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# LAWYER-POLITICIANS IN NEW ENGLAND: AN OVERVIEW OF POLITICS AND PRACTICES

CLYDE D. MCKEE, JR.\*

## INTRODUCTION

Life and law must be kept  
closely in touch, as you  
can't adjust life to law  
you must adjust law to  
life.

The only point in having law  
is to make life work.  
Otherwise there will be  
explosions.<sup>1</sup>

—Arnold Toynbee

The practice of law and the practice of politics are both compatible and incompatible. This paradox is illustrated by the life of Daniel Webster, one of this nation's most famous and influential lawyers. John F. Kennedy, in his *Profiles In Courage*, wrote, "Daniel Webster is familiar to many of us as the battler for Jabez Stone's soul against the devil in Stephen Vincent Benet's story. But in his own life time, he had many battles against the devil for his own soul—and some he lost."<sup>2</sup>

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1. J. BRAUDE, *COMPLETE SPEAKER'S AND TOASTMASTER'S LIBRARY, REMARKS OF FAMOUS PEOPLE* 59 (1965).

2. J. KENNEDY, *PROFILES IN COURAGE* 53 (Giant Cardinal ed. 1960).

Kennedy described Webster as “undoubtedly the most talented figure in our Congressional history,”<sup>3</sup> but he also wrote that he “was not as great as he looked.”<sup>4</sup> He could see nothing improper in writing to the President of the Bank of the United States—at the very time when the Senate was engaged in debate over a renewal of the Bank’s Charter—noting that “my retainer has not been received or refreshed as usual.”<sup>5</sup> Although lawyers can take pride in the fact that the ethical standards of the legal profession have progressed significantly since Chief Justice John Marshall delivered *Marbury v. Madison*,<sup>6</sup> lawyer-politicians still have serious problems related to conflicts of interest. The devil-battling dilemma—to identify the line separating proper legal conduct from improper conduct and to prevent political opportunities from forcing the lawyer to cross it—is as real today as it was nearly two centuries ago.

Robert Leuci, the former New York City policeman who inspired the movie *Prince of the City*, accused New York’s lawyers, prosecutors, and judges, of corruption. In a presentation at Western New England College School of Law he warned law students: “An erosion process begins that attacks your integrity, your morality. Many times you’re going to have to make decisions about what you are and who you are.”<sup>7</sup>

This article has several objectives. First, it will show the affinity between the practice of law and politics. Next, it will use three New England states—Connecticut, Rhode Island, and Massachusetts—to describe opportunities for lawyers who are also interested in politics. Attention will be given to the Code of Professional Responsibility of the American Bar Association, the conflicts of interest statutes in three states, and how these laws and the opinions of bar associations and ethics commissions have influenced the policies of law firms serving these areas. The closing section is designed for those interested in improving legal ethics or making law and politics more compatible.

## I. THE AFFINITY BETWEEN LAW AND POLITICS

Alexis de Tocqueville, the nineteenth century French aristocrat who perceptively analyzed the political culture of the United States,

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3. *Id.*

4. *Id.* at 54.

5. *Id.* at 54-55.

6. 5 U.S. (1 Cranch) 137 (1803).

7. LeVick, *Ex-police Corruption Figure Warns of Erosion of Morals*, The Hartford Courant, Jan. 20, 1983, at 42.

wrote, "If I were asked where I place the American aristocracy, I should reply without hesitation . . . that it occupies the judicial bench and the bar . . . scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."<sup>8</sup> One of the earliest examples of both the affinity of law and politics and the lawyer as aristocrat is found in the metamorphosis of Connecticut from plantation to colony.<sup>9</sup> Trinity College Professor Glenn Weaver observed that Connecticut's Fundamental Orders "was largely the work of Roger Ludlow of Windsor, the only man in the river towns with training in law."<sup>10</sup>

Stimson Bullitt, author of *To Be a Politician*,<sup>11</sup> is a lawyer-politician, who twice ran for Congress. Bullitt further illustrated de Tocqueville's insight when he wrote,

. . . if politics is one's main interest, law is a good home base. Although this factor is overrated, a legal background is a help in the performance of a politician's job because the work experience of a lawyer, even a specialist, covers such a wide variety of knowledge in his community.<sup>12</sup>

Bullitt also saw law as "a castle which one can leave for a venture in politics."<sup>13</sup> He quotes Henry Stimson, who spent many years moving from the practice of law to the service of national government and then back to law, "I always felt that I remained a lawyer with a law firm waiting as a home behind me, to which I could return on the completion of my public task and where I could always find awaiting my genial friends and collaborators in the law."<sup>14</sup> But Bullitt saw, in his own practice of law and politics, the same dangers that confronted Daniel Webster.<sup>15</sup> Interviews by the author with young and old lawyers, political reporters, legislative administrators, and those responsible for policing legal practices and advising lawyers revealed that the problems faced by the New England lawyer who engages in politics both directly and indirectly are enduring and fre-

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8. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 278, 280 (1945).

9. G. WEAVER, *AN ILLUSTRATED HISTORY OF CONNECTICUT'S CAPITAL* 18 (1982).

10. *Id.* at 19. Historian John Fiske called the Fundamental Orders, which Connecticut claims as its initial constitution, "the first written constitution known to history that created a government" and wrote that "it marked the beginning of American democracy." *CONNECTICUT STATE REGISTER* 53 (1982).

11. S. BULLITT, *TO BE A POLITICIAN* 13 (1977).

12. *Id.* at 13.

13. *Id.*

14. *Id.* at 13-14.

15. *Id.*

quently monumental.<sup>16</sup>

## II. POLITICAL OPPORTUNITIES: WHERE "THE PLUMS" ARE IN CONNECTICUT, RHODE ISLAND AND MASSACHUSETTS

Although the author has been a student of New England's state and local governments for the past two decades, the diversity of opportunities for lawyer-politicians in the New England states came as a surprise. Because the political cultures of such states as Connecticut, Rhode Island, and Massachusetts are different, the ways lawyers engage in politics are also different.

### A. *Connecticut*

Just as a lawyer drafted Connecticut's Fundamental Orders in 1639, it was Harvard-educated lawyer John M. Bailey who was "the architect of modern Connecticut politics."<sup>17</sup> Superior Court Judge Robert Satter, who experienced many phases of the Connecticut lawyer-politician as a local party leader, state legislator, counsel for the Democratic Party, and judge, has valuable insights into both Connecticut's political culture and the role lawyers have played within this culture.<sup>18</sup> Satter shows the way in which lawyer-politician Bailey dominated Connecticut politics during the period 1946-1975, masterminding the election of six Democratic governors in nine elections.<sup>19</sup> As a local (Hartford), state, and national Democratic Party chairman (appointed by President Kennedy in 1960), Bailey had tremendous influence in the selection of Connecticut's judges, prosecutors, clerks, and even the court staff. Bailey had two

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16. During the period of October 1982 to January 1983, the author interviewed, either in person or by telephone lawyers, reporters, lobbyists, researchers, prosecutors, and the heads of ethics commissions. Some of the lawyers were just beginning their careers as attorneys and politicians while others were senior partners on the executive committees of major law firms. Although the author would like to give credit to these individuals for their contributions to this article, in nearly all instances there was a request for confidentiality as a condition for candid information.

17. Satter, *Hero Worship and the State We're In*, The Hartford Courant, Jan. 9, 1983, at 9.

18. Robert Satter is a superior court judge in Connecticut who has had comprehensive experience as a lawyer-politician. He began his career in private practice, served in the Connecticut General Assembly as a member of the House for three terms, held the position of Legislative Counsel for the Democratic Party for eight years at a time when the Democrats controlled the office of governor and both houses of the legislature, and was appointed a state judge in 1975. He is also an adjunct professor at the University of Connecticut Law School.

