

# REPRESENTING REPRESENTATIVES: ETHICAL CONSIDERATIONS FOR THE LEGISLATURE'S ATTORNEYS

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## INTRODUCTION

Attorneys employed by legislatures play an important role in the development and enactment of laws by the federal government and by every state. Yet there is a dearth of scholarship addressing the activities and professional responsibilities of these attorneys.<sup>1</sup> It is unclear what professional ethical constraints, if any, apply to such lawyers. The extent to which scholars have examined the ethical constraints on these attorneys pales in comparison to the attention given to other government attorneys, such as prosecutors and attorneys employed by the executive branch.<sup>2</sup> The professional responsibilities of attorneys em-

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1. There are only four articles from law reviews or legal journals discussing in any depth the ethics of attorneys employed by legislatures. See Kathleen Clark, *The Ethics of Representing Elected Representatives*, 61 LAW & CONTEMP. PROBS. 31, 39, 44 (1998) (discussing role of lawyers who advise elected officials); David A. Marcello, *The Ethics and Politics of Legislative Drafting*, 70 TUL. L. REV. 2437, 2457-63 (1996) (using Model Rules of Professional Conduct to explain responsibilities of lawyers who draft legislation); Roger Purdy, *Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussion of Ethics and Role Problems*, 11 SETON HALL LEGIS. J. 67, 68, 70-71 (1987) (examining duties of lawyers who draft legislation and ethical dilemmas they may face); Steven Pressman, *Ethics Rules Urged for Attorneys on Capitol Hill Staff*, L.A. DAILY J., Aug. 3, 1982, at 1 (questioning ethical guidelines available to lawyers who work on Capitol Hill).

2. See John C. Yoo, *Lawyers in Congress*, 61 LAW & CONTEMP. PROBS. 1, 1 (1998) (explaining that academics who study the ethics of government lawyers "commonly ignore what the Framers considered to be the most dangerous branch of government: Congress"). Not surprisingly, academics who ignore the role of lawyers in Congress similarly ignore the role of lawyers in state legislatures. Furthermore, these academics typically refer to "government lawyers" as a whole, without considering whether any relevant distinctions exist between lawyers for the executive branch and lawyers for the legislative branch.

ployed by legislatures, though, require special attention due to the unique role these attorneys play in the democratic process. In addition, there are important distinctions between the activities of legislative branch attorneys and those employed by the executive branch. Attorneys employed by legislatures who ignore these distinctions, and who heed the advice of certain commentators addressing the ethics of “government attorneys,” will be seriously led astray.

This Essay begins to fill the void in scholarship concerning the professional responsibilities of attorneys employed by legislatures. The Essay first reviews the manner in which attorneys employed by state legislatures contribute to the legislative process.<sup>3</sup> Then, the Essay discusses why current rules of professional ethics governing attorneys should also apply to these attorneys. Next, the Essay discusses the various arguments for exempting these attorneys from the rules of professional ethics and illustrates why these arguments should not prevail. Finally, the Essay discusses the difficulties involved in identifying the client of these attorneys and argues that the institution of the legislature or, in certain cases, a particular committee should be viewed as the attorney’s client. Although the Essay focuses on attorneys employed by state legislatures, it is hoped that this piece will foster the professional growth of attorneys who practice law in any legislative setting and, as a result, contribute to the growth of legislative bodies as independent, democratic institutions.

## I.

### THE ROLE OF THE LEGISLATURE’S ATTORNEYS

Attorneys employed in legislative service agencies (hereinafter referred to as “legislative attorneys”) provide important legal services to the legislature and occupy a unique position within the legislative process. In an effort to strengthen their institutional capacity for developing and assessing public policy independently of the executive branch and lobbyists, state legislatures, over the past several decades,

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3. This Essay uses the phrase “rules of professional ethics” to refer to any rules that are currently in effect in a particular jurisdiction. In 1983, the American Bar Association (ABA) promulgated the Model Rules of Professional Conduct (Model Rules). The Model Rules replaced the ABA’s Model Code of Professional Responsibility (Model Code). Although a substantial majority of states have based their codes of professional attorney ethics on the Model Rules, a few states have in large part retained the Model Code. As a result, this Essay provides examples from both the Model Rules and the Model Code, where appropriate. All references to the Model Rules are to the Model Rules as published by the ABA in 2001. All references to the Model Code are to the Model Code as published by the ABA in 1980. For specific information on how the rules of professional conduct may apply to attorneys who draft legislation, see Marcello, *supra* note 1, at 2458–63.

have increased the number of legislative attorneys they employ.<sup>4</sup> Such attorneys currently perform a variety of tasks in the legislative process, including drafting legislation and providing legal analysis and counsel regarding constitutional requirements, statutory requirements, and legislative proposals. In addition, in every state, legislative attorneys are required to be nonpartisan and to offer their services to legislators regardless of political party affiliation.<sup>5</sup> Legal advice from nonpartisan legislative attorneys ideally is free from political and policy bias and, hence, is of a different character than legal advice from lobbyists and other advocates. In addition, legal advice that has the virtue of being non-partisan is often politically useful. Thus, by virtue of the legal services they provide and the nonpartisan character of their work, legislative attorneys are trusted members of the institution of the legislature.

## II.

### ARGUMENTS FOR APPLYING RULES OF PROFESSIONAL ETHICS

Given this position of trust, there are several reasons why legislative attorneys should be held to the standards reflected in the rules of professional ethics.

#### A. *Avoiding the Potential Harm of Unethical Practice*

Many of the harms that the rules of professional ethics are designed to prevent are applicable to the practice of legislative attorneys. For example, the ability of lawyers to exert undue influence over legal

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4. See, e.g., WILLIAM J. KEEFE & MORRIS S. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* 222 (10th ed. 2001) (discussing nexus between increased professional staff in state legislatures and development of legislative autonomy); ALLEN ROSENTHAL, *GOVERNORS & LEGISLATURES: CONTENDING POWERS* 46 (1990) (suggesting that increased professional staffing played significant part in development of contemporary legislative independence); JOEL A. THOMPSON & GARY F. MONCRIEF, *The Evolution of the State Legislature: Institutional Change and Legislative Careers*, in *CHANGING PATTERNS IN STATE LEGISLATIVE CAREERS* 200–01 (Gary F. Moncrief & Joel A. Thompson eds., 1992) (noting that with increased professional staff comes increased legislative autonomy); James D. King, *Changes in Professionalism in U.S. State Legislatures*, 25 *LEGIS. STUD. Q.*, 327, 330–33 (2000) (examining increased professionalism of state legislatures since 1960s). According to the National Conference of State Legislatures, forty-four state legislatures currently use a central, legislative staff agency to provide legal services to members of the legislature or legislative committees in the legislative process. See *NAT'L CONFERENCE OF STATE LEGISLATURES, LEGISLATIVE STAFF SERVICES: PROFILES OF THE 50 STATES AND TERRITORIES*, at 7–8 (1999). Six states currently use a legislative staff agency in each house to provide these services. *Id.* at 7.

5. *NAT'L CONFERENCE OF STATE LEGISLATURES, supra* note 4, at 7.

proceedings is a core concern of the rules of professional ethics.<sup>6</sup> An attorney representing a private client is in a position to influence unduly the outcome of that representation. The ill effects of this are undeniable, although they often are limited to the particular client, the parties involved in the representation, or a relatively small number of third parties. Similarly, a legislative attorney is in a position to unduly influence the legislature's lawmaking activities. If a legislative attorney unduly influences the legislature, for example, by intentionally providing biased legal advice in order to bolster legislation the attorney desires or by intentionally mis-drafting legislation to accomplish a policy the attorney desires, the ill effects can affect a sizeable portion of the state's residents.

