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### **Legal Ethics Versus Political Practices: The Application of the Rules of Professional Conduct to Lawyer-Politicians**

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**LEGAL ETHICS VERSUS POLITICAL  
PRACTICES: THE APPLICATION OF THE  
RULES OF PROFESSIONAL CONDUCT TO  
LAWYER-POLITICIANS**

Andrew Flavelle Martin\*

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*Canadian legal ethics has paid little attention to how the rules of professional conduct for lawyers apply to lawyer-politicians – that is, politicians who happen to be lawyers. This article addresses this issue with reference to what Canadian case law and commentary do exist, supplemented by more plentiful American materials. It proposes a distinction between conduct that is politically expedient and conduct in which lawyer-politicians' duties as lawyers come into apparent conflict with their duties of office. Canadian case law reveals three conflicting approaches to this latter category: that the duties of a lawyer prevail, that the duties of a politician prevail, and that the two sets of duties must be balanced in the circumstances. The article then considers the legal barriers and policy considerations that may limit law societies' discipline of lawyer-politicians. It ends by considering potential approaches and solutions, concluding that law societies should regulate lawyer-politicians' conduct but should balance the professional obligations of those lawyers against their responsibilities as holders of public office. It also emphasizes that lawyer-politicians who do not want to be held to this standard should surrender their law licenses.*

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\* SJD Candidate, University of Toronto. My thanks to Chris Kycinsky at the Great Library of the Law Society of Upper Canada for her assistance. Thanks also to Michael Frisch, Ethics Counsel at Georgetown Law, for his helpful comments at early stages of my research and on an early draft. This research was supported in part by a graduate fellowship from Georgetown Law. Changes proposed in this article are advocated in the public interest.

*Le droit canadien de la déontologie juridique a accordé peu d'attention à la manière dont s'appliquent les règles de conduite professionnelle des avocats aux avocats-politiciens – c'est-à-dire des politiciens qui se trouvent aussi à être membres du Barreau. Le présent article examine cette question en procédant à l'analyse de la jurisprudence canadienne et des commentaires émis, le tout étant complété par une étude des autorités américaines, plus abondantes, sur cet aspect. L'article propose d'établir une distinction entre une conduite à finalité politique et une conduite où les obligations des avocats-politiciens à titre d'avocats créent un conflit apparent avec leurs fonctions. A cet égard, la jurisprudence canadienne révèle trois approches contradictoires : i) que les obligations d'un avocat doivent prévaloir; ii) que les obligations du politicien doivent prévaloir; iii) que les deux types d'obligations doivent être évalués selon les circonstances. L'article aborde ensuite les questions liées aux obstacles juridiques et les considérations de politique générale qui peuvent limiter les mesures de discipline qui pourraient être appliquées par les barreaux à l'encontre des avocats-politiciens. L'article se termine par une analyse des autres approches et des solutions possibles, concluant que les barreaux doivent aussi réglementer la conduite des avocats-politiciens, tout en veillant à maintenir un équilibre entre les obligations professionnelles de ces avocats et leurs responsabilités en tant que détenteurs d'une charge publique. L'article souligne également que les avocats-politiciens qui refusent de se conformer à cette norme devraient renoncer à leurs permis de pratiquer le droit.*

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### 1. Introduction

Is a lawyer in political office either a lawyer or a politician first, or some amalgam of the two? The lawyer-politician has been a longstanding fixture of public life, but the connection between the two roles is much more complex than the hyphen conveys. Politicians routinely engage in obfuscation, misleading statements, name-calling, and other ethically dubious practices that are commonly accepted as the *status quo* of the political arena. Lawyers, however – despite a public perception to the contrary – are governed by extensive rules of conduct, with a recent emphasis on civility.<sup>1</sup> This article will examine how these ethical rules apply to lawyer-politicians, in theory and in practice, and how that application and the rules themselves might be better tailored to address this challenge. This issue has been the subject of surprisingly little commentary. There is a moderate body of relevant American legal

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<sup>1</sup> See e.g. Alice Woolley, “Does Civility Matter?” (2008) 46 Osgoode Hall LJ 175 at 176 [Woolley, “Civility”].

literature, but none of note in Canada.<sup>2</sup> For this reason, both American and Canadian sources will be considered.<sup>3</sup>

The focus of this article is lawyers in elected or appointed political positions in government where the duties of office do not include legal practice – that is, politicians who happen to be lawyers. This scope is captured in the term “lawyer-politician,” which has been used elsewhere,<sup>4</sup> and adopts the idea that “[b]y definition, lawyer-politicians are not engaged in the day-to-day practice of law.”<sup>5</sup> This term also goes beyond “lawyer-legislator” by capturing politicians such as mayors.<sup>6</sup> This article seeks to complement longstanding work in Canadian legal ethics on the special role of the Attorney General,<sup>7</sup> as well as work on the duties of prosecutors<sup>8</sup> and more recent work on the role of other government

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<sup>2</sup> See primarily Kevin Hopkins, “The Politics of Misconduct: Rethinking How We Regulate Lawyer-Politicians” (2005) 57 Rutgers L Rev 839; Thomas More Kellenberg, “When Lawyers Become Legislators: An Essay and a Proposal” (1993) 76 Marq L Rev 343; Nancy B Rapoport, “Presidential Ethics: Should a Law Degree Make a Difference?” (2001) 14 Geo J Legal Ethics 725. Specifically on campaigning, see Robert F Housman, “The Ethical Obligations of a Lawyer in a Political Campaign” (1995) 26 U Mem L Rev 3; see also Lauren Gilius, “The Model Rules of Professional Conduct and Political Campaign Activities” (2008) 1(1) Legislation and Policy Brief 31, online: Washington College of Law, American University <<http://digitalcommons.wcl.american.edu/lpb/vol1/iss1/2/>>.

<sup>3</sup> I remain conscious of the imperative that Canadian legal ethics must be Canadian, or as Adam Dodek put it, “Canadian legal ethics must also attempt to situate legal ethics within a distinctly *Canadian* context;” see Adam Dodek, “Canadian Legal Ethics: Ready for the Twenty-First Century at Last” (2008) 46 Osgoode Hall LJ 1 at 7 [Dodek, “Canadian Legal Ethics”] [emphasis in original and citation omitted].

<sup>4</sup> See e.g. Hopkins, *supra* note 2 at 843; Jeffrey W Stempel, “Lawyers, Democracy and Dispute Resolution: The Declining Influence of Lawyer-Statesmen Politicians and Lawyerly Values” (2004-2005) 5 Nevada LJ 479 at 480.

<sup>5</sup> Hopkins, *ibid* at 884.

<sup>6</sup> See e.g. Stempel, *supra* note 4 at 484; Christopher Brinson, “The Potential Positive Impact of the Ethical Lawyer-Legislator on American Legislative Politics” (2008) 32 J Legal Prof 273 at 273.

<sup>7</sup> For a recent bibliography, see Adam M Dodek, “Lawyering at the Intersection of Public Law and Legal Ethics: Government Lawyers as Custodians of the Rule of Law” (2010) 33 Dal LJ 1 at 5-6, note 10 [Dodek, “Government Lawyers”].

<sup>8</sup> See e.g. Stuart J Whitley, “Prosecution Ethics: A Proposal for Formalizing Rules of Conduct” (2010) 55 Crim LQ 508; Mary Lou Dickie, “Through the Looking Glass: Ethical Responsibilities of the Crown in Resolution Discussions in Ontario” (2005) 50 Crim LQ 128; David Layton, “The Prosecutorial Charging Decision” (2002) 46 Crim LQ 447; Deborah MacNair, “Crown Prosecutors and Conflict of Interest: a Canadian Perspective” (2002) 7 Can Crim L Rev 257; John D Brooks, “Ethical Obligations of the Crown Attorney: Some Guiding Principles and Thoughts” (2001) 50 UNB LJ 229;

lawyers.<sup>9</sup> It will not address the distinct issue of conflicts of interest arising from the outside practice of law while in office or from practice after leaving office.<sup>10</sup>

The article will begin by introducing the specific provisions of the rules of legal ethics that govern how these rules apply to lawyer-politicians. It will then propose a distinction between cases in which the conduct at issue is committed for political expediency and those in which it is committed in the good-faith execution of the obligations of public office. Three conflicting approaches to this latter class are then identified in Canadian jurisprudence: that the duties of lawyers (as specified in the rules of legal ethics) prevail, that the duties of the office prevail, or that the two sets of duties must be balanced. In order to evaluate these three approaches, legal barriers and policy considerations are then canvassed to determine whether the conduct of lawyer-politicians can and should be regulated. The article ends by analyzing the options available and proposing that the applicable ethical rules should indeed be applied to lawyer-politicians, with the balancing approach being the best choice when the duties of lawyers and the duties of political office conflict. It calls on law societies to clarify which rules apply and on lawyer-politicians to either accept their obligations as lawyers or surrender their law licenses.

## 2. *The Governing Rule*

The first step in assessing the application of the rules of legal ethics to lawyer-politicians is to identify what these rules themselves say about the issue. Rule 7.4 of the *Model Code of Professional Conduct* of the Federation of Law Societies of Canada (FLSC) provides that “[a] lawyer

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Michael Code, “Crown Counsel’s Responsibilities When Advising the Police at the Pre-charge Stage” (1998) 40 *Crim LQ* 326.

