MINUTES

House Select Investigative Committee

March 29, 2010
Room 159-S, State Capitol

Members Present

Representative Clark Shultz, Chair
Representative Carl Holmes, Vice-Chair
Representative Nile Dillmore, Ranking Minority
Representative Bob Grant
Representative Jeff King
Representative Jerry Henry

Members Absent

None

Staff

Raney Gilliland, Kansas Legislative Research Department
Athena Andaya, Kansas Legislative Research Department
Norm Furse, Revisor of Statutes Emeritus
Gary Deeter, Committee Secretary

Conferees

Others Attending

See attached sheet

The Chairman called the meeting to order at 1:34 p.m. and welcomed Staff Norm Furse, Office of the Revisor of Statutes, who provided further information to assist the Committee in establishing a definition for misconduct.

Mr. Furse referenced a protest in the House Journal for June 4, 2009, a protest by Speaker O'Neal which noted the Attorney General's opinion questioning the constitutionality of fee sweeps as a revenue measure. Mr. Furse also referenced the section of **K.S.A. 46-233** which prohibits a legislator from representing a special interest group in court within one year unless the legislator voted against the measure at issue (Attachment 1). Mr. Furse then reviewed a memo written in 1993 regarding the history of legislative protests (Attachment 2).

Mr. Furse illustrated the process by which monies are swept from fee funds into the

State General Fund [SGF] (Attachment 3). Referencing 2002 and 2003 Session Laws of Kansas (Chapters 205 and 3 respectively), Mr. Furse traced legislation authorizing the transfer of monies from fee funds to the SGF and, on occasion, how the fee funds were partially restored by transfers from the SGF. He noted that deficits from some fee funds continue to be carried over from one year to the next.

After noting a recall reference in the Kansas Constitution and in statute (**K.S.A. 25-4302)**, the latter which defines misconduct as a violation of law that impacts an officer's ability to perform the duties of the office, Mr. Furse reviewed recall procedures drawn from Kansas court cases (Attachment 4). He observed that the court cases reflect the intent of the statute: that misconduct is held to be actions that affect an officer's performance; misconduct does not reference an individual's character or morality. He commented that, under House rules, members may set standards for reprimand, censure, or expulsion.

In reference to fees paid to an attorney who sues the state, Mr. Furse said that funds may come through an appropriations bill or through a claims bill; a claims bill would seem to be the better procedure.

The Chair referred to a document provided by Speaker O'Neal regarding four specific transfers to the SGF from four special revenue funds (Attachment 5). The transfers were included in the 2009 **House Sub for SB 23.** The document concluded by saying that none of the receipts to the funds were generated through payment by individuals in the form of a fee imposed by the state.

The Chair noted three documents provided by Minority Leader Davis: a Senate Code of Ethics from the Iowa Legislature (Attachment 6), an article from the *Hastings Law Journal* dealing with whether or not legislators should be practicing lawyers (Attachment 7), and a letter from the complainants offering some guidelines for the Committee in defining the term *misconduct* (Attachment 8).

A member outlined what he considered five essential elements of the Complaint:

- That a lawyer-legislator should not, as a private lawyer, sue the state;
- That a lawyer-legislator should not receive a fee from special-interest groups for such a lawsuit;
- That the lawsuit should not in any way be related to the legislative appropriations process in which that legislator had a vote;
- That a Speaker of the House of Representative should not participate in such a lawsuit; and
- That a lawyer-legislator should not represent clients in a lawsuit if those clients have given money to his/her election campaign.

Another member, commenting on the previous member's observations, suggested that the complaint could be reduced to the fact that the Speaker is in the dual position of holding an attorney-client relationship with a number of interested parties to the legislative process while holding a position of power over the outcome of that legislative process. This situation creates an appearance of impropriety and casts suspicion on the institution of the House and the office of the Speaker.

The Chair noted that the law anticipates the tension created by such a lawsuit and stipulates rules by which a legislator may bring a lawsuit against the state. A member replied that the Speaker's actions cross no prohibited lines of conduct, but his actions create a shadow over the office of Speaker. Responding to another question, Mr. Furse replied that a "no" vote can be printed as a protest in the House Journal or may be validated by an explanation of vote.

Members discussed whether the Committee report should include guidelines or specific rules addressing misconduct. No consensus developed. The Chair recommended that members give further study to the information provided.

A member noted previous testimony by the Speaker that, since five of the six complainants did not appear before the Committee, their part in the complaint should be dismissed. A motion was made, seconded, and passed unanimously to dismiss five members of the Complaint: Representatives Ward, Phelps, Ballard, Crow, and Neighbor. (Motion by Representative Dillmore, seconded by Representative Holmes)

The meeting was adjourned at 1:30 p.m. The next meeting is scheduled for Tuesday, March 30, 2010.

Prepared by Gary Deeter

Approved by the Committee on:

March 30, 2010

HOUSE SELECT INVESTIGATIVE COMMITTEE

GUEST LIST

DATE: March 29, 2010

NAME	REPRESENTING
Scott Rothschild	Carmel Jamal Ward
Tim Lyons	CF
Milack Talk	Self
Martin Hawver	Hawai'i Capitol Report
Holly R	House D Staff
Audrey McFarland	House D Intern
Meghan Ryan	House D Intern
Ryan Quitiquit	Pro Tem
Stephen Kerr	KPR
Austin LaFrentere	Rep. Card Holmes

PROTEST

Pursuant to the provisions of Article 2, Section 10 of the Kansas Constitution and K.S.A. 2008 Supp. 46-233(c), I make formal written protest regarding the passage of those line items contained in 2009 **S. Sub. for HB 2373** (Omnibus Appropriations bill) which purport to cause the transfer of statutory fee funds to the State General Fund under the guise of reimbursing the SGF for ''accounting, auditing, budgeting, legal, payroll, personnel and purchasing services and any other governmental services which are performed on behalf of the state agency by other state agencies which receive appropriations from the state general fund to provide such services.''

Attention is directed to the holding and rationale of Kansas Attorney General Opinion No. 2002-45, where it was noted that ***''[i]f an assessment so exceeds the cost of regulation that it is apparent the legislature is using it as a general revenue raising measure, the overage cannot stand on police power authority. If the assessment is in fact a revenue raising measure, it must be analyzed as such, which may include a deter- mination as to whether it meets Commerce Clause and Equal Protection requirements, as well as any state constitutional requirements applicable to the type of tax it is. If an assessment cannot stand on either police power or taxing authority, it would have to be reimbursed...''***

It cannot be argued that the fee sweeps contained in **S. Sub. for HB 2373** serve the legitimate purpose of reimbursing the SGF for the reasonable and necessary expenses of providing the purported services. Indeed, it is common knowledge that the fee sweeps were and are for the sole purpose of providing sufficient revenue within the SGF to balance the budget for FY 2010. Sweeping statutory fee funds held in trust for the specific purposes outlined in their enabling legislation constitutes a taking for which affected parties are entitled to a remedy under the law. That remedy is reimbursement. That it is common knowledge that revenue raising was the primary, if not sole motivation for the fee sweeps is illustrated by the Notices of Assessment that were recently sent out by the Kansas Insurance Department with regard to assessing Kansas businesses for the Workers' Compensation Fee Fund, one of the funds targeted for sweeps in **S. Sub. for HB 2373.** The Notice states: ''**Action by the 2009 Kansas Legislature included a sweep of monies from the Workers' Compensation Fee Fund into the State General Fund. This action was part of the Legislature's proposal to remedy a revenue shortage in the State General Fund. This legislative sweep makes it necessary that the Kansas Insurance Department levy an assessment this year of 1.0 percent.**''

The effect of the fee sweeps will, like the Notice above implies, cause individuals and businesses required to pay the statutory fees to pay a second time for the same services/ programs they paid for previously with funds that are now swept. This constitutes an unauthorized tax. This practice of fee sweeps has occurred in the past, prompting the above-referenced Attorney General Opinion. The time has come for the Executive Branch and Legislative Branch to cease and desist the practice of attempting to balance the State General Fund by a subterfuge that is neither legal nor ethical, and which amounts to an unauthorized tax increase on affected Kansas taxpayers.—MICHAEL R. ''MIKE' O'NEAL

Attachment 1
HSIC 3-29-10

K.S.A. **46-233**

West's Kansas Statutes Annotated Currentness
Chapter 46. Legislature
Article 2. State Governmental Ethics
➡46-233. Contracts involving state officer or employee or legislator; prohibited acts, exceptions; challenging constitutionality of legislative action or enactment by legislator; prohibited acts

(a)(1) No state officer or employee shall in the capacity as such officer or employee be substantially involved in the preparation of or participate in the making of a contract with any person or business by which such officer or employee is employed or in whose business such officer or employee or any member of such officer's or employee's immediate family has a substantial interest and no such person or business shall enter into any contract where any state officer or employee, acting in such capacity, is a signatory to, has been substantially involved in the preparation of or is a participant in the making of such contract and is employed by such person or business or such officer or employee or any member of such officer's or employee's immediate family has a substantial interest in such person or business.

(2) Except as otherwise provided in this subsection, whenever any individual has participated as a state officer or employee in the making of any contract with any person or business, such individual shall not accept employment with such person or business as an employee, independent contractor or subcontractor until two years after performance of the contract is completed or until two years after the individual terminates employment as a state officer or employee, whichever is sooner. This prohibition on accepting employment shall not apply in any case where a state officer or employee who participated in making a contract while employed by the state of Kansas is laid off or scheduled to be laid off from any state position on or after July 1, 2002. As used in this subsection (a)(2), "laid off" and "layoff" mean a state officer or employee in the classified service under the Kansas civil service act, being laid off under K.S.A. 75-2948, and amendments thereto.

(b) No individual shall, while a legislator or within one year after the expiration of a term as legislator, be interested pecuniarily, either directly or indirectly, in any contract with the state, which contract is funded in whole or in part by any appropriation or is authorized by any law passed during such term, except that the prohibition of this subsection (b) shall not apply to any contract interest in relation to which a disclosure statement is filed as provided by K.S.A. 46-239, and amendments thereto.

(c) No individual, while a legislator or within one year after the expiration of a term as a legislator, shall represent any person in a court proceeding attacking any legislative action taken or enactment made during any term such individual served as a legislator as being unconstitutional because of error in the legislative process with respect to such action or enactment unless such legislator voted no upon the enactment of the measure and declared on the record, during such term, that such legislation was unconstitutional. The prohibition of this subsection (c) shall not apply to a current or former legislator charged with a violation of such legislative action or enactment.

(d) Subsections (a) and (b) shall not apply to the following:

(1) Contracts let after competitive bidding has been advertised for by published notice; and
(2) contracts for property or services for which the price or rate is fixed by law.

(e) When used in this section:

(1) "Substantial interest" shall have the same meaning ascribed thereto by K.S.A. 46-229, and amendments thereto, and any such interest held within the preceding 12 months of the act or event of participating in the preparation of making a contract.
(2) "Substantially involved in the preparation or participate in the making of a contract" means having approved or disapproved a contract or having provided significant factual or specific information or advice or recommendations in relation to the negotiated terms of the contract.

January 17, 1993

2

MEMORANDUM

FROM: Norman J. Furse, Revisor of Statutes

RE: Member Written Protests

I. BACKGROUND

A. Section 10 of article 2 of the Kansas constitution provides in part as follows: "Any member of either house may make written protest against any act or resolution, and the same shall be entered in the journal without delay or alteration."

B. The Wyandotte constitutional convention proceedings indicate that the member written protest provision of the Kansas constitution was taken from the constitution of the State of Ohio.

C. The privilege of protest developed from the British parliamentary system of allowing members of the House of Lords the privilege of registering their protest or dissent with respect to any vote taken on any question. This privilege was probably due to the peerage of members of the House of Lords and the fact that a Lord was privileged to vote by proxy and was not required to be present to have a vote recorded. The privilege to protest or dissent was accorded to absent members as well as those present. The time for making a protest or dissent was established by rule of the House of Lords. (See Luther Stearns Cushing, Elements of the Law and Practice of Legislative Assemblies in the United States of America, 1866.)

D. Twelve states including Kansas have a constitutional provisions which provides for the right to protest against an act or resolution by a member of either house of the legislature: Alabama, Indiana, Iowa, Kansas, Michigan, Minnesota, New Hampshire, North Carolina, Ohio, Oregon, South Carolina and Tennessee.

II. CASES

A. Kansas. While no Kansas cases construing this

Attachment 2
HSIC 3-29-10

constitutional provision have been found, three cases from states which have similar provisions do exist.

B. Ohio. Most directly in point, since the Ohio constitution is the source of the Kansas provision, is the Ohio case of State ex rel Carney v. Brown, 11 O App 2d 239, 40 002d 497, 230 NE 2d 350. The Ohio constitution grants to any member of either house the right to protest "any act, or resolution thereof" and to have the protest entered upon the journal. In this 1967 case, the senate rules committee of Ohio refused to order the printing of a proposed resolution offered by a senator. The senator then made a formal, written protest against the failure of the rules committee to print the proposed resolution. The president of the senate denied the senator's request to have the protest entered upon the journal. Upon appeal to the floor of the senate, the denial was upheld. The senator appealed to the courts. The Ohio court held that the right of a senator to protest "any act" applies to any act of that House and not to any act of a member of such House: "The phrase 'any act' necessarily refers to either an act of a member or an act of the House. In our opinion, the proper interpretation is an act of the House." The senator's request to have the protest entered on the journal was denied.

C. Alabama. The Alabama constitutional provision guarantees each member the right to protest against any act or resolution and have the reason for the dissent entered on the journal. In the 1949 Alabama case Opinion of the Justices, 252 Ala. 493, 41 So.2d 769, the Justices of the Alabama supreme court were asked the meaning of the word "act" and "resolution" as used in the constitutional provision, whether the word "act" was synonymous with the word "bill" and at what point in the legislative process may member "protest" against an act or resolution. After an analysis of the historical background of the provision referring to practice in the English House of Lords and the analysis by Cushing (part I.C. of this memo), the Alabama court found: (1) "Act or resolution" connotes any proceeding in the legislative process on which a vote has been favorably taken; (2) the word "act" as used in the section comprehends the term "bill" after the question has been taken and received a passing vote; and (3) the time for a protest and the nature and extent of the protest are subject to the rule of the legislative body under its rulemaking power.

D. Michigan. In the 1893 Michigan case of Turnbull v. Giddings, 95 Mich. 314, 54 N.W. 887, a senate member

offered a protest against certain proceedings of the senate and a house member offered a protest against the passage of a resolution. In both houses, the presiding officers ruled the protest offered in their respective houses out of order as reflecting on that house, the rulings were appealed and sustained in their respective houses. The members brought a mandamus action in court to compel the inclusion of the protest in the journals. The court pointed out that the Michigan constitution imposes the duty of keeping a journal upon each house (the Kansas constitution has a similar provision). Since the senate and house refused to receive and enter the protests, the action in this case of mandamus against officers of the senate and house will not lie to compel the insertion in the journals of such protests because the officers would be powerless to execute the order without the concurrence of their respective house of the legislature.

III. CONCLUSIONS

A. The term "act" or "resolution" as used in the constitutional protest language refers to any proceeding in the legislative process on which a vote has been taken and does not refer to an action of a committee or member of the body. It is an "act" of the whole body, not a committee of the body or an individual member of the body, which is to be protested. Any protest which goes beyond these limitations should be ruled out of order.

B. The "act" or "resolution" protested must be completed prior to the time of the protest. As the opinion of the Justices case states: "the word 'act' . . . comprehends the term 'bill' after the question has been taken and received a passing vote. . . . " Any protest attempted prior to the whole body taking action should be ruled out of order.

C. Under the Opinion of the Justices case and practice in the House of Lords, the time for a protest to be made and the nature and extent of the protest may be regulated by rule of the body. Any attempt to regulate the "nature and extent" of this constitutionally guaranteed right of protest would need to be carefully crafted and should emphasize specifically the conclusions under Part III, A and B of this memo and the applicable case law.

D. Any ruling of the chair on a protest under section 10 of article 2 of the Kansas constitution which holds that the protest is out of order should be appealed to the whole body so that the body may take action on the protest for

the purpose of invoking the reasoning in the Turnbull case discussed in Part II, D, of this memo. That is, that the whole body has acted to deny the protest and that the officers of the body are therefor powerless to enter the protest on the journal without the concurrence of the body.

2002 Session Laws of Kansas, Chapter 205

Sec. 32.

INSURANCE DEPARTMENT

(a) The director of accounts and reports shall not make the transfer of $7,000,000 from the workers compensation fund of the insurance department to the state general fund on July 1, 2002, or as soon thereafter as moneys are available, as directed by section 74(d) of 2002 Senate Bill No 517, and the provisions of section 74(d) of 2002 Senate Bill No. 517 are hereby declared to be null and void and shall have no force and effect.
(b) On June 30, 2002, the director of accounts and reports shall transfer $7,000,000 from the workers compensation fund of the insurance department to the state general fund: <<+Provided+>>, That the amount transferred from the workers compensation fund of the insurance department to the state general fund pursuant to this subsection is to reimburse the state general fund for accounting, auditing, budgeting, legal, payroll, personnel and purchasing services and any other governmental services which are performed on behalf of the state agency involved by other state agencies which receive appropriations from the state general fund to provide such services: <<+Provided further+>>, That the commissioner of insurance shall prepare and submit a workers compensation fund cash-flow analysis to the house committee on appropriations and the senate committee on ways and means during the month of January, 2003.

2003 Session Laws of Kansas, Chapter 3

Sec. 10.

INSURANCE DEPARTMENT

(a) (1) On the effective date of this act, notwithstanding the provisions of K.S.A. 2002 Supp. 44-566a and amendments thereto or any other statute, the director of accounts and reports shall transfer $4,000,000 from the workers compensation fund of the insurance department to the state general fund: Provided, That the amount transferred from the workers compensation fund of the insurance department to the state general fund pursuant to this subsection is to reimburse the state general fund for accounting, auditing, budgeting, legal, payroll, personnel and purchasing services and any other governmental services which are performed on behalf of the state agency involved by other state agencies which receive appropriations from the state general fund to provide such services.

(2) On or before June 30, 2007, on a date certified by the director of the budget, the director of accounts and reports shall transfer $1,000,000 from the state general fund to the workers compensation fund of the insurance department for the purpose of repaying 25% of the amount transferred to the state general fund pursuant to subsection (a)(1): Provided, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection (a)(2), the director of the budget shall deliver a copy of such certification to the director of the legislative research department.

Attachment 3
HSIC 3-29-10

(3) On or before June 30, 2008, on a date certified by the director of the budget, the director of accounts and reports shall transfer $1,000,000 from the state general fund to the workers compensation fund of the insurance department for the purpose of repaying 25% of the amount transferred to the state general fund pursuant to subsection (a)(1): Provided, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection (a)(3), the director of the budget shall deliver a copy of such certification to the director of the legislative research department.

(4) On or before June 30, 2009, on a date certified by the director of the budget, the director of accounts and reports shall transfer $1,000,000 from the state general fund to the workers compensation fund of the insurance department for the purpose of repaying 25% of the amount transferred to the state general fund pursuant to subsection (a)(1): Provided, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection (a)(4), the director of the budget shall deliver a copy of such certification to the director of the legislative research department.

(5) On or before June 30, 2010, on a date certified by the director of the budget, the director of accounts and reports shall transfer $1,000,000 from the state general fund to the workers compensation fund of the insurance department for the purpose of repaying 25% of the amount transferred to the state general fund pursuant to subsection (a)(1): Provided, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection (a)(5), the director of the budget shall deliver a copy of such certification to the director of the legislative research department.

vestment portfolio, that is directed to be transferred during the fiscal year ending June 30, 2011, from the state general fund to the bioscience development and investment fund by K.S.A. 2009 Supp. 74-99b34, and amendments thereto, is hereby decreased from such aggregate amount, which would otherwise be transferred pursuant to K.S.A. 2009 Supp. 74-99b34, and amendments thereto, to the aggregate annual amount of $35,000,000: *Provided*, That not more than $35,000,000 shall be transferred from the state general fund to the bioscience development and investment fund during the fiscal year ending June 30, 2011, pursuant to K.S.A. 2009 Supp. 74-99b34, and amendments thereto: *Provided further*, That the state treasurer shall certify to the director of the budget and the director of legislative research when $35,000,000 has been transferred from the state general fund to the bioscience development and investment fund during the fiscal year ending June 30, 2011, pursuant to K.S.A. 2009 Supp. 74-99b34, and amendments thereto.

(b) On and after July 1, 2011, notwithstanding the provisions of K.S.A. 2009 Supp 74-99b34, and amendments thereto, or any other statute, the aggregate amount equal to (1) the annual amount equal to 95% of withholding above the base, as certified or estimated and reconciled by the secretary of revenue, plus (2) annual interest earnings based on the average daily balance of moneys in the bioscience development and investment fund and the net earnings rate of the pooled money investment portfolio, that is directed to be transferred during the fiscal year ending June 30, 2012, from the state general fund to the bioscience development and investment fund by K.S.A. 2009 Supp. 74-99b34, and amendments thereto, is hereby decreased from such aggregate amount, which would otherwise be transferred pursuant to K.S.A. 2009 Supp. 74-99b34, and amendments thereto, to the aggregate annual amount of $35,000,000: *Provided*, That not more than $35,000,000 shall be transferred from the state general fund to the bioscience development and investment fund during the fiscal year ending June 30, 2012, pursuant to K.S.A. 2009 Supp. 74-99b34, and amendments thereto: *Provided further*, That the state treasurer shall certify to the director of the budget and the director of legislative research when $35,000,000 has been transferred from the state general fund to the bioscience development and investment fund during the fiscal year ending June 30, 2012, pursuant to K.S.A. 2009 Supp. 74-99b34, and amendments thereto.

Sec. 137. On June 30, 2011, notwithstanding the provisions of K.S.A. 79-4804, and amendments thereto, or any other statute, the director of accounts and reports shall transfer $3,743,605 from the state economic development initiatives fund to the state general fund.

Sec. 138. (a) The director of accounts and reports shall not make the transfer of $250,000 prescribed to be transferred from the state general

fund to the waste tire management fund of the department of health and environment — division of environment by section 48(h)(2) of chapter 2 of the 2009 Session Laws of Kansas, which was directed to be made on or before June 30, 2011, on a date certified by the director of the budget for the purpose of repaying 25% of the amount transferred from the waste tire management fund to the state general fund pursuant to section 13(a)(1) of chapter 3 of the 2003 Session Laws of Kansas. On the effective date of this act, the provisions of section 48(h)(2) of chapter 2 of the 2009 Session Laws of Kansas are hereby declared to be null and void and shall have no force and effect.

(b) The director of accounts and reports shall not make the transfer of $2,500,000 prescribed to be transferred from the state general fund to the underground petroleum storage tank release trust fund of the department of health and environment — division of environment by section 48(i)(2) of chapter 2 of the 2009 Session Laws of Kansas, which was directed to be made on or before June 30, 2011, on a date certified by the director of the budget for the purpose of repaying 25% of the amount transferred from the underground petroleum storage tank release trust fund to the state general fund pursuant to section 13(b)(1) of chapter 3 of the 2003 Session Laws of Kansas. On the effective date of this act, the provisions of section 48(i)(2) of chapter 2 of the 2009 Session Laws of Kansas are hereby declared to be null and void and shall have no force and effect.

(c) (1) The director of accounts and reports shall not make the transfer of $23,652,162 prescribed to be transferred from the state general fund to the state highway fund of the department of transportation by section 86(d)(2) of chapter 2 of the 2009 Session Laws of Kansas, which was directed to be made on or before June 30, 2011, on a date certified by the director of the budget for the purpose of repaying 25% of the amount transferred from the state highway fund to the state general fund pursuant to section 40(a) of chapter 205 of the 2002 Session Laws of Kansas. On the effective date of this act, the provisions of section 86(d)(2) of chapter 2 of the 2009 Session Laws of Kansas are hereby declared to be null and void and shall have no force and effect.

(2) On or before June 30, 2012, during the fiscal year ending June 30, 2012, on a date certified by the director of the budget, the director of accounts and reports shall transfer $23,652,162 from the state general fund to the state highway fund for the purpose of repaying 25% of the amount transferred to the state general fund pursuant to section 40(a) of chapter 205 of the 2002 Session Laws of Kansas: *Provided*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection (c)(2), the director of the budget shall deliver a copy of such certification to the

director of legislative research.

(3) On or before June 30, 2013, during the fiscal year ending June 30, 2013, on a date certified by the director of the budget, the director of accounts and reports shall transfer $23,652,162 from the state general fund to the state highway fund for the purpose of repaying 25% of the amount transferred to the state general fund pursuant to section 40(a) of chapter 205 of the 2002 Session Laws of Kansas: *Provided*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection (c)(3), the director of the budget shall deliver a copy of such certification to the director of legislative research.