Competency is another example of a core concern of the rules of professional ethics that applies with equal force to legislative attorneys.<sup>7</sup> An attorney in private practice may cause his or her client to endure a significant amount of financial hardship if the attorney provides incompetent representation in a lawsuit. Similarly, a legislative attorney who fails to advise adequately the legislature of a constitutional issue may cost the state an enormous sum if the state is forced to defend the statute and pay attorneys' fees and damages in multiple lawsuits. Even something as simple as an incompetently drafted law may result in substantial, ongoing costs to persons governed by the law, who must negotiate over the law's ambiguities in the formation of private contracts or bring an action to clarify the manner in which the law applies in their particular case. Requiring legislative attorneys to adhere to these and other professional standards set forth in the rules of professional ethics will help to protect the legislature and its constituents from many of the detrimental effects of the unethical practice of law.

### *B. Strengthening Legislative Institutions*

Holding legislative attorneys to the requirements of the rules of professional ethics also has a beneficial effect on democracy by supporting the institutional capacity of legislatures. There are three ways in which the rules of professional ethics would accomplish this end.

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6. See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002) (lawyers shall abide by clients' decisions concerning the objectives of representation); MODEL RULES OF PROF'L RESPONSIBILITY EC 7-7 (1980) (authority to make decisions rests with client subject to certain specific exceptions).

7. See MODEL RULES OF PROF'L CONDUCT R. 1.1 (lawyers shall provide competent representation to client); MODEL CODE OF PROF'L RESPONSIBILITY EC 6-4 (lawyers must be qualified to handle any matter taken on and must prepare adequately to represent interests of client).

First, in the absence of competition for legal services, the threat of professional discipline would serve as a significant incentive for legislative attorneys to provide services that at least satisfy the requirements of professional ethics. As Professors Jonathan Macey and Geoffrey Miller have noted, the rules of professional ethics operate “to fill in the gaps in the contractual relationship that exists between lawyers and their clients.”<sup>8</sup> Without competition, there is little incentive or opportunity for legislative attorneys to bargain with their clients in order to reach agreement on the manner in which the legislative attorneys will provide their services. As a result, the contractual relationship between legislative attorneys and their clients is particularly likely to contain “gaps.”<sup>9</sup> A legislative attorney may fill these gaps by referring to the rules of professional ethics or other applicable law governing the attorney’s behavior. Alternatively, a legislative attorney may refuse to consult the rules of professional ethics and, instead, fill the gaps by relying solely on his or her own sense of right and wrong or by following the traditions of the legislative service agency in which the legislative attorney is employed. If legislative attorneys fill these gaps without resorting to the rules of professional ethics, the legislature will not be ensured of receiving the high quality of legal services that it needs and that the profession demands. Rather, the legislature will receive legal services that adhere only to the standards of its own attorneys and the traditions those attorneys helped to create. Those standards may be at odds with the standards embodied in the rules of professional ethics.

For example, a legislative attorney who has worked on a particular bill may receive a call from an executive branch official who is advising the governor on whether to veto the bill. The executive branch official may request that the legislative attorney describe any legal and constitutional issues the bill raises or describe any loopholes in the bill that are ripe for attack. Out of dislike for the bill’s policies, or merely because the legislative attorney wants to be helpful, the legislative attorney may be inclined to assist the executive branch official. In the absence of an attorney-client relationship with a legislator, a legislative committee, or the legislature, the legislative attorney may feel free to help the executive branch official kill the bill. It may even be in the tradition of the particular legislative service agency for legislative attorneys to provide the executive branch with legal advice con-

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8. Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105, 1105 (1995).

9. See *id.* at 1106, 1115–17 (suggesting that absence of market forces in public sector can create ethical problems for government attorneys).

cerning vetoes. Providing legal advice to the executive branch, however, without the informed consent of the legislature, would likely cause the legislative attorney to have conflicted loyalties. The legislature may reasonably expect such a legislative attorney to be less dedicated to the interests of the legislature than an attorney in private practice, who is generally prohibited from acting against the interests of his or her client.

Second, enforcement of professional standards with regard to zealotness and competence would strengthen the institution of the legislature by ensuring that the legislature, and not its attorneys, have the authority to make law. In the absence of these standards, a legislative attorney may feel less inhibited to provide inaccurate or slanted legal analysis or mis-drafting legislation in order to support the attorney's own policy bias or personal ethics.<sup>10</sup> A legislative attorney who engages in such activities, though, arguably usurps the lawmaking authority of the legislature.

Third, the institution of the legislature is strengthened if the legislature receives legal services from legislative attorneys who are dedicated to the interests of the legislature, rather than from lobbyists or attorneys representing the executive branch or other interest groups.<sup>11</sup> In this way, competent, ethical legal representation by legislative attorneys helps the legislature overcome the problem of "clientelism," where the legislature relies on the regulated person in the formation of regulatory legislation to the exclusion of other sources of informa-

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10. Constraints against usurping the client's authority are basic to good legal drafting:

A legislative draftsman, although entitled to point out policy considerations involved in the draft, must take every precaution against the unwelcome injection of his own views into the policy features of the bill . . . . However deeply he may feel about the wisdom of the policy he is called on to express, he must submerge his own feelings and act with scrupulous objectivity. Within the bounds of legality and professional morality, he should do his utmost to carry out his client's purpose even when he strongly disagrees with it.

REED DICKERSON, *THE FUNDAMENTALS OF LEGAL DRAFTING* 10–11 (2d ed. 1986). *But cf.* Marcello, *supra* note 1, at 2440–56 (describing how politically-charged process of drafting legislation typically requires legislative attorney to make numerous policy choices that could easily influence legislation's reception). These subsidiary policy decisions involve issues such as evaluating alternatives; determining whether the legislator's intent is best attained via a bill, amendment, resolution, or some other legislative instrument; determining how to place the new law in the current statutes; and facilitating enforcement and administration of the new law. *See id.* The legislator, though, should retain the ultimate authority to accept or reject even these subsidiary policy decisions.

11. *See* ROSENTHAL, *supra* note 4, at 46 (suggesting that expansion of professional staff is one factor that allows legislature to gain independence from executive branch).

tion.<sup>12</sup> If legislative attorneys become less reliable as a source of competent, unbiased legal analysis, the legislature will be less capable of independently proposing and evaluating legislation and will become more dependent for information upon attorneys who are paid to represent private interests or the executive branch.<sup>13</sup>

### C. *Educating the Public*

Legislation that is drafted to accomplish the legislator's intent completely and accurately and that is drafted, to the extent possible, in an understandable manner enhances the ability of the legislature to educate the public about the public policy being considered.<sup>14</sup> The legislature's teaching function is an oft overlooked but key aspect of American legislative institutions.<sup>15</sup> The less complete or clear legislation is, the less likely the public and the legislature are to understand what legal effect the legislation will have. Similarly, the legislature's teaching function is enhanced when legislative committees and members of the legislature receive competent legal analysis in preparation

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12. Clientelism is particularly a problem in legislatures where party alliances do not dominate the legislators. In this situation, legislators often seek assignments on committees whose agendas coincide with the dominant interests of their constituents. See KEEFE & OGUL, *supra* note 4, at 512–13. In such an environment, private interests have inordinate influence over the legislative process and “the response of the legislature is simply to referee group struggles . . .” *Id.* at 511. By providing legislators with competent, unbiased legal information, legislative attorneys act as an alternative source of information or, at least, as a check on the quality of information provided by such private interests. In a sense, they help the referee retain control of the game.

