limited. The proposed revision affects 2 V.S.A. § 266 and 3 V.S.A. § 267. Both statutes were passed as part of Act 79 in 2017. "Executive officer" is defined by 3 V.S.A. § 1201(3).

What is the reason for this? This current writing seems to place our tenure at the State of Vermont over our ability to be private citizens in Vermont—it is important the we have the ability to use our own

**10) Outside Employment and Activities, Post-Government Employment:**

**(a) Current State Employment:** Public servants may not seek or engage in outside employment or activities that are inconsistent, incompatible, or conflict with their official duties.

Source: DHR policy 11.5, March 1996, 5 C.F.R. § 2635.802.  
<https://www.law.cornell.edu/cfr/text/5/2635.802>

**(b) Post-government employment: one or two-year restrictions:**

**(1) Executive officers:** Except as permitted by (c) below executive officers shall not, for one year after leaving state service, be an advocate for anyone, other than the State of Vermont, for compensation before the department, division, agency, board, commission, body, or office in which they served at the time of their termination of service, concerning any matter in which the State of Vermont has a direct and substantial interest.

**(2) Legislative branch public servants**

**(A) Legislators:** Except as permitted by (c) below, former legislators shall not be an advocate for anyone, other than the State of Vermont, for compensation, before the general assembly or any of its constituent parts, until the end of the biennial session following their departure from the legislature.

**(B) Legislative branch employees:** Except as permitted by (c) below, former legislative branch employees shall not, for one year after leaving state service, be an advocate for [language from 3 V.S.A. § 267] anyone, other than the State of

personal voices to advocate for things that we care about personally in our personal time. Also, that is really restrictive to never be able to represent anything but a State of Vermont opinion (that someone else decides) professionally just because you used to work for the State (and is not something we opted into at the time of our hiring). This language needs to be narrowed and clarified, I think.”

Response: See proposed revision

#2 “Vermont is small and having restrictions on employees that keeps them from working in their own field seems like something that should have to be negotiated in the contract. There are few people in Vermont that do what I do and the SOV has a monopoly on the regulatory and a near monopoly on the financial proceedings of those works. Hiring has been challenging in our division and it’s not uncommon for engineers to leave state practice and return to private practice. Not being able to work in your field for a year seems like a large, uncompensated financial burden that will impact our ability to hire qualified professionals.”

Response: See proposed revision

#3 “Finally, I am aware that gubernatorial candidate Rebecca Holcombe is suggesting different time frames for administration officials versus legislators before they can become lobbyists. As I understand her suggestion, she wants five years for administration officials and two years for legislators. Personally I don’t think there should be a difference at all between those two entities in whatever time frame you choose. But if you are going to have a difference, it would make more sense to have the longer period be for former legislators because they are the ones most apt to be friendly with legislators.”

#### #4 Post-Government Employment

This section of the Draft Code of Ethics places limitations on the employment opportunities former public servants may seek. Because of their breadth, these limitations may be particularly difficult for many government attorneys to follow. This is especially true for attorneys with a specialized practice. In addition, it is especially problematic given that most government attorneys are exempt

Vermont, for compensation before the general assembly or any of its subparts or office in which they served at the time of their termination of service, concerning any matter in which the State of Vermont has a direct and substantial interest.

(c) Exemption: The limitations in subsection (b) set forth above do not apply to individuals providing information or services to the State of Vermont pursuant to contracts with the State of Vermont.

[Note: adoption of (b) will require amendment to 2 V.S.A. § 266 and 3 V.S.A. § 267.]

(d) Permanent restrictions on representation on particular matters involving a specific party or parties. Public servants shall not, after termination of their service or employment with the State, knowingly make with the intent to influence, any communication or appearance before any entity of the State of Vermont on behalf of any person other than the State of Vermont in connection with any investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, quasi-judicial, judicial or other proceeding

- 1) in which the State of Vermont is a party or has a direct and substantial interest,
- 2) in which the public servant participated personally and substantially as a public servant, and
- 3) which involved a specific party or parties at the time of such participation.

[Sources: 18 U.S.C. § 207(a)(1), 5 C.F.R. § 2641.201]

employees who may be terminated at any time for any non-discriminatory reason. Two examples are illustrative.  
First, arguably under this section an attorney who worked for the Agency of Natural Resources and then accepts a job at a private law firm doing development work may not help a client apply for any Agency permits even for projects that attorney had no connection with while working for the Agency.

Second, arguably under this section an attorney who worked for the Department of Corrections who accepts a job as a private criminal defense attorney may not represent a client at a parole board hearing even if the attorney had no involvement in that client's case while working for the Department.

These examples, and there may be others, indicate that this section of the Draft Code of Ethics goes farther than Rule 1.11 of Vermont's Rules of Professional Conduct, which addresses the "Special Conflicts of Interest for Former and Current Government Officers and Employees." As a result, the Board respectfully requests the Commission consider whether the language of Rule 1.11 can be altered to apply to all of Vermont's public servants and then incorporated into the Draft Code of Ethics.

**Response:** See proposed revision

#5 Again, I think providing a handful of actual examples here or in an additional guidance document would be incredibly helpful. Depending on the interpretation of substantial interest this could be incredibly restricting in a state like Vermont with limited job opportunities, especially in certain sectors.

#6 Rule 10 concerns me. It reads like a non-compete clause, and it would essentially guarantee that I cannot work in Vermont should I choose to leave public service. "Permanent restrictions on representation on particular matters?" Really? Al Gobeille laughed his way to the bank, while many State employees in the same line of work will be unable to stay in the industry if, say, the Administration tries to cut pay for State employees due to COVID as many of us expect.

Response: See proposed revision

A six month restriction is appropriate, given the diminishing returns of institutional knowledge. Even then, I would hope that the Ethics Commission carefully interprets the phrase “any matter in which the State of Vermont has a substantial interest.” I would hate to see someone in a non-partisan data analysis role unable to take up data analysis in the same domain across the road. It would not serve Vermonters’ interests to compel experts to leave the state rather than add their expertise to another side of the public domain.

#7 In regards to the Proposed Ethics Code, I would like to make a suggestion to Section 1(10), regarding seeking post government employment. I would recommend including a protocol to have employees immediately advise their supervisor if they are considering engaging in such discussions so actions may be taken to mitigate any potential conflicts of interests or recusals to prevent the appearance of any should they be seeking post government employment that may have a conflict of interest with their existing position. It is inevitable that this will arise and taking proactive measures to insulate the state from any existing or perceived conflict of interest would be helpful to both the employee and state.

#8 Many leave state employment to pursue work in the field they work with in state service. Is clarification needed?

#9 Where is it defined what constitutes a “substantial interest” in item #10 – Post-Government Employment? VTrans relies on engineers in private sector consulting firms to develop projects. It’s common for engineers to move from VTrans employment to private sector consulting and vice versa. Where can a current employee or former employee get a determination as to whether a particular scenario constitutes a substantial interest (or a potential conflict)?

#10 The language in Section 10 of the Draft Ethics rule on Post-Government Employment could be plainer and clearer and should mesh with [Employee Policy 1996. Policy 5.6. [[https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor\\_Relations\\_Policy\\_EEO/Policy\\_Procedure\\_Manual/Number\\_5.6\\_EMPLOYEE\\_CONDUCT.pdf](https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor_Relations_Policy_EEO/Policy_Procedure_Manual/Number_5.6_EMPLOYEE_CONDUCT.pdf)]] It should be clear how to handle



permit applications, site inspections, grant applications, and similar items from a regulated/eligible entity when a state employee receiving applications or inspecting is a former employee; the former employee may still be a job reference and potential future employer. Similarly, it should be clear what involvement a former state employee can have in permit and grant applications from a regulated/eligible entity to their former state agency. Are there time limits? Limits on new vs. old projects? Are there recusals (which may be challenging in a state agency without multiple staff managing a type of application, and small businesses applying)? Technical skills from outside organizations and from state employment can be excellent training and the most relevant experience for each others' jobs, and applicant pools may be limited in a small state, but this also presents a risk for ethical conflicts and favoritism.

#11 Similarly, this paragraph is also unclear. Are you permanently making working for a State contractor, a criminal offense, after working for the State?

#12 The restrictions on post-government employment (draft code rule 10) are important, however, we believe that a permanent restriction for certain officials could be counterproductive. Some of our most talented state employees should not be required to give up for all time meaningful opportunities for future employment in their field of greatest expertise. Such a restriction could make it quite unnecessarily difficult to attract top talent into government. Therefore, a restriction of two years may be an effective alternative in Vermont. This would be more than is required under current law

#13 We have two suggestions regarding these post-employment restrictions. First, we recommend mirroring federal law by limiting the permanent ban to particular matters involving specific parties. When limited to particular matters involving specific parties, the Congressional Research Service describes the lifetime ban in federal law as follows:  
"This lifetime ban is a fairly narrow and case-specific restriction which in practice would apply to one who worked substantially on a particular governmental matter such as a specific contract, a particular investigation or a certain legal action, involving specifically identified

private parties, and who then leaves the government and attempts to represent those private parties before the government on that same, specific matter.”<sup>3</sup>

We agree. The permanent restriction on switching sides is an important safeguard; and when limited to particular matters involving specific parties, it is narrow enough to ensure compliance while leaving former public servants free to pursue nongovernment work in their areas of expertise.

Revisions distinguish between leaving state government (permitted) and becoming an advocate for an adverse party in a particular matter (forbidden). This section needs to be clear that there is no work prohibition, only a temporary or permanent advocacy prohibition.

Second, CLC recommends not only prohibiting public servants from seeking conflicting post-government employment, but also prohibiting conflicting outside employment while working as a Vermont public servant. This restriction is especially important for full-time public servants.

See proposed revision.

**11) Compliance with Law:**

Public servants shall meet personal legal obligations and comply with applicable state and federal laws and regulations and comply with applicable governmental codes of conduct.

Comments:

#1 Consider adding something about federal law. State employee managers/leaders that make decisions that conflict with federal law and then put lower level employees in position of having to follow federal law or follow their state bosses' directives (if they don't follow these they lose job for insubordination). Being untruthful or misleading on federal funding paperwork; not following federal labor laws or OSHA; not following federal ADA laws; these are examples.

Response: As drafted, when taken in conjunction with others (non-delegation, misuse of government position), this section is adequate. Revision includes: anti-discrimination and equal opportunity laws.