19. Satter, *The Role of the Legislative Counsel*, in PERSPECTIVES OF A STATE LEGISLATURE 33-40 (C. McKee, Jr., ed. 1980).

cornerstones for his political influence. First, he had an understanding with all his Democratic governors that there would be a division of authority: the governor would run the state, and Bailey would run the party and the patronage system. Second, Bailey, an expert in the legislative process, controlled the state senate, which he used to block unwanted legislative initiatives.<sup>20</sup> Satter describes how Bailey used the promise of a judgeship to motivate his service to Connecticut: "Bailey lived to see Ella elected and inaugurated. And one of his final acts was to fulfill his promise to me by calling Governor Grasso from his hospital bed, when he could hardly speak, to have my name put on the list of prospective judges."<sup>21</sup> But when John Bailey and Governor Grasso died, a new political system evolved in Connecticut. As the incentives and rewards system shifted, the opportunities for lawyer-politicians also changed.

Connecticut's political system is becoming democratized, professionalized, and, in some areas, nonpartisanized. What this means is that lawyers can now use the state's challenge primary law to make direct runs for office with or without the endorsement of party chairman. They can create their own campaign organizations, raise their own funds, get their own supporters to the voting machines, and let the people decide. If elected, they are relatively free to establish their own political priorities and to use personal discretion in selecting staff. Because the governor nominates lawyers for judgeships, however, and the judiciary committee (Connecticut uses a joint-committee system) screens and approves them, the governor and the party's legislative leaders still have significant influence over those who aspire to positions within the judiciary.<sup>22</sup> One lobbyist, who is not a lawyer, but who served several terms as a state legislator, complained bitterly about this motivating feature. He said, "Attorneys in the legislature are asked to 'check their brains' if they want to be judges. I think it is dangerous to require that judges be lawyers."<sup>23</sup> The trend in Connecticut, however, is towards a more professionalization and greater certification.

Connecticut's General Assembly is a mixture of patronage and merit appointments. The personal staff of majority and minority

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20. See C.D. McKEE, JR., *Constitutional Principles and Strategies for Controlling the Authority of the State*, in PERSPECTIVES OF A STATE LEGISLATURE 3-13 (1980).

21. Satter, *Hero Worship and The State We're In*, in PERSPECTIVES OF A STATE LEGISLATURE 16 (C. McKee, Jr. ed. 1980).

22. See C.D. McKEE, JR., *Connecticut: A Political System in Transition*, in NEW ENGLAND POLITICAL PARTIES (1983).

23. See *supra* note 16.

leaders, plus the clerks of committees, are appointed on the basis of personal and party loyalty and service. But partisan affiliation can be a handicap for those lawyers seeking positions within the research components of the legislature. Numerous attorneys are hired on the basis of their legal qualifications rather than party connections.

Similarly, Connecticut's 112 state prosecutors are becoming less partisan. They are selected by senior resident judges in each of Connecticut's twelve judicial districts rather than by the attorney general or the legislature.<sup>24</sup> Connecticut's seventeen part-time assistant prosecutors are being phased out. The entry level salaries for deputy assistant state's attorneys is \$26,000, which is more than most private law firms pay for inexperienced associates. The path to one of these positions is often through a clerkship for a senior judge rather than through service to a party chairman or candidate for elected office. The erosion of an "incentive-rewards" system within the major parties has contributed to the decline in their influence in Connecticut.

Some of the best opportunities for lawyer-politicians in Connecticut are at the local level. Near the top is the elected position of probate judge. There are 131 probate judges, each with a four-year term. Although the requirements for these judgeships are political rather than legal (judges do not have to be lawyers), probate judges who are attorneys have considerable advantages. They can engage in civil and criminal private law practice. Their time is flexible. They have high public visibility. Additionally, they can build a network of valuable relationships using their authority to appoint executors of estates. Probate judgeships are highly stable in that incumbents are usually re-elected. In recent years, the probate court system has come under strong attack for improprieties, however, by *The Hartford Courant*, Connecticut's largest newspaper.<sup>25</sup>

Town counsel or director of law is a position that has many of the same benefits as probate judge. Most are part-time jobs, with flexible schedules, few restrictions on criminal or civil practice, and high public visibility. The disadvantages are that these attorneys are usually appointed by chief executives, and the positions have no fixed terms, and less stability than probate judges. Also, there is a

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24. See *supra* note 16. Newly-elected Attorney General Joseph Lieberman campaigned to change this provision of the Connecticut Constitution. He wants his office to have both civil and criminal jurisdiction with control over the Chief State's Attorney, who is now appointed by the Chief Justice of the Supreme Court. *The Hartford Courant*, July 17, 1983 at B5.

25. See, e.g., *The Hartford Courant*, April 14, 1983, at 1.

trend in some larger cities to remove directors of law from partisan politics and to make them full-time, civil service positions.

Some young attorneys seek appointments as counsel for various boards, commissions, and committees. Particularly attractive is counsel for the zoning board, hospital board, or economic development committee. While these appointments have relatively low visibility, little stability, and limited financial rewards, they offer the young lawyer-politician valuable opportunities for knowledge and experience.

The main attraction for Connecticut lawyers to serve on partisan committees at the state and local levels is the opportunity to develop relationships with partisan decision-makers, while running few conflicts-of-interest risks that restrict private practice. Similarly, lawyers who serve as campaign managers for prominent candidates have additional incentives and advantages. A campaign manager has a variety of opportunities to develop valuable contacts with the heads of organizations in both the public and the private sectors. Compared to serving a term of office as an elected or appointed official, the period of commitment for a campaign manager is relatively short. Because the personal relationship between the candidate and his or her manager is often highly personal and frequently intense, there is the opportunity for an enduring friendship. If the state party chairman is relatively weak and the candidate is an incumbent governor, the lawyer-campaign manager can become one of the most influential figures in the entire state political system without incurring the responsibilities or restrictions on legal practice that are associated with public office. Also, there is widespread perception that this lawyer has political influence when practicing before state agencies even though actual influence does not exist.

#### B. *Rhode Island*

Lincoln Steffens in 1905 called Rhode Island "a state for sale."<sup>26</sup> Duane Lockard, a political scientist at Connecticut College in 1958, attempted to explain why this state has a reputation for being politically corrupt.<sup>27</sup> First, he stressed the fact that Rhode Island was a one-party Republican state until 1932, when it abruptly went Democratic. There was considerable corruption under the Republican re-

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26. Steffens, *Rhode Island: A State For Sale*, 24 MCCLURE'S MAG., 337 (Feb. 1905). See also D. LOCKARD, NEW ENGLAND STATE POLITICS 172 (1959).

27. LOCKARD, *supra* note 26, at 172.



gime which established a tradition that the Democrats continued.<sup>28</sup> Next, Lockard stressed the fact that Rhode Island is one of the most urbanized states, with half of the population engaged in manufacturing. Equally important was the fact that Rhode Island had "a higher proportion of immigrants and their second- and third-generation progeny than any other state."<sup>29</sup>

Lawyers were very much part of the system Lockard described. Republican "boss" Charles Brayton, a civil war general, controlled the state legislature and all appointments.<sup>30</sup> Lincoln Steffens observed that Brayton controlled Rhode Island's lawyer-legislators by using judgeships and law business as incentives and rewards.<sup>31</sup> Contributing to the tradition of political corruption, was the practice of dual office holding, whereby legislators could accept executive appointments. There was also the linkage between lawyer-legislators and the race-tracks.

The majority leader of the House, James H. Kiernan, has for many years been an attorney for one of the race tracks. One cannot conclude from this fact alone that the actions of the majority leader on race-track issues are influenced thereby, but at the very least there would seem to be a serious conflict of interest.<sup>32</sup>

Interviews with lawyers, reporters, and state civil employees revealed that although the state has adopted a variety of reforms it still has "a different political culture."<sup>33</sup> What this means is that while Massachusetts pays its state legislators \$30,000 per year and Connecticut pays its part-time, "citizen" legislators \$10,500 and \$2,500 expenses, Rhode Island still has a constitutional provision for paying its legislators \$300 per year for its short (60 days), four-day week sessions. Yet many of the 150 legislators, representing 39 communities, are lawyers.<sup>34</sup> To illustrate, the chart below reveals that attor-

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28. *Id.*

29. *Id.*

30. According to Lockard, in 1901 Rhode Island passed "The Brayton Law", a procedure authorizing the Senate to reject a governor's nomination for any office and then to substitute its own candidate. Without authority to veto, the governor was without the power usurped by Brayton as party boss. *Id.* at 175.