13. Cf. Michael B. Berkman, *Legislative Professionalism and the Demand for Groups: The Institutional Context of Interest Population Density*, 26 LEGIS. STUD. Q., 661, 665, 673 (2001) (explaining that less capable legislature is at obtaining information internally, more it must rely on information provided by interest groups).

14. The complexity of legislation is a major barrier to the legislature's effectively educating the public. KEEFE & OGUL, *supra* note 4, at 31 (suggesting that complexity and volume of legislation makes it incredibly difficult for legislators to educate public about policy as it develops). Competent legislative attorneys can assist legislators in overcoming this barrier. For example, legislation can be drafted to communicate the proposed policy in a straightforward and legally accurate manner. See DICKERSON, *supra* note 10, at 25–26 (explaining that for legislation to be effective as communication, it must be accessible to its ultimate audience and not only to its drafters); ROBERT J. MARTINEAU, *DRAFTING LEGISLATION AND RULES IN PLAIN ENGLISH* 13 (1991) (noting that drafters must ensure that legislation can be easily understood by each of different audiences who will view it). *But see* JACK STARK, *THE ART OF THE STATUTE* 2 (1996) (suggesting that drafting attorney should not focus on clarity to exclusion of accuracy). If simplicity cannot be attained through the drafting process, legislative attorneys can assist legislators and the public to understand proposed legislation by providing legislators with memoranda that accurately translate the proposals from “legalese” into English.

15. See KEEFE & OGUL, *supra* note 4, at 30–32 (evaluating methods by which legislatures educate public).

for and during public hearings and debates concerning legislation. The less competent or more biased the legal analysis is, the more likely a legislative committee or member of the legislature is to communicate inaccurate information to the public during hearings, debates, and public appearances.

Finally, it is important to note that the expanding role of state legislatures in the formation of public policy makes the need for enforcement of the rules of professional ethics more urgent. Many state legislatures have taken a more active role in overseeing executive branch agencies and in forming public policy over the last several decades.<sup>16</sup> Legislatures may reasonably be expected to continue to expand their role in the formation of public policy, given the recent trend toward devolution of power from the federal government to the states.<sup>17</sup>

### III.

#### ARGUMENTS AGAINST APPLYING RULES OF PROFESSIONAL ETHICS

The lack of scholarship concerning the professional responsibilities of legislative attorneys raises the question of whether the rules of professional ethics should apply to these attorneys. There are four primary arguments that can be made against the application of the rules of professional ethics to legislative attorneys. The first three arguments, which have received little attention from the courts and scholars, generally call for a complete exemption from the rules. The fourth argument, which has received a significant amount of scholarly debate, though not in the specific context of legislative attorneys, calls for an exemption only to the extent necessary to protect the public interest. Each of these arguments is seriously flawed.

##### A. *Legislative Attorneys are Not Practicing Law*

The first argument against applying the rules of professional ethics to legislative attorneys is that legislative attorneys are not practicing law. This argument does not square with the facts. Although the specific test varies among jurisdictions, the practice of law generally includes preparing instruments by which legal rights are secured, giving legal advice and counsel, and rendering a service that requires the

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16. See THOMPSON & MONCRIEF, *supra* note 4, at 201–02 (chronicling development of increased legislative oversight in recent decades).

17. For a brief discussion of this trend, see David L. Markell & Martha F. Davis, *A Conversation on Federalism and the States: The Balancing Act of Devolution*, 64 ALB. L. REV. 1087, 1088–90 (2001).

use of legal knowledge or skill.<sup>18</sup> To varying degrees, legislative attorneys, and particularly legislative drafters and committee counsel, provide these services. In performing their jobs, legislative attorneys typically must ascertain and describe the current state of the law on a particular issue, the potential legal effect of a proposal, and any constitutional issues raised by the proposal.<sup>19</sup> If the legislature is considering a proposal that may be unconstitutional, legislative attorneys typically explain options the legislature may consider in order to accomplish the intended effect in a more constitutionally defensible way. In addition, legislative attorneys who draft legislation arguably are preparing a legal instrument (typically, an introducible bill or amendment) that is primarily designed to affect the rights of certain persons under the law (persons who will be subject to the legislation upon enactment). Drafting legislation is akin to drafting a contract, except that legislation generally applies to all of society rather than only to the consenting parties. Finally, although there is no case discussing whether legislative attorneys are practicing law, at least one state bar association has publicly reprimanded a legislative attorney for practicing law while her license was suspended for failure to pay bar dues and failure to satisfy her continuing legal education requirements.<sup>20</sup>

It is true that certain legislatures permit non-attorneys to draft legislation and to provide analysis of legislative proposals to legislators. This might indicate that legislative attorneys who perform similar tasks are not practicing law. However, legislative attorneys enrich the drafting or analysis services they provide by utilizing their legal training and expertise. For example, legislative attorneys may do extensive legal research to ascertain the scope of federal preemption in a particular area of the law or to determine how other states have addressed similar policy issues, or they may utilize their legal skills in interpreting and applying constitutional provisions or federal statutory requirements applicable to the states. Also, the fact that a non-attorney may provide the same services as an attorney does not necessarily prove that the attorney is not practicing law. An attorney who prepares an offer to purchase real estate on behalf of a client likely is

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18. 7 AM. JUR. 2D *Attorneys At Law* § 118 (1997).

19. See STARK, *supra* note 14, at 13–14 (suggesting that drafters initially describe subject's current law to person requesting legislation and then ask how requester would like to alter law).

20. *Public Reprimand of Mary Kay Matthias*, WIS. LAW., Feb. 1998, at 33, 33 (reporting reprimand of attorney for dispensing legal advice about existing and proposed laws during suspension of attorney's license).

practicing law, even though, in some states, a real estate agent who is not a licensed attorney may provide the same service.

### B. Separation of Powers

The second argument against applying the rules of professional ethics to legislative attorneys is that the judicial branch is constitutionally prohibited from intruding into the lawmaking process, even to the extent reflected in the rules. According to this argument, the legislative and judicial powers are constitutionally vested in separate branches of government. Because legislative attorneys play an integral role in the operation of the legislative branch, the argument goes, it is unconstitutional for the judicial branch to dictate the manner in which legislative attorneys provide legal services to the legislature.<sup>21</sup>

In the only case discussing this argument, *In the Matter of Advisory Committee on Professional Ethics Opinion 621*,<sup>22</sup> the New Jersey Supreme Court emphasized that it had full authority to regulate the practice of attorneys who work for the legislature. The case involved a licensed attorney, Zublatt, who was offered a part-time position as an aide to a legislator.<sup>23</sup> The New Jersey conflicts of interest statute prohibited such an employee from representing private clients before the board, agency, commission, or other part of government in which he or she was employed.<sup>24</sup> Because much of Zublatt's income was derived from representing private clients before governmental agencies, he sought an opinion with regard to the meaning of the conflicts of interest statute from the legislative committee charged with advising legislative officers and employees about ethical standards.<sup>25</sup> According to that committee, the statute prohibited Zublatt only from representing private parties before agencies of the legislative branch.<sup>26</sup> However, Zublatt also sought an opinion from a committee that was

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21. This argument is analogous to arguments that legislatures have exclusive authority to govern their internal proceedings. See, e.g., Opinion of the Justices No. 220, 322 So. 2d 107, 107 (Ala. 1975) (noting that Alabama's Constitution vests each house of legislature with power to determine rules of its proceedings); Brinkhaus v. Senate of the State of La., 655 So. 2d 394, 396-98 (La. Ct. App. 1995) (holding that Louisiana judicial branch lacks subject-matter jurisdiction to hear suit concerning alleged erroneous procedural ruling by legislative branch); State *ex rel.* Johnson v. Hagemeister, 73 N.W.2d 625, 628-29 (Neb. 1955) (observing that specific provision of state constitution gives legislature broad authority to determine rules of its proceedings).