(d) (1) The director of accounts and reports shall not make the transfer of $7,220,145 prescribed to be transferred from the state general fund to the state highway fund of the department of transportation by section 86(e)(2) of chapter 2 of the 2009 Session Laws of Kansas, which was directed to be made on or before June 30, 2011, on a date certified by the director of the budget for the purpose of repaying 25% of the amount transferred from the state highway fund to the state general fund pursuant to section 73(j) of chapter 138 of the 2003 Session Laws of Kansas. On the effective date of this act, the provisions of section 86(e)(2) of chapter 2 of the 2009 Session Laws of Kansas are hereby declared to be null and void and shall have no force and effect.

(2) On or before June 30, 2012, during the fiscal year ending June 30, 2012, on a date certified by the director of the budget, the director of accounts and reports shall transfer $7,220,145 from the state general fund to the state highway fund for the purpose of repaying 25% of the amount transferred to the state general fund pursuant to section 73(j) of chapter 138 of the 2003 Session Laws of Kansas: *Provided*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection (d)(2), the director of the budget shall deliver a copy of such certification to the director of legislative research.

(3) On or before June 30, 2013, during the fiscal year ending June 30, 2013, on a date certified by the director of the budget, the director of accounts and reports shall transfer $7,220,145 from the state general fund to the state highway fund for the purpose of repaying 25% of the amount transferred to the state general fund pursuant to section 73(j) of chapter 138 of the 2003 Session Laws of Kansas: *Provided*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection (d)(3), the director of the budget shall deliver a copy of such certification to the director of legislative research.

(e) (1) The director of accounts and reports shall not make the transfer

of $23,901.75 prescribed to be transferred from the state general fund to the state highway fund of the department of transportation by section 86(f)(2) of chapter 2 of the 2009 Session Laws of Kansas, which was directed to be made on or before June 30, 2011, on a date certified by the director of the budget for the purpose of repaying 25% of the amount transferred from the state highway fund to the state general fund pursuant to section 19(c) of chapter 160 of the 2003 Session Laws of Kansas. On the effective date of this act, the provisions of section 86(f)(2) of chapter 2 of the 2009 Session Laws of Kansas are hereby declared to be null and void and shall have no force and effect.

(2) On or before June 30, 2012, during the fiscal year ending June 30, 2012, on a date certified by the director of the budget, the director of accounts and reports shall transfer $23,901.75 from the state general fund to the state highway fund for the purpose of repaying 25% of the amount transferred to the state general fund pursuant to section 19(c) of chapter 160 of the 2003 Session Laws of Kansas: *Provided*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection (e)(2), the director of the budget shall deliver a copy of such certification to the director of legislative research.

(3) On or before June 30, 2013, during the fiscal year ending June 30, 2013, on a date certified by the director of the budget, the director of accounts and reports shall transfer $23,901.75 from the state general fund to the state highway fund for the purpose of repaying 25% of the amount transferred to the state general fund pursuant to section 19(c) of chapter 160 of the 2003 Session Laws of Kansas: *Provided*, That, at the same time that such certification is made by the director of the budget to the director of accounts and reports under this subsection (e)(3), the director of the budget shall deliver a copy of such certification to the director of legislative research.

(f) The director of accounts and reports shall not make the transfer of $1,000,000 prescribed to be transferred from the state general fund to the workers compensation fund of the insurance department by section 86(i)(2) of chapter 2 of the 2009 Session Laws of Kansas, which was directed to be made on or before June 30, 2011, on a date certified by the director of the budget for the purpose of repaying 25% of the amount transferred from the workers compensation fund to the state general fund pursuant to section 10(a) of chapter 3 of the 2003 Session Laws of Kansas. On the effective date of this act, the provisions of section 86(i)(2) of chapter 2 of the 2009 Session Laws of Kansas are hereby declared to be null and void and shall have no force and effect.

Sec. 139. On the effective date of this act, K.S.A. 2009 Supp. 2-223 is hereby amended to read as follows: 2-223. (a) There is hereby established

INFORMATION CONCERNING REMOVAL FOR MISCONDUCT IN OFFICE
Prepared by Norm Furse, Revisor of Statutes Office

Kansas Constitution Article 4 § 3. Recall of elected officials

All elected public officials in the state, except judicial officers, shall be subject to recall by voters of the state or political subdivision from which elected. Procedures and grounds for recall shall be prescribed by law.

Laws 1913, ch. 336, § 1; Laws 1974, ch. 463, § 1.

25-4302. Grounds for recall

(a) Grounds for recall are conviction of a felony, misconduct in office or failure to perform duties prescribed by law. No recall submitted to the voters shall be held void because of the insufficiency of the grounds, application, or petition by which the submission was procured.

(b) As used in this section, the term "misconduct in office" means a violation of law by the officer that impacts the officer's ability to perform the official duties of the office.

Laws 1976, ch. 178, § 16; Laws 1987, ch. 130, § 1; Laws 1999, ch. 105, § 8; Laws 2003, ch. 127, § 1.

State ex rel. Hecht v. Felker, Kan. Dist. Ct. 2003, October 17, 2003.

CONCLUSION
At the outset of the hearing, the Court stated the object of removal of a public officer for official misconduct is not to punish the offending official, but to protect and preserve the office, and to free the public of an unfit officer. State v. Schroeder, 199 Kan. 403 (1967). Based upon the reasoning set forth above, the Court must consider whether the Mayor's continuance in office pending the ultimate disposition constitutes an impediment to the effective governance of our city. Without judging the ultimate outcome of whether to remove Defendant from office, the question remains whether the city can most effectively be governed by a person under a cloud of credible suspicion of criminal violations involving moral turpitude. Accordingly, the Court grants Plaintiff's Application For Suspension. The Court reminds all parties concerned in this matter that the decision to suspend Mayor Felker during the pendency of these ouster proceedings in itself no way presupposes his guilt or innocence of the allegations which have been brought against him. The decision to suspend is made in order that the governance of this city may proceed unencumbered by the suspicion of serious wrong doing on the part of its chief executive. Such leaves-of-absence during the resolution of major issues affecting tenure in office are in wide practice in the business, academic, and governmental worlds.

Attachment 4
HSIC 3-29-10

State ex rel. Stovall v. Meneley, Kan. Dist. Ct., 2000, February 14, 2000

CONCLUSIONS OF LAW

15. The object of removal of a public officer for official misconduct is not to punish the offending official, but to protect and preserve the office, and to free the public of an unfit officer. State ex rel. v. Schroeder, 199 Kan. 403, 415, 430 P.2d 304 (1967); State ex rel v. Showalter, 189 Kan. 562, 569, 370 P.2d 408 (1962); and State, ex rel. v. Duncan, 134 Kan. 85, 4 P.2d 443 (1931)

State ex rel. Rockwell v. State Bd. of Educ., 213 Minn. 184, 6 N.W. 2d 251, 143 A.L.R. 503 (1942)

Where the removal is to be for official misconduct or for misfeasance or maladministration in office, the misconduct must be such as affects the officer's performance of his duties as an officer and not such as affects only his character as a private individual. In such cases it is necessary "to separate the character of the man from the character of the officer." Mechem, Public Offices and Officers, sec. 457, p. 290.

KANSAS LEGISLATIVE RESEARCH DEPARTMENT

68-West–Statehouse, 300 SW 10th Ave.
Topeka, Kansas 66612-1504
(785) 296-3181 ◆ FAX (785) 296-3824
kslegres@klrd.ks.gov
http://www.kslegislature.org/klrd

March 29, 2010

To: Speaker Mike O'Neal

From: Alan D. Conroy, Director

Re: Information Regarding Certain Special Revenue Fund Transfers to the State General Fund

You recently requested information about four specific transfers to the State General Fund from four special revenue funds. These transfers were included in 2009 House Substitute for Substitute for SB 23.

Kansas Corporation Commission - Kansas Electric Transmission Authority (KETA) Development Fund

Receipts to the KETA Development Fund are derived from transfers from the State General Fund. The Fund is to be used for improvements in the state's electric transmission infrastructure. KSA 74-99d13 specifically provides that appropriations or transfers of State General Fund moneys to the Fund for operation of the Authority are considered loans:

> **74-99d13. Appropriation or transfer of state general fund moneys constitutes loan**. (a) Any appropriation or transfer of state general fund moneys for the operation of the Kansas electric transmission authority and other expenses incurred pursuant to this act shall be considered a loan and shall be repaid with interest to the state general fund in one payment not later than 120 months from the effective date of the appropriation or transfer of such general fund moneys. Such loan shall not be considered an indebtedness or debt of the state within the meaning of section 6 of article 11 of the constitution of the state of Kansas. Such loan shall bear interest at a rate equal to the rate prescribed by KSA 75-4210, and amendments thereto, for inactive accounts of the state effective on the first day of the month during which the appropriation or transfer takes effect.
>
> (b) At the time of repayment of a loan pursuant to subsection (a), the chairman of the board shall certify to the director of accounts and reports the amount to be repaid and any interest due thereon. Upon receipt of such certification, the director of accounts and reports shall promptly credit or transfer the amount certified from accounts of the authority to the state general fund.

The Legislature, in 2009 House Substitute for Substitute for SB 23, recommended the transfer of $1.0 million from the KETA Fund back to the State General Fund in FY 2009.

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Attachment 5
HSIC 3-29-10

Department of Revenue - Kansas Qualified Biodiesel Fuel Producers Incentive Fund

Revenues to the Kansas Qualified Biodiesel Fuel Producers Incentive Fund come through transfers from the Economic Development Initiatives Fund. They are to be used by the Secretary of Revenue to provide payment for producer incentives for the production of biodiesel fuel. The Legislature, in 2009 House Substitute for Substitute for SB 23, recommended that funding of $500,000 be transferred from this Fund to the State General Fund. KSA 79-34,157 provides that all moneys remaining in the Fund upon the expiration of the act should be credited to the Economic Development Initiatives Fund.

Office of the Attorney General - Medicaid Fraud Prosecution Revolving Fund

Receipts to the Medicaid Fraud Prosecution Revolving Fund are derived from recoupment of expenses following successful prosecution in Medicaid fraud cases. KSA 21-3851 addresses the fund *(emphasis added)*:

> **21-3851. Penalties; medicaid fraud reimbursement fund; medicaid fraud prosecution revolving fund.** (a) Any person convicted of a violation of this act, may be liable, in addition to any other criminal penalties provided by law, for all of the following:
>
> (1) Payment of full restitution of the amount of the excess payments;
>
> (2) Payment of interest on the amount of any excess payments at the maximum legal rate in effect on the date the payment was made to the person for the period from the date upon which payment was made, to the date upon which repayment is made;
>
> (3) Payment of all reasonable expenses that have been necessarily incurred in the enforcement of this act, including, but not limited to, the costs of the investigation, litigation and attorney fees.
>
> (b) All moneys recovered pursuant to subsection (a)(1) and (2), shall be remitted to the state treasurer in accordance with the provisions of KSA 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the medicaid fraud reimbursement fund, which is hereby established in the state treasury. Moneys in the medicaid fraud reimbursement fund shall be divided and payments made from such fund to the federal government and affected state agencies for the refund of moneys falsely obtained from the federal and state governments.
>
> *(c) All moneys recovered pursuant to subsection (a)(3) shall be remitted to the state treasurer in accordance with the provisions of KSA 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the medicaid fraud prosecution revolving fund, which is hereby established in the state treasury. Moneys in the medicaid fraud prosecution revolving fund may be appropriated to the attorney general, or to any county or district attorney who has successfully prosecuted an action for a violation of this act and been awarded*

such costs of prosecution, in order to defray the costs of the attorney general and any such county or district attorney in connection with their duties provided by this act. No moneys shall be paid into the medicaid fraud prosecution revolving fund pursuant to this section unless the attorney general or appropriate county or district attorney has commenced a prosecution pursuant to this section, and the court finds in its discretion that payment of attorney fees and investigative costs is appropriate under all the circumstances, and the attorney general, or county or district attorney has proven to the court that the expenses were reasonable and necessary to the investigation and prosecution of such case, and the court approves such expenses as being reasonable and necessary.

The Fund is utilized by the Attorney General to finance the operations of the Medicaid Fraud and Abuse Division. The 2009 Legislature, in 2009 House Substitute for Substitute for SB 23, transferred $1,500,000 from this Fund to the State General Fund.

Department on Aging - Long Term Care Loan and Grant Fund

Funds were deposited into the Department on Aging's Long Term Care Loan and Grant Fund pursuant to the Intergovernmental Transfer (IGT) program created by the 2000 Legislature in KSA 75-4265. Funding for the IGT came from moneys received from the federal government and from the State General Fund. The Long Term Care Loan and Grant Fund was authorized to provide loans and grants to support the expansion of housing alternatives and services for senior Kansans. The 2009 Legislature, in 2009 House Substitute for Substitute for SB 23, transferred $805,000 from this Fund to the State General Fund.

None of the receipts to the above funds are generated through any payments by individuals in the form of a fee imposed by the state.

I hope this information is helpful. If you need any additional information, please let me know.

ADC/jl

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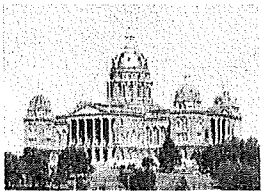

The Iowa Legislature

HOME PAGE
In the Chambers
Track Legislation
Legislators
Committees
Fiscal
Legislative Agencies
Lobbyist Information
Iowa Law
Publications
Educational
Archives
Help
Search

Chamber Rules

SENATE CODE OF ETHICS

(S.R. 6 - Adopted 1-27-05)

PREAMBLE. Every legislator owes a duty to uphold the integrity and honor of the general assembly, to encourage respect for the law and for the general assembly and the members thereof, and to observe the legislative code of ethics.

In doing so, members of the senate have a duty to conduct themselves so as to reflect credit on the general assembly, and to inspire the confidence, respect, and trust of the public, and to strive to avoid both unethical and illegal conduct and the appearance of unethical and illegal conduct.

Recognizing that service in the Iowa general assembly is a part-time endeavor and that members of the general assembly are honorable individuals who are active in the affairs of their localities and elsewhere and that it is necessary that they maintain a livelihood and source of income apart from their legislative compensation, the following rules are adopted pursuant to section 68B.31, to assist the members in the conduct of their legislative affairs.

1. ECONOMIC INTEREST OF SENATOR. Taking into account that legislative service is part-time, a senator shall not accept economic or investment opportunity, under circumstances where the senator knows, or should know, that there is a reasonable possibility that the opportunity is being afforded the senator with intent to influence the senator's conduct in the performance of official duties.

2. DIVESTITURE. Where a senator learns that an economic or investment opportunity previously accepted was offered with the intent of influencing the senator's conduct in the performance of official duties, the senator shall take steps to divest that senator of that investment or economic opportunity, and shall report the facts of the situation to the senate ethics committee.

3. CHARGES FOR SERVICES. A senator shall not charge to or accept from a person, corporation, partnership, or association known to have a legislative interest a price, fee, compensation, or other consideration for the sale or lease of any property or the furnishing of services which is in excess of that which the senator would charge another.

4. USE OF CONFIDENTIAL INFORMATION. A senator in order to further the senator's own economic or other interests, or those of any other person, shall not disclose or use confidential information acquired in the course of official duties.

5. HONORARIA. A senator shall not accept an honorarium from a restricted donor for a speech, writing for publication, or other similar activity, except as otherwise provided in section 68B.23.

6. EMPLOYMENT. A senator shall not accept employment, either directly or indirectly, from a political action committee. A senator may accept employment from a political party, but shall disclose the employment relationship in writing to the secretary of the senate within ten days after the beginning of each legislative session. If a senator accepts employment from a political party during a legislative session, the senator shall disclose the employment relationship within ten days after acceptance of the employment.

For the purpose of this rule, a political action committee means a committee, but not a candidate's committee, which accepts contributions, makes expenditures, or incurs indebtedness in the aggregate of more than seven hundred fifty dollars in any one calendar

Attachment 6
HSIC 3-29-10

year to expressly advocate the nomination, election, or defeat of a candidate for public office or to expressly advocate the passage or defeat of a ballot issue or influencing legislative action, or an association, lodge, society, cooperative, union, fraternity, sorority, educational institution, civic organization, labor organization, religious organization, or professional organization which makes contributions in the aggregate of more than seven hundred fifty dollars in any one calendar year to expressly advocate the nomination, election, or defeat of a candidate for public office or ballot issue or influencing legislative action.

7. ECONOMIC INTERESTS OF LOBBYIST. With the exception of exercising unfettered discretion in supporting or refusing to support proposed legislation, a senator shall not take action intended to affect the economic interests of a lobbyist or citizen supporting or opposing proposed legislation.

8. APPEARANCE BEFORE GOVERNMENTAL AGENCY. A senator may appear before a governmental agency or board in any representation case, except that the senator shall not act as a lobbyist. Whenever a senator appears before a governmental agency or board, the senator shall carefully avoid all conduct which might in any way lead members of the general public to conclude that the senator is using the senator's official position to further the senator's-professional success or personal financial interest.

9. CONFLICTS OF INTERESTS. In order to permit the general assembly to function effectively, a senator will sometimes be required to vote on bills and participate in committee work which will affect the senator's employment and other monetary interests. In making a decision relative to the senator's activity on given bills or committee work which are subject to the code, the following factors shall be considered:

a. Whether a substantial threat to the senator's independence of judgment has been created by the conflict situation.
b. The effect of the senator's participation on public confidence in the integrity of the legislature.
c. The need for the senator's particular contribution, such as special knowledge of the subject matter, to the effective functioning of the legislature.

A senator with a conflict of interest may participate in floor debate if prior to debate the senator indicates the conflict of interest.

10. GIFTS. Except as otherwise provided in section 68B.22, a senator, or that person's immediate family member, shall not, directly or indirectly, accept or receive any gift or series of gifts from a restricted donor.

11. DISCLOSURE REQUIRED. Each senator shall file with the secretary of the senate within ten days after the adoption of the code of ethics by the senate, and within ten days after the convening of the second session of the general assembly, a statement under section 68B.35 on forms provided by the secretary of the senate setting forth the following information:

The nature of each business in which the senator is engaged and the nature of the business of each company in which the senator has a financial interest. A senator shall not be required to file a report or be assumed to have a financial interest if the annual income derived from the investment in stocks, bonds, bills, notes, mortgages, or other securities offered for sale through recognized financial brokers is less than one thousand dollars.

Disclosures required under this rule shall be as of the date filed unless provided to the contrary, and shall be amended to include interests and changes encompassed by this rule that occur while the general assembly is in session. All filings under this rule shall be open to public inspection in the office of the secretary of the senate at all reasonable times.

The secretary of the senate shall inform the ethics committee of the statements which are filed and shall report to the ethics committee the names of any senators who appear not to have filed complete statements. The chairperson of the ethics committee shall request in writing that a senator who has failed to complete the report or appears to have filed an incomplete report do so within five days, and, upon the failure of the senator to comply, the

ethics committee shall require the senator to appear before the committee.

12. STATUTORY VIOLATIONS. Members of the general assembly are urged to familiarize themselves with chapters 68B, 721, and 722.

13. CHARGE ACCOUNTS. Senators shall not charge any amount or item to any charge account to be paid for by any lobbyist or any client the lobbyist represents.

14. TRAVEL EXPENSES. A senator shall not charge to the state of Iowa amounts for travel and expenses unless the senator actually has incurred those mileage and expense costs. Senators shall not file the vouchers for weekly mileage reimbursement required by section 2.10, subsection 1, unless the travel was actually incurred at commensurate expense to the senator.

15. COMPLAINTS. Complaints or charges against any senator or any lobbyist shall be in writing, made under oath, and filed with the secretary of the senate or the chairperson of the ethics committee. If filed with the secretary of the senate, the secretary shall immediately advise the chairperson of the ethics committee of the receipt of the complaint.

Complaint forms shall be available from the secretary of the senate, or the chairperson of the ethics committee, but a complaint shall not be rejected for failure to use an approved form if the complaint substantially complies with senate requirements.

A complainant may submit exhibits and affidavits attached to the complaint.

16. FILING OF COMPLAINTS.

a. Persons entitled. Complaints may be filed by any person believing that a senator or lobbyist has violated the senate ethics code, the senate rules governing lobbyists, or chapter 68B of the Iowa Code. A violation of the criminal law may be considered to be a violation of this code of ethics if the violation constitutes a serious misdemeanor or greater, or a repetitive and flagrant violation of the law.
b. Committee complaint. The ethics committee may, upon its own motion, initiate a complaint, investigation, or disciplinary action.
c. Timeliness of filing. A complaint will be considered to be timely filed if it is filed within three years of the occurrence of the alleged violation of the ethics code.

17. PERMANENT RECORD. The secretary of the senate shall maintain a permanent record of all complaints filed, evidence received by the committee, and any transcripts or other recordings made of committee proceedings, including a separate card file containing the date filed, name and address of the complainant, name and address of the respondent, a brief statement of the charges made, and ultimate disposition of the complaint. The secretary shall keep each such complaint confidential until public disclosure is made by the ethics committee.

18. PREHEARING PROCEDURE.

a. Defective complaint. Upon receipt of a complaint, the chairperson and ranking member of the ethics committee shall determine whether the complaint substantially complies with the requirements of this code of ethics and section 68B.31, subsection 6. If the complaint does not substantially comply with the requirements for formal sufficiency under the code of ethics, the complaint may be returned to the complainant with a statement that the complaint is not in compliance with the code and a copy of the code. If the complainant fails to amend the complaint to comply with the code within a reasonable time, the chair and ranking member may dismiss the complaint with prejudice for failure to prosecute.
b. Service of complaint on respondent. Upon receipt of any complaint substantially complying with the requirements of this code of ethics, the chairperson of the ethics committee shall cause a copy of the complaint and any supporting information to be delivered promptly to the respondent, requesting a written response to be filed within ten days. The response may do any of the following:
(1) Admit or deny the allegation or allegations.

(2) Object that the allegation fails to allege a violation of chapter 68B or the code of ethics.
(3) Object to the jurisdiction of the committee.
(4) Request a more specific statement of the allegation or allegations.

c. Objection to member. In addition to the items which may be included in a response pursuant to paragraph "b", the response may also include an objection to the participation of any member of the committee in the consideration of the allegation or allegations on the grounds that the member cannot render an impartial and unbiased decision.
d. Extension of time. At the request of the respondent and upon a showing of good cause, the committee, or the chairperson and ranking member, may extend the time for response, not to exceed ten additional days.
e. Confidentiality. If a complaint is not otherwise made public, the members of the committee shall treat the complaint and all supporting information as confidential until the written response is received from the respondent.
f. Communications with ethics committee. After a complaint has been filed or an investigation has been initiated, a party to the complaint or investigation shall not communicate, or cause another to communicate, as to the merits of the complaint or investigation with a member of the committee, except under the following circumstances:
(1) During the course of any meetings or other official proceedings of the committee regarding the complaint or investigation.
(2) In writing, if a copy of the writing is delivered to the adverse party or the designated representative for the adverse party.
(3) Orally, if adequate prior notice of the communication is given to the adverse party or the designated representative for the adverse party.
(4) As otherwise authorized by statute, the senate code of ethics, the senate rules governing lobbyists, or vote of the committee.
g. Scheduling hearing. Upon receipt of the response, the committee shall schedule a public meeting to review the complaint and available information, and shall:
(1) Notify the complainant that no further action will be taken, unless further substantiating information is produced, or
(2) Dismiss the complaint for failure to meet the statutory and code of ethics requirements for valid complaints, or
(3) Request that the chief justice of the supreme court appoint an independent special counsel to conduct an investigation of the complaint and supporting information, to make a determination of probable cause, and to report the findings to the committee, which shall be received within a reasonable time.
h. Public hearing. If independent special counsel is appointed, upon receipt of the report of independent special counsel's findings, the committee shall schedule a public meeting to review the report and shall do either of the following:
(1) Cause the complaint to be scheduled for a public hearing.
(2) Dismiss the complaint based upon a determination by independent special counsel and the committee that insufficient evidence exists to support a finding of probable cause.

19. HEARING PROCEDURE.

a. Notice of hearing. If the committee causes a complaint to be scheduled for a public hearing, notice of the hearing date and time shall be given to the complainant and respondent in writing, and of the respondent's right to appear in person, be represented by legal counsel, present statements and evidence, and examine and cross?examine witnesses. The committee shall not be bound by formal rules of evidence, but shall receive relevant evidence, subject to limitations on repetitiveness. Any evidence taken shall be under oath.
b. Subpoena power. The committee may require, by subpoena or otherwise, the attendance and testimony of witnesses and the production of such books, records, correspondence, memoranda, papers, documents, and any other things it deems necessary to the conduct of the inquiry.
c. Ex post facto. An investigation shall not be undertaken by the committee of a violation of

a law, rule, or standard of conduct that is not in effect at the time of violation.

d. Disqualification of member. Members of the committee may disqualify themselves from participating in any investigation of the conduct of another person upon submission of a written statement that the member cannot render an impartial and unbiased decision in a case. A member may also be disqualified by a unanimous vote of the remaining eligible members of the committee.
A member of the committee is ineligible to participate in committee meetings, as a member of the committee, in any proceeding relating to the member's own official conduct.
If a member of the committee is disqualified or ineligible to act, the majority or minority leader who appointed the member shall appoint a replacement member to serve as a member of the committee during the period of disqualification or ineligibility.

e. Hearing. At the hearing, the chairperson shall open the hearing by stating the charges, the purpose of the hearing, and its scope. The burden of proof rests upon the complainant to establish the facts as alleged, by clear and convincing evidence. However, questioning of witnesses shall be conducted by the members of the committee, by independent special counsel, or by a senator. The chairperson shall also permit questioning by legal counsel representing the complainant or respondent.
The chairperson or other member of the committee presiding at a hearing shall rule upon procedural questions or any question of admissibility of evidence presented to the committee. Rulings may be reversed by a majority vote of the committee members present.
The committee may continue the hearing to a future date if necessary for appropriate reasons or purposes.

f. Committee action. Upon receipt of all relevant evidence and arguments, the committee shall consider the same and recommend to the senate:
(1) That the complaint be dismissed, or
(2) That the senator or lobbyist be censured or reprimanded, and recommend the appropriate form of censure or reprimand, or
(3) Any other appropriate sanction, including suspension or expulsion from membership in the senate, or suspension of lobbying privileges.

g. Disposition resolution. By appropriate resolution, the senate may amend, adopt, or reject the report of the ethics committee, including the committee's recommendations regarding disciplinary action.