<sup>9</sup> See generally Dodek, “Government Lawyers,” *supra* note 7, as well as the articles Dodek cites at 5, n 9, especially Allan C Hutchinson, “‘In the Public Interest’: The Responsibilities and Rights of Government Lawyers” (2008) 46 *Osgoode Hall LJ* 105. See also Deborah McNair, “Legislative Drafters: A Discussion of Ethical Standards from a Canadian Perspective” (2003) 24 *Statute L Rev* 125. More recently, see Malliha Wilson, Taia Wong and Kevin Hille, “Professionalism and the Public Interest” (2011) 38 *Advocates’ Q* 1. In the American context, see also WJ Michael Cody, “Special Ethical Duties for Attorneys Who Hold Public Positions” (1993) 23 *Memphis State U L Rev* 453 at 455-59.

<sup>10</sup> See e.g. M Deborah MacNair, *Conflicts of Interest: Principles for the Legal Profession*, looseleaf (consulted on 12 November 2012), (Toronto: Thomson Reuters Canada, 2012) at §12:70. In the American literature, see e.g. George F Carpinello, “Should Practicing Lawyers Be Legislators?” (1989) 41 *Hastings LJ* 87 at 119; Dennis Mitchell Henry, “Lawyer-Legislator Conflicts of Interest” (1992) 17 *J Legal Prof* 261 at 276.

who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law.”<sup>11</sup> The commentary to this rule serves several different purposes. It begins by explaining that the term “public office” is very broad: “The rule applies to a lawyer who is *elected or appointed* to a *legislative or administrative office at any level of government*, regardless of *whether the lawyer attained the office because of professional qualifications*.”<sup>12</sup> It then identifies the reputation of the legal profession as a rationale for the rule, observing that “[b]ecause such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards.”<sup>13</sup> It also provides some guidance as to the manner in which the rule will be applied: “Generally, the Society is not concerned with the way in which a lawyer holding public office carries out official responsibilities, but *conduct in office that reflects adversely upon the lawyer’s integrity or professional competence* may be the subject of disciplinary action.”<sup>14</sup> While the FLSC Model Code was only recently adopted in 2009, these parts of rule 7.4 and the commentary track closely to Chapter X of the Canadian Bar Association’s (CBA) *Code of Professional Conduct*,<sup>15</sup> and are essentially identical to rule 6.05(1) of

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<sup>11</sup> The Federation of Law Societies of Canada, *Model Code of Professional Conduct* (Ottawa: FLSC, 2009), revised 2011 and 2012, online: Federation of Law Societies of Canada <<http://www.flsc.ca>> [FLSC Model Code].

<sup>12</sup> *Ibid* r 7.4, comment 1 [emphasis added].

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid*, comment 2 [emphasis added]. This is analogous to comment 4 to r 2.1-1, which states that “Generally ... the Society will not be concerned with the purely private or extraprofessional activities of a lawyer that do not bring into question the lawyer’s professional integrity.” Note that the commentary to r 7.4 also provides that “Lawyers holding public office are also subject to the provisions of Rule 3.4 (Conflicts) when they apply.”

<sup>15</sup> The Canadian Bar Association, *Code of Professional Conduct* (Ottawa: CBA, 2009), online: Canadian Bar Association <<http://www.cba.org>> [CBA Code]. The rule is essentially identical, except that it uses the verb “should” instead of “must,” and refers to “the” lawyer instead of “a” lawyer. The commentary is more extensive than that to the FLSC model rule. Comment 1 is identical to the FLSC commentary regarding the term “public office” and the rationale, although a footnote absent from the FLSC Model Code confirms that “[c]ommon examples [of lawyers in public office] include Senators, members of the House of Commons, members of provincial legislatures, cabinet ministers, municipal councillors” and others. Comment 8 has only minor syntax differences from the FLSC commentary regarding what conduct may lead to discipline. (The intervening comments address conflicts of interest, appearances, and confidentiality.) This rule is virtually the same as it was when the Code was first adopted by the Council of the CBA in 1974: “The lawyer who holds public office should in the discharge of his official duties adhere to standards of conduct as high as those which this Code requires of a lawyer in the practice of law;” see Canadian Bar Association, *Code of Professional Conduct*, (Ottawa: CBA, 1975) at 36.

the *Rules of Professional Conduct* of the Law Society of Upper Canada (LSUC).<sup>16</sup>

Interestingly, the American Bar Association's (ABA) *Model Rules of Professional Conduct* do not have a direct equivalent to FLSC rule 7.4.<sup>17</sup> The nearest is comment 5 to rule 8.4, which refers specifically to abuse of public office: "Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers."<sup>18</sup> Kevin Hopkins has described the ABA in comment 5 as having "indirectly indicated an intent to regulate" what he terms lawyer-politicians.<sup>19</sup> In contrast, Nancy Rapoport has argued that rule 8.4, the general rule defining misconduct for a lawyer, "by definition, applies to lawyer-politicians," because it "governs lawyer behavior at all times."<sup>20</sup> This position suggests

<sup>16</sup> The Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: LSUC, 2000), last amended 2011, online: Law Society of Upper Canada <<http://www.lsuc.on.ca>> [LSUC Rules]. Rule 6.05(1) uses the verb "shall." The LSUC Rules have a separate r 6.05(2) on conflicts of interest for lawyers in public office, whereas the comment 3 to FLSC Model Code r 7.4 refers to conflicts of interest (see note 14). Rule 6.05(1) can be traced back to r 18 of the Law Society's *Professional Conduct Handbook* of 1978; see Law Society of Upper Canada, *Professional Conduct Handbook* (Toronto: LSUC, 1978) at 26. Like the CBA Code, r 18 used "should" instead of "must;" see *supra* note 15. The language of "should" is also found in the 1987 version of r 18; see Law Society of Upper Canada, *Professional Conduct Handbook* (Toronto: LSUC, 1987) at 45. My thanks to Chris Kycinsky for her assistance in tracking the history of this rule.

<sup>17</sup> The American Bar Association, *Model Rules of Professional Conduct* (Chicago: ABA, 2012), online: American Bar Association <<http://americanbar.org>> [ABA Model Rules].

<sup>18</sup> Hopkins, *supra* note 2 at 872; Rapoport, *supra* note 2 at 728-29; Gilius, *supra* note 2 at 39. Note that Rapoport at 729 identifies r 8.2 as "[t]he closest thing to an explicit regulation governing the behavior of lawyer-politicians" – this is odd because that rule merely prohibits false or reckless statements "concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office" and states that "[a] lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct."

<sup>19</sup> Hopkins, *ibid.*

<sup>20</sup> Rapoport, *supra* note 2 at 729; ABA Model Rules, *supra* note 17, r 8.4: "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of

that comment 5 is not strictly necessary in order to bring lawyer-politicians under disciplinary jurisdiction.

### 3. *Two Classes of Violations: Expedient Politics and Conflicting Obligations*

Disciplinary decisions applying these rules to lawyer-politicians can be broken into two general categories. The first and more simple one involves conduct that is merely expedient and potentially accepted as politics-as-normal. The second and more complex category is where the duties of the office come into apparent conflict with the duties of a lawyer. While the distinction is imperfect, it provides a helpful framework for analysis.

#### A) *The Simple Class of Violations: Expedient Politics*

The rules of legal ethics restrain lawyer-politicians from dubious but politically expedient conduct that would otherwise only be punished at the ballot box. An excellent example is *Office of Disciplinary Counsel v Yoshimura*, involving a member of city council who was in an auto collision and later lied about whether he had been drinking beforehand.<sup>21</sup> The attorney drove his automobile into a parked car and then drove away almost immediately.<sup>22</sup> When police went to his residence later that night and noted signs of alcohol impairment, he admitted that he had been drinking at a bar after work and had struck the vehicle.<sup>23</sup> He later pled no contest to failing to report a collision with an unattended vehicle.<sup>24</sup> When asked by a reporter, however, he denied that he had been drinking – a denial he later repeated during a television interview.<sup>25</sup> He made similar misleading statements to the Hawaii Bar’s Office of Disciplinary Counsel.<sup>26</sup>

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Professional Conduct or other law; or (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.”

<sup>21</sup> *Office of Disciplinary Counsel v Yoshimura*, 2002 WL 32864713 (Haw) [*Yoshimura*].

<sup>22</sup> *Office of Disciplinary Counsel v Yoshimura – Hearing Committee’s Findings of Fact, Conclusions of Law, and Recommendation for Discipline* (2 November 2001) at paras 6-9 [*Hearing Committee Report in Yoshimura*]. This unpublished document was provided by the Office of Disciplinary Counsel of Hawaii and is on file with the author. Note that paragraph numbers are only provided for the section, “Findings of Fact and Conclusions of Law,” which runs from pages 3 to 15. Citations are thus given to paragraphs for this section, and to page numbers elsewhere.

<sup>23</sup> *Ibid* at paras 15-21.

<sup>24</sup> *Ibid* at para 22.

<sup>25</sup> *Ibid* at paras 23-29. He had also stated that he came to his vehicle directly from work (as opposed to from the bar).

<sup>26</sup> *Ibid* at paras 30-37.



