

Memorandum

To: Senate Committee on Government Operations

From: Merrill Bent, Chair, Judicial Conduct Board
Carolyn Anderson, Chair, Professional Responsibility Board

Date: March 26, 2025

Re: H.1

I. Background

Thank you for the opportunity to submit this memorandum as your Committee considers H.1, an Act relating to accepting and referring complaints by the State Ethics Commission.

This memorandum provides an informational overview of the ethics oversight applicable to judicial officers and attorneys in the State of Vermont, in support of the changes made to subsection (c)(1)(B) of H.1 as passed by the House. H.1 as amended corrects an infringement on constitutional judicial authority that Act 171 (H.875) inadvertently created by requiring the Judicial Conduct Board (“JCB”) and the Professional Responsibility Board (“PRB”) to consult with the State Ethics Commission before taking action on matters within their respective jurisdictions.

The basis for our support for exempting the JCB and PRB from the consultation requirement begins with the separation of powers among the three branches of government that Chapter II, § 5 of the Vermont Constitution requires: “The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.” Support for the exemption is also based on Chapter II, § 30 of the Vermont Constitution that provides: “The Supreme Court shall have all administrative control of all the courts of the state, and disciplinary authority concerning all judicial officers and attorneys at law in the state.”

The longstanding precedent in this state is that the Supreme Court’s disciplinary authority is plenary and comprehensive, and, importantly, “it includes conduct unrelated to adjudicative proceedings,” and “even ‘goes beyond the

professional affairs of judges and into their non-judicial lives.”¹ The law in this state is that the conduct of judicial officers is always subject to the Code of Judicial Conduct (“Code”), and thus there is no conduct by judicial officers that is left out of its reach. The far reach of the Code is to protect the integrity of the judiciary. The Court’s plenary authority over the disciplinary control of judicial officers is necessary to ensure that other branches of government do not infringe upon the independence of the judiciary or the administration of the courts.

Likewise, the Constitution gives the Vermont Supreme Court the “unique responsibility to regulate the practice of law within this state,” and plenary authority over the disciplinary control of attorneys.²

II. Ethics Rules Specifically Applicable to Judges and Attorneys

It is important to understand that ethical obligations are at the core of the profession for judges and attorneys. The strict ethical code that each must follow is inextricably linked to their respective roles and requires constant consideration and attention to ensure conformity therewith. Thus, judges and attorneys are held to a very high ethical standard, which is necessary to perform their job duties, and to protect the integrity of the judicial system.³ Attorneys and judges are subject to robust investigative and disciplinary processes, which can result in serious, potentially career-ending sanctions imposed by their respective Boards, and ultimately by the Court.

A. The Code of Judicial Conduct

The Code of Judicial Conduct governs the conduct of judicial officers in the State of Vermont. The principle that control of judicial conduct applies to but also transcends performance of judicial functions is plainly reflected in the Code. Rule 1.2, entitled “Promoting Confidence in the Judiciary” requires that “A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” Comment 1 to Rule 1.2 provides that the Code applies to judges in their professional and personal capacity. Comment 5 to Rule 1.2 provides that “Actual improprieties include violations of law, court rules, or provisions of this Code. The test for appearance of impropriety is whether the

¹ *In re Boardman*, 2009 VT 42, ¶ 30. 186 Vt. 176, 192, 979 A.2d 1010 (quoting *In re Hill*, 152 Vt. 576, 578, 569 A.2d 446 (1989)).

² *In re Grundstein*, 2018 VT 10 ¶ 23, 206 Vt. 575, 584 (2018); *In re Studdert-Kennedy*, 2024 VT 24, ¶ 10, 319 A.3d 671, 675 (Vt. 2024).

³ See *In re Bryan*, 164 Vt. 589, 594, 674 A.2d 793, 796 (1996) (“[T]he Code of Judicial Conduct sets a standard of conduct higher than that required of other public officials.”).

conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge."

Rule 2.1 requires that judicial officers give their judicial duties precedence over all of their personal and extrajudicial affairs. Comment 1 to Rule 2.1 further provides that "judges must conduct their personal and extrajudicial affairs to minimize risk of conflicts" In other words, the Code reaches beyond the "core functions" of the judiciary and governs every aspect of a judicial officer's life.

The Code is comprehensive and detailed and covers the same subject matter as the State Ethics Code, but in a manner that is specific to the obligations and functions of judicial officers. While the Code is comprehensive, it also casts some rules in general terms since it would be impractical to list every possibility of conduct that compromises or appears to compromise the independence, impartiality, or integrity of a judge, or which otherwise undermines public confidence in the judiciary.