20. COMMITTEE AUTHORIZED TO MEET. The senate ethics committee is authorized to meet at the discretion of the chairperson to conduct hearings and other business that properly may come before it. If the committee submits a report seeking senate action against a senator or lobbyist after the second regular session of a general assembly has adjourned sine die, the report shall be submitted to and considered by the subsequent general assembly. However, the report may be submitted to and considered during any special session which may take place after the second regular session of a general assembly has adjourned sine die, but before the convening of the next general assembly.

20A. ADVISORY OPINIONS.

a. Requests for formal opinions. A request for a formal advisory opinion may be filed by any person who is subject to the authority of the ethics committee. The ethics committee may also issue a formal advisory opinion on its own motion, without having previously received a formal request for an opinion, on any issue that is within the jurisdiction of the committee. Requests shall be filed with either the secretary of the senate or the chairperson of the ethics committee.

b. Form and contents of requests. A request for a formal advisory opinion shall be in writing and may pertain to any subject matter that is related to the application of the senate code of ethics, the senate rules governing lobbyists, or chapter 68B of the Code to any person who is subject to the authority of the ethics committee. Requests shall contain one or more specific questions and shall relate either to future conduct or be stated in the hypothetical. A request for an advisory opinion shall not specifically name any individual or contain any other specific identifying information, unless the request relates to the requester's own conduct. However, any request may contain information

6-5

which identifies the kind of individual who may be affected by the subject matter of the request. Examples of this latter kind of identifying information may include references to conduct of a category of individuals, such as but not limited to conduct of legislators, legislative staff, or lobbyists.

c. Confidentiality of formal requests and opinions. Requests for formal opinions are not confidential and any deliberations of the committee regarding a request for a formal opinion shall be public. Opinions issued in response to requests for formal opinions are not confidential, shall be in writing, and shall be placed on file in the office of the secretary of the senate. Persons requesting formal opinions shall personally receive a copy of the written formal opinion that is issued in response to the request.

20B. CALCULATION OF TIME - DAYS.

For purposes of these rules, unless the context otherwise requires, the word "day" or "days" shall mean a calendar day except that if the day is the last day of a specific time period and falls upon a Saturday, Sunday, or legal holiday, the time prescribed shall be extended so as to include the whole of the next day in which the offices of the senate and the general assembly are open for official business.

21. COMPLAINT FILING FORM. The following form shall be used to file a complaint under these rules:

THE SENATE
Ethics Complaint Form
Re: _____ (Senator/Lobbyist),
of _____ , Iowa.
I, _____ (Complainant), residing
at _____ , in the City of _____,
State of _____, hereby complain that
_____(Senator/Lobbyist), whose
address is _____,
has violated the Senate Code of Ethics or Senate Rules Governing Lobbyists in that:
(Explain the basis for the complaint here. Use additional pages, if necessary).
Under penalty of perjury, I certify that the above complaint is true and correct as I verily believe.

_____
Signature of Complainant
SUBSCRIBED AND AFFIRMED to before me this _____
day of _____,_____.
_____
Notary Public in and for the
State of _____

22. COMPLAINT NOTICE FORM. The following form shall be used for notice of a complaint under these rules:

STATE OF IOWA
THE SENATE

COMMITTEE ON ETHICS)
IOWA STATE SENATE)
)
On The Complaint Of) NOTICE OF COMPLAINT
)
)
_____)
)
And Involving)
)
_____)
)
TO_____,

Senator or Lobbyist named above:

You are hereby notified that there is now on file with the Secretary of the Senate, State Capitol, Des Moines, Iowa, a complaint which alleges that you have committed a violation of the Senate's Code of Ethics or Senate Rules Governing Lobbyists. A copy of the complaint and the Senate rules for processing the same are attached hereto and made a part of this notice.

You are further notified and requested to file your written answer to the complaint within ten days of the date upon which the notice was caused to be delivered to you, _____, ___. Your answer is to be filed with the Secretary of the Senate, State Capitol, Des Moines, Iowa.

Dated this _____ day of _____, _____.

_____
Chair, Senate Ethics Committee,
or Secretary of the Senate

23. HEARING NOTICE FORM. The following form shall be used for notice of a hearing under these rules:

STATE OF IOWA

THE SENATE

COMMITTEE ON ETHICS)
IOWA STATE SENATE)
)
On The Complaint Of) NOTICE OF HEARING
)
)
_____)
)
And Involving)
)
_____)
)
TO_____,

Senator or Lobbyist named above:
You are hereby notified that there is now on file with the Secretary of the Senate, State Capitol, Des Moines, Iowa, a complaint which alleges that you have committed a violation of the Senate's Code of Ethics or Senate Rules Governing Lobbyists. A copy of the complaint and the Senate rules for processing the same are attached hereto and made a part of this notice.

You are further notified that, after preliminary review, the committee has caused a public hearing to be scheduled on (date) _____, _____, at (hour)_____ (a.m.) (p.m.), in Room _____, State Capitol, Des Moines, Iowa.

At the hearing, you will have the right to appear in person, be represented by legal counsel at your own expense, present statements and evidence, and examine and cross-examine witnesses. The committee shall not be bound by formal rules of evidence, but shall receive relevant evidence, subject to limitations on repetitiveness. Any evidence taken shall be under oath.

The committee may continue the hearing to a future date if necessary for appropriate reasons or purposes.

You are further notified that the committee will receive such evidence and take such action as warranted by the evidence.
Dated this _____ day of _____, _____.

_____
Chair, Senate Ethics Committee,
or Secretary of the Senate

24. PERSONAL FINANCIAL DISCLOSURE FORM. The following form shall be used for disclosure of economic interests under these rules and section 68B.35:

STATEMENT OF ECONOMIC INTERESTS

Name:_____
(Last) (First) (Middle Initial)

Address:_____
(Street Address, Apt.# - P.O. Box)

_____
(City) (State) (Zip)

Phone:(Home) _____-_____-_____ (Business) _____-_____-_____
****

a. Please list each business, occupation, or profession in which you are engaged. In listing the business, occupation, or profession, it is not necessary that your employer or the name of the business be listed, although all businesses,

occupations, or professions must be listed, regardless of the amount of income derived or time spent participating in the activity. (Examples of types of businesses, occupations, or professions that may be listed: teacher, lawyer, legislator, real estate agent, insurance adjuster, salesperson....)

(1) _____
(2) _____
(3) _____
(4) _____
(5) _____

b. Please list the nature of each of the businesses, occupations, or professions which you listed in paragraph "a", above, unless the nature of the business, occupation, or profession is already apparent from the information indicated above. The descriptions in this paragraph should correspond by number to the numbers for each of the businesses, occupations, or professions listed in paragraph "a". (Examples: If you indicated, for example, that you were a salesperson in subparagraph (1) of paragraph "a", you should list in subparagraph (1) of this paragraph the types of goods or services sold in this item. If you indicated that you were a teacher in subparagraph (2) of paragraph "a", you should indicate in subparagraph (2) of this paragraph the type of school or institution in which you provide instruction or whether the instruction is provided on a private basis. If you indicated that you were a lawyer in subparagraph (3) of paragraph "a", you should indicate your areas of practice and whether you are in private, corporate, or government practice in subparagraph (3) of this paragraph. If you indicated in subparagraph (4) of paragraph "a" that you were a consultant, in subparagraph (4) of this paragraph you should indicate the kind of services provided and types of clients served.)

(1) _____
(2) _____
(3) _____
(4) _____
(5) _____

c. Please list each source, by general description, from which you receive, or which generates, more than one thousand dollars in gross annual income in the categories listed below. For purposes of this item, a source produces gross annual income if the revenue produced by the source is subject to federal or state income taxes. In completing this item, it is not necessary to list the name of the company, business, financial institution, corporation, partnership, or other entity which constitutes the source of the income and the amount or value of the holding should not be listed.

(1) Securities (Here for example, you need not state that you own X number of shares of any specific company by brand or corporate name, or that the stock is of a certain value, but may instead state that you possess stock in a company and indicate the nature of the company's business.):

_____
_____
_____
_____
_____

(2) Instruments of Financial Institutions (You need not indicate, for example, in which institutions you hold certificates of deposit that produce annual income over the one thousand dollar threshold, but simply listing the nature of the institution will suffice, e.g., bank, credit union, or savings and loan association.):

_____
_____
_____
_____
_____

(3) Trusts (The name of the particular trust need not be listed. However, if the income is received from a charitable trust/foundation, such as the Pugh Charitable Trust, in the form of a grant, the fact that the trust is a charitable trust should be noted here.):

_____
_____
_____
_____
_____

(4) Real Estate (When listing real estate, it is not necessary to list the location of the property, but the general nature of the real estate interest should be indicated, e.g. residential leasehold interest or farm leasehold interest.):

_____
_____
_____
_____
_____

(5) Retirement Systems (When listing retirement benefits, it is not necessary to list the name of the particular pension system or company, but rather the type of benefit should be listed, e.g., health benefits, life insurance benefits, private pension, or government pension.):

_____
_____
_____
_____
_____

(6) Other Income Categories Specified in State or Federal Income Tax Regulations (List description of other sources of income producing over one thousand dollars in annual income not previously reported above, but which must be reported for income tax purposes.):

_____
_____
_____
_____
_____

_____ _____
(Signature of filer) (Date)

25. CO-CHAIRPERSONS — DUTIES. For purposes of the Eighty-first General Assembly, all of the following shall apply:

a. A reference in these rules to the chairperson of the ethics committee shall be considered to be a reference to the co=chairpersons of the ethics committee and a reference in these rules to the chairperson and ranking member of the ethics committee shall be considered to be a reference to the co-chairpersons of the ethics committee.

b. The co-chairpersons shall jointly perform the duties and responsibilities of the committee chairperson, including committee administration, staff assignments, and scheduling. The co-chairpersons shall agree upon a procedure for dividing the duties of presiding at committee meetings. The powers of the committee chairperson shall not be exercised individually by a co=chairperson without the prior agreement of both co=chairpersons, except that any co-chairperson may individually request a study bill on behalf of the committee.

Should Practicing Lawyers Be Legislators?

by
GEORGE F. CARPINELLO*

Legislators, like all public officials, act as fiduciaries[1] of the public interest.[2] They are expected to exercise their political power in furtherance of the interests of their constituents and of the body politic as a whole.[3] Legislators may be characterized either as "delegates," who are guided strictly by their constituents' desires, or as "trustees" who are expected to act in their constituents' best interest.[4] Underlying both models is the assumption that the legislator will act in good faith to fur-

* Professor of Law, Albany Law School; A.B. 1972, Princeton University; J.D. 1975, Yale Law School.

1. "[T]he Legislature being only a Fiduciary Power to act for certain ends, there remains still *in the People a Supream [sic] Power* to remove or *alter the Legislature,* when they find the *Legislative* act contrary to the trust reposed in them." J. LOCKE, TWO TREATISES OF GOVERNMENT, SECOND TREATISE Ch. XIII, § 149, at 385 (P. Laslett 2d ed. 1970) (3d ed. 1698) (emphasis in original).

A fiduciary is "a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. A person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking." BLACK'S LAW DICTIONARY 563 (5th ed. 1979).

2. Political scientists debate the question of whether the "public interest" can be defined. J. FLEISHMAN & B. PAYNE, ETHICAL DILEMMAS AND THE EDUCATION OF POLICYMAKERS 19-20 (1980); Schubert, *Is There a Public Interest Theory?*, in THE PUBLIC INTEREST: NOMOS V 162-76 (C. Friedrich ed. 1962). For our purposes, however, we can define "public interest" as the legislator's good faith belief as to what is in the constituents' best interests or in the best interests of the entire community that the representative serves. Fleishman defines it as "what the official sincerely believes to be to the long-run benefit of the public as a whole" or "the greatest good for the greatest deserving number, over the longest possible range of time . . . ." Fleishman, *Self Interest and Political Integrity*, in PUBLIC DUTIES: THE MORAL OBLIGATIONS OF GOVERNMENT OFFICIALS 63 (1981) [hereinafter Fleishman, *Self Interest*].

Fleishman further notes that although scholars claim that the public interest cannot be defined, an impartial spectator can generally articulate, in any given problem, what is in the public interest. *Id.* at 85-86. The question of whether a representative should choose the welfare of her constituents over that of the entire body politic need not be resolved for purposes of this discussion.

3. THE HASTINGS CENTER, THE ETHICS OF LEGISLATIVE LIFE, xiii (1985).

4. The former "delegate" model was espoused by James Mill, father of John Stuart Mill. J. MILL, *Essay on Government* (1820), in ESSAYS IN GOVERNMENT, JURISPRUDENCE, LIBERTY OF THE PRESS AND LAW OF NATIONS 3-32 (1967). The "trustee" model was adopted by Edmund Burke in his famous Speech to the Electors of Bristol in 1774, reproduced in ED-

Attachment 7
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ther the desires or best interests, respectively, of her constituents and place those desires or interests before personal interest or the interests of those with whom the legislator has private business or personal relationships.

Viewed either as a delegate or a trustee, the legislator's relationship with the public is analogous to an attorney's relationship with a client. Because of a disparity in sophistication and expertise, the client cannot monitor easily his attorney's fidelity to her fiduciary duties. The client must trust the attorney to act in his best interest.[5] This places a heavy burden of self-discipline on the attorney to avoid relationships or interests that conflict with the client's interests.

Legislators bear a similar burden. The public often is incapable of determining whether a legislator's exercise of his independent judgment in favor of the public interest has been compromised by other interests. The complexity of many public issues, the abstruseness of the legislative process, and the public's general lack of awareness of a legislator's position on most issues[6] makes monitoring impractical. If the public loses

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MUND BURKE: ON GOVERNMENT, POLITICS AND SOCIETY, 156-58 (B. Hill ed. 1975). *See also* French, *Burking a Mill,* in ETHICAL ISSUES IN GOVERNMENT 7-22 (N. Bowie ed. 1981).

The conflict between the Mill and Burke models can also be described as "the tension between the normative expectation that a representative should represent the subjective preferences (or self-defined interests) of the constituents and the normative expectation that a representative should represent the objective needs (or enlightened interests) of the constituents." Jennings, *Legislative Ethics and Moral Minimalism*, in REPRESENTATION AND RESPONSIBILITY 149, 160 (1985). Jennings adds that, because of voter apathy and the "significant electoral advantage for incumbents," representative democracy pulls in the direction of the latter model. *Id.* Fleishman describes the two roles as "advocate," when the legislator furthers his clients' interests, and "judge," when the legislator must scrutinize his constituents' preferences and determine that they are in the constituents' and the whole society's best interest. Fleishman, *Self Interest, supra* note 2, at 66.

Modern political scientists have added a third category, the "Politico," who adopts aspects of both the trustee and delegate roles, depending upon the issue. *See* Eulau, Wahlke, Buchanan & Ferguson, *The Role of the Representative: Some Empirical Observations on the Theory of Edmund Burke,* 53 AM. POL. SCI. REV. 742 (1959). These authors found from a four-state survey that 63% of legislators viewed themselves as trustees, 23% as politicos and 14% as delegates. The authors attribute this result, in part, to the complexity of modern political issues and the willingness of the electorate to entrust these issues to their representatives. *Id.* at 751; M. JEWELL, REPRESENTATION IN STATE LEGISLATURES 104-13 (1982). *See also* THE REPRESENTATIVE: TRUSTEE? DELEGATE? PARTISAN? POLITICO? 108 (N. Riemer ed. 1967) (adding a fourth type of representative: the partisan, who is a thoughtful adherent to the positions of her political party).

5. The requirement that an attorney scrupulously avoid any conflict between his own interests and those of a client, or conflict among clients, has long been part of the profession's canons of ethics. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1980); CANONS OF PROFESSIONAL ETHICS Canon 6 (1908).

6. M. JEWELL, *supra* note 4, at 104-13. In his interviews with hundreds of legislators in

trust in its representatives and comes to believe that its elected representatives are acting only or primarily in their own self-interest,[7] the consequences for democracy are quite serious. Eventually, the citizenry will be unwilling to make the sacrifices necessary for the long term general good.[8] The public may be willing, for example, to shoulder the tax burden necessary to bail out the savings and loan industry if it is convinced that such action is necessary for the health of the economy. Public support for such expenditure would evaporate, however, if the public believed that key members of Congress supported the bill because it would protect the value of their stock in threatened savings and loan institutes. The action may still be necessary to protect the national interest, but it has lost its legitimacy because of the selfish motivations which led to its passage.

Ironically, the legal profession, which has enjoyed the opportunity to serve in public office more than any other group,[9] has been insensitive

several states, Jewell found that most legislators believe that their constituents are informed only on a very small percentage of the issues, and that the constituents "trust them to use their own judgment on most issues." *Id.* at 108. One legislator, whose view seemed to be typical stated that "[p]eople seem to be saying — we elected you; we have confidence in you and expect you to use your own judgment." Said another: "I think the people elected me to look at things myself and they trust me to make a decision. They want me to make objective decisions on issues." *Id.*

7. Public respect for state legislators, never particularly high, has declined further in the past twenty years. In a survey conducted in the late 1960s, 16% of the respondents rated the ethics of state legislators as "high" or "very high." By 1977, the percentage had declined to 11%. A 1982 Gallup survey placed the level at 12%; only insurance agents, advertisers, and used car salesmen ranked lower. Stern, *Ethics in the States,* in REPRESENTATION AND RESPONSIBILITY, *supra* note 4, at 243-44.

8. Fleishman, *Self Interest, supra* note 2, at 82-83 ("If the motives are suspect, so also is the advice." On the other hand, "[s]elfless officials can be trusted to exercise judgment without suspicion that they have been swayed by those who will be benefited by the sacrifices of the rest of us.").

9. A 1986 survey found that 16% of all state legislators identified their occupation as attorneys, the largest occupational category nationally. That percentage is down from 22% in 1976. B. BAZAR, STATE LEGISLATORS' OCCUPATIONS: A DECADE OF CHANGE 2-3 (1987). A previous survey conducted in 1966 found that 26% of all state legislators were attorneys. C. WOLFRAM, MODERN LEGAL ETHICS 751 n.81 (1986). The percentage of attorneys varies considerably from state to state. In Virginia, for example, 45% of the legislators are attorneys while none of the members of the Delaware legislature list their occupation as "attorney." B. BAZAR, *supra*, at 2. Part of the explanation for the decline in the number of attorneys may lie in the fact that increasing numbers of legislators consider themselves full-time legislators and list their occupation as "legislator." *Id.* at 3. *See infra* notes 134-50 and accompanying text. Other factors undoubtedly include the increased time requirements of legislative office, the impact of disclosure laws on client privacy and the reduced need for public office as a method of advertising for clients. *Id.*

Still, attorneys have significant occupational advantages that help explain their continued preponderance in the legislature. Attorneys can develop flexible work schedules allowing them to devote substantial time to legislative duties. Attorneys are able to enter the political arena

to the potential for conflict of interest[10] when an attorney in private practice assumes public office. An attorney retained by a client assumes a fiduciary duty to protect that client's interests. Those interests may often conflict with what the lawyer as legislator believes to be the public interest. In being retained by a private client, the attorney only assumes a fiduciary duty with regard only to the matter he has undertaken. He is under no duty to conduct his affairs as a citizen or as a legislator to maximize the welfare of the client.[11] Thus, an attorney is not bound by a fiduciary duty to vote in favor of a client's interest on legislative matters unrelated to the attorney's representation. It is unrealistic, however, to expect that lawyer-legislators are not influenced by the concerns of an important client relating to pending legislation. This influence prevents the legislator from using his independent judgment in the public interest.

Moreover, the client's needs eventually may include representation before the legislature. Such representation by the lawyer-legislator, or his firm,[12] inevitably would create an actual conflict of interest. The legislator would be serving two clients and could not fulfill simultaneously his fiduciary duty to both his private client and the public.

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without significant harm, and often with benefit, to their profession. Of course, attorneys are also able to use their position in government to the benefit of clients, the issue with which this article is primarily concerned. Additionally, attorneys uniquely benefit from the political advantages of membership in the legislature since so many other political positions from which they may come or to which they might advance, such as judge, attorney general, and district attorney are filled solely by attorneys. Finally, of course, attorneys may have a greater affinity for legislative work since law, including statutory law, is the stock in trade of the legal profession. F. HARRIS & P. HAIN, AMERICA'S LEGISLATIVE PROCESSES: CONGRESS AND THE STATES 59-60 (1983); Matthews, *Legislative Recruitment and Legislative Careers,* 9 LEGIS. STUD. Q. 547, 550-51 (1984).

10. A conflict of interest for a public official can be defined as "the use of public office to advance private interests at the expense of some public interest." Cranston, *Regulating Conflict of Interest of Public Officials: A Comparative Analysis,* 12 VAND. J. TRANSNAT'L. L. 215, 219 (1979).

11. Indeed EC 8-4 of the ABA Model Code of Professional Responsibility provides that when "a lawyer purports to act on behalf of the public, he should espouse only those changes which he conscientiously believes to be in the public interest." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-4 (1980).

12. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.10 (1987); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(D) (1987). "It has long been recognized that the disqualification of one lawyer in an organization generally constituted disqualification of all affiliated attorneys . . . . [t]he rule is based upon the close, informal relationship among law partners and associates and upon the incentives, financial and otherwise, for partners to exchange information freely among themselves when the information relates to existing employment." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 n.2 (1975) (citations omitted) (The opinion goes on to create an exception to the above-stated rule when an attorney associated with the firm is disqualified because of prior government service, so long as the attorney is "screened" from any involvement in the case creating the conflict of interest and receives no compensation therefrom.).

7-4

This conflict was identified by a former President of the American Bar Association in 1960 as "one of the most serious [issues] facing the profession today in the professional responsibility area."[13] Unfortunately, the organized bar has done little to help attorneys resolve such conflicts. It has provided conflicting advice and failed to articulate a workable standard to deal with such conflicts. Even when the conflict may appear patently obvious to the lay person, the bar, especially the American Bar Association, has shown a myopia born of short-term self-preservation.[14]

Section I of this Article will examine potential and actual conflicts of interest faced by lawyer-legislators who represent private clients. The following section will review attempts by the organized bar and state legislatures to deal with these conflicts. Section III recommends solutions to these conflicts that balance the need for an independent legislature with the realities of the citizen legislature composed of individuals for whom public service is a part-time avocation. Finally, section IV considers the advent of the full-time legislature, and its effect on conflict of interest issues.

I. Conflicts of Interest

To some extent a legislator's determination of what is in the public interest inevitably will be influenced by, or will conflict with, the legislator's own private interest. For example, a legislator who is a farmer or a doctor may be disposed to vote in favor of provisions that aid farmers or doctors.[15] This influence generally is accepted as an inevitable aspect of democratic government and is not necessarily undesirable. The voters, by selecting a farmer or a doctor, are aware of the particular point of view of the legislator and either believe that their views will coincide with the views of farmers or doctors or that the legislator will not be influenced unduly by that position. In any event, the conflict is unavoidable if we are to elect representatives from every segment of society. This fact is

13. Malone, *The Lawyer and His Professional Responsibilities,* 17 WASH. & LEE L. REV. 191, 207 (1960).

14. *See infra* notes 48-75 and accompanying text.

15. J. Kirby, Jr., Executive Director of the New York City Bar Association states:

> Since legislative bodies must be constituted from the general public, it is inevitable that legislators bring with them the interests of the economic groups to which they belong. . . . Such groups are quite large, however, and the legislator's interest is common to many persons. The potential for adverse effects from such conflicts is quite low.

