LEGISLATIVE ETHICS AND CONDUCT

One Hundred and Nineteenth Maine Legislature

Presented By:

ANDREW KETTERER

ATTORNEY GENERAL

December 1, 1998

TABLE OF CONTENTS

TITLE 1
CHAPTER 25

GOVERNMENTAL ETHICS

SUBCHAPTER I
STATEMENT OF PURPOSE

1 § 1001. Statement of purpose

It is essential under the American system of representative government that the people have faith and confidence in the integrity of the election process and the members of the Legislature. In order to strengthen this faith and confidence that the election process reflects the will of the people and that each Legislator considers and casts his vote on the enactment of laws according to the best interests of the public and his constituents, there is created an independent commission on governmental ethics and election practices to guard against corruption or undue influencing of the election process and against acts or the appearance of misconduct by Legislators.

Section History:
1975, c. 621, § 1

1 § 1002. Commission on Governmental Ethics and Election Practices

1. Membership. The Commission on Governmental Ethics and Election Practices, established by Title 5, section 12004-G, subsection 33 and referred to in this chapter as the "commission," consists of 5 members appointed as follows.

A. By March 31, 1997, and as needed after that date, the Governor, the President of the Senate, the Senate Minority Leader, the Speaker of the House and the House Minority Leader shall jointly establish and publish a nomination period during which members of the public, groups and organizations may nominate qualified individuals to the Governor for appointment to the commission. The initial nomination period must close by May 1, 1997.

B. The Governor shall appoint the members of the commission, taking into consideration nominations made during the nomination period, subject to review by the joint standing committee of the Legislature having jurisdiction over legal affairs and confirmation by

the Legislature. No more than 2 commission members may be enrolled in the same political party.

C. Two initial appointees are appointed for 1-year terms, two are appointed for 2-year terms and one is appointed for a 3-year term according to a random lot drawing under the supervision of the Secretary of State. Subsequent appointees are appointed to serve 4-year terms. A person may not serve more than 2 terms.

D. The commission members shall elect one member to serve as chair for at least a 2-year term.

E. A vacancy during an unexpired term must be filled as provided in this subsection for the unexpired portion of the term only.

2. Qualifications. The members of the commission must be persons of recognized judgment, probity and objectivity. A person may not be appointed to this commission who is a member of the Legislature or who was a member of the previous Legislature, or who was a declared candidate for an elective county, state or federal office within 2 years prior to the appointment, or who now holds an elective county, state or federal office, or who is an officer of a political committee, party committee or political action committee.

3. Oath. Each member shall, within 10 days of his appointment, take an oath of office to faithfully discharge the duties of a commissioner in the form prescribed by the Constitution. Such oath shall be subscribed to by the commissioner taking it, certified by the officer before whom it is taken and immediately filed in the Office of the Secretary of State.

4. Legislative per diem. The members of the commission are entitled to receive legislative per diem according to Title 5, chapter 379.

5. Employees. The commission may employ such assistance as may be necessary to carry out its duties.

Section History:
1975, c. 621, § 1 (NEW).
1983, c. 812, § 1 (AMD).
1989, c. 503, § B1 (AMD).
1991, c. 86 (AMD).
1991, c. 880, §1 (AMD).
1997, IN BILL c. 1, §1,2 (AMD).

1 § 1003. Procedures, rules and regulations

1. Procedures, rules and regulations. The commission shall adopt such procedures, rules and regulations as may appear necessary for the orderly, prompt, fair and efficient carrying out of its duties, consistent with this chapter.

2. Records. Except as provided in section 1013, subsection 2, paragraph J, all records of the commission, including business records, reports made to or by the commission, findings of fact and opinions, shall be made available to any interested member of the public who may wish to review them. Any member of the public may request copies of any record held by the commission which is available for public inspection. The commission shall furnish these copies upon payment of a fee covering the cost of reproducing them.

Section History:
1975, c. 621, §1(NEW).
1979, c. 541, §A4 (AMD).

1 § 1004. Meetings

The President of the Senate and the Speaker of the House shall jointly call an organizational meeting of the commission within 10 days after the members have taken their oaths of office. Thereafter, the commission shall meet on the call of the Secretary of State or of the Speaker of the House or the President of the Senate to perform the duties required of it or as specifically provided in this chapter. The commission shall also meet at other times at the call of the chairman or at the call of a majority of the members, provided all members are notified of the time, place and purpose of the meeting at least 24 hours in advance.

Section History:
1975, c. 621, §1 (NEW).
1977, c. 252, §1 (AMD).

1 § 1005. Open meetings

Notwithstanding any other provision of law, all meetings, hearings or sessions of the commission shall be open to the general public unless, by an affirmative vote of at least 3 members, the commission requires the exclusion of the public.

Section History:
1975, c. 621, § 1 (NEW).
1997, c. 562, § D1 (AMD).
1997, c. 562, § D11 (AFF).

1 § 1006. Assistance

The commission may call for the aid or assistance in the performance of its duties on the Attorney General, Secretary of State, Department of Audit or any law enforcement agency in this State. When called upon, these agencies shall comply to the utmost of their ability.

Section History:
1975, c. 621,§ 1 (NEW).

1 § 1007. Annual report

The commission shall submit to the Legislature and the public an annual report discussing its activities under this chapter and any changes it considers necessary or appropriate regarding ethical standards.

Section History:
1975, c. 621, §1 (NEW).
1989, c. 561, §1 (AMD).

1 § 1008. General duties

The general duties of the commission shall be:

1. Legislative ethics. To investigate and make advisory recommendations to the appropriate body of any apparent violations of the ethical standards set by the Legislature;

2. Election practices. To administer and investigate any violations of the requirements for campaign reports and campaign financing, including the provisions of the Maine Clean Election Act and the Maine Clean Election Fund, and to investigate and make findings of fact and opinion on the final determination of the results, within the limits of the Constitution of Maine and the Constitution of the United States, of any contested county, state or federal election within this State;

3. Ethics seminar. To conduct, in conjunction with the Attorney General and the Chair of the Legislative Council or their designees, an ethics seminar for Legislators after the general election and before the convening of the Legislature, in every even-numbered year. The Attorney General shall

provide each Legislator with a bound compilation of the laws of this State pertaining to legislative ethics and conduct;

4. Lobbyist activities. To administer the lobbyist disclosure laws, Title 3, chapter 15;

5. Maine Clean Election Act and Maine Clean Election Fund. To administer and ensure the effective implementation of the Maine Clean Election Act and the Maine Clean Election Fund according to Title 21-A, chapter 14; and

6. Enhanced monitoring; source of revenue. To provide for enhanced monitoring and enforcement of election practices and to institute electronic submission of reports and computerized tracking of campaign, election and lobbying information under the commission's jurisdiction. Funds to support enhanced monitoring and computerized data collection must come from the commission's share of lobbyist registration fees, penalties and other revenues pursuant to Title 3, section 320 as well as other revenue sources.

Section History:
1975, c. 621, §1 (NEW).
1977, c. 337, §1 (AMD).
1989, c. 561, § 2,3 (AMD).
1993, c. 691, §1-3 (AMD).
1997, IN BILL c. 1, § 3-6 (AMD).

SUBCHAPTER II
LEGISLATIVE ETHICS

1 § 1011 Statement of purpose

The Maine Legislature enjoys a high reputation for progressive accomplishment. The vast majority of its members are public officers of integrity and dedication, seeking at all times to maintain high standards of ethical conduct.

The public interest is best served by attracting and retaining in the Legislature men and women of high caliber and attainment. The public interest will suffer if unduly stringent requirements deprive government "of the services of all but princes and paupers."

Membership in the Legislature is not a full-time occupation and is not compensated on that basis; moreover, it is measured in 2-year terms, requiring each member to recognize and contemplate that his election will not provide him with any career tenure.

Most Legislators must look to income from private sources, not their public salaries, for their sustenance and support for their families; moreover, they must plan for the day when they must return to private employment, business or their professions.

The increasing complexity of government at all levels, with broader intervention into private affairs, makes conflicts of interest almost inevitable for all part-time public officials, and particularly for Legislators who must cast their votes on measures affecting the lives of almost every citizen or resident of the State. The adoption of broader standards of ethics for Legislators does not impugn either their integrity or their dedication; rather it recognizes the increasing complexity of government and private life and will provide them with helpful advice and guidance when confronted with unprecedented or difficult problems in that gray area involving action which is neither clearly right nor clearly wrong.

If public confidence in government is to be maintained and enhanced, it is not enough that public officers avoid acts of misconduct. They must also scrupulously avoid acts which may create an appearance of misconduct.

The Legislature cannot legislate morals and the resolution of ethical problems must indeed rest largely in the individual conscience. The Legislature may and should, however, define ethical standards, as most

professions have done, to chart the areas of real or apparent impropriety.

Section History:
1975, c. 621,§ 1 (NEW).

1 § 1012. Definitions

As used in this subchapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Close economic association. "Close economic association" means the employers, employees, partners or clients of the Legislator or a member of the Legislator's immediate family; corporations in which the Legislator or a member of the Legislator's immediate family is an officer, director or agent or owns 10% or more of the outstanding capital stock; a business which is a significant unsecured creditor of the Legislator or a member of the Legislator's immediate family; or a business of which the Legislator or a member of the Legislator's immediate family is a significant unsecured creditor.

2. Commission. "Commission" means the Commission on Governmental Ethics and Election Practices.

3. Employee. "Employee" means a person in any employment position, including public or private employment, employment with a nonprofit, religious, charitable or educational organization, or any other compensated service under an expressed, implied, oral or written contract for hire, but does not include a self-employed person.

4. Gift. "Gift" means anything of value, including forgiveness of an obligation or debt, given to a person without that person providing equal or greater consideration to the giver. "Gift" does not include:

A. Gifts received from a single source during the reporting period with an aggregate value of $300 or less;

B. A bequest or other form of inheritance;

C. A gift received from a relative; and

D. A subscription to a newspaper, news magazine or other news publication.

5. Honorarium. "Honorarium" means a payment of money or anything

with a monetary resale value to a Legislator for an appearance or a speech by the Legislator. Honorarium does not include reimbursement for actual and necessary travel expenses for an appearance or speech. Honorarium does not include a payment for an appearance or a speech that is unrelated to the person's official capacity or duties as a member of the Legislature.

6. Immediate family. "Immediate family" means a Legislator's spouse or dependent children.

7. Income. "Income" means economic gain to a person from any source, including, but not limited to, compensation for services, including fees, commissions and payments in kind; income derived from business; gains derived from dealings in property, rents and royalties; income from investments including interest, capital gains and dividends; annuities; income from life insurance and endowment contracts; pensions; income from discharge of indebtedness; distributive share of partnership income; income from an interest in an estate or trust; prizes; and grants, but does not include gifts. Income received in kind includes, but is not limited to, the transfer of property and options to buy or lease, and stock certificates. Income does not include alimony and separate maintenance payments.

8. Relative. "Relative" means an individual who is related to the Legislator or the Legislator's spouse as father, mother, son, daughter, brother, sister, uncle, aunt, great aunt, great uncle, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother or half sister, and shall be deemed to include the fiance or fiancee of the Legislator.

9. Self-employed. "Self-employed" means that the person qualifies as an independent contractor under Title 39-A, section 102, subsection 13.

Section History:
1975, c. 621, § 1 (NEW).
1989, c. 561, § 4 (RPR).
1991, c. 885, § E1 (AMD).
1991, c. 885, § E47 (AFF).
1995, c. 33, § 1,2 (AMD).

1 §1013. Authority; procedures

1. Authority. The commission shall have the authority:

A. To issue, on request of any Legislator on an issue involving

himself, or on its own motion, advisory opinions and guidelines on problems or questions involving possible conflicts of interest in matters under consideration by, or pertaining to, the Legislature;

B. To investigate complaints filed by Legislators, or on its own motion, alleging conflict of interest against any Legislator, to hold hearings thereon if the commission deems appropriate and to issue publicly findings of fact together with its opinion; and

C. To administer the disclosure of sources of income by Legislators as required by this subchapter.

2. Procedure. The following procedures shall apply:

A. Requests for advisory opinions by members of the Legislature shall be filed with the commission in writing, signed by the Legislator requesting the opinion and shall contain such supporting data as the commission shall require. When preparing an advisory opinion on its own motion, the commission shall notify the Legislator concerned and allow him to provide additional information to the commission. In preparing an advisory opinion, either upon request or on its own motion, the commission may make such an investigation as it deems necessary. A copy of the commission's advisory opinion shall be sent to the Legislator concerned and to the presiding officer of the House of which the Legislator is a member;

B. A Legislator making a complaint shall file the complaint under oath with the chairman. The complaint shall specify the facts of the alleged conflict of interest. The Legislator against whom a complaint is filed shall immediately be given a copy of the complaint and the name of the complainant. Only those complaints dealing with alleged conflicts of interest related to the current Legislature shall be considered by the commission. Upon a majority vote of the commission, the commission shall conduct such investigation and hold such hearings as it deems necessary. The commission shall issue its findings of fact together with its opinion regarding the alleged conflict of interest to the House of which the Legislator concerned is a member. That House may take whatever action it deems appropriate, in accordance with the Constitution of the State of Maine.

C. When the conduct of a particular Legislator is under inquiry and a hearing is to be held, the Legislator shall be given written notification of the time and place at which the hearing is to be held. Such notification shall be given not less than 10 days prior to the date set

for the hearing.

D. The commission shall have the authority, through its chairman or any member designated by him, to administer oaths, subpoena witnesses and compel the production of books, records, papers, documents, correspondence and other material and records which the committee deems relevant. The commission shall subpoena such witnesses as the complainant Legislator or the Legislator against whom the complaint has been filed may request to be subpoenaed. The State, its agencies and instrumentalities shall furnish to the commission any information, records or documents which the commission designates as being necessary for the exercise of its functions and duties. In the case of refusal of any person to obey an order or subpoena of the commission, the Superior Court, upon application of the commission, shall have jurisdiction and authority to require compliance with the order or subpoena. Any failure of any person to obey an order of the Superior Court may be punished by that court as a contempt thereof.

E. Any person whose conduct is under inquiry shall be accorded due process and, if requested, the right to a hearing. All witnesses shall be subject to cross-examination.

Any person whose name is mentioned in an investigation or hearing and who believes that testimony has been given which adversely affects him shall have the right to testify, or at the discretion of the commission and under such circumstances as the commission shall determine to protect the rights of the Legislator under inquiry, to file a statement of facts under oath relating solely to the material relevant to the testimony of which he complains. Any witness at an investigation or hearing, subject to rules and regulations promulgated by the commission, shall be entitled to a copy of such testimony when the same becomes relevant to a criminal proceeding or subsequent investigation or hearings.

All witnesses shall be sworn. The commission may sequester witnesses as it deems necessary. The commission shall not be bound by the strict rules of evidence, but its findings and opinions must be based upon competent and substantial evidence. Time periods and notices may be waived by agreement of the commission and the person whose conduct is under inquiry.

F. If the commission concludes that it appears that a Legislator has violated a criminal law, a copy of its findings of fact, its opinion and such other information as may be appropriate shall be referred to the

Attorney General. Any determination by the commission or by a House of the Legislature that a conflict of interest has occurred does not preclude any criminal action relating to the conflict which may be brought against the Legislator.

G. If the commission determines that a complaint filed under oath is groundless and without foundation, or if the Legislator filing the complaint fails to appear at the hearing without being excused by the commission, the commission may order the complainant to pay to the Legislator against whom the complaint has been filed his costs of investigation and defense, including any reasonable attorney's fees. The complainant may appeal such an order to the House of which he is a member. Such an order shall not preclude any other remedy available to the Legislator against whom the complaint has been filed, including, but not limited to, an action brought in Superior Court against the complainant for damages to his reputation.

H. A copy of the commission's advisory opinions and guidelines, with such deletions and changes as the commission deems necessary to protect the identity of the person seeking the opinions, or others, shall be filed with the Clerk of the House. The clerk shall keep them in a special binder and shall finally publish them in the Legislative Record. The commission may exempt an opinion or a part thereof from release, publication or inspection, if it deems such action appropriate for the protection of 3rd parties and makes available to the public an explanatory statement to that effect.

I. A copy of the commission's findings of fact and opinions regarding complaints against Legislators shall also be filed with the Clerk of the House. The clerk shall keep them in a special binder and shall finally publish them in the Legislative Record.

J. The records of the commission and all information received by the commission acting under this subchapter in the course of its investigation and conduct of its affairs shall be confidential, except that Legislators' statements of sources of income, evidence or information disclosed at public hearings, the commission's findings of fact and its opinions and guidelines are public records.

K. When a Legislator has a question or problem of an emergency nature about a possible conflict of interest or an issue involving himself which arises during the course of legislative action, he may request an advisory opinion from the presiding officer of the

legislative body of which he is a member. The presiding officer may, at his discretion, issue an advisory opinion, which shall be in accordance with the principles of this subchapter, which shall be in writing, and which shall be reported to the commission. The commission may then issue a further opinion on the matter. The presiding officer may refer such question or problem directly to the commission, which shall meet as soon as possible to consider the question or problem.

3. Confidentiality. The subject of any investigation by the commission shall be informed promptly of the existence of the investigation and the nature of the charges or allegations. Otherwise, notwithstanding chapter 13, all complaints shall be confidential until the investigation is completed and a hearing ordered or until the nature of the investigation becomes public knowledge. Any person, except the subject of the investigation, who knowingly breaches the confidentiality of the investigation is guilty of a Class D crime.

Section History:
1975, c. 621,§1 (NEW).
1977, c. 252, § 2 (AMD).
1989, c. 561, §5,6 (AMD).

1 § 1014. Conflict of interest

1. Situations involving conflict of interest. A conflict of interest shall include the following:

A. Where a Legislator or a member of his immediate family has or acquires a direct substantial personal financial interest, distinct from that of the general public, in an enterprise which would be financially benefited by proposed legislation, or derives a direct substantial personal financial benefit from close economic association with a person known by the Legislator to have a direct financial interest in an enterprise affected by proposed legislation;

B. Where a Legislator or a member of his immediate family accepts gifts, other than campaign contributions duly recorded as required by law, from persons affected by legislation or who have an interest in a business affected by proposed legislation, where it is known or reasonably should be known that the purpose of the donor in making the gift is to influence the Legislator in the performance of his official duties or vote, or is intended as a reward for action on his part;

C. Receiving compensation or reimbursement not authorized by law for services, advice or assistance as a Legislator;

D. Appearing for, representing or assisting another in respect to a claim before the Legislature, unless without compensation and for the benefit of a citizen;

E. Where a Legislator or a member of his immediate family accepts or engages in employment which could impair the Legislator's judgment, or where the Legislator knows that there is a substantial possibility that an opportunity for employment is being afforded him or a member of his immediate family with intent to influence his conduct in the performance of his official duties, or where the Legislator or a member of his immediate family stands to derive a personal private gain or loss from employment, because of legislative action, distinct from the gain or losses of other employees or the general community;

F. Where a Legislator or a member of his immediate family has an interest in legislation relating to a profession, trade, business or employment in which the Legislator or a member of his immediate family is engaged, where the benefit derived by the Legislator or a member of his immediate family is unique and distinct from that of the general public or persons engaged in similar professions, trades, businesses or employment.

2. Undue influence. It is presumed that a conflict of interest exists where there are circumstances which involve a substantial risk of undue influence by a Legislator, including but not limited to the following cases.

A. Appearing for, representing or assisting another in a matter before a state agency or authority, unless without compensation and for the benefit of a constituent, except for attorneys or other professional persons engaged in the conduct of their professions.

(1) Even in the excepted cases, an attorney or other professional person must refrain from references to his legislative capacity, from communications on legislative stationery and from threats or implications relating to legislative action.

B. Representing or assisting another in the sale of goods or services to the State, a state agency or authority, unless the transaction occurs after public notice and competitive bidding.

3. Abuse of office or position. It is presumed that a conflict of interest exists where a Legislator abuses his office or position, including but not limited to the following cases.

A. Where a Legislator or a member of his immediate family has a direct financial interest or an interest through a close economic association in a contract for goods or services with the State, a state agency or authority in a transaction not covered by public notice and competitive bidding or by uniform rates established by the State, a state agency, authority or other governmental entity or by a professional association or organization;

B. Granting or obtaining special privilege, exemption or preferential treatment to or for oneself or another, which privilege, exemption or treatment is not readily available to members of the general community or class to which the beneficiary belongs; or

C. Use or disclosure of confidential information obtained because of office or position for the benefit of self or another.

Section History:
1975, c. 621, § 1 (NEW).

1 § 1015. Actions precluded; reports

1. Actions precluded. When a member of the Legislature has a conflict of interest, that member has an affirmative duty not to vote on any question in connection with the conflict in committee or in either branch of the Legislature, and shall not attempt to influence the outcome of that question.

2. Reports. When the commission finds that a Legislator has voted or acted in conflict of interest, the commission shall report its findings in writing to the house of which the Legislator is a member.

3. Campaign contributions and solicitations prohibited. The following provisions prohibit certain campaign contributions and solicitation of campaign contributions during a legislative session.

A. As used in this subsection, the terms "employer," "lobbyist" and "lobbyist associate" have the same meanings as in Title 3, section 312-A and the term "contribution" has the same meaning as in Title 21-A, section 1012.

B. The Governor, a member of the Legislature or any constitutional

officer or the staff or agent of the Governor, a member of the Legislature or any constitutional officer may not intentionally solicit or accept a contribution from a lobbyist, lobbyist associate or employer during any period of time in which the Legislature is convened before final adjournment. A lobbyist, lobbyist associate or employer may not intentionally give, offer or promise a contribution to the Governor, a member of the Legislature or any constitutional officer or the staff or agent of the Governor, a member of the Legislature or any constitutional officer during any time in which the Legislature is convened before final adjournment. These prohibitions apply to direct and indirect solicitation, acceptance, giving, offering and promising, whether through a political action committee, political committee, political party or otherwise.

C. This subsection does not apply to:

(1) Solicitations or contributions for bona fide social events hosted for nonpartisan, charitable purposes;

(2) Solicitations or contributions relating to a special election to fill a vacancy from the time of announcement of the election until the election; and

(3) Solicitations or contributions after the deadline for filing as a candidate as provided in Title 21-A, section 335.

D. A person who intentionally violates this subsection is subject to a civil penalty not to exceed $1,000, payable to the State and recoverable in a civil action.

Section History:
1975, c. 621, §1 (NEW).
1989, c. 561, § 7 (AMD).
1997, c. 529, §1 (AMD).

1 § 1016. Statement of sources of income (REPEALED)

Section History:
1975, c. 621, § 1 (NEW).
1989, c. 561, §8 (RP).