The Hearing Committee, upheld by the Disciplinary Board and the Supreme Court of Hawaii, found that the attorney's statements to the journalists and disciplinary counsel were "misrepresentation[s] and false,"<sup>27</sup> and that they constituted violations of rules 8.4(a) and (c), prohibiting "conduct involving dishonesty, fraud, deceit, and misrepresentation."<sup>28</sup> Both the Hearing Committee and the Court cited the comment to rule 8.4 quoted above, with the Court stating that "[w]e view a lawyer's misrepresentations as a matter of extreme gravity, particularly when the lawyer holds public office;" both, however, also recognized as a mitigating factor that the violations "did not cause any loss or damage to a client."<sup>29</sup> While the Hearing Committee recommended suspension for one month,<sup>30</sup> the Supreme Court imposed the Disciplinary Board's recommendation for a six-month suspension.<sup>31</sup>

A different kind of misrepresentation was at issue in *Bayly (Re)*.<sup>32</sup> The lawyer was the Principal Secretary of the Northwest Territories, an unelected position in which he "reported directly to the Premier . . . and was to provide political advice to the Cabinet and Premier."<sup>33</sup> Bayly telephoned the territorial Conflict of Interest Commissioner on behalf of the Deputy Premier.<sup>34</sup> He did not tell her that the call was on speakerphone and that other people were present; when she mentioned interference on the line, he told her the call was on speakerphone "so that I can take notes if I need to."<sup>35</sup> Neither did he say anything to her when he realized that the Deputy Premier was taping the conversation<sup>36</sup> – even though under the applicable

<sup>27</sup> *Ibid* at paras 25, 28, 34, 38, 46.

<sup>28</sup> *Ibid* at paras 26, 29, 35, 39, 47. The statements to disciplinary counsel also violated rr 8.1(a) and 8.4(d) regarding failing to cooperate and making false statements during ethics investigations; see *ibid* at paras 34-35, 38-39, 46-47.

<sup>29</sup> *Yoshimura, supra* note 21 at 1; *Hearing Committee Report in Yoshimura, ibid* at 17. Note that at the time of these decisions, comment 5 to ABA r 8.4 was actually comment 4 in the Hawaii rules.

<sup>30</sup> *Hearing Committee Report in Yoshimura, ibid* at 16-18.

<sup>31</sup> *Yoshimura, supra* note 21 at 1.

<sup>32</sup> *Decision of the Sole Inquirer into Complaint #0116-728, Regarding John U Bayly QC, Filed with the Law Society of the Northwest Territories*, 2002 CanLII 53208 [*Bayly*]. As this case is not published in a reporter, pinpoints given are to the CanLII pdf online at <<http://www.canlii.ca/en/nt/ntls/doc/2002/2002canlii53208/2002canlii53208.pdf>>.

<sup>33</sup> *Ibid* at 2.

<sup>34</sup> *Ibid* at 1-2.

<sup>35</sup> *Ibid* at 2.

<sup>36</sup> *Ibid* at 2.

code of conduct,<sup>37</sup> as under the FLSC Model Code,<sup>38</sup> lawyers are prohibited from recording a conversation without prior notification to the other participant.

The decision-maker appointed by the Law Society of the Northwest Territories characterized both the misleading explanation for why the call was on speakerphone and the recording as very serious. While he found that the misinformation regarding the speakerphone was not deliberate, it “was such a great omission that the integrity of the legal profession could be brought into disrepute,” thus breaching the rule that “[t]he lawyer must discharge with integrity all duties owed to clients, the court or tribunal or other members of the profession and the public.”<sup>39</sup> Although it was noted that Bayly “did not make the recording himself and was placed in that unenviable position by his employer,” his failure to rectify the situation was nonetheless grievous:

The image of the member, the Deputy Premier and other senior government staff listening to [the Commissioner] on the speakerphone, while the call was tape recorded, without [the Commissioner’s] knowledge, is an image that sears the respect that the public has for lawyers.<sup>40</sup>

The violation was also held to be more serious because it was committed against the Conflict of Interest Commissioner, herself a lawyer, whose purpose was “to help ensure that the public is governed by individuals who have the best interests of the general public in mind when performing their legislative duties.”<sup>41</sup> Bayly was reprimanded, fined \$1250, and ordered to pay costs of \$1750.<sup>42</sup>

Significant misstatements like these from a non-lawyer politician are not uncommon and may be largely accepted as politics-as-usual. Moreover, they would have no legal consequences and might not even

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<sup>37</sup> The Northwest Territories uses the CBA Code, *supra* note 15. See Comment 5 to ch XVI: “The lawyer should not use a tape-recorder or other device to record a conversation, whether with a client, another lawyer or anyone else, even if lawful, without first informing the other person of the intention to do so.”

<sup>38</sup> FLSC Model Code, *supra* note 11, r 7.2-3: “A lawyer must not use any device to record a conversation between the lawyer and a client or another lawyer, even if lawful, without first informing the other person of the intention to do so.”

<sup>39</sup> *Bayly*, *supra* note 32 at 6; CBA Code, *supra* note 15, ch I. The corresponding provision in the FLSC Model Code, *ibid*, is r 2.1-1: “A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.”

<sup>40</sup> *Bayly*, *ibid* at 5.

<sup>41</sup> *Ibid* at 5.

<sup>42</sup> *Ibid* at 8.

have political ones. The conduct in *Yoshimura* certainly has some parallels to successful Canadian politicians. For example, in 2010 a Toronto city councillor running for mayor denied having been charged for marijuana possession; soon afterward he said he “forgot about [that] charge ... because that same evening, I was charged with failing to give a breath sample.”<sup>43</sup> (In fact, the driving charge, to which he later pled no contest, was not for failure to provide a sample but for driving under the influence.<sup>44</sup>) That explanation, which may appear dubious to some but has not been contradicted, was for voters alone to evaluate, because he was not a lawyer. This credibility incident was not the councillor’s first – four years earlier, he had initially denied attending a hockey game at which a couple claimed he had “shouted insults and obscenities” at them, before admitting the next day that he had been there, and then offering his “heartfelt apology.”<sup>45</sup> Nonetheless, the councillor went on to win the mayoralty.<sup>46</sup> Similarly, note that in *Bayly* the recording itself was made by the Deputy Premier – an elected politician – and neither she nor any of the other politicians present appear to have intervened to correct Bayly’s misstatement regarding the reason for the call being on speakerphone.

It should be noted that not all misstatements by a lawyer-politician would constitute a violation, as some would be *de minimis* either in their content or their impact. As the Supreme Court of Vermont put it recently, “[W]e are not prepared to believe that *any* dishonesty, such as giving a false reason for breaking a dinner engagement, would be actionable under the rules.”<sup>47</sup> Instead, the test was whether the dishonesty “reflect[ed] on an attorney’s fitness to practice law,” as specified in the relevant rule.<sup>48</sup>

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<sup>43</sup> Kelly Grant, “Ford’s freefall: Will driving drunk prove too much?” *The Globe & Mail* (20 August 2010) A1, 2010 WLNR 16597639.

<sup>44</sup> *Ibid.*

<sup>45</sup> Haley Mick, “Couple accept apology from councillor who lied” *The Globe & Mail* (5 May 2006) A17, 2006 WLNR 7709479.

<sup>46</sup> These matters – in which there were potential political consequences but no legal consequences, because the councillor was not a lawyer and there was no applicable law governing him as a politician – should be distinguished from the more recent controversy involving Mayor Ford, in which it was alleged that his conduct did violate a law, specifically the *Municipal Conflict of Interest Act*, RSO 1990, c M 50. Such laws apply both to lawyer-politicians and to non-lawyer politicians; see *Magder v Ford*, 2012 ONSC 5615, (2012), 112 OR (3d) 401 (Sup Ct).

<sup>47</sup> *In re PRB Docket No 2007-046*, 989 A2d 523 at para 12 (Vt 2009). This excerpt was quoted by the State of Vermont Professional Responsibility Board in *In re PRB File No 2011.046*, Decision No 144 (14 October 2011) at 3, online: Government of Vermont <<http://libraries.vermont.gov/sites/libraries/files/prb/144prb.pdf>>.

<sup>48</sup> *Ibid.*; ABA Model Rules, *supra* note 17, r 8.04(c).

*Yoshimura* and *Bayly* both demonstrate that even if dishonest or unethical conduct is practiced by other politicians, lawyer-politicians are held to the standard of lawyers. Given that the conduct at issue raises serious integrity issues and does not appear to serve any higher purpose, it would be difficult to argue that this standard should be relaxed to further political expediency.

### *B) The More Complex Class of Violations: Conflicting Obligations*

The more difficult cases arise when a politician perceives the responsibilities of her position to be in conflict with her professional obligations as a lawyer. Indeed, during the development of the current LSUC Rules, as adopted in 2000, one unresolved point of discussion regarding rule 6.05(1) was “what a lawyer is expected to do when his or her duties as a lawyer and as an individual in public office conflict.”<sup>49</sup> Three cases illustrate this dilemma and reveal that Canadian jurisprudence has taken three different approaches: that the obligations of a lawyer prevail, that the obligations of a politician prevail, and that the two sets of obligations must be balanced in the particular circumstances.