22. 608 A.2d 880 (N.J. 1992).

23. *Id.* at 883.

24. *Id.* at 882.

25. *Id.* at 882, 886.

26. *Id.* at 886.

under the jurisdiction of the state supreme court and that was charged with advising attorneys with regard to professional ethics.<sup>27</sup> According to that committee, the rules of professional ethics prohibited Zublatt from representing private parties before *any* state agency in *any* branch of government, except when the state was not an adverse party.<sup>28</sup> Zublatt and other interested parties then sought and obtained review from the New Jersey Supreme Court.

One argument put forth by various parties to the suit was that the judiciary lacked authority to regulate the activities of legislative aides who were lawyers, because the conflicts of interest statute vested the particular legislative committee with the exclusive authority to oversee the ethics of legislative officers and employees.<sup>29</sup> This argument did not fare very well. As the court noted, “[B]y the conclusion of oral argument, it was clear that no one doubted the power of this Court in that regard.”<sup>30</sup> The court explained:

[No] branch of government has the power to authorize, either explicitly or implicitly, conduct by attorneys that violates the ethical standards imposed by the judiciary . . . . We reject the contention that the establishment of ethical standards for a lawyer/government employee is uniquely a matter for the Legislature . . . . [When] the employee or officeholder is a lawyer, the Legislature’s ethical mandate becomes a floor, not a ceiling. Ultimately, it is the Court that establishes the ethical standards to which an attorney is held, and neither the Legislature nor the Executive can diminish them.<sup>31</sup>

Thus, the New Jersey Supreme Court affirmed an axiom of American legal practice: the judicial branch has inherent and exclusive authority to regulate the practice of law.<sup>32</sup> Although this case dealt

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27. *Id.* at 883.

28. *Id.* at 883, 889–90.

29. *Id.* at 886.

30. *Id.*

31. *Id.* at 886–87.

32. Other courts have similarly relied upon their exclusive authority to regulate the practice of law. *See, e.g.*, *Bd. of Comm’rs of the Ala. State Bar v. State ex rel. Baxley*, 324 So. 2d 256, 258–59, 262 (Ala. 1975) (invalidating statute limiting number of times person could apply for and take bar examination and holding that court has inherent power to determine who will practice before it); *State v. McMillan*, 319 S.E.2d 1, 6, 8 (Ga. 1984) (invalidating statute that prohibited practice of law by certain retired superior court judges); *In re Pub. Law No. 154-1990*, 561 N.E.2d 791 (Ind. 1990) (invalidating statute that immunized certain attorneys from court’s disciplinary rules and procedures); *Bestor v. La. Supreme Court Comm. on Bar Admissions*, 779 So. 2d 715, 716–18, 721–22 (La. 2001) (holding that court’s inherent authority to regulate practice of law allows it to exempt bar examinations, model answers, and grading guidelines from disclosure under public records law); *Attorney Gen. of Md. v. Waldron*, 426 A.2d 929, 932, 934, 939–40 (Md. 1981) (holding that legislature is constitutionally prohibited from promulgating statutes that regulate prac-

with the authority of the judiciary to regulate the activities of a legislative employee in his or her capacity as an attorney in private practice, the courts would likely support their own inherent and exclusive authority by, in effect, telling the legislature, "If you choose to hire attorneys, you get attorneys who are licensed and regulated by the judiciary." This conclusion seems to be undisputed with regard to attorneys for the executive branch, and there is no basis in the Constitution to treat the legislature's attorneys any differently. Attorneys currently play an integral role in the operation of the executive branch and, given the level of scholarship and discussion concerning the ethics of executive branch attorneys, it appears to be accepted commonly that the Constitution permits the court to regulate executive branch attorneys.

In addition to the inherent and exclusive authority of the courts to regulate the practice of law, the minimal extent to which the rules of professional ethics would intrude into the legislative process is another reason why the separation of powers argument is unlikely to prevail. For example, the rule of professional ethics relating to conflicts of interest is potentially the most intrusive, because it may be construed to impede legislative attorneys from providing legal services to legislators on opposite sides of the same issue.<sup>33</sup> However, the rule has this effect only if each legislator is viewed as the legislative attorney's client. This problem is avoided entirely if the institution of the legislature is viewed as the legislative attorney's client and the institution specifically authorizes its attorneys to provide services to competing legislators.<sup>34</sup> Of course, it is possible to imagine a rule of professional

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tice of law); *Archer v. Ogden*, 600 P.2d 1223, 1225–27 (Okla. 1979) (invalidating statute imposing special requirements upon nonresident attorneys who are members of state bar as prerequisite to practicing in state); *Commonwealth v. Stern*, 701 A.2d 568, 570–73 (Pa. 1997) (holding that only judiciary has power to regulate and discipline attorneys who have been admitted to practice in Pennsylvania); *Bennion, Van Camp, Hagen & Rhul v. Kassler Escrow*, 635 P.2d 730, 731, 734–36 (Wash. 1981) (holding that legislature's attempt to authorize practice of law by lay persons violated Washington's separation of powers doctrine).

33. Model Rule 1.7 (a) states, "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) each client consents after consultation." MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2001). See also MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105(a) (1980) (lawyer "shall decline proffered employment . . . if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(c)," which requires, among other things, consent by each client after full disclosure).

34. See *infra* Part IV for a discussion of the treatment of the legislature as an entity client.

ethics that arguably would violate the separation of legislative and judicial powers. Rules that required legislative attorneys to report to the court any criticism of the court system that was communicated in the scope of the attorneys' representation or that prohibited legislative attorneys from drafting any legislation that negatively affected judicial incumbents are obvious examples. The current rules of professional ethics, though, are not nearly so intrusive into the legislative process.

### C. Comity

The third argument against applying the rules of professional ethics to legislative attorneys acknowledges the judicial branch's inherent and exclusive authority to regulate attorneys, but posits that the judicial branch, if asked, would choose to exempt legislative attorneys as a matter of comity. It is certainly possible that the judicial branch would make this choice. Courts have shown a willingness, in certain cases, to share with the legislature the court's authority to regulate the practice of law.<sup>35</sup> However, given the factors that likely would be important in a case involving the issue of comity, it is by no means certain that a court would choose to grant legislative attorneys such an exemption.