1 § 1016-A. Disclosure of specific sources of income

Each Legislator shall file a statement of specific sources of income received in the preceding calendar year with the commission by 5:00 p.m. on February 15th of each year on forms provided by the Secretary of State. Prior to the end of the first week in January of each year, the Secretary of State shall deliver a form to each Senator and member of the House of Representatives. The statement of specific sources of income filed under this subchapter must be on a form prescribed by the commission and prepared by the Secretary of State and is a public record.

1. Disclosure of Legislator's income. The Legislator filing the statement shall name and give the address of each specific source of income received as follows.

A. A Legislator who is an employee of another shall name the employer and each other source of income of $1,000 or more.

B. A Legislator who is self-employed shall state that fact and the name and address of the Legislator's business. The Legislator shall name each source of income derived from self-employment that represents more than 10% of the Legislator's gross income or $1,000, whichever is greater, provided that if this form of disclosure is prohibited by law, rule or an established code of professional ethics, the Legislator shall only specify the principal type of economic activity from which the income is derived. With respect to all other sources of income, a self-employed Legislator shall name each source of income of $1,000 or more. The Legislator shall also indicate major areas of economic activity and, if associated with a partnership, firm, professional association or similar business entity, the major areas of economic activity of that entity.

C. In identifying the source of income, it shall be sufficient to identify the name and address and the principal type of economic activity of the corporation, professional association, partnership, financial institution, nonprofit organization or other entity or person directly providing the income to the Legislator.

D. With respect to income from a law practice, it shall be sufficient for attorneys-at-law to indicate their major areas of practice and, if associated with a law firm, the major areas of practice of the firm, in such manner as the commission may require.

2. Campaign contributions. Campaign contributions duly recorded as required by law shall not be considered income.

3. Disclosure of gifts. The Legislator shall name the specific source of each gift that the Legislator receives.

4. Disclosure of income of immediate family. The Legislator shall disclose the type of economic activity representing each source of income of $1,000 or more that any member of the immediate family of the Legislator received.

5. Disclosure of honoraria. The Legislator shall disclose the name of each source of honoraria that the Legislator accepted.

6. Representation before state agencies. The Legislator shall identify each executive branch agency before which the Legislator has represented or assisted others for compensation.

7. Business with state agencies. The Legislator shall identify each executive branch agency to which the Legislator or the Legislator's immediate family has sold goods or services with a value in excess of $1,000.

Section History:
1989, c. 561,§ 9 (NEW).
1989, c. 608, § 1,2 (AMD).
1989, c. 734 (AMD).

1 § 1016-B. Disclosure of reportable liabilities

Each Legislator shall include on the statement of income under section 1016-A all reportable liabilities incurred during the Legislator's term of office.

1. Definition. For the purposes of this section, "reportable liability" means any unsecured loan of $3000 or more received from a person not a relative. "Reportable liability" does not include:

A. A credit card liability;

B. An educational loan made or guaranteed by a governmental entity, educational institution or nonprofit organization; or

C. A loan made from a state or federally regulated financial institution for business purposes.

2. Reporting. A Legislator shall make a supplementary statement to the commission of any reportable liability within 30 days after it is incurred. The report shall identify the creditor in the manner of section 1016-A, subsection 1, paragraph C.

3. Campaign contributions. Campaign contributions duly recorded as required by law are not required to be reported under this section.

Section History:
1989, c. 561, § 10 (NEW).
1991, c. 331, § 1 (AMD).

1§ 1016-C. Reports by legislative candidates

A candidate, as defined in Title 21-A, section 1, subsection 5, for the Legislature who is not required to file a report under section 1016-A or 1016-B shall file a report containing the same information required of Legislators under sections 1016-A and 1016-B no later than 5 p.m. on the first Monday in August preceding the general election unless the candidate withdraws from the election in accordance with Title 21-A, section 374-A by that date.

Section History:
1991, c. 880, § 2 (NEW).

1 § 1017. Form; contents (REPEALED)

Section History:
1975, c. 621, § 1 (NEW).
1977, c. 252, § 3 (AMD).
1981, c. 698, § 2 (AMD).
1989, c. 561, § 11 (RP).

1 § 1018. Updating statement

A Legislator shall file an updating statement with the commission on a form prescribed by the commission and prepared by the Secretary of State. Such statement shall be filed within 30 days of addition, deletion or change to the information relating to the preceding year supplied under this subchapter.

Section History:
1975, c. 621, § 1 (NEW).
1977, c. 252, § 4 (RPR).

1 § 1019. False statement; failure to file

The intentional filing of a false statement shall be a Class E crime. If the commission concludes that it appears that a Legislator has willfully filed a false statement, it shall refer its findings of fact to the Attorney General.

If the commission determines that a Legislator has willfully failed to file a statement required by this subchapter or has willfully filed a false statement, the Legislator shall be presumed to have a conflict of interest on every question and shall be precluded or punished as provided in section 1015.

Section History:
1975, c. 621, § 1 (NEW).
1977, c. 252, § 5 (AMD).
1977, c. 696, § 12 (AMD).

1 § 1020. Penalty for false accusations

Any person who files a false charge of a conflict of interest with the commission or any member of the commission, which he does not believe to be true, or whoever induces another to file a false charge of a conflict of interest, which he does not believe to be true, shall be guilty of a Class E crime.

Section History:
1975, c. 621, §1 (NEW).
1977, c. 696, §13 (RPR).

1 § 1021. Membership on boards, authorities or commissions

It shall not be a conflict of interest for a Legislator to serve on a public board, authority or commission created by the Legislature so long as there is no consideration paid to the Legislator other than his actual expenses.

Section History:
1975, c. 621,§ 1 (NEW).

1 § 1022. Disciplinary guidelines

The Legislature shall adopt, publish, maintain and implement, as authorized in the Constitution of Maine, Article IV, Part Third, Section 4, disciplinary guidelines and procedures for Legislators, including the violations of ethical standards, penalties of reprimand, censure or expulsion and the procedures under which these or other penalties may be imposed.

Section History:
1989, c. 561, § 12 (NEW).

1 § 1023. Code of ethics

The Legislature by Joint Rule shall adopt and publish a code of ethics for Legislators and legislative employees.

Section History:
1989, c. 561,§12 (NEW).

TITLE 5
CHAPTER 158
ADMINISTRATIVE SERVICES

SUBCHAPTER II

5 §1890-B. Misuse of State Government computer system

1. Violation. A person is guilty of misuse of a State Government computer system if that person knowingly uses a computer system operated by a state department or agency, the Judicial Department or the Legislature:

A. To prepare materials with the intent to expressly advocate, to those eligible to vote, for the election or defeat of any candidate for a federal office, a constitutional office, or any candidate for elective municipal, county or state office, including leadership positions in the Senate and the House of Representatives; or

B. With the intent to solicit contributions reportable under Title 21-A, chapter 13.

1-A. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Computer system" has the same meaning as in Title 17-A, section 431.

B. "Leadership positions" includes the presiding officers of each House, party leaders, the Clerk of the House and Assistant Clerk of the House and the Secretary of the Senate and the Assistant Secretary of the Senate.

2. Penalty. Misuse of a State Government computer system is a Class C crime.

3. Repealed.

4. Confidentiality. Computer programs, technical data, logic diagrams and source code related to data processing or telecommunications are confidential and are not public records as defined in Title 1, section 402, subsection 3 to the extent of the identified trade secrets. To qualify for confidentiality under this subsection, computer programs, technical data, logic diagrams and source code must:

A. Contain trade secrets as defined in Title 10, section 1542,

subsection 4 held in private ownership; and

B. Have been provided to a state agency by an authorized independent vendor or contractor under an agreement by which:

(1) All trade secrets that can be protected are identified without disclosing the secret;

(2) The vendor or contractor retains all intellectual property rights in those trade secrets; and

(3) The state agency agrees to hold and use the programs, data, diagrams or source code without disclosing any identified trade secrets.

5. Public records. Except as provided in subsection 4, any document created or stored on a State Government computer is a public record and must be made available in accordance with Title 1, chapter 13 unless specifically exempted by that chapter.

Section History:
1989, c. 501, § P17 (NEW).
1989, c. 596, § Q (RPR).
1991, c. 340 (AMD).
1995, c. 703, § 1 (RPR).

TITLE 17-A
CHAPTER 1

PRELIMINARY

17A § 2. Definitions

As used in this code, unless a different meaning is plainly required, the following words and variants thereof have the following meanings.

> 21. "Public servant" means any official [,] officer or employee of any branch of government and any person participating as juror, advisor, consultant or otherwise, in performing a governmental function. A person is considered a public servant upon his election, appointment or other designation as such, although he may not yet officially occupy that position.

Section History:
1975, c. 499, §1.

TITLE 17-A
CHAPTER 25

BRIBERY AND CORRUPT PRACTICES

17A § 601. Scope of chapter

Nothing in this chapter shall be construed to prohibit the giving or receiving of campaign contributions made for the purpose of defraying the costs of a political campaign. No person shall be convicted of an offense solely on the evidence that a campaign contribution was made, and that an appointment or nomination was subsequently made by the person to whose campaign or political party the contribution was made.

Section History:
1975, c. 499, §1 (NEW).

17A § 602. Bribery in official and political matters

1. A person is guilty of bribery in official and political matters if:

A. He promises, offers, or gives any pecuniary benefit to another with the intention of influencing the other's action, decision, opinion, recommendation, vote, nomination or other exercise of discretion as a public servant, party official or voter;

B. Being a public servant, party official, candidate for electoral office or voter, he solicits, accepts or agrees to accept any pecuniary benefit from another knowing or believing the other's purpose to be as described in paragraph A, or fails to report to a law enforcement officer that he has been offered or promised a pecuniary benefit in violation of paragraph A; or

C. That person promises, offers or gives any pecuniary benefit to another with the intention of obtaining the other's signature on an absentee ballot under Title 21-A, chapter 9, subchapter IV, or referendum petition under Title 21-A, chapter 11, or that person solicits, accepts or agrees to accept any pecuniary benefit from another knowing or believing the other's purpose is to obtain that person's signature on an absentee ballot or referendum petition, or fails to report to a law enforcement officer that the person has been offered or promised a pecuniary benefit in violation of this paragraph.

2. As used in this section and other sections of this chapter, the following definitions apply.

A. A person is a "candidate for electoral office" upon his public announcement of his candidacy. [1975, c. 499, °1 (new).]

B. "Party official" means any person holding any post in a political party whether by election, appointment or otherwise. [1975, c. 499, °1 (new).]

C. "Pecuniary benefit" means any advantage in the form of money, property, commercial interest or anything else, the primary significance of which is economic gain; it does not include economic advantage applicable to the public generally, such as tax reduction or increased prosperity generally. "Pecuniary benefit" does not include the following:

(1) A meal, if the meal is provided by industry or special interest organizations as part of an informational program presented to a group of public servants;

(2) A meal, if the meal is a prayer breakfast or a meal served during a meeting to establish a prayer breakfast; or

(3) A subscription to a newspaper, news magazine or other news publication.

3. Bribing in official and political matters is a Class C crime.

Section History:
1975, c. 499, § 1 (NEW).
1981, c. 349, § 1,2 (AMD).
1983, c. 583, § 8 (AMD).
1989, c. 502, § A47 (AMD).
1993, c. 396, § 1 (AMD).
1995, c. 33, §3 (AMD).
1997, c. 223, § 1 (AMD).
1997, R R c. 1, § 12 (COR).

17A § 603. Improper influence

1. A person is guilty of improper influence if he:

A. Threatens any harm to a public servant, party official or voter with the purpose of influencing his action, decision, opinion,

recommendation, nomination, vote or other exercise of discretion;

B. Privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, argument or other communication with the intention of influencing that discretion on the basis of considerations other than those authorized by law; or

C. Being a public servant or party official, fails to report to a law enforcement officer conduct designed to influence him in violation of paragraphs A or B.

2. "Harm" means any disadvantage or injury, pecuniary or otherwise, including disadvantage or injury to any other person or entity in whose welfare the public servant, party official or voter is interested.

3. Improper influence is a Class D crime.

Section History:
1975, c. 499, § 1.

17A § 604. Improper compensation for past action

1. A person is guilty of improper compensation for past action if:

A. Being a public servant, he solicits, accepts or agrees to accept any pecuniary benefit in return for having given a decision, opinion, recommendation, nomination, vote, otherwise exercised his discretion, or for having violated his duty; or

B. He promises, offers or gives any pecuniary benefit, acceptance of which would be a violation of paragraph A.

2. Improper compensation for past action is a Class D crime.

Section History:
1975, c. 499, § 1.

17A § 605. Improper gifts to public servants

1. A person is guilty of improper gifts to public servants if:

A. Being a public servant he solicits, accepts or agrees to accept any pecuniary benefit from a person who he knows is or is likely to

become subject to or interested in any matter or action pending before or contemplated by himself or the governmental body with which he is affiliated; or

B. He knowingly gives, offers, or promises any pecuniary benefit prohibited by paragraph A.

2. Improper gifts to public servants is a Class E crime.

Section History:
1975, c. 499 § 1.

17A § 606. Improper compensation for services

1. A person is guilty of improper compensation for services if:

A. Being a public servant, he solicits, accepts or agrees to accept any pecuniary benefit in return for advice or other assistance in preparing or promoting a bill, contract, claim or other transaction or proposal as to which he knows that he has or is likely to have an official discretion to exercise; or

B. He gives, offers or promises any pecuniary benefit, knowing that it is prohibited by paragraph A.

2. Improper compensation for services is a Class E crime.

Section History:
1975, c. 499, § 1.

17A § 607. Purchase of public office

1. A person is guilty of purchase of public office if:

A. He solicits, accepts or agrees to accept, for himself, another person, or a political party, money or any other pecuniary benefit as compensation for his endorsement, nomination, appointment, approval or disapproval of any person for a position as a public servant or for the advancement of any public servant; or

B. He knowingly gives, offers or promises any pecuniary benefit prohibited by paragraph A.

2. Purchase of public office is a Class D crime.

Section History:
1975, c. 499, § 1.

17A § 608. Official oppression

1. A person is guilty of official oppression if, being a public servant and acting with the intention to benefit himself or another or to harm another, he knowingly commits an unauthorized act which purports to be an act of his office, or knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office.

2. Official oppression is a Class E crime.

Section History:
1975, c. 499, § 1

17A§ 609. Misuse of information

1. A person is guilty of misuse of information if, being a public servant and knowing that official action is contemplated, or acting in reliance on information which he has acquired by virtue of his office or from another public servant, he:

A. Acquires or divests himself of a pecuniary interest in any property, transaction or enterprise which may be affected by such official action or information; or

B. Speculates or wagers on the basis of such official action or information; or

C. Knowingly aids another to do any of the things described in paragraphs A and B.

2. Misuse of information is a Class E crime.

Section History:
1975, c. 499, § 1.

LEGISLATIVE CODE OF ETHICS

Any public office holder is charged with responsible conduct commensurate with the trust placed in him/her by the electorate. In a free government the official is entrusted with the security, safety, health, prosperity, and general well-being of those whom he/she serves. With such a trust high moral and ethical standards producing the public's confidence, with the reduction to a minimum of any conflict between private interests and official duties, should be observed. No state legislator will accept any employment which can possibly impair his/her independence and integrity of judgement or will he/she exercise his/her position of trust to secure unwarranted privileges for themselves or for others. The Maine legislator will be ever mindful of the ordinary citizen who might otherwise be unrepresented, and will endeavor conscientiously to pursue the highest standards of legislative conduct.

Adopted by the 100th Legislature

JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

August 18, 1983

Honorable John L. Martin
Speaker
House of Representatives
State House Station #2
Augusta, Maine 04333

Dear Speaker Martin:

You have asked for my views regarding the propriety of members of the Maine Legislature accepting an offer from the Whitewater Outfitters Association of Maine, Inc. to participate, at a cost of $15 for up to two people, in a whitewater raft trip on the Penobscot River on August 25, 1983. You have further indicated that the price includes luncheon on the river, and that the fee generally charged by the Association for the services in question runs substantially in excess of that which is being asked of any participating Legislator.

The most relevant provision of law concerning your question is Section 1014 of the Maine Legislative Ethics Act, 1 M.R.S.A. § 1011, et seq., which provides, in pertinent part,

> "1. Situations involving conflict of interest. A conflict of interest shall include the following:
>
> * * *
>
> "B. Where a Legislator or a member of his immediate family accepts gifts, other

> than campaign contributions duly recorded as required by law, from persons affected by legislation or who have an interest in a business affected by proposed legislation, where it is known or reasonably should be known that the purpose of the donor in making the gift is to influence the Legislator in the performance of his official duties or vote, or is intended as a reward for action on his part."

The first paragraph of the letter of the President of Whitewater Outfitters Associations of Maine, Inc., offering the whitewater raft trip to members of the Legislature at a substantially reduced price, states:

> "The past year saw much legislation dealing with rivers in Maine. The many users of Maine rivers, including whitewater rafting, canoeing, fishing, camping and hydro power, will almost certainly be issues that are with us in the years ahead."

It thus appears that the offer of a low-cost raft trip is intended to "influence [Legislators] in the performance of [their] official duties or vote" in future years within the meaning of 1 M.R.S.A. § 1014(1)(B). That being the case, should individual Legislators choose to participate in this activity, such participation could well be construed to constitute acceptance of a "gift" and give rise to conflicts of interest for such Legislators should further legislation concerning the regulation of whitewater rafting, or activities such as hydropower development which might be inconsistent with whitewater rafting, come before the Legislature in the future. Under these circumstances, I would immediately encourage members of the legislature not to accept this particular invitation, unless they were to pay the normal price for the service.

Please be further advised that in providing you with my views on this question, I do not mean to be interfering with the procedure which the Legislature has established for resolving questions of this kind. As you know, the Legislative Ethics Act establishes a Legislative Ethics Commission, whose function is to advise individual members of the Legislature as to the interpretation of the Act. The reason that I am providing you with my thoughts is only that, in view of the time constraints involved, it would be impossible to assemble the Commission in sufficient time to allow it to render an

opinion. I should hope, therefore, that the course which the Legislature has provided for the resolution of legislative ethics questions will continue to be used in the future when time is not of the essence.

I hope the foregoing is responsive to your inquiry. Please feel free to reinquire if any further clarification is necessary.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/ec

cc: Jim Ernst

JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

December 5, 1983

Honorable Judy C. Kany
Maine Senate
State House Station #3
Augusta, Maine 04333

Honorable John L. Martin
Speaker of the Maine House of Representatives
State House Station #2
Augusta, Maine 04333

Dear Senator Kany and Speaker Martin:

You have asked whether it would violate any provision of law for the members of the Low-level Waste Siting Commission to accept an offer of the Maine Yankee Atomic Power Company to pay their transportation and housing expenses for a trip to Barnwell, South Carolina, in order to inspect the low-level radioactive waste disposal facility there. For the reasons which follow, it is the opinion of this Department that there are no legal impediments to the acceptance of this offer by any of the members of the Commission.

The Low-level Waste Siting Commission was established by P.L. 1981, ch. 439 for the purpose of studying the management, transportation and disposal of low-level radioactive waste in order to assist the Governor and the Legislature in regulating such activity within the State. The Commission consists of nine members, four of whom are members of the Legislature, three of whom are members of the Executive Branch, and two of whom are private citizens. Various members of the Commission have expressed an interest in visiting the only operating low-level radioactive waste facility in the Eastern United States at Barnwell, South Carolina, to assist them in

discharging their statutory functions. While the Legislature has provided some funding to the Commission to assist it in carrying out its responsibilities, it appears that the funds available are not sufficient to pay the expenses of all of those members of the Commission wishing to visit the Barnwell site. Consequently, on November 16, 1983, the Maine Yankee Atomic Power Company, the principal generator of low-level radioactive waste in Maine, offered to provide transportation and housing costs for any member of the Commission who wished to avail himself of that offer. The offer, a copy of which is attached, proposes to fly the participants to Columbia, South Carolina, and to house them there that night; to transport the participants by bus to Barnwell to inspect the facility the next morning; and to fly them back to Maine that evening.

Two statutes present themselves as possible barriers to the acceptance of this offer by the members of the Commission: The provisions of the Maine Criminal Code, Title 17-A, M.R.S.A., relating to the bribing or conferring of gifts upon public servants, and the Legislative Ethics Act, 1 M.R.S.A. § 1011, et seq. which applies to the activities of members of the Legislature. The relevant provisions of the Criminal Code, which apply to any "public servant",1/ prohibit any such person from accepting "any pecuniary benefit" from a person who, generally, has an interest in the manner in which the servant discharges his public function. 17-A M.R.S.A. §§ 602(1)(B), 605(1)(A). The term "pecuniary benefit" is further defined to mean "any advantage in the form of money, property, commercial interest or anything else, the primary significance of which is economic gain." 17-A M.R.S.A. § 602(2)(C) (emphasis added). The question presented here, therefore, is whether the provision of transportation and lodging expenses to members of the Low-level Waste Siting Commission to permit them to gain information to assist them in discharging their responsibilities would constitute the conferral of any economic advantage upon them.

In the view of this Department, such would not be the case. In view of the relatively tight schedule of the proposed excursion, it is difficult to conclude that the provision of free transportation services or free lodging for one night would constitute the conferral of something which would have any particular pecuniary value to any member of the

---

1/ For purposes of this opinion, it will be assumed that the two private citizen members of the Commission are "public servants" within the meaning of the anti-bribery statutes to the extent that they are engaged in the business of the Commission. 17-A M.R.S.A. § 2(21).

Commission. Indeed, to the extent that the members of the Commission would be obliged to forego employment or other economically beneficial activity during the same period, their acceptance of the offer would be to their economic disbenefit. Accordingly, since there does not appear to be any "advantage", nor any "economic gain" accruing to any member of the Commission who accepts the offer, this Department cannot say that the recipients of the offer would be guilty of accepting bribes or improper gifts within the meaning of the Criminal Code.

The only question remaining, therefore, is whether the acceptance of the offered transportation or lodging by the legislative members of the Commission would violate the Legislative Ethics Act. Section 1014(1)(B) of that statute specifies that a conflict of interest shall arise, sufficient to disqualify a member of the Legislature from voting on any related question, when a member of the Legislature accepts a "gift" where the purpose of the gift is to influence the Legislator in the performance of his duties. 1 M.R.S.A. § 1014(1)(B). The term "gift" is undefined in the statute. Nonetheless, it would appear to this Department that the word should be interpreted in a manner similar to the definition of the term "pecuniary benefit" included in the anti-bribery laws just discussed. Only if a legislator accepts something of value which is to his economic advantage could a conflict of interest arise under the Legislative Ethics Act. Thus, since, as explained above, the services offered in the case at hand could not be viewed as being to the economic advantage of any member of the Commission,[2/] they should not be considered a "gift" within the meaning of the Legislative Ethics Act.

