

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

* * *

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.