The lawyer-politician in *Nova Scotia Barristers’ Society v Morgan* unsuccessfully argued that the obligations of a politician prevail; instead, the hearing committee held the opposite.<sup>50</sup> In 2008, Mayor John Morgan of Cape Breton gave a radio interview regarding the municipality’s loss in a court case against the provincial government. He alleged that the deciding judge and the judiciary in general were politically biased because of ties with the political parties and “the establishment.”<sup>51</sup> He was charged with violating the rules regarding encouraging respect for the administration of justice and showing “courtesy and respect” to the court.<sup>52</sup> Morgan claimed “that his duties to the electorate were paramount” and that those duties required him to speak frankly:

As a politician I need to be able to survey the landscape and to analyze what the threats are to the region, even political threats to myself. I need to be able to speak colourfully. I need to be able to speak emotionally. I need to be able to speak quickly.

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<sup>49</sup> Law Society of Upper Canada, *Report of the Task Force on Review of the Rules of Professional Conduct* (Toronto: LSUC, 1999) at 36 [LSUC, “Report on the Rules”]. My thanks to Chris Kycinsky for bringing this report, and specifically this portion of it, to my attention.

<sup>50</sup> 2010 NSBS 1 (available on CanLII) [*Morgan*]. As this case is not published in a reporter, pinpoints given are to the CanLII pdf at <<http://www.canlii.ca/en/ns/nsbs/doc/2010/2010nsbs1/2010nsbs1.pdf>>.

<sup>51</sup> *Ibid* at 2.

<sup>52</sup> *Ibid* at 2-3.

I need even to be able to be wrong at times when I am doing that. I need, at times, to be able to offend people in certain circumstances as well.<sup>53</sup>

Morgan argued that the purpose of the regulation of lawyers was to “protect the public interest,” and that “[t]he real public interest... is to have your politicians speaking freely.”<sup>54</sup> The Hearing Committee rejected this argument and referred to the rule on lawyers in public office being subject to the same standard as practicing lawyers.<sup>55</sup> They found that he had breached that standard and that his actions “are inappropriate and should not be condoned.”<sup>56</sup>

*Re Rowe*, although an older case, is particularly illustrative because the discipline committee split evenly on whether the acts involved constituted misconduct: one set of reasons held that the duties of a politician prevail but the other held that those of a lawyer prevail.<sup>57</sup> Rowe was the Leader of the Opposition in the Newfoundland House of Assembly.<sup>58</sup> Suspecting that

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<sup>53</sup> *Ibid* at 6, 7.

<sup>54</sup> *Ibid* at 7. He also argued, unsuccessfully, that discipline for his comments violated his freedom of speech under s 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]: *ibid* at 5, 6-7, 8. See further note 89 below.

<sup>55</sup> *Ibid* at 8. The rule, quoted *ibid* at 5, is found in *Legal Ethics and Professional Conduct: A Handbook for Lawyers in Nova Scotia*, 2d ed (Halifax: Nova Scotia Barristers' Society, 1998) ch 16 [*Handbook*], is essentially the same as r 7.4 of the FLSC Model Code: “A lawyer who holds public office has a duty, in the proper discharge of that office, to adhere to standards of conduct as high as those which this Handbook requires of a lawyer engaged in the practice of law.” The Hearing Committee at 4 also made reference to the commentary on the rule on encouraging respect for the administration of justice, which provides in part: “The lawyer, in public life, must be particularly careful in this regard, because the mere fact of being a lawyer lends weight and credibility to any public statement. For the same reason, the lawyer should not hesitate to speak out against injustice;” see *Handbook*, ch 21, commentary 21.4. Virtually identical language is found in the FLSC Model Code, *supra* note 11, r 5.6-1, comment 1, and in the CBA Code, *supra* note 15, ch 13, commentary 3.

<sup>56</sup> *Morgan*, *ibid* at 8-10. Morgan was nonetheless found not guilty, as he had been charged not with conduct unbecoming but with professional misconduct, and the latter only applied to a lawyer's conduct in the course of the practice of law. This aspect of the decision in *Morgan* has been criticized as “rest[ing] upon a rigid and technical interpretation of the complaint;” see Brent Olthuis, “Professional Conduct,” in Adam M Dodek, ed, *Canadian Legal Practice: A Guide for the 21st Century*, looseleaf (consulted on 12 November 2012), (Markham: LexisNexis, 2009) at §3.22 [Dodek, *Canadian Legal Practice*].

<sup>57</sup> *Rowe (Re)*, 1980 CanLII 28 (NL LS). As this case is not published in a reporter, pinpoint given are to the CanLII pdf online at <<http://www.canlii.ca/en/nl/nlls/doc/1980/1980canlii28/1980canlii28.pdf>>.

<sup>58</sup> *Ibid* at 4.

there was an ongoing cover-up in the investigation of an apartment fire, he “actively encouraged” a police officer to unlawfully give him confidential reports in connection with the investigation, and then provided these reports to the media.<sup>59</sup> In addition to encouraging the officer’s unlawful act, Rowe also interfered with the course of justice by potentially prejudicing the fairness of a future criminal trial regarding the fire.<sup>60</sup> The Disciplinary Committee found that the “primary reason” for his actions was to reveal the cover-up and prompt a proper investigation, motivated in part by the safety of the building’s residents; however, another reason “was political in nature, in light of his position as Leader of the Opposition and the fact that the documents in question would prove embarrassing to the Government of the day.”<sup>61</sup>

The disagreement among the Committee was on the meaning of the rule on the lawyer in public office.<sup>62</sup> Rowe’s position was that his duty to the public – to “do what was right and act in the best interests of the people of the Province as Leader of the Opposition” – trumped his obligations as a lawyer.<sup>63</sup> Two committee members agreed, alluding to a lawyer’s duty of zealous advocacy for her client:

[T]his Chapter of the Code requires that a lawyer in public office serve the end of that public office to the same degree of integrity and single mindedness as he would be expected to show to his client and the Courts in a professional capacity.... Mr. Rowe’s actions were as a politician and Leader of the Opposition, and were in pursuit of the public interest as he perceived it at the time. While the actions were ill-advised and may have prejudiced a person’s right to a fair trial, Mr. Rowe felt that it was necessary...<sup>64</sup>

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<sup>59</sup> *Ibid* at 5, 7.

<sup>60</sup> *Ibid* at 5-7.

<sup>61</sup> *Ibid* at 6.

<sup>62</sup> The rule, quoted *ibid* at 9, was essentially identical to FLSC Model Code r 7.4: “[T]he lawyer who holds public office should, in the discharge of his official duties, adhere to standards of conduct as high as those which this Code requires of a lawyer in the practice of law.”

<sup>63</sup> *Ibid* at 4.

<sup>64</sup> *Ibid* at 7. Note that while zealous advocacy is expected in representing a client’s interests, overzealousness can lead to disciplinary consequences. See *Law Society of Upper Canada v Joseph Peter Paul Groia*, 2012 ONLSP 94 at para 63 (available on CanLII). Groia filed a notice of appeal on July 23, 2012. See Jeff Gray, “Bre-X lawyer Joe Groia appeals civility ruling” *The Globe & Mail* (23 July 2012); Christopher Guly, “Groia comes out swinging; Sides dispute timing of misconduct appeal” *The Lawyers Weekly* 32(14) (27 August 2012) (QL). In the American literature, see e.g. Michael S Frisch, “Zealousness Run Amok” (2007) 20 *Geo J Legal Ethics* 1035.

The other two members held that under that rule (which in that jurisdiction was then Chapter 9), a lawyer in public office always retains the ethical obligations of a lawyer:

[S]imply because a lawyer chooses to do certain actions in his political or non-legal role, he cannot escape the fact that he is a lawyer throughout and subject to certain standards of conduct... Chapter 9 should not be interpreted so as to set up different standards of conduct in the public as opposed to the legal role. Rather, ... Chapter 9 says no more than that, where a lawyer chooses to adopt a public, or indeed any other role, he is nevertheless a lawyer throughout, and in his actions publically, his standard of conduct must be no less than that standard would be if he was acting as a lawyer. In other words, there are not two standards, but simply that the legal standards are carried into the public sphere when a lawyer enters that field... those basic ethical and moral standards which members of the legal profession are required to uphold by virtue of their profession.<sup>65</sup>

These committee members also made two more subtle points. First, Rowe's obligations would be the same even if his status as a lawyer was not common knowledge:

[W]hether or not any individual of the public on viewing Mr. Rowe's actions and hearing his words, actually knew at that time that he was a lawyer, the test is rather whether, had they known, they could reasonably have concluded that the actions in question must have been acceptable conduct in the legal sense, not only to Mr. Rowe, but to lawyers generally.<sup>66</sup>

Second, one comment suggests that Rowe could have resigned his license in order to be unconstrained by the Code of Conduct – “Having chosen to retain his membership in The Law Society, he cannot avoid his responsibilities as a lawyer.”<sup>67</sup>

In reviewing the report of the discipline committee, the Benchers of the Law Society held in brief reasons that “Mr. Rowe's duties as a lawyer overrides that as a politician” and that he was guilty of conduct

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<sup>65</sup> *Ibid* at 9-10.

<sup>66</sup> *Ibid* at 9.