In responding to your question, I would like to reiterate my concern that, with regard to the applicability of the Legislative Ethics Act, questions of this kind should more properly be resolved by the Legislative Ethics Commission, which the Legislature has established for that purpose, than by requests for advice from my office. I have provided our views in this case because, as in the situation involving the offer

---

2/ The conclusion of this Opinion is therefore different from the advice rendered on August 18, 1983 to Speaker Martin, copy attached, regarding whether the acceptance of low-cost whitewater rafting trips by a member of the Legislature would cause a conflict of interest to arise under the Legislative Ethics Act. Since a free or low-cost whitewater rafting trip would be something of pecuniary value to anyone receiving it, its offer to a member of the Legislature would constitute a "gift" within the meaning of the Act.

of low-cost whitewater rafting trips to members of the Legislature, there is insufficient time to assemble the Commission to allow it to render an opinion. Nonetheless, I would hope that in the future the Legislature would be able to anticipate problems of this kind in order to permit it to avail itself of its own procedures.

Finally, in setting forth the foregoing, I do not wish to be interpreted as suggesting that it would be preferable for the costs of this trip to be paid for by private persons with an interest in the affairs of the Commission, rather than by the State Government,[3/] nor do I wish to be viewed as encouraging the members of the Legislature to avail themselves of offers of this kind. To quote the Legislative Ethics Act, "The Legislature cannot legislate morals and the resolution of ethical problems must indeed rest largely in the individual conscience." 1 M.R.S.A. § 1011, seventh paragraph.

I hope the foregoing is of assistance to you. Please feel free to reinquire if further clarification is necessary.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/ec

3/ As you know, the Legislative Council has available to it funds to defray the expenses of individual legislators in discharging legislative functions. See generally the portion of Section 23 of Part A of P.L. 1981, ch. 110 appropriating money for the operation of the Legislature for the 1983-85 biennium, and 3 M.R.S.A. § 162.

MAINE YANKEE ATOMIC POWER COMPANY

EDISON DRIVE
AUGUSTA, MAINE 04336
(207) 623-3521

November 16, 1983

Rep. John L. Martin
P.O. Box 250
Eagle Lake, Maine 04739

Dear Rep. Martin:

You are invited to participate in a tour of the Barnwell, South Carolina low level radioactive waste disposal facility on December 12, 1983. Maine Yankee Atomic Power Company has arranged the tour in cooperation with Chem-Nuclear Systems, Inc., the operator of the Barnwell facility, in order to provide Maine decision makers with an opportunity to view an operating low level radioactive waste disposal facility.

Tour participants will leave from the Portland Jetport at approximately 11:00 A.M. on December 11. Accommodations have been arranged at the Carolina Inn in Columbia, South Carolina which is approximately 60 miles from the Barnwell site. On Sunday evening, participants will be able to meet with South Carolina state regulators and legislators to discuss the Barnwell operation from their perspective. On Monday morning, a bus will take participants to the Barnwell site for a two hour tour of the facility. The return flight to Maine is scheduled for 5:00 P.M. on Monday.

We hope that you will be able to attend the Barnwell tour and feel confident that such a visit could add an important dimension to your role in the decision making process on low level waste disposal for the state of Maine. Maine Yankee has agreed to underwrite the expense of this tour for a few key Maine decision makers although individual participants are welcome to arrange for alternative financing of their tour if preferred.

If you are interested in attending the Barnwell tour please notify me or Donald Vigue, Maine Yankee Director of Public Affairs, by November 23, 1983. At that time we will also need your social security number and home addresses for reporting purposes. Please contact me or Mr. Vigue if you have any questions regarding the tour. I hope to see you Sunday, December 11 for what promises to be a very informative and worthwhile study tour of an operating low level radioactive waste disposal facility.

Sincerely,

Charles D. Frizzle
Assistant Vice President

CDF/sla
cc Low Level Waste Siting Commission
Richard Davies
Richard Barringer
George Seel
Sen. Gerard Conley
Rep. John Martin
Carol Fritz
Donald H. Marden, Esq.

DER FORM F-120

STATE OF MAINE

Inter-Departmental Memorandum Date January 30, 1986

To James S. Henderson, Deputy Dept. Secretary of State

From William R. Stokes, Assistant Dept. Attorney General

Subject Legislator-Lobbyist: Conflict of Interest

This will respond to your memorandum dated January 6, 1986 to Robert Frank, Assistant Attorney General, posing the following question:

> May a member of the Legislature also serve as Executive Director of the Maine County Commissioners Association when a significant portion of the Director's duties include acting as a lobbyist?

As you correctly point out in your memorandum, there is no explicit prohibition in the law which prohibits a Legislator from acting as a lobbyist. Nevertheless, it is my opinion that the practice of a Legislator acting as a paid lobbyist before the Legislature of which he is a member would constitute a conflict of interest under the Legislative Conflict of Interest statutes, general common law principles pertaining to conflicts of interest, as well as the legislative code of ethics adopted by the Maine Legislature.

There are several provisions of the laws governing legislative ethics which I believe are relevant to your inquiry. 1 M.R.S.A. § 1014(1)(C), (D) and (E) all, in my view, relate to this issue. They provide that a conflict of interest includes the following:

> C. Receiving compensation or reimbursement not authorized by law for services, advice or assistance as a Legislator.
>
> D. Appearing for, representing or assisting another in respect to a claim before the Legislature, unless without compensation and for the benefit of a citizen.
>
> E. Where a Legislator . . . accepts or engages in employment which could impair the Legislator's judgment, or where the Legislator knows that there is a substantial possibility that an opportunity for employment is being afforded him . . . with intent to influence his conduct in the performance of his official duties, or where the Legislator . . . stands to derive a personal private gain or loss from employment, because of legislative action, distinct from the gain or losses of

> of other employees or the general community.

In addition, 1 M.R.S.A. § 1014(2)(A) provides that it is presumed that a conflict of interest exists where there are circumstances which involve a substantial risk of undue influence by a Legislator, including but not limited to the following cases:

> A. Appearing for, representing or assisting another in a matter before a state agency or authority, unless without compensation and for the benefit of a constituent . . . .

The legislative code of ethics provides in relevant part as follows:

> No State Legislator will accept any employment which can possibly impair his independence and integrity of judgment. . . .

Additionally, there are common law principles of conflict of interest which have application where an individual holds a public office and is also involved in employment such that there is a question as to whether he can be totally faithful to his public duties. A public officer is required to exercise his powers and fulfill his legal obligations with "perfect fidelity . . . and whatever has a tendency to prevent [the] exercise of such fidelity is contrary to the policy of the law, and should not be recognized as lawful. . . . " Lesieur v. Inhabitants of Rumford, 113 Me. 317, 321, 93 A. 838, 839 (1915) quoted in Opinion of the Justices, 330 A.2d 916. As a public officer, an individual acts as a trustee on behalf of the public and as such he must not be placed "in a situation of temptation to serve his own personal interests to the prejudice of the interests of those for whom the law authorized and required him to act on the premises as an official." Tuscan v. Smith, 130 Me. 36, 46, 153 A. 389 (1931). With respect to the common law principles of conflict of interest, it is generally easy to articulate the rule, but more difficult to apply the rule to any given fact situation, and therefore, it is necessary to examine the nature of the public office involved as well as the private employment in question. As the Supreme Judicial Court stated, "Essentially, each case will be 'law' only unto itself." Opinion of the Justices, 330 A.2d at 917 (Me. 1975).

As can be seen from the foregoing, there would appear to be serious potential for a conflict in a situation where a member of the Legislature acts as a paid lobbyist for the

purpose of influencing his colleagues in the Legislature for some other interest. While the legislative conflict of interest statute may not explicitly say that a Legislator may not be a lobbyist, the entire spirit of that statute is designed to prevent Legislators from accepting compensation or remuneration for the purposes of assisting or representing someone before the Legislature.

For your information I have enclosed a copy of an opinion issued by this office dated April 11, 1979 (Op. 79-69) in which the subject of conflict of interest as it relates to acting as a lobbyist is addressed.

In view of the foregoing, it is my view that there is a conflict of interest when a Legislator engages in private employment a significant portion of which consists of acting as a lobbyist before the very Legislature of which he is a member.

I hope this information is helpful to you, and please don't hesitate to contact me at 3661 if you have any questions or if I can be of any assistance to you.

WILLIAM R. STOKES
Assistant Attorney General

WRS/ec

MICHAEL E. CARPENTER
ATTORNEY GENERAL

VENDEAN V. VAFIADES
CHIEF DEPUTY

Telephone: (207) 626-8800
FAX: (207) 287-3145

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

REGIONAL OFFICES:
84 HARLOW ST., SUITE A
BANGOR, MAINE 04401
TEL: (207) 941-3070
59 PREBLE STREET
PORTLAND, MAINE 04101-3014
TEL: (207) 879-4260

October 2, 1992

The Honorable Santo DiPietro
Maine House of Representatives
State House Station 3
Augusta, Maine 04333

The Honorable Jeffrey Butland
Maine House of Representatives
State House Station 3
Augusta, Maine 04333

Dear Representatives DiPietro and Butland:

This will respond to your letter to Attorney General Michael E. Carpenter dated October 2, 1992 requesting this Office to provide "written guidance outlining the obligations of . . . lawyer-legislators under the Governmental Ethics Law," with specific reference to proposed legislation and any related amendments thereto which would implement the recommendations of the Blue Ribbon Commission on Workers' Compensation. Specifically, you have indicated that you have called "for lawyers who are members of the Legislature who practice, or whose firms practice, workers' compensation insurance law, to voluntarily disclose their interest prior to voting on any reform measures."

Your inquiry raises two distinct issues. First, whether a lawyer-legislator who practices, or whose firm practices, workers' compensation law has any conflict of interest with respect to voting on any reform measure dealing with workers' compensation. Second, whether, regardless of any conflict of

interest, lawyer-legislators are required to disclose the sources of their income from the practice of law, and in particular, from the practice of workers' compensation law.

The Legislature has provided specific guidance to its members on the issue of what constitutes a conflict of interest. See 1 M.R.S.A. § 1014. The "Statement of Purpose" underlying the statutes governing legislative ethics recognizes that being a legislator in Maine "is not a full-time occupation . . ." in that "[m]ost legislators must look to income from private sources, not their public salaries for their sustenance and support for their families . . . ." 1 M.R.S.A. § 1011. The Legislature intentionally adopted "broader standards of ethics for legislators" because, as a practical matter, "the resolution of ethical problems must indeed rest largely in the individual conscience." Id. Nevertheless, for the purpose of "providing helpful advice and guidance" the Legislature recognized the need to statutorily "define ethical standards, . . . to chart the area of real or apparent impropriety." Id.

With this general background in mind, it is possible to briefly address the specific provisions of the legislative ethics law. In our view, the one provision which is most closely relevant to your inquiry is 1 M.R.S.A. § 1014(1)(F) which provides that a conflict of interest situation exists

> Where a Legislator or a member of his immediate family has an interest in legislation relating to a profession, trade, business or employment in which the Legislator or a member of his immediate family is engaged, where the benefit derived by the Legislator or a member of his immediate family is unique and distinct from that of the general public or persons engaged in similar professions, trades, businesses or employment.

We have previously indicated that this provision requires that the benefit derived by the legislator be "unique and distinct" from the benefit that may be derived by persons engaged in similar professions. In this particular situation, a legislator who happens to be a lawyer engaged in workers' compensation law or whose firm engages in workers' compensation law, would not be receiving any benefit which is unique and distinct from what other persons engaged in that line of work

would receive. Attached please find two prior opinions from this Office on this point.1/

On the issue of disclosure of a lawyer-legislator's financial interest, we would point out that there is also legislation requiring legislators to file a statement of specific sources of income. See 1 M.R.S.A. § 1016-A (a copy of which is attached). Subsection 1(D) deals specifically with the legislator who is also an attorney and provides:

> The legislator filing the statement shall name and give the address of each specific source of income received as follows:
>
> . . .
>
> D. With respect to income from a law practice, it shall be sufficient for attorneys-at-law to indicate their major areas of practice and, if associated with a law firm, the major areas of practice of the firm, in such manner as the commission may require.

In view of the forgoing, lawyer-legislators are already required to provide certain information concerning their sources of income, including the major areas of their law practice and the major areas of the practice of their firms. Whether a particular lawyer-legislator wishes to provide

---

1/The only other provision of the legislative ethics law which even arguably relevant to your inquiry is 1 M.R.S.A. § 1014(1)(E) which provides in part that a conflict of interest situation exists "where a legislator or a member of his immediate family . . . engages in employment which could impair the Legislator's judgment . . . ." In the past, we have interpreted this provision to reach those situations where certain types of employment, by their very nature, might cause an impairment of the legislator's judgment in a particular matter. In our view, there is no reason why a lawyer-legislator who happens to practice workers' compensation law cannot exercise his or her best judgment as a legislator with respect to this proposed legislation. In other words, there is nothing about being a lawyer engaged in the practice of workers' compensation law that, by its very nature, would impair that legislator's judgment.

additional information on a voluntary basis is purely up to that individual legislator.

We hope this information is helpful to you and please do not hesitate to contact us if we can be of further assistance.

Sincerely,

WILLIAM R. STOKES
Assistant Attorney General

WRS/bls

enclosures
cc: The Honorable John L. Martin, Speaker of the House
The Honorable Charles Pray, President, Maine State Senate

'ICHAEL E. CARPENTER
ATTORNEY GENERAL

COPY

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

March 29, 1991

Honorable Jeffrey Mills
Senate Chair, Legal Affairs Committee
State House Station #3
Augusta, ME 04333

Dear Senator Mills:

On March 28, 1991, you asked for advice concerning whether you would be involved in any conflict of interest should you vote on Legislative Documents Nos. 194 and 867 dealing with the subject of requiring landlords to pay interest earned on security deposits paid by tenants. Your specific concern relates to the fact that you apparently own rental property and would be affected by these pieces of proposed legislation. You requested a response, if possible, prior to 9:00 a.m. on March 29, 1991. I am responding to you and providing you with my opinion in my capacity as counsel to the Commission on Governmental Ethics and Election Practices. For the reasons discussed below and in the accompanying Opinion of the Attorney General dated September 6, 1984, it is my opinion that those Legislators who are landlords and, therefore, might be affected by L.D.'s 194 and 867 do not have any conflict of interest which would require the Legislator to abstain from voting on either of those bills.

The relevant provision of the Legislative Ethics Law is 1 M.R.S.A. § 1014(1)(F) which provides that a conflict of interest shall include the following:

> Where a Legislator or a member of his immediate family has an interest in legislation relating to a profession, trade, business or employment in which the Legislator or a member of his immediate family is engaged, where the benefit derived by the Legislator or member of his immediate family is unique and distinct from that of the general public or persons engaged in similar professions, trades, businesses or employment.

The key element of this conflict of interest provision is that which provides that the benefit derived by the Legislator or a member of his immediate family by legislation must be "unique and distinct from that of the general public or persons engaged in similar professions, trades, businesses or employment." While Legislators who are landlords may be affected by L.D. 194 and L.D. 867[1/], the effect on Legislators who are landlords is not unique or distinct from that of persons who are not Legislators and who are landlords. In other words, if enacted, either of these bills will apply equally to all landlords in the State, not just those located in a particular area or with particular characteristics which are unique and distinct and which are shared by you or any other Legislator who may be a landlord. Because the bills apply equally to all landlords, the "benefit" derived from that legislation who are members of the Legislature is not "unique and distinct," and therefore, it is my opinion that there is no conflict of interest for a Legislator who is also a landlord which would require abstention from voting on either of those bills.

I hope this information is helpful to you, and please don't hesitate to contact me if I can be of further assistance to you.

Sincerely,

WILLIAM R. STOKES
Assistant Attorney General

WRS/ec
Enc.

1/It is not even entirely clear that 1 M.R.S.A. § 1014(1)(F) is directly on point since it does not appear that a Legislator who is a landlord would actually derive a "benefit" from either of those bills. In any event, 1 M.R.S.A. § 1014(1)(F) appears to be the most relevant provision of the Legislative Ethics Law which applies to your question.

83-29

JAMES E. TIERNEY
ATTORNEY GENERAL

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

June 10, 1983

Honorable John L. Martin
Speaker of the House
State House, Station #2
Augusta, ME 04333

Dear Speaker Martin:

In your capacity as presiding officer of the House of Representatives you have requested an opinion from this Office as to whether an advisory opinion issued by the Commission on Governmental Ethics and Election Practices on May 31, 1983, in response to a request from Representative Elizabeth H. Mitchell, is incorrect as a matter of law. For the reasons discussed below, it is the opinion of this Office that Representative Mitchell would not be involved in a conflict of interest, within the meaning of 1 M.R.S.A. § 1014(1)(A), should she vote on Legislative Document 1353.

Prior to addressing your specific inquiry, it is important to emphasize that the opinions of both the Commission and this Office are advisory only, and that ultimately it is for the particular member of the Legislature in question to determine whether to be bound by either opinion.

Factual Background

In a letter dated May 17, 1983, Representative Mitchell requested the Commission on Governmental Ethics and Election Practices to issue an advisory opinion, pursuant to 1 M.R.S.A. § 1013(2)(A), as to whether her vote on L.D. 1353 (AN ACT to Limit Future Increases in the Cost of Hospital Care in Maine)

would constitute a conflict of interest in view of the fact that her husband, an attorney, provides legal representation to the Maine-Dartmouth Family Practice Residency, an association of physicians affiliated with the Kennebec Valley Medical Center. The facts, as outlined in Representative Mitchell's letter to the Commission, are reprinted in their entirety below:

> The facts are as follows: My husband, James Mitchell, Esq., maintains a private law practice. For the past several years Jim has provided legal advice and counsel for the Maine-Dartmouth Family Practice Residency in Augusta, Maine, an association of doctors that provide medical services to the general public. The Residency is affiliated with the Kennebec Valley Medical Center. As part of his ongoing relationship with the Residency, which provides less than 10% of his total income, Jim has been asked to provide and has provided legal advice, interpretation and counsel concerning the hospital cost containment bill (L.D. 1353) pending before this session of the Legislature. At the Residency's request, he has advised them as to the potential impact of the bill and has drafted certain amendments which the Residency may use in communicating with various legislators concerning the bill. He has not engaged in "lobbying" as that term is defined in 3 M.R.S.A. § 312 (8).

In short, the facts as presented by Representative Mitchell reveal that her husband provides legal services to the Family Practice Residency, including advice on L.D. 1353, and is compensated therefor.

On May 31, 1983, four[1/] members of the Commission concluded that "[b]ased on the information contained in your letter, it is the opinion of the Commission that your voting on L.D. 1353 would constitute a conflict of interest pursuant to M.R.S.A. § 1014(1)(A)." It is our understanding that the House of Representatives voted on L.D. 1353 on June 9, 1983 and that Representative Mitchell abstained. The Commission did not

---

1/ Two members of the Commission recused themselves because of conflicts of interest on the question and one member was absent.

explain the basis of its opinion other than to state that a vote by Representative Mitchell on L.D. 1353 would violate 1 M.R.S.A. § 1014(1)(A).

The Statutory Framework

By virtue of Chapter 621 of the Public Laws of 1975, the Legislature has established the Commission on Governmental Ethics and Election Practices consisting of seven members who may not be members of the Legislature. 1 M.R.S.A. § 1002. The Commission is specifically authorized to issue advisory opinions to Legislators "on problems or questions involving possible conflicts of interest in matters under consideration by, or pertaining to, the Legislature." 1 M.R.S.A. § 1013(1)(A). In enacting P.L. 1975, c. 621, the Legislature clearly articulated the "statement of purpose" underlying the statutes governing legislative ethics. In particular, the Legislature recognized that being a Legislator in Maine "is not a full-time occupation. . . ." and that "[m]ost Legislators must look to income from private sources, not their public salaries, for their sustenance and support for their families. . . ." 1 M.R.S.A. § 1011. In view of this fact, the Legislature intentionally adopted "broader standards of ethics for Legislators" because, as a practical matter, "the resolution of ethical problems must indeed rest largely in the individual conscience." Id. Nevertheless, for the purpose of providing "helpful advice and guidance," the Legislature recognized the need to statutorily "define ethical standards, . . . to chart the area of real or apparent impropriety." Id.

Accordingly, the Legislature, in 1 M.R.S.A. § 1014, has set forth a description of those situations in which a Legislator may be involved in a conflict of interest. Subsections 1(A)-(F) deal specifically with the subject of legislative conflicts of interest.2/ For purposes of this Opinion, we need only consider subsections 1(A), 1(E), and 1(F), which are the provisions of law which have direct relevance to Representative Mitchell's situation.

1 M.R.S.A. § 1014(1)(A) provides in its entirety as follows:

> 1. A conflict of interest shall include the following:

2/ Subsections 2 and 3 deal with the issues of "undue influence" and "abuse of office" and have no relevance for purposes of this Opinion.

> A. Where a Legislator or a member of his immediate family has or acquires a direct substantial personal financial interest, distinct from that of the general public, in an enterprise which would be financially benefited by proposed legislation, or derives a direct substantial personal financial benefit from close economic association with a person known by the Legislator to have a direct financial interest in an enterprise affected by proposed legislation. (emphasis added)

1 M.R.S.A. § 1014(1)(E) provides, in pertinent part, that a conflict of interest exists

> E. Where a Legislator or a member of his immediate family accepts or engages in employment which could impair the Legislator's judgment, . . . or where the Legislator or a member of his immediate family stands to derive a personal private gain or loss from employment, because of legislative action, distinct from the gain or loss of other employees or the general community.

Finally, 1 M.R.S.A. § 1014(1)(F) provides that a conflict of interest arises

> F. Where a Legislator or a member of his immediate family has an interest in legislation relating to a profession, trade, business or employment in which the Legislator or a member of his immediate family is engaged, where the benefit derived by the Legislator or a member of his immediate family member is unique and distinct from that of the general public or persons engaged in simiar professions, trades, businesses or employment.

In concluding that Representative Mitchell's vote on L.D. 1353 would create a conflict of interest, the Commission relied exclusively on 1 M.R.S.A. § 1014(1)(A). However, it is obvious from a reading of that statute that the first clause of subsection (1)(A) has no application to the situation presented by Representative Mitchell since neither she nor her husband have "a direct substantial financial interest, distinct from

that of the general public in an enterprise which would be financially benefited by proposed legislation." Based upon the facts as recited by Representative Mitchell, her husband does not have a financial interest in the Family Practice Residency, but is simply providing legal services to a client for which he is compensated. Moreover, it is apparent that the Family Practice Residency, even assuming it is an "enterprise," although affected, will not receive a direct financial benefit which is foreseeable from either the passage or defeat of L.D. 1353.