B. The Rules of Professional Conduct

The Vermont Rules of Professional Conduct (V.R.Pr.C.) govern the conduct of attorneys in the State of Vermont. The purpose of the Rules is to "protect the public from persons unfit to serve as attorneys and to maintain public confidence in the bar."⁴ The Rules govern all aspects of an attorney's conduct and apply to attorneys practicing law as well as to the conduct of retired lawyers. In many instances, the conduct of lawyers is addressed even when they are not acting in a professional capacity⁵ as well as to lawyers applying for admission to the bar.⁶ Like the Code of Judicial Conduct, the V.R.Pr.C. are comprehensive,⁷ and cover the same areas as the State Ethics Code. Many rules are detailed and cover specific areas of conduct or practice while other rules are cast in general terms to encompass behavior by individuals who are unfit to serve as an attorney even if the specific conduct is not detailed in the rules.⁸

⁴ In re PRB Docket No. 2006-167, 2007 Vt 50, ¶ 9, 181 Vt. 625, 925 A.2d 1026 (quoting In re Berk, 157 Vt. 524, 532, 602 A.2d 946, 950 (1991).

⁵ Vermont Rules of Professional Conduct I. Preamble: A Lawyer's Responsibilities; See, e.g., V.R.Pr.C. 8.4

⁶ V.R.Pr.C. 8.1

⁷ For example, V.R.Pr.C. address conflicts of interests for government attorneys specifically in V.R.Pr.C. 1.11 and generally in V.R.Pr.C. in V.R.Pr.C. 1.7 and 1.9.

⁸ For example, V.R.Pr.C. 8.4 applies to lawyers in general, whether practicing law or in a non-professional capacity and states that it is professional misconduct for a lawyer to, among other things,

- engage in a serious crime, or a lesser crime an element of which involves "interference with the administration of justice, false swearing, intentional

III. Adjudicatory Processes Regarding Allegations of Unethical Conduct

A. Process Regarding Judicial Conduct

The JCB's process for enforcement of the Code is robust and comprehensive. The Rules for the Disciplinary Control of Judges promulgated by the Vermont Supreme Court grant the JCB broad jurisdiction over the conduct of Vermont's judicial officers. The JCB also has continuing jurisdiction over former judges for conduct that occurred during judicial service as long as a complaint is made within three years.

The JCB is comprised of three judges, three attorneys, and three lay persons. The JCB is empowered to receive information, investigate, dismiss unfounded complaints, enter into deferred discipline agreements, issue written warnings, conduct hearings and adjudicate complaints of misconduct, and to impose sanctions for judicial misconduct and disability. The JCB has broad investigatory and subpoena powers in order to effectuate its authority. When a formal complaint has been initiated, the matter becomes public and proceeds as a quasi-judicial administrative proceeding, which includes discovery and requires conformity with the rules of procedure and evidence applicable in civil actions.

Sanctions that the JCB may impose include (but are not limited to) written warning, public reprimand, limitations or conditions on the performance of judicial duties, and suspension for all or a portion of the remainder of a judge's term in office. The JCB's powers are subordinate to the authority of the Vermont Supreme Court.⁹

B. Process Regarding Attorney Conduct

Pursuant to its constitutional authority to oversee the professional conduct of all attorneys practicing in Vermont, the Supreme Court promulgated Administrative Order 9 ("A.O. 9") which created the Vermont Professional

misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a serious crime. V.R.Pr.C. 8.4(b).

- engage in conduct involving dishonesty, fraud, deceit or misrepresentation. V.R.Pr.C. 8.4(c).
- discriminate against any individual because of his or her race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth or age, or against a qualified handicapped individual, in hiring, promoting or otherwise determining the conditions of employment of that individual. V.R.Pr.C. 8.4(g).

⁹ *In re Bryan*, 164 Vt. 589, 593 (1996); Vermont Rules for Disciplinary Control of Judges, 10, 12.

Responsibility Program (“the Program”) to regulate the legal profession and the Professional Responsibility Board (“PRB”) to oversee and administer the Program. The Program’s objectives are to (1) assist attorneys and the public by providing education, guidance, referrals and other information designed to achieve, maintain, and enhance professional competence and professional responsibility; and to (2) resolve disciplinary complaints against attorneys through fair and prompt dispute resolution procedures; and investigate and discipline attorney misconduct.¹⁰

The PRB is appointed by the Supreme Court and is comprised of three attorneys admitted to the Vermont Supreme Court, three non-lawyers, and one active or retired judge. The Program is staffed by Disciplinary Counsel, Screening Counsel and Bar Counsel, whose duties and obligations are enumerated in A.O.9. Disciplinary Counsel is empowered to investigate and litigate disciplinary cases and has authority to issue subpoenas, conduct discovery, and utilize investigators.¹¹ Complaints are subject to strict confidentiality, but when a formal charge has been initiated, the matter becomes public and proceeds as a quasi-judicial administrative proceeding, which includes discovery and requires conformity with the rules of procedure and evidence applicable in civil actions. Disciplinary cases are considered by a hearing panel comprised of three members (two lawyers and one non-lawyer) appointed by the Chair of the PRB. Hearing Panels must issue written decisions with findings of fact and conclusions of law assessing the attorney’s conduct and if professional misconduct is found, imposing sanctions.