#2 I think it is important that you add a separate heading dealing explicitly with power over the less powerful, sexual and otherwise. I am a retired psychologist, licensed in New York state, and have experience with the ethics codes for psychologists. I am not sure why you do not deal with the power-over, sexual issue, which is as much part of our culture as the things you do deal with.

I have copied a small section of the APA (American Psychological Association) ethics code (see below). I understand that the code for public servants will not be the same as the code for psychologists. I am sending it just to give you an idea of what I am talking about, and the language used in the attempt to describe it. Legislators and psychologists are similar in that they both have more power over others because of their position.

I would be glad to answer any questions you might have. (see attached APA principles)

#3 In my view, a code of ethics should include language that prohibits discrimination or harassment on the basis of a protected class by elected officials. More specifically, access to or participation in government services (as is access to legislators) should not be predicated upon one belonging to a particular group. It is time for our legislators to commit to long held anti-discrimination views.

Response: The Code is revised to specifically mention anti-discrimination laws and equal opportunity laws that provide equal

**11) Compliance with Law:**

Public servants shall comply with applicable state and federal laws and regulations including anti-discrimination and equal opportunity laws and comply with applicable governmental codes of conduct.

	<p>opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap. See proposed revision.</p> <p>#4 The statute needs to address lying and perjury. Have not seen anyone held accountable when they lied under oath. Perjury in epidemic and is critical to address to gain public trust.</p> <p>Response: Compliance with laws includes those governing lying and perjury.</p> <p>#5 I believe some form of the statement below should be included in our Code of Ethics. "Employees shall adhere to all laws and regulations that provide equal opportunity for and fair treatment of all Vermonters regardless of ethnicity, color, religion, sex, national origin, age, or handicap."</p> <p>Response: Adopted. See Response to #3 above.</p> <p>#6 I would suggest adding that where Federal Law and State Law conflict, that State Law takes precedence.</p> <p>Response: Article IV of the U.S. Constitution states that laws of the United States ...shall be "the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."</p> <p>Commission Note: "meet personal obligations" is unnecessarily broad. It could encompass behavior or activities beyond those required as public servants. It should be stricken.</p>	
<p><b>12) Other Ethics Rules or Policies:</b></p> <p>Public servants shall comply with any other applicable rules or policies established by executive order, agency rule, or policy. Nothing herein shall prohibit branches of state government, agencies, or departments from adopting more stringent ethics provisions.</p>		<p><b>12) Other Ethics Rules or Policies:</b></p> <p>Public servants shall comply with any other applicable rules or policies established by executive order, agency rule, or policy. Nothing herein shall prohibit branches of state government, agencies, or departments from adopting more stringent ethics provisions.</p>

**13) Whistleblower Protections for Ethics Complaints:**

Consistent with 3 V.S.A. § 971 et seq., public servants shall be free to disclose waste, fraud, abuse of authority, violations of law, or violations of this or other applicable ethics codes to the Ethics Commission without fear of reprisal, intimidation, or retaliation.

**Comments:**

#1 Does this include reporting concerns of federal laws not being followed? Does this cover reporting misleading (maybe not fully a violation) unethical behavior?

**Response: Yes.**

#2 Whistleblower protections: Although retaliation is illegal, it is very difficult to prove. Unless a manager comes out and says “I’m punishing you because you filed a complaint of sexual harassment” there is no way to hold managers accountable when they retaliate. This means that corrupt managers can do almost anything they want to employees that report fraud or abuse. Retaliation can take many forms—from denying vacation requests to reassigning job duties. Can the whistleblower protections in this code of ethics be strengthened? One potential solution might be to outline types of behavior that constitute retaliation.

**Response: These concerns are valid. But, in the spirit of furnishing general ethical principles, providing a comprehensive list of acts that might constitute retaliation is not appropriate or necessary as part of this draft code of ethics.**

#3 Something needs to be said about people acting in this manner. Disciplinary action up to termination.

**Response: The Commission’s immediate goal is adoption of standards for ethical conduct. How they may be enforced should follow adoption and education about them. Eventual ethics enforcement is contemplated as separate from direct employment action. Like civil violations an individual might receive, for example speeding tickets a public servant can be issued and sanctioned for, violations may eventually result in sanctions not affecting their employment. Should conduct constitute both an ethics violation and violation of an employment condition, the employing body retains authority to impose employment sanctions.**

**13) Whistleblower Protections for Ethics Complaints:**

Consistent with 3 V.S.A. § 971 et seq., public servants shall be free to disclose waste, fraud, abuse of authority, violations of law, or violations of this or other applicable ethics codes to the Ethics Commission without fear of reprisal, intimidation, or retaliation.

**14) Ethics Education and Training:**

Mandatory ethics training. Within the first 6 months of public service or beginning a new state position, public servants shall engage in ethics training which may be in person or on-line. Public servants shall participate in continuing ethics education which may be in person or on-line at least once every three years thereafter. Acceptable continuing ethics education providers are: The State Ethics Commission, the Department of Human Resources - Center for Achievement in Public Service (CAPS), the Vermont House of Representatives Ethics Panel for the House of Representatives, and the Vermont Senate Ethics Panel for the Senate. Copies of CAPS, House, and Senate Ethics training materials shall be provided to the Ethics Commission. On request, the State Ethics Commission may collaborate with or assist other providers.

**Comments:**

**#1 Rules – 14) Ethics Education and Training**

This section of the Draft Code of Ethics requires public servants to complete mandatory ethics training “[w]ithin the first 6 months of public service or beginning a new state position.” This requirement presents two questions. First, does this apply to public servants who move from one state entity to another without an intervening stint in the private sector? For example, would an administrative assistant at the Department of Education have to recomplete the training (regardless of how recently they took it) upon accepting a position as an administrative assistant at the Department of Labor? Second, does this apply to a public servant who moves from one job to another within the same state entity? For example, would a District Commission member have to retake the training (regardless of how recently they took it) upon being appointed the chair or vice chair of that very same District Environmental Commission?

Response: As originally drafted, yes it would. This section should be amended “deleting or beginning a new position”.... See revision.

**#2 Disclaimer?** Will there be a type of ‘**disclaimer**’ ( or **explanation**) and/or covered in the Training that helps the people who are reading or acclimating to the Code to understand they are not being blamed or being ascribed as having a character defect per se? Smarter folks than me have language on this topic or aspect of racial bias I.e. how to face and admit the racism but dispel the notion that the individual is somehow the same as the behavior ( I would have to do more research to articulate this aspect better 😊) Maybe as part of the SOV Training sessions suggested reading(s) and proof of reading the materials would be helpful or even excerpts from good books on racism and Ethics could be part of the Training. I know there are excellent books being talked about in society at the moment but the “bias **fatigue**” I feel now is so strong I just forgot the titles of the books 😞?

Response: This proposed code sets ethics standards. The standards do not speak of blame or character defect. The Ethics Commission believes that it can be most effective assisting and guiding public servants in their future conduct. The specific content of ethics training does not need to be specified in the code.

**14) Ethics Education and Training:**

Mandatory ethics training. Within the first 120 days of public service public servants shall engage in ethics training which may be in person or on-line. Completion of ethics training shall be documented by the department where the public servant is employed. Public servants shall participate in continuing ethics education which may be in person or on-line at least once every three years thereafter. Acceptable continuing ethics education providers are: The State Ethics Commission, the Department of Human Resources - Center for Achievement in Public Service (CAPS), the Vermont House of Representatives Ethics Panel for the House of Representatives, and the Vermont Senate Ethics Panel for the Senate. Copies of CAPS, House, and Senate Ethics training materials shall be provided to the Ethics Commission. On request, the State Ethics Commission may collaborate with or assist other providers.

- In the training elements or elsewhere in the Code, will there be talk of how adherence to the code is not just thankless favor to “the other(s)” but benefits everyone, their children, society etc. and that good ethics( integrity) lends itself to better outcomes for all? I remember a Secretary or commissioner at SOV Training, saying how integrity was the major and most important attribute for a good public servant.

Response: Training will most likely emphasize this, yes.

- How if at all, will the sense of infusing Ethics into the Public Servants’ life align with one’s work evaluation, chances for promotion etc.?

Response: Ethical conduct should be considered in evaluation and advancement. This code does not address this issue.

**#3 Unfunded mandate:** This section creates an unfunded mandate for entities who are somehow connected to public servants to create ethics education and track who has, and has not, completed this education. The section does not require that the training be provided free of charge to the public servant, nor does it specify that for those public servants who are paid, that it may be taken during working hours. It also creates one more in a list of redundant training which, if needed at all, certainly is not needed more than once. As an example I list courses, the necessity of which is highly questionable, which the Vermont Department of Health, through Regional Ambulance Service, requires me to take in order to “volunteer” as an EMT: F333 - Driving Safety B1106 - EMS Medical, Ethical, and Legal Issues HD-EMP - Harassment and Discrimination Training for Employees B319 - Sexual Harassment in the Workplace That’s 4 wasted hours per year, and that’s just one entity I’m affiliated.

Various entities are stuffing these repetitive courses down the throats of volunteers and employees so that in individual is likely to have to take essentially the same course more than once per year due to overlapping requirements from various entities the individual is affiliated.

I sincerely believe there will be a substantial number of cases where a person who accepts an unpaid, or nearly unpaid, position is informed

that he/she must take yet another course reiterating what the person learned from his/her family while growing up, will throw the position back in the face of the State of Vermont.

Response: Ethics training should be provided by the State of Vermont at no charge to public servants. Government ethics is distinct from other employment training activities.

#4 Do they need to document the training or report to someone that the training has been completed?

Response: Yes. This section will be amended to ensure that training provided to public servants is timely recorded. A failure to attend training would be considered non-compliance with Vermont law.

#5 While I agree education is important, many do not take the training seriously.. Follow-up through the training institutes, coaching, and performance evaluation are needed to hold people accountable.

Response: Compliance with ethics standards should be a continuing concern of all in state government.

#6 My third and my final comment both pertain to training. I would suggest that training should take place within the first 90 or 120 days of public service. Then, during training, test for understanding of bribes, kickbacks, or other types of graft. This would help cement for less experienced people that no matter how ethical they may desire to be, others may exert external pressure in ways they have not experienced before entering into public service or state employment.

Response: This section should be amended to require training within 120 days of public service.