Consequently, in determining whether the Commission correctly opined that Representative Mitchell would be involved in a conflict of interest, it is necessary to focus on the second clause of subsection (1)(A), which provides that a conflict of interest exists "[w]here a legislator or a member of his immediate family . . . derives a direct substantial personal financial benefit from close economic association with a person known by the Legislator to have a direct financial interest in an enterprise affected by proposed legislation."

In addressing this question, we are guided by the fact that a Legislator's "immediate family" is statutorily defined to include her spouse, (1 M.R.S.A. § 1012(2)), and that the phrase "close economic association includes the employers, employees, partners or clients of the Legislator or a member of his immediate family." (1 M.R.S.A. § 1012(1)). Thus, the issue becomes (1) whether Representative Mitchell's spouse derives a direct substantial personal financial benefit by virtue of the fact that he provides legal services, for a fee, to a client and (2) whether that benefit will derive from a client who has a direct financial interest in an enterprise affected by L.D. 1353. Based on the facts as presented by Representative Mitchell, it is the opinion of this Office that no violation of 1 M.R.S.A. § 1014(1)(A) exists.

In view of the lengthy legislative history of P.L. 1975, c. 621, it is clear that the Legislature never intended that a member of either House must be disqualified from voting on a proposal merely because she or a member of her immediate family is compensated for work performed for an employer or a client who might be affected by the legislation. The "direct substantial personal financial benefit" referred to in 1 M.R.S.A. § 1014(1)(A) must involve a financial reward separate and distinct from the remuneration one receives as an employee or agent for services rendered. This was made abundantly clear by several members of the 106th Legislature which enacted the precursor of 1 M.R.S.A. § 1014(1)(A). See P.L. 1974, c. 773, codified at 3 M.R.S.A. § 382, repealed and

replaced by P.L. 1975, c. 621. The Senate Chairman of the State Government Committee and at least two House members of that Committee, which reported out favorably the original legislative ethics bill, clearly stated that a Legislator would not be involved in a conflict of interest simply because she or her spouse is an employee or attorney for a person with a financial interest in proposed legislation. See 2 Legis. Rec. 2206 (1974) (statement of Senator Speers); 2 Legis. Rec. 2227 (1974) (statement of Representative Curtis); 2 Legis. Rec. 2458 (1974) (statement of Representative Gahagan). Rather, the financial benefit to the Legislator or her immediate family member must be directly related to and derived from the proposed legislation which affects the enterprise in which the employer or client has a direct financial interest.

In short, § 1014(1)(A) does not prevent a Legislator from voting on a measure unless she or a member of her immediate family will receive a financial benefit either directly or through a third party, by virtue of the proposed legislation. To suggest otherwise, leads to the conclusion, clearly not contemplated by the Legislature, that any Legislator employed in the private sector must abstain from voting on legislative matters which affect the profession or business in which the Legislator is employed. Such a view conflicts with the plain meaning of the statute and its legislative history and would render subsections 1(E) and 1(F) superfluous.

In view of the foregoing, it is apparent that Representative Mitchell's husband does not fall within the ambit of § 1014(1)(A). He will not derive a personal financial benefit from either passage or defeat of L.D. 1353. On the contrary, he is simply being compensated for providing legal representation to a client.

Accordingly, it is the opinion of this Office that the Commission on Governmental Ethics and Election Practices was incorrect as a matter of law in its interpretation of 1 M.R.S.A. § 1014(1)(A) and its conclusion that Representative Mitchell would be in a conflict of interest had she voted on L.D. 1353. In reaching this conclusion, of course, we recognize, as the Legislature has, that "the resolution of ethics problems must indeed rest largely in the individual conscience" (1 M.R.S.A. § 1011) and that a Legislator may, as a matter of individual choice, abstain from voting on proposed legislation notwithstanding the fact that she is not required by law to do so.

Finally, the Legislature has repeatedly recognized and endorsed the concept of a part-time Legislator. This opinion, therefore, should be read broadly to include, not only an

attorney who represents a hospital, but also direct employees of health care institutions and trustees of not-for-profit institutions on the same theory outlined in this opinion. This opinion holds that the purpose of the conflict of interest statute is to prohibit the use of legislative office for private gain. Indeed, there is affirmative legislative history supporting the view that the conflict of interest laws were not designed to frustrate the legitimate attempts by publicly elected officials to use their personal experience in attempting to solve the problems of our State.

I hope this information is helpful to you. Please feel free to call upon this Office if we can be of further assistance.

Very truly yours,

JAMES E. TIERNEY
Attorney General

JET:mfe

JAMES E. TIERNEY
ATTORNEY GENERAL

① Conflict of Interest
② Freedom of Access law

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

September 6, 1984

The Honorable John L. Martin
Speaker of the House of Representatives
State House Station #2
Augusta, Maine 04333

Dear Speaker Martin:

In your capacity as presiding officer of the House of Representatives, you have requested an opinion from this Office as to whether a letter dated August 29, 1984 from the Chairman of the Commission on Governmental Ethics and Election Practices constituted a valid advisory opinion. For the reasons discussed below, it is the opinion of this Office that because the Commission violated the Freedom of Access Law, the Commission has not yet issued a valid advisory opinion.

Also in your capacity as presiding officer of the House of Representatives, you have requested an opinion of this Office as to whether legislators who are full-time teachers or spouses of full-time teachers have a conflict of interest within the meaning of the Maine Governmental Ethics Act, 1 M.R.S.A. §§ 1001-1021 (1979 & Supp. 1983), if they vote on Legislative Document 2482, "AN ACT to Implement the Recommendations of the Commission on the Status of Education in Maine," in that each full-time Maine teacher in the public school system under the bill would receive a $2,000 "teacher recognition grant." For the reasons set out below, it is the opinion of this Office that full-time teachers or spouses of full-time teachers in the public school system would not have a conflict of interest if they vote on this bill.

Prior to addressing your specific inquiries, it is important to emphasize that the opinions of both the Commission and this Office are advisory only, and that ultimately, it is for the particular member of the Legislature in question to determine whether to be bound by any such opinion. Additionally, each legislator will have to determine for himself or herself whether the conduct is permitted by the "Legislative Code of Ethics" adopted by the Legislature.

I

On August 15, 1984, Representative Norman E. Weymouth sent a letter to the Commission on Governmental Ethics and Election Practices (the "Commission") as to whether "legislators who are full-time teachers have a 'conflict of interest' if they vote on the Governor's salary increase for teachers." On August 17, 1984, copies of Representative Weymouth's letter were forwarded to members of the Commission. On August 24, 1984, a draft of a letter from the Chairman of the Commission to the Speaker of the House of Representatives was mailed to members of the Commission. On August 28, 1984, another draft of the letter was mailed to the members. Between August 29 and September 5, 1984, the Executive Director of the Commission polled the members of the Commission by telephone as to whether they concurred with the letter sent by the Chairman of the Commission. At no time was a meeting held by the Commission to act upon Representative Weymouth's request.

The letter from the Chairman of the Commission to the Speaker of the House dated August 29, 1984, concluded that "it is the opinion of this Commission that if the Governor's proposal includes payment of state stipend or bonus directly to full-time teachers,[1/] Legislators who are full-time teachers or whose spouses are full-time teachers in the public school system should refrain from voting on the proposed legislation." The threshold question presented is whether, in the absence of a public meeting, the Commission has issued a valid advisory opinion.

The Law Court previously has made clear "that to a maximum extent the public business must be done in public." Moffett v. City of Portland, 400 A.2d 340, 347-48 (Me. 1979). The Freedom of Access Law codifies this intent.

1/ At the time the letter was sent from the Chairman, neither the Commission nor Representative Weymouth had a copy of the actual legislation that the Governor proposed.

> The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly. It is further the intent of the Legislature that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of this subchapter.

1 M.R.S.A. § 401 (1979). In furtherance of this declared purpose, the Legislature statutorily has mandated that, unless it is otherwise specifically provided, "all public proceedings shall be open to the public, any person shall be permitted to attend any public proceeding and any record or minutes of such proceedings that is required by law shall be made promptly and shall be open to public inspection." 1 M.R.S.A. § 403 (1979).

There can be little doubt that the proceedings of the Commission are "public proceedings" within the meaning of the Freedom of Access Law. Public proceedings include the transaction of business by legislative committees, pursuant to 1 M.R.S.A. § 402(2)(A) (1979),[2/] and by commissions of any "political or administrative subdivision," pursuant to 1 M.R.S.A. § 402(2)(C) (1979). In addition the statute creating the Commission mandates that "[n]otwithstanding any other provision of law, all meetings, hearings or sessions of the Commission shall be open to the general public unless, by an affirmative vote of at least six members, the Commission requires the exclusion of the public." 1 M.R.S.A. § 1005 (1979).[3/] The remaining issue, therefore, is whether the telephone poll of the Commission members satisfied the provisions of the Freedom of Access Law.

[2/] Commission members are appointed by the legislative leadership. See 1 M.R.S.A. § 1002(1) (1979).

[3/] Even if the Commission had excluded the public from their meeting, the Freedom of Access Law would prohibit them from taking any final action on Representative Weymouth's request for an advisory opinion, pursuant to 1 M.R.S.A. § 409(2) (1979).

This Office has had several occasions to address the question of whether meetings conducted by telephone satisfy the requirements of the Freedom of Access Law. The conclusion reached by this Office in 1979 applies with equal force to the instant situation.

> The practice of conducting "public proceedings" over the telephone is inimical to the fundamental purpose embodied in the Freedom of Access Law that, except in those instances where executive sessions are authorized, all "public proceedings" are to be conducted openly and subject to the public's eye. See 1 M.R.S.A. § 403 (1979). See also Op. Atty. Gen., May 17, 1977; Op. Atty. Gen., April 6, 1977; Op. Atty. Gen., March 25, 1977.
>
> * * *
>
> In [emergency] situations the Freedom of Access Law permits a relaxation of the notice requirements which must precede all public proceedings. However, the requirement that the meeting be public is not eliminated by its emergency nature. Thus, the practice of conducting a "public proceeding" by telephone cannot be justified, under the Freedom of Access Law, on the ground that an emergency exist. Cf. Op. Atty. Gen., July 3, 1974 (telephone poll of Commission members held to violate statute governing the Lottery Commission).

Op. Me. Att'y Gen. 79-126 (June 15, 1979) (footnote omitted). Indeed, in emergency situations concerning possible conflicts of interest, the presiding officer of the Senate or the House (not the Chairman of the Commission):

> may, at his discretion, issue an advisory opinion, which shall be in accordance with the principles of this subchapter, which shall be in writing, and which shall be reported to the commission. The commission may then issue a furthr opinion on the matter. The presiding officer may refer

> such question or problem directly to the commission, which shall meet as soon as possible to consider the question or problem.

1 M.R.S.A. § 1013(2)(K) (1979) (emphasis added). The statute, therefore, contemplates that the Commission will meet to render advisory opinions, and, if that is not possible, the presiding officer of the appropriate legislative body will issue such opinions.

Applying that analysis to the instant situation, it must be concluded that the Commission's practice in this case of simply polling the Commission members by telephone did not comply with the Freedom of Access Law. Accordingly, pursuant to 1 M.R.S.A. § 409(2) (1979), it should be concluded that the Commission's action was invalid, and therefore, the Commission has not yet issued a valid advisory opinion.

II

In responding to your second inquiry as to whether full-time teachers or spouses of full-time teachers in the public school system have a conflict of interest if they vote on Legislative Document 2482 (AN ACT to Implement the Recommendations of the Commission of the Status of Education in Maine) (the "bill"), it is important to recognize that the Commission is specifically authorized to issue advisory opinions to legislators "on problems or questions involving possible conflicts of interest in matters under consideration by, or pertaining to, the Legislature." 1 M.R.S.A. § 1013(1)(A) (1979). Although this Office is authorized to issue written opinions upon questions of law to legislators, 5 M.R.S.A. § 195 (1979), questions concerning possible conflicts of interest should be addressed, if possible, by the Commission. It is our understanding, however, that the Commission will be unable to meet prior to the time that a vote will be taken on the bill, and therefore, with some reluctance, this Office answers your inquiry.

In addressing questions concerning legislative ethics, this Office is mindful of the stated legislative purpose of such statutes. In particular, the Legislature recognized that being a legislator in Maine "is not a full-time occupation" and that "[m]ost legislators must look to income from private sources, not their public salaries, for their sustenance and support for

their families." 1 M.R.S.A. § 1011 (1979). The Legislature recognized further that "[t]he public interest will suffer if unduly stringent requirements deprive government 'of the services of all but princes and paupers.'" Id. Finally, the Legislature recognized that it "cannot legislate morals and the resolutions of ethical problems must indeed rest largely in the individual conscience." Id. In light of these considerations, your specific inquiry can now be addressed.

In determining whether or not it would be a conflict of interest for a full-time teacher or a spouse of a full-time teacher in the public school system to vote on the bill, it is necessary to consider the relevant features of the bill. Although the 92 page bill addresses many educational issues, as relevant to your inquiry, the bill provides twice yearly $1,000 "teacher recognition grants" to all full-time teachers in the public school system. Specifically, "qualifying schools" are defined as the following:

> A. Public schools that are governed by a school board of a school administrative unit.
>
> B. Private secondary schools whose school enrollments are at least two-thirds publicly funded pupils as determined by the previous school years' October to April average enrollment; and
>
> C. Schools operated by an agency of the state government, including the following:
>
> (1) Baxter School for the Deaf;
>
> (2) Arthur R. Gould School;
>
> (3) Pineland State (Berman School); and
>
> (4) Education of children in unorganized territories.

H.P. 1879, L.D. 2482, Part J, § 3, enacting 20-A M.R.S.A. § 13502(1). A "teacher" is defined as "a person certified by the Department of Educational and Cultural Services who is an employee of a public school, an eligible private school, or a state operated school including elementary and secondary teacher, specialized subject teacher, vocational-industrial teacher as defined in the Certification Rules of the State Board of Education." Id. § 13502(2). Finally, the bill provides that:

> Teacher recognition grants of $1,000 shall be awarded twice during the school year to only those teachers who have been employed full-time in qualifying schools since the first day of each corresponding semester. Teachers employed less than full-time or less than a full semester, as determined by the qualifying school, shall not receive a prorated grant amount.

Id. § 13503. The issue presented is whether a teacher or a spouse of a teacher eligible for a "teacher recognition grant" has a conflict of interest in voting on the bill.

A conflict of interest exists:

> Where a legislator or a member of his immediate family has an interest in legislation relating to a profession, trade, business or employment in which the legislator or a member of his immediate family is engaged, where the benefit derived by the legislator or a member of his immediate family is unique and distinct from that of the general public or persons engaged in similar professions, trades, businesses or employment.

1 M.R.S.A. § 1014(1)(F) (1979).[4] Although teachers eligible for "teacher recognition grants" would derive a benefit from the proposed legislation, a conflict of interest does not exist because the benefit derived is not "unique and distinct from that of . . . persons engaged in similar professions." Id.[5] If enacted, the bill will apply equally to all

---

[4] This is the provision relied upon in the letter from the Chairman of the Commission and the other provisions do not appear to be relevant to the instant situation. See generally 1 M.R.S.A. § 1014 (1979).

[5] It is irrelevant that the statute refers to "professions" instead of "profession" because it is a common rule of statutory construction that references to the plural may include the singular, which has been codified by Maine law. See 1 M.R.S.A. § 71(9) (1979) ("Words of the singular number may include the plural; and words of the plural number may include the singular.").

teachers, and not just those located in a particular area or with particular characteristics. This bill, therefore, is like any other state statute which comprehensively regulates education, including statutes which establish minimum teacher salaries, see 20-A M.R.S.A. § 13402 (1983 & Supp. 1983), and statutes which establish the state contributions to local school districts which, in turn, are used to pay teachers' salaries, see 20-A M.R.S.A. ch. 605 (1983 & Supp. 1983) and the collective bargaining statutes. See 26 M.R.S.A. ch. 9-A (1974 & Supp. 1983). Because the bill applies equally to all members of the teaching profession, the benefit derived by those teachers who are members of the Legislature is not "unique and distinct," and therefore, it may be concluded that it is not a conflict of interest for a full-time teacher or a spouse of a full-time teacher in the public school system to vote on Legislative Document 2482, "AN ACT to Implement the Recommendations of the Commission of the Status of Education in Maine."[6/] As emphasized at the outset, however, this is a determination ultimately that must be made by each legislator.

* * * *

I hope that you find this information helpful to you. Please feel free to call upon this office if we can be of any further assistance.

Very truly yours,

JAMES E. TIERNEY
Attorney General

JET:sl

[6/] This conclusion is in accordance with two prior decisions of the Committee on Legislative Ethics. See Op. Comm. Leg. Ethics (Feb. 13, 1972); Op. Comm. Leg. Ethics (Jan. 16, 1973).

STATE OF MAINE
HOUSE OF REPRESENTATIVES
SPEAKER'S OFFICE
AUGUSTA, MAINE 04333

JOHN L. MARTIN
SPEAKER

March 1, 1988

The Honorable John L. Martin
Speaker of the House
State House Station #2
Augusta, Maine 04333

Dear Mr. Speaker:

You have requested my opinion as your Counsel as to whether certain legislators may have a conflict of interest regarding L.D. 2019, "An Act Pertaining to Radar Detectors".

It is important to note that the Commission on Governmental Ethics and Election Practices is expressly authorized to issue advisory opinions to legislators relating to "conflicts of interest". 1 MRSA @ 1013, sub-@ 1, par. A. The Attorney General is also authorized to issue opinions on legal issues to legislators. 5 MRSA @ 195. However, it is my understanding that you are requesting my opinion regarding the terms of a Joint Rule, rather than the statutory provisions. (The statutory provision, 1 MRSA @ 1014, relates exclusively to financially based decisions.

The critical provision of the Joint Rules appears to be Joint Rule 10:

> No member shall be permitted to vote on any question in either branch of the Legislature or in Committee whose private right, distinct from public interest, is immediately involved.

The term "private right" in this rule is not defined. The same phrase, however, has apparently been used in the debate on the Radar Detector bill.

In order to consider whether such a "private right" is involved with this bill, the bill itself needs to be reviewed. The bill totally bans the possession or use of radar detectors by anyone. The critical element for this analysis appears to be that the ban applies to everyone equally.

A general principle has long been accepted in applying the financial conflict of interest standards that the interest has to be "unique and distinct from that of ... persons engaged in similar professions, trades, businesses or employment". Opinion of the Attorney General, September 6, 1984. Clearly, most, if not all, legislators do not have a "unique and distinct" interest affected by the banning of radar detectors. That ban applies to all citizens equally, including all legislators. The fact that a legislator believes his or her rights are removed by this bill would not give rise to a conflict as that removal is not unique to that legislator.

However, there is another aspect of this analysis that should be addressed. A legislator's primary purpose in voting on legislation should be, and commonly is, to represent the interests of his constituents. By expressing a concern that his or her "private right" is affected by this bill, a legislator may be expressing a feeling that his personal opinions are controlling his voting preference. To the extent that a legislator was voting his personal preference, rather than the interests of his constituents, the "public interest", it could be considered a violation of Joint Rule 10,

It is clear that a decision on whether a legislator can represent the "public interest" and his constituents, rather than his personal opinions, or "private rights", should be left to the individual legislator.

I hope this analysis provides the information you require.

Sincerely,

Jonathan C. Hull
Counsel to the Speaker

JCH/as

June 10, 1985

The Honorable John L. Martin
Speaker of the House of Representatives
State House
Augusta, Maine 04333

Dear Speaker:

You have requested my opinion as your Counsel as to whether Legislators who are owners of Union Mutual insurance policies have a conflict of interest within the meaning of the Maine Governmental Ethics Act, 1 M.R.S.A. § 1001-1021 (1979 & Supp. 1984), if they vote on L.D. 1476 AN ACT To Amend the Provisions Governing the Conversion of a Mutual Insurer.

It is important to note that the Commission on Governmental Ethics and Election Practices is specifically authorized to issue advisory opinions to legislators relating to "conflicts of interest" 1 M.R.S.A. § 1013 (1) (A). Further, the Attorney General is also authorized to issue opinions on questions of law to legislators, 5 M.R.S.A. § 195 (1979). I presume that opinions from Commission and Attorney General cannot be received in time to provide the necessary guidance. Further, I understand that you are seeking my opinion in order to make a ruling in your position as Speaker, having been requested to do so by a member of the House.

The general purposes of the legislative ethics statutes have been set out in detail in those statutes 1 M.R.S.A. § 1011 and place special emphasis on the part-time nature of legislators' duties and their obligation to represent their constituents by exercising their voting privileges.

The legislative ethics statute clearly states the general conflict of interest standard applicable to this situation.

> A conflict of interest shall include the following:

> A. Where a Legislator or a member of his immediate family has or acquires a direct substantial personal financial interest, distinct from that of the general public, in an enterprise which would be financially benefited by proposed legislation, or derives a direct substantial personal financial benefit from close economic association with a person known by the Legislator to have a direct financial interest in an enterprise affected by proposed legislation. 1 M.R.S.A. § 1014 (1) (A).

A second provision may also apply to certain legislators..

> F. Where a Legislator or a member of his immediate family has an interest in legislation relating to a profession, trade, business or employment in which the Legislator or a member of his immediate family is engaged, where the benefit derived by the Legislator or a member of his immediate family is unique and distinct from that of the general public or persons engaged in similar professions, trades, businesses or employment. 1 M.R.S.A. § 1014 (1) (F).

In order to apply these provisions, it is necessary to examine the provisions of L.D. 1476. The bill and the Committee Amendment (H-279) establish more specific provisions for the conversion of a mutual insurer into a stock insurer. In particular it establishes voting provisions for demutualization and specific standards for the Superintendent to apply in approving a demutualization plan. Of particular interst are the provisions establishing the standards to be applied for payment to members for their interest in the mutual insurer when that interest is converted into a stock interest. The bill, as amended, establishes approval standards for a demutualization plan that allows the superintendent to approve a plan that provides that the equity return to members may be in a combination of stock and cash. Thus, the basic purpose of the bill is to establish the procedures and standards for the superintendent's decision on a demutualization plan.

Most important, it must be borne in mind that this bill applies to any "demutualization," and not to a particular company or proceeding. Though the reality is that there is only one proceeding presently in progress, the bill, by its terms, is general legislation applying to any such proceeding now or in the future.

The issue presented is whether a legislator who is an "owner" of a mutual insurance policy has a "conflict of interest" in voting on this bill.