31. *Id.* (citing L. STEFFENS, THE AUTOBIOGRAPHY OF LINCOLN STEFFENS 466 (1931)).

32. LOCKARD, *supra* note 26, at 209-10.

33. This was the phrase used by a state career administrator, who has lived in Rhode Island most of his life and is familiar with the politics of the other New England states. *Id.*

34. *Id.*

ney-legislators for the past decade have dominated both the House and Senate judiciary committees.

House and Senate Judiciary Committees Membership<sup>35</sup>

<u>House</u>	<u>No. of Members</u>	<u>No. of Attorneys</u>
1973-74	17	9
1975-76	16	8
1977-78	17	9
1979-80	17	8
1981-82	17	6
<u>Senate</u>	<u>No. of Members</u>	<u>No. of Attorneys</u>
1973-74	17	11
1975-76	15	9
1977-78	18	7
1979-80	18	9
1981-82	16	12

Rhode Island's structure resembles that of a city-state largely because, like Connecticut, it has no county government. This means that lawyer-politicians play influential roles at the local levels.<sup>36</sup> There are 39 probate judges and an equal number of city solicitors, who are part-timers free to engage in both civil and criminal practice. Unlike Connecticut's system, both probate judges and city solicitors are appointed by the city councils. This means there are incentives for lawyers to run for council seats from which they can control judicial appointments or advance their own legal-political careers.<sup>37</sup> It does not seem that the political culture which Lincoln Steffens described in 1905 and Lockard analyzed in 1958 has changed significantly in Rhode Island. There seems to be considerable acceptance of apparent, if not actual, conflicts of interest by lawyer-politicians at both the state and local levels.<sup>38</sup>

### C. *Massachusetts*

Politics in Massachusetts is "big league hard ball" played by committed and often talented professionals. Tradition runs deep and permeates public institutions at both the state and local levels.

35. Letter from Eileen Cook to Dr. Clyde D. McKee, Jr. (Jan. 25, 1983). This table was constructed by researchers in the Legislative Council on January 25, 1983. *Id.*

36. *See supra* note 16.

37. *Id.*

38. *Id.*

National, state and local officials have statures and reputations greater than those in many other states. Obvious are the examples of Senator Kennedy and House Speaker O'Neill. Whereas Connecticut and Rhode Island have traditions for part-time, citizen-politicians, who are paid meager salaries, Massachusetts has the tradition for full-time office holders, who are adequately compensated.<sup>39</sup>

There is a Brahmin factor in Massachusetts politics which influences lawyer-politicians. "[I]n some states, family names do not mean a great deal; in others, first family, blueblood status has great political influence. Probably none of these privileged groups has so conspicuous or well-heralded a place as the Boston Brahmins."<sup>40</sup> The prominence and influence of politically active, old-line families has tended to keep political parties weak while contributing to the legitimacy and the honor of public service for lawyers in the Commonwealth. Lockard saw this when he wrote, "The General Court has an air of importance and decorum about it that resembles Congress or the House of Commons more than other state legislatures."<sup>41</sup> Lawyers considering practice in Massachusetts are confronted with clearer choices than is usually the case in Connecticut or in Rhode Island.

On the one hand, there is the attraction of the large and prestigious, downtown Boston law firms. Salaries start at about \$35,000 and within six or seven years there is an expectation of \$70,000-\$90,000.<sup>42</sup> On the other hand, there are the political offices. Near the top of the list are the ten district attorneys, who are elected for four-year terms and who serve as county prosecutors. In addition to having high public visibility and substantial authority to appoint assistant prosecutors, the office of district attorney can be viewed as an excellent location from which to launch a campaign for state-wide office or Congress. It may also serve as a fine reentry point into private criminal practice. Lawyers who fail to gain appointment with one of the big Boston firms will sometimes use positions within the attorney general's office to gain the specialized experiences and reputations they need to win prestigious appointments within the private sector on the second attempt.<sup>43</sup>

At the local level there are strong incentives for some lawyers to

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39. *Id.*

40. LOCKARD, *supra* note 26, at 119.

41. *Id.* at 148.

42. This information was supplied by a young Harvard-educated lawyer, who left one of these firms for an appointment at the state capitol. *See supra* note 16.

43. *Id.*

engage in politics to gain advantages in the practice of law. One young attorney explained how being a state representative can help in the practice of law in a local court.

State representatives get to know the local judge. They also know their way around the court. They know when the calendar of cases is backed up. Timing can be a major factor in the practice of law. With a continuance, a lawyer can often work out a deal with the other side to the advantage of his client.<sup>44</sup>

Similarly, a state representative enjoys an advantage in representing a client who has legislative matters of interest. This is because the representative clearly enjoys access to state government which is of great value to the client, to the extent the access may be properly used.<sup>45</sup>

### III. THE CONFLICT OF INTEREST REFORM MOVEMENT

#### A. *National Guidelines and Disciplinary Rules*

On August 12, 1969, the Code of Professional Responsibility was adopted as a model of ethical conduct for the nation's attorneys.<sup>46</sup> The American Bar Association's Special Committee on Evaluation of Ethical Standards was appointed to evaluate the Canons of Professional Ethics, which were first promulgated in 1908. The committee identified four shortcomings of the Canons.<sup>47</sup> Included in the shortcomings, was the need to update the Canons to keep pace with the changing conditions of our legal system in an urbanized society.<sup>48</sup>

Recently the Code of Professional Responsibility has become a source of concern both from within and outside the bar.<sup>49</sup> Heightened public criticism of legal ethics in the post-Watergate years has helped fuel reform movements. In response, the ABA appointed the Special Commission for the Evaluation of Professional Standards on August 22, 1977, to review the need for improving the Code.<sup>50</sup> The new code is currently in the form of a restatement.<sup>51</sup>

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44. *Id.*

45. *Id.*

46. See generally *Reflections on a Decade Under the Code of Professional Responsibility: The Need for Reform*, 57 N.C. L. REV. 495 (1979) [hereinafter cited as *Reflections*].

47. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Preface (1979).

48. *Id.*

49. *Reflections*, *supra* note 47, at 495.

50. *Id.*

51. *Id.* at 495-96.

While the present Code leaves wide latitude for state and federal discretion concerning conflicts of interest arising when a lawyer is also a public office holder, some policy considerations are manifested by the Code.<sup>52</sup> These considerations and the applicable Disciplinary Rules and Ethical Considerations will be outlined before an analysis is made. Clearly, society benefits by having lawyers serve as public officers.<sup>53</sup> One ethical consideration provides that lawyers are uniquely qualified to make significant contribution in improving the legal system.<sup>54</sup> This provision serves also as a warning to public officeholders to refrain from engaging in activities which are, or foreseeably could be, in conflict with their official duties as lawyers.<sup>55</sup>

An attorney who holds public office must avoid conduct which could lead a lay person to conclude that the attorney is using his office to further his professional success or personal interest.<sup>56</sup> Moreover, such an attorney knows that his conduct is not in the public interest.<sup>57</sup> Finally, DR 8-101(A)(2) prohibits an office-holding attorney from using his position to influence or attempting to influence a tribunal to take action in his or his client's favor.<sup>58</sup>

The code provisions cited above serve as an outline, albeit a general one, for attorneys to follow. Courts have similarly generalized when and how these provisions should be applied. The New Jersey Supreme Court in applying DR 8-101(A)(2) stated that: "The touchstone of our disciplinary power is to fashion a sanction which fulfills our trust to the public and the profession, edifies the bar and is fair and just to the respondent."<sup>59</sup>

One writer<sup>60</sup> commented that, while DR 8-101(A)(1) is a worthwhile and necessary proscription for certain conduct by lawyers who are also public officials, it is also an "unrealistic and unenforceable" provision.<sup>61</sup> This is so because the lawyer must use discretion in determining whether certain legislation is in the public's interest.<sup>62</sup> This author believes that a better provision would read: "A lawyer

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52. *See infra* note 54.

53. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-8 (1979).

54. *Id.*

55. *Id.*

56. ABA Comm. on Professional Ethics and Grievances, Formal Op. 192 (1939).

57. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-101(A)(1) (1979).

58. *Id.* DR 8-101(A)(2).

59. *In re Vasser*, 75 N.J. 357, 364, 382 A.2d, 114, 117 (1978).

60. Cady, *Canons to the Code of Professional Responsibility*, 2 CONN. L. REV. 222 (1969-1970).

61. *Id.* at 243-44.

62. *Id.* at 244.

who holds public office shall not use his public position for the sole purpose of advancing in legislative matters the selfish or special interests of himself or of a client.”<sup>63</sup>

With this criticism as a starting point, we now will specifically deal with several of the current dilemmas that face public office holders who are also private attorneys.

B. *Lawyer-Legislator Conflict of Interest: Informal Opinion 1182*<sup>64</sup>

A total of eight questions were posed to the committee, of which four will be considered. The first was, “Should a lawyer who is a member of a legislative body accept a retainer or other compensation from an electric utility . . . or any other organization which is likely to be affected by the passage or defeat of proposed legislation?”<sup>65</sup>

In response, the committee found that no definitive answer could be given because there exists no Disciplinary Rule to prohibit a lawyer-legislator from representing an individual or organization that will likely be affected by the passage or defeat of legislation.<sup>66</sup>

The committee did find that Disciplinary Rule 8-101(A)(3) may effectively proscribe the acceptance of a retainer because fact issues may show that an offered retainer may be made with the purpose of influencing the lawyer-legislator’s action as a public official. The committee then quoted DR 8-101(A)(1), which prohibits a lawyer-legislator from using his position to attempt to obtain a *special advantage* for himself or for a client in legislative matters where such action *is not* in the public interest.<sup>67</sup>

The terms “special advantage” and “not in the public interest” are not defined but a blanket prohibition was not intended because the committee that drafted the Code did not (although it easily could have) prohibit a lawyer-legislator from representing a client who is likely to be affected by the passage or defeat of proposed legislation.<sup>68</sup> Further, an interpretation that constituted a blanket proscription would leave the lawyer-legislator with very few clients whom he could represent. The committee construed the phrase “special ad-

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63. *Id.*

64. ABA Comm’n on Ethics and Professional Responsibility, Informal Op. 1182 (1972).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

vantage" to mean a direct and peculiar advantage, and "not in the public interest" to mean an action that is clearly inimical to the public's interest.<sup>69</sup> E.C. 8-8<sup>70</sup> was quoted to support the proposition that a lawyer should refuse a retainer if, considering all circumstances, the lawyer's conduct will adversely affect public confidence.<sup>71</sup>

The commission proceeded to consider the question: "Where the compensation of members of administrative boards is fixed by the legislature, or where their appointments are subject to legislative approval or where they are elected by the legislature, should lawyer-legislators appear before these administrative boards in behalf of private clients?"<sup>72</sup>

The commission recognized the proscription of DR 8-101(A)(2) for a lawyer to use his public position to influence a tribunal to act either in his behalf or in favor of his client.<sup>73</sup> Further, the Commission found that a lawyer's mere appearance before such a board may be circumstantial evidence of using such influence or the attempt thereof.<sup>74</sup> Ultimately, this will be a question of fact that must be dealt with on a case by case basis.

The commission continued with a further question: "Is it proper for a lawyer-legislator to accept legal employment by the state or by one of its agencies?"<sup>75</sup> While no Disciplinary Rule could be found to prohibit a legislator from being employed in such a capacity, the commission concluded that such dual employment is often controlled by local law.<sup>76</sup> Moreover, EC 8-4 provides that this type of dual employment requires the lawyer clearly to state his position, pro or con, concerning individual legislation taken by him as a legislator or as a state employee.<sup>77</sup>

Finally, the last question asked if the same rules apply to a law partner of the legislator-lawyer.<sup>78</sup> The general rule is that disqualification of a lawyer includes disqualification of his law partners.<sup>79</sup> It

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69. *Id.*

70. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 8-8 (1979).

71. ABA Comm'n on Ethics and Professional Responsibility, Informal Op. 1182 (1972).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. See ABA Comm'n on Ethics and Professional Responsibility, Formal Op. 33 (1931), cited in Note, *Unchanging Rules in Changing Times: The Canons of Ethics and Intra-Firm Conflicts of Interest*, 73 YALE L.J. 1058, 1078 (1964).

was the opinion of the commission that the same rules will apply to a law partner of the legislator.<sup>80</sup>

### C. *State Conflict-of-Interest Legislation*

In 1971, Connecticut passed a conflict of interest statute, that was perceived as "land-mark" legislation.<sup>81</sup> For the first time, at least in the New England region, a state legislature probed the financial holdings of its members and accepted the responsibility of defining proper conduct. There was one main weakness in the 1971 statute which became apparent as other states began to pass similar legislation. David Ogle, Executive Director of the General Assembly's Legislative Management Committee, said, "By 1977 we recognized that our land-mark conflict-of-interest statute was weak and ineffective."<sup>82</sup> Thus the General Assembly amended this law so that financial information pertaining to all legislators was not only open to public inspection, but was in the hands of the members of an ethics commission which was empowered to act on violations and initiate sanctions.

#### 1. Connecticut

Connecticut's Code of Ethics for public officials is codified in the Connecticut General Statutes.<sup>83</sup> The relevant statute provides that all statewide elected officials must file, under a penalty of false statement, a statement for the preceding year.<sup>84</sup> This statement must include the following: (1) the names of all businesses with which the officeholder is associated; (2) all sources of income in excess of \$1,000, and all clients who provide over \$5,000 of income; (3) the name of any securities which have a fair market value in excess of \$5,000 unless the stock is held in trust established for the purpose of divesting the officeholder of all control and knowledge of his assets in order to avoid a conflict of interest; and (4) all real property and its location.<sup>85</sup>

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80. ABA Comm'n on Ethics and Professional Responsibility, Informal Op. 1182 (1972). Two committee members did not participate in the opinion because of the vagueness of the inquiry. *Id.*

81. David Ogle, Executive Director of the Legislative Management Committee of Connecticut's General Assembly, was the architect for much of the state's modernized structures and procedures. Prior to 1977, he had custody of *sealed* confidential information pertaining to each legislator. Interview with David Ogle (Jan. 11, 1983).

82. *Id.*

83. CONN. GEN. STAT. § 1-79 through 1-90 (1981).

84. *Id.* § 1-83(a).

85. *Id.* § 1-83(b)(1)(A)-(D).



In addition, the officeholder must file with the commission a disclosure of any fees or honorariums received for any appearance or the delivery of an address before an organization or a meeting.<sup>86</sup> The filed statement is a matter of public information.<sup>87</sup> Moreover, a public official cannot be offered or given anything of value based on an understanding that the official's judgment, action, or vote will be influenced.<sup>88</sup>

For the purposes of this discussion, the most important portion of the Code is the section that prohibits a public official from engaging in outside activities or incurring any obligation which is in "substantial conflict with the proper discharge of his duties or employment in the public interest and of his responsibilities as prescribed in the laws of this state."<sup>89</sup> Under this provision, no public official may accept other employment which will impair his or her independence of judgment in the role as a public official.<sup>90</sup>

Similar to provisions in Rhode Island General Laws,<sup>91</sup> and a Rhode Island Advisory Opinion,<sup>92</sup> Connecticut's statutes forbid a public official from deriving a direct monetary gain or suffering a direct monetary loss because of official activity.<sup>93</sup> The procedures required for a public official when a discharge of the duty affects his or her financial interests are nearly identical in Connecticut and Rhode Island.<sup>94</sup>

Upon finding a violation of the Connecticut statutes, the commission is empowered to order the violator to do any or all of the following: "(1) cease and desist the violation; (2) file any report, statement or other information as required by the statute; and (3) pay a civil penalty of not more than one thousand dollars for each violation of the statute."<sup>95</sup>

Moreover, one who intentionally violates any provision of the statute will be imprisoned for a term not to exceed one year or fined a sum not to exceed \$1,000.<sup>96</sup> Finally, the penalties prescribed limit neither the power of the legislature to impeach or discipline public

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86. *Id.* § 1-83(b)(2).