#### **Miscellaneous Comments:**

**#1 Enforcement:** Second, the proposal has no teeth. In order for the code to be meaningful it must have a progressive form of discipline to actually discourage the behavior it seeks to curtail. Examples of the type of discipline that would be useful includes undoing of the contracts inappropriately negotiated, censure (private and public), expelling legislators from committees (one or more depending on how egregious the behavior) and, lastly, in the most extreme of cases, expulsion from the body.

**Response:** Discussion of ethics code enforcement should follow agreement on what ethics standards will apply to public servants and their enactment.

Lastly, the document does not seem to provide for a robust mechanism to investigate and deliberate on whether a public official has violated the principles outlined in the proposed code. It, then, becomes too easy for individuals to be accused of behavior and have no means to defend themselves privately or publicly. This type of processless document will lead, in my view, to further opaqueness in government. Due process is necessary not just to defend oneself but so that the citizenry can trust outcomes.

**Response:** See response immediately above.

**#2 Technology:** Technology has transformed the way that we practice and we are incorporating more forms of technology into our work on a regular basis. While Vermont has a Computer Users policy for state employees, it doesn't have an official policy on the ethical use of electronic communication or social media, for example. I'm particularly concerned about at-risk families served by AHS. Is it ok for a DCF employee, for example, to look up any client on Facebook just to see what they are up to? If their Facebook page is public, does that give them permission? There are definitely times when investigating via social media makes sense and is an important tool in the work of say, child protection. But after a child is already safely in alternative care, is it still OK to peruse that parent's Facebook page to see what they are up to?

The National Association of Social Workers Code of Ethics would say it is not (link below). But DCF does not have a policy in place to prevent this. I don't know where the right place is to draw the line in the sand but I would like to see the State commit to an ethical code regarding digital communications; specifically social media.

<https://www.socialworktoday.com/archive/081617.shtml>

**Response:** Agencies and departments should consider whether enacting ethics provisions or policies related social media or other electronic information is appropriate to their needs. This topic is beyond the scope of the general principles targeted in this draft code of ethics.

#### **Non-specific comments:**

**#1** "Well done and long overdue! This is an excellent document."

**Response:** none needed.

**#2** Thank you for soliciting feedback from the public on the proposed Ethics Code.

As a State worker who talks with library trustees, library staff, and Friends of the Library members every day, I see a great need for formalized ethics codes whenever people hold taxpayer money "in trust." Our small state has operated for a long time on "handshake agreements," trusting who we know rather than going through formal processes, and other informal understandings that frequently lead to misunderstandings, personality conflicts, misrepresentations of history, and/or misuse of public resources. These unfortunate circumstances can cause boards and employees to focus on personal agendas, personal gains, and grievances that are not necessarily in the best interests of the public whose money and resources these board members and/or employees use.

Because of this, I believe public boards and public employees throughout VT need the state to set an example of the importance of holding public servants to a higher ethical standard.

Response: The Ethics Commission has come to realize that ethics in local government is critically important to public trust in government as a whole.

Thus I strongly support this proposed Ethics Code and applaud the Commission on its creation. Thank you for the work that you do!

#3 The Ethics Code should refer to relevant employee policies, at a minimum those listed below.

5.2 Conflicts of Interest Arising from Employment (this narrowly addresses two relatives working for the State)

[https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor\\_Relations\\_Policy\\_EEO/Policy\\_Procedure\\_Manual/Number\\_5.2\\_CONFLICTS\\_OF\\_INTEREST\\_ARISING\\_FROM\\_EMPLOYMENT.ENT.pdf](https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor_Relations_Policy_EEO/Policy_Procedure_Manual/Number_5.2_CONFLICTS_OF_INTEREST_ARISING_FROM_EMPLOYMENT.ENT.pdf)

5.6 Employee Conduct – overlaps very directly with language in the draft Ethics Code

[https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor\\_Relations\\_Policy\\_EEO/Policy\\_Procedure\\_Manual/Number\\_5.6\\_EMPLOYEE\\_CONDUCT.pdf](https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor_Relations_Policy_EEO/Policy_Procedure_Manual/Number_5.6_EMPLOYEE_CONDUCT.pdf)

5.7 Political Activity

[https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor\\_Relations\\_Policy\\_EEO/Policy\\_Procedure\\_Manual/Number\\_5.7\\_POLITICAL\\_ACTIVITY.pdf](https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor_Relations_Policy_EEO/Policy_Procedure_Manual/Number_5.7_POLITICAL_ACTIVITY.pdf)

6.8 Appropriate Use of Communications and Marketing Positions in State Government

[https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor\\_Relations\\_Policy\\_EEO/Policy\\_Procedure\\_Manual/Number\\_6.8\\_APPROPRIATE\\_USE\\_OF\\_COMMUNICATIONS\\_AND\\_MARKETING\\_POSITIONS\\_IN\\_STATE\\_GOVERNMENT.pdf](https://humanresources.vermont.gov/sites/humanresources/files/documents/Labor_Relations_Policy_EEO/Policy_Procedure_Manual/Number_6.8_APPROPRIATE_USE_OF_COMMUNICATIONS_AND_MARKETING_POSITIONS_IN_STATE_GOVERNMENT.pdf)

It should also be congruent with the HR policies and VSEA contract terms with respect to employee misconduct.

Response: Section 12 of the proposed draft requires public servants to comply with “any other applicable” rules or policies.... Each agency or department should make its members aware of its requirements. Generally, statutes do not contain a catalog of all related provisions in statute, rule, or policy. Ethics requirements for all in state government are separate and distinct from contractually negotiated terms.

#4 I would incorporate all recommendations that the State of Vermont Racial Equity Director, Xusana Davis suggests. Her contact is here. [Xusana.Davis@vermont.gov](mailto:Xusana.Davis@vermont.gov)

Response: All agency heads have been contacted and asked for input. All comments received are contained in this annotated document or its attachments.

#5 I wonder if acting to acknowledge and overcome personal and social privileges including those of economic class, gender, race, sexual orientation, physical and mental capabilities and association should be an ethical requirement.

Response: This code does require compliance with anti-discrimination laws. Mandating acknowledgment of the various privileges many enjoy is not realistic in statute.

I'm also interested in how we ethically consider and cherish future generations and non-human inhabitants. To survive as a species (in a meaningful way) we need to reassess how we act for those that are not directly and legally represented. I'm intrigued by the adage "what is good for all is good for each". Perhaps this perspective should be considered, weighed and preferred in deliberations.

Response: This document addresses but one important aspect of our lives as public servants, government ethics.

**Public Hearing Comments:** See original hearing recording: <https://us02web.zoom.us/rec/share/5-V6JbvBx2BLE4WczXn1fKICRb36T6a8g3BM-YLzUwOWNegHGSM62b38DPHXPg>  
Password: Password: 3Q!F@Xpb

Rough Transcription of Comments:

**Campaign Legal Center:** (see written comments). Make changes to “gifts” to avoid first amendment challenges, set \$ limits and exclusions, expand and clarify “personal gain,” amend post government employment to include outside employment during government service, strengthen disclosure statements and make them available in a searchable downloadable format. Follow up written comments will be forwarded to the legislature.

Finally, CLC recommends that Vermont require by statute an accessible public financial disclosure database. We suggest that the Commission publish all financial disclosure statements in one place—on its website—in a searchable, sortable, and downloadable format. Although public servants should maintain constant awareness of conflicts of interest that arise during their official duties, making reports available for public scrutiny provides extra impetus for public servants to resolve conflicts of interest and take extra care to avoid even the appearance of a conflict. The transparency that comes with a user-friendly, centralized source for accessing financial disclosures will boost public confidence in Vermont public servants’ decision making.

**Response:** Promoting and achieving transparency in government makes these suggestions worthy of further discussion.

**Vermont Public Interest Research Group:** See, written comments. Post-government employment: permanent restrictions should not bar state employees from employment in the field of their greatest expertise. “Conflict of interest” provisions are questioned. Written comments later submitted are incorporated above. VPIRG also spoke of the need for Ethics Commission investigation and enforcement authority. Their full written comments will be forwarded to the legislature.

**Response:** See comments and proposed revisions to Section § 10) Outside Employment and Activities and Post-Government Employment:

From Judicial Branch:

**From:** Swyer, Lenny

Sent: Wednesday, August 5, 2020 7:36 AM

**To:** Novins, Larry <[Larry.Novins@vermont.gov](mailto:Larry.Novins@vermont.gov)>

**Cc:** Gabel, Patricia <[Patricia.Gabel@vermont.gov](mailto:Patricia.Gabel@vermont.gov)>

**Subject:** Draft Code of Ethics - Response to follow-up questions

Dear Larry,

Thank you for reaching out to Pat Gabel and me to solicit our views on the Ethics Commission's draft Code of Ethics. In your follow-up questions (reproduced below) you have inquired in particular about the constitutional sources of the Supreme Court's authority in the area of judicial branch employee conduct and discipline, as well as the nature of the Judiciary's employee Code of Conduct, the Canons of Judicial Conduct and the Code of Professional Responsibility.

As you rightly observe, Chapter II, section 30 of the Vermont Constitution vests broad authority in the Supreme Court to exercise "administrative control of all the courts of the state, and disciplinary authority concerning all judicial officers and attorneys at law in the state." Section 37 further provides that "[t]he Supreme Court shall make and promulgate rules governing the administration of all courts . . . ." Pursuant to this authority, the Supreme Court has approved a Code of Conduct and Employee Discipline applicable to all judicial branch employees except judges, a Code of Judicial Conduct applicable to all judicial officers, and Rules of Professional Conduct that govern attorney conduct. None of these provisions is approved by the Joint Legislative Committee on Judicial Rules; they fall within the plenary constitutional authority of the Supreme Court over the administration of the courts and judicial and attorney discipline.

As we discussed, the draft Code of Ethics circulating for comment expressly states that it "does not apply to those exercising judicial power . . . as protected by Chapter II, § 5 "Departments to be Distinct." This is, of course, a reference to the separation-of-powers provision contained in Chapter II, § 5 of the Vermont Constitution and an explicit recognition that the conduct and discipline of judicial officers fall within the authority of the Supreme Court and the broad scope of the Code of Judicial Conduct.