First, the provisions of 1 M.R.S.A. § 1014, subsection 1, paragraph A require that the Legislators' interest be in an "enterprise which would be financially benefited by (the) proposed legislation ..." It appears that the provisions of L.D. 1476 do not "financially benefit" the "enterprise", the mutual insurance company. All the bill does is establish procedures and standards for review and approval of a proposed action. It does not provide tax benefits or exemptions, financial assistance or relief, or exemptions from statutory limitations that could be construed to "financially benefit" the insurance company.

Secondly, it seems clear that the required "direct substantial personal financial interest" of a Legislator in a mutual insurance company also does not exist. Certainly, to the extent a Legislator's interest in a mutual insurance company is through a "group plan", it is not direct. The "owners" of a group plan are the persons in whose name the master policy is held. (See the provisions of the Committee Amendment, H-279, sec. 4, that recognize this fact.) Thus any Legislator who has a policy in a mutual company through a "group plan" could not be found to have a "direct interest".

The "indirect provision" of this paragraph, that of "close economic association" would apparently apply to a "group plan" member. However, it again appears that a "group plan" member would not derive "direct substantial personal financial benefit" from that association. The bill merely establishes procedure and standards and confers no direct financial benefit on any "group plan".

Even if a Legislator owns a mutual insurance policy individually, in most instances it would appear that that interest may not be "substantial". Though the interpretation of "substantial" is sparse, it would appear that for an interest to be "substantial" in this context, it would require an abnormal insurance investment. Many, if not all Legislators, may carry insurance policies in mutual companies. In addition, insurance companies issue millions of dollars in policies. In order to apply the principles and purpose of the "conflict of interest" statutes, (see 1 M.R.S.A. 1011) and to properly protect the public interest in having Legislators actively represent their constituents, wholesale disqualification of Legislators should be avoided. Thus, in applying the standard of "substantial", the financial interest would have to be unusually significant. However, this point would have to be decided on the facts in each individual case. The number and size of policies held by an individual Legislator would determine if that Legislator's interest was substantial.

Thus, it seems clear that as this bill confers no financial benefit on a mutual insurance company, but merely establishes procedure and standards for demutualization, no "conflict of interest" would arise in a Legislator, who directly or indirectly "owned" a policy, voting on the bill. This result is entirely consistent with the purpose and history of the legislative "conflict of interest" statute.

One final issue remains, that of Legislators who are insurance agents, and who sell mutual insurance company policies. The provisions of 1 M.R.S.A. § 1014, subsection 1, paragraph F establish the conflict of interest provisions for a "professions, trade, business or employment ". Again, it would seem clear that this bill does not create any "benefit" to such Legislators. However, even it if could be argued to do so, a Legislator clearly would have no interest "unique and distinct from that of ... persons engaged in similar professions, trades, businesses or employment". (See Attorney General Opinion, September 6, 1984, relating to teacher - Legislators and the "teacher recognition grants.") Thus, it appears clear that this situation presents no "conflict of interest".

Therefore, it appears clear that L.D. 1476 presents no "conflict of interest" for Legislators who own individual or group policies in mutual insurance companies, nor does it create such a "conflict" for insurance brokers who are Legislators.

Sincerely,

Jonathan C. Hull
Counsel to the Speaker

JCH-as

STATE OF MAINE

COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES

In the Matters of:	)	
	)	
Senator [redacted]	)	ADVISORY OPINION
Senator [redacted]	)	AND RECOMMENDATIONS
Representative [redacted]	)	
	)	
Legislative Ethics	)	

Background and Authority

On August 31, 1988, the Commission on Governmental Ethics and Election Practices ("Commission") received a letter from [redacted], Chairman of the Maine Real Estate Commission, complaining of the conduct of three Legislators in connection with a proceeding before that Commission (Exhibit "A"). At its September 9, 1988 meeting, the Commission unanimously voted to investigate, on its own motion, the allegations of misconduct and to issue an advisory opinion. In so doing, the Commission was acting pursuant to the authority conferred by 1 M.R.S.A. §§ 1008(1), 1013(1)(A) and 1013(2)(A).

The Commission scheduled a public hearing for September 23, 1988 and notice was duly given to the Legislators involved and to the public. The hearing was conducted on that date in accordance with the Commission's statutory authority, 1 M.R.S.A. § 1013(2)(D) and (E), and its procedural rules.

Present with counsel were Senators [redacted] and [redacted]. Representative [redacted] appeared without counsel. All members of the Commission were present throughout the full-day hearing.

Evidence

The Commission heard the testimony of [redacted], Chairman, Maine Real Estate Commission ("MREC"); [redacted], Member MREC; [redacted], Deputy Director, MREC; [redacted], Commissioner of the Department of Professional and Financial Regulation; Representative [redacted]; Senator [redacted]; Senator [redacted]; Senator [redacted]; Representative [redacted]; [redacted], and his attorney, [redacted]. Between them, the witnesses offered 16 numbered exhibits for the record. The Commission itself offered Exhibits A, B and C. All exhibits are indexed and reproduced separately as an appendix to this opinion.

Applicable Law

The subject of legislative ethics is governed by statute, set out in Title 1, Chapter 25 of the Maine Revised Statutes. These provisions are reproduced in their entirety in the appendix to this opinion. Of particular significance to the Commission in this proceeding are the following statutory provisions:

> 1 M.R.S.A. § 1014:
>
> 1. Situations involving a conflict of interest. A conflict of interest shall include the following:

* * *

D. Appearing for, representing or assisting another in respect to a claim before the Legislature, unless without compensation and for the benefit of a citizen. (Emphasis added.)

* * *

2. Undue influence. It is presumed that a conflict of interest exists where there are circumstances which involve a substantial risk of undue influence by a Legislator, including but not limited to the following cases.

A. Appearing for, representing or assisting another in a matter before a state agency or authority, unless without compensation and for the benefit of a constituent, except for attorneys or other professional persons engaged in the conduct of their professions. (Emphasis added.)

(1.) Even in the accepted cases, an attorney or other professional person must refrain from references to his legislative capacity, from communications on legislative stationary and from threats or implications relating to legislative action.

* * *

3. Abuse of office or position. It is presumed that a conflict of interest exists where a legislator abuses his office or position, including but not limited to the following cases:

* * *

B. Granting or obtaining special privilege, exemption or preferential treatment to or for oneself or another, which privilege, exemption or treatment is not readily available to members of the general community or class to which the beneficiary belongs.

It was these provisions defining a conflict of interest by a Legislator, as well as the mandate of 1 M.R.S.A. § 1011 that Legislators "must also scrupulously avoid acts which may create an appearance of misconduct," against which the Commission weighed the evidence received in this case.

Findings and Conclusions

Based upon the record of its public hearing, and after extensive deliberation, the Commission makes the following findings and conclusions:

1. The letter dated March 24, 1988 signed by Senator [redacted], Senator [redacted], and Representative [redacted] in their official capacities, and sent to the Maine Real Estate Commission addressing a particular case then pending before that agency, constituted an exercise of undue influence, in and of itself, by each of the three Legislators, regardless of whether the intended beneficiary was a "constituent" of any of the Legislators. This conclusion is based particularly upon the fact that the letter requests dismissal of a staff complaint against [redacted], in conjunction with a commitment by the Legislators to an expansion of the Real Estate Commission's statutory authority. A copy of the March 24 letter is attached as an exhibit to this advisory opinion.

2. The Commission rejects the claim made by all three

Legislators that [redacted], as a resident of Maine, is a constituent of theirs notwithstanding that he resides in none of their electoral districts. Compare § 1014(2)(A) with § 1014(1)(D), differentiating between assistance by a Legislator to a "constituent" and a "citizen," respectively.

3. Representative [redacted] exercised poor judgment in signing the March 24, 1988 letter without being more familiar with its contents or having a better understanding of the context in which it was being sent. That letter was Representative [redacted]s only communication with the Real Estate Commission disclosed by this investigation. There was no evidence at all that Representative [redacted] acted out of an improper motive, or intended to interfere with the operation of the Real Estate Commission.

4. Senator [redacted] also exercised poor judgment in signing the March 24, 1988 letter. Senator [redacted] had limited further communication with the Real Estate Commission staff in connection with the [redacted] case, but ceased all communication when he received documents concerning the case from the Real Estate Commission providing more detailed information about the basis and procedure involved in the handling of the case. As Chairman of the Committee on Business Legislation, Senator [redacted] had a legitimate interest in the disciplinary authority and procedures of the Real Estate Commission, but that interest provides no proper basis for seeking to influence the outcome of any particular case.

5. By his own admission, Senator [redacted] was the author of the March 24, 1988 letter, and it was at his request that the letter was later signed by Representative [redacted] and Senator [redacted]. Senator [redacted] made several other appeals to the Real Estate Commission's chief investigator on the [redacted] case, including calling her at home, as well as to [redacted], the Commission Chairman, and [redacted], Commissioner of the Executive Department containing the Real Estate Commission. The actions of Senator [redacted] in preparing the March 24, 1988 letter, obtaining the signatures of other Legislators, and undertaking other communications with the Real Estate Commission or persons associated with it on behalf of [redacted], were inappropriate and constitute an exercise of undue influence. The Commission concludes that Senator [redacted]'s motive in intervening in the proceeding was purely to assist a friend by having a case against the friend dismissed, and considers that motive inappropriate. Senator [redacted]'s testimony that he was simply seeking fair and timely treatment of [redacted] by the Real Estate Commission is contrary to the great weight of the substantial evidence, and is not accepted.

6. There is no evidence that any of the three Legislators received any compensation for the activities described above on behalf of [redacted], or undertook those actions in anticipation of any personal financial gain.

7. None of the three Legislators had an understanding of the statutory ethical standards, or appeared to appreciate the inappropriateness of their actions.

8. The decision of the Real Estate Commission to bring this complaint to the attention of the Commission on Governmental Ethics and Election Practices was responsible and appropriate. The Real Estate Commission documented and presented information in its possession concerning these matters in a very thorough and capable manner.

Recommendations and Conclusions

1. In an effort to avoid similar exercises of undue influence in the future, the Legislature should provide an educational forum in which Legislators would be informed and reminded of the statutory standards for legislative ethics, on an annual basis. The particulars of such a program are properly left to the Legislature itself.

2. The Commission concludes that the respective Houses of the Legislature should determine what disciplinary action, if any, is appropriate under the circumstances regarding Senator [redacted], Senator [redacted] and Representative [redacted]

Dated: October 14, 1988

COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES

Arthur L. Lerman

ARTHUR L. LERMAN
Chairman

Members concurring:

Charles J. Sanders
Richard H. Pierce
Gregory G. Cyr
Paul W. Chaiken
David Benson

MAINE
LAW REVIEW

Volume 42, Number 2, 1990

LEGISLATIVE ETHICS: IMPROPER INFLUENCE BY A LAWMAKER ON AN ADMINISTRATIVE AGENCY

Mark W. Lawrence

LEGISLATIVE ETHICS: IMPROPER INFLUENCE BY A LAWMAKER ON AN ADMINISTRATIVE AGENCY*

"Politics says: 'Be ye therefore wise as serpents'; but morals adds as a limiting condition: 'and innocent as doves.'"
Immanuel Kant[1]

I. INTRODUCTION

Moral and ethical dilemmas are inherent in the legislative process.[2] Representative democracy raises a fundamental ethical conflict for lawmakers: choosing between representing constituent views or following personal convictions.[3] Recent moral crises of elected officials have demonstrated the complex, diverse, and problematic nature of political ethics,[4] yet the belief that these guardians of the public trust must successfully distinguish among the subtle distinctions of political ethics remains an integral tenet of American politi-

---

* The Author gratefully acknowledges the assistance of Merle W. Loper, Professor, University of Maine School of Law, in reviewing this Comment.

1. I KANT, *Eternal Peace*, in THE PHILOSOPHY OF KANT: IMMANUEL KANT'S MORAL AND POLITICAL WRITINGS 457-58 (C.J. Friedrich ed. 1949).

2. By definition, ethics focuses on questions of right and wrong, good and evil, benefit and harm. These questions arise whenever an individual or group exercises power over others, and ethical conduct is required to transform effective power into legitimate authority. In legislative life, the exercise of power is ubiquitous and necessary; hence, ethical issues are pervasive and unavoidable.

THE HASTINGS CENTER, THE ETHICS OF LEGISLATIVE LIFE 10 (1985) [hereinafter ETHICS OF LEGISLATIVE LIFE]. *See generally* D. THOMPSON, POLITICAL ETHICS AND PUBLIC OFFICE (1987); REPRESENTATION AND RESPONSIBILITY: EXPLORING LEGISLATIVE ETHICS (B. Jennings and D. Callahan ed. 1985).

3. ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 4 ("In a democracy, legislative representatives are in a paradoxical situation: they must be both followers and leaders at the same time."); *See also* T. O'NEILL, MAN OF THE HOUSE: THE LIFE AND POLITICAL MEMOIRS OF SPEAKER TIP O'NEILL 46-47, 195-96 (with W. Novak, 1987); ETHICAL ISSUES IN GOVERNMENT 3-6 (N. Bowie ed. 1981). *See generally* H. EULAU & J. WAHLKE, THE POLITICS OF REPRESENTATION (1978); J.F. KENNEDY, PROFILES IN COURAGE (1955).

4. In 1989, the *New York Times* printed over 300 articles reporting on legislative ethics in the Congress alone. A small sample of these articles demonstrates the complexity of legislative ethics. *E.g.*, *Lessons of the Senate Five*, N.Y. Times, Nov. 3, 1989, at 14, col. 1; *House Panel Hears 3 Journalists on the Media's Coverage of Ethics*; N.Y. Times, Sept. 21, 1989, at A22, col. 1; *Former Employees Say Gingrich Had Workers Do Prohibited Jobs*, N.Y. Times, Sept. 6, 1989, at A23, col. 1; *Rep. Frank Acknowledges Hiring Male Prostitute as Personal Aide*, N.Y. Times, Aug. 26, 1989, at A1, col. 3; *D'Amato Staff Aided Brother's Client*, N.Y. Times, Aug. 23, 1989, at B3, col. 4; *Wright Resigning as Speaker; Defends His Ethics and Urges End of 'Mindless Cannibalism'*, N.Y. Times, June 1, 1989, at A1, col. 6; *Coelho To Resign His Seat In House In Face Of Inquiry*, N.Y. Times, May 27, 1989, at A1, col. 6.

cal thought.[5]

One of the most perplexing moral dilemmas a legislator faces is deciding what degree of influence can be exerted on an administrative agency to obtain a result beneficial to the lawmaker's constituency without violating ethical principles. There is little doubt that the American political system requires and accepts a legislator's influencing agency actions as part of the legislator's democratic function,[6] but whenever a lawmaker exerts such influence, not for personal gain but on behalf of a member of the general public, the lines distinguishing ethical from unethical behavior inevitably become blurred.[7] The issue of improper influence on an agency by a legislator is further complicated by the unique constitutional structure of American government[8] and conflicting beliefs in American political

5. "Legislators must embody our highest social ideals and aspirations without losing touch with hard reality. They must descend into the trenches of partisan dealing and in-fighting without losing their integrity and perspective." ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 1. "To assume the role of legislator is to make a special promise to the rest of us and to accept a special trust on our behalf." *Id.* at 13.

"[A] democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." United States v. Mississippi Valley Co., 364 U.S. 520, 562 (1961).

"It is essential under the American system of representative government that the people have faith and confidence in the integrity of the election process and the members of the Legislature." ME. REV. STAT. ANN. tit. 1, § 1001 (1989).

6. ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 1. *See also* STAFF OF HOUSE COMMITTEE ON STANDARDS OF OFFICIAL CONDUCT, 100TH CONG., 1ST SESS., ETHICS MANUAL FOR MEMBERS, OFFICERS AND EMPLOYEES OF THE U.S. HOUSE OF REPRESENTATIVES 167 (Comm. print 1987) ("An important aspect of a Congressman's representative function is to act as a 'go-between' or conduit between his constituents and administrative agencies of the Federal Government.") [hereinafter HOUSE ETHICS MANUAL]; P. DOUGLAS, ETHICS IN GOVERNMENT, 87 (1952); SENATE SUBCOMMITTEE ON LABOR AND PUBLIC WELFARE, 82ND CONG., 1ST SESS., ETHICAL STANDARDS IN GOVERNMENT 28 (Comm. print 1951).

7. D. THOMPSON, *supra* note 2, at 11 ("[T]he most perplexing kind of immorality in public office displays a more noble countenance. It is that committed, not in the interest of personal goals, but in the service of the public good.").

8. Bowsher v. Synar, 478 U.S. 714 (1986) (deciding constitutional doctrine of separation of powers prevents Congress from retaining removal authority over an individual it entrusts with executive power); INS v. Chada, 462 U.S. 919 (1983) (holding action by a single house of Congress to overturn executive action under legislatively delegated authority violates the constitutional requirement for bicameralism); Nixon v. Administrator of General Service, 433 U.S. 425 (1977) (noting the Constitution does not contemplate a complete division of authority between the three branches of government); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding executive branch may not promulgate rules and regulations to further presidential policy, but only in furtherance of congressional policy); THE FEDERALIST Nos. 47 and 48 (J. Madison). *See generally* D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST (1984); Levi, *Some Aspects of the Separation of Powers*, 76 COLUM. L. REV. 371 (1976); Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, with Special Emphasis upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583 (1973); Strauss, *The Place of Agencies in Government: Separation of Pow-*

thought.[9] Few societies share the strong belief in individuality,[10] the desire for government to solve problems,[11] and the healthy distrust of bureaucracy[12] that are found in American culture.

This Comment explores the ethical questions raised when legislators use their knowledge and influence on behalf of their constituencies to affect the behavior of administrative agencies. Current methods of resolving ethical problems in legislative service that could be used to address questions of improper influence raise constitutional, political, and legal issues. Any resolution to the question of improper influence must first recognize the legitimacy and democratic function of lawmaker influence on administrative agency actions. The complex, diverse, and contextual nature of such ethical questions makes the creation of effective general ethical principles impractical. Legislatures and individual legislators must become sensitive to the types of situations that may raise ethical questions and address them on a case by case basis.

II. Improper Influence by a Lawmaker on an Administrative Agency

Legislatures face a wide variety of ethical questions ranging from bribery[13] on one extreme to the "constituent or conscience" dilemma[14] on the other. Moral issues between these extremes of the

---

ers and the Fourth Branch, 84 Colum. L. Rev. 573 (1984).

9. Ethics of Legislative Life, *supra* note 2, at 3.

10. *See generally* Y. Arieli, Individualism and Nationalism in American Ideology (1966); H. Gans, Middle American Individualism (1988); H. Hoover, American Individualism (1923); H. Kallen, Individualism: An American Way of Life (1933); W. Lippmann, The Method of Freedom (1934); V. Smith, The Promise of American Politics (1936).

11. Ethics of Legislative Life, *supra* note 2, at 14.

12. *See infra* notes 54-56 and accompanying text.

13. *E.g.*, Me. Rev. Stat. Ann. tit. 17-A, § 602(1) (1981). The type of ethical question raised will invariably affect the appropriate manner of resolution. Bribery and similar corruption have historically been addressed through specific statutes dealing with disclosure of attempted wrongdoing and strict punishment. Me. Rev. Stat. Ann. tit. 17-A, § 602(3) (1981) (making bribery in official and political matters a Class C crime). The conduct involved represents the clearest form of unethical conduct and undermines representative democracy; hence, the criminal process has been used for quick and effective enforcement. Eisenberg, *Conflicts of Interest Situations and Remedies*, 13 Rutgers L. Rev. 666, 667 (1959). *See also* Comment, *Commentaries on the Maine Criminal Code: White Collar Crimes*, 28 Me. L. Rev 96, 96-100 (1976).

14. *See supra* note 3. Resolution of the ethical questions raised in the constituent-or-conscience dilemma, however, is generally left to the political process. The legislator must explain the reasoning for his or her actions to voters, and the electorate must weigh this explanation with the quality of the legislator's representation. *See, e.g.*, T. O'Neill, *supra* note 3, at 200. The ethically correct behavior in this situation is very difficult to determine, and the public has not made clear what it feels is the proper conduct. Resolving the constituent-or-conscience dilemma in any other manner than through the electoral process would, however, threaten representative democracy by denying the public the chance to evaluate the legislator's choices.

ethical spectrum present difficult questions. Although the ethical questions that American legislatures[15] have historically addressed are intertwined, they can be generally separated into four overlapping categories: bribery and similar corruption,[16] conflicts of interest,[17] improper election practices,[18] and undue influence on the legislative process by special interests.[19]

Conflicts of interest are similar to, and often confused with, improper influence by a lawmaker on an administrative agency. Conflicts of interest arise in situations where the personal or private interests of the legislator clash with his or her duty to the public.[20] A conflict of interest occurs when a legislator, through the exercise of his or her public office, receives some private personal gain, other than a direct bribe, benefitting the legislator or a member of his or her immediate family.[21] This type of unethical conduct can be more

---

15. To compare legislative ethics in jurisdictions other than the United States of America, see Cranston, *Regulating Conflict of Interest of Public Officials: A Comparative Analysis*, 12 VAND. J. TRANSNAT'L L. 215 (1979); Denning, *Misuse of Power*, 55 AUSTL. L.J. 720 (1981); Rogers, *Conflicts of Interest—A Trap for Unwary Politicians*, 11 OSGOODE HALL L.J. 537 (1973); Vaughan, *The Role of Statutory Regulation of Public Service Ethics in Great Britain and the United States*, 4 HASTINGS INT'L & COMP. L. REV. 341 (1981).

16. *See supra* note 13.

17. *See* Cooper, *The Alabama Ethics Act—Milestone or Millstone*, 5 CUMB.-SAMFORD L. REV. 183 (1974); Gonzalez & Claypool, *Voting Conflicts of Interest Under Florida's Code of Ethics for Public Officers and Employees*, 15 STETSON L. REV. 675 (1986); Lee, *Virginia's New Comprehensive Conflict of Interests Act: A Statutory Review*, 18 U. RICH. L. REV. 77 (1983); Owen, *Conflicts of Interests of Public Officers and Employees*, 13 GA. ST. B.J. 64 (1976); Pines & Smith, *California's Governmental Conflict of Interest Act: The Public Interest vs. the Right to Privacy*, 49 LOS ANGELES B. BULL. 321 (1974); Rhodes, *Enforcement of Legislative Ethics: Conflict Within the Conflict of Interest Laws*, 10 HARV. J. ON LEGIS. 373 (1973). *Compare* Cranston & Rogers, *supra* note 15 (contrasting conflicts of interest laws in various countries).

18. Regulation of election practices is directed at prevention of improper influence on the electoral process by either a candidate or a private interest. Legislatures are concerned with the effect of both monetary and in-kind contributions to candidates on the outcome of elections. As with other legislative ethics issues, special constitutional values, such as freedom of speech, must be considered. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976) (limiting voluntary expenditures by candidates on their own behalf violates the candidate's right to freedom of speech).