Here again, the case of *Opinion 621* is instructive. Although the court in that case expressly noted that it did not reach the issue of comity,<sup>36</sup> the court evinced an openness to entertain the issue under the right set of facts. The court explained:

While we assume that we may be more sensitive to the need for regulation of the bar in the public interest than are the Executive and the Legislature—since that is primarily our responsibility—we do not and should not assume that those branches are any less concerned with the preservation of public confidence in government. The Executive and the Legislature know, perhaps better than we, what appearances are likely to have an adverse effect . . . . While we recognize their commitment, we do not imply that we would accede . . . to the executive and legislative judgment about ethical

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35. See, e.g., *In re Cristeta S. Paguirigan*, 17 P.3d 758 (Cal. 2001) (upholding statute requiring disbarment of attorneys convicted of certain felonies); *Colorado v. Buckles*, 453 P.2d 404 (Colo. 1968) (similar); *Knight v. City of Margate*, 431 A.2d 833 (N.J. 1981) (upholding statute prohibiting judges from having certain dealings with casinos); *State ex rel. Reynolds v. Dinger*, 109 N.W.2d 685 (Wis. 1961) (upholding administrative rule permitting non-lawyers to practice real estate law to limited extent).

36. Rather, the court noted that it interpreted the rules of professional conduct to be consistent with the duties imposed under the conflicts of interest statute at issue in the case and that, therefore, it was not necessary to reach the issue of comity. *Opinion 621*, 608 A.2d at 893.

prohibitions placed by the Act on lawyers serving as part-time legislative aides. However. . . we believe that considerable deference should be given to their judgment.<sup>37</sup>

Thus, under the court's analysis, one important factor in a case addressing the issue of comity likely would be whether the legislature, with due regard for the preservation of public confidence in government, has chosen to utilize its attorneys in a manner requiring an exemption from the rules of professional ethics.<sup>38</sup> This factor, because it depends upon the actions of the particular legislature involved, requires a case-by-case analysis. Another important factor in the court's analysis would be the impact that an exemption from the rules of professional ethics would have upon the efficient operation of the other branches of government.<sup>39</sup> This factor illustrates the significant difficulties the comity argument is likely to encounter. The important services provided by legislative attorneys argue against granting an exemption from the rules of professional ethics on the basis of comity. As noted above, ethical restraints on legislative attorneys are important not only for the institution of the legislature, but also for the democratic process itself. The courts may be unwilling to risk damaging the institution or the democratic process.<sup>40</sup> Furthermore, the proposed legislative employment of the attorney in *Opinion 621* would have involved many tasks that are not particularly legal in nature.<sup>41</sup> It is reasonable to expect that the court would be more vigilant over the practices of legislative attorneys, who are hired primarily to provide legal services, and less deferential to the judgment of the legislative branch.

In addition, the rules of professional ethics were drafted, at some minimal level, with government attorneys in mind.<sup>42</sup> This is another

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37. *Id.* at 892–93.

38. *Id.*

39. *Id.* at 893.

40. As a practical matter, it would be professionally risky for a legislative attorney to assume that a court, if asked, would grant an exemption on the basis of comity. The more prudent course would be to petition the court for such an exemption before practicing in a manner that is inconsistent with the applicable rules of professional conduct.

41. Although required tasks included analyzing proposed legislation, they also included periodic legislative appearances, conferences with constituent lobbyists, public speaking engagements on behalf of the legislator, and anything else the legislator deemed appropriate. *Opinion 621*, 608 A.2d at 882–83.

42. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8 (2001) (addressing special responsibilities of prosecutors); *id.* 1.11 (b), (c) (addressing successive government and private employment with reference to activities of government lawyers); MODEL RULES PmbI. (discussing for entire paragraph responsibilities of government lawyers); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (1980) (addressing duties of gov-

reason why the separation of powers and the comity arguments are unpersuasive. Although it is difficult to apply the rules to legislative attorneys, because the rules are primarily focused on the ethics of attorneys in private practice, the text of the various codes of professional conduct indicate that the courts believe they have the authority to regulate government attorneys and that they intend to do so.

#### *D. Protection of the Public Interest*

The fourth argument against the application of the rules of professional ethics to legislative attorneys concerns the extent to which the protection of the public interest affects the ethical duties of these attorneys. This argument does not necessarily call for a complete exemption from the rules for these attorneys; rather, it calls for a limited exemption to the extent necessary to protect the public interest. This argument can be derived from the debate over the duty of government lawyers, generally, to uphold the public interest. Although the debate has thus far ignored the practices of legislative attorneys, legislative attorneys have much to learn from it.

Thus far, two positions have been staked out in the debate: (1) the government lawyer has a duty to uphold the public interest, and that duty trumps any duty of fidelity to the client's wishes concerning the goals of representation (the public interest model); and (2) the government lawyer's conception of the public interest is irrelevant to the government lawyer's practice, except to the extent that upholding the public interest would avoid a violation of the rules of professional conduct (the private practice model).<sup>43</sup> As is shown below, the public interest model is decidedly inappropriate for legislative attorneys.

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ernment lawyers involved in litigation or administrative proceedings). In addition, government lawyers are specifically mentioned in the official comments to Model Rules 1.6, 1.7, 1.11, 1.13, 2.3, and 5.1.

43. One published Note attempts to bridge the gap between these two positions. See Note, *Rethinking the Professional Responsibilities of Federal Agency Lawyers*, 115 HARV. L. REV. 1170 (2002). However, this Note primarily offers insight into the manner in which government lawyers should approach their jobs and the methods by which they should provide legal services. Among other things, the Note argues that a government lawyer's conception of the public interest should inform the lawyer's counseling of the client and, thus, may appropriately influence the client's choice with regard to the goals of representation. However, the Note does not squarely address the primary conflict between the two positions: to what extent a government attorney's conception of the public interest should be permitted to trump the directives of the government client.

Although the public interest model has been referred to in numerous forums discussing the duties of government attorneys,<sup>44</sup> it has been most forcefully outlined and defended by Professor Steven Berenson.<sup>45</sup> Berenson argues that each government lawyer should determine the public interest to be served in the course of the lawyer's representation of the governmental client.<sup>46</sup> In response to criticism of the public interest model,<sup>47</sup> Berenson has suggested methods by which a government lawyer may make this determination. These methods include analyzing applicable judicial decisions, statutes, and constitutional provisions; contemplating the norms of legal culture; and consulting polling results and other tools used in the participatory model of bureaucracy, giving due regard to the interests of disadvantaged members of society.<sup>48</sup> Presumably, once the public interest is identified, the ethical government lawyer must do no harm to the public interest and must refuse to assist a governmental client in harming the public interest.

It is almost always inappropriate for legislative attorneys to resort to these suggested methods of identifying the public interest and conform their activities accordingly.<sup>49</sup> In the legislative context, such a model of practice would result in arbitrary decisions, made by persons who are not easily held accountable by the electorate, and that negatively affect the institution primarily charged with transforming the public interest into law. Two hypothetical, though realistic, examples help to illustrate this conclusion.

In the first example, assume that a legislator asks a legislative attorney to draft a bill that the attorney believes is unconstitutional under existing judicial precedents. The legislative attorney knows that, given the politics of the legislature, the bill is likely to be enacted into law. Under the public interest model, the legislative attorney

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44. See, e.g., Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 955-57 (1991).

45. See Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000).

46. *Id.* at 814.

47. See, e.g., Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294 (1987) (describing notion that government lawyers represent public interest as "incoherent").