The draft Code of Ethics contains no similar exemption for all other judicial branch employees who are subject to, and governed by, the judicial branch Code of Conduct and Employee Discipline set forth in the Judicial Branch Personnel Policy. I would respectfully suggest that this omission be rectified by amending the draft Code of Ethics to provide that it "does not apply to employees of the Judicial Branch pursuant to Chapter II, § 5 of the Vermont Constitution, providing for the separation of the branches." The reasons for this are two-fold. First, as a practical matter, the judicial branch Code of Conduct and Employee Discipline addresses nearly every subject covered by the draft Code of Ethics--except with greater specificity--and is equally robust in its protection of the public interest. Thus, the judicial-branch Code of Conduct declares that employment within the court system is "a public trust" and that proper conduct by its employees is essential to uphold "the values of impartiality, equity and fairness" that it represents.

The judicial branch Code of Conduct sets forth a detailed, non-exhaustive list of required and prohibited conduct by judicial employees. The list spans ten full pages, and thus can only be briefly quoted and summarized here, as follows:

1. “Discriminatory behavior will not be tolerated or condoned. Discriminatory behavior includes any implicit or explicit action or behavior based on race, color, sex, religion, national origin, ancestry, age, disability, marital status, or sexual orientation . . . .”
2. “No employee shall misuse, falsify or alter court records or remove the records from a court or office without authorization.” Employees are required in this regard to “safeguard confidential information,” “refus[e] ever to use such information for personal advantage,” and “abstain at all times from public comment about pending court proceedings.”
3. “No employee shall conduct himself or herself in any manner which shall reflect negatively on the Court,” including the use of alcoholic beverages or illegal drugs while on duty.
4. Employees must refrain from “improper use of the property of the court” and “theft, misuse, or misappropriation of the funds or property of the court . . . will not be tolerated.”
5. Employees must “respect the rights of their co-workers.”
6. Employees must be courteous, “furnish accurate information,” and demonstrate “the utmost patience, impartiality and discretion when dealing with the public.”
7. “Every judicial branch employee shall avoid conflicts of interest in the performance of professional duties.” Within this mandate, are several additional specific requirements:
  - “No employee shall solicit or accept a fee, gift, or other valuable item . . . when . . . [it]has the appearance of being given or is given in the hope or expectation of receiving a favor or better treatment than that accorded other persons by the court.”
  - “No employee shall use their position to secure special privileges, favors or exemptions for themselves or others.”
  - “An employee shall not engage in any employment, activity or enterprise which may be determined by the employer’s supervisor incompatible or in conflict with the duties, functions or responsibilities of the court by which he or she is employed . . . .”
  - Employees shall not use their official authority to “interfere[e] with or affect[] the nomination or election of any candidate for public office” or solicit or coerce other employees to do so.

In addition to these specific rules of conduct, the judicial branch Code of Conduct and Employee Discipline sets forth a detailed set of disciplinary procedures for their enforcement as well as four levels of potential sanctions, ranging from an oral warning, to a written warning, to suspension without compensation, and finally to dismissal. The judicial branch Code of Conduct further specifies the mitigating and aggravating circumstances that may be considered in determining an appropriate sanction.

Thus, the judicial branch Code of Conduct and Employee Discipline subsumes nearly every subject more generally covered by the draft Code of Ethics, rendering the application of the draft Code to judicial branch employees largely unnecessary. Beyond that, as noted, the judicial branch Code of Conduct establishes an enforcement, adjudication and disciplinary process that falls squarely within the Supreme Court’s administrative authority over the courts. While the Ethics Commission has consciously refrained from including its own enforcement provisions in the current draft Code of Ethics, it is easy to conceive that enforcement would be the next logical step, which could lead in turn to direct conflict with judicial authority if judicial branch employees were subject to separate disciplinary and

enforcement proceedings under the Ethics Commission. That, indeed, would be an invitation to a separation-of-powers conflict.

For these reasons, I would urge that the proposed Code of Ethics expressly exempt judicial branch employees, who are subject to rigorous ethical standards and disciplinary procedures under the judicial branch Code of Conduct and Employee Discipline and the Code of Judicial Conduct.

Although the procedures and forms for filing a complaint against a judicial branch employee are accessible on the Judiciary website, the judicial branch Code of Conduct and Employee Discipline is not. I believe that it clearly should be, and I will take steps to see that it is. In the meantime, for your convenience, I have attached a copy of the Judicial Branch Personnel Policy; the Code of Conduct and Employee Discipline is contained in Part VII, starting on page 58. I would also note that the latest collective bargaining agreement between the Judiciary and the VSEA in Article 13 expressly incorporates the judicial branch Code of Conduct and Employee Discipline as a part of the agreement.

I would be happy to discuss these or any other matters or questions at your convenience.

Best regards,

Lenny Swyer, Counsel to the Court Administrator

112 State Street  
4<sup>th</sup> Floor  
Montpelier, VT 05620-2701  
TEL: 802-828-2358



**State of Vermont  
Public Utility Commission**

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August 7, 2020

To: Larry Novins, Executive Director, Vermont State Ethics Commission (*via email*)

Re: Comments on July 10, 2020 Draft Code of Ethics

Dear Executive Director Novins,

The Public Utility Commission fully agrees with the objectives of the Draft Code of Ethics and the inclusion of each of the provisions that are in that document. We have two comments: (1) we think the Commission should be treated the same as the Judiciary, and (2) we have developed our own comprehensive “PUC Code of Ethics” that we attach in case you may find it useful.

First, we ask that you treat the Commission the same as the Judiciary and list us as an excluded agency that operates under our own PUC Code of Ethics. As you will see in the attached document, the PUC Code of Ethics incorporates all of the provisions of the Draft Code of Ethics and is, in fact, more protective of Vermonters and more restrictive than the Draft Code of Ethics.

We have our own PUC Code of Ethics because, for the last 40 years, the Commission has been an independent agency, like the Judiciary. Under 30 V.S.A. § 9, the Commission is quasi-judicial and has the powers of a court of record. Under 30 V.S.A. § 3, the Chair of the Commission “shall be nominated, appointed, and confirmed in the manner of a Superior judge.” Both other Commissioners must also be reviewed and recommended by the Judicial Nominating Board before they can become Commissioners. To ensure independence from the rest of the Executive Branch—including multiple state agencies that appear before the Commission as parties to our proceedings—the Public Utility Commission is the one agency in the Executive Branch that has its own Ethics Code. This practice dates back to 1988, when Commission Chair Richard Cowart explained that the Commissioners “are and must remain entirely independent from management and supervision from the Governor’s Office and independent of the Department of Public Service and other agencies under the Governor’s political direction.”

Second, we are attaching our PUC Code of Ethics in case you may find it useful. We thoroughly updated this Code in 2018 and incorporated draft materials from the Ethics Commission at that time. We made other changes to ensure that our PUC Code of Ethics is even more protective of Vermonters and even more restrictive than what is contemplated in the Draft Code of Ethics. We hope that our work will benefit you as you move forward with this important process.

Sincerely,

*Anthony Z. Roisman*

Anthony Z. Roisman  
Chair



August 20, 2020

Larry Novins  
Executive Director  
Vermont State Ethics Commission  
6 Baldwin St.  
Montpelier, VT 05633

Dear Mr. Novins:

Campaign Legal Center (“CLC”) respectfully submits these written comments to the Vermont State Ethics Commission (“Commission”) regarding the Commission’s proposed statutory code of ethics.

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening American democracy across all levels of government. We work toward a more transparent, accountable and inclusive democracy that is responsive to the people. In furtherance of that goal, we work to ensure ethics laws across the country adequately protect the public’s confidence in the integrity of democratic institutions.

We support the Commission’s decision to initiate this new statutory ethics code, and we applaud the Commission for including the fundamental pillars of ethical government service in its draft. As public confidence in the federal government hits historic lows,<sup>1</sup> it has never been more important for states to reaffirm their commitment to public service.

Our comments are intended to support the Commission’s initiative to promulgate a statute with meaningful safeguards to maintain Vermonters’ trust in their state government. We recognize that some of these suggestions may be incorporated into Vermont’s ethics code through other means, so we encourage the Commission to incorporate these suggestions in whatever

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<sup>1</sup> Pew Research Center, *Public Trust in Government: 1958-2019* (Apr. 11, 2019), <https://www.pewresearch.org/politics/2019/04/11/public-trust-in-government-1958-2019/>.



manner it sees fit. Below is a summary of our comments. Our in-text suggestions for the statutory language are also attached.

### **Use of Position for Personal Gain**

CLC recommends clarifying the scope of what constitutes misusing official positions for personal gain. The additional language is taken from the federal regulation covering misuse of position.<sup>2</sup> Our recommendation clarifies that use of position for *any* personal gain is a violation of the public's trust, even if a friend or a business affiliated with the public servant is the beneficiary of that gain. We also recommend including language surrounding the use of confidential or non-public information for private financial gain to clarify that the prohibition covers the use of non-public information acquired during the course of official duties for trading in securities or other business transactions.

### **Gifts**

CLC recommends striking the term “political contribution” from the definition of a prohibited gift, and instead including “a lawfully reported political contribution” under the list of items not considered gifts. As written, the statute suggests that if a political contribution given after a public servant makes a policy choice the contributor likes (*i.e.*, “as a reward for any official action”), the acceptance of that contribution violates the ethics code. Removing the otherwise lawful political contributions from the definition of prohibited gifts will prevent a constitutional challenge of a ban on political contributions from non-lobbyists.

The Commission should include an exception for nominal gifts as well. Our suggestion is to allow unsolicited gifts valued at \$20 or less, provided that the total value of gifts from the same source is not more than \$50 in a calendar year. This exception will encourage compliance with the other gift restrictions by not prohibiting generally acceptable conduct.

### **Outside Employment and Post-Government Employment**

CLC believes the post-employment restrictions included in the draft code are important to prevent the conflicts of interest that occur when public servants depart government for the private sector. The draft code currently includes three post-employment restrictions for Vermont public servants: a prohibition on seeking conflicting employment while in office; a “cooling off” period of one year, during which the public servant is barred from representational activities in front of the department, agency, board,

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<sup>2</sup> 5 C.F.R. § 2635.702.

commission, or office in which they served; and a permanent restriction on “switching sides,” or representational activities to influence the State of Vermont on the same matter the public servant personally worked on while in office.