19. "Lobbyist disclosure" or "sunshine" measures are aimed at decreasing or equalizing the influence of special interests on legislatures and increasing the opportunity for independent consideration of general public welfare by the legislator. *See* THE NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE LEGISLATIVE ETHICS 10-22 (1976); ZIEGLER & BAER, LOBBYING: INTERACTION AND INFLUENCE IN AMERICAN STATE LEGISLATURES (1969).

20. Eisenberg, *supra* note 13, at 666. For a discussion of a variety of definitions of conflicts of interest see, Rhodes, *supra* note 17, at 375-77 and sources cited therein.

21. *See, e.g., In re* Craven, Mass. State Ethics Comm'n, Docket No. 110 (June 18, 1980) (finding that Representative's participation in the award of a grant represented a conflict of interest when he knew that his immediate family stood to benefit financially). *Cf.* Craven v. State Ethics Comm'n, 390 Mass. 191, 454 N.E.2d 471 (1983)

difficult to define and identify than bribery because the legislator, as a member of the general public, benefits from nearly all of his or her actions. Many legislatures have tried to distinguish acceptable from unacceptable behavior by saying that a legislator may not receive a benefit different from that available to the general public as a result of the exercise of his or her office.[22] The difficulty comes in determining what is the public good and whether a private benefit has accrued to the legislator.[23]

As used in this Comment, improper influence on an administrative agency occurs when a legislator uses his or her position to benefit a member or members of the public, usually with a concomitant benefit to the legislator's personal political goals, in a manner that violates ethical principles held by the general public.[24] Improper influence is distinguished from the ethical questions that arise when an individual legislator influences an administrative agency for personal, private gain.[25] The latter case represents a conflict of interest.

Improper influence gives rise to a different and distinct dilemma. The lawmaker is being asked to meet a public demand in a manner that could conflict with the public's ethical principles. In other words, improper influence occurs when the political and ethical obligations of a legislator's office diverge, and the legislator is pulled in opposite and competing directions. To understand how a lawmaker must resolve this conflict of responsibilities, it is first necessary to discern the principles that underlie the political and ethical considerations of legislative office.

A. Politics and Ethics

The political process of election and representation is fundamental to democracy.[26] It is through the political process that the public

---

(Massachusetts Supreme Judicial Court declining to review merits of ethics question, addressing only constitutional questions raised by legislator). *Compare* Groener v. Oregon Gov't Ethics Comm'n, 59 Or. App. 459, 651 P.2d 736 (1982) (upholding constitutionality of conflicts-of-interest statute under which senator was found to have used his legislative influence to further personal financial endeavors).

22. *See, e.g.*, ME. REV. STAT. ANN. tit. 1, § 1014(1)(A) (1989).

23. *See, e.g.*, Op. Me. Att'y Gen. 83-29 (no conflict of interest where a state representative, whose spouse is an attorney providing legal representation to an association of physicians, votes on legislation to limit future increases in the cost of hospital care).

24. HOUSE ETHICS MANUAL, *supra* note 6, at 167.

25. The terms "improper" and "undue" influence have been used to denote sharply divergent issues in legislative ethics. *Compare* DEL. CODE ANN. tit. 11, § 1209 (1979); ME. REV. STAT. ANN. tit. 1, § 1014(2) (1989); HOUSE ETHICS MANUAL, *supra* note 6, 168-71.

26. The following examination is based in part on the relationship between political and ethical considerations in a legislative context as discussed in ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 7-9.

maintains control over its government.[27] By making political demands and exerting pressure on an officeholder, both at election and during the term of office, the public retains influence over the legislative branch of the government. By addressing the political desires of the public, the legislator wins the support of a majority constituency and the means to influence governmental processes.

Legislators must constantly be aware of the political dynamics that are inherent in their offices.[28] A candidate cannot obtain the means to influence government and cannot continue to retain that position once elected, unless he or she builds a base of political support and continues to maintain and expand it.[29] As a politician, the legislator must be constantly aware of the changing needs of that base of support and seek to meet them.[30] The legislator must also continually add new supporters to replace those lost and to build a more secure political base.[31] By building a broader base of support, a legislator becomes more effective at serving the interests of the public and improves his or her reputation within the legislature.[32]

A legislator must not only build a base of political support among the general public, both in and out of the legislative district, but must also achieve a base of support within the legislative body in order to achieve the political ends desired by his or her constituency.[33] The legislator must form an ever-changing series of relationships with colleagues in the legislature. These relationships must be built upon mutual respect and trust, even when legislators are at odds with one another, because it is likely that sooner or later one legislator's political constituency will require the legislator to seek support from erstwhile adversaries.

It is inevitable that these needs—to satisfy past supporters, to reach out to new supporters, and to win the respect of political colleagues—will compete against each other and lead to conflicts for the legislator.[34] These conflicts embody not ethical, but political considerations to be resolved through persuasion, "compromises, bargaining, and a willingness to forego the ideal in order to achieve the possible."[35]

In addition to these political considerations, a legislator must constantly be aware of the ethical dynamics of the office. Morally, a

---

27. ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 29-34.
28. *Id.* at 14-16.
29. *Id.* at 22-23.
30. *Id.* at 23. *Cf.* P. DOUGLAS, *supra* note 6, at 2-5 (Senator Douglas describing the successful lobbying effort of the Reconstruction Finance Corporation to defeat legislation addressing ethical problems in that agency).
31. ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 23.
32. T. O'NEILL, *supra* note 3, at 187-88.
33. ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 15.
34. *Id.*
35. *Id.* at 7-8.

legislator has an obligation to fulfill the trust placed in him or her, and in the legislature as a whole, to use the office and power in a manner consistent with public mores.[36] To avoid jeopardizing this public trust, a lawmaker must know the current public ethical standards and how those standards are changing.[37] This is a challenging task given the diversity of public values and the difficulty in defining specific moral principles.[38]

Often, political and ethical considerations are not in conflict, but, to the contrary reinforce each other.[39] A legislator who violates the public's ethical standards will likely lose political support. Conversely, by failing to practice politics as "the art of the possible," the legislator fails to fulfill the ethical obligation to serve the interests of the public to the best of the legislator's ability.[40]

B. Lawmakers and Agencies

A legislator improperly influences an administrative agency when, in pursuing the political ends of office, the legislator violates ethical principles and threatens the public trust.[41] When political and ethical considerations diverge, the legislator is forced to choose between fulfilling a political need of a constituency, and behaving in an ethical manner. If the legislator acts, then he or she may betray the public trust. If the legislator fails to act, the risk is a loss of political support.[42] This ethical dilemma is not new to the legislative process. In America, administrative agencies have implemented legislative policy for nearly as long as legislative bodies have been in existence.[43] Some authors place the birth of the administrative state in this country in 1887, one hundred years after the adoption of the United States Constitution, when Congress enacted the Interstate Commerce Act.[44] However, if one views the Armed Services as agencies of the federal government, the administrative agency has been an integral part of our government since its very inception.[45] Other writers trace the evolution of modern administrative agencies back to their roots in colonial America.[46] Whatever point one fixes for the

---

36. *See supra* note 5.
37. ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 23.
38. *Id.* at 3.
39. *Id.* at 8.
40. *Id.*
41. *See, e.g.*, P. DOUGLAS, *supra* note 6, at 88-92 (Senator Douglas defining what he feels are some ethical principles governing the relationship between legislators and agencies).
42. ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 9.
43. *Cf.* P. DOUGLAS, *supra* note 6, at 85-86 (comparing the relationship between administrative agencies and lawmakers in America, Germany, and Great Britain).
44. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1987).
45. U.S. CONST. art. I, § 8.
46. Nelson, *Officeholding and Powerwielding: An Analysis of the Relationship*

birth of the administrative state, its expansion during the twentieth century has made it an indispensable and powerful component of the American system of government.[47]

Created by the legislative branch, administrative agencies both influence, and are influenced by, lawmakers.[48] Agencies develop their own political agendas,[49] establish relationships with specific members of the legislative branch,[50] and pursue their agendas through active lobbying techniques similar to those used by private concerns.[51] Legislatures have developed methods, subject to judicial review, to control administrative agencies.[52] The result has been extensive informal contact and political give-and-take.[53]

The relationship of the general public to the administrative agency has been less of a two-way street.[54] While the executive, legislative, and judicial branches have developed successful working relationships with administrative agencies, the public often feels powerless before and alienated by governmental bureaucracy.[55] The evolution of the American bureaucratic state and the inability of the public to influence the administrative agencies directly run contrary to the democratic principle of public sovereignty.[56] Concomitant with the growth and influence of administrative agencies, the public has demanded an expanded role of the legislator as a servant of the public in dealing with the bureaucracy.[57] On both the federal[58] and

---

Between Structure and Style in American Administrative History, 10 LAW & SOCIETY REV. 185 (1976).

47. Miller, *supra* note 44, at 41-43.

48. For an interesting discussion of the interrelationship of the mode of acquiring office in administrative agencies and the capacity of government to rule the people, see Nelson, *supra* note 46.

49. T. O'NEILL, *supra* note 3, at 5-8, 20-26, 87-89.

50. "Bureaucrats allocate expenditures both in gratitude for past support and in hopes of future congressional support; and congressmen support agencies both because they owe them for past allocations and because they desire future allocations." R. ARNOLD, CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE 36 (1979).

51. *See, e.g.*, W. COHEN, ROLL CALL: ONE YEAR IN THE UNITED STATES SENATE 141 (1981).

52. *See, e.g.*, INS v. Chada, 462 U.S. 919 (1983) (discussing the constitutionality of legislative veto of administrative action). *See also* Comment, *State Constitutional Limits on Regulation of Legislators by the Oregon Government Ethics Commission*, 19 WILLAMETTE L. REV. 701 (1983). *See generally* M. ETHRIDGE, LEGISLATIVE PARTICIPATION IN IMPLEMENTATION: POLICY THROUGH POLITICS (1985).

53. *Compare* P. DOUGLAS, *supra* note 6, at 85.

54. *See* Nelson, *supra* note 46, at 232.

55. J. O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT 41 (1978).

56. "It was not until the closing decades of the [nineteenth] century that this politicized and democratic style of administration was superseded by a rational bureaucratic style that was covertly anti-democratic insofar as its controlling standards bore no necessary relationship to the will of the majority." Nelson, *supra* note 46, at 188.

57. *See supra* note 6.

state levels,[59] lawmakers are rewarded for dealing with problems constituents are having with bureaucracies.

Several reasons explain the general public's reliance on legislators to resolve problems with administrative agencies.[60] Locally elected legislators are responsive to parochial interests and have direct and ongoing contact with constituents. Legislators also deal with administrative agencies on an ongoing basis, and thus are a natural bridge between the agencies and private citizens. Legislative bodies create and periodically review the policy functions of administrative agencies. Finally, legislatures have the tools, lawmaking and appropriation, to influence agency action. These political interrelationships have led the public to turn to individual legislators for help in resolving specific problems with administrative agencies.[61]

The political dimensions of the relationship between the public and legislators, and between the legislature and administrative bodies, have ameliorated the erosion of public sovereignty that has occurred through the administration of government by unelected bureaucracies. The public relies on the legislator to get what it perceives to be a just result from the bureaucracy. The legislator, in turn, uses this constituent service to enhance and maintain his or her political base and thereby retain power.[62]

C. *The Ethics of Influencing Agencies*

Despite many years of ongoing interactions between legislatures and administrative agencies, the question of what influence is improper has only begun to be discussed in the past forty years,[63] and legislatures have rarely addressed this question in any formal manner. Two recent controversies have raised the public's awareness of the problem of improper influence. In 1989, the Select Committee on Ethics of the United States Senate was asked to examine the ethical behavior of five senators who sought to affect the investigation of a savings and loan institution by the Federal Home Loan

58. P. DOUGLAS, *supra* note 6, at 85-92.

59. "A trend is also evident toward increased constituent service and attention by state legislators. The professionalization of the legislature has accelerated this development. Nine state legislatures now provide district offices for members and expenditure allowances for district activity are growing." THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 83 (1989).

60. P. DOUGLAS, *supra* note 6, at 85-86.

61. The executive branch also services constituent complaints, and to the extent that it does, ethical questions will arise. These questions are distinctly different from those raised when legislators seek to influence agency action because the constitutional roles of the executive and the legislature are different. Examination of these differences is beyond the scope of this Comment.

62. *E.g.*, T. O'NEILL, *supra* note 3, at 42-43, 71-72, 87-88, 114, 132-34, 140, 200.

63. P. DOUGLAS, *supra* note 6, at 85-92.

Bank Board.[64] Prior to this investigation, it appears that only one state legislature had been formally asked to examine members' ethical behavior in influencing administrative agencies.[65] In 1988, the Maine Commission on Governmental Ethics and Election Practices was asked to issue an opinion on influence exerted by three legislators during a proceeding to revoke a real estate license.[66] Although legislatures have dealt with the issue of potentially improper influence only rarely in the past, several reasons explain why legislative bodies are increasingly being called upon to address formally these ethical questions. First, many of the informal mechanisms to control the ethical behavior of legislators have weakened. Legislators are increasingly independent of party[67] and legislative leadership[68] for their reelection,[69] leaving novice legislators with little ethical guidance in their new positions and experienced colleagues with little ability to influence their new counterparts.[70] Second, public attitudes about legislative ethics are continually changing,[71] and the public may be more concerned now about a legislator's influence on administrative agencies than in earlier years. Third, legislative ethics have evolved considerably over the last hundred years.[72] Once

64. *Lessons of the Senate Five*, N.Y. Times, Nov. 3, 1989 at 14, col. 1.

65. In preparing this Comment, the author sent inquiries to legislative entities responsible for consideration of ethical questions in the federal government, all fifty states, the District of Columbia, and several Territories of the United States, as well as selected municipalities and the Canadian provinces and federal government. Of the forty-five responses received, only those of the Maine Legislature and the U.S. House of Representatives indicated that those bodies had dealt with this question in any formal manner, though many individual respondents recognized this ethical question as a pressing problem.

66. In the Matters of: Senator John L. Tuttle, Jr., Senator John E. Baldacci, Representative Donnell P. Carroll, Commission on Governmental Ethics and Election Practices, Advisory Opinion and Recommendations (Oct. 14, 1988) [hereinafter Tuttle Opinion] (copies available from the Commission on Governmental Ethics and Election Practices, State House Station 101, Augusta, Maine). *See infra* notes 132-61 and accompanying text.

67. F. Sorauf, *Political Action Committees in American Politics: An Overview*, in What Price PAC's? 40-42 (1984). For an interesting perspective on political parties and legislative ethics, see Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. Pa. L. Rev. 1567 (1988).

68. The Council of State Governments, *supra* note 59, at 62 ("Another trend in legislatures today is the declining authority of legislative leadership. . . . The ability of leaders to control information, favors and finances is no longer as great as it once was."); Ethics of Legislative Life, *supra* note 2, at 20-24; O'Neill, *supra* note 3, at 282-85.

69. Ethics of Legislative Life, *supra* note 2, at 21.

70. For a general discussion of changes in state legislatures, see Rosenthal, *The State of State Legislatures: An Overview*, 11 Hofstra L. Rev. 1185 (1983).

71. Ethics of Legislative Life, *supra* note 2, at 23.

72. R. Baker, *The History of Congressional Ethics*, in Representation and Responsibility, *supra* note 2, at 3; Kirby, *The Role of the Electorate in Congressional Ethics*, in Representation and Responsibility, *id.* at 37.

preoccupied with correcting the most blatant of ethical problems, legislatures have now learned how to address the obvious improprieties and have moved on to face more difficult ethical questions.

Whatever factors are responsible for the growing concern over improper influence by individual lawmakers on administrative agencies, any solution to this question will undoubtedly evolve from the methods by which legislatures currently address general ethical questions. Lawmakers must decide whether this issue can be addressed through the existing ethics structure or whether new solutions must be fashioned. Therefore, an exploration of the current problem necessitates a brief examination of the past legislative means of addressing ethical issues.

III. CONFRONTING THE QUESTION OF IMPROPER INFLUENCE

A. *Methods of Resolving Legislative Ethics Questions*

Deciding what methods can be effective in resolving the ethical issues surrounding a legislator's influence on an administrative agency is a difficult task. Historically, legislatures have been hesitant about controlling the behavior of their members. In cases where the ethical standards are clear, and the question is largely one of fact, as in the case of bribery, legislatures are willing to take action against a member. Where the ethics of the conduct are not clear, however, as when a legislator is confronting a "constituent or conscience" dilemma, legislatures will defer to the electorate to determine the moral qualifications of the member to sit in the body.[73]

Such deference is not a failure of the legislative ethics process, but rather a recognition of the unique constitutional structure of the legislative branch.[74] American democracy places the responsibility for determining who will make laws directly in the hands of the electorate.[75] However, the Federal Constitution[76] and nearly all state constitutions[77] provide that each house of the legislative branch is the sole judge of the election, qualifications, and conduct of its members.[78] Courts have consistently recognized legislative exclusivity in

---

73. ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 11-12.

74. SPECIAL COMMITTEE ON CONGRESSIONAL ETHICS OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK, CONGRESS AND THE PUBLIC TRUST 206 (1970). *Compare* Rhodes, *supra* note 17, at 377-83 (critiquing legislative deference as an indication that the system itself is an obstacle to resolution of conflict-of-interest questions).

75. *E.g.*, U.S. CONST. art. I, § 2, cl. 1; § 3, cl. 1.

76. U.S. CONST. art. I, § 5, cl. 1.

77. *E.g.*, CAL. CONST. art. IV, § 5; ME. CONST. art. IV, pt. 3, § 3; MASS. CONST. pt. II, ch. I, § II, art. IV; § III, art. X; PA. CONST. art. II, § 11; R.I. CONST. art. VI, § 6; TEX CONST. art. III, § 8.

78. CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, INDEPENDENT INVESTIGATIONS OF ALLEGATIONS OF WRONGDOING BY MEMBERS OF CONGRESS 3-7 (July 6, 1988, No. 88-488A). For an interesting discussion of the constitutional and policy questions raised by the establishment of a state ethics commission, see Comment,

the exercise of this power.[79] The result has been preservation of the primary right of the sovereign public to select its lawmakers and the conflicting, limited power in the legislature to act against one of its members in order to preserve public trust in the legislative branch as a whole. Periodic public outcries[80] for better ethics in government, however, have pushed the Congress,[81] nearly all the state legislatures,[82] and numerous lawmaking bodies in local government[83] to take some form of action to prevent the loss of public trust in the legislative branch.

The methods used to address ethical questions vary greatly, but can be classified into three broad types: reliance on the political process, both in and out of the legislature,[84] internal rules,[85] and specific statutory[86] or constitutional provisions.[87] The first of these, the po-

---

State Constitutional Limits on Regulation of Legislators by the Oregon Government Ethics Commission, 19 WILLAMETTE L. REV. 701 (1983).

79. *E.g.*, State v. Cutts, 53 Mont. 300, 163 P. 470 (1917) (court without jurisdiction to entertain attorney general's proceeding in *quo warranto* to determine the right of individual to sit as member of the House of Representatives); French v. Senate of State of California, 146 Cal. 604, 606, 80 P. 1031, 1033 (1905) (expulsion of senators by the senate for bribery and malfeasance in office beyond the jurisdiction of the legislative branch and the judiciary without power to revise even the most arbitrary and unfair action of the senate).

80. Johnson, *Responsibility for Integrity in Government*, 35 ALA. LAW. 12 (1974) ("At the very least there appears to be a pattern of nonfeasance, or more likely malfeasance, at all levels of our government."); Eisenberg, *supra* note 13, at 666 ("Stimulated most recently by . . . activities involving [government officials] . . . the question of what constitutes appropriate behavior for government officials has become of much concern to . . . the public at large."). *Compare* ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 9:

> Accurate exposés serve a useful function in directing public attention to specific abuses, but they do not encourage the sober moral reflection and analysis that we feel is needed. More to the point, critical exposés rarely take the trouble to spell out the grounds on which the conduct they condemn should reasonably be judged unethical.

81. R. Baker, *The History of Congressional Ethics*, in REPRESENTATION AND RESPONSIBILITY, *supra* note 2, at 3; Kirby, *The Role of the Electorate in Congressional Ethics*, in REPRESENTATION AND RESPONSIBILITY, *id.* at 37; ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 16-20, 24-28.

82. R. Stern, *Ethics in the States: The Laboratories of Reform*, in REPRESENTATION AND RESPONSIBILITY, *supra* note 2, at 243-61; ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 25. *See also infra* note 98.

83. *See, e.g.*, PHILADELPHIA CODE §§ 20-601 to -610.

84. ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 16-20.

85. *See, e.g.*, Maine Rules of the Senate, §§ 28, 38, 39; Maine Rules of the House, §§ 14, 19; Joint Rules of the Maine Legislature, § 10.

86. *E.g.*, ME. REV. STAT. ANN. tit. 1, §§ 1001-21 (1989 & Supp. 1989); ME. REV. STAT. ANN. tit. 17-A §§ 601-609 (1981 & Supp. 1988).

87. *E.g.*, ARK. CONST. art. V, § 35; CAL CONST. art. IV §§ 5, 15; DEL. CONST. art. II, §§ 14, 21, 22, art. V, § 8; MD. CONST. art. III, § 50; MICH. CONST. art. II, § 4; MISS. CONST. art. III, § 55; MONT. CONST. art. XIII, § 4; NEB. CONST. art. III, § 16; N. DAK. CONST. art. IV, §§ 14, 15, 21; TEX. CONST. art. III, §§ 18, 22, art. XVI, § 41; VT. CONST. art. II, § 55; W. VA. CONST. art. VI, §§ 14, 15, 45; WYO. CONST. art. III, §§ 12, 42-46.

litical process, is the fundamental method of control over the ethical behavior of legislators. The process of reelection forces legislators to explain any ethically questionable conduct to the electorate and allows the public to judge the propriety of the legislators' behavior.

The electoral process alone, however, can be an inadequate source of ethical guidance for legislators.[88] The public may be only poorly informed of any ethical misconduct or may consider the issue relatively unimportant. The press may aggravate the problem of public ignorance or misunderstanding of an ethical problem, through sloppy or slanted reporting.[89] Furthermore, even behavior that is ethically acceptable to a majority of voters within a legislative district may seriously threaten the trust that voters outside that district place in the legislature.