87. *Id.* § 1-83(c).

88. *Id.* § 1-84(f).

89. *Id.* § 1-84(a).

90. *Id.* § 1-84(b).

91. R.I. GEN. LAWS § 36-14-6 (Supp. 1982).

92. Rhode Island Conflict-of-Interest Comm'n, Advisory Op. 77-9 (April 19, 1977).

93. CONN. GEN. STAT. § 1-85 (1981).

94. *Id.* § 1-86 (1981); R.I. GEN. LAWS § 36-14-5 (Supp. 1982).

95. CONN. GEN. STAT. § 1-88(a) (1981).

96. *Id.* § 1-89(a).

officials nor the power of any agency or commission to discipline its own employees or officials.<sup>97</sup>

## 2. Rhode Island

In 1977, the State of Rhode Island and Providence Plantations followed Connecticut's lead and passed what was considered a "strong" conflict-of-interest statute.<sup>98</sup> However, unlike Connecticut, where a state's attorney has prosecuted a lawyer-legislator for ethical and criminal violations, Rhode Island's Conflict-of-Interest Commission "has not received any conflict-of-interest complaints regarding attorneys misusing their public office for personal gain."<sup>99</sup> This means the Rhode Island statute has never been tested in an actual court case. This is not to imply, however, that the commission has been inactive during the period from 1977 to the present. In addition to issuing over 700 advisory opinions on questions raised by candidates and elected officials, some of whom were lawyers, the commission has processed 123 complaints related to failure to file required information (only one involved a lawyer-politician).<sup>100</sup>

Because Rhode Island's conflict-of-interest law so closely resembles the Connecticut statute, it does not merit further analysis. Better insights can be gained by reviewing selected advisory opinions issued by the commission.

### (a) Advisory Opinion 81-13<sup>101</sup>

Representative A is both a member of the State House of Representatives and is an attorney. He learned that he may be able to serve as counsel for the Bay Commission, an incorporated state authority. Representative A had introduced a bill requiring the Bay Commission to have its rates reviewed by the Public Utilities Commission before being asked to perform legal services.<sup>102</sup> The commission considered the question whether the attorney-representative can provide legal services to the Bay Commission.<sup>103</sup>

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97. *Id.* § 1-89(b).

98. R.I. GEN. LAWS § 36-14-8(k) (Supp. 1982). Telephone interviews with David Ogle and members of Rhode Island's Conflict-of-Interest Commission (Jan. 1983).

99. Letter from Gerald A. Slattery, Conflict-of-Interest Commission, to Clyde D. McKee, Jr. (October 8, 1982).

100. Telephone interview with research assistant at Conflict-of-Interest Commission (Jan. 1983).

101. Rhode Island Conflict-of-Interest Comm'n, Advisory Op. 81-13 (Apr. 23, 1981).

102. *Id.*

103. *Id.*

In its advisory opinion, the commission determined that representative A may perform legal services for the Bay Commission so long as he does *not* vote on or influence directly or indirectly any General Assembly matters which specifically affect the Bay Commission.<sup>104</sup> Since under House Rules, the sponsor of legislation must request that the bill be brought up for consideration and vote, Representative A may make this request. Finally, Representative A's partners should avoid all activities from which Representative A himself is prohibited.<sup>105</sup>

(b) Advisory Opinion 81-9<sup>106</sup>

Representative B is an associate on salary with a law firm. She does *not* share in the profits or expenses. She is a candidate for the City Council but now must anticipate how her law firm and practice will be affected. The law firm appears before the City Zoning Board often and occasional appearances are made before the City Council for liquor license applications, transfers, and zoning amendments.<sup>107</sup> The commission examined the consequences of her election.

Here, the commission ruled that if Attorney B is elected, any firm member appearing before the City Council would be in violation of Rhode Island General Laws<sup>108</sup> even if B disqualifies herself from participation.<sup>109</sup> The firm may appear before other municipal agencies provided that: (1) B does *not* participate in or vote on any matter before the Town Council in which she or any firm member has been personally involved; and (2) B abstains from any matter before the Town Council involving municipal agencies in which she, or any firm member, continues to practice after B is elected.<sup>110</sup> Finally, B is advised that if elected, she should request advice as individual situations arise since all potential conflicts *cannot* be anticipated.<sup>111</sup>

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104. *Id.*

105. *Id.*

106. Rhode Island Conflict-of-Interest Comm'n, Advisory Op. 81-9 (Feb. 18, 1981).

107. *Id.*

108. R.I. GEN. LAWS § 36-14-4(e)(1) (Supp. 1982).

109. Rhode Island Conflict-of-Interest Comm'n, Advisory Op. 81-9 (Feb. 18, 1981).

110. *Id.*

111. *Id.*

(c) Advisory Opinion 81-2 as Amended<sup>112</sup>

Attorney C is a partner in a law firm and his law partner is Chairman of the City Board of Public Safety. C has been appointed Labor Relations Administrator by the Mayor. His duties include negotiating collective bargaining agreements for the city's uniformed police officers. As a private attorney, C has been asked by a long-standing client to represent her in an action brought by the city police. He has agreed to represent her on a *pro bono* basis.<sup>113</sup> The issue addressed was whether this agreement was in violation of the Code.<sup>114</sup>

It was the commission's opinion that C may represent his client without violating the conflict-of-interest law although the commission noted that an appearance of impropriety within the meaning of the Code of Professional Responsibility,<sup>115</sup> may arise.<sup>116</sup>

(d) Advisory Opinion 79-73(a) and 79-73(b)<sup>117</sup>

Representative D practices part-time in a law firm and she is paid on an hourly basis. A partner in the firm is a candidate for a State Supreme Court vacancy, which will be filled by the General Assembly. Can D support, campaign or vote for the partner?<sup>118</sup>

The commission found that Representative D may vote or make a supporting statement for the partner and may actively campaign for him without violating the conflict-of-interest law.<sup>119</sup>

(e) Advisory Opinion 79-8<sup>120</sup>

E is a member of the Finance Committee of the City Council. He is a partner in a law firm that often represents a company that now seeks approval from the Finance Committee of an agreement between the company and city relating to tax payments, litigation and real estate. The company has retained another firm with which

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112. Rhode Island Conflict-of-Interest Comm'n, Advisory Op. 81-2 *as amended* (Feb. 26, 1981).

113. *Id.*

114. *Id.*

115. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1980).

116. Rhode Island Conflict-of-Interest Comm'n, Advisory Op. 81-2 *as amended* (Feb. 26, 1981).

117. Rhode Island Conflict-of-Interest Comm'n, Advisory Op. 79-73(a), (b) (Sept. 17, 1979).

118. *Id.*

119. *Id.*

120. Rhode Island Conflict-of-Interest Comm'n, Advisory Op. 79-8 (March 8, 1979).

E has no connection.<sup>121</sup> The commission considered what would be appropriate conduct for E.