48. Berenson, *supra* note 45, at 818-21.

49. There are limited instances where the applicable rules of professional conduct may require a legislative attorney to protect the interest of the public. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 4.1(b) (2001) (requiring lawyers in certain circumstances to disclose material facts to third persons when disclosure necessary to avoid assisting client's criminal or fraudulent act).

must decide whether drafting the bill would harm the public interest. If the bill is drafted and introduced, the public interest could be protected by members of the public lobbying against the bill and, if the bill is enacted into law, by members of the public filing an action in order to protect the public values that the law transgresses. This manner of protecting the public interest, though, is more cumbersome and costly than simply preventing the legislature from considering the unconstitutional bill. Also, the Constitution, as interpreted by the Supreme Court, arguably reflects the public interest. As a result, the legislative attorney might reasonably determine that, to protect the public interest, he must refuse to draft the bill. Additionally, it is at least conceivable that such a determination could be supported by polling results.<sup>50</sup> On the other hand, the legislative attorney could just as reasonably believe that drafting the bill is in the public interest because the legislature is a coequal branch of government with independent authority to interpret the constitution, or that the public interest requires him only to inform the legislature of the constitutional issues prior to the legislature voting on the bill.

In the second example, assume that a committee chairperson requests that a legislative attorney analyze a memorandum prepared by a lobbyist. The memorandum points out that a bill being considered by the committee will result in a large reduction in tax liability for the industry the lobbyist represents. This result is not commonly known to members of the committee, including the author of the bill, and appears to have been unintended. The legislative attorney prepares a memorandum advising the chairperson of the accuracy of the lobbyist's analysis and asking the chairperson if she desires an amendment to the bill in order to close the unintended loophole. The chairperson requests, instead, that the legislative attorney return all information to the chairperson and keep the information confidential at the committee hearing unless a committee member asks the attorney directly for a similar legal opinion. Under the public interest model, the legislative attorney must decide whether honoring the chairperson's instructions would harm the public interest.

As discussed earlier, it is arguably in the public interest for committee chairpersons to obtain legal advice from non-partisan staff, especially when staff are asked to critique advice provided by lobbyists.

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50. This example is not outrageous. Professor Berenson uses a variant of the example in the context of drafting administrative rules to argue for the public interest model. See Berenson, *supra* note 45, at 826–27. Also, Professor Purdy has noted that “a strong argument can be made” for refusing to draft unconstitutional legislation. See Purdy, *supra* note 1, at 102–03.

The chairperson is unlikely to seek staff advice, though, if she fears that the staff attorney might disclose otherwise confidential information in order to protect the attorney's conception of the public interest. As a result, the legislative attorney reasonably might determine that, to protect the public interest, she will comply with the chairperson's request. On the other hand, the legislative attorney could just as reasonably believe that the public interest requires her to inform fully the legislature of the effects of the bill by distributing a memorandum explaining the loophole to all members of the committee or to all members of the legislature.

As these examples illustrate, the public interest model is inappropriate for legislative attorneys due to concerns about arbitrariness, lack of accountability, usurpation of legislative authority, separation of powers, and weakening of legislative institutions. This Essay discusses each of these concerns below.

### 1. *Arbitrariness and Attorney Fallibility*

Commentators have discussed the potential arbitrariness of the public interest model<sup>51</sup> and, as these examples illustrate, the threat of arbitrary decisionmaking is no less present in the legislative context. The conception of what is in the public interest likely will vary from attorney to attorney. Even if a definable public interest exists independently of the personal values of each particular legislative attorney, it is reasonable to expect that legislative attorneys will inaccurately assess the public interest. Although it is unfortunate, attorneys are not perfect. For instance, in the first example, the courts may be ready to ignore or distinguish the relevant precedents, and the public may be ready for a change. Thus, by refusing to draft the bill, the legislative attorney may actually be defeating the public interest, despite his intentions.

### 2. *Lack of Accountability*

A lack of accountability is also cited by critics of the public interest model,<sup>52</sup> and this concern is uniquely important in the context of

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51. See, e.g., Miller, *supra* note 47, at 1294–95 (“[T]here are as many ideas of the ‘public interest’ as there are people who think about the subject.”); Macey & Miller, *supra* note 8, at 1116 (noting that “there is simply no consensus in our pluralistic society as to what constitutes the common good”).

52. See, e.g., Lanctot, *supra* note 44, at 1014 (“[G]overnment lawyers are not elected, and they do not represent any constituency. For better or worse, the American political system places the burden of determining the ‘fairness’ or ‘justice’ of public policy upon elected officials in the first instance and, ultimately, upon the courts.”); Macey & Miller, *supra* note 8, at 1116 (noting that public interest model

legislative attorneys. Unlike most executive branch lawyers, legislative attorneys work very closely with elected officials, who are directly accountable to the voters. This proximity to the electorate is of little consequence to legislative attorneys, but of grave consequence to legislators. In the preceding examples, the legislative attorney will not be held accountable at election time for the attorney's assessment of the public interest. However, a legislator could very well pay the price for the legislative attorney's determination.<sup>53</sup> Admittedly, it is conceivable that a legislative attorney may be in danger of losing his or her job if he or she causes the demise of a political career.<sup>54</sup> Presumably, though, it is not in the public interest to sacrifice political careers in order to protect the ability of a legislative attorney to stand up for his or her individual conception of the public interest.

Berenson has correctly pointed out that denying an executive branch lawyer the authority to protect the public interest does not necessarily result in decisions being made by persons who are more easily held accountable.<sup>55</sup> This is so because the executive branch bureaucrat who would direct the lawyer's representation is not necessarily any closer to electoral accountability than the lawyer. In a sense, they are both bureaucrats, each with the same level of accountability. As the discussion above illustrates, however, denying legislative attorneys the authority to protect the public interest does result in decisions be-

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"would lead to government attorneys being free to operate without any constraints on their behavior"); William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 *How. L.J.* 539, 565-69 (1986) (arguing that public interest model runs counter to representative democracy).

53. According to Berenson, simply because government attorneys may occasionally misconceive the public interest does not provide an adequate reason for rejecting the public interest model. Berenson, *supra* note 45, at 827. The situation where a legislator loses her seat due to a legislative attorney's failed attempt to uphold the public interest suggests otherwise.

54. Also, the legislature might choose to stop employing legislative attorneys and choose, instead, to rely on information provided by executive branch attorneys and attorneys representing other special interests. Thus, there is at least some incentive for a legislative attorney to think carefully before attempting to uphold the public interest, as opposed to the interests of the legislative attorney's client. It is unclear, though, how many legislators must be sacrificed before a legislative attorney will be threatened with the loss of employment or a legislative service agency will be threatened with elimination. This problem illustrates how the general lack of market forces affecting the relationship between legislative attorneys and their clients reduces the barriers to legislative attorneys making unaccountable decisions under the public interest model. See Macey & Miller, *supra* note 8, at 1115-17, 1120 (concluding that executive branch attorneys "are more likely than private-sector attorneys to put their own interests ahead of the interests of their agency because of the absence of market constraints on their behavior").

55. See Berenson, *supra* note 45, at 822.

ing made by persons who are more easily held accountable, because legislators are directly accountable to the electorate.