Politics within the legislative process may also influence the ethical choices of legislators. Members whose behavior is considered unethical are often shunned by other members and have difficulty promoting their own legislative agendas. Legislative leaders can exert influence and use their powers to discourage unethical behavior and to protect the reputation of the legislative body.[90] These powers, which vary from body to body, can include committee appointments, traveling assignments, staff and office assignments, assignment of seating on the floor of the body, and many other informal powers. In addition, the body as a whole has the power to censure, exclude, or expel members.[91]

The second method for controlling the ethics of individual mem-

---

88. *See* Rhodes, *supra* note 17, at 374-75 (critiquing reliance on the electoral process to police legislative ethics on slightly different grounds).

89. The electoral process also places a heavy burden on the press to report accurately the nature of the ethical question. Journalistic reports can at best be only a partial representation of the truth. See *Washington Post* writer David Broder, as quoted in *The Portsmouth Press*, Nov. 26, 1989, at 6, col. 1 ("I would like to see us say—over and over, until the point has been made—that the newspaper that drops on your doorstep is a partial, hasty, incomplete, inevitably somewhat flawed and inaccurate rendering of some of the things we have heard about in the past 24 hours—distorted, despite our best efforts to eliminate gross bias, by the very process of compression that makes it possible for you to lift it from the doorstep and read it in about an hour.").

Relying on the press as the sole investigator of ethical behavior forces the public to make its decision based on incomplete information. As a result, the legislature may find it difficult to draw any inferences about the public's ethics based on the results of the electoral process. This may lead to growing tensions between the legislature and the press, who in the final analysis need each other's cooperation to fulfill their respective functions effectively. *See, e.g.*, W. COHEN, *supra* note 51, at 65-66, 207-208; T. O'NEILL, *supra* note 3, at 228-33.

90. *See*, NATIONAL CONFERENCE OF STATE LEGISLATURES, MASON'S MANUAL OF LEGISLATIVE PROCEDURE §§ 575-82 (1989) [hereinafter MASON'S MANUAL OF LEGISLATIVE PROCEDURE].

91. *See id.* §§ 560-64. For a discussion of the constitutional questions involved, see Powell v. McCormack, 395 U.S. 486 (1969).

bers is through the legislative body's power to adopt rules for its own procedure.[92] Such rules commonly include general ethical principles for legislators[93] but these principles provide only broad guidelines for legislators. Frequently, such rules do not specifically address the toughest political questions such as the equality and independence of each member of the body and control of an individual legislator's behavior by the entire body. The transitory nature of internal legislative rules further diminishes their significance as a tool for molding the ethics of individual legislators. Rules adopted by a legislative body pertain only to that assembly and cease to have effect when the body dissolves.[94] Depending upon the nature of the body and the manner in which it acquired its power,[95] rules can be modified[96] or suspended[97] by the body when such rules hamper the body's ability to accomplish its function.

Statutes and constitutional provisions provide a more enduring mechanism for addressing ethical questions. Many legislative bodies have used their lawmaking powers to enact provisions controlling ethical behavior of legislators.[98] Whereas legislative rules can be adopted, amended, or suspended solely at the will of the body adopting them,[99] the use of its lawmaking powers restricts the body

92. *See* MASON'S MANUAL OF LEGISLATIVE PROCEDURE, *supra* note 90, §§ 1-4.

93. *See, e.g., id.* § 522. Often ethics rules are adopted as part of the parliamentary rules of the body or as a separate resolution. *Compare* Joint Rules of the 114th Maine Legislature § 10 (*reprinted in* STATE OF MAINE, 114TH LEGISLATURE, 1989 SENATE AND HOUSE REGISTERS 207 [hereinafter 1989 REGISTER]) *with* NEW JERSEY JOINT LEGISLATIVE COMMITTEE ON ETHICAL STANDARDS, LEGISLATIVE CODE OF ETHICS (1982-83 temporarily adopted for use in 1988-89 session) [hereinafter N.J. LEGISLATIVE CODE OF ETHICS]. *See also* ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 26.

94. MASON'S MANUAL OF LEGISLATIVE PROCEDURE, *supra* note 90, § 21(4).

95. *Id.* § 281(1).

96. *Id.* § 22.

97. *Id.* §§ 23, 279-86.

98. *See, e.g.*, 2 U.S.C. §§ 701-709 (1988); 18 U.S.C. §§ 201-24 (1988); CAL. GOV'T CODE §§ 1090-98, 8920-26, 9050-56 (West 1980 & Supp. 1990); CAL. GOV'T CODE §§ 81000-91574 (West 1987 & Supp. 1990); CAL. PENAL CODE § 85 (West 1988); CONN. GEN. STAT. ANN. §§ 1-79 to 1-89 (West 1988 & Supp. 1989); ILL. ANN. STAT. ch. 127, para. 601-101 to 608-101 (Smith-Hurd 1981 & Supp. 1989); ME. REV. STAT. ANN. tit. 1, §§ 1001-23 (1989 & Supp. 1989); ME. REV. STAT. ANN. tit. 17-A, §§ 601-20 (1983 & Supp. 1989); MASS. GEN. LAW ANN. ch. 268A, §§ 1-25, ch. 268B §§ 1-8 (West 1970 & Supp. 1989); N.H. REV. STAT. ANN. §§ 15:1 to 15-B:6 (1988); N.H. REV. STAT. ANN. § 640:1 (1986 & Supp. 1989); N.J. STAT. ANN. §§ 52:13C-18 to :13D-27 (West 1986 & Supp. 1989); N.Y. PUB. OFF. LAW §§ 73-80 (McKinney 1988 & Supp. 1990); PA. STAT. ANN. 46, § 143.1 (Purdon 1969); R.I. GEN. LAWS §§ 36-14-1 to -14-21 (1984 & Supp. 1989); TEX. REV. CIV. STAT. ANN. art. 6252-9a to -9f (Vernon Supp. 1990); TEX. GOV'T CODE ANN. §§ 302.011-.035, 305-001-.041 (Vernon 1988); TEX. ELEC. CODE ANN. §§ 251.001-256.007 (Vernon Supp. 1990); VT. STAT. ANN. tit. 2, §§ 251-58 (1985); tit. 13, §§ 1101-02 (Supp. 1989).

99. MASON'S MANUAL OF LEGISLATIVE PROCEDURE, *supra* note 90, §§ 3-4, 19, 21-25. In the case of joint rules adopted by a bicameral legislature, rules suspension requires concurrence of both houses. *Id.* § 20.

to constitutional or statutory processes for adoption, amendment, and repeal requiring the concurrence of more than one lawmaking entity.

Many state legislatures and the Congress have also statutorily created specific committees or commissions to deal with ethical controversies involving individual members.[100] These commissions may also oversee the executive branch,[101] but in many cases they deal solely with legislative ethics.[102] Such commissions and committees are useful in providing a structured approach for investigating and answering ethical questions which is somewhat removed from the everyday political concerns of the legislative body itself. In addition to statutes, many state constitutions have specific provisions dealing with legislative ethics.[103] Though less detailed than most statutory approaches to legislative ethics, the constitutional provisions provide a more fixed enunciation of ethical principles.

There is no general agreement among legislatures about which method is best suited to resolve any given ethical question. For example, conflicts of interest are alternatively addressed through constitutional provisions,[104] statutes,[105] rules and codes of ethics,[106] the political process, or some combination thereof. In many states individual legislators must disclose financial interests that may create a voting conflict of interest.[107] While the public could then use this information to examine the voting record of the legislator in the next election, it is unlikely that many voters use the information effectively.[108] Under rules adopted by other bodies, one member may question, on the floor of the house, whether another member's vote

100. *See, e.g.*, ME. REV. STAT. ANN. tit. 1, §§ 1001-20 (1989 & Supp. 1989). The structure and functions of these commissions vary greatly; there are, however, general distinctions that deserve note. Some statutes restrict the issues the committee or commission can address. *E.g.*, ME. REV. STAT. ANN. tit. 1, § 1008 (1989 & Supp. 1989). Some commissions have no remedial power but simply make recommendations to the legislative body. *Id.* Often members of the legislative body themselves make up the membership of the commission. *E.g.*, N.J. STAT. ANN. § 52:13D-22(b) (West 1986). Some statutes specifically exclude members of the legislature from sitting on the commission or committee. *E.g.*, ME. REV. STAT. ANN. tit. 1, § 1002(2) (1989). The method of appointment also varies greatly between legislatures. *Compare* ME. REV. STAT. ANN. tit. 1, § 1002(1) (Supp. 1989) *with* FLA. STAT. ANN. § 112.321(1) (West Supp. 1989). For a thoughtful discussion in favor of the establishment of ethics commissions to address conflict of interest questions, see, Rhodes, *supra* note 17. *But see*, Comment, *supra* note 52.

101. *E.g.*, FLA. STAT. ANN. § 112.320 (West 1982 & Supp. 1989).

102. *E.g.*, ILL. ANN. STAT. ch. 127, ¶ 601-101 to 608-101 (Smith-Hurd 1981 & Supp. 1989).

103. *See* constitutions cited *supra* note 87.

104. *E.g.*, W. VA. CONST. art. 6, § 15; WYO. CONST. art. 3, § 46.

105. *E.g.*, ALASKA STAT. §§ 39.50.010-.200 (1984 & Supp. 1989).

106. *E.g.*, N.J. LEGISLATIVE CODE OF ETHICS, *supra* note 93, §§ 1:1-4:5.

107. *E.g.*, N.Y. PUB. OFF. LAW § 73-a (McKinney 1988 & Supp. 1990).

108. ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 25-26.

involves a conflict of interest.[109] In some states, legislators submit questions of whether a conflict of interest exists to a committee or commission for an opinion prior to voting.[110] In other states, such committees or commissions often have the power to investigate reported conflicts on their own initiative.[111]

These three methods—political, procedural, and legal—represent the means most frequently used by legislatures to address the public's concern over the ethical behavior of legislators. Each method has its own strengths and weaknesses; none represents a perfect solution for any ethical question. The political process best protects the democratic ideal of direct election of the legislative branch. Unfortunately, the electoral process often confuses or distorts ethical issues. Legislative rules offer a flexible, albeit transitory, enunciation of ethical principles. The appropriate remedial action by a legislature against an individual legislator who violates these rules, however, undermines the constitutional principle of direct election, potentially in a highly politically charged setting. Statutes and constitutional provisions provide a more enduring set of guidelines, less subject to the immediate political process. However, these enactments can seldom anticipate the variety of possible ethics problems. Ethics commissions can provide a less political forum for an indepth look into ethical questions, but they, like other legislative interventions, represent a threat to constitutional direct election. Further, ethics commissions are often reactive rather than anticipatory, issuing opinions on mistakes already made rather than pitfalls to be avoided. The particular method or combination of methods employed undoubtedly is a direct product of each legislature's unique experience with ethical problems and its particular philosophy on the proper role of the legislature in controlling the ethics of its members.

B. The Interaction of Political and Ethical Obligations in Improper Influence

The ethical questions that arise when an individual lawmaker attempts to assert influence over an administrative agency are more difficult to answer than conflict of interest questions, because the distinction between acceptable and unacceptable conduct is often more subtle.[112] Three brief hypotheticals demonstrate this problem.

> (1) A non-profit hospital seeks assistance from a legislator representing the community it serves in dealing with the state's hospital licensing agency. The agency is threatening to deny the hospital

109. MASON'S MANUAL OF LEGISLATIVE PROCEDURE, *supra* note 90, § 522(1),(4).

110. *E.g.*, FLA. STAT. § 112.322(3)(a) (West 1982 & Supp. 1989).

111. *E.g.*, ME. REV. STAT. ANN. tit. 1, § 1013(1)(A) (1964 & Supp. 1989).

112. As discussed earlier, conflicts of interest and improper influence present analytically different problems. *See supra* notes 20-25 and accompanying text.

license to provide a certain service due to a perceived lack of demand. The legislator, who is currently sponsoring legislation to expand the agency's staff, says he will withdraw support if the agency "gives his hospital a hard time."

(2) A for-profit hospital seeks assistance from a legislator representing the community it serves in stopping a hospital regulatory agency's promulgation of certain cost-control rules that would be detrimental to the hospital. Members of the hospital's board of directors and several stockholders have made substantial contributions to the legislator's compaign committee. The legislator attacks the agency, both in the press and in legislative debate, for overstepping its legislative authority and introduces legislation to curb the agency's power.

(3) A paper company is about to be cleared by the state environmental agency of charges of dumping sludge in violation of regulations. The striking local labor union seeks to put pressure on the company by asking the local legislator, a union member who enjoys union support, to thwart the pending decision. The legislator enlists the support of legislative leadership who threaten to re-examine the board's enforcement of legislative policy in light of the impending "travesty in environmental regulation."

Each of these hypotheticals illustrates the variety of political and ethical considerations a legislator faces when asked to influence an agency. The type of organization or individual seeking assistance, the political relationship between that person and the legislator, the nature of the relevant agency action, the political consequences of inaction by the legislator, and the manner in which the legislator brings pressure to bear on the agency will all affect whether the public could perceive the influence as improper.

The wide variety and contextual nature of potentially problematic situations make it difficult for legislators to develop specific guidelines that would help lawmakers avoid actions that constitute improper influence. Is it always unethical for a legislator to assist a campaign contributor? Would a ban on all legislation introduced in reaction to an agency decision unconstitutionally restrict the legislator's lawmaking power? Questions like these demand, but rarely receive, the most searching inquiry and analysis.

C. Current Legislative Approaches to Improper Influence

Few legislatures have formally addressed the ethical questions arising from a legislator's influence on administrative agency actions.[113] At the state level, statutes, codes, or rules that control an individual legislator's interaction with agencies focus primarily on preventing the legislator's acting for private personal gain.[114] While a few legislatures have enacted general statutes or resolutions that

113. *See supra* notes 63-66 and accompanying text.

114. *E.g.* ALA. CODE §§ 36-25-10 to -12 (1977 & Supp. 1989).

may also be applicable to the question of improper influence for public benefit, with the exception of Maine, none has formally applied such provisions to this issue.

An example of such a general provision is the Hawaii statute that provides, "No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others . . . ."[115] The statute itself provides no definition of "unwarranted," "privilege," or of any other of the operative words. The four non-exclusive examples of improper conduct provided by the statute all involve some element of personal private gain for the legislator.[116] Further, the statute specifies that, "Nothing herein shall be construed to prohibit a legislator from introducing bills and resolutions, serving on committees or from making statements or taking action in the exercise of the legislator's legislative functions."[117] This provision leaves the critical phrase "taking action in the exercise of the legislator's legislative functions" open to interpretation. Similarly vague statutory provisions are in effect in Florida,[118] Louisiana,[119] Maine,[120] New Jersey,[121] and New York,[122] and the city of Philadelphia.[123] In Tennessee, if an agency is conducting an adjudicatory proceeding, the Administrative Procedures Act requires the decisionmaker to divulge, on the record, any communications received that are intended to influence his or her decision.[124] That agency member can be required to withdraw from the hearing case because of the communication. Willful violation may be referred to appropriate authorities for disciplinary proceedings. Ten-

---

115. HAW. REV. STAT. § 84-13 (1985 & Supp. 1989).

116.

(1) Seeking other employment or contract for services for oneself by the use or attempted use of the legislator's or employee's office or position.

(2) Accepting, receiving, or soliciting compensation or other consideration for the performance of the legislator's or employee's official duties or responsibilities except as provided by law.

(3) Using state time, equipment or other facilities for private business purposes.

(4) Soliciting, selling, or otherwise engaging in a substantial financial transaction with a subordinate or a person or business whom the legislator or employee inspects or supervises in the legislator's or employee's official capacity.

Id.

117. *Id.*

118. FLA. STAT. § 112.313 (1982 & Supp. 1989).

119. LA. REV. STAT. ANN. § 42:1116 (West 1965 & Supp. 1990).

120. ME. REV. STAT. ANN. tit. 1, § 1014 (1989).

121. N.J. REV. STAT. ANN. § 52:13D-16 (1986 & Supp. 1989); N.J. LEGISLATIVE CODE OF ETHICS, *supra* note 93, §§ 2:2-:3.

122. N.Y. PUB. OFF. LAW ANN. § 74 (McKinney 1988 & Supp. 1990).

123. PHILADELPHIA CODE §§ 20-602, -605.

124. TENN. CODE ANN. § 4-5-304 (1985 & Supp. 1989).

nessee has no corollary provisions to address the legislator's behavior, but presumably the matter could be referred to the speaker of the legislative body of which the legislator is a member.

Similar statutory provisions exist on the federal level regarding *ex parte* communications with a member of an executive or independent agency when a matter is being adjudicated or is in a formal proceeding within the agency.[125] Some lower federal courts have held that involvement of individual members of Congress with ongoing administrative proceedings may unduly influence and prejudice the proceedings, necessitating vacation of the agency decision.[126]

Of all American legislative bodies, the United States House of Representatives has made the most sophisticated attempt to address the question of improper influence. In its ethics manual, the Committee on Standards of Official Conduct attempts to address squarely the ethical questions surrounding communications with administrative agencies.[127] The House Ethics Manual, while not an adopted rule of the body and not legally binding, is an attempt by the Committee "to provide Members, officers . . ., and employees of the House of Representatives with a single, comprehensive reference containing guidance about standards of conduct, rules, regulations, and statutes applicable to their activities."[128]

Although the Manual notes that "[n]o statutory provision specifically prohibits the use of undue or improper influence upon a Federal agency,"[129] it attempts to provide guidelines on what communications with an executive or independent agency are appropriate and what principles should be observed when making such communications. The Committee suggests that it would be proper for a Member of the House of Representatives to

> request information or a status report; urge prompt consideration; arrange for interviews or appointments; express judgment;
>
> call for reconsideration of an administrative response which he believes is not supported by established law, Federal regulation or legislative intent;
>
> perform any other service of a similar nature in this area compatible with the criteria hereinafter expressed in this Advisory

125. 5 U.S.C. § 557(d) (West 1977).

126. Pillsbury Co. v. F.T.C., 354 F.2d 952 (5th Cir. 1966) (Senate subcommittee proceedings, held before hearing examiner made initial decision on merits of divestiture case and in which senators questioned two of the four who participated as commissioners in final decision, deprived corporation of procedural due process). *See also*, D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1245-46 (D.C. Cir. 1972), *cert. denied.* 405 U.S. 1030 (1972) (decision of Secretary of Transportation approving construction of bridge at certain location invalid if based solely on pressures emanating from congressmen).

127. HOUSE ETHICS MANUAL, *supra* note 6, at 165-77.

128. *Id.* at III. For a brief history of the legislative actions leading up to the publication of the manual, see *id.* at III-IV.

129. *Id.* at 169.

Opinion.[130]

The Committee also provides certain principles to be followed in all the representative's communications with an agency:

> 1. A Member's responsibility in this area is to all his constituents equally and should be pursued with diligence irrespective of political or other considerations.
>
> 2. Direct or implied suggestion of either favoritism or reprisal in advance of, or subsequent to, action taken by the agency contacted is unwarranted abuse of the representative role.
>
> 3. A Member should make every effort to assure that representations made in his name by any staff employee conform to his instruction.[131]

While the Committee's opinion represents an important effort by a legislative body to deal directly with the issue of improper influence, the opinion fails to answer several questions. First, it is unclear whether the "representations" and "principles" apply only to communications with agencies involved in adjudicatory proceedings or whether the same standards apply to both rulemaking and adjudication. Second, the Committee nowhere addresses the ethical questions that arise when the constituent is a political supporter of the representative or, more importantly, a contributor to the representative's political campaign. Third, though the opinion stresses that all constituents should be treated equally, regardless of political considerations, the Committee gives no indication of how to balance political considerations against ethical considerations. Fourth, the principle against direct or implied suggestion of either favoritism or reprisal, if interpreted literally, restricts a representative from performing his or her constitutional legislative duty. Even if the representative believes the constituent has been unjustly harmed by an agency rule or decision and there is potential for others to be similarly harmed, the representative cannot, for example, push legislation to alter the agency's power. If the principle forbidding reprisal is not interpreted literally, the opinion fails to define where a representative's constitutional legislative function ends and implied suggestions of favoritism or reprisal begin. Lastly, there is no attempt to define "constituent," or present an opinion as to whether the term refers only to voters within a legislator's electoral district.

It is perhaps unfair to criticize the Committee's opinion, given the impossibility of presenting concrete ethical principles to govern the myriad of circumstances that give rise to questions of improper influence. Instead, the Committee should be commended for its effort

---

130. *Id.* at 169-70. *See also* Committee on Standards of Official Conduct, Advisory Opinion No. 1 issued Jan. 26, 1970 (reprinted in HOUSE ETHICS MANUAL, *supra* note 6, at 175-77).

131. HOUSE ETHICS MANUAL, *supra* note 6, at 170. *See also* Committee on Standards of Official Conduct, Advisory Opinion No. 1, *supra* note 130, at 175-77.

to educate legislators on how to avoid potential ethical problems, rather than reactively blaming them for previous misconduct.

More flexible than rules or statutes, the House Ethics Manual provides a guide to individuals who will be facing ethical questions common to legislative life, in a format that encourages discussion of the underlying issues without setting out rigid rules. This approach is particularly suited to a complex and contextual problem such as improper influence. The Manual provides the Committee with a flexible approach to discussion of the ethical and political considerations. As new situations arise, the lessons they teach can be incorporated into the Manual through the issuance of additional opinions in a manner that is instructive rather than accusatory.

Despite, or perhaps as a result of, the foresight of the United States House of Representatives, that body has never been asked to address formally a specific occurrence of improper influence. Maine alone has attempted to apply general ethical statutes, similar to those found in Hawaii, to such an ethical question.

D. In the Matter of Senator John Tuttle et al.[132]

In 1988, the Maine Commission on Governmental Ethics and Election Practices issued an advisory opinion and recommendations to the Legislature on the propriety of the conduct of three legislators with respect to a proceeding before an administrative agency.[133] Senator John L. Tuttle,[134] Senator John E. Baldacci,[135] and Repre-

---

132. Tuttle Opinion, *supra* note 66, at 1.

133. The Ethics Commission was established by statute to monitor election practices and "[t]o investigate and make advisory recommendations to the appropriate body of any apparent violations of the ethical standards set by the Legislature." ME. REV. STAT. ANN. tit. 1, § 1008(1) (1989). The Ethics Commission has no punitive powers. *Compare* MASS. GEN. L. ch. 268B, § 3 (Supp. 1989). *See also Legislators Deny Trying Coercion to Help Broker*, Portland Press Herald, Sept. 8, 1988, at 1, col. 5; *Ethics Commission to Probe Legislators*, Portland Press Herald, Sept. 10, 1988, at 1, col. 4; *Democrats: Probes of Lawmakers Unfair*, Portland Press Herald, Sept. 15, 1988, at 41, col. 1; *State Panel Rules Three Legislators Violated Ethics*, Portland Press Herald, Sept. 29, 1988, at 1, col. 1; *Panel Cites Ethical Breach by Three Lawmakers*, Portland Press Herald, Oct. 18, 1988, at 40, col. 1; *No Disciplinary Action Sought Against Sens. Tuttle, Baldacci*, Portland Press Herald, Oct. 20, 1988, at 39, col. 1.