We have two suggestions regarding these post-employment restrictions. First, we recommend mirroring federal law by limiting the permanent ban to particular matters involving specific parties. When limited to particular matters involving specific parties, the Congressional Research Service describes the lifetime ban in federal law as follows:

“This lifetime ban is a fairly narrow and case-specific restriction which in practice would apply to one who worked substantially on a particular governmental matter such as a specific contract, a particular investigation or a certain legal action, involving specifically identified private parties, and who then leaves the government and attempts to represent those private parties before the government on that same, specific matter.”<sup>3</sup>

We agree. The permanent restriction on switching sides is an important safeguard; and when limited to particular matters involving specific parties, it is narrow enough to ensure compliance while leaving former public servants free to pursue nongovernment work in their areas of expertise.

Second, CLC recommends not only prohibiting public servants from seeking conflicting post-government employment, but also prohibiting conflicting outside employment while working as a Vermont public servant. This restriction is especially important for full-time public servants.

### **Financial Disclosure**

Finally, CLC recommends that Vermont require by statute an accessible public financial disclosure database. We suggest that the Commission publish all financial disclosure statements in one place—on its website—in a searchable, sortable, and downloadable format. Although public servants should maintain constant awareness of conflicts of interest that arise during their official duties, making reports available for public scrutiny provides extra impetus for public servants to resolve conflicts of interest and take extra care to avoid even the appearance of a conflict. The transparency that comes with a user-friendly, centralized source for accessing financial disclosures will boost public confidence in Vermont public servants’ decision making.

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<sup>3</sup> JACK MASKELL, CONG. RESEARCH SERV., POST-EMPLOYMENT, “REVOLVING DOOR,” LAWS FOR FEDERAL PERSONNEL 3 (May 12, 2010), <https://fas.org/sgp/crs/misc/97-875.pdf>.

## Conclusion

CLC respectfully urges the Commission to adopt these recommendations for the new statutory ethics code. We appreciate having the opportunity to participate in this important process, and CLC welcomes any questions that the Executive Director has regarding our comments.

Sincerely,

\_\_\_\_\_/s/\_\_\_\_\_  
Kedric L. Payne  
General Counsel and Senior Director,  
Ethics

\_\_\_\_\_/s/\_\_\_\_\_  
Delaney N. Marsco  
Legal Counsel, Ethics

# Vermont State Ethics Commission

## 2020 Statutory Proposal: Draft Code of Ethics

July 10, 2020 for public input

Subject to further revision

### Introduction:

More than 40 states have adopted ethics codes by statute. Vermont has no ethics code in law. The Vermont State Ethics Commission intends this document to prompt discussion of a Vermont Ethics Code which can be adopted by statute. The provisions of this draft code below are taken or modified from:

- Provisions of other states' ethics codes,
- The Code of Federal Regulations,
- The current State Code of Ethics (COE) adopted by the State Ethics Commission,
- Vermont statutes, and
- Governor Scott's Executive Order 19-17.

The suggestions herein are made with full knowledge that not all parts of this draft code of ethics will be deemed necessary at this time.

This draft code of ethics builds on the sources listed above. An ethics code should help public servants avoid conflicts of interest and promote faith in government. This draft code of ethics sets a baseline for acceptable and unacceptable conduct. Many states and the federal government have more comprehensive and detailed ethics provisions. They often represent responses to specific instances of unethical conduct. The Ethics Commission has not yet seen conduct that would justify such detailed, complex provisions for Vermont. This draft addresses core concerns of government ethics.

This draft code of ethics contemplates that Executive Orders, internal rules of the General Assembly, or administrative agency rules or policies may be adopted imposing more specific or stringent ethics requirements.

The substantive provisions address the following topics:

- 1) Conflict of Interest
- 2) Unethical Conduct May Not Be Delegated
- 3) Appearance of Conflicts of Interest or Other Ethical or Law Violations
- 4) Preferential Treatment
- 5) Use of Position for Personal Gain
- 6) Use of Confidential or Non-Public Information

- 7) Use of Government Resources
- 8) Gifts
- 9) Statements Obligating the State of Vermont
- 10) Post-Government Employment
- 11) Compliance with Law
- 12) Other Ethics Rules or Policies
- 13) Whistleblower Protections for Ethics Complaints
- 14) Ethics Education and Training
- 15) Financial Disclosure

\* \* \*

## **Vermont State Ethics Commission Draft Vermont Code of Ethics**

### **Findings and Legislative Intent**

It is declared that high moral and ethical standards among state public servants are essential to the conduct of government affairs; that the General Assembly believes a code of ethics: will help public servants avoid conflicts between their personal interests and their public responsibilities, will improve standards of public service, and will promote and strengthen the faith and confidence the people of this state are entitled to have in the judgment, integrity, and impartiality of their public servants.

Public servants hold their positions as a public trust. Any effort to realize personal gain through official conduct is a violation of that trust. This code of ethics does not prevent public servants from accepting other employment or following pursuits which in no way interfere with the full and faithful discharge of their duties to the state.

The Legislature recognizes that: public servants are drawn from society and, therefore, cannot and should not be without all personal and economic interest in the decisions and policies of government; citizens who serve as state public servants retain their rights as citizens to interests of a personal or economic nature; standards of ethical conduct for state public servants need to distinguish between minor and inconsequential conflicts that are unavoidable in a free society and conflicts which are substantial and material. The legislature further recognizes that state public servants may need to engage in employment, professional, or business activities, other than official duties, in order to support themselves or their families and to maintain a continuity of professional or business activity. They may need to maintain activities or investments, which do not conflict with the specific provisions of this

code. The legislature recognizes that the activities of public servants should not be unduly circumscribed.

[Source: Wisconsin-modified]

\* \* \*

## **Vermont State Code of Ethics Substantive Provisions**

### **Applicability:**

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.”

### **Exclusions:**

- I. This code of ethics does not apply to the functions of State Legislators that are protected by the Constitution of the State of Vermont. Vermont Constitution, Chapter I, Article 14.

#### **Chapter I Article 14. [Immunity for words spoken in legislative debate]**

The freedom of deliberation, speech, and debate, in the Legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever.

- II. This code of ethics does not apply to those exercising judicial power under Chapter II § 4, Judiciary as protected by Chapter II § 5 “Departments to be Distinct.”

**Chapter II Article 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.

**Chapter II Article 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.

## **Definitions**

### **1) Conflict of Interest:**

(a) A “conflict of interest” for a public servant means an interest, direct or indirect, financial or otherwise, of the public servant or such an interest, known to the public servant, of a member of the public servant’s immediate family or household, or of a business associate, in the outcome of a particular matter pending before the public servant or the public servant’s public body, or which is in

conflict with the proper discharge of the public servant's duties. "Conflict of Interest" does not include any interest that:

(1) is no greater than that of other persons generally affected by the outcome of a matter (such as a policyholder in an insurance company or a depositor in a bank), or

(2) has been disclosed as required by law or applicable written policy and found not to be significant. [Modified from COE and Exec. Order #79]

**2) Confidential information:** means information that is exempt from public inspection and copying or is otherwise designated by law as "confidential."

**3) Gift:** means anything of value, tangible or intangible, that is bestowed for less than adequate consideration. [Sources: 3 V.S.A. § 1201(4)(a) and 2 V.S.A. § 261(6)(A)(ii)] Included within this definition are travel expenses such as travel fare, room and board, and other expenses associated with travel.

(a) Examples of gifts may also include;

~~(1) a political contribution; [Source: 2 V.S.A. § 261(6)(A)(i)] [Deleted, and added to exceptions below, to prevent constitutional challenge of ban on political contributions from non-lobbyists.]~~

(2) a meal or alcoholic beverage; [Source: 2 V.S.A. § 261(6)(A)(iii)]

(3) a ticket, fee, or expenses for or to any sporting, recreational, or entertainment event; [Source: 2 V.S.A. § 261(6)(A)(iv)]

(4) a speaking fee or honorarium, except actual and reasonable travel expenses; [Source: 2 V.S.A. § 261(6)(A)(v)]

(5) a loan made on terms more favorable than those made generally available to the public in the normal course of business. [Source: 2 V.S.A. § 261(6)(A)(vi), 3 V.S.A. § 1201(4)(a), 2 V.S.A. § 261(6)(A)(ii)]

(b) Not Considered "Gifts:"

(1) An item which would qualify as a gift, but which is not used, and which within 30 days after receipt, is returned to the donor, or for which the donor is reimbursed for its fair market value will not be considered a "gift;" [2 V.S.A. § 261]

(2) anything given between immediate family members;

(3) printed educational material such as books, reports, pamphlets, or periodicals;

~~(4) an unsolicited gift valued at \$20 or less, provided that the total value of gifts from the same person is not more than \$50 in a calendar year; [5 C.F.R. § 2635.204(a)] [Inserting exception for nominal gifts, which encourages compliance by not prohibiting generally acceptable conduct.]~~

(5) a devise or inheritance; [currently in 3 V.S.A. § 1201(4)(B) and 2 V.S.A. § 261]

~~(6) a lawfully reported campaign contribution.~~

**4) "Person"** as used in this chapter means: any individual, group, business entity, association or organization.

## Rules

### **1) Conflicts of Interest:**

Public servants who are confronted with a conflict of interest shall take no action on the matter and, upon identifying the conflict of interest or potential conflict of interest, shall in writing disclose to their immediate supervisor or to the public in detail sufficient to be understood by the public, the nature of the interest, financial or otherwise, that gives rise to the conflict of interest, and sign a statement of recusal from future participation in the matter.

[Taken roughly from CT. Ethics Code, 1-86.]

### **2) Unethical Conduct May Not Be Delegated:**

Public servants may not direct others to act in a manner which they themselves cannot. Public servants who have a conflict of interest shall not direct others to act to their benefit. Public servants, who because of a conflict of interest, recuse themselves from a matter may not in any way participate in or act to influence a decision regarding that matter.

### **3) Appearance of Violation:**

Public servants shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this chapter.

Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

[5 CFR § 2635.101 - Basic obligation of public service]

### **4) Preferential Treatment:**

Public servants in the course of state business shall act impartially showing no favor toward or prejudice against any person. Public servants shall not give or represent an ability to give preference or special treatment to anyone because of their wealth, position, or status, or because of any personal relationship with a public servant. When required by law, public servants may give preference to designated individuals or groups.

[Comment: e.g. Affirmative action plans, or a statute giving a preference to a group like veterans. A public servant executing the statute may give preference to the target group, but otherwise act impartially and consistent with the statute. Modified from Current Code, and NIH Ethics Order, 5 CFR § 2635.101(b)(8).]