<sup>67</sup> *Ibid* at 9.

unbecoming.<sup>68</sup> The Benchers adopted the Committee's unanimous recommendation of a reprimand.<sup>69</sup>

The tensions argued in *Morgan* and reflected in the split reasons of the discipline committee in *Rowe* were acknowledged and – to some extent – reconciled in the decision of the Committee of Inquiry in *Law Society of Yukon v Kimmerly*, which explicitly took a balancing approach.<sup>70</sup> The Ministry of Justice had decided that the courtrooms in a new courthouse would have the territorial court of arms mounted on the walls.<sup>71</sup> The Court ordered that the coat of arms be taken down, and when this proved too difficult, that it be covered.<sup>72</sup> When asked to comment by a reporter, territorial Minister of Justice Kimmerly made various remarks that the Law Society prosecutor claimed to constitute “conduct deserving of censure”: “Yukoners have been insulted;” “It is silly;” “It brings the repute of the Courts and the judiciary into disrespect in the Yukon, and I’m extremely saddened by the whole thing.”<sup>73</sup> While explicitly noting that lawyers in public office are held to the standard of other lawyers,<sup>74</sup> the Committee emphasized the context in which the remarks were made, particularly Kimmerly’s responsibilities of office, in dismissing the complaint:

A member holding public office is bound by the same standards of professional conduct required of a practicing lawyer ... On the other hand, the Committee must not overlook the position in which Mr. Kimmerly found himself. He was an elected member of the legislature and the Minister of Justice, the one person in government obliged to respond in some manner to the actions of the Court in shrouding the Yukon Coat of Arms. One can argue now that softer phrases might have been chosen by the member, but the Committee is not unmindful of the realities of political life and the position of the member as Minister of Justice at the end of a telephone ... when told

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<sup>68</sup> *Ibid* at 12; the decision of the Benchers of the Law Society is included in the same CanLII document as the report of the Discipline Committee, beginning at 11. The Committee explained that “conduct unbecoming” was that which “would be reasonably regarded as disgraceful or dishonourable by solicitors of good repute and competency,” and that the Code “codifies in a detailed and convenient form the common law in respect to conduct unbecoming a solicitor”: *ibid* at 7-9.

<sup>69</sup> *Ibid* at 11, 13.

<sup>70</sup> *Law Society of Yukon v Kimmerly*, [1988] LSDD No 1 (QL). Note that no paragraph or page numbers are provided in this online reporter, and so pinpoints given are to the six numbered sections into which the reasons are divided.

<sup>71</sup> *Ibid* at I.

<sup>72</sup> *Ibid*.

<sup>73</sup> *Ibid* at I, II.

<sup>74</sup> The applicable rule, cited *ibid* at V, was r IX of the 1974 CBA Code of Conduct, *supra* note 14.



of the shrouding of the Coat of Arms.... [C]omments in situations such as this cannot and should not be taken out of context.<sup>75</sup>

The Committee explicitly stated that it was necessary “to balance the competing priorities” – Kimmerly’s obligations as a lawyer and “his freedom to make fair and reasonable comment in the exercise of his right to speak out.”<sup>76</sup>

This balancing and context-driven approach in *Kimmerly* gives more weight to the political responsibilities of lawyer-politicians than do the decisions in *Morgan* and *Rowe*. It is also consistent with the competing set of reasons in *Rowe*, insofar as recognizing that a lawyer-politician has the same duty of zealous advocacy as a practicing lawyer. In this sense, it has the advantage of reconciling the duties of a lawyer with those of a politician, instead of merely holding that the latter are always trumped by the former. It should be emphasized, however, that the use of balancing does not in itself determine what the precise balance is to be. For example, unsupported assertions of political bias in the judiciary, such as those in *Morgan*, would likely constitute a violation under most if not all circumstances. While courts have recognized “the critical role played by lawyers in assuring the accountability of the judiciary”<sup>77</sup> and that “[t]o play that role effectively, he/she must feel free to act and speak without inhibition and with courage when the circumstances demand it,”<sup>78</sup> they have also emphasized that that role “does not by any means argue for an unlimited right on the part of lawyers to breach the legitimate public expectation that they will behave with civility.”<sup>79</sup> To the extent that the responsibilities of the office would enter into consideration, it is doubtful that Mayor Morgan’s purported “need ... to be able to offend people” would ever justify deliberately offending the judiciary.<sup>80</sup>

These three conflicting approaches to the application of what seems like a straightforward rule (that “[a] lawyer who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law”),<sup>81</sup> as well as their differing conceptions of the need for a politician to be unhindered in her execution of the duties of office, raise two larger issues. One is a legal

<sup>75</sup> *Ibid* at VI.

<sup>76</sup> *Ibid* at VI.

<sup>77</sup> *Doré v Barreau du Québec*, 2012 SCC 12 at para 64, [2012] 1 SCR 395 [*Doré*], citing with approval *Histed v Law Society (Manitoba)*, 2007 MBCA 150 at paras 79-82, 225 Man R (2d) 74 [*Histed*], leave to appeal to SCC refused, [2008] SCCA No 67.

<sup>78</sup> *Histed*, *ibid* at para 71, quoted with approval in *Doré*, *ibid* at para 64.

<sup>79</sup> *Doré*, *ibid* at para 65.

<sup>80</sup> *Morgan*, *supra* note 50 at 7.

<sup>81</sup> FLSC Model Code, r 7.4, *supra* note 11.

question: *Can* law societies regulate the conduct of lawyer-politicians? If so, a policy question remains: *Should* they?

#### 4. *Substantive Legal Barriers: Can Lawyer-Politicians' Conduct be Regulated?*

There are some respects in which the law may constrain the power of law societies to regulate the conduct of lawyer-politicians. From most significant to least significant, these are parliamentary privilege, ministerial immunity, freedom of speech, and federalism.

Given the prevalence of lawyer-legislators, the most substantial legal barrier is the absolute protection for statements made in the legislature, a key aspect of parliamentary privilege.<sup>82</sup> It is constitutionalized in both Canada and the US.<sup>83</sup> As Binnie J of the Supreme Court of Canada stated in *Canada (House of Commons) v Vaid*, “The purpose of privilege is to recognize Parliament’s *exclusive* jurisdiction to deal with complaints within its privileged sphere of activity.”<sup>84</sup> However, the weakness of this approach is that its assumption that legislators should be regulated by legislatures according to the standards of legislatures. It is questionable that legislatures would have the capacity or willingness to enforce the norms or rules of the legal profession against lawyer-legislators. Nonetheless, it is virtually certain that this doctrine would bar disciplinary action for anything said by a lawyer-politician in legislative proceedings.

What is less clear in both countries is the scope of immunity for executive-branch politicians, referred to as ministerial immunity. To some extent this is a lesser issue in Canada, given that the premier or prime

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<sup>82</sup> In the Canadian context, see *Canada (House of Commons) v Vaid*, 2005 SCC 30, [2005] 1 SCR 667 [*Vaid*]. In the American context, where it is termed “legislative immunity,” see *Tenney v Brandhove*, 341 US 367 at 372-79 (1951) [*Tenney*], cited in Hopkins, *supra* note 2 at 924.

<sup>83</sup> The preamble of the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, refers to “a Constitution similar in Principle to that of the United Kingdom,” as recognized in *Vaid, ibid* at para 21, which notes the United Kingdom’s tradition of parliamentary privilege. For a discussion of *Vaid*, see Steven R Chaplin, “House of Commons v. Vaid: Parliamentary Privilege and the Constitutional Imperative of the Independence of Parliament” (2008) 2 J Parliamentary & Political L 153. See similarly US Const art I, § 6: “The Senators and Representatives ... for any Speech or Debate in either House, they shall not be questioned in any other Place,” noted in *Tenney, ibid* at 372-73, which also traces at 372 the history of the United Kingdom tradition. Note that although the Constitution refers to Congress, the privilege has been held to apply at the state level – *Tenney* concerned the California legislature; see *Tenney, ibid* at 369.

<sup>84</sup> *Vaid, supra* note 82 at para 4 [emphasis in original].

minister and the cabinet are almost always legislators and so are protected by parliamentary privilege for their conduct in the legislature. In the American context, the protection is clearest in its application to the president himself.<sup>85</sup> Two Canadian cases regarding claims of ministerial immunity by a provincial minister of justice against law society discipline come to opposite results. In a 1967 Quebec case, the Minister was held to be immune for criticism of a judge in a public speech.<sup>86</sup> In 1987, however, a judge refused to prohibit the Law Society of the Yukon from proceeding on charges against the Minister for criticizing a judge in a press interview, holding that “the principle of ministerial immunity from a disciplinary inquiry by the Law Society ... has not been established.”<sup>87</sup> Thus, the extent to which ministerial immunity precludes law society discipline remains uncertain.

Another potential challenge to the regulation of lawyer-politicians is that it violates the constitutional freedom of speech under section 2(b) of the *Canadian Charter of Rights and Freedoms*.<sup>88</sup> Discipline of lawyers has been held to be a justifiable limitation on freedom of speech under section 1 of the *Charter*.<sup>89</sup> In the leading case of *Histed*, a lawyer described one judge as “a bigot” and others as “too right wing” in a letter to opposing counsel.<sup>90</sup> In rejecting the lawyer’s *Charter* challenge to law society

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<sup>85</sup> Hopkins, *supra* note 2 at 921-22, citing *Nixon v Fitzgerald*, 457 US 731 at 749 (1982); and *Clinton v Jones*, 520 US 681 at 693-94 (1997). The American term for ministerial immunity is “executive immunity.”