In this situation, the commission decided that E must abstain from discussing, voting on, or participating in any way on the agreement in order to avoid a potential conflict of interest under Rhode Island General Laws.<sup>122</sup>

(f) Advisory Opinion 78-92 and 78-95<sup>123</sup>

Attorney General-elect F owns 100 shares of a Rhode Island Public Utility stock. As Attorney General, F will be the legal advisor to the Public Utilities Division, which regulates the company.<sup>124</sup> The commission considered what F should do to avoid a conflict of interest.<sup>125</sup>

The Conflict-of-Interest Commission found that it had no present authority to order divestiture of the stock owned by F. The commission did state that a potential conflict of interest would be actualized when F assumed the office of Attorney General. Thus he should either divest himself of the stock or place it in a qualified blind trust as defined in federal statutes.<sup>126</sup>

(g) Advisory Opinion 78-7<sup>127</sup>

G is a member of the Town Council. The council appoints the Town Probate Judge. G, in his role as an attorney, represents an estate presently pending before the Probate Court. Does this situation present a conflict of interest?<sup>128</sup>

No conflict of interest was found to exist because the Probate Judge's term is concurrent with that of the council and Councilman G will have no opportunity to vote on the present Probate Judge's position.<sup>129</sup>

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121. *Id.*

122. *Id.* See R.I. GEN. LAWS § 36-14-4 (Supp. 1982).

123. Rhode Island Conflict-of-Interest Comm'n, Advisory Op. 78-92 & 78-95 (Jan. 22, 1979).

124. *Id.*

125. *Id.*

126. *Id.* The applicable federal statute which covers the qualified blind trust is the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1828 (codified at 2 U.S.C. § 702(e)(3) (Supp. V 1981)).

127. Rhode Island Conflict-of-Interest Comm'n, Advisory Op. 78-7 (Apr. 25, 1978).

128. *Id.*

129. *Id.*

(h) Advisory Opinion 77-9<sup>130</sup>

House Speaker H is in a law firm in which one of the partners represents city school committees. Legislation will ultimately come before the House wherein H must vote upon issues dealing with public school teachers, teachers' unions, and other matters of vital and monetary concern to the school committees.<sup>131</sup>

The commission found that a potential conflict of interest exists under Rhode Island General Laws when legislation comes before H or any committee on which he serves, that can cause direct monetary gain or loss to H, his partners or firm, and result in a benefit or detriment to H, his firm or law partners.<sup>132</sup> Under state law,<sup>133</sup> therefore, H is required to: (1) file a sworn statement describing the matter to the Conflict-of-Interest Commission; (2) deliver a copy of the statement to the person who presides over the House in H's absence; (3) record the statement in the *House Journal*; and (4) request to be excused from voting on the matter on which the potential conflict exists.<sup>134</sup>

## 3. Massachusetts

## (a) State Statutes

In 1962, Massachusetts passed a short conflict-of-interest statute that had three provisions.<sup>135</sup> First, it restricted state and county employees from receiving directly or indirectly, or requesting compensation from anyone outside the government for a matter in which the government was a party or had "a direct and substantial interest."<sup>136</sup> Second, it made it a crime for anyone to give or promise compensation to a government official to exercise influence.<sup>137</sup> Third, it expressly restricted state-employed attorneys from representing clients with claims against the government.<sup>138</sup> The penalty for violating these requirements was not to exceed a fine of \$3,000 or a prison term of two years, or both.<sup>139</sup> This statute was revised in 1978, im-

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130. Rhode Island Conflict-of-Interest Comm'n, Advisory Op. 77-9 (Apr. 19, 1977).

131. *Id.*

132. *Id.*; R.I. GEN. LAWS § 36-14-6 (Supp. 1982).

133. R.I. GEN. LAWS § 36-14-5.

134. Rhode Island Conflict-of-Interest Comm'n, Advisory Op. 79-9 (Apr. 19, 1977).

135. MASS. GEN. LAWS ANN. ch. 268A, §§ 1-25 (West 1970).

136. *Id.* § 11(a).

137. *Id.* § 11(b).

138. *Id.* § 11(c).

139. *Id.*

posing restrictions on legal partners of lawyers in the employment of the Commonwealth.<sup>140</sup> It also imposed a one-year restriction on lawyer-legislators from acting as "legislative agents" for parties outside the government under threat of fine and imprisonment.<sup>141</sup>

Added insights into the legal theory of the Commonwealth's conflict-of-interest laws can be gained by reviewing the following advisory opinion.

(b) Advisory Opinion 82-6<sup>142</sup>

The committee considered the following situation. A legislator (L) wants to practice law part-time with two friends. The proposed firm would attract clients whose needs would require the firm to go before federal, state, and local administrative authorities. The lawyers would be appearing in settings for formal adjudication, rule-making, and negotiations for permits and licenses. L wants to know what his limitations are as a lawyer-legislator.<sup>143</sup>

The committee determined that the lawyer would not be subjected to duties to the Commonwealth under Canons 4 and 5.<sup>144</sup> Despite this, it may give rise to fiduciary duties to the commonwealth which may be compromised by his representation of private concerns against the Commonwealth. The committee provided that such fiduciary duties are matters of substantive law which it cannot address.<sup>145</sup> Similarly, the committee determined that application of Massachusetts statutes<sup>146</sup> to a public official's representation of private clients is equally beyond its purview.<sup>147</sup>

The committee did find Massachusetts law<sup>148</sup> imposing stringent restrictions upon a legislator's legal representation of private individuals in front of state agencies when the legislator is being compen-

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140. *Id.* § 5(d) (Supp. 1980).

141. *Id.* § 5(e) (Supp. 1980).

142. Comm'n on Professional Ethics, Massachusetts Bar Ass'n Op. 82-6 (May 6, 1982). It should be understood that this opinion is not a state ethics ruling, but an advisory opinion by the committee of a voluntary association.

143. *Id.*

144. *Id.* Canon 4 states: "A lawyer should preserve the confidences and secrets of a client." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1979). Canon 5 states: "A lawyer should exercise independent professional judgment on behalf of a client." *Id.* Canon 5.

145. Comm'n on Professional Ethics, Massachusetts Bar Ass'n Op. 82-6 (May 6, 1982).

146. MASS. GEN. LAWS ANN. ch. 268A, §§ 1-25 (West 1970).

147. Comm'n on Professional Ethics, Massachusetts Bar Ass'n Op. 82-6 (May 6, 1982).

148. MASS. GEN. LAWS ANN. ch. 268A, § 4 (West 1970).

sated.<sup>149</sup> Moreover, the State Ethics Commission has proposed to amend the state statute to further restrict such representation.<sup>150</sup>

The committee then found that DR 8-101(A)(2)<sup>151</sup> would be applicable in situations in which the lawyer goes before certain federal and local governmental entities.<sup>152</sup> This was interpreted as a violation only when the lawyer uses his influence, as opposed to using his public position *per se*.<sup>153</sup> The committee found that DR 9-101(c)<sup>154</sup> would prohibit a lawyer from stating or implying that he is able to influence the action of any entity of government in an improper manner.<sup>155</sup> Finally, the committee stated that the lawyer-legislator's partners would not be barred from practicing in front of governmental agencies.<sup>156</sup> While such partners obviously could not state or imply that they may be able to influence the agency because of their partnership with the lawyer-legislator, this does not mean that a total bar is appropriate.<sup>157</sup> The committee warned, however, that the lawyer-legislator cannot be involved in a matter engaged in by one of his partners, if the legislator himself could not handle it personally; nor may the legislator's compensation be affected by the firm's handling of the matter.<sup>158</sup>

#### IV. THE CONSEQUENCES OF NATIONAL AND STATE CONFLICT OF INTEREST LEGISLATION AND ADVISORY OPINIONS

What have been the consequences of the national and state reform movements initiated during the past two decades? Are fewer lawyers running for public office, particularly legislative seats at the state and local levels? If so, are legislatures becoming more representative of the general population? To what extent has the adoption of stringent conflict-of-interest statutes influenced the policies of major law firms? How have these statutes influenced the behavior of

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149. Comm'n on Professional Ethics, Massachusetts Bar Ass'n Op. 82-6 (May 6, 1982).

150. Massachusetts Lawyers Weekly, Feb. 8, 1982, at 1, col. 1.

151. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 8-101(A)(2) (1979).

152. Comm'n on Professional Ethics, Massachusetts Bar Ass'n Op. 82-6 (May 6, 1982).

153. *Id.*

154. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9-101(c) (1979).