### **5) Use of Position for Personal Gain:**

Public servants shall not use their official positions for personal or financial gain, for the endorsement of any product, service or enterprise, or for the private gain of friends, relatives, or persons with whom the employee is affiliated in a nongovernmental capacity, including nonprofit organizations of which the



employee is an officer or member, and persons with whom the employee has or seeks employment or business relations. [taken from 5 C.F.R. § 2635.702]. [Inserted to clarify the scope of personal gain.]

**6) Use of Confidential or Non-Public Information:**

Public servants shall not use or disclose non-public government information or confidential information acquired during the course of state service for their own or anyone else's personal or financial gain, including trading in stock or other securities or otherwise transacting private business based upon such information. [Exec Order #79] [inserted clarifying language]

[Modified from current Vermont COE]

**7) Use of Government Resources:**

Public servants shall not make use of state materials, funds, property, personnel, facilities, or equipment or permit others to do so for any purpose other than for official state business unless the use is expressly permitted or required by law or by a written agency, departmental, or institutional policy or rule.

Public servants shall not engage in, or direct others to engage in work other than the performance of official duties during working hours, except as permitted or required by law, or by written agency, departmental, or institutional policy or rule.

[Modified from Iowa Statutes and E.O. 19-17.]

**8) Gifts:**

Public servants shall not solicit, accept, or receive, directly or indirectly, from any person a gift under circumstances in which it can reasonably be inferred that the gift is intended to influence them in the performance of their official duties or is intended as a reward for any official action or inaction on their part.

[Modified from current COE. Note: E.O. 19-17 is more specific.]

**9) Statements Obligating the State of Vermont:**

Public servants shall not make unauthorized commitments or promises of any kind purporting to bind State government.

[VCOE, modified per 5 CFR § 2635.101(b)(12)]

**10) Outside Employment and Post-Government Employment:**

While in State service, public servants shall not have [prohibiting conflicting outside employment], seek or negotiate in any manner employment that potentially or actually conflicts with their official government duties and responsibilities.

[VCOE]

One-year restriction. Public servants shall not, for one year after leaving state service, represent anyone, other than the State of Vermont, for compensation before the department, agency, board,

commission, or office in which they served at the time of their termination of service, concerning any matter in which the State of Vermont has a substantial interest.

Permanent restrictions on representation on particular matters. Public servants shall not, after termination of their service or employment with the State, knowingly make with the intent to influence, any communication or appearance before any entity of the State of Vermont on behalf of any person other than the State of Vermont in connection with a particular matter **involving specific parties** *[narrowing scope of permanent restriction]*:

- (a) in which the State of Vermont is a party or has a direct and substantial interest, and
- (b) in which the former public servant participated personally and substantially while in public service.

[Source: 18 USC § 207, a criminal statute].

### **11) Compliance with Law:**

Public servants shall meet personal legal obligations and comply with applicable state and federal laws and regulations and comply with applicable governmental codes of conduct.

[VCOE, modified]

### **12) Other Ethics Rules or Policies:**

Public servants shall comply with any other applicable rules or policies established by executive order, agency rule, or policy. Nothing herein shall prohibit branches of state government, agencies, or departments from adopting more stringent ethics provisions.

### **13) Whistleblower Protections for Ethics Complaints:**

Consistent with 3 V.S.A. § 971 et seq., public servants shall be free to disclose waste, fraud, abuse of authority, violations of law, or violations of this or other applicable ethics codes to the Ethics Commission without fear of reprisal, intimidation, or retaliation.

### **14) Ethics Education and Training:**

Mandatory ethics training. Within the first 6 months of public service or beginning a new state position, public servants shall engage in ethics training which may be in person or on-line. Public servants shall participate in continuing ethics education which may be in person or on-line at least once every three years thereafter. Acceptable continuing ethics education providers are: The State Ethics Commission, the Department of Human Resources - Center for Achievement in Public Service (CAPS), the Vermont House of Representatives Ethics Panel for the House of Representatives, and the Vermont Senate Ethics Panel for the Senate. Copies of CAPS, House, and Senate Ethics training materials shall be provided to the Ethics Commission. On request, the State Ethics Commission may collaborate with or assist other providers.

### **15) Financial Disclosure**

**Financial disclosure forms required by 17 V.S.A. § 2414(a), 3 V.S.A §§ 1211(a) and 1212(a), and all ethics disclosures filed by the following individuals shall be accessible to the public on the website of the State Ethics Commission in a format that is searchable, sortable, and downloadable: Each elected Statewide**

officeholder, State Senator, and State Representative; each Executive Officer; each member of the State Ethics Commission; and the Executive Director of the State Ethics Commission. *[Inserted to accomplish intent of the VT financial disclosure requirements – public transparency. Public needs a centralized source of the records.]*

July 8, 2020



## NATURAL RESOURCES BOARD

10 Baldwin Street  
Montpelier, Vermont  
05633-3201  
(802) 828-3309  
[www.nrb.vermont.gov](http://www.nrb.vermont.gov)

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July 10, 2020

### VIA ELECTRONIC MAIL

Vermont State Ethics Commission  
[ethicscomment@vermont.gov](mailto:ethicscomment@vermont.gov)

Re: Comments to Proposed Ethics Code.

Dear Commissioners:

In response to the Commission's July 8, 2020 press release, the Vermont Natural Resources Board ("Board") offers the following comments to the Commission's Draft Code of Ethics. The Board appreciates the opportunity to provide these comments and hopes they will assist the Commission's work, which the Board agrees is vital to sustaining Vermonter's faith in their public servants. For ease of reference, the Board's comments are organized using the same headings the Draft Code of Ethics employs.

### Introduction

The introduction to the Draft Code of Ethics states, in part, that "Vermont has no ethics code in law." This statement may lead Vermonters to believe there are no ethical obligations set forth in Vermont law that govern the conduct of Vermont's public servants. With respect to the Board, the Act 250 District Commissions, and their legal staff this is incorrect for two reasons.<sup>1</sup>

First, 10 V.S.A. § 6031 sets forth the ethical standards that all Board members and all District Commission members must follow. For ease of reference, Section 6031 and 12 V.S.A. § 61, which is referenced therein, are set forth in their entirety in Appendix A to these comments. These two statutes address many of the same topics addressed in the Draft Code of Ethics, such as what constitutes a conflict of interest, the procedure that must be followed in response to an alleged conflict of interest, and restrictions on activities upon leaving office.

Second, Vermont's Rules of Professional Conduct set forth obligations that all licensed attorneys in Vermont must follow, including but not limited to the Board's General Counsel, the Board's Associate General Counsel, and Board and District Commission members who are licensed attorneys. See Vermont Rules of Professional Conduct, available at <https://www.vermontjudiciary.org/sites/default/files/documents/VermontRulesofProfessionalConduct.pdf> (last visited July 9, 2020). These Rules also address some of the same topics addressed in the Draft Code of Ethics. For example, Rule 1.11 addresses special conflicts of interests for

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<sup>1</sup> It may also be incorrect with respect to other State entities, but the Board has not analyzed any statutes other than the ones that pertain to Act 250.

former and current government officers and employees. For ease of reference, Rule 1.11 is set forth in its entirety in Appendix B to these comments. However, there are other rules related to conflicts of interest that the Commission may find useful.

The Board respectfully requests the Commission consider the language of these two statutes and the Rules of Professional Responsibility as it continues to develop the Draft Code of Ethics. The Board further requests that in doing so, the Commission consider whether to adopt modified versions of or suggest changes to the language of these legal authorities when it submits its proposal to the General Assembly. Doing so may minimize any conflicting ethical obligations that the Board, the District Commissions, and their legal staff must follow.

### Exclusions

The Draft Code of Ethics contains two exclusions. The second exclusion states: “This code of ethics does not apply to those exercising judicial power under Chapter II § 4, Judiciary as protected by Chapter II § 5 ‘Departments to be Distinct.’” It then cites in full the two referenced constitutional provisions. It does not, however, explain: (i) why the language of these provisions prevents the legislature from imposing ethical obligations on those exercising judicial power; (ii) whether the exemption applies to all judicial branch employees; or (iii) if the exemption does not apply to all judicial branch employees, which employees are considered to be exercising judicial power and are, therefore, included in the exemption. Such explanations may provide additional clarity to the public and public servants about what is expected of judicial branch employees.

### Definitions – 1) “Conflict of Interest”

As mentioned above, 10 V.S.A. § 6031 sets forth the ethical obligations that apply to Board and District Commission members. Subsection (a)(2) thereof contains an enumerated list of conflicts of interest. As a result, the definition of “conflict of interest” in the Draft Code of Ethics is arguably broader than Section 6031. This breadth comes with both advantages and disadvantages. For example, one advantage may be that the definition of conflict of interest in the draft code may encompass more unethical conduct than Section 6031. However, one disadvantage may be that it provides less concrete examples of what actually constitutes a conflict and, therefore, it may provide less guidance to both the public and its servants.

To address this disadvantage, the Board respectfully suggests the Commission consider: (i) including a nonexclusive list of potential conflicts of interest in the definition of “conflict of interest”; (ii) issuing some type of guidance document that helps elucidate what types of conduct meet the definition of “conflict of interest”; or (iii) putting together and posting to its website some training materials that provide the same level of elucidation.

### Definitions – 2) “Confidential Information”

The Board respectfully suggests the Commission clarify whether the phrase “exempt from public inspection and copying” is synonymous with information that is exempt from public inspection under Vermont’s Access to Public Records Law, 1 V.S.A. §§ 315-20.

### Definitions – 3) “Gift”

Because this definition includes “anything of value, tangible or intangible” and does not define what constitutes “adequate consideration,” it risks covering at least two situations that the Commission may not have intended to cover. There are likely other, similar situations.

First, some entities, such as the National Association of Attorneys General, regularly offer scholarship opportunities for attorneys around the nation, including Vermont, to attend Continuing Legal Education Conferences. These scholarships frequently include conference registration fees, hotel rooms, airfare, and meal reimbursements for which the State does not have to give any consideration (to the Board’s knowledge). Without these scholarship opportunities many attorneys would not be able to attend these conferences, which are limited to government employees.

Second, state employees are sometimes asked to present at conferences or staff a booth to answer questions about their regulatory program. Such regulators frequently don’t have to pay the conference registration fee, are often provided coffee, snacks and lunch (just like the rest of the attendees), and sometimes receive conference-wide giveaways such as pens and thumb drives.