134. A Democrat from Sanford representing District 33, Sen. Tuttle was Senate Chair of the Joint Standing Committee on State and Local Government and a member of the Joint Standing Committee on Energy and Natural Resources during Maine's 113th Legislature. *See* STATE OF MAINE, 113TH LEGISLATURE, 1987 SENATE AND HOUSE REGISTERS, 183 [hereinafter 1987 REGISTER]; MAINE PEOPLE'S RESOURCE CENTER, CITIZEN'S GUIDE TO THE MAINE LEGISLATURE 27 (1988) [hereinafter 1988 CITIZEN'S GUIDE]. Legislation affecting the creation, membership, and operation of commissions, such as the Real Estate Commission, was commonly referred to the Joint Standing Committee on State and Local Government during the 113th Legislature.

135. A Democrat from Bangor representing District 10, Sen. Baldacci was Senate Chair of the Joint Standing Committee on Business Legislation and a member of the

sentative Donnell P. Carroll[136] allegedly tried to influence improperly a proceeding of the Maine Real Estate Commission, a board established for the licensing of real estate brokers and salespersons.[137] The Real Estate Commission was reviewing the license of an individual for possible suspension.[138] The licensee, though not a resident of Senator Tuttle's legislative district, contacted Senator Tuttle for assistance. When the Senator sought information regarding the suspension and requested an extension of the proceeding for the licensee,[139] the Real Estate Commission filed a complaint directly to the Ethics Commission,[140] alleging that he "had imposed himself" on members of the Real Estate Commission and its staff. The Commission also complained about several letters written by Senator Tuttle and two other legislators, which suggested that the investigation was misfocused and should be dismissed.[141]

Joint Standing Committee on State and Local Government. *See* 1987 REGISTER, *supra* note 134, at 178; 1988 CITIZEN'S GUIDE, *supra* note 134, at 16. Legislation affecting real estate licensing laws were commonly referred to and heard by the Joint Standing Committee on Business Legislation during the 113th Legislature.

136. A Democrat from Gray representing House District 44, Rep. Carroll was House Chair of the Joint Standing Committee on State and Local Government and a member of the Joint Standing Committee on Economic Development. *See* 1987 REGISTER, *supra* note 134, at 183; 1988 CITIZEN'S GUIDE, *supra* note 134, at 39.

137. ME. REV. STAT. ANN. tit. 32, §§ 13061-69 (1988 & Supp. 1989).

138. The grounds for the suspension appear in Tuttle Opinion, *supra* note 66, Exhibit 8, at 3-6.

139. Tuttle Opinion, *supra* note 66, Exhibit A.

140. A complaint of unethical behavior towards an administrative agency brought directly by that agency to the Ethics Commission appears to be unprecedented in the State of Maine and raises numerous interesting political questions about the relationship between agencies and the legislature. At the time the complaint was raised, both houses of the legislature were controlled by the Democratic Party while the governor was a Republican. The Real Estate Commission, whose members were appointed by the Governor, took its problem first to the Commissioner of Finance, also a gubernatorial appointee, under whose authority it operated. Tuttle Opinion, *supra* note 66, Exhibit 1. The Finance Commissioner recommended taking the matter to the Attorney General. The Maine Attorney General, at the time a Democrat, had been elected directly by the Legislature under the Maine Constitution, making individual legislators constituents of the Attorney General. ME. CONST. art. 9, § 11. Tuttle Opinion, *supra* note 66, Exhibit 3. The Attorney General's office determined the matter was not criminal and referred the matter to the Ethics Commission in deference to the role of the Legislature as the sole judge of the ethical conduct of its members. *Id.*, Exhibit 4. This response apparently created some hard feelings on the part of the Real Estate Commission whose chairman, in a letter to the Ethics Commission, referred to being "turned off" by the Attorney General. *Id.*, Exhibit A.

The Ethics Commission dealt with these political issues by determining that the Attorney General had properly determined that the correct statutory forum for this ethical question was the Ethics Commission. *Id.* at 1. The Ethics Commission further concluded that the decision of the Real Estate Commission to bring this complaint to the attention of the Ethics Commission was "responsible and appropriate." *Id.* at 7. *See also infra* notes 150-51 and accompanying text.

141. *Id.*

In its advisory opinion and recommendations to the Senate and House of the 113th Maine Legislature, the Ethics Commission focused on the March 24, 1988 letter from Senators Tuttle and Baldacci and Representative Carroll. The Ethics Commission, applying Maine's conflict of interest statute,[142] concluded that the letter, "in and of itself," constituted an exercise of "undue influence" under Maine law,[143] in part because the letter requested dismissal of a staff complaint in conjunction with a commitment by legislators to seek an expansion of the Real Estate Commission's statutory authority.[144] The Ethics Commission found no intention on the part of either Senator Baldacci or Representative Carroll to interfere with the actions of the Real Estate Commission.[145] The Ethics Commission concluded that, in regard to Senator Tuttle, the letter, in combination with other contacts with the Real Estate Commission, was inappropriate and constituted an exercise of undue influence.[146] The Ethics Commission rejected Senator Tuttle's argument that he was simply seeking fair and timely treatment of the claim; it found this position "contrary to the great weight of the substantial evidence."[147] It further found Senator Tuttle's motive for intervening in the proceeding, to assist a friend by having the case dismissed, "inappropriate."[148]

The Ethics Commission referred the matter and its advisory opinion to the respective houses of the legislature for disciplinary ac-

---

142. ME. REV. STAT. ANN. tit. 1, § 1014 (1989):

> . . .
>
> 2. *Undue Influence.* It is presumed that a conflict of interest exists where there are circumstances which involve a substantial risk of undue influence by a Legislator, including but not limited to the following cases.
>
> A. Appearing for, representing or assisting another in a matter before a state agency or authority, unless without compensation and for the benefit of a constituent, except for attorneys or other professional persons engaged in the conduct of their professions.

143. Tuttle Opinion, *supra* note 66, at 4.

144. The letter from Senators Tuttle and Baldacci and Representative Carroll read in part:

> We, the undersigned members of the Legislature, do hereby petition the members of the Real Estate Commission to dismiss its complaint . . . . Based on our review of the evidence of the case given to us . . . , it is our feeling that [the licensee] is being wrongfully singled out for blame in this incident. We, the undersigned, commit ourselves to broadening commission powers so that the Commission would possess statutory authority to investigate wrongdoings in the banking community when interrelated with real estate dealings.

Id., Exhibit B.

145. *Id.* at 5. The cited sections of Maine law make no specific mention of the necessity for motive, intention, or *mens rea.*

146. *Id.* at 6.

147. *Id.*

148. *Id.*

tion.[149] No disciplinary action was taken by either body. The complaint had been made on August 31, 1988, a little more than two months before the November general election in which all three legislators were running for reelection. The timing of the complaint raised questions regarding use of the legislative ethics process for political ends,[150] in part because it was not the only complaint raised in the fall of 1988.[151] The Ethics Commission issued its advisory opinion in the *Tuttle* matter on October 14th. Senator Baldacci and Representative Carroll were subsequently reelected. Senator Tuttle lost in his attempt for a third term.[152]

The Ethics Commission's opinion raises more questions than it answers. The statutory foundation and the underlying ethical basis for its decision are unclear. Ostensibly, the Ethics Commission rested its finding of undue influence on the impropriety of the legislators' letter offering to exchange a dismissal of agency disciplinary action for specific legislative acts.[153] The opinion does not indicate what the crucial facts were for its finding of impropriety. Was the offer of exchange improper in itself, or was it important that the

149. *Id.*

150. "Noting that all five members of the Real Estate Commission were appointed by Republican Gov. John R. McKernan Jr., [Democrats] Tuttle and Baldacci hinted that the complaint may be a politically motivated move in an election year." *Legislators Deny Trying Coercion to Help Broker*, Portland Press Herald, Sept. 8, 1988, at 12, col. 6. *See also Democrats: Probes of Lawmakers Unfair*, Portland Press Herald, Sept. 15, 1988, at 41, col. 1.

151. A second complaint, later dismissed by the Ethics Commission, was filed by Republican State Committee Chair Karen Stram on September 8th, accusing Democratic Representative Stephen M. Bost, House Chair of the Joint Standing Committee on Education and a candidate for the State Senate, of a conflict of interest in performing work for the Maine Teachers' Association. *Teachers' Union Wields Power: Controversy Focuses Spotlight on Influence in Augusta*, Maine Sunday Telegram, Sept. 25, 1988, at 1A, col. 1. Rep. Bost was cleared of any wrongdoing and was elected to the Senate. The Ethics Commission found that the consulting fees were paid for grant work unrelated to pending legislation and were earned between legislative sessions. Rep. Bost had disclosed these fees pursuant to Maine's legislative financial disclosure law which at that time required only disclosure of the amount and purpose. ME. REV. STAT. ANN. tit. 1, § 1017 (1989), *repealed by* P.L. 1989, ch. 561, § 11 (effective Sept. 30, 1989). Maine's 114th Legislature amended the financial disclosure law to require reporting of specific sources of earnings and consulting fees. ME. REV. STAT. ANN., tit. 1, § 1016-A (Supp. 1989).

152. The political ramifications of the timing of ethics complaints and opinions cannot be overlooked in a discussion of the legislative approaches to ethics. The legislative ethics process is necessarily intertwined with the political process, and the political process is the public's basic control over legislative ethics. Some states that have formal ethics mechanisms prohibit the use of the ethics process for political ends. *E.g.*, ME. REV. STAT. ANN. tit. 1, § 1020 (1989). However, the difficulty in proving political motivation and the fear of inhibiting legitimate complaints may render these provisions ineffective and little-used. Any legislative ethics process must be carefully crafted to balance the benefits of that process against the antidemocratic consequences flowing from its use as a political tool.

153. Tuttle Opinion, *supra* note 66, at 4.

agency was acting in an adjudicatory capacity in the *Tuttle* case? Would the Commission have reached the same result if the agency had been engaged in rulemaking?

While denying the relevance of the distinction in this case, the Ethics Commission noted the Maine legislative ethics laws distinguish between a legislator representing someone before the Legislature itself and before an administrative agency. It is ethical for a legislator to do either provided that it is without compensation and for the benefit of a particular member of the public. The distinction recognized by the Ethics Commission in *Tuttle* was that, in the case of a claim before the Legislature, a legislator may act on behalf of a "citizen,"[154] but in the case of matters before a state agency or authority a legislator may act only on behalf of a "constituent" or resident of the legislator's legislative district.[155] Such a distinction is confusing partly because the term "constituent" is itself ambiguous,[156] but primarily because it would produce unpredictable results.[157] Further, the constituent-citizen distinction compels the absurd result that the residence of the individual, not the conduct of the legislator, determines whether the questioned conduct is ethical.

The vague basis for the Ethics Commission's recommendations is particularly disappointing in light of the existence of other grounds on which the Commission could have rested a more definitive opinion. Each subsection of the conflict of interest statute supplies an example of conduct that constitutes a conflict of interest, although this list is not meant to be inclusive.[158] The Commission, reasoning from analogy, could have applied the examples to the questions

---

154. ME. REV. STAT. ANN. tit. 1, § 1014(1)(D) (1989).

155. ME. REV. STAT. ANN. tit. 1, § 1014(2)(A) (1989). See *supra* note 142 for full text of this subsection.

156. "Constituent" has been defined as "one who elects or assists in electing another as his representative in a deliberative or administrative assembly; as, the representative took up the claims of their *constituents*." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 391 (2d ed. 1983). Such a definition would seem to include campaign workers and contributors who did not live within one's district as constituents.

"[Constituent] is also used in the language of politics as a correlative to 'representative,' the constituents of a legislator being those whom he represents and whose interests he is to care for in public affairs; usually the electors of his district." BLACK'S LAW DICTIONARY 281 (5th ed. 1979).

157. Legislative districts will often split municipal and county divisions. *See* 1989 REGISTER, *supra* note 93, at 79-85, 132-70 (1989). Residents of one legislative district may feel more comfortable taking their problems to a legislator from another legislative district, especially if the legislative districts are all within one municipal or county political subdivision. Often members of one party who are represented by a legislator of another party will seek out a legislator from their own political party for their constituent concerns. Interpreting "constituent" to be only residents of a certain district will leave such persons, and those whose legislators refuse to help them, without recourse.

158. ME. REV. STAT. ANN. tit. 1, § 1014 (1989).

raised by *Tuttle*, showing the conduct of the three legislators involved to be the sort proscribed by the statute. Alternatively, subsection 3 specifically addresses abuse of office or position.[159] This subsection says that a conflict of interest is presumed to exist when a legislator abuses the office or position by, among other things, "[g]ranting or obtaining special privilege, exemption or preferential treatment to or for oneself or another, which privilege, exemption or treatment is not readily available to members of the general community or class to which the beneficiary belongs."[160] The Ethics Commission referenced this subsection but did not clearly apply it, thereby missing an opportunity to make a more searching inquiry into the ethical issues at hand.

Either of these analyses would have provided a clearer basis for the Ethics Commission's opinion. However, even had the Ethics Commission used the conflict of interest section for its analysis, it still would have failed to address the more significant ethical problem presented by the different underlying premises of improper influence and conflicts of interest. The ethical question raised in *Tuttle* occurred because a legislator took action, not for personal gain, but for what he arguably perceived as some benefit to a member of the public. This conflict between a legislator's political role and his or her ethical obligations both to represent the public and to allow the agency to fulfill its duties without harassment, is simply not addressed by the conflict of interest statute.

Following the *Tuttle* matter, the Maine Legislature created the Commission to Study Ethics in State Government to recommend changes in Maine's governmental ethics laws. The Tupper Commission, as it has come to be called, was composed of former Republican Congressman Stanley P. Tupper, former Democratic Governor Kenneth M. Curtis, and Professor Eugene Mawhinney of the University of Maine. In its report filed on December 30, 1988, the Tupper Commission recommended, in part, amending the language of section 1014(2)(A) by changing "constituent" to "citizen" and adding the following: "All legislators, without exception, shall refrain from any threat, or statement that could be reasonably construed as a threat, orally or in writing, relating to legislative action in communication with a state agency or authority."[161]

---

159. ME. REV. STAT. ANN. tit. 1, § 1014(3) (1989).

160. ME. REV. STAT. ANN. tit. 1, § 1014(3)(B) (1989).

161. COMMISSION TO EXAMINE ETHICS IN STATE GOVERNMENT, REPORT TO THE SPEAKER OF THE HOUSE AND PRESIDENT OF THE SENATE, at 3 (1988).

The comment following this recommendation says:

> A legislators [sic] role is to legislate, despite the fact that they have taken on numerous other functions at the urging of constituents. Legislators must take extraordinary care not to use or give the appearance of using coercion or intimidation in communications with state agencies or authorities. It should be unnecessary to add that a legislator should not intervene in a

Although the Tupper Commission recommendations represent an attempt to address directly the ethical questions raised by *Tuttle*, the Commission failed to grapple with the real ethical problem. If enacted, the Tupper Commission's recommendations would require the finding of an ethical breach whenever a legislator threatens legislative action against an agency, provided that the legislation has no correlation to the action taken by the administrative agency. This proposal parallels the principle enunciated in the House Ethics Manual.[162] Such a conclusion, however, ignores the reality that legislators are likely to refrain from making overt threats and simply to pursue a course of action that the legislator knows will be understood by the agency to be retaliation for its administrative action.

The Tupper Commission's recommendations also fail to recognize that there may be some situations in which threatened action by a legislator could be ethical. For example, recall the earlier hospital hypothetical,[163] and assume that an agency is using its rulemaking authority, contrary to what the legislator feels is the legislative intent, to affect adversely the legislator's hospital. Would it be unethical for the legislator to attempt to intercede and discourage the agency from adopting the rule by informing the agency that the legislator will take legislative action to curtail the agency's authority if it acts in a manner adverse to the interests of the legislator's constituents? It is difficult to determine, under the Tupper Commission's

---

criminal proceeding unless a complainant, defendant, or as a subpoenaed witness.

Id. at 4.

Given the competitive nature of legislative elections, the demands of constituents, and the rising independence of candidates from political parties and legislative leadership, it is unlikely that these recommendations as written could be implemented successfully. Legislators who refrained from acting for fear of accusations of using intimidation and coercion would be at a substantial political disadvantage unless there was an outright ban on any legislative interaction with administrative agencies. Further, the threat of political damage caused by an agency bringing a complaint, even if no ethical breach is found, gives the agency substantial political clout and would have a chilling effect on legitimate influence by a legislator on an agency.

Cf. ETHICS OF LEGISLATIVE LIFE, *supra* note 2, at 7:

> Surely our nation cannot tolerate a state of affairs in which legislators are forced to choose between ethical integrity and political survival. We can ask that they be prepared to risk a loss of popularity and to take politically courageous stands when their ethical duties require them to do so. That is part of what integrity and leadership mean in political life. But we cannot ask that legislators routinely sacrifice their political futures in order to observe ethical standards to which their constituents pay lip service but are not willing to endorse with their votes. To do so would not only be hopelessly impractical, it would be unfair to legislators and self-defeating for democracy because it would virtually ensure that the most conscientious individuals would not remain in public office.

(footnote omitted).

162. House Ethics Manual, *supra* note 6, at 170.

163. *See supra* Hypothetical example 2.

recommendations, if this action could be reasonably construed as a threat. Certainly the legislator wants to give the agency a message—If you do not apply the statute in the manner that the legislature intended, I will be forced to take action to see that the Legislature restricts you from operating in this manner. Is this not precisely the constitutional lawmaking function of the legislator in a democratic society?

Both the Ethics Commission and the Tupper Commission failed to address the question of whether there are different ethical considerations involved when a legislator influences an agency in an adjudication rather than rulemaking. In carrying out an adjudicatory function granted to it by the legislature, an agency performs a function similar to a court of law. The legislature, in granting powers to an agency, can give no more power than the legislature has itself. But in granting adjudicatory powers the legislature is often attempting to remove that adjudication from the legislative process in order to insulate it from political influences.

There may still be circumstances in which it would be appropriate for the legislator as an individual to participate in the adjudicatory process. If in the first hospital hypothetical the agency were conducting adjudicatory proceedings, would it be ethical for the legislator to go before the licensing board to testify as to the facts involved in the case about which the legislator has particular knowledge or about the potential impact of the loss of the hospital? Would it be unethical for the legislator to make comments on the floor of the legislative body that, after seeing how the hospital licensing procedures operate, he or she questions whether it ought to be revised or abolished? Would this question be answered differently if the statements were made to the press or to the agency itself?

The *Tuttle* opinion and the Tupper Commission's recommendations fail to provide legislators with a helpful analysis of the ethical and political issues raised by improper influence and leave numerous questions unanswered. Further, both the Ethics Commission and the Tupper Commission oversimplified the underlying ethical and political issues, and fashioned broad ethical principles that neither addressed the issues raised in *Tuttle* nor provided beneficial guidance for legislators facing future ethical dilemmas. Admittedly, it is unlikely that any general principles can be fashioned to address all the ethical questions involved when a legislator attempts to influence an agency. Failure to recognize these obstacles served as stumbling blocks to both commissions. Following a proper analysis of the underlying ethical and political issues, recommendations can be made to legislators, legislatures, the public, the media, and administrative agencies on how these difficult ethical questions can be recognized and resolved.

CONCLUSION

Improper influence by a lawmaker on an administrative agency poses significant problems for the legislative branch. Legislative bodies have a vested interest in protecting the appropriate constitutional balance of power between the three branches of government. The legislative branch also has an interest in protecting the independence and ability of its members to fulfill their political obligations. Of equal importance, legislatures must prevent individual legislators from undermining public trust in the legislative branch through action that creates an appearance of unethical influence on administrative agencies.

State legislatures have almost all failed to recognize the characteristics unique to improper influence. Most state legislative rules, statutes, and constitutional provisions are too broad to provide meaningful guidance in this area to legislators and, too often, they blur the distinctions between improper influence and other ethical questions. The Maine Legislature was squarely presented with this problem in the *Tuttle* matter. Unfortunately, the Ethics Commission failed to recognize the distinct nature of improper influence in making its recommendations. The result was a vague opinion based on a broad concept of what was unethical about the conduct. The Maine Legislature correctly declined to take further formal action and allowed the election process to determine a just result. Appointed in the aftermath of the *Tuttle* matter, the Tupper Commission also failed to address the unique nature of improper influence by making recommendations which were at once too vague and too restrictive.

The best attempt to date to address the problem of improper influence and provide effective guidance for legislators comes from the United States House of Representatives, in its House Ethics Manual. The Manual lists certain activities that are acceptable, as well as some that constitute abuse of legislative office. The strength of the House approach is its flexibility, allowing for easy inclusion of new material addressing the specific concerns of members. Indeed, the major inadequacy of the Manual, its failure to consider whether an agency's rulemaking and adjudicatory roles trigger different considerations in evaluating a legislator's conduct, can be addressed easily through the issuance of new opinions. Another strength is the Manual's focus on education of legislators and discussion of ethical issues.

The challenge facing the Maine Legislature in the wake of the *Tuttle* matter is the same as that now faced by the United States Senate following revelations regarding the Federal Home Loan Bank Board and by other state legislative bodies, that is, to resolve the overlapping political and ethical obligations that all legislators face when representing constituents through intervention with administrative agencies. Several possible changes may point in the direction

of a solution. Ethical principles, whether embodied in procedural rules, statutes, or constitutional provisions, should be amended to recognize improper influence as a singular ethical question requiring consideration of distinct underlying issues. Proscriptive rules and adversarial adjudicatory proceedings add little corrective influence and should be used only as a last resort. Instead, legislative bodies should follow the lead of the United States House of Representatives and focus their efforts on educating legislators to be sensitive to the complex ethical issues and to recognize the myriad situations that can create an appearance of improper influence.

In no other area of legislative ethics are the lawmaker's political and ethical obligations so interconnected and, potentially, so divergent. In no other area of legislative ethics is the determination of propriety so fact-based, so highly contextual. These qualities make the rigid, simple proscriptive rules appropriate for other areas of legislative ethics inadequate for the issues of improper influence. Education and frank and frequent discussion are necessary to alert legislators to the potential implications of their conduct and help to avoid the appearance of impropriety. Legislative bodies should establish flexible guidelines and a safe environment for dialogue, so that legislators can fulfill their political duties with the greatest respect for their ethical obligations. The public demands no less.

Mark W. Lawrence