ASSOC. OF THE BAR OF THE CITY OF NEW YORK, CONGRESS AND THE PUBLIC TRUST 44 (1970) [hereinafter CITY BAR REPORT].

recognized by numerous state ethics laws t interest regulation those private interests t class, or profession.[16] Thus, a farmer need ing on a general measure that inevitably wo every other farm within the state.[17]

When a legislator directly benefits in a u piece of legislation, however, the legislator nounce his or her involvement and to recu

16. *See, e.g.*, ALASKA STAT. § 24.60.030(d) (1988) (a person to whom this chapter applies beyond that which the profession, occupation or group to which the person CAL. GOV'T CODE § 8921 (West Supp. 1989) (no conflict a degree no greater than any other member of "that group"); CONN. GEN. STAT. ANN. §§ 1-85 (West 1986 (Michie/Bobbs-Merrill 1988); LA. REV. STAT. ANN. § where economic interest is shared by "general class or g STAT. ANN. tit. 1, § 1014(1)(F) (1988); MINN. STAT. AN when effect no greater than on other member of the offic or occupation); MONT. CODE ANN. § 2-2-112(3) (198 (1986); OKLA. STAT. ANN. tit. 74, § 4246 (West 1987) (interest" legislation that affects legislator or in which leg est, but legislator may promote "general legislation" that legislator has substantial financial interest); OR. REV. ST. LAWS § 36-14-7(b) (1984); N.D. H.R. RULES & SEN. R all questions, unless member has "personal or private int affects the member directly, individually, uniquely anc RULE 16.03(7); VA. CODE ANN. § 2.1-639.31 (1987); W (1987); Md. Comm. on Ethics, Informal Op. 78-33 (1978 ters which generally affect the profession; should disquali has a "direct personal or pecuniary interest.").

See also MODEL STATE CONFLICT OF INTEREST § 17 (1979) (legislator shall disclose when discharge of d tor, a member of his household or a business with whi guishable from the effects of such action on the public public").

17. James Mill, in fact, argued that it is essential fc their actions in the same way that constituents are to e constituents' best interests. J. MILL, *supra* note 4, at 1 legislators not to have some personal interest in the l HASTINGS CENTER, *supra* note 3, at 35 ("When legislat their constituents' interests from the promotion of thei politics is functioning as it should. Conflicts of interes legislator's personal or political self-interests pull in one broader public interests pulls in another."); THE FEDER. comments in Federalist No. 10 when he distinguished b his own case, and the legislator, who, acting for the en personal self interest as he perceives it); J. NOONAN, BI son, *The Theory of Legislative Ethics*, in REPRESENTAT 4, at 175.

7-6

volvement with the legislation.[18] This conflict is similar to the conflict of interest that generally is condemned in the legal profession's rules of professional conduct. When an attorney has an interest that is or may be directly contrary to that of her client, to avoid acting contrary to her client's interest, the attorney is expected to inform the client and to remove herself from the situation.[19]

While some conflicts between private interest and public duty are inevitable, prudential rules have been adopted to reduce the frequency of such conflict. These include laws that prohibit or severely restrict legislators, as well as other government officials, from contracting with the state,[20] from accepting employment that readily could lead to conflicts,[21] or from accepting employment upon departure from governmental service from entities regulated by the agency that formerly employed the official.[22]

18. *See infra* note 92.

19. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5 (1970).

20. *See, e.g.,* TEX. CONST. art. III, § 18; ALA. CODE § 36-25-11 (1977); DEL. CODE ANN. tit. 29, §§ 5804(d), 5805(j) (1983); FLA. STAT. ANN. § 112.313(3)(7) (West 1982); HAW. REV. STAT. § 84-15 (1985); KAN. STAT. ANN. § 46-233(b) (1986); LA. REV. STAT. ANN. § 42.1113 (West 1989); ME. REV. STAT. ANN. tit. 1, § 1014(3)(A) (1989); MASS. GEN. L. ch. 268A, § 7 (1970); MICH. COMP. LAWS § 15.302 (1981); MISS. CODE ANN. § 25-4-105(2)(a), (b), (t) (1988); MO. ANN. STAT. § 105.456 (Vernon 1989); NEB. REV. STAT. § 49-14,102 (1988); NEV. REV. STAT. ANN. § 281.481(4) (Michie 1986); N.H. REV. STAT. ANN. § 95.1 (1978); N.J. REV. STAT. § 52:13D-19 (1986); N.J. LEG. CODE OF ETHICS § 2:5 (1983); N.M. STAT. ANN. § 10-16-7, 9 (1987); N.Y. PUB. OFF. LAW § 73(4) (McKinney 1988); N.D. CENT. CODE § 12.1-13-03 (1985); OHIO REV. CODE ANN. § 102.04(B) (Anderson 1984); OKLA. STAT. tit. 74, § 4246(e) (1987); 65 PA. CONS. STAT. ANN. § 403(c) (Purdon Supp. 1989); R.I. GEN. LAWS § 36-14-5(h) (1988); S.C. CODE ANN. § 8-13-410(2) (Law. Co-op. 1986); VA. CODE ANN. §§ 2.1-639.6, 2.1-639.35 (1987); UTAH JOINT LEG. RULES 16.03(a) (1987) (legislators may contract after public notice and competitive bidding); Wash. Code of Leg. Ethics (c)(2); WIS. STAT. ANN. § 19:45(6) (West 1987).

21. *See infra* note 91.

22. *See, e.g.,* ARIZ. REV. STAT. ANN. § 38-504(A) (1985) (one year term relating only to matters with which public official was directly concerned and participated in while at agency); DEL. CODE ANN. tit. 29, § 5805(f) (1983) (two year ban relating only to matters participated in by public official); HAW. REV. STAT. § 84-18 (1985) (one year ban on legislators and employees, relating to matters participated in, as well as all other official action by the relevant agency); IOWA CODE ANN. § 68 B.7 (West 1973) (two year ban on matters participated in by public official; two year ban on any appearance before agency by supervisory personnel, if paid on a contingency basis); LA. REV. STAT. ANN. § 42.1121 (West 1989) (two year ban on senior officials, including legislators, appearing before former agencies; two year ban on all employees as to matters participated in while at agency; two year ban on former employees contracting to perform services for agency); MD. ANN. CODE art. 40A, § 3-103(b) (1988) (permanent ban on representing parties in cases which involve the state in which the person was involved while a state official); MASS. GEN. LAWS ANN. ch. 268A, § 5 (West Supp. 1989) (permanent ban on matters involved with; one year ban as to matters formerly under official's responsibility in which state is a party; bans apply to partners of employees as well); MISS. CODE ANN. § 25-4-

7-7

Legislators who are also practicing attorneys face a special problem not shared by other legislators. When an attorney enters the legislature, he brings with him not only his own private interest, which may conflict with the public good, but also the interests of each and every client. Thus, the attorney, unlike the farmer or the doctor, inevitably has a wider range of potential conflicts. Virtually all legislation will affect, often directly and significantly, the interests of clients.[23] An attorney may be disposed to act sympathetically toward his clients' interests. Thus, for the attorney, the conflict is more acute, because he may be forced to sacrifice a particular client's best interests for the benefit of his more general client—the public.[24] Moreover, a particular client's interests may well require zealous representation at the legislative or administrative level. If the lawyer-legislator undertakes such representation, he inevitably sacrifices his fiduciary duty to his constituents.[25]

105(e) (1988) (permanent ban on matters involved with); NEV. REV. STAT. ANN. § 281.491(1) (Michie 1986) (permanent ban on matters which were considered by the agency during the former official's tenure); N.J. REV. STAT. § 52:13D-17 (1986) (permanent ban for official and members of firm, with regard to matters involved with); N.Y. PUB. OFF. LAW § 73(8) (McKinney Supp. 1989) (two year absolute ban for all former employees of effective branch; permanent ban on matters involved with); OHIO REV. CODE ANN. § 102.03(A) (Anderson Supp. 1984) (one year ban with regard to matters involved with; two year absolute ban on certain officials of public service commission); 65 PA. CONS. STAT. ANN. § 403(e) (Purdon Supp. 1989) (one year absolute ban as to all appearances, with or without compensation); R.I. GEN. LAWS § 36-14-5(4) (1988) (general ban on appearing before official's former agency for one year); S.C. CODE ANN. § 8-13-500(2) (Law. Co-op. 1986) (permanent ban as to matters involved with as an official); WASH. REV. CODE ANN. § 42.22.040 (1972) (two year ban on appearing before former agency on matters involved with while at agency); WIS. STAT. ANN. § 19:45(8) (West 1986) (one-year ban on former state officials, other than legislators and legislative employees, appearing before former agency; one year ban on appearing in judicial or quasi-judicial proceeding as to matters under their responsibility as state official; permanent ban on appearing in judicial or quasi-judicial proceedings on matters involved with "personally and substantively").

23. As the Delaware State Bar Committee on Professional Responsibility said, "Few pieces of legislation do not affect the interests of some client of a busy lawyer." Law. Man. on Prof. Conduct, Ethics Ops. 1980-83 (ABA/BNA). Del. Op. 1982-5 (1982). The Committee relied on this fact, however, to conclude that there could be no blanket prohibition on a lawyer-legislator using his position to support legislation favorable to a client. *See infra* notes 71, 74-75 and accompanying text.

24. *See* Malone, *supra* note 13, at 207:

> [T]he standard I have suggested for lawyers is higher than that required of other legislators. True, the merchant in the legislature does not abstain from voting on a proposed increase in the sales tax; the wholesaler does not abstain on fair trade legislation; nor does the doctor abstain when legislation governing naturopaths is under consideration. The difference, of course, is that the lawyer is not protecting his *personal* interest, but rather the interest of one who, so far as the public is concerned, has purchased his protection.

25. *See infra* notes 51-57, 67-69 and accompanying text.

7-8

Additionally, a legislator's constituents are not likely to know the client's interests. While the public can decide that they want a doctor or farmer as a representative, they are not able to make a decision as to whether they want a lawyer who, in private practice may represent banks, insurance companies, labor unions, or other clients unknown to the public, whose interests are affected significantly by legislative action.

The problem is compounded when potential clients recognize and seek to use the attorney's dual role. Some clients believe that the attorney can provide not only the services that any other attorney can provide, but also the potential additional service of influence within the government. Thus, by representing that he can represent the client's interest while also representing the public good, the attorney is an attractive target for undue influence.

At its extreme, the dual role of lawyer-legislator may facilitate simple bribery.[26] It is recognized universally as improper and illegal for a legislator to accept a payment of money as a *quid pro quo* for a particular vote.[27] The bribe compromises the legislator's autonomy. The vote is not based on the best interests of the legislator's constituents, but upon

26. Bribery generally is defined as the giving or receiving of "anything of value" "corruptly" with intent "to influence" the performance of an official act. *See* 18 U.S.C. § 201(b) (1979). Cf. MODEL PENAL CODE § 240.1 (1980), which does not contain the term "corruptly," but which limits bribery of a public servant, party official or voter to the conferring of a "pecuniary benefit." *See generally id.* (discussing deletion of "corrupt" purpose requirement due to difficulty in defining scope of term).

Bribery is the only crime, other than treason, that is specifically mentioned in the Constitution, and both are referred to only with regard to impeachment of the President. *U.S. Const.*, art. II, § 4. The Framers failed to specify any grounds for the removal of legislators, except to state that it could be accomplished only by a two-thirds vote. *Id.* art. I, § 5, cl. 2. They apparently believed that it would be much more difficult to corrupt the many members of Congress than one President. *See* J. NOONAN, *supra* note 17, at 429-34. They did not take into account either the willingness of special interests to pay large numbers of legislators (*see, e.g., id.* at 435-42 (the Yazoo land scheme)) or their ability to identify those key members of the legislature who, by controlling the right committee or coalition of votes, could shepherd desired legislation through the Congress.

Noonan suggests another reason accounting for the lack of a constitutional sanction against corruption by legislators: the belief that the political sanction would effectively deal with the corrupted legislators. *Id.* at 435, 442. But as the Yazoo affair demonstrated, the retribution of the voters has proven to be a flimsy sword. *Id.* at 435-42. *See infra* notes 108-12 and accompanying text.

The Framers were sensitive, however, to the possibility of bribery of legislators by the executive. They believed that influence peddling by the Crown and the offer of lucrative offices in the government had totally corrupted the British Parliament. To deal with the problem of enticement with offers of position by the Executive, the Framers prohibited legislators from assuming any other office during their term if the office was created or the salary was increased, during their term. *Id.*; U.S. CONST., art. I, § 6, cl. 2.

27. *See* United States v. Brewster, 506 F.2d 62, 72 (D.C. Cir. 1974). For two comprehensive discussions of the ambiguity of bribery statutes see Lowenstein, *Political Bribery and the*

7-9

the financial reward.[28] When a lawyer-legislator accepts a "retainer" from a client with the tacit understanding that the payment is for the attorney's services in the legislature, the legislator is guilty of accepting a bribe.[29]

The conflict problem is not limited to the egregious case of the camouflaged bribe. Even if both the attorney and the client enter into a bona fide relationship for that attorney's private services, the problem of conflicting interests nonetheless remains. It is unrealistic to expect that an attorney receiving a significant amount of his outside income from a particular client will knowingly vote contrary to that client's interests in the legislature.[30] Intentionally or not, the attorney's perception of the public good is shaped by the client's perspective.

The conflict can arise with any client, but most clearly arises in the case of institutional clients. Clients such as banks, insurance companies, utilities, labor unions, and regulated industries are not only heavy users of attorney services, but also are most likely to be interested in specific legislation. A conflict is not only possible but, indeed, inherently likely.[31]

The problem is not theoretical. It plagued Congress for years.[32] The hiring of prominent legislators' law firms by companies directly af-

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Intermediate Theory of Politics, 32 UCLA L. REV. 784 (1985) and Note, *Campaign Contributions and Federal Bribery Law,* 92 HARV. L. REV. 451 (1978).

28. Gutman & Thompson, *supra* note 17, at 175-76.

29. Describing corruption in the early 19th century, Noonan notes that the fact that "money paid to lawyers could be explained, or rationalized, or laundered as money paid for actual legal services was a substantial difficulty in isolating bribes paid to lawyers occupying official posts." J. NOONAN, *supra* note 17, at 447.

30. "[I]t is totally unrealistic to expect lawyers to subordinate their clients' interests when they make decisions as trustees of the public interest." CITY BAR REPORT, *supra* note 15, at 105.

31. See, for example, D. PEARSON & J. ANDERSON, THE CASE AGAINST CONGRESS 101-207 (1968), in which the hiring of the law firms of U.S. Senators and Representatives by major corporations was discussed at length: "Of the 50 law firms in the survey, 40 represent banks, 31 represent insurance companies, 11 represent gas and oil companies, 10 represent real-estate firms." *Id.* at 102.

32. The hiring of members of Congress by private interests for representation before federal courts and agencies was common in the mid-19th century. In 1853, as a result of the questionable practice by members of Congress and office holders of prosecuting claims on behalf of private individuals against the federal government, Congress passed the first general statute prohibiting payment to public officers for bringing claims against the federal government. B. MANNING, FEDERAL CONFLICT OF INTEREST LAW 75-77, 277 (1964) (discussing Act of Feb. 26, 1853, ch. 81 52, 10 Stat. 170). This was followed by legislation during the Civil War, apparently as a result of continued abuses, that prohibited political officers from receiving compensation for any representation before federal agencies in any matter in which the United States was interested. *Id.* at 14-16, 276 (discussing Act of June 11, 1864, ch. 119, 13

7-10

fected by legislative action assumed scandalous proportions.[33] In the minds of many, including some members of Congress, the retainer was

Stat. 123). J. NOONAN, *supra* note 17, at 452-53. These provisions are now codified as 18 U.S.C. §§ 203, 205 (1969 & Supp. 1989).

A more significant and longer lasting problem was the payment of retainers to members of Congress for the purpose of representing private interests in Congress. The most famous example was David Webster's unabashed mention to Nicholas Biddle, President of the Bank of the United States, that his retainer should be renewed so that his "relation to the bank be continued." Webster, like many members, also represented special interests, such as the Bank, before the courts while sitting in the Senate. While some challenged Webster's "retainer" from the Bank, few saw anything improper in Webster's overt representation of the Bank before the courts. The fact that the Congress was called to vote on the rechartering of the Bank did not appear to create a conflict of interest in the minds of contemporaries. Baker, *The History of Congressional Ethics,* in REPRESENTATION AND RESPONSIBILITY, *supra* note 4, at 3-27. Webster's role as attorney for the Bank while sitting in the Senate was also not that unusual. Henry Clay also was retained by the Bank and Thomas Hart Benton, senator from Missouri, was retained by John Jacob Astor's American Fur Company, which had a long and abiding interest in Congressional action. J. NOONAN, *supra* note 17, at 444-45. Webster also was beholden to the Bank as one of a number of federal officeholders, including Henry Clay and James Monroe, who had borrowed significant sums of money from the Bank. *Id.* at 444.

In contrast, John Quincy Adams, in turning down an offer to argue a case in the Supreme Court while serving as a member of Congress, commented:

> It occurs to me that this double capacity of a counsellor in courts of law and a member of a legislative body affords opportunity and temptation for contingent fees of a very questionable moral purity. It is a sad contemplation of human nature to observe how the action of members of legislative bodies may be bought and sold, and how some of the brightest stars in that firmament may pass in occultation without losing their lustre.

Baker, *supra,* at 9. Senate and House rules enacted in 1968, and strengthened in 1977, have effectively put an end to the outside practice of law by members of Congress. *See infra* notes 43-44 and accompanying text.

33. *See, e.g.,* United States v. Johnson, 419 F.2d 56 (4th Cir. 1969) (former Congressman convicted for accepting attorney's "fees" for influencing federal administrative action); CITY BAR REPORT, *supra* note 15, at 79-85 (tracing the history of congressional law practices from Daniel Webster through the 1960s); P. DOUGLAS, ETHICS IN GOVERNMENT 53 (1952)

> (Officials (and legislators) who are also lawyers can reap a profitable harvest without too much opprobrium. Firms can always engage them on other matters or pay them a "retainer" for general "services," and it can always be claimed that it is the lawyer and not the official who is being hired. The legal profession has been slow to recognize the fact that since the two are the same man, the income received by the lawyer may help to sway the acts of the official.);

J. GOULDEN, THE SUPERLAWYERS 268-86 (1971) (describing the successes of a number of congressmen and senators who made use of their Washington ties as lobbyists and attorneys both during and after their legislative careers); D. PEARSON & J. ANDERSON, *supra* note 31, at 102

> ([s]ome of the biggest corporate names in America are listed as clients of Congressmen's law firms in such out of the way places, say, as Nicholasville, Kentucky and Pascagoula, Mississippi . . . [t]here is no doubt that the vested interests have sought out and systematically engaged the services of Congressmen who are lawyers.

The authors go on to detail numerous instances of congressmen and senators being "retained" by corporations or individuals who have an interest in legislation pending in Congress); *Conflict of Interest? Putting A Lid on Lawyers in Congress,* U.S. NEWS AND WORLD REPORT,

7-11

perhaps the most effective method of influence peddling.[34] Although Congress has effectively eliminated the problem,[35] it still plagues state legislatures throughout the country.[36]

As early as 1944, the State Bar of Michigan noted that it was "common knowledge that some lawyer-legislators are tendered retainers or are continued in employment by clients because such lawyer-legislator has a vote in the legislative [sic] and is presumed to have some influence with his colleagues."[37] In 1957, the Texas Bar Association acknowledged that "[i]t is common knowledge that many lawyer-legislators are on legal retainer fees which are naturally calculated to improperly influence legislation of the subject matter embraced by such retainers . . . ."[38] The problem continues thirty years later. Recently, it was revealed that a major New York bank, interested in important legislation pending before the New York State Legislature, had retained the law firms of *both* the Democratic Speaker of the Assembly and of an important aide to the Republican Majority Leader of the State Senate. The bank claimed that

Sept. 12, 1977, at 39 (discussing the law practices of a number of members of Congress in light of legislation capping the amount a congressional member may earn for personal services).

34. A study conducted by the Brookings Institution in the early 1970s found widespread feeling among members of the House of Representatives, especially nonlawyers, that an outside law practice created considerable conflict. According to one member, outside practice was an "obvious channel for sanitized bribery and influence peddling. Every major bribery effort of a public official goes through a law firm." E. BEARD & S. HORN, CONGRESSIONAL ETHICS: THE VIEW FROM THE HOUSE 23 (1975).

35. *See infra* notes 43-44 and accompanying text.

36. For example, Alan G. Havesi, a New York state legislator and perceptive critic of the legislative system states: "Why should a legislator who, for example, is an attorney get involved in a direct and naked payoff when he can simply and legally accept a retainer from the interested lobby group for his law firm?" A. HAVESI, LEGISLATIVE POLITICS IN NEW YORK STATE 189 (1975). See also the comments of a former Connecticut State Senator: "Legal payoffs through public relations fees, or legal counsel fees are often reported to be involved in moving legislation forward in some states." Lockard, *The State Legislator,* in STATE LEGISLATURES IN AMERICAN POLITICS 115 (1966). For an illustration of how the problem has cast a shadow over the California state legislature, see *Capitol conflicts of interest—where to draw the line?,* Sacramento Union, Dec. 23, 1980, at D-1, and *Conflict of Interest still a Major Legislative Problem,* San Mateo Times, Aug. 21, 1980, *reprinted in* STAFF OF CAL. FAIR POLITICAL PRACTICES COMM., LEGISLATORS AS ADVOCATES BEFORE STATE AGENCIES: AVOIDING CONFLICTS OF INTEREST app. (Comm. Print 1981) [hereinafter CAL. CONFLICTS OF INTEREST REPORT]; for a descriptive analysis of the problem in Virginia, see Frankel & Bauer, *It's Assembly Time Again in Richmond, Annapolis; Va. Lawyer-Legislators Use Power for Clients,* Wash. Post, Jan. 11, 1981, at A-1, col. 1; *The Case of Virginia Sen. Babalas,* Wash. Post, Jan. 9, 1986, at A-22; Baker, *Va. Senate Votes to Censure Babalas for Ethics Violation,* Wash. Post, Jan. 24, 1987, at A-1, col. 4 (Virginia senator censured for voting on issue affecting client after receiving $60,000 in legal fees from client; senator was acquitted of one criminal charge and second was dismissed).

37. Mich. Comm. on Professional Ethics, Op. 83 (1944).

38. Tex. State Ethics Advisory Comm'n, Op. 162 (1957).

7-12

these two firms, out of the thousands of firms practicing law in New York, happened to be best qualified to perform real estate closings.[39] The examples do not end with the leadership. In New York, where 32 out of 61 senators and 45 out of 150 assemblymembers are lawyers, there are numerous instances of representatives or their senior staff unabashedly pursuing their clients' interests through legislation.[40] The problem is not unique to New York. It is endemic in the state legislative system.[41]

II. Responses to the Problem

Despite widespread publicity regarding the use of public office to favor legislators' private clients, little has been done on the state level to deal with the problem. The problem, however, has been addressed on the federal level. After much criticism and a bar recommendation that all outside practice be prohibited,[42] Congress made it virtually impossible for representatives and senators to engage in outside practice. Specifically, the House of Representatives limits income from outside employment to 30 percent of a representative's government salary.[43] The Senate expressly prohibits any senator from practicing law except as a sole practitioner on nonofficial time.[44] In any event, service in Congress and campaigning for reelection has become a full-time job. Members of Congress who are lawyers simply cannot afford to spend time in private practice. Moreover, members of Congress no longer "sell" their name and influence to private law firms. Mere use of a legislator's name to add lustre and the aura of power to a law firm has long been prohibited by the codes of ethics.[45]

Prohibiting outside practice, however, has not been considered viable on a state level because state legislators traditionally have served only

39. *Miller spokesman denies conflict in Citibank business,* Times Union (Albany, N.Y.), Feb. 9, 1988, at B-12, col. 7. The New York Times reported that the new majority leader of the Senate, Ralph J. Marino, pledged at the time of his selection "that his top aides will not have outside law practices, as many of Mr. Anderson's did, that could cause a conflict of interest." Kolbert, *L.I. Lawmaker Shakes Albany In G.O.P. Rise,* N.Y. Times, Sept. 19, 1988, at B-1, col. 4, B-8, col. 1.

40. Madden & Smothers, *The Lawyers in Albany: Lawmakers with Two Hats,* N.Y. Times, July 15, 1987, at 1, col. 5.

41. *See supra* note 36.

42. The recommendation was made by the Association of the Bar of the City of New York in 1970. CITY BAR REPORT, *supra* note 15, at 111.

43. H.R. DOC. No. 277, 98th Cong., 2d Sess., rule XLVII at 704-05 (1985).

44. S. DOC. No. 100-1, 98th Cong., 1st Sess., rule XXXVII at 71 (1984).

45. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(B) (1983); ABA Comm. on Ethics and Professional Responsibility, Informal Ops. 1134 (1969), 1205 (1972), 1240 (1972) (legislator's name may be retained in firm letterhead only if the legislator practices law and renders services to clients of that firm on a "regular and active basis").

7-13

part time. Legislators proclaim pride in their citizen and part-time nature, even if, in reality, state legislators are becoming increasingly full time.[46] Moreover, political pressure generally has kept state legislative salaries at relatively low levels. Although salaries have steadily increased, with some states paying in excess of 50,000 dollars,[47] legislative salaries are still considerably below salaries that can be earned in private law practice. This citizen-legislature ethos has proved a significant barrier to serious discussion and resolution of the lawyer-legislator conflict of interest.