155. Comm'n on Professional Ethics, Massachusetts Bar Ass'n Op. 82-6 (May 6, 1982).

156. *Id.*

157. *Id.*

158. *Id.*



lawyer-politicians who are serving in state and local legislatures? Are additional reforms necessary?

Occupational surveys showing the percentages of lawyers serving in state legislatures have been compiled by organizations such as the Insurance Information Institute (I.I.I.).<sup>159</sup> This institute's occupational survey for the New England region is reproduced in Appendix A. Similar national information was first compiled in 1966, facilitating a framework for the analysis of the impact of conflict-of-interest legislation. The Institute's findings concerning the role of lawyers are summarized below.

A. *Entire United States: Comparison of 1979 with Previous Years*

Generally, representation by lawyers in the state legislatures across the nation is continuing to decline, and the percentage of state lawmakers from the field of education is on the rise.<sup>160</sup> The latest survey, in 1979, shows that lawyers hold 20% of the state legislative seats countrywide, down from 21% in 1977 and 22% in 1976. This represents a decrease of 106 seats since 1977; 188 seats since 1976.<sup>161</sup> In 1966, when the I.I.I. first conducted an occupational study, 26% of all state lawmakers were lawyers.<sup>162</sup>

B. *Major Regional Areas*

The percentage of state legislators who are also attorneys is down in each of the nation's four major geographical areas. Only in the South does the percentage (29%) exceed that for the total U.S. Virginia has the highest percentage of lawyer-legislators (53%) of any state. At the other end of the spectrum, Delaware has the only legislature with no lawyers among its members. Lawyers hold 30% or more of the legislative seats in each of 7 states; in 1977, it was 11. On the other hand, the number of states in which lawyers hold 15% or fewer of the legislative seats now stands at 20, up from 18 in 1977.<sup>163</sup>

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159. See, e.g., INSURANCE INFORMATION INSTITUTE, OCCUPATIONAL PROFILE OF STATE LEGISLATURES (1979).

160. See *infra* Appendix A.

161. *Id.*

162. INSURANCE INFORMATION INSTITUTE, OCCUPATIONAL PROFILE OF STATE LEGISLATURES 8 (1979).

163. See page 691.

C. *The New England Region: Comparison of 1979 with Previous Years*

In 1979, in each of the three urban-industrial states in New England, more than 1 of every 5 legislators were lawyers: Massachusetts, 25%; Rhode Island, 23%; and Connecticut, 21%. By contrast, in the three rural New England states, fewer than 1 of 10 state legislators were attorneys: Maine, 9%; Vermont, 8%; and New Hampshire, 3%.<sup>164</sup>

D. *Implications*

This information supports the hypothesis that conflict-of-interest statutes initiated at the national and state levels during the past

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REPRESENTATION BY LAWYERS, INSURANCE PEOPLE AND EDUCATORS,  
1979, 1977 AND 1976

- TOTAL U.S. -

	<u>Total U.S.</u>	<u>Northeast</u>	<u>North Central</u>	<u>South</u>	<u>West</u>
<u>Lawyers</u>					
1979	20%	17%	16%	29%	12%
1977	21%	18%	17%	31%	13%
1976	22%	19%	18%	32%	14%

*Id.*

164.

REPRESENTATION BY LAWYERS, INSURANCE PEOPLE AND EDUCATORS,  
1979, 1977 AND 1976

- NEW ENGLAND -

	<u>Regional Total</u>	<u>Conn.</u>	<u>Maine</u>	<u>Mass.</u>	<u>N.H.</u>	<u>R.I.</u>	<u>Vt.</u>
<u>Lawyers</u>							
1979	12%	21%	9%	25%	3%	23%	8%
1977	12%	19%	6%	24%	2%	24%	8%
1976	13%	23%	7%	24%	2%	27%	8%

REPRESENTATION BY LAWYERS, INSURANCE PEOPLE AND EDUCATORS  
IN 1979, SENATES AND HOUSES

- NEW ENGLAND -

	<u>Regional Total</u>	<u>Conn.</u>	<u>Maine</u>	<u>Mass.</u>	<u>N.H.</u>	<u>R.I.</u>	<u>Vt.</u>
<u>Lawyers</u>							
Senate	25%	47%	9%	35%	4%	26%	20%
House	10%	15%	9%	22%	2%	22%	5%

*Id.* at 12.

two decades may be causal factors in discouraging lawyers from service in state legislatures. As the percentages of attorneys declined, the percentages of other groups (educators, women, minorities, etc.) have increased, making legislatures more representative of the general population.<sup>165</sup>

The three-year survey of percentages of attorneys in the New England states suggest that this region has a trend that runs counter to the trend of the nation. Over this three-year period, the percentage for the New England region declined only a single point.<sup>166</sup> There were actual increases in the percentages of attorneys serving in four of the six states between 1977 and 1979.<sup>167</sup> Only in Rhode Island has there been a steady decline, while the percentage of lawyer-legislators in Vermont remained a constant 8%.<sup>168</sup> But more important than these small deviations is the glaring fact that in three states (Connecticut, Massachusetts, and Rhode Island) each legislature has more than one-fifth lawyer-legislators while in the remaining three states (Maine, New Hampshire, and Vermont) each has less than one-tenth lawyer-legislators.<sup>169</sup> A possible explanation may be that the high-percentage states tend to be "commuter-legislator" states. However, one lawyer, who practices in Vermont and teaches at the University of Connecticut, said, "We have higher legal standards in Vermont than in Connecticut. We would not tolerate what goes on in the Connecticut Probate Courts."<sup>170</sup> This statement suggests there may be significant differences in the political cultures of the more rural states which affect the incentive-rewards systems of their lawyer-politicians.

#### V. DIVERSITY OF POLICY IN LAW FIRMS FOR LAWYER-POLITICIANS

Law firms in Connecticut, Rhode Island, and Massachusetts can be grouped into six major categories. First, there are the large law firms located in capital cities. These firms are primarily interested in the practice of law and will not allow any of their members to serve as state representatives. Second, there are large law firms that facili-

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165. *Id.*

166. *Id.* at 9.

167. These increases occurred in Connecticut, Maine, Massachusetts, and New Hampshire. *See supra* note 164.

168. Rhode Island declined from 27% to 23% between 1976 and 1979. Vermont remained steady at 8%. *Id.*

169. *Id.*

170. *See supra* note 16.

tate, if not encourage, their members to seek elected statewide executive offices and national appointments. They allow their lawyer-politicians to take leaves of absence and remain associated with the firm, providing a "castle" to which the lawyer-politicians can return if defeated or retired. Third, there are smaller law firms, located outside the capital regions which do not object to their members serving in the state legislature or in other elected and appointed positions. Fourth, there are small firms which encourage their members to seek positions on partisan committees, town councils, and to serve as town counsel or judges of probate. Fifth, there are firms which facilitate if not encourage their members to take active roles in such partisan activities as fundraising and campaigns but prohibit their holding of elected or appointed office. Finally, there is the "political law firm."<sup>171</sup>

In Connecticut, at least, "political law firms" are offices composed of prominent ex-political officials. They have held leadership positions and run for public office. Democrats and Republicans occupy these law offices which are designed to provide high class state lobbying services for affluent corporations and interest groups. There are such firms in Connecticut which exercise substantial political influence at the national, state, or local levels.<sup>172</sup>

At the other end of the spectrum are those law firms not interested in having their members participate in politics. Law students at Harvard are instructed on how to approach many of the Boston firms: "Tell the representatives of these firms that you have always wanted to work for their particular firm, that you only want to practice law, and that you want to spend your entire career with them."<sup>173</sup> The theory for this advice is that the senior partners in these firms see their organizations strictly as business enterprises designed to make money rather than serving the public's interest by participating in the political process.<sup>174</sup>

Some large law firms in Connecticut try to strike a more balanced position. While they have restrictions on members serving in the state legislature because they represent major clients regulated by state agencies, they will facilitate the election of members of the firm to the office of mayor or city council even though service in these positions costs the firm thousands of dollars in legal fees from clients

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171. *Id.*

172. *Id.*

173. This information was supplied by a recent Harvard Law School graduate, who was hired by a Boston firm. *Id.*

174. *Id.*

with zoning and tax problems. One senior partner in such a firm explained that there was a need for his firm to have an enlightened and expansive concept of social and civic responsibility. He also said conflict-of-interest statutes, advisory opinions of the bar associations, and the threat of perceived ethical and legal conflicts are a constant source of frustration in the firm's practice of law.<sup>175</sup>

Rhode Island has few, if any, large law firms which can equal the size of those in Massachusetts or Connecticut. Although Rhode Island has a strict conflict-of-interest statute, there is a general perception by both lawyers and non-lawyers that this law imposes few restrictions on lawyer-politicians, who wish to serve as public or elected officials.<sup>176</sup> The fact that there have been no official complaints involving lawyer-politicians supports this generalization.