<sup>86</sup> *Barreau (Montréal) c Wagner*, 1967 CarswellQue 253, [1968] BR 235 (QB). The CBA Code gives the following description of this case, *supra* note 15, ch X, commentary 8, footnote 10: “In *Barreau de Montreal v Claude Wagner* ... it was held that the respondent, then provincial Minister of Justice, was not subject to the disciplinary jurisdiction of the Bar in respect of a public speech in which he had criticized the conduct of a judge because he was then exercising his official or ‘Crown’ functions.”

<sup>87</sup> *Kimmerly v Law Society (Yukon)*, 3 YR 54, [1987] YJ No 39 (QL) (SC). For the subsequent decision of a Committee of Inquiry of the Law Society of the Yukon dismissing the charges, see *Kimmerly*, *supra* note 70.

<sup>88</sup> *Charter*, *supra* note 54, s 2(b).

<sup>89</sup> *Histed*, *supra* note 77 at paras 79-82, quoted with approval in *Goldberg v Law Society of British Columbia*, 2009 BCCA 147 at paras 58-59, 92 BCLR (4th) 18. *Goldberg* was cited by disciplinary counsel in *Morgan*, *supra* note 50 at 5. In rejecting *Morgan*’s *Charter* claim, the hearing committee held at 9 that “[i]t is well established law in Canada that the governing societies, and in this case the Nova Scotia Barristers Society, has a right to impose a reasonable restraint on the freedom of speech of its members consistent with the provisions of section 1 of the *Charter*.”

<sup>90</sup> *Histed*, *ibid* at para 2. A more recent case from the Supreme Court concerning offensive language in a letter written by a lawyer to a judge quoted *Histed* with approval; see *Doré*, *supra* note 77 at para 64. However, the *Charter* analysis in *Doré* was brief, as the issue was not the constitutionality of the relevant rule of ethics, the *Code of ethics of advocates*, RRQ 1981, c B-1, r 1, art 2.03, but whether its application in that case was

disciplinary proceedings, the Manitoba Court of Appeal – using language similar to that in *Rowe*<sup>91</sup> – observed that choosing to become or remain a lawyer necessarily involves restrictions not faced by the general public:

While litigants and other interested persons may comment publicly on cases before the courts and may criticize judicial decisions in terms which some might consider offensive, lawyers are bound by the constraints of the professional standards which apply to all members of the legal profession.... [I]f [a lawyer] wishes to have that same unfettered right to criticize the administration of justice, he may do so, *but not while a member of the Law Society*.<sup>92</sup>

Similarly, the ethical regulation of American lawyers has been held not to violate the First Amendment to the US Constitution.<sup>93</sup> Thus freedom of speech does not pose a major obstacle to the regulation of lawyer-politicians.

There remains a final constitutional consideration to address. Hopkins has characterized the discipline of federal lawyer-politicians by state bars as a threat to federalism, particularly the potential for attempts to discipline

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reasonable in accordance with the *Charter* value of freedom of expression; see *Doré* at paras 59-60, 67-71.

<sup>91</sup> *Supra* note 57 at 9: “Having chosen to retain his membership in The Law Society, he cannot avoid his responsibilities as a lawyer.”

<sup>92</sup> *Histed*, *supra* note 77 at para 79 [emphasis added].

<sup>93</sup> Housman, *supra* note 2 at 79, referring to US Const amend I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Housman cites the following sources in n 341: *State v. Russell*, 610 P 2d 1122 at 1126 (Kan 1980); *Kentucky State Bar Ass’n v Lewis*, 282 SW 2d 321 at 326 (Ky Ct App 1955); *Nebraska State Bar Ass’n v Michaelis*, 316 NW 2d 46 at 53 (Neb 1982); *In re Thatcher*, 89 [NE] 39 at 88 (Ohio 1909). Indeed, one of the cases quoted by Housman at 79 to illustrate this point uses language remarkably similar to that in *Histed*:

[A] layman may, perhaps, pursue his theories of free speech or political activities until he runs afoul of the penalties of libel or slander, or into some infraction of our statutory law. A member of the bar can, and will, be stopped at the point where he infringes our Canon of Ethics; and *if he wishes to remain a member of the bar* he will conduct himself in accordance therewith.

*In re Woodward*, 300 SW2d 385 at 393-94 (Mo 1957) [emphasis added]. See also *Gentile v Nevada State Bar*, 501 US 1030 at 1075 (1991) [*Gentile*], where Chief Justice Rehnquist (dissenting on another issue) held for a majority of the Court that “the “substantial likelihood of material prejudice” standard [for restricting attorneys’ comments concerning ongoing trials] constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State’s interest in fair trials.”

the president regarding his use of the pardon power or the war power or to discipline sitting Supreme Court justices.<sup>94</sup> Indeed, he suggests that any federal lawyer-politicians must not be disciplined by state bars for their non-criminal and discretionary conduct in office.<sup>95</sup> However, from a Canadian perspective, this situation – federal officials being regulated *qua* lawyer at the provincial or territorial level – appears to be merely one of many quirks created by a federal system as opposed to a “threat” to the division of powers. For example, the Supreme Court of Canada in *Krieger v Law Society of Alberta*, although in *obiter*, noted that law societies have jurisdiction over lawyers for the federal government: “As members of their respective law societies, federal Crown prosecutors are subject to the same ethical obligations as all other members of the bar and not immune to discipline for dishonest or bad faith conduct.”<sup>96</sup> Moreover, unlike federal prosecutors – who law societies could disqualify from their jobs by disbarring them – lawyer-politicians do not practice law and so disbarment or any lesser discipline could not affect their ability to hold federal office.

Thus, with the major exception of parliamentary privilege and the potential exception of ministerial immunity, there are no legal barriers to the regulation of lawyer-politicians.

### *5. Policy Considerations: Should Lawyer-Politicians’ Conduct be Regulated?*

To the extent that law societies can – as a matter of law – regulate the conduct of lawyer-politicians, it must be determined whether they should – as a matter of policy – indeed exercise that authority. This determination requires an examination of the potential direct and indirect impacts of such regulation. These impacts fall into three categories: the double standard between lawyer-politicians and other politicians, the potential abuse for political purposes, and the possible implications for the self-regulation of the legal profession.

#### *A) The Double Standard*

As demonstrated by the cases discussed above, the rules of conduct clearly create a double standard between lawyer-politicians and their non-lawyer colleagues. This distinction has been recognized repeatedly by American

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<sup>94</sup> Hopkins, *supra* note 2 at 884-913.

<sup>95</sup> *Ibid* at 930-32.

<sup>96</sup> 2002 SCC 65 at para 56, [2002] 3 SCR 372.

authorities.<sup>97</sup> However, it has been only tentatively noted in the Canadian legal literature. For example, Lorne Sossin has written of the rule on lawyers in public office, “Interestingly, this implies that two people, holding the same or similar public office, may be held to different standards of conduct merely because one is also qualified to practice law.”<sup>98</sup>

In evaluating whether this double standard is problematic, it is helpful to distinguish between a lawyer-politician’s success as a politician versus her normative effectiveness as a holder of public office. The distinction is obviously an imperfect one, as political success is essential to gaining and keeping office. To the extent that legal ethics prevents the lawyer-politician from engaging in expedient conduct that may be a common or even accepted part of politics – for example, lying to the media as in *Yoshimura* or secretly recording a conversation as in *Bayly* – the rules of conduct do impose a comparative political disadvantage. Such a disadvantage may, however, be justifiable. For example, Rapoport has noted that lawyer-politicians share the “special duty” of all lawyers “to work to improve the system of justice.”<sup>99</sup> Housman makes a related point: “Differential responsibilities are a price that lawyers, as officers of the courts, pay to be members of the profession.”<sup>100</sup>

The higher ethical obligations on lawyer-politicians may actually improve the tone of political discourse and the normative quality of politicians. Christopher Brinson has suggested that these greater obligations are “a potential benefit” to the public, as such politicians “exhibit a higher standard of value than is currently prevalent in politics.”<sup>101</sup> Jeffrey Stempel has argued that the deterioration of political discourse, including the “general decline in civility and principled negotiation,” is partly due to the decreasing number and influence of lawyer-politicians and the failure of those that remain to meet their ethical obligations as lawyers.<sup>102</sup>

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<sup>97</sup> See e.g. Rapoport, *supra* note 2 at 729; Brinson, *supra* note 6 at 276; Cody, *supra* note 9 at 464; Hopkins, *supra* note 2 at 845; Kellenberg, *supra* note 2 at 344; Housman, *supra* note 2 at 81; Stempel, *supra* note 4 at 497.

<sup>98</sup> Lorne M Sossin, *Halsbury’s Laws of Canada: Legal Profession*, 1st ed (Markham: LexisNexis, 2007) at §HLP-104. The same passage is included in another treatise to which Sossin contributed: Dodek, *Canadian Legal Practice*, *supra* note 56 at §5.78.

<sup>99</sup> Rapoport, *supra* note 2 at 731.

<sup>100</sup> Housman, *supra* note 2 at 81.

<sup>101</sup> Brinson, *supra* note 6 at 276, 284.