A. The Position of the Organized Bar

The organized bar has not responded adequately to the problem. As this section shows, although the ABA has considered the problem, it has not provided strong guidance. Perhaps as a consequence, state bar associations have reacted inconsistently. The first significant discussion of this issue by the organized bar occurred in 1944. The State Bar of Michigan's Committee on Professional Ethics was asked whether it was proper for a lawyer-legislator to accept employment from a client who was "directly or indirectly" interested in proposed legislation. The panel first noted that the strict prohibition against representing conflicting interests under Canon 6 of the former Canons of Professional Ethics[48] could not

46. The number of state legislators claiming other professions is declining. In 1976, 48% of all state legislators identified themselves as lawyers, business owners, or insurance or real estate executives. In 1986, only 37% so identified themselves. In 1986, 11% of the legislators considered themselves to be full-time legislators. Paterson, *Is the Citizen Legislature Becoming Extinct?*, in STATE GOVERNMENT 75-78 (1988). *See infra* note 136.

47. In New York, legislators' base salaries recently have been raised to $57,500, although with stipends and expense reimbursements, actual pay can be significantly greater. *Cuomo Urges Study of Plan For Full-time Legislature*, N.Y. Times, July 16, 1987, at B-4, col. 4 (national ed.). In the New York Senate, for example, there are 87 positions that pay additional stipends in a body which has only 61 members. These stipends range from $30,000 for the Temporary President or majority leader, to $9,000 for the chairman of every committee and $6,500 for the ranking minority member of every committee. N.Y. LEGIS. LAW § 5-a (McKinney Supp. 1989). In the Assembly, similar stipends are given for some 108 positions in the 150-member Assembly. *Id.* No legislator, however, is eligible to receive more than one stipend at the same time. *Id.* § 5-a(2).

In California, legislators earn more than $50,000 when salary, per diem expenses, pension, and other perquisites are added. Stern, *Ethics in the States: The Laboratives of Reform*, in REPRESENTATION AND RESPONSIBILITY, *supra* note 4, at 246. While New York and California are somewhat exceptional, there are now fifteen states which provide a base pay (without including per diem expenses) of at least $20,000, and seven that pay more than $30,000: California ($40,816); Illinois ($35,661); Massachusetts ($39,000); Michigan ($39,881); New York ($57,500, as of Jan. 1, 1989); Ohio ($34,905); Pennsylvania ($47,000). As of 1990, New Jersey's base salary will rise to $35,000. COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 97-99 (1988-89).

48. "It is unprofessional to represent conflicting interests, except by express consent of all

7-14

be avoided by consent of the parties, since one party was the public. No surrogate, not even a representative's constituents, could give such consent. The panel concluded that a private retainer might unreasonably influence the legislator and, because "[e]very conflict of interest must be resolved in favor of the public trust," the panel held that the retainer should not be accepted. The legislator must "sever completely any existing client relationship where the client is or becomes interested in legislative action."[49]

This opinion clearly recognized the conflict, but failed to address the practical implications for the lawyer-legislator. When is a client "interested"? What if the client is affected by annual legislation because of the business it is in? What if the client is interested in legislation, but its interest is no greater than that shared by a group or class in society?[50]

The American Bar Association has provided weak and inconsistent guidance. In its first major opinion on the subject of lawyer-legislators, the ABA's Committee on Professional Ethics opined in 1959 that a law firm could not represent a client before a legislative committee while a member of the firm is serving in the legislature.[51] Little analysis was given, but the Committee's reliance on Canon 6 of the Canons of Professional Ethics,[52] and a previous opinion in which an attorney was barred from representing a criminal defendant while his partner was the prosecuting attorney,[53] left little doubt that the Committee viewed the dual representation as a conflict of interest.[54] Moreover, the Committee em-

concerned given after full disclosure of the fact. . . ." CANONS OF PROFESSIONAL ETHICS Canon 6 (1908).

49. Mich. Comm. on Professional Ethics, Op. 83 (1944), *reprinted in* 38 MICH. S.B.J. 109 (1959).

50. The Committee on Professional Ethics dealt only tangentially with these issues a year later when it was asked whether a relationship between a client and lawyer-legislator was improper when the attorney did not know that the client "will or may be interested or affected by the legislative action." The Committee stated that impropriety depended upon knowledge—either actual or implied—but that if the conflict does become apparent to the legislator at some subsequent time, the legislator must then sever the relationship. If, however, the relationship proceeds to the point where "he has become disqualified as a legislator," he must then not only remove himself from the vote, but also officially explain the reasons for his disqualification to his colleagues. The committee concluded that such disqualification should be rare, since the legislator should be "sufficiently circumspect so as ordinarily to avoid conflicts of interest." Mich. Comm. on Professional Ethics, Op. 87 (1945), *reprinted in* 38 MICH. S.B.J. 114 (1959).

51. ABA Comm. on Professional Ethics, Formal Op. 296 (1959).

52. *Id.* Ironically, Canon 6 was cited in the abstract of the opinion but was not referred to at all in the opinion.

53. ABA Comm. on Professional Ethics, Formal Op. 16 (1929).

54. In Opinion 306, the Committee characterized Opinion 296 as holding "in effect, that there was a necessary conflict of interest where a partner or associate of a law firm was in the

7-15

phasized that neither full disclosure before the legislative committee, nor the fact that the legislator would not share in the fee would change the result.

The obvious purpose of such a prohibition was to eliminate the likely possibility that the legislator's firm's advocacy of a private client's interest would affect her judgment of the public good. Because legislators are expected to make their decisions based upon their determination of the public good, receipt of funds by them or their partners for the purpose of influencing legislation is antithetical to that goal. The legislator's fiduciary duty to her private client inevitably conflicts with her fiduciary duty to the public.

Less than three years later, however, the Committee on Professional Ethics retreated from its previous opinion in the face of considerable criticism from the bar. The Committee concluded, by analogy to private practice, that the public could "consent" to such a conflict of interest through either constitutional or statutory provisions that "expressly or by necessary implication recognize the propriety of a lawyer appearing before legislative committees, or otherwise lobbying in the legislature."[55] The Committee found such consent in a Texas constitutional provision that had the obvious purpose of removing conflicts of interest, not of consenting to them: "A member who has a personal interest in any measure or bill, proposed or pending before the legislature, shall disclose the fact to the House of which he is a member, and shall not vote thereon."[56]

The Committee concluded that this provision amounted to public consent to allow lawyer-legislators' law firms to lobby the legislature as long as that legislator disclosed the conflict and declined to vote.[57] For

legislature, for another representative of the firm to appear before the legislature and sponsor or oppose legislation in the interest of one of the clients of the firm." ABA Comm. on Professional Ethics, Formal Op. 306 (1962).

Interestingly, the Committee went on to say that it had held, in the prior opinion, that "since the public was involved, consent to the dual representation could not be given, so as to meet the requirements of Canon 6 . . . ." While a committee of the State Bar of Michigan had so held expressly in 1944, *see supra* note 49, no mention of either the issue of consent or of Canon 6 were made in the ABA's prior opinion. *See supra* note 51.

55. We have been advised that in some states, particularly some of the smaller states, our ruling has had the effect of cutting down on the number of lawyers in the legislatures, and has deterred many able young lawyers employed by law firms from standing for positions in the legislature; and as requested by some members of the Bar from certain of these states, we have given consideration to *Opinion 296.*

ABA Comm. on Professional Ethics, Formal Op. 306 (1962) (emphasis in original).

56. *Id., (quoting* TEX. CONST. art. III, § 22).

57. While such provisions were probably never intended to apply to the situation we now have under discussion, such provisions are very broad and it seems to the Committee they might appropriately be considered as applicable to a legislator-lawyer

7-16

those states that did not have such constitutional provisions, the Committee offered a convenient escape by suggesting that an act of the legislature or legislative rule "substantially to the effect" of the Texas constitutional provision would provide the necessary consent.

In 1970, the ABA adopted the Model Code of Professional Responsibility, which, unlike the Canons of Professional Ethics, specifically addresses the responsibilities of attorneys as public officials. In its ethical considerations, the Code is sensitive to the dual role an attorney may play as advocate for a client and as a public official, or simply as a citizen seeking political reform. Thus, the Code admonishes attorneys that when they disclose representation of a client, they may advocate that client's position, even though they disagree with it. But when "the lawyer purports to act on behalf of the public, he should espouse only those changes which he conscientiously believes are in the public interest."[58] Similarly, a lawyer who is a public official, whether full or part time, is admonished not to engage in activities "in which his personal and professional interests are or foreseeably may be in conflict with his official duties."[59]

The Code's applicable disciplinary rule, however, is inconsistent with these admonitions. DR 8-101(A)(1) prohibits an attorney from using his public position to obtain "special advantages" for himself or for a client only "where he knows or it is obvious that such action is not in the public interest."[60] The implication is that if, in the lawyer-legislator's

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whose firm was employed by a client to lobby for or against certain legislation. As a member or associate of the law firm he has a 'personal and private interest' in the activities of the firm in behalf of the client. Accordingly, it is the opinion of the Committee that in states having a constitutional provision of this kind, the public in its basic law has consented to appearances by lawyers under such circumstances and has removed the question of conflict by providing that the legislator in question should disclose the interest and not vote upon the measure.

Id.

58. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-4 (1984).

59. *Id.* EC 8-8 (1987).

60. DR 8-101 reads in full:

(A) A lawyer who holds public office shall not:

(1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.

(3) Accept any thing of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-101 (1980). *See also id.* DR 9-101(C) (admonishing an attorney not to "state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official").

7-17

opinion, the client's interest is consistent with the public interest, no conflict is created. The problem with such an approach is that the existence of the private interest itself tends to corrupt the ability of the legislator to make an independent determination of the public interest. The rule invites self-serving justification on the legislator's part.[61] Even if the legislator consciously avoids the influence of his client's interest, such action creates the appearance of impropriety and leads to public distrust of the legislator's true motives.[62] In the eyes of colleagues and constituents, the legislator is compromised by the client's agenda. The result is a loss of confidence in both the legal profession and the legislature.

The rule also is inconsistent with virtually all conflict of interest rules and statutes regulating the conduct of public officials. Almost universally, a public official is prohibited or admonished from undertaking any official action that might benefit himself, or other private persons, whether or not such action might be deemed to be in the public interest.[63] The use of public office for private gain is *presumed* to be against the public interest.

The weakness of DR 8-101 was amply demonstrated in 1971 when the ABA's Committee on Ethics and Professional Responsibility was asked whether a lawyer-legislator could accept a retainer from a client, such as a bank, public utility, or labor union, that is likely to be affected by proposed legislation.[64] The Committee gave no definitive answer. The Committee concluded that the drafters of the Code did not intend for DR 8-101(A)(1) to be an absolute ban on the representation of all private clients who might be interested in legislation. "[S]uch a blanket proscription would make it a drastic measure, for there would be extremely few clients whom the lawyer-legislator could represent." The Committee therefore narrowed further the conditions for exclusion by construing "special advantage" as a "direct and peculiar advantage," and "not in the public interest" as legislation "clearly inimical to the best interests of the public as a whole."[65] Since the answer to the posed question would depend on specific facts, that were not enumerated, the Com-

61. *See* CITY BAR REPORT, *supra* note 15, at 108.

62. "[A]n attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests." ABA Comm. on Professional Ethics, Formal Op. 192 (1939).

63. *See, e.g.*, Exec. Order No. 11,222, 5 C.F.R. § 735.201a(a) (1989) (requiring federal employees to avoid any action that might result in "using public office for private gain"). The prohibition is not qualified by the possibility that such use of office might also be deemed to be in the public interest. *See also* statutes cited *infra* note 92.

64. ABA Comm. on Professional Ethics, Informal Op. 1182 (1971).

65. *Id.*

7-18

mittee chose not to advise the requesting attorney what he should do when legislation affecting his client is presented in the legislature. The Committee further noted that the Code does not regulate an attorney's conduct as legislator but leaves this to local law.[66]

The Committee also was asked whether it was appropriate for a lawyer-legislator to appear on behalf of a private client before an administrative agency when the members of the agency are appointed by the legislature. While acknowledging the admonition of DR 8-101(A)(2) that an attorney not use "his public position to influence . . . a tribunal to act in favor of himself or of a client," the Committee refused to condemn the practice because whether or not the attorney was influencing or attempting to influence the agency would be a question of fact.[67]

This conclusion ignores the inherent impropriety of allowing a legislator to be an advocate before those state employees whom he indirectly controls. The members of the agency who are required to act in the public good may be influenced in their decision making by the fact that the advocate before the agency is also a legislator with the power to reward or punish the agency for its individual decision.[68] This, at the very least, creates the appearance of impropriety. The public is led to believe that the decision by the agency may be shaped by the advocate's identity rather than by the substance of the parties' asserted positions.

Second, appearing before state agencies exacerbates the problem faced by lawyer-legislators because it makes the lawyer even more attractive to those clients who are interested in obtaining attorneys with influence. The clients who need representation before agencies are generally the same clients who are particularly interested in matters that are the subject of legislation. Moreover, the lawyer's role as advocate for clients

66. *Id.* The Committee failed to explain how this statement was to be reconciled with DR 8-101(A)(3) of the ABA Model Code of Professional Responsibility, which provides that a lawyer should not accept anything of value, given for the purpose of influencing the attorney's actions as a public official. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-101(A)(3) (1983).

67. Significantly, the Committee found that whatever restraints applied to the lawyer-legislator also applied to her law partners, although the committee noted that "the question is not completely free from doubt." ABA Comm. on Professional Ethics, Informal Op. 1182 (1971).

68. CAL. CONFLICTS OF INTEREST REPORT, *supra* note 36, at 17a, 17b, 18, 36, 40 (documenting instances of legislators' intimidation of agency personnel and concluding that legislators' representation of private clients before state agencies creates a conflict of interest); Stern, *supra* note 7, at 253-54; Note, *Conflicts of Interest of State Legislators,* 76 HARV. L. REV. 1209, 1220-21, 1227-30 (1963); Note, *Legislators as Private Attorneys: The Need For Legislative Reform,* 30 UCLA L. REV. 1052, 1053 (1983) (authored by Robert Reeves); Note, *Curbing Influence Peddling in Albany: The 1987 Ethics in Government Act,* 53 BROOKLYN L. REV. 1051, 1057-58 (1988) (authored by Patrick J. Dellay).

7-19

before state agencies could influence the legislator's approach to matters that come before the legislature. Finally, the lawyer-legislator's paid representation of clients interferes with that legislator's ability to represent *all* constituents before state agencies as part of his generally accepted duties as legislator.[69] A legislator who is retained by a major utility, for example cannot be expected to adequately represent the concerns of his consumer constituents over high utility rates or the environmental hazards of nuclear power plants in either his legislative activities or in his communications to the state public service commission. If, in deference to his private client, or in recognition of his conflict of interest, he refrains from voting on such issues, or from communicating with the commission, he has deprived his constituents of representation on matters of public concern.

Taking a firm stand where its economic impact on the profession is least significant, the ABA Committee unequivocally has held that a lawyer-legislator who voted for passage of legislation should not accept employment to contest the constitutionality of that legislation. Ironically, while such representation would be inconsistent, to some extent, with the attorney's public vote, it would create significantly less distrust of the motives of legislators than the representation the Committee refused to condemn.

The ABA's position provides little guidance to lawyer-legislators and, if anything, conveys an attitude of permissiveness rather than prohibition. Unfortunately, this position on the issue continued with the adoption of the new Model Rules of Professional Conduct, which has no express counterpart to DR 8-101(A)(1) and speaks of the relationship between lawyers and public officials in vague terms.[70]

Without strong leadership from the ABA, state bar associations have reacted to the lawyer-legislator conflict inconsistently. Some have relied on the ABA opinions to condone lobbying by a legislator's firm,[71]

69. CAL. CONFLICTS OF INTEREST REPORT, *supra* note 36, at 26.

70. *See* MODEL RULES OF PROFESSIONAL CONDUCT 8.4(e) (1983) ("It is professional misconduct for a lawyer to: . . . (e) state or imply an ability to influence improperly a government agency or official. . . ."); *see also id.* Rule 1.11 ("Successive Government and Private Employment," dealing primarily with government attorneys moving into private practice).

71. In Arizona, the state bar association, relying on ABA Formal Opinions 296 and 306, held that since Arizona did not have a constitutional provision like that of Texas, lawyer-legislators' firms should not lobby before the legislature. Ariz. Ethics Comm., Ops. 124 (1963), 170 (1965). The association, however, suggested a legislative rule that would provide such consent, *id.* Op. 170 (1965), and the rule was adopted. The bar association then allowed such representation. *Id.* Op. 71-7 (1971). Ultimately, however, the Committee concluded that disqualification of a lawyer-legislator's law firm from lobbying was an issue to be decided by the Bar, not the legislature. The Committee nonetheless permitted the lobbying, so long as the

7-20

while others have declined to follow the ABA and have prohibited the practice.[72] Decisions also are mixed with regard to practice before state agencies. Some bar committees have banned it expressly,[73] while others

lawyer-legislator forgoes any fees from the representation, abstains from voting, and the client is advised of the restrictions on the firms. *Id.* Op. 73-3 (1973). The Arizona state bar relied on a New Mexico opinion that held that a legislator's firm may lobby if the legislator does not participate in the matter, the client is advised of the restriction, and the legislator receives no portion of the fee. *See* N.M. Bd. of Bar Comm'rs, Op. 14 (1960), *reprinted in* 1 S.B.N.M.J. 12 (1961).

The Oregon State Bar went through similar contortions. In 1939, the Bar's Committee on Legal Ethics clearly found a conflict of interest for an attorney, once elected to the legislature, to pursue a client's interest by obtaining passage of a private bill. Or. Comm. on Legal Ethics, Op. 10 (1939). In 1966, however, the Committee, relying upon a typographical error in the first printing of the ABA's Formal Opinion 306, was willing to hold that a mere lobbying registration statute constituted "consent" by the public to the conflict. Because that error was quickly detected, the Oregon Bar's Board of Governors declined to adopt the opinion. *Id.* Op. 151 (1966), *reprinted in* 26 OR. S.B.B. 6 (1966). In March 1976, the Committee, relying upon ABA Formal Opinions 192, 296 and 306, and the new Canons of Professional Responsibility, held that lobbying by a lawyer-legislator's firm was a conflict of interest not excused by a statute that required a legislator to declare a potential conflict of interest prior to voting. The Committee believed that such a provision, which did not require disqualification, would hardly create "a necessary implication . . . that the public consent is given" to having a legislator or his firm consciously assume lobbying duties. Or. Comm. on Legal Ethics, Op. 318 (1976). Two years later, however, the Board of Governors effectively overruled that opinion by holding simply, and without discussion, that "there is no Ethical violation where there is compliance with [the statute]." *Id.* Op. 409 (1978).

Also relying on ABA Formal Opinion 306, the Delaware Bar Association's Committee on Professional Responsibility, while recognizing Michigan's strict position, opted to allow lobbying by a legislator, so long as the legislator does not vote on the question. Del. Comm. on Professional Responsibility, Op. 1982-5 (1982).

72. In Florida, the bar association followed ABA Formal Opinion 296 in 1960. Fla. Ethics Comm., Op. 59-31 (1960). In subsequent opinions, it declined to follow the ABA's liberalization in Formal Opinion 306, totally unpersuaded by its logic. Absent an express provision allowing lobbying by a legislator, lobbying by a legislator's firm was held to be improper, even if the legislator abstained or disclosed the reason for his abstention and did not share in any way in the fees earned. *Id.* Op. 67-5 (1967). *See also id.* Ops. 73-19 (1973), 76-5 (1977). For other ethics opinions prohibiting lawyer-legislators and their firms from lobbying *see, e.g.*, Me. Professional Ethics Comm., Op. 28 (1982); Miss. Ethics Comm., Op. 62 (1981) (lieutenant governor and his law firm prohibited from appearing before legislature and committees); N.H. Ethics Comm., Op. 5 (1981) (city legislator); N.Y. Comm. on Professional Ethics, Op. 415 (1975) (legislator's firm should not appear before legislative committees, except when specifically and expressly authorized by statute); Vt. Professional Responsibility Comm., Op. 83-5 (1983) (improper for lawyer to challenge law for which she voted); Va. Comm. on Legal Ethics, Op. 419 (1983) (improper for attorney to lobby legislature when his partner is a member of the legislature); *id.* Op. 537 (1984) (reaffirming the opinion rendered in No. 419, despite the passage of a comprehensive conflict of interest law); W.Va. Legal Ethics Comm., Op. 83-11 (1984) (legislators and their firms prohibited from appearing before Court of Claims which is an arm of the Legislature).

73. *See, e.g.*, Ill. Comm. on Professional Responsibility, Op. 175 (1959) (legislator may not appear when agency exercises discretion and when client's interest are adverse to those of the state); Mo. Ethics Comm., Op. 195 (1981) (legislator and members of firm prohibited from appearing before state agencies); La. Comm. on Professional Responsibility, Op. 127 (1975)

7-21

allow the practice but admonish legislators not to use their position to "unduly influence" state agencies.[74]

Beyond these obvious examples of conflict, few bar associations have directly addressed the inherent conflicts faced by lawyer-legislators raised in the 1944 Michigan opinion. Those that have, follow the position of the ABA, reasoning that because conflict is inevitable, legislators should abstain from voting only when legislation will have an effect that is direct and peculiar to the client, and is not shared by the general public.[75] As a result, there are few ethical constraints on lawyer-legislators' use of their public position to obtain benefits for their private clients.

(construing Canon 6 of the former Canons of Prof. Ethics, and holding that a lawyer-legislator who exercises indirect control over agencies, through appointment and budgetary review, may not appear before such agencies); N.J. Ethics Comm., Op. 250, *reprinted in* 96 N.J. L.J. 234 (1973) (when lawyer-legislator is a member of a professional corporation, no employees or shareholders of firm may appear before state agencies); N.Y. Comm. on Professional Ethics, Op. 415 (1975) (a legislator's firm may not appear before state agencies unless specifically and expressly authorized by statute); Wis. Standing Comm. on Professional Ethics, Op. E-76-2, *reprinted in* WIS. B. BULL. 55 (Supp. 1984) (legislator may not appear before any state agencies) (overruling Wis. Standing Comm. on Professional Ethics, Op. E-1973, *reprinted in* WIS. B. BULL. (Supp. 1974)).

74. Del. Comm. on Professional Responsibility, Op. 1982-5 (1985) (no absolute ban, but when legislator "has worked closely" with an agency or official, she must be "especially careful to avoid profiting personally from this relationship"); Mass. Ethics Comm., Op. 82-6 (1982) (legislator and member of firm may appear if they comply with MASS. GEN. L. ch. 268 A, § 4 (1989), which places limitations on appearance, and if they are careful to avoid attempt to influence agency by virtue of their position); Vt. Professional Responsibility Comm., Op. 76-12 (1976), *reprinted in* 2 VT. B. J. 19 (1977) (no per se ban, but legislator must be careful not to use position to influence tribunal; however, firm would be disqualified whenever legislator would be disqualified).

75. The Delaware Bar Association, following the ABA's Informal Opinion 1182, concluded that because most legislation would affect a lawyer-legislator's clients, no absolute ban on supporting legislation favorable to a client would be practical. "A lawyer should not be restricted in the support of a bill of general interest to the public, even if the bill also happens to affect the interests of a client." Del. Comm. on Professional Responsibility, Op. 1982-5 (1982). Rather, the legislator is only prohibited from obtaining a "direct and peculiar" advantage for a client. The committee did not provide any further guidance. A similar conclusion was reached by the Maine Bar, Me. Professional Ethics Comm., Op. 28 (1982) (legislator and firm may retain clients who are likely to be affected by legislation, unless compensation is offered for purpose of influencing the legislator's official conduct); and the Maryland Bar, Md. Professional Ethics Comm., Informal Op. 78-33 (1978) (lawyer-legislator disqualified from voting on matter only when "his or her clients are directly affected personally or pecuniarily").

The Florida Bar, for a time at least, took a stricter view. In 1973, the ethics committee held that a lawyer-legislator who had previously represented public bodies created by special acts of the legislature could no longer represent them, since to do so would create a conflict between his duties to the public and his duties to his clients. Fla. Ethics Comm., Op. 73-19 (1973). In 1976, however, the ethics committee softened its position and allowed a lawyer-legislator's partner to represent a municipality, so long as the legislator abstained from voting on matters affecting the municipality and disclosed the relationship to all concerned. *Id.* Op. 76-5 (1976). The committee relied in part on a Florida Commission on Ethics opinion inter-

9-22

B. The Response of the State Legislatures

Although state legislatures have addressed some conflict of interest problems, the measures are not enough. Provisions to prohibit conflicts are either construed too broadly to be effective or are generally not enforced. The states rely primarily on legislative disclosure, but this reliance is misplaced.