Perhaps Section 8 of the Draft Code of Ethics sufficiently addresses each of these situations because in neither is there an apparent effort to influence public servants. However, and as stated elsewhere in these comments, it could be helpful for the Commission to publish some guidance or develop and post to its website some training materials to provide more assistance in understanding the proposed restrictions on “gifts.”

### Rules – 1) Conflicts of Interest

The Board has two comments with respect to this section of the Draft Code of Ethics.

First, this section states that when a public servant identifies a potential conflict of interest, one option he or she may take is to disclose that conflict in writing to his or her immediate supervisor. However, it does not state what the supervisor is supposed to do in response to the written disclosure. Presumably, the supervisor should evaluate the disclosure, determine whether there is an actual conflict of interest, and, if there is, evaluate whether the conflict can be resolved or whether the public servant must recuse him or herself from the matter. However, this is not detailed in the draft code and the only option appears to be recusal even when something short of recusal may resolve the conflict. Nor is it stated whether the supervisor is supposed to or is prohibited from taking additional actions, such as providing the disclosure to others, including but not limited to the public. Conversely, 10 V.S.A. § 6031(b) sets forth a more specific process that the Board and District Commission members must follow when a potential conflict of interest arises. Similarly, Vermont’s Rules for Professional Conduct (applicable to attorneys only) contain several more specific provisions related to identifying, disclosing, and resolving conflicts of interest.

Second, this section states that a public servant’s written disclosure of a potential conflict of interest must be “in detail sufficient to be understood by the public.” The way in which this

clause is written leads to three questions. First, and as stated above, is the written disclosure to the public servant's supervisor subject to public inspection or is disclosure of its contents governed by Vermont's Access to Public Records Law, 1 V.S.A. §§ 315-20? Second, but relatedly, if the nature of the conflict can't be adequately explained without revealing otherwise privileged information (e.g., attorney-client communications, attorney-work product, communications covered by the spousal privilege, confidential medical information, or information protected by non-disclosure agreements, etc.), does that information have to be contained in the disclosure? Finally, does the phrase "in detail sufficient to be understood by the public" apply both to the public disclosure and the supervisor disclosure?

#### Rules – 7) Use of Government Resources

This section states, in part: "Public servants shall not engage in, or direct others to engage in work other than the performance of official duties during working hours, except as permitted or required by law, or by written agency, departmental, or institutional policy or rule." The Board respectfully suggests the Commission explicitly state, if not stated elsewhere in Vermont statute, that this prohibition include campaign activities by both elected officials and non-elected public servants who support their candidacy.

#### Rules – 10) Post-Government Employment

This section of the Draft Code of Ethics places limitations on the employment opportunities former public servants may seek. Because of their breadth, these limitations may be particularly difficult for many government attorneys to follow. This is especially true for attorneys with a specialized practice. In addition, it is especially problematic given that most government attorneys are exempt employees who may be terminated at any time for any non-discriminatory reason. Two examples are illustrative.

First, arguably under this section an attorney who worked for the Agency of Natural Resources and then accepts a job at a private law firm doing development work may not help a client apply for any Agency permits even for projects that attorney had no connection with while working for the Agency.

Second, arguably under this section an attorney who worked for the Department of Corrections who accepts a job as a private criminal defense attorney may not represent a client at a parole board hearing even if the attorney had no involvement in that client's case while working for the Department.

These examples, and there may be others, indicate that this section of the Draft Code of Ethics goes farther than Rule 1.11 of Vermont's Rules of Professional Conduct, which addresses the "Special Conflicts of Interest for Former and Current Government Officers and Employees." As a result, the Board respectfully requests the Commission consider whether the language of Rule 1.11 can be altered to apply to all of Vermont's public servants and then incorporated into the Draft Code of Ethics.

#### Rules – 14) Ethics Education and Training

This section of the Draft Code of Ethics requires public servants to complete mandatory ethics training “[w]ithin the first 6 months of public service or beginning a new state position.” This requirement presents two questions. First, does this apply to public servants who move from one state entity to another without an intervening stint in the private sector? For example, would an administrative assistant at the Department of Education have to recomplete the training (regardless of how recently they took it) upon accepting a position as an administrative assistant at the Department of Labor? Second, does this apply to a public servant who moves from one job to another within the same state entity? For example, would a District Commission member have to retake the training (regardless of how recently they took it) upon being appointed the chair or vice chair of that very same District Environmental Commission?

Once again, the Board appreciates the Commission’s work and the opportunity to offer comments on the Draft Code of Ethics. If the Commission has any questions about these comments or if the Board can support the Commission’s work in any other way, please feel free to contact me directly at either [evan.meenan@vermont.gov](mailto:evan.meenan@vermont.gov) or (802) 477-2346.

Sincerely,

A handwritten signature in black ink, appearing to read 'Evan Meenan', with a stylized, sweeping flourish at the end.

Evan Meenan  
Associate General Counsel



## Appendix A

### 10 V.S.A. § 6031

(a) The Chair and members of the Board and the Chair and members of each District Commission shall comply with the following ethical standards:

- (1) The provisions of [12 V.S.A. § 61](#) (disqualification for interest).
- (2) The Chair and each member shall conduct the affairs of his or her office in such a manner as to instill public trust and confidence and shall take all reasonable steps to avoid any action or circumstance that might result in any one of the following:
  - (A) undermining his or her independence or impartiality of action;
  - (B) taking official action on the basis of unfair considerations;
  - (C) giving preferential treatment to any private interest on the basis of unfair considerations;
  - (D) giving preferential treatment to any family member or member of his or her household;
  - (E) using his or her office for the advancement of personal interest or to secure special privileges or exemptions;
  - (F) adversely affecting the confidence of the public in the integrity of the District Commission.

(b) As soon as practicable after grounds become known, a party may move to disqualify a Board member or District Commissioner from a particular matter before the Board or District Commission.

- (1) The motion shall contain a clear statement of the specific grounds for disqualification and when such grounds were first known.
- (2) On receipt of the motion, a District Commissioner who is the subject of the motion shall disqualify himself or herself or shall refer the motion to the Chair of the Board.
  - (A) The Chair of the Board may disqualify the District Commissioner from the matter before the District Commission if, on review of the motion, the Chair determines that such disqualification is necessary to ensure compliance with subsection (a) (ethical standards) of this section.
  - (B) On disqualification of a District Commissioner under this subsection, the Chair of the Board shall assign another District Commissioner to take the place of the disqualified Commissioner. The Chair shall consider making such an assignment from among the members of the same District Commission before assigning a member of another District Commission.
- (3) On receipt of the motion, a Board member who is the subject of the motion shall disqualify himself or herself or shall refer the motion to the full Board. The Board may disqualify a member from the matter before the Board if, on review of the motion, the Board determines that such disqualification is necessary to ensure compliance with subsection (a) (ethical standards) of this section. The Board member who is the subject of the motion shall not be eligible to vote on the motion.

(c) For one year after leaving office, a former appointee to the Board or a District Commission shall not, for pecuniary gain:

(1) be an advocate on any matter before the Board or the District Commission to which he or she was appointed; or

(2) be an advocate before any other public body or the General Assembly or its committees regarding any matter in which, while an appointee, he or she exercised any official responsibility or participated personally and substantively.

### **Credits**

2013, No. 11, § 12, eff. July 1, 2013.

### 12 V.S.A. § 61

(a) A Justice of the Supreme Court, judge, juror, or other person shall not act in a judicial capacity in or as trier of a cause or matter in which he or she has been retained or acted as an attorney or counsel, or is interested in the event of such cause or matter, or is related to either party, if a natural person, within the fourth degree of consanguinity or affinity, or if a corporation, to any officer, director, trustee, or agent thereof within such degree; nor shall he or she be permitted to appear as attorney or counsel in a cause in which he or she has acted in such capacity or as trier; but he or she shall not be disqualified from so acting in a cause or matter in which a railroad corporation is a party by reason of being a taxpayer in a town which owns stock in such railroad corporation.

(b) A Justice of the Supreme Court or a judge shall not be disqualified from acting in a judicial capacity in a cause in which a county, town, village, or school district is a party or interested by reason of being a taxpayer or resident in such corporation.

(c) A Superior judge or Justice of the Supreme Court shall not be disqualified to act in his or her official capacity in any matter in which a municipality, a life, fire, or accident insurance company is a party in interest by reason of being a resident or taxpayer in such municipality or a policy holder in such insurance company.

(d) Membership in a domestic mutual fire insurance corporation shall not disqualify a Superior judge to take jurisdiction of a cause wherein such corporation is a party.

(e) A petit juror shall be disqualified from sitting as such in a case where a municipality is a party, if such juror is a resident or taxpayer of such municipality.

(f) A juror who is a policy holder in any cooperative or mutual insurance company shall not by reason thereof be disqualified as a juror in a cause where such cooperative or mutual insurance company is a party, or is interested in the outcome thereof by reason of being an insurer of any of the parties in such cause.

### **Credits**

1965, No. 194, § 10; 1973, Adj. Sess., No. 249, § 13.

## Appendix B

### Rule of Professional Responsibility 1.11

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to [Rule 1.9\(c\)](#); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by [Rule 1.12\(b\)](#) and subject to the conditions stated in [Rule 1.12\(b\)](#).

(e) As used in this rule, the term “matter” includes:

- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
- (2) any other matter covered by the conflict of interest rules of the appropriate government agency.

# Coalition for Integrity

## Comments of Coalition for Integrity on Vermont State Ethics Commission 2020 Statutory Proposal: Draft Code of Ethics

The Coalition for Integrity is a non-profit, non-partisan 501(c)(3) organization. We work in coalition with a wide range of individuals and organizations to combat corruption and promote integrity in the public and private sectors.

One of our areas of focus is state ethics laws. In 2018, the Coalition published a report on States with Anticorruption Measures for Public Officials (SWAMP Index). This report graded and compared all fifty states and DC on their laws and regulations surrounding ethics and integrity in state government. The report, rankings, and methodology are all available [here](#).

We built on this report in 2019 with another report: Enforcement of Ethics Rules by State Ethics Agencies: Unpacking the S.W.A.M.P. Index. This report examined how state ethics agencies actually enforce those ethics laws that they are charged with enforcing. It also graded and ranked states based on how transparent they were with the public regarding that enforcement. The report, methodology, and rankings are all available [here](#). We are currently working on a revised SWAMP Index and appreciate the Ethics Commission's comments on our work.