<sup>102</sup> Stempel, *supra* note 4 at 481-482, 488-489, 497.

While this double standard may deter some lawyers from entering politics, such an impact could be desirable to the extent that unethical lawyers are the ones who are deterred.<sup>103</sup> Housman makes this point more dramatically: “[T]hose lawyers who are so concerned that egregious political actions may bring about liabilities as to remove themselves from participating in politics probably should not be involved in matters of public trust in the first place.”<sup>104</sup> And who can argue with that?

One potential criticism of this reasoning, albeit cynical, is that lawyer-politicians who violate norms of legal ethics by engaging in accepted political conduct are still more desirable than non-lawyer politicians prone to engage in the same conduct, solely by virtue of their special training and skills. Competent lawyers are detail-oriented and experienced in analytical reasoning, and they understand the substantive law and the interpretation of legislation.<sup>105</sup> Moreover, the conduct of a lawyer-politician could violate the ethical standards of the legal profession while still surpassing those of non-lawyer politicians. Such criticism, however, overlooks the harm that such lawyer-politicians nonetheless do to the reputation of the legal profession and the administration of justice.

The more serious limitation of Housman’s assertions becomes apparent when one considers the effect of the double standard on the conscientious politician’s zealous fulfillment of the duties of her office. Surely lawyers who desire the flexibility to take “egregious political actions” are not desirable candidates for public office. As described above in the *Morgan* and *Rowe* cases, however, lawyer-politicians may believe it is necessary to violate legal ethics in the good-faith execution of their responsibilities. While not necessarily “egregious” – they may actually seem quite defensible – such violations also expose the politician-lawyer to professional consequences. Indeed, Hopkins cites “the necessary freedom to perform their job functions in a principled fashion” as a primary reason for his position that lawyer-politicians should not face disciplinary consequences for their conduct.<sup>106</sup> To the extent that this reality discourages “good” lawyers from seeking public office or vigorously fulfilling the functions of that office, it is certainly problematic.

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<sup>103</sup> Housman, *supra* note 2 at 81.

<sup>104</sup> *Ibid* at 81.

<sup>105</sup> TW Cary, “Where Have All the Lawyers Gone? The Problem of the Vanishing Lawyer-Legislator” (2006) 67(2) *Alabama Lawyer* 111 at 115; Janet Stidman Eveleth, “Lawyer Legislators Vanishing from Legislative Landscape” (2008) 41(6) *Maryland Bar J.* 62 at 63; Brinson, *supra* note 6 at 279-82; Elizabeth Holtzman, “Women Lawyers in the Political Arena” (1992) 14(1) *Women’s Rts L Rep* 1 at 5.

<sup>106</sup> *Supra* note 2 at 932. The other key factor is his evaluation of the requirements of federalism, which was discussed above at notes 94-95.

There have been repeated expressions of concern regarding the decreasing number of lawyers in political office.<sup>107</sup>

### *B) Abuse for Political Purposes*

The robust regulation of lawyer-politicians may also have undesirable side effects beyond the constraint on the zealous execution of the duties of their office. Another important policy consideration is the potential for the rules of conduct to be abused by opponents of lawyer-politicians – to be used, as have criminal law and civil law, to gain political advantage. The post-Watergate “criminalization of politics” in the US, particularly as exemplified in the investigation and impeachment of President Bill Clinton, provides a somewhat extreme example of the use of law as a political weapon.<sup>108</sup> The civil law can also be used as a tool to stifle criticism by opponents. For example, only a few years ago the Prime Minister of Canada brought an action in defamation against the opposing Liberal Party.<sup>109</sup> While the Prime Minister’s true motivations are unknowable, it has been suggested that the purpose was to constrain debate of the allegations and to damage the Liberals financially.<sup>110</sup> In light of these phenomena, it is appropriate to recognize that lawyer ethics complaints could similarly be utilized for political purposes; indeed, there are cases in which they may already have been.

In 2005, Conservative Member of Parliament John Reynolds filed a complaint with the Law Society of Upper Canada regarding an Ontario lawyer (and former Premier) who had allegedly encouraged another Conservative MP to switch parties; he also complained to the Law Societies of Upper Canada and British Columbia, respectively, about the (Liberal) Prime Minister’s Chief of Staff (an Ontario lawyer) and a member of cabinet (a BC lawyer) trying to convince a different Conservative MP to vote against his party.<sup>111</sup> These complaints provoked attention in the legal press, with a former senior counsel for the Law Society of Upper Canada characterizing them as “a cheap political trick”

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<sup>107</sup> See e.g. Stempel, *supra* note 4 at 481-87; Eveleth, *supra* note 105 at 62-63; Cary, *supra* note 105 at 111-13; William M Corrigan, “Lawyers in the Legislature, George Shannon and the Missouri Plan” (2004) 60(1) J Missouri Bar 8.

<sup>108</sup> See e.g. Edwin M Yoder, “The Presidency and the Criminalization of Politics” (1999) 43 Saint Louis ULJ 749.

<sup>109</sup> Greg Flynn, “Strategic Defamation Lawsuits and Parliamentary Accountability” (2009) 4 J Parliamentary & Political L 283 at 283, 291-94 (2009). The action was later dismissed without costs on the consent of the parties; see *ibid* at 283.

<sup>110</sup> *Ibid* at 283-84.

<sup>111</sup> Jane Taber, “Tory MP asks law society to probe Peterson; Former Ontario premier acted improperly in Stronach defection, Reynolds says” *The Globe & Mail* (15 June 2005) A7, 2005 WLNR 12652246.



and “just an attempt by the Opposition to embarrass the government.”<sup>112</sup> While these descriptions may be debatable along partisan lines, what is also interesting is that lawyer’s explanation for why an investigation would be inappropriate: “The individuals in question . . . were functioning in their capacity as politicians, not in their capacity as lawyers, and for that reason, it is in my opinion, not an appropriate matter for investigation.”<sup>113</sup>

The Reynolds complaints and these comments by a former disciplinary counsel raise two important issues. First, a complaint against a lawyer-politician is not necessarily illegitimate or unfounded merely because it is made by a political opponent. Reynolds may have had political reasons to make the complaints, but he may also have honestly believed that the politicians in question had violated the ethical standards of lawyers; indeed, Reynolds said that a lawyer friend of his had told him that the conduct at issue was unethical, and that he had made the complaints at the friend’s suggestion.<sup>114</sup> However, even if his *sole* purpose was political, it does not necessarily follow that the complaint was without merit – the propriety of the conduct is independent of the motivation of the complainant.

The second issue raised by the former disciplinary counsel’s comments is a more fundamental one about the rule regarding lawyer-politicians. The suggestion that an investigation is inappropriate because the lawyer-politicians “were functioning in their capacity as politicians, not in their capacity as lawyers” is surprising as it is directly contrary to the letter and spirit of that rule.<sup>115</sup> The relevant consideration is not the capacity in which the lawyer-politician was acting, but instead – as the FLSC and LSUC commentary indicates – whether that conduct “reflects adversely on the lawyer’s integrity or professional competence.”<sup>116</sup>

Journalist Edwin Yoder has eloquently described two major dangers of the criminalization of politics, which can be applied more generally to the use of law as a political weapon and specifically to rules governing lawyer conduct: “to squander public energy and resources on relatively trivial

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<sup>112</sup> Cristin Schmitz, “Should lawyer politicians be investigated by law societies?” 25(10) *Lawyers Weekly* (8 July 2005) (QL), quoting Stephen Traviss.

<sup>113</sup> *Ibid.* The Law Society of British Columbia did investigate the allegation against the member of cabinet; see “Lawyer to review Dosanjh’s role in Grewal affair” *The Globe & Mail* (22 June 2005) A5, 2005 WLNR 12649247.

<sup>114</sup> Taber, *supra* note 111; Schmitz, *supra* note 112.

<sup>115</sup> Schmitz, *ibid.*, quoting Stephen Traviss; FLSC Model Code, *supra* note 11 at r 7.4 and commentary.

<sup>116</sup> FLSC Model Code, *supra* note 11, r 7.4, comment 2; LSUC Rules, *supra* note 16, r 6.05(1), commentary.

evils” and “to confess a collapse of faith in the ability of the press to expose, the politicians to scrutinize, and the voters to recognize and punish, significant departures from public probity.”<sup>117</sup> This first danger is certainly true for the regulation of lawyers; if complaints about, and investigations of, lawyer-politicians became more common, there could be resource implications for law societies.<sup>118</sup> Even if the conduct involved was not always “relatively trivial,” there would remain the need to separate the trivial matters from the non-trivial ones.

Yoder’s second perceived danger is a more fundamental one; in a democratic system of government, judgment about the propriety of politicians’ conduct is a task for voters. This issue can be resolved, however, by recognizing that the lawyer-politician is simultaneously both a lawyer and a politician. It is for the law society to determine whether or not a lawyer has breached the rules of conduct, and it is for the voters to decide how much that violation matters – if at all. As noted by the disciplinary committee in *Rowe*, by virtue of becoming and remaining a lawyer the lawyer-politician has voluntarily agreed to be held to a higher standard of conduct than she otherwise would be.<sup>119</sup> Insofar as voters should be able to decide which factors they consider relevant, it is not for the regulator to paternalistically withhold a piece of information from them by refusing to adjudicate a potential ethical violation. Yoder’s concern may also be less pressing in the context of lawyer regulation because the public may well consider a disciplinary record to carry less stigma than a criminal one.