Some state legislatures have enacted a variety of provisions to deal with the more obvious conflicts faced by lawyer-legislators. Several states, going beyond the ABA's tentative position, have expressly banned legislators and, in some cases, their law firms from representing clients before some or all administrative agencies.[76] These limitations, however,

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preting the State's Code of Ethics, and on ABA Informal Opinion 1182. Agreeing with that opinion, the committee concluded that the Code of Professional Responsibility does not create a blanket ban on dual employment by lawyer-legislators. The committee expressly distinguished and reaffirmed, however, its position disapproving lobbying by a legislator's law firm.

Similarly, the Nebraska State Bar Association, relying upon ABA Formal Opinions 296, 306, and Informal Opinion 1182, held that lawyer-legislators may engage in the practice of law so long as they do not use their official position for special advantage of their clients. The Bar's Advisory Committee emphasized that Nebraska had the lowest number of attorneys of any state legislature and that "any unrealistic or inappropriate extension of restrictions or disabilities further depleting representation in legislative areas of government would be inconsistent with the public interest." Neb. Bar Advisory Comm., Op. 75-12 (1975). Actually, Delaware has the least number of attorneys in its legislature: none. *See* M. JEWELL, *supra* note 4.

76. *See, e.g.*, FLA. CONST. art II, § 8(e) (West 1989) (legislator prohibited from appearing before any state agency); ALA. CODE § 36-25-10 (1977) (legislator or her law firm must disclose representation before agency to state ethics commission; complete ban on appearance for a fee by legislator (but not her firm) before public service commission or state board of adjustment) (*see* Ala. Ethics Comm., Advisory Op. 935 (1985)); CAL. GOV'T CODE § 8920(3) (West Supp. 1989) (legislator disqualified from appearing before most state agencies for a fee; law firm not disqualified if legislator receives no compensation from representation); CONN. GEN. STAT. ANN. § 1-84(d) (West 1988) (legislator and law firm disqualified from appearing before most state agencies for a fee) (*see* Conn. State Ethics Comm. Advisory Op. 80-19 (1980)); D.C. CODE ANN. § 1-1461(h) (1987) (legislators may not appear before any district agency); HAW. REV. STAT. § 84-14(c) (1985) (legislator disqualified from appearing before state agency for a contingent fee only. The Hawaii State Ethics Commission, while acknowledging the statute's express ban on only contingent fee representation before state agencies, consistently has opined that any representation for a fee could amount to a legislator's use of position for undue influence and urged legislators to voluntarily refrain from such representation. *See* Haw. Ethics Comm'n, Ops. 26, 27, 28 (1969), 70 (1970), 173, 174 (1973), 485, 505 (1983)); ILL. REV. STAT. ch. 127, para. 602-104 (1981) (legislator barred from appearances before Court of Claims or Industrial Commission, but members of firm not barred unless association with the legislator is used to "influence or attempt to influence" the agency); *id.* para. 602-105 (legislator may not appear before state agency when there is reason to believe that case has been offered with intent to obtain improper influence over state agency); *id.* para. 602-106 (legislator shall not use improper means to influence state agency); *id.* para. 602-205 (legislator, when feasible, should arrange for other persons to make appearances before state agencies); IOWA CODE ANN. § 68 B.6 (West 1973) (legislator may not appear for compensation by himself or through another before any agency or court "against the interest of the state"); KAN. STAT. ANN. § 46-240 (1986) (representation by contingent fee prohibited); *id.* § 46-239 (disclosure of all cases re-

7-23

are often ineffective. In some states, the most significant agencies are exempt from application of the rule. In Illinois, for example, only appearances before the Court of Claims and the Industrial Commission are banned.[77] In Texas, a legislator may appear before a state agency in any proceeding that is adversarial, a matter of public record, or ministerial.[78] Similar rules apply in Wisconsin.[79] Moreover, the ban generally does not apply to the legislator's law firm. In only two states, Connecticut and New Jersey,[80] does the ban extend to the legislator's law firm, while New York and California allow other attorneys in the firm to appear so long as the legislator receives no compensation from the client.[81] Thus, in most states the legislator may still peddle his influence to private clients

quired); *id.* § 46-242 (representation offered with intent to obtain "improper influence" and where case is obviously without merit, prohibited; legislator shall not use threat or promise of official action in an attempt to influence an agency); KY. REV. STAT. ANN. § 6.795 (Michie/Bobbs-Merrill 1983) (legislator may not appear before agency for contingent fee; nor may legislator use public position in improper attempt to influence agency); ME. REV. STAT. ANN. tit. 1, § 1014(2)(A) (1989) (legislator may not refer to status as legislator or use threats implicating legislative action when appearing before agencies); MASS. GEN. LAWS ANN. ch. 268A, § 4 (West 1989) (legislator may not personally appear before state agencies; disqualification does not apply to quasi-judicial proceedings); NEV. REV. STAT. ANN. § 281.491(2) (Michie 1986) (legislator may appear before state agencies if "less than half of his time" is public service and only before agency he does not serve); N.J. STAT. ANN. § 52:13D-16(b), (c) (West Supp. 1989) (legislators and their firms prohibited from appearing for a fee before most state agencies), (*see* N.J. Leg. Code of Ethics 2:2 (c) (same)); N.Y. PUB. OFF. LAW § 73(2), (7), (10) (McKinney 1988) (legislator may not appear, for compensation, before agencies on most matters; contingent fee prohibited for all appearances; law firm of legislator not barred if legislator does not share in fee); OHIO REV. CODE ANN. § 102.04(A) (Anderson 1984) (legislator may not receive compensation for any service rendered in a matter before any agency); OKLA. STAT. ANN. tit. 74, § 4246(h) (West 1987) (legislator may not receive compensation for representing private entity before any state agency); S.C. CODE ANN. § 8-13-470 (Law. Co-op. 1986) (legislators and firms barred from appearing before three enumerated agencies on rate or price-fixing matters); TEX. REV. CIV. STAT. ANN. art. 6252-9b, § 7(a)(1) (Vernon Supp. 1989) (legislator may not appear before agencies *unless* the proceeding is adversarial, a matter of public record, or ministerial); WIS. STAT. ANN. § 19.45(7) (West 1986) (legislator may not appear before agencies for a fee, except (1) in a contested matter against another private party; (2) in an open hearing with stenographic record; (3) in a ministerial matter; or (4) in a tax matter. In contested cases, legislator may not phone, visit or write to agency and may only appear at the open hearing); WASH. CODE OF LEG. ETHICS Rule 1(a)(6), (b)(1), (2) (1987) (appearances before agencies by contingent fee prohibited; legislator shall not appear for a fee in matters involving claims of state employees; legislator shall not use "improper means" to influence a state agency).

77. ILL. REV. STAT. ch. 127, para. 602-104 (1981).

78. TEX. REV. CIV. STAT. ANN. art. 6252-96, § 57 (Vernon 1989).

79. WIS. STAT. ANN. § 19.45(7) (West 1986).

80. CONN. GEN. STAT. ANN. § 1-84(d) (West 1988); N.J. STAT. ANN. § 52:13D-16(b), (c) (West Supp. 1989).

81. CAL. GOV'T CODE § 8920(3) (West Supp. 1989); N.Y. PUB. OFF. LAW § 73(2), (7), (10) (McKinney 1988).

D-24

and indirectly intimidate the state agency.[82] In most states, uncompensated legislators can still appear. As one critic noted, however, the legislator may still exert undue influence[83] and indirectly be compensated by higher fees for other services.[84] Other states have required only disclosure of paid representation to appear before state agencies.[85]

A number of states have also banned legislators and their firms from legislative lobbying.[86] Some have also banned former legislators from

82. [A]n administrative official who knows that an attorney appearing before the agency is a partner or associate of a powerful legislator may feel the weight of [the] legislator behind the attorney's cause no matter how carefully the legislator disassociates himself or herself from the matter. Of course, the problem is most acute when the legislator's name appears on the firm's letterhead or pleadings, or when the legislator's name is invoked by the attorney.

CAL. CONFLICTS OF INTEREST REPORT, *supra* note 36, at 29. *See also* N.Y. COMM. ON GOV'T INTEGRITY, ETHICS IN GOVERNMENT ACT: REPORT AND RECOMMENDATIONS 32 (Comm. Print 1988) [hereinafter NEW YORK ETHICS REPORT] (Comm'r Emery, dissenting) ("The impropriety, or appearance of impropriety, which occurs when a public official or employee appears before a state or local agency on behalf of a private client is no less when the partner of the public official or employee does so.").

83. NEW YORK ETHICS REPORT, *supra* note 82, at 17.

84. *See* Note, *Legislators as Private Attorneys: The Need for Legislative Reform*, *supra* note 68, at 1061-71 (criticizing California's statute on appearance before agencies as containing too many loopholes, such as allowing appearances without compensation).

85. *See, e.g.*, ALASKA STAT. § 24.60.100 (1988) (very limited disclosure requirement; disclosure required for appearance before a state agency, board or commission); IND. CODE ANN. § 2-2.1-3-2(10) (Burns 1988) (appearances for a fee subject to mandatory but minimal disclosure requirement); LA. REV. STAT. ANN. § 42:1111(E)(2) (West 1989) (assistance of an elected official in dealings with a governmental entity, official, or agency must be disclosed); MD. ANN. CODE art. 40A, § 3-102(f)(1) (1986) (very limited disclosure requirement; does not apply in judicial or quasi-judicial proceedings); MINN. STAT. ANN. § 10A.08 (West 1988) (disclosure required for appearance before agencies with rulemaking power); 46 PA. CONS. STAT. § 143.5 (d), (e)(7) (Purdon 1969) (appearances for a fee must be disclosed, except that appearances by a lawyer-legislator before an agency whose actions are subject to judicial review or whose action is routine, need not disclose); VA. CODE ANN. § 2.1-639.41 (1987) (appearances for a fee in excess of $1,000 by legislator or firm must be disclosed).

86. *See, e.g.*, FLA. CONST. art. II, § 8(e) (West Supp. 1989) (legislator may not lobby before the legislature); ALASKA STAT. § 39.50.090 (1988) (public official may not accept money for legislative advice or assistance); CAL. GOV'T CODE § 8920(b)(4) (West 1989) (member of legislature shall not receive any compensation for any service relating to legislative process); CONN. GEN. STAT. ANN. §§ 1-102, 2-16 (West 1988) (state employee may not lobby the General Assembly) (*see* Conn. State Ethics Comm. Advisory Op. 80-19 (1988) (former state employee and his law firm banned from lobbying)); HAW. REV. STAT. § 84-14(d) (1985) (legislator may not represent client for a fee to secure passage of a bill); ILL. ANN. STAT. ch. 127, para. 602-101 (Smith-Hurd 1981) (legislator may not engage in lobbying); KAN. STAT. ANN. § 46-232 (1986) (legislator may not lobby for compensation); KY. REV. STAT. ANN. § 6.785 (Michie/Bobbs-Merrill 1985) (legislator may not lobby for compensation; if those having "close economic association" with legislator lobby, full disclosure must be made); ME. REV. STAT. ANN. tit. 1, § 1014(1)(D) (1989) (legislator may not lobby for compensation); MD. ANN. CODE art. 40A, § 3-102(b)(3) (1986) (legislator accepting payment from persons affected by legislator's vote is disqualified from voting or attempting to influence legislation); MISS.

7-25

lobbying.[87] New York has used the expedient of allowing the legislator's firm to lobby the legislature, so long as the legislator does not share in the fee from such lobbying.[88] This economic Chinese wall is totally ineffective, however, in screening the legislator because economic benefit to the firm can be transferred to the legislator in a number of indirect ways.[89] Recognizing that both the organized bar and the state's disciplinary committees might look askance upon such a device, the New York legislature immunized its members' firms from any professional discipline for engaging in such lobbying.[90]

Outside of these efforts to curtail lawyer-legislators' appearances before state agencies and lobbying by them and their firms, few states have tackled the inherent conflict between the goals of lawyer-legislators' private clients and the public interest. Most states have dealt with conflicts of interest generally by: urging legislators not to accept outside employment or an economic opportunity that is designed to influence that legislator's vote;[91] requiring legislators either to abstain from voting

CODE ANN. § 25-4-105(d) (1988) (public official may not receive fee for attempting to influence a decision of the entity of which the official is a member); OHIO REV. CODE ANN. § 102.04(A) (Anderson 1984) (public official may not receive compensation in a matter before legislature or agency); 46 PA. CONS. STAT. ANN. § 143.5(a) (Purdon 1969) (legislator shall not receive anything of value for advocating passage or defeat of legislature); R.I. GEN. LAWS § 36-14-5(e)(2)(f) (Supp. 1988) (public official may not represent any party, of which the official is a member or an employee, before a legislative agency; "business associate" may represent such a party only if disclosure is made and official abstains from participation); TEX. REV. CIV. STAT. ANN. art. 6252-9b, § 8(c) (Vernon 1989) (section that urges legislators not to accept employment that could reasonably impair independence of judgment construed to prohibit legislator's lobbying before the body of which he is a member. Op. Tex. Att'y Gen. No. H-688 (1975), *cited in* Tex. State Ethics Advisory Comm'n, Op. 1984-1 (1984)); Fla. H.R. Op. 27 (1974) (legislator may not associate in a law firm with a lobbyist).

87. *See, e.g.*, FLA. CONST. art. II, § 8(e) (West 1989) (two year ban); ALA. CODE §§ 36-25-13, 36-25-23 (1977) (three-year ban); MASS. GEN. LAWS ANN. ch. 268A, § 5(e) (West Supp. 1989) (one year ban on lobbying by legislator or partners; however, partners may lobby if they form a separate firm in which legislator has no financial interest); N.Y. PUB. OFF. LAW § 73(8) (McKinney 1988) (two year ban on lobbying by former legislator); R.I. GEN. LAWS § 36-14-5(4) (1988) (general one year ban on legislator).

88. N.Y. PUB. OFF. LAW § 73(11)(c) (McKinney 1988).

89. "[N]o sanctity is given to the arrangement if the legislator does not participate in the fees received for the lobbying services. Such arrangements are simply too subject to abuse by virtue of the flexibility inherent in other financial dealings between partners." Fla. Ethics Op. 67-5 (1967).

90. N.Y. PUB. OFF. LAW § 73(11)(c) (McKinney 1988).

91. *See, e.g.*, CAL. GOV'T CODE § 8920(a), (b)(1) (West Supp. 1989); CONN. GEN. STAT. ANN. § 1-84(b) (West 1988); FLA. STAT. ANN. § 112.313(7) (West 1982); ILL. ANN. STAT. ch. 127, para. 603-201, 301, 302 (Smith-Hurd 1981); KY. REV. STAT. ANN. § 6.780(1) (Michie/Bobbs-Merrill 1985); ME. REV. STAT. ANN. tit. 1, § 1014(1)(E) (1989); MD. ANN. CODE art. 40A, § 3-103(a)(1)(ii) (Supp. 1988); MASS. GEN. LAWS ANN. ch. 268A, § 23(b)(1) (West Supp. 1989); N.J. STAT. ANN. § 52: 13D-14 (1986); N.Y. PUB. OFF. LAW § 74(3)(a) (McKinney 1988); N.C. GEN. STAT. § 120.86(a) (1988); OKLA. STAT. ANN. tit. 74, § 4246(g) (West

7-26

when they stand to gain direct economic advantage, or to disclose their conflict;[92] or prohibiting public officers generally from using their posi-

1987); R.I. GEN. LAWS § 36-14-5(b) (1988); TEX. REV. CIV. STAT. ANN. art. 6252-9b, § 8(c) (Vernon Supp. 1989); UTAH CODE ANN. § 67-16-4(4) (1986); VA. CODE ANN. § 2.1639.33(5), (6) (1987); N.J. LEG. CODE OF ETHICS § 2:1 (1983); UTAH JOINT LEG. RULES 16.03(1).

92. *See, e.g.*, OKLA. CONST. art. IV, § 24 (West 1981) (legislator who has "personal or private interest" in measure shall so disclose and abstain); TEX. CONST. art. III, § 22 (legislator who has "personal or private interest" in measure shall so disclose and abstain); ALASKA STAT. § 24.60.110 (1988) (legislator must at least disclose conflict in the legislative journal); CAL. GOV'T CODE § 87100 (West 1987) (public official shall not participate in making a governmental decision where he has a financial interest); CONN. GEN. STAT. ANN. § 1-86 (West 1988) (legislator who has conflict shall be excused from voting or shall prepare a statement of conflict and explanation as to why he may rule objectively despite the conflict); D.C. CODE ANN. § 1-1461(g) (1987) (legislator shall prepare statement of personal interest and may request to be excused from the deliberations); FLA. STAT. ANN. § 112.3143(2)(a) (West Supp. 1989) (legislator shall disclose "special private gain or the special gain of any principal by whom he is retained" before voting; legislator never prohibited from voting); ILL. ANN. STAT. ch. 127, para. 603-202 (Smith-Hurd 1981) (legislator should eliminate interest causing conflict; if not feasible, should "consider" abstaining); KY. REV. STAT. ANN. § 6.760(1) (Michie/Bobbs-Merrill 1985) (legislator shall disqualify himself when he has a "personal or private interest"; legislator may participate in debate, however); LA. REV. STAT. ANN. § 42:1120 (West Supp. 1989) (legislator shall recuse himself when there is personal substantial economic interest, or may vote upon filing of statement explaining the conflict and why such conflict would not affect his vote); ME. REV. STAT. ANN. tit. 1, § 1014(A) (1989) (legislator must abstain from voting and not act to influence vote when he, or those in "close economic association," including clients, have a "direct financial interest" in an enterprise affected by the vote); MD. ANN. CODE art. 40A, §§ 3-101(a), 3-102(a), (b) (1986); MASS. GEN. LAWS ANN. ch. 268A, § 6 (West Supp. 1989); MINN. STAT. ANN. § -10A.07 (West 1988) (legislator shall disclose any benefit to himself, family or associated business, not generally shared by public; no prohibition on voting, unless bill creates an actual, as opposed to potential conflict); MONT. CODE ANN. § 2-2-112 (1987) (when legislator has conflict created by personal or financial interest, should consider disclosing or eliminating conflict, or abstaining); NEB. REV. STAT. § 49-14, 101(3) (1988); NEV. REV. STAT. ANN. § 281.481(3) (Michie 1986) (legislator shall disclose financial interest); *id.* § 281.501(1) (legislator may not vote, but may otherwise participate when private interest or "commitment in a private capacity to the interests of others" materially affects a reasonable person's independence of judgment); N.J. STAT. ANN. § 52:13D-18 (West 1986) (legislator must disclose personal interest before voting, may vote if legislator believes he can cast "fair and objective vote"), N.C. GEN. STAT. § 120-88 (1988) (legislator shall be asked to be excused if legislator has actual economic interest that would impair judgment); OKLA. STAT. ANN. tit. 74, § 4246(a) (West 1987) (legislator shall not promote "special interest" legislation on his own behalf or on behalf of any other person or entity which affects the legislator); OR. REV. STAT. § 244.120 (1986) (legislator shall disclose potential conflicts of interest prior to voting); R.I. GEN. LAWS § 36-14-6 (Supp. 1988) (legislator must file written statement of potential conflict with either commission and legislature, and if choosing to vote, explain why the legislator may do so objectively); S.C. CODE ANN. § 8-13-460(b) (Law. Co-op. 1986) (legislator must deliver statement of direct personal financial interest in any measure to the presiding officer and may ask to be excused from acting thereon); Utah Joint Leg. Rule 16.03 (7) (legislation shall disclose "personal or pecuniary interest" in legislation, presumed to conflict where there is direct monetary gain or loss); VA. CODE ANN. § 2.1-639.38 (1987) (legislator who has personal interest, or who represents one who may obtain direct or indirect benefit shall abstain; legislator may participate in debate, however, if interest is disclosed); WIS. STAT. ANN. § 19.46(1)(a) (West 1986) (public officials shall not take

7-27

tion to gain special privileges or financial advantage for themselves or those with whom they have a financial relationship.[93]

Broadly construed, these provisions effectively would eliminate conflict problems. Legislators would be prohibited from voting on measures resulting in significant benefit to their clients. They also would be banned from representing, as an attorney, any client interested in legislation pending before the legislative body. But such a broad construction generally has been rejected. Because of the possibility that virtually every piece of legislation will "affect" a lawyer-legislator's client, the conflict of interest statutes have been narrowly construed to prohibit a legislator from voting only when his client's interest is directly and peculiarly affected.[94] Such narrow construction has not placed any substantial limitations on lawyer-legislators.

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any official action in which official, his family, or organization with which he is associated has a substantial financial interest); Ind. House Code of Ethics (no legislator shall participate in any vote that might directly result in substantial increase of nonlegislative income of legislator); N.D.H.R. & Senate rules 318 and 319 (if legislator has "personal and private interest" in any measure, that must be disclosed and whole body must then determine whether to allow the member to vote; "The general practice in the Chamber is to permit the member to vote on the question." Letter from Jay E. Buringrud, Asst. Director, N.D. Leg. Council to author, (Oct. 21, 1987) (copy on file at *The Hastings Law Journal*)); N.J. LEG. CODE OF ETHICS § 2:9 (1983); Ohio H.R. § 4, Senate Code of Ethics (member who has personal interest may obtain permission to abstain); WASH. CODE OF LEG. ETHICS Rule 1(a)(1) (1987) (legislator who has personal interest—*i.e.*, direct monetary gain or loss—shall not vote or influence legislator in committee).

93. *See, e.g.*, ARK. STAT. ANN. § 21-8-304(a) (1984); CAL. GOV'T CODE §§ 8920(b)(5), 87100 (West 1987 & Supp. 1989); D.C. CODE ANN. § 1-1461(b) (1987); FLA. STAT. ANN. § 112.313(6) (West 1987); HAW. REV. STAT. § 84-13 (1985); KY. REV. STAT. ANN. § 6.760-775 (Michie/Bobbs-Merrill 1985); MASS. GEN. LAWS ANN. ch. 268A, § 23(b)(2) (West 1989); MISS. CODE ANN. § 25-4-105(1) (1988); MO. ANN. STAT. § 105.452(2) (Vernon Supp. 1989); NEB. REV. STAT. § 49-14, 101 (3) (1988); NEV. REV. STAT. ANN. § 281.481(2) (Michie 1986); N.J. STAT. ANN. § 52:13D-23(E)(3), (f) (West 1986); N.Y. PUB. OFF. LAW § 74(3)(d) (McKinney 1988); OKLA. STAT. ANN. tit. 74, § 4246(c) (West 1987); OR. REV. STAT. § 244.040(1) (1986); 65 PA. CONS. STAT. ANN. § 403(a) (Purdon Supp. 1989); R.I. GEN. LAWS § 36-14-5(d) (1988); S.C. CODE ANN. § 8-13-410(1) (Law. Co-op. 1986); UTAH CODE ANN. § 67-16-4(3) (1986); WIS. STAT. ANN. §§ 19.45(2)(5), 19.46(1)(b) (West 1986); Utah Joint Leg. Rules 16.03(6).

94. *See, e.g.*, Fla. H. Comm. on Ethics, Ops. 80-7 (1980), 77-129 (1977) (lawyer-legislators may vote on and handle in committee legislation benefiting their clients, so long as clients are benefited as a class); Mass. Ethics Comm., Conflict Op. 81-81 (1981) (lawyer-legislator may vote on general legislation even if it affects private client. Legislator must, however, disclose interest); Neb. Accountability and Disclosure Comm., Advisory Op. 79 (1985) (lawyer-legislator may propose statute to legalize activity which a client wishes to engage in; no actual or potential conflict when only client stands to benefit); Pa. Ethics Comm., Order No. 27 (1981) (legislator may vote on bills appropriating funds to governmental agencies that he represents as solicitor, since legislator would not provide agencies with any "unusual benefits"). *Cf.* Wash. H. Bd. of Leg., Ethics Advisory Op. 1986, No. 2 (1987) (lawyer-legislator may not support legislation that would resolve on-going litigation in which the legislator represents one

7-28

In Alabama, for example, an advisory ethics opinion broadly applied a provision prohibiting use of one's position for special advantage to prohibit voting on a measure affecting clients such as utility companies.[95] The legislature then promptly amended the provision's definition of a "business with which [a legislator] is associated" to exclude any business that is a client.[96] Subsequently, the Alabama Ethics Commission approved of a lawyer-legislator supporting and voting for a bill that would affect directly and solely the lawyer-legislator's client, because, under the amended law, the client was not a business with which the legislator was associated.[97]

In California, a similar provision has been construed to prohibit a legislator from voting on any matter affecting clients of the legislator or his firm if the client is the source of 200 dollars or more in fees, but only if the client would obtain an identifiable, direct financial benefit not shared by a group or business[98].

The Hawaii State Ethics Commission faced an inquiry from lawyer-legislators holding key legislative posts who asked whether they could represent "substantial corporations" engaged in real estate development that clearly would be affected by state legislation. The Commission recognized the potential for conflict of interest, but chose only to suggest that any action these legislators take on bills of importance to their clients "may constitute" a use of official position to obtain "unwarranted treatment for themselves or others."[99] In situations when the legislation was of "special interest" to clients, the Commission recommended recusal by the legislator and disclosure of the interest.[100]

A significant flaw of such general conflict of interest provisions is that they leave the recusal decision to the legislator. The legislator has discretion to decide the matters on which he cannot exercise his judgment impartially. The problem with this approach is that it is self-policing and depends upon the judgment calls and ethical constraints of each

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of the parties; such legislation, although affecting garnishment procedures generally, would result in "direct monetary gain" to the legislator). See also *supra* note 16, for conflict of interest laws that exempt from conflict of interest regulation those private interests which are shared by a group, class, or profession.