Sanctions that the hearing panel may impose include disbarment, suspension, public reprimand, and admonition. Hearing panel decisions may be appealed by either party to the Supreme Court, and the Court may and frequently does order review of hearing panel decisions even when neither party has appealed.

IV. The Mandatory Consultation Requirement in Act 171

The State Ethics Commission is within the Executive Branch of government.¹² As referenced *supra*, Act 171 (H. 875) contains a provision in section 9 to be effective September 1, 2025, which provides that when the State Ethics Commission refers a complaint to the JCB or the PRB, the receiving entity will “consult” with the Commission regarding the application of the State Code of Ethics to facts presented in the complaint. The provision further provides that the consultation must occur prior to that entity taking final action on the complaint.

¹⁰ A.O. 9.

¹¹ Screening counsel conducts a limited investigation and may dismiss a complaint, refer it to an assistance panel for review or refer it to disciplinary counsel for further investigation. A.O. 9.

¹² 3 V.S.A. § 1221(a).

The JCB and the PRB both support an exemption from the provision as provided in the proposed version of H.1 because section 9 in Act 171 is currently inconsistent with Vermont's constitutional governance structure and would serve no practical purpose with regard to complaints referred to those bodies.

A. Application of a Mandatory Consultation to the JCB

The current requirement in section 9 of Act 171 (H. 875) purports to require the JCB to consult with the State Ethics Commission before acting on a complaint within the JCB's jurisdiction. If adhered to, this provision would usurp the exclusive constitutional authority of the judicial branch. Additionally, because matters before the JCB are confidential per Rule 6(7) of the Vermont Supreme Court Rules for Disciplinary Control of Judges, the JCB would generally be prohibited from engaging in a discussion with the State Ethics Commission regarding particular matters—or even acknowledging the existence of a complaint against a judicial officer.

As a practical matter, the State Ethics Code would not inform the JCB's review of matters before it since such review is necessarily and exclusively under application of the Code of Judicial Conduct. In short, a consultation requirement would not and should not serve any useful purpose in the process required by the Vermont Supreme Court for the disciplinary control of judicial officers.

B. Application of a Mandatory Consultation to the PRB

The current requirement in section 9 of Act 171 (H. 875) purports to also require the PRB to consult with the State Ethics Commission before acting on a complaint within its jurisdiction. If adhered to, this provision would usurp the exclusive jurisdiction of the judicial branch over the regulation of the legal profession. Additionally, complaints brought to the Program are confidential under a number of provisions of A.O.9 unless or until a charge is brought or the attorney who is subject to the complaint consents.¹³ As such, engaging in a discussion with the State Ethics Commission regarding particular matters involving an attorney -or even acknowledging the existence of a complaint against an attorney is prohibited under the rules governing the Professional Responsibility Program.

V. Existing Advisory Resources

It is also worth noting that judicial officers and attorneys both have access to robust resources for guidance and advice in connection with their ethical responsibilities. For judges, the Judicial Ethics Committee is a five-person

¹³ A.O.9 §§ 8, 9, 11, 12, and 16.

committee of lawyers and judges that does research and provides independent guidance on issues that may violate the Code of Judicial Conduct. The committee helps ensure that judges operate with the very high standards of ethical behavior that the public expects from the judiciary.

For attorneys, opportunities for guidance exist with Bar Counsel and the Bar Assistance Program. Bar Counsel provides attorneys with guidance, referrals, educational materials, and information necessary to achieve, maintain, and enhance high standards of professional responsibility.

These readily accessible advisory resources are specific to the Codes and Rules applicable to judges and lawyers.

VI. Conclusion

The Judiciary opposes the provision in section 9 of Act 171 that requires the Judicial Conduct Board and the Professional Responsibility Board to consult with the State Ethics Commission on four grounds. First, the requirement infringes on separation of power principles and on the Supreme Court's constitutional authority to have "disciplinary authority concerning all judicial officers and attorneys at law in the state." Second, the requirement violates the confidentiality provisions in the Supreme Court's Rules for Disciplinary Control of Judges and in the Rules under Administrative Order 9 governing the Professional Responsibility Program. Third, the requirement would serve no useful or practical purpose given the robust and substantial adjudicatory processes in place in the Judicial Conduct Board and the Professional Responsibility Program. Lastly, established advisory resources specific to judges and attorneys already exist.

For these reasons the Judiciary supports H.1 in its current form which appropriately exempts the Judicial Conduct Board and the Professional Responsibility Board from a mandatory consultation requirement. Thank you again very much for this opportunity to comment.