### 3. *Usurpation of Legislative Authority*

A legislative attorney who zealously protects his or her conception of the public interest is also likely to hinder severely or usurp the exercise of legislative authority.<sup>56</sup> In the first example above, by refusing to draft the requested legislation, the legislative attorney may hinder the legislature from determining and expressing the public interest with regard to the public policy at issue. This is particularly true if the public policy is complex and requires the skills of an attorney to convert it into statutory language. The legislator in the example may draft the legislation him or herself or may use a non-attorney to draft the legislation, but if professional legal skills are necessary to draft the legislation best, there will likely be numerous costs incurred as the poorly drafted law works its way through the courts. Furthermore, a legislature that passes incompetently drafted legislation effectively delegates to the courts and the executive branch the authority to legislate as necessary to fill in the gaps. In addition, if the result of a legislative attorney's refusal to draft legislation is the death of a public policy initiative, the legislative attorney will have succeeded in usurping a key legislative function from the legislature itself. Choosing not to legislate a new public policy is itself a public policy decision constitutionally reserved to the legislature.

### 4. *Separation of Powers*

Some critics have pointed out that the public interest model violates the separation of powers principle because adherence to prece-

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56. Usurpation of legislative authority under the public interest model is an issue that other commentators have raised in the context of executive branch attorneys. See, e.g., Miller, *supra* note 47, at 1295 (noting that Constitution establishes procedures for ascertaining public interest through "election, appointment, confirmation, and legislation" and that Constitution does not empower government lawyers to substitute their individual understandings of public interest for those expressed through Constitutional processes); Josephson & Pearce, *supra* note 51, at 564 ("[T]he government lawyer who uses the public interest approach when policy colleagues are in conflict usurps the function of the client to provide her with instructions. Inevitably, the lawyer who decides for herself which conflicting point of view to represent decides what the public interest is. Such a lawyer is not a lawyer representing a client but a lawyer representing herself."). For lawyers in Congress, however, this issue appears to be more of an academic debate than a practical one. See Clark, *supra* note 1, at 37-38 (characterizing personal views of lawyers in Congress with regard to public policy issues as "irrelevant" and noting that lawyers in Congress do not see their role as including the promotion of the public interest).

dent usurps the judicial function.<sup>57</sup> More subtly, the violation also involves a refusal to advocate the full constitutional authority of the branch of government that employs the attorney.<sup>58</sup> In the first hypothetical example, the question of whether to draft the legislation involves a test of the legislative attorney's loyalty. Does the attorney represent the judicial branch, such that the attorney will truncate the services provided to the legislative branch in order to preserve the full measure of judicial branch authority?<sup>59</sup> Or does the attorney represent the legislative branch, which arguably has independent authority to interpret the Constitution?<sup>60</sup> If the legislative attorney refuses to draft the legislation, he or she acts as a conduit for a vast intrusion of the judicial branch into the legislative process, which would have serious consequences for the operation of American governments. As Professor Geoffrey P. Miller has pointed out, "[T]he constitutional system presumes—indeed, depends upon—the institutional loyalty of its lawyers."<sup>61</sup>

Of course, a legislative attorney should neither ignore precedent nor refrain from advising legislators on the current state of the law and the likelihood that a particular bill may be unconstitutional. As Berenson points out, governments hire lawyers for the purpose of obtaining this advice.<sup>62</sup> But, contrary to Berenson's position, there is more involved here than a distinction analogous to that between putting forth frivolous claims and arguing for a good faith extension, modification, or reversal of existing law.<sup>63</sup> History illustrates that legal precedents can be overruled and replaced.<sup>64</sup> In fact, nothing in the Constitution prohibits the legislature from pursuing policies that blatantly violate legal precedents and that would clearly be frivolous to pursue in the

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57. See, e.g., Miller, *supra* note 47, at 1296. Berenson has persuasively refuted this argument, though. See Berenson, *supra* note 45, at 825.

58. For further discussion of this argument, see Miller, *supra* note 47, at 1296–97.

59. This test of loyalty also arises if government attorneys are called upon to protect the interest of the government as a whole, rather than the public interest. See *id.* at 1295–96.

60. For an explanation of the role of lawyers in Congress as constitutional advisors and an argument in favor of granting congressional lawyers wide latitude to interpret the Constitution, see Yoo, *supra* note 2, at 5–7.

61. Miller, *supra* note 47, at 1296.

62. See Berenson, *supra* note 47, at 842.

63. See *id.* at 842–43 (arguing that government lawyers may assist their government clients in pursuing good faith extension, modification, or reversal of existing law, but should not assist their government clients in pursuing what would be akin to frivolous claim).

64. For example, in order to achieve the New Deal, Congress was required to pass legislation directly contrary to existing Supreme Court precedents concerning the meaning of the Commerce Clause.

courts. Presumably, it is better to facilitate free and open debate by drafting such legislation at the request of legislators than to prevent such legislation from being drafted at all. In addition, for the reasons noted earlier, it is better to have legislative attorneys drafting such legislation and advising the legislature of the constitutional issues and the costs involved in passing such legislation, than to have non-attorneys drafting the legislation and attorneys representing moneyed interests “advising” the legislature as to the constitutional issues.

##### 5. *Effect of Public Interest Model on Legislative Institutions*

If the public interest model of practice is applied, the effect likely will be a reduced role in the legislative process for legislative attorneys and an increased dependence by the legislature upon attorneys who are lobbyists and paid advocates. There are several reasons for this. As a general matter, it is a rare client who has no difficulty with being told “I won’t do that for you.” It is even less likely that a legislator will have no problem being told by a legislative attorney “I won’t do that for you because I think you are going to harm the public interest.” Legislatures, not legislative attorneys, are elected to represent the will of the public. A legislative attorney who refuses to conform to the client’s desires, like any other lawyer, must be prepared eventually to have no client.

Legislators might also come to rely less on legislative attorneys due to political concerns and doubts about the professionalism of legislative attorneys. A legislative attorney might refuse to draft a politically popular bill or might disclose politically unpopular information. In either case, legislators likely would increasingly view legislative attorneys as politically dangerous and would hesitate to utilize their legal expertise. In addition, were some legislative attorneys to refuse, for personal ethical reasons, to act in a manner that other legislative attorneys did not find problematic, the legislature might begin to view at least some of its own lawyers as impediments to the legislative process. If the role of professional legal staff decreases, lobbyists who are members of the private bar and other attorneys who are paid to represent private interests will step in and satisfy the legislature’s need for information.<sup>65</sup>

Thus, the application of the public interest model to legislative attorneys likely would result in a significantly weakened legislature. Legislative attorneys would become more marginalized, and the benefits described in the first part of this Essay, which result from the

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65. See Berkman, *supra* note 13, at 665–66.

legislature hiring its own professional legal staff, would be in peril. Political science research indicates that legislatures may be de-institutionalizing, losing their institutional capacity to develop public policy.<sup>66</sup> If legislative attorneys follow the public interest model, they will be contributing to the forces causing this institutional decay.

#### IV.

##### TREATING THE LEGISLATURE AS AN ENTITY CLIENT

As might be expected, the application of the rules of professional ethics to legislative attorneys raises complex issues. Many of the issues arise because the rules of professional ethics were designed to govern attorneys following a more traditional model of practice. Although it is beyond the scope of this Essay to address all such issues, this Essay will briefly discuss the primary issue: identifying the legislative attorney's client. This issue is of primary importance because the client generally dictates the goals of legal representation and because identifying the client is necessary in order to apply key rules of professional ethics, such as zealotness, confidentiality, and conflicts of interest.