95. *See* Ala. Ethics Comm., Advisory Op. 127 (1975) (construing ALA. CODE § 36-25-5 (1975)).

96. 1975 Ala. Acts 130 § 1 (codified as ALA. CODE § 36-25-5 (1975)).

97. Ala. Ethics Comm., Advisory Op. 372 (1979).

98. Letter to Hon. Larry Stirling from Cal. Fair Political Practices Comm. (April 9, 1987) (construing CAL. GOV'T CODE §§ 87100, 87103 (West 1987); CAL. ADMIN. CODE tit. 2 §§ 18702.1, 18702.2, 18703(a) (1988)) (copy on file at *The Hastings Law Journal*).

99. Haw. Ethics Comm., Ops. 26, 27, 28 (1969).

100. *Id.* Ops. 97, 105 (1971), 130 (1972), 170 (1973).

legislator.[101] With no firm rules, the legislator may be tempted to rationalize her conduct based on the frequency of such conflicted representation. Moreover, such a self-policing rule makes saying no to client influence difficult for even conscientious legislators because no bright line defense to the client's importunings exists. Such rules state the obvious and do little to provide guidance or to set community standards in a particular legislative body.[102]

Recusal also deprives a representative's constituents of representation in the legislature. When a judge recuses himself, the litigants are provided with a new judge, presumably of equal qualification. When an attorney withdraws from representing a client, the client generally can obtain new counsel, even though he might prefer his original counsel. But when a representative withdraws there is no one in the legislature to fill the empty seat. The constituents are deprived of both an advocate to press their case, and a judge to use her considered judgment to determine what is in the constituents' best interests.[103]

Finally, recusal may not avoid the conflict. A legislator may remove himself from the debate, but may exercise considerable influence behind the scenes. The fact that fellow legislators know that a particular legislator supports or opposes legislation is often more important than the legislator's vote. Moreover, the failure to vote itself may be significant; by not voting that legislator may deprive the house of the necessary votes to pass the measure.[104]

Most states have been satisfied with the indirect remedy of extensive disclosure.[105] Rules generally require legislators to reveal their assets

101. The Association of the Bar of the City of New York reported in 1970 that United States House of Representatives Rule VIII, and § 376 of JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE, which required members of Congress to disqualify themselves when they had an economic interest in the outcome of legislation, were dead letters that had almost never been used. CITY BAR REPORT, *supra* note 15, at 71-72.

102. One of the arguments in favor of a Code of Ethics for Congress, made in the 1950s by Representative Charles Bennett of Florida, was that the Code would provide protection to members of Congress who were importuned to exert influence on behalf of private interests. R. GETZ, CONGRESSIONAL ETHICS 26-30 (1966).

103. "If the lawyer-legislator refrained from voting, he would thereby deprive the people of his legislative district from their right to be represented upon such legislation by the action of their own legislator." Mich. Comm. on Professional Ethics, Op. 83 (1944); "[I]t seems that intentional disqualification of a legislator under most circumstances is a positive disservice to his constituents. Fla. Ethics Op. 67-5 (1967). *See also* CITY BAR REPORT, *supra* note 15, at 39.

104. Bigelow, *Ethics in Government: A Look at the Issues,* in ETHICS IN GOVERNMENT: SELECTED STATUTES AND REPORTS I-7 (P. Bigelow ed. 1973).

105. ALA. CODE § 36-25-14 (Supp. 1988); ALASKA STAT. §§ 39.50.050, 120 (1987); ARK. STAT. ANN. §§ 21-8-304, -308 (1987); CAL. GOV'T CODE §§ 87200-87210 (West 1987); COLO. REV. STAT. §§ 24-6-201, 202 (1988); CONN. GEN. STAT. ANN. § 1-83 (West 1988); D.C.

7-30

and sources of income in considerable detail. These requirements, like the provisions allowing a legislator to disclose a specific conflict and then to vote, are based on the notion that, in a democracy, the people should decide whether the actions of the legislator are appropriate. The people will pass judgment on election day.[106] There are three problems, however, with this approach.

First, many of the disclosure laws have limited utility. They only require legislators to reveal, in general terms, their source of income and their property holdings. They generally do not require disclosure of information regarding the identity of the attorney's clients.[107] While disclosure of client names may be considered to be too much of an invasion

CODE ANN. § 1-1462 (1981); FLA. STAT. ANN. § 112.3145(3) (West Supp. 1989); HAW. REV. STAT. § 84-17 (1985); ILL. REV. STAT. ch. 127, para. 604A-101, 102 (1981 & Supp. 1989); IND. CODE ANN. § 2-2.1-3-2 (Burns 1988); KAN. STAT. ANN. §§ 46-229, -247, -248 (1986); KY. REV. STAT. ANN. §§ 61.710, .740 (Michie/Bobbs-Merrill 1986); ME. REV. STAT. ANN. tit. 1, §§ 1016, 1017 (1989); MD. ANN. CODE art. 40A, § 4-101 (1986); MINN. STAT. ANN. § 10A.09 (West 1988); NEB. REV. STAT. §§ 49-1493, -1496 (1988) (the names of clients of a partnership or professional corporation expressly are excluded from disclosure); NEV. REV. STAT. ANN. §§ 281.561, .571 (1986) (names of clients expressly excluded from disclosure); N.J. STAT. ANN. § 19:44B-2 (West Supp. 1989) (names of clients who pay in excess of $10,000 per year or 5% of firms income must be disclosed; *see* N.J. Election L. Enforcement Comm. rules 19.25-19.3); N.Y. PUB. OFF. LAW § 73-a (McKinney 1988) (clients need not be disclosed; "principal subject areas" of practice must be disclosed); N.C. GEN. STAT. §§ 120-95, -96 (1988) (names of clients specifically excluded); N.D. CENT. CODE §§ 16.1-09-02, -03 (1981); OHIO REV. CODE ANN. § 102.02; (Anderson 1988) (names of attorneys' clients expressly excluded from disclosure); OR. REV. STAT. §§ 244.050, .060, .070 (1986) (when a client of a legislator has a "legislative interest", the legislator must reveal that client's name if the fee paid was in excess of $1,000, unless disclosure of the client's name is prohibited by a professional code of ethics); 65 PA. CONST. STAT. ANN. §§ 404, 405 (Purdon Supp. 1989) (disclosure of source of income not required where such information is confidential pursuant to professional code of ethics § 405(b)(5)); R.I. GEN. LAWS §§ 36-14-16, -17, -18 (Supp. 1988); S.C. CODE ANN. §§ 8-13-810, 820 (Law. Co-op. 1986); TENN. CODE ANN. §§ 8-50-501, -502 (1988) (sources of income need not be specifically identified by name or amount); TEX. REV. CIV. STAT. ANN. art. 6252-9b, §§ (3), (4) (Vernon Supp. 1989); VA. CODE ANN. §§ 2.639.40, .41 (1987); WASH. REV. CODE ANN. §§ 42.17.240, .241 (Supp. 1989); WIS. STAT. ANN. §§ 19.43, .44 (West 1986) (individual payers need not be disclosed if official describes general value of official's private business).

106. This sentiment was expressed forcefully by the Florida House of Representatives' Committee on Ethics. Fla. Ethics Comm., Op. 12 (1969), *reprinted in* HOUSE JOURNAL, at 11-15. The Committee first noted that all legislators have economic and noneconomic interests that influence their vote. Lawyers, especially, have numerous conflicts because they "represent so many economic interests." The Committee then emphasized that disqualification of a legislator deprived the electorate of its representation, and a legislator had an affirmative duty to vote "except on those occasions." The Committee concluded that disclosure of interests was therefore the proper way to allow the electorate to judge the ethics of its representatives.

107. *But see* Haw. Disclosure Guideline No. 2, promulgated by the Hawaii State Ethics Commission (*cited in* Haw. Ethics Comm'n, Ops. 173, 174 (1973)), which requires disclosure of a lawyer-legislator's clients when the legislator knows or should have known of:

1. A client who is a party to regulatory action, transaction or litigation in which the

7-31

of privacy, disclosure of the *type* of client and the percentage of the lawyer-legislator's revenues derived from particular types of clients would be reasonable and equally informative.

Second, and more fundamentally, disclosure does not provide an effective means of dealing with conflicts of interest. In theory, the disclosure of questionable practices would lead to public censure and eventual removal from office. In the legislative branch, however, the process does not work as contemplated. While substantial portions of the general electorate may be offended by the practices engaged in by a particular legislator, only the residents of that legislator's district have the ability to take corrective political action. Those constituents, however, would probably be interested more in the particular legislator's effectiveness in getting benefits for their district than in the adverse effect that that representative's actions may have on the public good of the state as a whole.[108]

In any event, the American electorate has become particularly reluctant to turn sitting legislators out of office.[109] In the U.S. House of Representatives, and especially in state legislatures, electoral defeat of incumbents has become exceedingly rare.[110] The natural propensity of the electorate to give an incumbent the benefit of the doubt, and the tre-

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State is a party and for whom professional services on that particular matter are rendered.

2. A client who has drafted or submitted directly or indirectly, bills, resolutions or other matters to the Legislature, or a client who, directly or indirectly, communicates with officials in the Legislature or executive branch with the purpose of influencing legislative or executive actions.

3. A client who may be directly or indirectly financially affected by pending State regulatory action or transaction if professional services on the particular matter are rendered to the client.

108. Preyer, *Legislative Ethics*, in ETHICS AND GOVERNMENT 6-71 (Roscoe Pound — Am. Trial Lawyers' Found. 1982); Note, *Conflict of Interest of State Legislators*, *supra* note 68, at 1213.

109. Incumbents usually do face rejection at the polls if they have been indicted, convicted, or officially censored by their colleagues. *See* Kirby, *The Role of the Electorate in Congressional Ethics*, in REPRESENTATION AND RESPONSIBILITY, *supra* note 4, at 29-37.

110. Benjamin, *The Power of Incumbency*, in STATE GOVERNMENT 58-61 (T. Boyle ed. 1988). The author cites as an example New York, where, in 1986, 193 out of 194 state legislators who sought reelection were successful. The one loser was from a district specially targeted by the Assembly Speaker as part of his effort to elect members who would support him in his bid to be elected Speaker. The author explains that the power of incumbency is somewhat less in the U.S. Senate because it is a national position, determined state-wide, which attracts high-powered opponents willing to spend the large sums of money needed to unseat an incumbent. In 1988, almost 85 percent of incumbent state legislators nationwide who sought reelection won. More than 95 percent of the members of the U.S. House of Representatives won. Jones, *The Role of Staff in State Legislatures*, 61 J. ST. GOV'T 188, 189 (1988).

mendous amount of campaign funds donated to incumbents give them a formidable advantage over challengers.[111]

Finally, political gerrymandering practiced by legislatures as part of the periodic reapportionment process has created the equivalent of tenure in the political academy. Increasingly, incumbents are running without any opposition.[112] Thus, disclosure of facts which may reveal a conflict of interest pose little threat to the popular, well-financed incumbent. This is not to say that disclosure is useless, but only to caution that the purported prophylactic effect is much diluted in the legislative context.

III. Some Suggested Solutions

The organized bar and state legislatures have shied away from dealing effectively with conflicts faced by lawyer-legislators because of fear of deterring lawyers from public service and an unwillingness to place an absolute ban on the outside practice of law. Yet, some very practical solutions to the conflict exist. While these solutions would place some limitations on lawyers' outside practice, they would also encourage lawyers to enter public service by creating clear and enforceable standards.

Certain conflicts can be remedied easily. Significant conflict and influence peddling can be eliminated by an express ban, through legislation and organized bar enforcement, of appearances before state agencies by legislators or their firms. A ban limited solely to the legislator does not eliminate the potential for intimidation of the agency officials[113] or the possibility of indirect remuneration to the legislator through enhancement of her firm's revenues. Moreover, "screening" of the legislator from any involvement in such representation is ineffective since it is not the legislator's *knowledge* that creates the undue influence, but her legislative power to bring retribution upon the agency.[114]

111. *See, e.g.*, May, *Bulging War Chests Protect Seats in the House*, N.Y. Times, March 6, 1989, at B1, col. 2 (members of Congress amass huge amounts of campaign contributions, even though few face serious challenges from opponents).

112. Lynn, *Record Number of State Races Are Not Contests,* N.Y. Times, Aug. 9, 1988, at B-1, col. 2; Kolbert, *A Handful of Albany Races Are "Hot,"* N.Y. Times, Nov. 3, 1988, at B-10, col. 1 (In the 1988 New York elections, 7 out of 38 members of Congress, 19 out of 60 Senators, and 41 out of 150 Assemblymen ran unopposed.).

113. *See supra* note 82 and accompanying text.

114. The Association of the Bar of the City of N.Y. reached the same conclusion in recommending that the law firms of members of Congress be barred from appearing before federal agencies. CITY BAR REPORT, *supra* note 15, at 115; *see also* J. MASKELL, ETHICS MANUAL FOR MEMBERS AND EMPLOYEES OF THE U.S. HOUSE OF REPRESENTATIVES 78 (1979) (overview of the standards of conduct, rules, regulations, and statutes as they relate to House of Representative Members and employees).

Second, a lawyer-legislator and his firm should be absolutely prohibited from lobbying the legislature. The firm, which has the same interests as the legislator, cannot purport to represent the exclusive interests of a private client while the legislator has sworn to act solely in the public interest. The legislator cannot act independently when his firm is being paid to represent the position of a private client. Even if the legislator recused himself on the vote, his colleagues would know that his firm stands behind the private client and may therefore vote the client's wishes because of the legislator's influence. In sum, the legislator is being paid indirectly to encourage his colleagues to vote for legislation favorable to particular private interests. Even if the legislator does not receive part of that particular fee, the legislator's general compensation will reflect his worth to the firm in lobbying matters.

But the conflict of interest problem extends beyond these flagrant situations to the ordinary case of a legislator representing private clients who may or will be affected by the actions of the legislature. As the ABA acknowledged in 1971, this problem potentially includes virtually all clients.[115] Private practice can create a conflict for the legislator whether a client's interest in legislation is special and unique, or is shared by a larger group, class, or profession as a whole. A legislator who represents a bank obviously can be subject to undue influence when voting on legislation raising the usury rate, or adopting truth-in-lending provisions, even though all banks in the state may be affected.[116] While it seems reasonable to allow a legislator to vote on measures from which he will personally benefit only as part of a group or class, the group exception makes little sense when it is the client who benefits.

There are several reasons why the "group" exception should not apply to clients. First, as noted above,[117] the public is generally aware of the legislator's group identity and can consider this when voting. The legislator's *client's* group identity is almost never known by the public. Second, the public can evaluate how a legislator has reconciled her group interest with the public interest by examining her voting record in light

115. ABA Comm. on Professional Ethics, Informal Op. 1182 (1971); *see supra* notes 64-65 and accompanying text.

116. Consider the case of Virginia State Senator Peter K. Babalas, who was censured by the Virginia Senate for having accepted $60,000 in legal fees from a second-mortgage lending company allegedly paid in part for Babalas' role in killing legislation that would have imposed interest rate ceilings on loans made by all such lending companies. Criminal prosecution of Babalas ended in acquittal of one charge and dismissal of the second. *Va. Senate Votes To Censure Babalas For Ethics Violation, supra* note 36; Moore & Baker, *Babalas to Be Prosecuted Under Va. Conflict Law,* Wash. Post, Jan. 8, 1986, at D-1, col. 5; Baker, *Va. Ethics Panel Hears Arguments For Sen. Babalas,* Wash. Post, Dec. 24, 1985, at B-1, col. 1.

117. *See supra* notes 15-17 and accompanying text.

of her identifiable group. Evaluating how a legislator has reconciled her client's interests with those of the public is much more difficult, since the clients are often unknown. More importantly, a lawyer-legislator receives direct remuneration in the form of fees from the client whose legislative interests are protected. Even if the fees are not paid or earned directly in return for legislative services, the indirect economic impact is too significant to be ignored. While it is sometimes difficult for a legislator to subordinate his professional or group interest to that of the public at large, it may be impossible for him to risk loss of an important client for the greater public good.[118] This may be especially true when the legislator believes that the disenchantment of an important client may redound to the detriment of an entire law firm, to which the legislator feels considerable loyalty. Finally, in the eyes of the public, unabashedly promoting the interests of a particular group is often defensible; promoting the interests of those who are simply willing to pay a fee is rarely acceptable.

The conflicts created by the private practice of legislators are more numerous than ethics committees or legislators are willing to admit. Requiring legislators to recuse themselves or to announce a conflict only when a client's interest in legislation is "direct" and "unique" leaves many real conflicts unresolved.

The organized bar should recognize that its integrity is adversely affected by lawyer-legislators who use public office to advance private interests. The ABA should amend DR 8-101 to admonish a lawyer not to use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client. Such a ban would apply whether or not the client's interests coincided with the "public interest."[119]

The ban should be enforced by the rule adopted by the Michigan bar in 1944: no lawyer-legislator should accept or continue employment by any client "directly or indirectly" interested in legislative action.[120] A client should be considered "interested" in legislative action when (1) a specific legislative measure will have a "direct and unique" impact on the client; or (2) a measure will have a substantial impact on the client, even though the measure impacts on a larger group or class, *and* the client has evidenced its interest in legislative action by its own conduct, such as formally or informally making its views known to the legislature or by retaining a lobbyist to espouse its positions.

118. *See* comments of former ABA President Malone, *supra* text accompanying note 13.
119. *See supra* notes 60-62 and accompanying text.
120. *See supra* notes 48-49 and accompanying text.

7-35

The first standard is now generally accepted by the organized bar.[121] The second standard would deal with the concerns expressed above, namely, that a lawyer-legislator may be using his public office to advance a client's interests though the client's position is common to a group or class. Because virtually all clients can be substantially affected by legislative action, however, some method must be devised to limit the scope of any rule to those clients who are likely to seek to influence legislators. Those clients are identified objectively by their own conduct.

Precedent for such an approach comes from the rules of the U.S. Senate, which prohibit senators from accepting gifts in excess of 100 dollars from any person or entity "having a direct interest in legislation." A person is deemed to have such a "direct interest" when that person is or works for a registered lobbyist or maintains a political action committee.[122] Similarly, the State of Hawaii's disclosure rules require a lawyer-legislator to disclose those clients who have submitted proposed bills to the legislature or who have communicated with the legislature for the purpose of influencing legislative action.

If a legislator's long time client becomes interested in particular legislation, the legislator should not be required to sever that relationship. Rather, the legislator should announce his interest in the legislation and withdraw from any participation, formal or informal, in the legislation's passage. If a client is consistently or perennially interested in legislation, persistent recusal deprives a legislator's constituents of her services. In this case, the legislator should sever the lawyer/client relationship.

While the ethical obligations of the lawyer-legislator would be interpreted on a case by case basis, the position proposed in this article would end the atmosphere of permissiveness that exists today. It would create a presumption against the acceptance of retainers by clients traditionally interested in legislation, such as banks, utilities, unions, and insurance companies. It would also encourage legislators to steer clear of committee assignments that would require them to draft and recommend legislation that may affect their clients, rather than encouraging them to seek such committee assignments, as they have in the past.[123]

Committee assignments also provide an opportunity for state legislatures to adopt preventative measures. While the power of legislative committees varies from state to state,[124] much of the important work of

121. *See supra* note 75 and accompanying text.

122. S. Doc. No. 100-1, 98th Cong., 1st Sess., Rules XXXV (1)(a), (b)(1), (2), at 67-68 (1984).

123. Haw. Disclosure Guideline No.2, ¶ 2 (*reproduced supra* note 107).

124. *See, e.g.*, CITY BAR REPORT, *supra* note 15, at 53 (U.S. Senator, as Chairman of the

legislatures often takes place in the committees.[125] The committee has the advantages of initiative and of shaping the debate on the floor. Once a piece of legislation receives the approval of a key committee, floor debate is often non-existent or perfunctory.[126]

The importance of committees in the legislative process points to the need for a legislative rule or statute bringing conflict of interest considerations into the committee assignment process. Legislatures should require that each member, upon election and annually thereafter, disclose to a legislative ethics committee not only that legislator's personal economic interests, but also any substantial clients and the services to be performed for those clients. The actual names of clients would be omitted from public disclosure in deference to the confidentiality of the attorney/client relationship. "Substantial clients" could be defined as those

Senate Commerce Committee fought against funds for the St. Lawrence Seaway while his firm was retained by railroad companies); GOULDEN, *supra* note 33, at 268-69, 282-83 (U.S. Senator, as member of Senate Commerce Committee played "key role" in legislation helping railroads while his firm represented a railroad company; same Senator, as member of Senate Finance Committee tried to kill tax regulation adverse to a company he had an interest in; member of the U.S. House of Representatives received fees from Teamster attorney while his subcommittee investigated matters relating to former Teamster president).

125. Generally, committees tend to be strongest in those states in which one party dominates the legislature. Where there is a strong two-party system, political leadership and the party caucus may be equally, or more, important in shaping the legislative agenda. Francis, *Leadership, Party Caucuses and Committees in U.S. State Legislatures,* 10 LEGIS. STUD. Q. 243, 243 (1985). In A. ROSENTHAL, LEGISLATIVE PERFORMANCE IN THE STATES (1974), states are categorized on the basis of the strength of their committees' performance. "Better performing" committees are described as those that "are referred bills, make choices, amend or substitute, prevail on the floor during sessions, and continue working with some results during the interim." While two populous states, California and Ohio, are included among the fourteen states with the "best performing" committee systems, seven populous states, Illinois, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, and Texas, are among the 20 poorer-performing states. *Id.* at 42.

In New York, the newly elected majority leader of the Senate reportedly has pledged to his fellow senators that he would curtail the power of the central staff, which works for the leaders, and give more authority to the individual committees. *New Leader in State Senate—Soft-Spoken, Tough Negotiator,* N.Y.L.J., Dec. 5, 1988, at 1, col. 1.

126. "[T]he most important work of the state legislatures, like that of Congress is conducted by standing and special committees." E. USLANER & R. WEBER, PATTERNS OF DECISION-MAKING IN STATE LEGISLATURES 74-75 (1977) (quoting COMMITTEE ON AM. LEGISLATURES, AMERICAN POLITICAL SCIENCE ASS'N, AMERICAN STATE LEGISLATURES 95 (1954)); A. ROSENTHAL, LEGISLATIVE LIFE: PEOPLE, PROCESS AND PERFORMANCE IN THE STATES 181-204 (1981) (committees' influence varies significantly from state to state, but they are "the basic work groups of the legislature." *Id.* at 181. Once bills pass committee, they are usually adopted by the full body. *Id.* at 200-01); CITY BAR REPORT, *supra* note 15, at 69 (member of Congress has much greater opportunity to influence legislation in committee). *See also* J. GOULDEN, *supra* note 33, at 281-83 (recounting past scandals in which Congressmen used their influence on committees to favor private clients).

7-37

who have provided more than 5,000 dollars in fees in any calendar year in the past three years.

The ethics committee would then determine, based upon this disclosure, whether the legislator should be prohibited, because of likely conflicts of interest, from serving on particular legislative committees. The legislative committee would exclude a legislator from serving on any committee that had responsibility for legislation that (1) was likely to affect uniquely and directly any of the legislator's major clients, or (2) has been of interest to the client or similarly-situated clients in the past. General interest legislation, such as revenue and general budgetary legislation, would not create a conflict with regard to any private clients.

If the legislator disagreed with the conclusions of the ethics committee, the legislator could request a public hearing on the matter. If the legislator still disagreed with the determinations of the committee, the legislator could appeal to either the senior most member of the legislative body or a group of senior members. The leaders could overrule the committee determination only upon a written decision setting forth specific reasons for the decision. This decision also should be available to the public.

Reducing conflicts of interest through the screening of committee assignments should not be limited to lawyers. The Association of the Bar of the City of New York made a similar proposal in 1970 to reduce conflicts of interest in Congress. Specifically, the Bar recommended that members of congress avoid committees whose jurisdiction would likely create a conflict, and that the committees themselves should adopt conflict of interest rules that would prohibit members from having any outside interests that could be specifically affected by committee action.[127] The Bar also recommended a requirement that members of congress disclose not only the nature of their personal assets, but also the names of clients of the congressman's law firm.[128]

Such a system still could be subject to abuse by the leadership and could be eviscerated by a legislative body that simply did not wish to cooperate. The fact that the entire proceeding and all decisions thereto pertaining would be subject to public review, would provide some safeguard from abuse and allow the public to determine whether the leadership was serious about avoiding conflicts of interests. At the very least,

127. *See, e.g.*, D. Songer, *The Influence of Empirical Research: Committee v. Floor Decision Making*, 13 LEGIS. STUD. Q. 375 (1988) (vast majority of South Carolina legislators deferred to subcommittee's expertise in tort reform legislation; only subcommittee members had actively studied relevant empirical data, and other legislators relied upon their advice).