In the SWAMP Index, Vermont ranked in the lower half of the states because of the limited nature of its gift rules, limited financial disclosure requirements and lack of enforcement powers. The Enforcement report noted that Vermont had no enforcement powers and therefore was not covered.

The Coalition applauds the State Ethics Commission's proposed Draft Code of Ethics. We believe that the provisions will go a long way in addressing the gaps in Vermont's ethics regulatory framework. There remains, however, more to be legislated for Vermont to have an effective ethics regime.

### **Enforcement**

While the Ethics Commission has stated that it “believes adopting a statutory code of ethics setting ethics standards for public servants should come first - before enforcement discussions,” the Coalition urges the State to give the Commission the power to investigate ethics complaints and sanction offenders as part of this new legislative effort. As of June 2019, there were 50 state ethics agencies with investigative and enforcement powers of some kind.<sup>1</sup> The majority of state ethics agencies have the power to initiate and conduct their own investigations and the ability to issue subpoenas.<sup>2</sup> Most of these agencies have the power to enjoin improper conduct, impose fines and issues letters of reprimand.<sup>3</sup> Three agencies have the ability to take personnel actions, including termination of an official not subject to impeachment



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- the Louisiana Board of Ethics, New Jersey State Ethics Commission and Rhode Island Ethics Commission.<sup>4</sup>

The fines which state ethics agencies can impose range from a minimal amount to significant penalties. In most cases, however, the minimal amount relates to failure to file financial disclosure statements. In the period from 2016 to 2018, 16 ethics agencies imposed fines of \$10,000 or more in individual cases.<sup>5</sup>

- Examples of practices in other states
  - Massachusetts – can issue cease and desist or compliance orders, impose fines up to \$10,000 (\$25,000 for corruptly demanding or accepting anything of value)<sup>6</sup>
  - Hawaii – can impose fines of up to \$1,000 per violation.<sup>7</sup>
  - West Virginia – can impose fines of up to \$5,000 per violation plus costs and issue cease and desist orders and public reprimands.<sup>8</sup>
  - Ohio can issue public censures.<sup>9</sup>

## Complaint Process

Anyone should be able to file a complaint against covered officials and employees. There should be some avenue for complainants to report anonymously to avoid fear of retaliation.

Most state ethics agencies allow anybody to file a complaint, whether or not a resident of the state. They differ, however, on whether a complaint can be filed anonymously; whether a complaint must be notarized; when a complaint is provided to the person who is the subject of the complaint; and when a complaint is made public.

- Examples of practices in other states
  - Florida – allows anybody to file a complaint, but requires it be notarized.<sup>10</sup> Identifying information is collected and made public upon a finding of probable cause.
  - Colorado – a complaint must be in writing, but is not required to be sworn or notarized. Identifying information is collected, but kept confidential until the complaint is found to be non-frivolous.<sup>11</sup>
  - California – a complaint must be in writing and can be done either sworn or as an anonymous tip. However, only persons filing sworn complaints have the right to be notified about the Commission's actions respecting the complaint.<sup>12</sup>

## Financial Disclosure

Vermont requires limited disclosure through the executive and legislative financial disclosure forms – particularly for legislators. For example, neither form requires disclosure of gifts and legislators have minimal reporting requirements. The proposed Code of Ethics will prohibit



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virtually all gifts so a reporting requirement on gifts received is not necessary. However, legislators should be required to make fuller disclosure.

In particular, Legislators should disclose the names of all clients for whom they work, whether the client directly hires the legislator or hires the entity which employs the legislator. Client disclosure is an important way to determine whether a legislator has a conflict of interest in matters on which he or she acts or refrains from acting. It is not sufficient to list the name of the employer, such as a consulting firm. The potential conflict arises from the clients for whom the legislator provides services, as an employee of that firm.

For example, Oregon requires that legislators must disclose the identity of each person for whom the person has performed services for a fee greater than \$1,000 if that person has a “legislative or administrative interest or that has been doing business, does business or could reasonably be expected to do business with the governmental agency of which the public official holds, or the candidate if elected would hold, an official position or over which the public official exercises, or the candidate if elected would exercise, any authority.”<sup>13</sup> 17 have some client disclosure requirements, for example, if the client is a lobbyist or if the service provided requires interaction with a state agency.<sup>14</sup>

We hope these comments are useful. Please do not hesitate to contact Shruti Shah, President & CEO at [sshah@coalitionforintegrity.org](mailto:sshah@coalitionforintegrity.org) if you have any questions.



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**To: Vermont Ethics Commission**  
**Fr: Kate Lapp, Government Reform Associate, VPIRG**  
**Dt: August 26, 2020**  
**Re: Proposed Statutory Code of Ethics – Written Public Comments**

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On Behalf of the Vermont Public Interest Research Group (VPIRG), and its nearly 50,000 members and supporters statewide, I offer the following comments with respect to the Vermont Ethics Commission's Draft Statutory Code of Ethics:

VPIRG has been deeply involved in matters of civic participation, government transparency and accountability, campaign finance, and ethics for decades. We appreciate the Commission's efforts in putting together this Draft Code of Ethics, which can effectively serve as starting place for elected legislators at the beginning of the 2021-2022 legislative biennium.

Our primary concern is that in order for Vermont to have a functioning ethics program, the state needs more than a Code of Ethics in law. For instance, this draft will do nothing to remedy the key weakness of the current Ethics Commission, namely its lack of resources and authority.

As stated previously in testimony before committees of jurisdiction in the legislature, VPIRG's position is that the Commission needs a substantial upgrade in order to be worth preserving. Otherwise, a largely toothless Commission may give Vermonters a false sense of security that the state has taken real and meaningful steps to guard against unethical behavior on the part of state officials.

This false sense of security, this mistaken belief that Vermont might have an effective means of ensuring ethical behavior on the part of its officials by merely adopting a Code of Ethics, could actually hinder real progress. That, in our opinion, would be a shame.

It is the belief of the Ethics Commission that "adopting a statutory code of ethics setting ethics standards for public servants should come first - before enforcement discussions. Once a code of ethics becomes law, ethics education and awareness will be the first and most effective means to ensure compliance. The Ethics Commission is a willing partner and resource for public servants."

We strongly disagree. And note that the Senate's Government Operations Committee voted favorably earlier this year on S.198, which called on the Ethics Commission not only to come up with a draft Code of Ethics, but also to identify "options for implementation and enforcement of that proposed State Code of Ethics."

Though COVID-19 derailed further consideration of S.198 this year, we believe that the Commission should follow through on the broader scope of work called for by the one committee to fully consider the legislation this year.

To be clear, VPIRG believes that there is an important role for ethics education and awareness. It is far better to help state officials avoid ethical missteps than to enforce against those who have committed violations.

Vermont Public Interest Research Group

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But what about the more troubling instances where an official refuses to comply with ethical guidelines, despite being educated and aware? And what if the Commission lacks the resources to effectively promote the Code and engage in education with all appropriate state officials?

The fact is, a statutory Code of Ethics is functionally little different from the Code of Ethics adopted by this Commission in the summer of 2018, unless it is enforceable.

Vermont already has a clear example of how an unenforceable code can be dismissed by even the state's most prominent official. Nearly two years ago, the Ethics Commission rendered an advisory opinion, responding to a VPIRG inquiry, that made clear the governor's ongoing financial arrangement with his former construction company violated multiple provisions of the ethics code. The business was (and is) paying the governor money, according to the terms of the sale, while also seeking and winning lucrative state contracts.

There is no question that the governor was aware that his actions were – and remain – in violation of the Code of Ethics. He did nothing to remedy the problem, and instead criticized the fact that the decision was issued at all. Later, the Commission removed the Opinion from its website as though it had never been issued. This act against public transparency, having nothing to do with the merits of the opinion, must be considered a stain of the record of the Commission to date. Just as importantly, this episode demonstrates that ethics education and awareness are not necessarily the most effective means to ensure compliance.

If an official can be found to be in violation of a Code of Ethics and essentially thumb his nose at the Commission, that just breeds public cynicism. It does not advance trust in government.

Therefore, we urge the Commission to investigate and make recommendations concerning the implementation and enforcement of the Draft Code. Implementation and enforcement should be considered as part of a package with the Code itself. Otherwise, we will likely face years of additional and unnecessary delay before Vermont joins the long list of states with a functioning ethics program.

Regarding specific improvements to this draft code, VPIRG offers the following recommendations:

- The Ethics Commission should be given the capacity to investigate complaints and, as necessary, the authority to sanction any state government official found to be in violation. (While recognizing the noted exceptions related to certain legislative and judicial functions.)
- The proceedings of the Ethics Commission should be open to the public once there is a determination that probable cause exists that a violation has occurred. It is our position that there should be no difference in terms of transparency between a criminal indictment, which is public, and a finding of probable cause of an ethics violation.
- In all cases where the Ethics Commission determines that a violation has occurred, its findings and sanctions should be publicly available.
- The opportunity to request an Advisory Opinion of the Commission should once again be made open to the public. Any opinions issued should be written in such a way as to provide general advice that could be applicable to more than a single office holder.

- The restrictions on post-government employment (draft code rule 10) are important, however, we believe that a permanent restriction for certain officials could be counterproductive. Some of our most talented state employees should not be required to give up for all time meaningful opportunities for future employment in their field of greatest expertise. Such a restriction could make it quite unnecessarily difficult to attract top talent into government. Therefore, a restriction of two years may be an effective alternative in Vermont. This would be more than is required under current law.<sup>1</sup>
- The draft definition of conflict of interest specifically excludes “any interest that . . . has been disclosed as required by law or applicable written policy and found not to be significant”. One could interpret this definition to mean that if an elected state executive has a financial conflict of interest, but declares it on their financial disclosure forms, then the conflict of interest is no longer an issue. Using the concerning case of Governor Scott’s continued financial interest in his former construction company as an example: the Governor could argue that he has disclosed this conflicted interest, and though the Ethics Commission received a complaint regarding this conflict of interest, and agreed it was a conflict of interest, before removing that decision, and has therefore resolved the conflict, despite the evidence that the conflict of financial interests persists.

VPIRG appreciates the ongoing effort of the Vermont Ethics Commission to strengthen its role in our state’s civic landscape, and the efforts of its staff and members to engage and educate the public on these important topics.

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<sup>1</sup> According to [2 V.S.A. § 266 \(b\)\(1\)](#), “A legislator or an Executive officer, for one year after leaving office, shall not be a lobbyist in this State.”