

Does the Doctrine of Separation of Powers in the Vermont Constitution Require Granting the Professional Conduct Board and Judicial Conduct Board Blanket Exemptions from Compliance with the Consultation Requirement in 3 V.S.A. §1223(c) as Proposed by H.1?

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before the Senate Government Affairs Committee
March 30, 2025

“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.”

In re D.L. (1995)¹

I. Introduction

In my testimony on Friday, March 28th, the focus of my testimony was on the question of whether, as supporters of H.1 have argued, the separation of powers clause in the Vermont constitution requires granting the legislative branches a blanket exemption from compliance with the consultation requirements in state ethics law. In this memo, I want to shift the focus to consider whether, as proposed by the amended version of H.1 passed by the House, the separation of powers clause requires granting the Professional Responsibility Board and Judicial Conduct Board an exemption.

My answer here is the same as it was for the legislative branches in general thrust.: Separation of powers doctrine does not require granting either the Professional Responsibility Board or the Judicial Conduct Board a blanket exemption from compliance with the consultation requirement.- but with an important caveat: In this context, because of the existence of already well-established procedures for dealing with ethics complaints, and the special considerations involved in dealing with ethics complaints involving lawyers and judges and other court personnel, the consultations play a different role in the process.. Moreover, there are special confidentiality concerns in this area that are not present in the legislative context.. But if the consultations are scheduled after formal complaints have been filed and published in Board proceedings, the special confidentiality concerns evaporate. They do not pose a barrier to

¹ 164 Vt 223; 669 A.2d 1172 (1995)

requiring representatives of the Board involved to participate in consultations and the consultations themselves can still serve a valuable, if somewhat different, purpose.

II. An Important Preliminary Question

According to the procedures established for review of ethics complaints by 3 V.S.A. §1223, the review process is not triggered until the Director of the Ethics Commission receives an ethics complaint. If the Director does not receive a complaint, the process established for review under that provision does not apply.

That has important implications in this area because the established practice for investigating and reviewing complaints involving lawyers and judges and other court personnel normally starts when the Professional Responsibility Board or the Judicial Conduct Board receives a complaint of possible ethics violation under their respective jurisdictions.

If the complaint is filed with one of these two Boards then, and not with the Director of the Ethics Commission, there is a question of whether the procedures established under §1223 even apply.

This is something that I think needs looking into.

However, assuming a complaint falling within the jurisdiction of one of these two Boards is filed initially with the Director of the Ethics Commission, how would separation of powers analysis apply?

III. Application of Separation of Powers in This Context

By now I think there is probably general agreement about what the separation of powers doctrine requires and what it does not require.² If the challenged law or legal requirement – here the requirement to participate in the review process established by state ethics law – involves the “exercise” by one branch of government of powers assigned to another by the state constitution, or allows a government body in one branch of government to “usurp” the functions assigned to a body in another branch, then there is a separation of powers violation. That is the core test. But even without actual “exercise” or “usurpation,” the law violates separation of powers if in practical application it prevents a governmental body from performing its constitutionally assigned responsibilities.

On the other hand, if the challenged law or legal requirement simply calls for some form of interbranch collaboration, that does not constitute a separation of powers violation. Indeed, the courts have recognized that certain forms of interbranch collaboration are often essential for the effective implementation of state policy.

² See discussion in Teachout testimony, “Does the Doctrine of Separation of Powers in the Vermont Constitution Require Granting the Legislative Branches a Blanket Exemption from Compliance with the Consultation Requirement in 3 V.S.A. §1223(c) as Proposed by H.1?” dated March 28, 2025, at pp. 4-9.

So the question here is whether requiring the Professional Responsibility Board and the Judicial Conduct Board to participate in consultations with the Ethics Committee at some point before reaching final decisions in their own disciplinary processes so interferes with their ability to conduct and review ethical complaints and reach final decision that it prevents them from effectively performing their responsibilities.

The argument that there might be a separation of powers conflict here is in some respects stronger, and the questions raised more complicated, than in the legislative context for three reasons. The first is that special ethics standards apply to lawyers and judges because of the unique roles they play in our system, standards that do not have general application to other governmental officials and employees. Second, both the Professional Responsibility Board and the Judicial Conduct Board already have well-established procedures for conducting investigations of ethics complaints and making disciplinary decisions and have had a long history of implementing those procedures.³ And third, there are special confidentiality requirements that must be observed in Professional Responsibility Board and Judicial Conduct Board ethics violation investigations that could potentially be compromised if the Board involved were required to consult with the Ethics Commission, at least early in the process.

The first of these considerations does not pose separation of powers issues because the process already contemplates that the special role and functions served by some departments of government may require recognition and application of special ethical standards. The second does not pose a problem because the fact that another agency of government already has its own procedures for investigating and deciding ethics complaints does not violate separation of powers unless it prevents the other agency from performing its constitutional responsibilities. These two considerations might have an impact on the nature of the consultations involved and what can be legitimately expected of them but they don't violate separation of powers doctrine.