128. CITY BAR REPORT, *supra* note 15, at 66-71.

such a mechanism would provide an avenue of escape for legislators who might be importuned by significant clients. The legislator could rely on the ethics committee's determination to explain to a client why the legislator was not in a position to influence legislation that could significantly affect that client's interest.

Legislative leaders require special consideration. The legislative leadership, generally composed of the President *pro tem* of the Senate, the Speaker of the House of Representatives or Assembly, and the two ranking party leaders of the minority, has inordinate power compared to other members of the legislature.[129] This power generally derives from control over other members' office budgets, committee assignments, campaign assistance, local aid to their districts, and office allocation.[130] In the New York Senate, for example, the majority leader has all of these powers as well as the absolute right to "star" a bill and thereby prevent its consideration by the entire body.[131] Generally, legislative leaders also are paid significantly greater salaries and expense stipends.[132]

Because of their inordinate power, they also are more susceptible to influence. If they are attorneys, this influence often comes from the payment of retainers to them or the law firms with which they are associated.[133] Their positions cannot truly be considered part time, and they should be subject to the same restrictions as full-time government officers and members of Congress. In short, they should be prohibited from engaging in the private practice of law.

IV. A Full Time Legislature?

One possible criticism of these proposals is that they will accelerate the decline in the number of attorneys serving in state legislatures. It undoubtedly is true that these proposals will make it more difficult for attorneys to practice law while serving as state legislators. Insofar as

129. *Id.* at 75.

130. A. ROSENTHAL, *supra* note 126, at 165-74, 200-01. For example, in the New York State legislature, the Speaker and the Senate majority leader wield enormous power:

> Unlike in Congress, there is no conference committee made up of legislators to work out differences between the two houses. Much of that is done here in what is called a leaders' meeting in which three people — the Governor, the Assembly Speaker and the Senate majority leader — meet behind closed doors, with no record kept, to strike the deals whereby legislation rises or falls.
>
> Lawmakers often telephone reporters to find out the results of those meetings, so they will know how they will be voting.

Schmalz, *Blurred Lines for Lawmakers in Albany,* N.Y. Times, July 13, 1987, at 1, col. 1.

131. A. ROSENTHAL, *supra* note 126, at 165-74; Kolbert, *supra* note 39.

132. *See generally* COUNCIL OF STATE GOV'TS, *supra* note 47, at 104-07.

133. *See supra* note 39 and accompanying text.

these proposals may discourage attorneys from using service in the state legislature to attract client's willing to pay for their influence, such deterrence is beneficial. More significantly, the implementation of these proposals may simply facilitate what may be inevitable in many of the more populous states: a full-time legislature.

As the issues facing state legislatures become more numerous and complex, the legislatures become more institutionalized.[134] Larger staffs, longer sessions, and more responsibility delegated to committees are required to increase institutional capacity.[135] The legislatures of several states, California, Illinois, Massachusetts, Michigan, New York, Ohio, Pennsylvania, and Wisconsin are now nearly full time, considering their lengthy sessions, relatively high pay, and the number of legislators who consider themselves full-time public officers.[136]

The increase in legislative duties makes outside employment significantly more difficult.[137] Such outside occupations traditionally were considered necessary, however, because of inadequate legislative pay.[138] Low pay creates a sense of frustration that may cause legislators to leave legislative service after two or three terms, either to run for a true full-time position or to return to private life.[139] Legislators have increased personal staff because they lack the time to attend to details themselves. Ironically, this increase in staff tends to increase rather than decrease the legislator's involvement.[140]

The almost full-time legislature has also begun to attract a different type of legislator: those increasingly from modest paying professions or

134. M. JEWELL, *supra* note 4, at 184.

135. *Id.*; COUNCIL OF STATE GOV'TS, *supra* note 47, at 76-83.

136. COUNCIL OF STATE GOV'TS, *supra* note 47, at 78, 97-99. A 1986 survey found that more than 60% of the legislators in New York and 65% of the legislators in Pennsylvania define their occupation as "legislator.". B. BAZAR, *supra* note 9, at 2. Nationwide, 11% of all legislators consider themselves full-time, but an additional 7% list themselves as "retired" and another 3% as "homemakers." *Id.* One well-respected student of state legislatures estimates that the actual percentage of full-time legislators nationwide is about 20%, up from 10% ten years ago. Rosenthal, *Origins of Staff Wars,* 61 J. ST. GOV'T 198 (1988).

137. A 1986 survey found that the percentage of legislators in the larger states who are "business owners" is smaller than in the less populous states with limited sessions. COUNCIL OF STATE GOV'TS, *supra* note 47, at 78.

138. The Citizens Conference on State Legislatures reported in 1971 that

> there is much evidence to suggest that low legislative salaries make it impossible for all but a select group of people to serve in the legislature: lawyers, real-estate and insurance agents, and others who because they must pursue a private and public career at the same time, find themselves inevitably and incessantly involved in conflicts between the two.

J. BURNS, THE SOMETIME GOVERNMENTS 138 (1971).

139. M. JEWELL, *supra* note 4, at 186.

140. *Id.*

those young or old enough to find the salary level tolerable.[141] This trend tends to confirm the fact that legislators, of necessity, are increasingly viewing their positions as essentially full time. By recognizing this reality, and raising compensation to realistic levels,[142] the states could again attract candidates from all economic strata.

As legislatures become more professional, that is, as salaries and available staff increase, average tenure also increases.[143] Studies show that turnover within legislatures has been falling consistently throughout this century[144] and turnover generally is lowest in those states where pay is highest and choices for using the legislature as a stepping stone to higher office are greatest.[145] Political scientists generally favor this development because it increases expertise and continuity from session to session.[146]

The political desirability of a full-time legislature is beyond the scope of this article. As various states consider the possibilities of adopting a full time legislature, however, they should consider the substantial gains in legislative independence that will result from such a shift. In return for adequate salaries, legislators could be required to forego all outside earned income, or income in excess of a small percentage of their salary.[147] In this way, opportunities for conflicts of interest would be

141. Francis, *Costs and Benefits of Legislative Service in the American States,* 29 AM. J. POL. SCI. 626, 629 (1985) (citing CONG. Q. W. R. at 1768-69 (1983)).

142. The Citizens Conference on State Legislatures recommended in 1971 that all state legislators should be paid at least $10,000, and that those in the more populous states should be paid $20,000 to $30,000. J. BURNS, *supra* note 137, at 160. In today's dollars, these salary levels would be approximately $27,000, $54,000, and $81,000 respectively. *See* U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 450 (1988).

143. Squire, *Career Opportunities and Membership Stability in Legislatures,* 13 LEGIS. STUD. Q. 65, 68-70 (1988).

144. Niemi & Winsky, *Membership Turnover in U.S. State Legislatures,* 12 LEGIS. STUD. Q. 115, 122 (1987).

145. Squire, *supra* note 142, at 67, 69.

146. *See* Oxendale, *Membership Stability on Standing Committees in Legislative Lower Chambers,* 54 J. ST. GOV'T 126 (1981):

> State legislatures, and especially their lower chambers, have long had highly unstable internal and external membership patterns. Since the early writings of Charles Hyneman, membership instability in state legislatures has concerned academicians and practitioners alike, and most observers have concluded that such turnover rates adversely affect the institution. Rather than developing a reservoir of professional legislators who become policy specialists and legislative professionals, legislatures must constantly acclimate new members to procedures and policy specialties.

147. Currently members of the U.S. House of Representatives may receive up to 30% of their salaries in outside income (House Rule XLVII), while Senators may receive up to 40% (2 U.S.C. § 31-1 (1988)). The President's Ethics Commission has recommended, however, that outside earned income for all senior federal officials, members of Congress, and federal judges be limited to approximately 15% of their salaries. PRESIDENT'S COMM. ON FEDERAL ETHICS

D-41

dramatically reduced. While the creation of such a full-time legislature would not eliminate the possibility for undue influence and corruption,[148] it would reduce lawyer-legislators' temptation to supplement their income through the tacit selling of influence. A ban on outside practice would be clear, unambiguous, and relatively easy to enforce.

A full-time legislature also would reduce the conflicts of interest faced by staff. So long as the legislature is considered part time, staff are free to be associated with private law firms, even though they may earn substantial salaries in the legislature. This outside employment creates the same conflict for the staff as that found by lawyer-legislators. With the establishment of full-time positions, outside employment could be eliminated completely.[149]

It might be argued that a full-time legislature would consist only of a professional class that is completely isolated from the community it represents.[150] This argument, however, ignores the fact that representatives' views are probably shaped much more by the occupations from which they come, than from the part-time occupations they may pursue while in the legislature. Surely a farmer, for example, does not lose his empathy for farmers' problems when he assumes full-time duties as a

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LAW REFORM, TO SERVE WITH HONOR: REPORT OF THE PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM (1989) [hereinafter FEDERAL ETHICS COMMISSION].

Recently, the Attorney General of Massachusetts recommended a cap of $40,000 on the annual outside income earned by state legislators and senior executive branch officials. The recommendation came after disclosure that the Senate President had received a $267,000 legal fee in connection with a real estate development project in Boston. The developer has charged that the fee was extorted from him by the President's law partner. Loth, *Shannon ethics bill seeks cap on legislators' income,* Boston Globe, Mar. 1, 1989, at 1, col. 1.

148. Obviously, Congress, which has essentially eliminated the outside practice of law, *see supra* notes 43-44, has not eliminated scandal or conflict of interest. Most recently, attention has been focused on the "honoraria" representatives and senators may receive for speeches and appearances before parties clearly interested in legislative action. Although limited to $2,000 per occasion (2 U.S.C. § 4411 (1988)), these payments have been strongly criticized in and out of Congress. The Quadrennial Commission recommended that such honoraria be eliminated in return for a substantial increase in Congressional pay. COMMISSION ON EXECUTIVE, LEGISLATIVE AND JUDICIAL SALARIES, FAIRNESS FOR OUR PUBLIC SERVANTS, 24-25 (1988). A recommendation to ban honoraria for all federal officials has also been made by President Bush's Ethics Commission. FEDERAL ETHICS COMMISSION, *supra* note 145, at 33-38.

149. The conflict of interest faced by senior legislative staff in the New York Senate has been an issue of some controversy. Recently, the newly elected majority leader, Ralph Marino, announced that his two senior counsel would be full-time employees and would not engage in any outside private practice. The shift to full-time status was made, according to Senator Marino, not only because of the problem of conflict of interest, but also because the legislature was moving to full-year sessions leaving little time for outside practice. Spencer, *Senate Majority Leader Names Counsels,* N.Y.L.J., Dec. 8, 1988, at 1, col 3.

150. *See, e.g.,* Bigelow, *supra* note 104, at I-8.

7-42

congressman. There is no reason to expect a different result in the state legislatures.[151]

Conclusion

Democracy is stronger when the public believes that its elected representatives are acting in the public interest, unaffected by undue influence born of self interest or the interests of those who have a peculiar claim on the representatives' loyalty. While many view the legislative process as simply "every man for himself," where each group fights tirelessly for its own interests to the exclusion of others, this "pluralist" model invites cynicism, disrespect for representatives, and, some believe, unethical conduct.[152] A fiduciary model, even if not fully attainable in an imperfect world, is still a preferable goal.

Legislators who are also practicing attorneys often face a conflict between their fiduciary duty to act in the public good and their fiduciary duty to act in the best interest of their clients. Even when both the lawyer-legislator and the client enter into a relationship without the intent of influencing the legislator's public position, the attorney's actions as a legislator inevitably are influenced by his private representation of the client. This problem, although endemic in the American system, has been the subject of little discussion or remedial action. Although the complete prohibition of outside practice may be impractical, the organized bar should recognize expressly the significant potential for conflict of interest and admonish lawyer-legislators to avoid representing clients who have significant interests in legislative action. Moreover, preventive measures, such as those recommended here, could deal with the most likely occasions for conflict of interest. These measures will disadvantage some attorneys. This should be welcomed by the vast majority of the public and the bar which has long resented the selling of influence rather than expertise.

151. In any event, proponents of the "citizen legislature" ignore the fact that the failure of legislative salaries to keep up with the increased time commitments has made legislative service impossible for many citizens. As a Kansas state legislator commented in 1970,

> Wichita lost three of its best legislators in 1970 simply because they could no longer stand the financial sacrifice involved. I submit that the system is predicated on the assumption that membership in the body is open to everyone. Compensation should be considerably raised to assure the validity of such an assumption.

J. BURNS, *supra* note 138, at 139.

152. "The dominant pluralist view of politics, whether as mere description or as a normative theory, may then be one of the major causes of unethical behavior by political actors, including voters. By glorifying and therefore legitimating the motive of self-interest, it encourages self-interested behavior at all levels of government. . . ." Fleishman, *supra* note 2, at 57.

Kansas House Democratic Leadership

Paul Davis
DEMOCRATIC LEADER

Jim Ward
ASSISTANT LEADER

Barbara Ballard
CAUCUS CHAIR

Marti Crow
AGENDA CHAIR

Eber Phelps
DEMOCRATIC WHIP

Cindy Neighbor
POLICY CHAIR

March 29, 2010

To Members of the Select Investigatory Committee:

As per your request, we have provided additional research that may be helpful in guiding this investigatory committee in determining the bounds of "misconduct".

Article 49 of the Rules of the Kansas House of Representatives provides that a member maybe reprimanded, censured or expelled for any misconduct. Misconduct is not defined anywhere in the Rules of the Kansas House of Representatives. We suggest that the fact that there is no definition provided by the Rules allows you to review a member's conduct in the context where it occurred and to evaluate it based on the norms and traditions of the House of Representatives as you understand them and based on your own beliefs as members of this body.

However, we do suggest several resources to aid you in this endeavor:

Dictionary Definitions of Misconduct

To aid with this analysis, we suggest referring to two relevant definitions of the term "misconduct". The American Heritage Dictionary defines misconduct as "behavior not conforming to prevailing standards or law, impropriety, immorality. Dishonest or bad management, especially by persons entrusted to act on another's behalf. Malfeasance, especially by public officials."

Misconduct is also defined by Black's Law Dictionary (8th ed. 2004) as "a dereliction of duty; unlawful or improper behavior." There is also a separate definition for official misconduct, which is "a public officer's corrupt violation of assigned duties by malfeasance, misfeasance, or nonfeasance."

Looking within these definitions, it is also helpful to explore some of the terms provided such as malfeasance and impropriety. Malfeasance is "a wrongful or unlawful act; especially wrongdoing or misconduct by a public official." Impropriety is an act that is "not suited to circumstances or intention" or "not keeping with conventional mores; irregular or abnormal." Dereliction of duty is "neglecting a duty or obligation."

Viewing the actions of Representative O'Neal within the applicable definitions put forward above, one must ask whether the Speaker of the House, the most powerful member of the House of Representatives, representing special interest groups that have business before the Legislature on a daily basis in a lawsuit against the State of Kansas over a legislative appropriation action that he presided over constitutes any of the following: a dereliction of duty, behavior not conforming to prevailing standards, impropriety or malfeasance.

- *Dereliction of Duty*
  Regardless of any statute that legally allows Representative O'Neal to provide legal representation in this case, at what point does Representative O'Neal's duty to the legislative body he leads take precedence? In his testimony, Representative O'Neal clearly stated that he filed a protest to House Bill 2373 in an effort to comply with a statute that would allow him to participate in this case. He did not take this action as a state representative sent to Topeka to advocate on behalf of the over twenty-thousand constituents in his district (evidenced also by the fact that he has maintained an inconsistent voting record on fee fund sweeps and that he had never filed a protest regarding this issue in the past). By his own admission, Representative O'Neal took this action as an attorney who was preparing to take on a new case.

- *Behavior not Conforming to Prevailing Standards*

Attachment 8
ASIC 3-29-10

Representative O'Neal's actions are unprecedented, largely creating the challenge in evaluating the complaint against him with concrete, objective standards. Many lawyer-legislators have represented clients against the state to challenge administrative actions. However, there is a difference between an administrative policy and a legislative appropriation. We are aware of no other instance when a lawyer-legislator (let alone a sitting Speaker of the House) has become involved in a lawsuit to challenge a legislative appropriation that he presided over and lost.

- *Impropriety*
  Representative O'Neal specifically asked during his testimony: at what point can you ask a part-time legislator to forego his professional obligations during the session? When is it acceptable to practice law during the session and when is it not? A lawyer-legislator's professional obligations should not include engaging in a private lawsuit against the State on behalf of special interest groups regarding a legislative appropriation. It is also improper to engage in this conduct when you continue to preside over the body with which your clients have ongoing business.

- *Malfeasance*
  It is unacceptable for a public official- especially the Speaker of the House- to receive compensation from special interest groups for legal services rendered while concurrently maintaining an influential role in the outcome of his clients' public agenda. The special interest groups that Representative O'Neal also calls clients have many pieces of legislation that they are supporting and opposing before the House of Representatives. No member of the body exerts more influential over their legislative agendas than Representative O'Neal.

The Iowa Senate Code of Ethics

A number of state legislatures have their own codes of conduct or codes of ethics to govern the behavior of legislators. Perhaps the most thorough of these belongs to the Iowa Senate. It specifically addresses the importance of "protecting the integrity of the Legislature" at the outset. The preamble reads, in part:

"Every legislator owes a duty to uphold the integrity and honor of the general assembly, to encourage respect for the law and for the general assembly and the members thereof, and to observe the legislative code of ethics. In doing so, members of the senate have a duty to conduct themselves so as to reflect credit on the general assembly, and to inspire the confidence, respect, and trust of the public, and to strive to avoid both unethical and illegal conduct and the appearance of unethical and illegal conduct."

It also addresses situations where a member would appear before a governmental agency (a similar circumstance to Representative O'Neal's lawsuit). It states that when the member does so, he or she should "carefully avoid all conduct which might in any way lead members of the general public to conclude that the senator is using the senator's official position to further the senator's professional success or personal financial interest".

The Iowa Code also has rules with regard to conflicts of interest. Rule 9 on Conflicts of Interests reads:

"In order to permit the general assembly to function effectively, a senator will sometimes be required to vote on bills and participate in committee work which will affect the senator's employment and other monetary interests. In making a decision relative to the senator's activity on given bills or committee work which is subject to the code, the following factors shall be considered:

a. Whether a substantial threat to the senator's independence of judgment has been created by the conflict situation.
b. The effect of the senator's participation on public confidence in the integrity of the legislature.
c. The need for the senator's particular contribution, such as special knowledge of the subject matter, to the effective functioning of the legislature.

All of these code provisions relate back to the member's duty to uphold the integrity and honor of the institution and to inspire confidence, respect and trust of the public. All one has to do is pick up a leading Kansas newspaper to see what Representative O'Neal's actions have done to these ideals. The *Manhattan Mercury* writes that O'Neal's representation of the interest groups is a "conflict of interest." The *Lawrence Journal-World* states that the lawsuit "raises serious ethical concerns about possible conflicts of interest involving a legislative leader who wields powerful control over what issues are considered by his chamber."

The *Topeka Capitol-Journal* writes "that some of his clients have contributed to his political campaigns raises the stench that permeates the entire affair." The *Hutchinson News* writes that "he (O'Neal) also has compromised himself when it comes to legislation that affects any of these clients, and he stands to profit personally from this at taxpayers' expense." And the *Kansas City Star* writes "suing the state over a decision with which he disagreed, but of which he was a part,

ıd be beneath the dignity of a speaker." Given this publicity, it is no wonder that a recent Survey USA poll pegged the Kansas Legislature's approval rating at 23%.

While it would it is easy to conclude that the existence of a Code of Ethics like this in the Kansas House of Representatives would be helpful in this situation, the absence of a code certainly does not prohibit this committee from drawing upon the examples provided in other states. These codes are in essence a reflection of time honored behavior that has been exhibited by the elected officials who have come before us. They really do not contain any unique provisions to any particular state and reflect standards and mores that exist in virtually every state. The fact that Iowa has that a Code for legislative ethics and no such code exists in Kansas does not make Representative O'Neal's conduct any less important or any less improper.

Hastings Law Review Article

There have been several law review articles written about lawyers as legislators. One of these articles, George F. Carpinello's *Should Practicing Lawyers be Legislators?* 41 HSTLJ 87, 94 (November 1989) offers extensive, useful insight on the inherent conflicts that many lawyer-legislators have while they serve in the Legislature. It distinguishes the lawyer-legislator from the doctor-legislator, or farmer-legislator (or teacher-legislator). Any legislator brings with him (or her) his own private interest, which relates to his life and career, but a lawyer-legislator also brings with him the interests of every client. Therefore, a lawyer-legislator inevitably has a wider range of conflicts than a doctor-legislator. A lawyer-legislator will be forced to sacrifice a particular client's best interests for the benefit of his more general client – the public. Moreover, a particular client's interests may well require zealous representation at the legislative or administrative level. If the lawyer-legislator undertakes such representation, he inevitably sacrifices his fiduciary duty to his constituents.

This problem can be compounded when a client or potential client recognizes and seeks to use a lawyer's dual role as a lawyer-legislator. Even a client's unfounded belief that his lawyer has influence on the legislative body is problematic, because a lawyer must avoid even the appearance of impropriety. The author argues that even if the client and lawyer enter into a relationship with good faith, it is unrealistic to expect that a lawyer will vote contrary to a client's interests (simply because the client is paying a significant amount of the lawyer's income). The author writes that, intentionally or not, the attorney's perception of the public good is shaped by the client's perspective. This problem especially arises with institutional clients such as banks, insurance companies, etc. (Carpinello at 95-96.)

In an ethics opinion, the State Bar of Michigan wrote that it was "common knowledge that some lawyer-legislators are tendered retainers or are continued in employment by clients because such lawyer-legislator has a vote in the legislative [sic] and is presumed to have some influence with his colleagues." Additionally, the panel wrote that "every conflict of interest must be resolved in favor of the public trust." (Carpinello at 98, 101, citing Mich. Comm. on Professional Ethics, Op 83 (1944), reprinted in 38 MICH. S.B.J. 109 (1959).)

The author repeatedly emphasizes the effect a lawyer-legislator's representation of his client has upon his personal perception of the public good, i.e., the way he should vote in his capacity as a legislator. Even if a lawyer-legislator does not intend to change his vote to benefit a particular client, his perception may have changed, which may ultimately lead to a change in his vote. (Carpinello at 102-104.) . "Legislators may be characterized as "delegates," who are guided strictly by their constituents' desires, or as "trustees" who are expected to act in their constituents' best interest. Underlying both models is the assumption that the legislator will act in good faith to further the desires or best interests, respectively, of her constituents and place those desires or interests before personal interest or interests of those with whom the legislator has private business or personal relationships."

In this circumstance, Representative O'Neal has clearly placed the interests of his private business above those of his constituents (which include the other 124 representatives that elected him as Speaker) and the institution.

Conclusion

The complaint alleges that Representative O'Neal has acted in an improper manner, in a derelict violation of his assigned duties, and in a wrongful manner. The specific behavior is outlined in our complaint, but can be summarized as allowing excessive and undue influence by the most powerful special interests on the legislative process, creating a conflict between his position as Speaker of the House and his role as the private attorney for these special interest clients, and actions that diminish the public trust in the institution of the Kansas House of Representatives. The primary wrong done by Representative O'Neal is putting his personal, private business agenda before his duties and responsibilities as Speaker of the House.

The complaint does not comment on the merits of the lawsuit filed on behalf of the special interest. We do not argue that the plaintiffs in this case do not have a right to seek judicial review of their claim. Our complaint is directed at the involvement of the Speaker of the House in this matter. The plaintiffs are special interests having daily business before the Kansas House. This committee must evaluate these facts and others contained within the original complaint as to the nature and seriousness of the misconduct.

Representative O'Neal argues he has broken no laws and therefore no misconduct exists. However, there are plenty of situations where misconduct can exist and no law is violated. There are standards of behavior and conduct that evolve over time in all legislative bodies and they must continually be upheld and reinforce. This is more important than ever now because of the growing interest of special interests in the political process and the erosion of the public's confidence in elected officials and the institutions which we serve.

Service in the Kansas House of Representatives is a privilege that incurs certain responsibilities and duties beyond those prescribed in the law. Furthermore, the position of Speaker has even greater responsibilities and duties and is held to a higher standard because the nature of this office. The actions of Representative O'Neal cannot be simply judged in the context of a rank-and-file legislator. They must be judged as those of the most powerful member of the House of Representatives and that of the public face of this Legislature with which we serve.

It is up to this committee to evaluate and determine the propriety of Representative O'Neal's conduct. If this committee fails to take any action with regard to this complaint, you send a message to Kansas citizens that this behavior is condoned. We believe that neither the Kansas public- nor the People's House- has further tolerance for such behavior.

Sincerely,

Paul Davis
Democratic Leader

Jim Ward
Assistant Leader

Eber Phelps
Democratic Whip

Barbara Ballard
Caucus Chair

Marti Crow
Agenda Chair

Cindy Neighbor
Policy Chair