Legislative attorneys have several potential clients: the public, the government as a whole, the institution of the legislature, the legislative service agency for which the legislative attorneys work, the committee to which the legislative attorneys provide services, or each individual legislator to whom the legislative attorneys provide services. A few of these options for identifying the client may be dealt with summarily. A legislative attorney does not represent the legislative service agency in which he or she works any more than an attorney in private practice represents his or her law firm. The legislative service agency, similar to a law firm, is designed to facilitate the provision of legal services to third parties by the attorneys who work there. In addition, for the reasons previously discussed, it is neither workable nor advisable for legislative attorneys to view their client as the public interest. Furthermore, because the pitfalls of authorizing legislative attorneys to represent the public interest also arise when the government as a whole is viewed as a legislative attorney's client, this Essay will not restate those arguments.

The options for viewing the institution of the legislature, a particular committee, or each individual legislator as the client are the most viable. However, viewing each legislator as the client creates a key

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66. Alan Rosenthal, *State Legislative Development: Observations from Three Perspectives*, 21 LEGIS. STUD. Q. 169, 186 (1996).

problem concerning conflicts of interest—a problem that can be avoided by viewing either the committee to which the legislative attorney provides services or the institution of the legislature as the client. In addition, viewing the institution of the legislature as the client best supports the institutional development of the legislature.

Viewing each legislator as the client of a legislative attorney is unworkable due to the multiple conflicts of interest that such a system would cause. It is common practice for legislative attorneys to provide legal services to legislators on competing sides of a particular issue as that issue wends its way through the legislative process. For example, a legislative attorney may draft a bill for a Democrat and then, after the bill is introduced, a Republican may ask the legislative attorney for help drafting amendments to change the bill, gut the bill of its efficacy, or even kill the bill. Similarly, a legislative attorney may help a committee chairperson who is a Republican formulate a bill, and then a Democratic committee member may ask the legislative attorney for a legal memorandum identifying all constitutional issues the bill creates. Providing services without regard to political affiliation is a defining characteristic of legislative attorneys. If each legislator is viewed as the legislative attorney's client, this practice would likely be prohibited under the rule against conflicts of interest.<sup>67</sup> Although this rule would permit competing legislators to consent to such a conflict, the rule requires consent to be given after consultation.<sup>68</sup>

These requirements are unworkable in the legislative process. Often, for example, there is a flurry of amendments that must be drafted and legal questions that must be answered while a bill is being debated on the floor. These drafting requests and legal questions routinely come from competing legislators. It is not operationally possible to require the particular house of the legislature to recess in order to allow the attorney to obtain consent for each such conflict from each legislator. Similarly, it would be awkward to require a legislative attorney to perform a conflicts check whenever he or she is asked a question at a committee hearing and to obtain consent during the hearing as each conflict arises.

It could be argued that this problem is avoided if each legislator provides a blanket consent to all such conflicts at the beginning of each legislative session. However, in addition to the obvious problems with obtaining informed consent in advance of any actual conflict, it is unclear what would happen to non-consenting legislators.

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67. For a description of the Model Rule and Model Code provisions against conflicts of interest, see *supra* note 33.

68. *Id.*

The legislature could choose to let non-consenting legislators draft their own legislation and could prohibit them from obtaining legal counsel from legislative attorneys, but that would place these legislators at a disadvantage vis-à-vis legislators who are permitted to use the services of legislative attorneys. Legislators arguably might be coerced into consenting to the conflict of interest in order to avoid this disadvantage. Alternatively, in order to treat all legislators fairly, and to avoid coercing a legislator's consent, the legislature may choose to provide each non-consenting legislator with a state-paid attorney, so that the legislator can obtain legal services commensurate with those provided to consenting legislators. However, because of the benefits of having one's own attorney (as opposed to sharing an attorney with a group of other legislators), in a short period of time most legislators would likely refuse to consent. The resulting cost to the taxpayers, combined with the loss of institutional standardization of the legislature's work, would not be justifiable.

Viewing the institution of the legislature or, if appropriate, a committee as a legislative attorney's client allows the legislature or the committee flexibility to structure the attorney-client relationship in the manner that avoids multiple conflicts of interest and best serves the legislative or committee process. In addition, this view of the client allows a legislature or committee to incorporate its own traditions into the attorney-client relationship.<sup>69</sup> For example, if the institution of the legislature is the client, the legislature could adopt a rule declaring that the institution desires legislative attorneys to provide services to the institution by performing work for all legislators on a non-partisan basis. Under such a rule, there would be no conflict of interest between competing legislators. Similarly, the legislature could adopt a rule clarifying the confidentiality requirements applicable to legislative attorneys, including requirements with regard to maintaining con-

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69. In at least two states, legislative attorney ethics have been studied and policies or position statements have been adopted. The author has personally taken part in the development of several such policies within the Wisconsin Legislative Reference Bureau, covering topics including the identity of the client, confidentiality, and conflicts of interest. In addition, the Colorado General Assembly has adopted a position statement declaring the legislature to be the client of the legislative attorneys. See Douglas Brown & Dan L. Cartin, *Position Statement on the Attorney-Client Relationship in the Legislative Employment Setting*, National Conference of State Legislatures Legal Services Newsletter, Winter 1996, available at <http://www.ncsl.org/programs/legman/legalsrv/vol10No1.htm> (on file with *The New York University Journal of Legislation and Public Policy*). In developing this position statement, the Colorado legislature took into account not only the content of the rules of professional conduct, but also the traditions of that particular legislative body and the changing role of its legislative attorneys.

fidentiality during conversations with legislators. Likewise, if a committee is the client, the committee could adopt a resolution declaring that the committee desires legislative attorneys to provide services to the committee by performing work for all committee members on a non-partisan basis.

Also, viewing the institution of the legislature as the client has the special benefit of best supporting the institutional capacity of the legislature. This view of the client acknowledges that the legislature exists as an entity with authority to govern its own affairs. Helping the legislature develop mechanisms for exercising that authority is consistent with efforts made during the last several decades to provide the legislature with the institutional capacity to develop and consider public policy. Also, consideration of the role legislative attorneys should play in the legislative process will encourage legislators to think carefully about and take responsibility for the legislature as an institution. In this way, a discussion of how to structure the manner in which legislative attorneys serve the institution of the legislature may help the legislature to avoid institutional decay.<sup>70</sup>

There is an extensive body of scholarship with regard to the application of the entity client rule which legislatures could rely upon in structuring the roles of legislative attorneys. The legislature, like a corporation, is an entity, and legislative attorneys are in some ways akin to attorneys who work in a corporate legal department. The corporate model provides a useful framework which legislatures and legislative attorneys could use to construct a method of providing legal services to the legislature in a manner generally consistent with the private bar.

## V. CONCLUSION

The rules of professional ethics are a key aspect of the legal profession. Legislative attorneys, as members of the profession, can and should be subject fully to these rules. Any exemption from the rules of professional ethics would empower legislative attorneys to make arbitrary decisions on behalf of the legislature for which they would be held relatively unaccountable. In addition, any exemption from the rules of professional ethics ultimately would detract from the health of American legislative institutions. There is no doubt that numerous issues arise when the rules of professional ethics are applied to legisla-

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70. For a discussion of the potential de-institutionalization of state legislatures, see Rosenthal, *supra* note 66, at 186.

tive attorneys. Those issues can be overcome, however, through careful analysis and planning and with appropriate reference to scholarship dealing with analogous models of practice. In the end, the public will be best served if such an effort is made.