Keep in mind that the applicable provision in state ethics law, 3 V.S.A. §1223, does not spell out what form the consultations must take except to say that they must be in writing. All that is required is that there be "consultations" sometime before the relevant government body makes a final decision. There is nothing in existing law to require that the consultations provide an occasion for the Commission to provide the affected government body with guidance or advice. The consultations could serve other functions. And it could be the other way around.

Because the Boards involved have well-established procedures for dealing with ethics complaints and substantial experience in dealing with those complaints, in this context, then, unlike the context where the government body involved does not have established procedures or

³ See

<https://www.vermontjudiciary.org/sites/default/files/documents/2023%20PRB%20Annual%20Report.pdf>, (Professional Conduct Board);

<https://www.vermontjudiciary.org/sites/default/files/documents/Judicial%20Conduct%20Board%20Annual%20Report%20-%20FY%202020%20-%202021.pdf> (Judicial Conduct Board)

substantial experience, the primary role played by the required consultations would not be to provide an occasion for the Ethics Commission to provide guidance and advice. If anything, it is likely that Ethics Commission itself would be the primary beneficiary, since the consultations would serve to inform the Commission about the special ethical considerations involved and their application by the Board in question to the particular circumstances involved.

That is not to say the consultations would serve no other purpose. Requiring consultations in this context would also serve as a kind of helpful “check in” point. Although there is no reason to believe it is currently a problem in Vermont or likely to be a problem in the near future – both Boards involved take their responsibilities seriously - it is well known that sometimes professional boards tend to protect members of the profession and occasionally even to “cover up” problematic behavior. The required consultations in this context then would serve to ensure the people of the state that, in processing ethics complaints involving lawyers and judges, the Boards involved are taking their responsibilities seriously.

The third concern, the concern about confidentiality, has a somewhat different impact. It is crucial that in the initial phases of investigation by the Boards in question and the preliminary disposition of complaints found not to warrant disciplinary action, information about the alleged violation and the individual involved remain strictly confidential. Although the state ethics law also requires that the consultations contemplated by §1223 be confidential, there is always a problem of possible compromise of confidentiality if the circle of those party to confidential information is expanded to include others. So if consultations between the applicable Board and the Commission were to be scheduled during the early phases in the investigatory and disciplinary processes, it could potentially compromise confidentiality requirements.

But that concern evaporates once the Board involved decides to file a formal complaint, since at that point the information supporting the alleged violation is made public.⁴ So as long as the required consultations are scheduled after the formal complaint has been filed, there would be no potential compromise of confidentiality requirements and no separation of powers violation. And, as suggested above, the consultations could still serve important purposes.⁵

IV. Conclusion

So long as the consultations between representatives of the Board involved and the Ethics Commission are scheduled after formal ethics complaints have been filed, there is no separation of powers violation involved by requiring the representative of the Board to participate in the

⁴ For an example of a formal complaint filed by the Professional Responsibility Board, see <https://www.vermontjudiciary.org/sites/default/files/documents/PRB-013-2023%20-%20Ewald%20-%20Petition%20of%20Misconduct%20-%202023-1017.pdf>

⁵ Even though the Code of Ethics does not technically apply to ethics violations falling under the jurisdiction of the professional Boards involved, that does not justify granting a blanket exception from participating in the required consultations, since in not a few cases the applicable ethical standards, although located in different codes, will be the same or very similar. They will be, if not identical twins, at least close cousins.

required consultations. And in that context, as explained above, the consultations themselves would still serve important, if somewhat different, purposes than they do in the normal case..

Simply because there would be no separation of powers violation, however, does not mean that the legislature cannot approve the amendments proposed by H.1. The legislature has the power to approve them.

But if it were to do so, it is crucial to appreciate what is potentially at stake.

The long term goal behind creating a state Ethics Commission in Vermont and granting to that Commission important powers and responsibilities, I think most would agree, was to make possible the development and implementation of an effective comprehensive statewide approach for dealing with ethics problems in government. That is the core aspiration behind adoption of the state ethics law..

It does not take much imagination to understand how that project would be threatened if the amendments to state ethics law proposed in H.1 were to be approved. If the proposed exemptions are adopted, it would lead to return to a system for dealing ethics complaints in Vermont government much like the one that existed before the creation of the state Ethics Commission. It would lead to a system in which complaints about ethics violations by government officials will be dealt with in five hermetically sealed compartments: one in the House, one in the Senate, one in the Professional Responsibility Board, one in the Judicial Conduct Board, and one for all the rest: in five independently operating hermetically sealed processes for dealing with ethics complaints. It would effectively mark the end of the effort to develop and implement a comprehensive statewide approach to dealing with ethics complaints in state government..