## VI. QUESTIONS, ISSUES, AND GUIDELINES FOR FURTHER REFORMS

### A. *Recent Changes*

In February 1982, the Massachusetts State Ethics Commission announced that it was proposing "a comprehensive legislative package" to amend the state conflict-of-interest law (Chapter 268A).<sup>177</sup> Similarly, in Connecticut, the state's legislative Codes of Ethics Study Committee announced in January 1983 that it was going to recommend "tighter state codes."<sup>178</sup>

In both states there is general agreement among lawyers, members of the press, and those who administer the conflict-of-interest statutes that their law is "basically sound."<sup>179</sup> The Massachusetts State Ethics Commission saw the need, however, to loosen the restrictions against "special" public employees and state legislators "from receiving compensation for appearing before quasi-judicial proceedings of state agencies," particularly the Industrial Accident Board.<sup>180</sup> Connecticut's Code of Ethics Study Committee was created in 1982 after a scandal involving a dozen legislators, who were

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175. *Id.*

176. *Id.*

177. *Conflict Amendments Proposed*, Massachusetts Lawyers Weekly, Feb. 8, 1982, at 1, col. 4.

178. *Ethics Panel Asks Tighter State Codes*, The Hartford Courant, Jan. 18, 1983, at 13.

179. Massachusetts Lawyers Weekly, Feb. 8, 1982, at 1, col. 4.

180. *Id.*

treated to a weekend on Cape Code by a lobbyist for a dog track.<sup>181</sup>

There is strong sentiment in Connecticut that more top government policy makers should be required to wait at least a year before taking jobs with businesses they have regulated.<sup>182</sup> One recommendation calls for lobbyists to be required to report campaign contributions exceeding \$50.00.<sup>183</sup> Another would require lobbyists to disclose the names of any officials they employ.<sup>184</sup> There is also a provision that calls for the Ethics Commission to be given the authority to refuse to accept, for a period of two years, the registration of any lobbyist found guilty of "a serious, intentional, violation of the ethics law."<sup>185</sup>

### B. *Unanswered Questions*

There are other issues that law-makers and political leaders in the New England states may want to consider. First, to what extent should the structures, requirements, and procedures of government be designed to facilitate public service by lawyers as elected and appointed officials? Second, there is a need to recognize that the behavior of lawyers is now regulated by state statutes, rulings of the ethics commissions, advisory opinions of bar associations, the internal policies of law firms, and the character and ethical values of individual practitioners. Which of these should have primary responsibility for maintaining high standards of legal conduct? Third, is the public better served by part-time, citizen-politicians, some of whom are lawyers, or should the system be changed to attract only those persons interested in becoming full-time professionals, whether they be local judges, city solicitors, city councilmen, state prosecutors, state legislators, state's attorney generals, or governors? Fourth, when conflicts of interest arise, how should they be handled? Should these issues be raised by opposing counsel, by fellow members of commissions, boards, committees, and legislative bodies, or by the lawyer directly involved? Who should decide if an actual conflict exists: the attorney general and city solicitor; other members of the political body; or the lawyer himself? Fifth, when a lawyer-politician is guilty of a serious and intentional conflict of interest, who should have primary responsibility for punishment: the

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181. Interview with Charles Morse, Political Reporter for The Hartford Courant (Jan. 11, 1983).

182. The Hartford Courant, Jan. 18, 1983, at 13.

183. *Id.*

184. *Id.*

185. *Id.*

political party; the political body to which the member belongs; the bar association; the state licensing board; or the press and media?

### C. *Implementation of Solutions*

There are a variety of structural options, salary incentives, formal and informal rewards, election provisions, and in-house rules that can be used to implement answers to the general questions. Space limitations will permit discussion of only several of these alternatives.

At the local level many lawyer-politicians are discouraged from running for seats on the city council due to potential conflicts of interest. When city councils have authority to rule on zoning issues, appeals from tax requirements, and suits against the municipality, all the members of the councilman's law firm are prohibited from representing clients with problems in these areas.<sup>186</sup> The city charter can be changed to empower the city council to decentralize and delegate its authority to remove potential conflicts of interest. Special attention can be given to the office of director of law or city solicitor. If this official is a full-time, permanent employee, with authority to act on suits against the city, then potential conflicts of interest for lawyer-councilmen are reduced significantly.

Similarly, if lawyers are appointed by the chief executives to commissions, boards, and committees rather than elected or appointed by the city council, the number of potential conflicts can be reduced for both the councilman and the appointed attorney. In general, there is a need for members of charter commissions to see governmental structures and procedures as incentives-rewards systems, which have a direct influence on attracting or discouraging lawyer-politicians.

## VII. CONCLUSION

There is an enduring affinity between the practice of law and the practice of politics in America. There are also enduring issues and problems of actual and perceived conflicts of interest for lawyer-politicians. During the past two decades the American Bar Association, state legislatures, and ethics commissions have initiated a variety of restrictions to check unacceptable behavior by legislators, lobbyists, and permanent employees. There appears to be a national relationship between the introduction of these restrictions and a de-

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186. See *supra* note 16.

cline in the numbers of lawyer-legislators. The New England region provides an interesting and challenging environment to study the opportunities, incentives-rewards, and conflict-of-interest problems of lawyer-politicians. Although there are a variety of proposals for modifying existing conflict-of-interest statutes, many of the fundamental issues affecting lawyers who want to participate in public service have yet to be adequately addressed. Once they are addressed, the political institutions at the state and local levels lend themselves to a variety of options and alternatives for facilitating the compatible practice of law and politics.



## APPENDIX A

NEW ENGLAND  
REGIONOCCUPATIONS OF STATE LEGISLATORS<sup>187</sup>

(Percentages by State)

	<u>Regional Total</u>	<u>Conn.</u>	<u>Maine</u>	<u>Mass.</u>	<u>N.H.</u>	<u>R.I.</u>	<u>Vt.</u>
<u>NUMBER OF LEGISLATORS</u>	<u>1,325</u>	<u>187</u>	<u>184</u>	<u>200</u>	<u>424</u>	<u>150</u>	<u>180</u>
	%	%	%	%	%	%	%
<u>OCCUPATIONAL CATEGORY</u>							
Lawyer	12%	21%	9%	25%	3%	23%	8%
Other Professionals	8	6	5	7	12	7	7
Insurance	6	7	4	7	4	9	6
Entrepreneur/Self-Employed	17	14	22	13	16	21	13
Business Executive/Managerial	6	9	5	3	5	4	9
Real Estate/Construction	8	4	12	5	10	8	8
Agriculture	5	2	9	-	4	-	16
Communications/Arts	3	3	1	1	5	-	3
Other Business Occupations	11	6	19	5	14	6	10
Education	10	9	7	13	8	14	13
Government Employees	6	5	3	10	10	1	4
Non-Profit Organizations	1	3	-	1	*	1	1
Labor Union	*	-	1	1	*	-	-
Homemaker/Student	6	6	3	9	9	5	2
Information Not Available	1	5	-	-	*	1	-

\*Less than ½ of 1%.

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187. INSURANCE INFORMATION INSTITUTE, OCCUPATIONAL PROFILE OF STATE LEGISLATURES 43 (1979).