A third danger, implicit in Yoder’s position but worth considering explicitly, is that the criminalization of politics is intertwined with the politicization of criminal justice. The same holds true for the regulation of the legal profession. As Hopkins has put it, “disciplinary actions against lawyer-politicians run the inherent danger of becoming entangled in the politics surrounding the alleged misconduct.”<sup>120</sup> Similarly, Housman has noted in the campaign context that “given the political nature of disciplinary boards, incidences where a disciplinary board seeks out for discipline campaigning lawyer-candidates are unsettling.”<sup>121</sup> It must be

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<sup>117</sup> Yoder, *supra* note 108 at 751.

<sup>118</sup> Lauren Gilius has noted this concern in the narrower context of political campaigns: “[T]here is a substantial question as to the ability of Bar Counsel to perform an investigation for every political assertion lawyer-candidates or political campaigns make;” see Gilius, *supra* note 2 at 32.

<sup>119</sup> *Rowe*, *supra* note 57 at 9: “Having chosen to retain his membership in The Law Society, he cannot avoid his responsibilities as a lawyer.”

<sup>120</sup> Hopkins, *supra* note 2 at 848. Hopkins at 924 gives the example of the Arkansas disbarment proceedings against President Bill Clinton.

<sup>121</sup> Housman, *supra* note 2 at 18, note 47.

strenuously emphasized that, regardless of whether American disciplinary boards are in fact “political,” there could be no credible suggestion that Canadian law societies or their tribunals are political in nature. In a hyperpartisan political climate, however, mere questioning – let alone sanction – of a politician is enough to prompt claims of political bias. At the same time, the potential for criticism and accusations of bias cannot warrant an abdication of the responsibility of law as a self-regulating profession.

While these concerns may make the regulation of lawyer-politicians complex and undesirable, they do not make it unnecessary. A nuanced approach to this dilemma was eloquently expressed by the United States District Court for the District of Puerto Rico in *Romero-Barcelo v Acevedo-Vila*, a petition for disbarment in which the newly elected Resident Commissioner was accused by the previous officeholder of making false statements in a complaint to the Federal Elections Commission:<sup>122</sup>

*Duty compels us to adjudicate this legal dispute* brought by two attorneys who happen to be political rivals. We note with disillusion and dismay the depths to which public discourse has fallen, and we hope, though indications are to the contrary, that this court is seldom, if ever, used to resolve *matters that are best left to other arenas*. That said, *we will not shirk our responsibility to enforce the highest standards of ethical conduct* for any individual who wishes to practice before this Federal District Court.<sup>123</sup>

In other words, while such political disputes would ideally be addressed through normal political mechanisms, that decision is not for the disciplinary process to make. Even a principled reluctance to engage in partisan disagreements could easily be misinterpreted by the public as condoning the conduct at issue; indeed, any hesitancy to enforce ethical rules against lawyer-politicians could damage public expectations of the profession. As the Court emphasized in *Romero-Barcelo*, “The mere fact that some may consider the behavior here as par for the course in both the legal and political process when it is in actuality unethical suggests that we have been too lax in enforcing the clearly articulated duties of the bar.”<sup>124</sup>

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<sup>122</sup> *Romero-Barcelo v Acevedo-Vila*, 275 FSupp2d 177 at 187-88 (D Puerto Rico, 2003) [*Romero-Barcelo*].

<sup>123</sup> *Ibid* at 181 [emphasis added].

<sup>124</sup> *Ibid* at 214.

### C) Implications for the Continued Self-regulation of the Legal Profession

A different policy concern is whether enforcement of ethical rules against lawyer-politicians could result in a backlash by legislators against law societies, and possibly against self-regulation itself. At the lowest level, this could consist of statutory amendments to remove the authority to discipline lawyers for all or certain conduct while in political office. George Carpinello has discussed two analogous situations in which ethics laws for American legislators were amended in order to reduce exposure of lawyer-legislators to bar discipline.<sup>125</sup> In New York, lobbying by firms whose members or former members were sitting legislators was “hereby authorized and shall not constitute professional misconduct or grounds for disciplinary action of any kind solely by reason of [that] professional relationship.”<sup>126</sup> In Alabama, legislative conflict-of-interest rules were amended so as not to prohibit legislators from voting where client interests were involved.<sup>127</sup> Such an amendment could benefit law societies to some degree, as it would reduce or remove their specific responsibility – along with their authority – to address the controversial issue of lawyer-politicians. It would, however, adversely affect their ability to fulfill their overall mandate to regulate the profession in the public interest and maintain public confidence in the administration of justice.

A more drastic measure would be to eliminate or constrain the self-regulation of the legal profession, as was recently done in England and Wales.<sup>128</sup> Such a change would appear to be within the power of the provincial and territorial legislatures. While a President of the Law Society of British Columbia has argued that statutes merely recognize and “aid,” as opposed to grant the “privilege” of, self-regulation<sup>129</sup> – in other words, that the statutes are an “irrevocable legislative recognition of [lawyers’ self-regulatory] authority”<sup>130</sup> – the strength of that argument remains to be seen. Indeed, while the Chief Justice of British Columbia extrajudicially

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<sup>125</sup> Carpinello, *supra* note 10 at 112, 115.

<sup>126</sup> NY Pub Off Law §73(11)(c), as cited in Carpinello, *ibid* at 112.

<sup>127</sup> Carpinello, *ibid* at 115, citing Ala Code 1975 § 36-25-5.

<sup>128</sup> See Richard Devlin and Porter Heffernan, “The End(s) of Self-Regulation?” (2007-2008) 45 *Alta L Rev* 169 at 183-85; Alice Woolley, “Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation” (2012) 45 *UBC L Rev* 145 at 167-94 [Woolley, “Rhetoric and Realities”].

<sup>129</sup> Gordon Turriff, “Self-Governance as a Necessary Condition of Constitutionally Mandated Lawyer Independence in British Columbia” (address delivered at the Conference of Regulatory Officers, Perth, Australia, 17 September 2009) at 10, online: <<http://www.lawsociety.bc.ca/docs/publications/reports/turriff-speech.pdf>>, quoted in Woolley, “Rhetoric and Realities,” *ibid* at 146.

<sup>130</sup> Woolley, “Rhetoric and Realities,” *ibid* at 146.

commended the speech in which it was presented, he refrained from endorsing any specific component.<sup>131</sup> Although the Supreme Court of Canada has described the “independence of the Bar from the state in all its pervasive manifestations [a]s one of the hallmarks of a free society,”<sup>132</sup> the broader context of that recognition suggests that it may require only the absence of political interference with “the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law,” that is, “the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally.”<sup>133</sup> The Court explicitly recognized that “[t]here are many reasons why a province might well turn its legislative action towards the regulation of members of the law profession” as “officers of the provincially-organized courts” and “the object of public trust.”<sup>134</sup>

Indeed, Canadian law societies seem to be acutely aware of the potential for government regulation of the legal profession.<sup>135</sup> This awareness is exemplified by the following strong words of a hearing panel in a recent Ontario case of failing to respond to communications from the Law Society:

It is impossible for the Law Society to manage and to convince the public – and *maybe more importantly, the politicians* – that the Law Society is able to self-discipline our profession, if the opinion out in the public becomes that we are not doing that, that we are not controlling the profession, that we are not managing our discipline, *we are going to lose the right to selfgovern.*<sup>136</sup>

A similar sentiment was expressed by a hearing panel of the Law Society of British Columbia a few years earlier: “If the Law Society and its

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<sup>131</sup> Hon Lance Fish, Chief Justice of British Columbia, foreword to Turriff, *supra* note 129 at 2.

<sup>132</sup> *AG Can v Law Society of BC*, [1982] 2 SCR 307 at 335, 137 DLR (3d) 1 [*Law Society*], quoted in Woolley, “Rhetoric and Realities,” *ibid* at 145.

<sup>133</sup> *Law Society*, *ibid* at 336; see also Woolley, “Rhetoric and Realities,” *ibid* at 151-52. On the relationship between independence and self-regulation, see generally Woolley, “Rhetoric and Realities,” *ibid*; and Devlin and Heffernan, *supra* note 128 at 186-87, 191-93.

<sup>134</sup> *Law Society*, *ibid* at 335.

<sup>135</sup> See e.g. Woolley, “Rhetoric and Realities,” *supra* note 128 at 167-68: “Canadian lawyers and regulators appear anxious to avert the possibility of significant regulatory change, in part by preemptively addressing the concerns reflected by changes elsewhere, and by asserting strong normative claims that would justify resisting those changes, the most notable of which is independence of the bar” [footnote omitted]. See similarly Devlin and Heffernan, *supra* note 128 at 208-209.

<sup>136</sup> *Law Society of Upper Canada v Jay Ian Bernholtz*, 2011 ONLSHP 113 at para 5 (available on CanLII) [emphasis added].

members are not seen to take communications from the Law Society seriously, *the profession may lose the right to independent self-governance, as has occurred in other jurisdictions.*"<sup>137</sup>

Instead of legislatures themselves directly interfering with self-regulation, a more nuanced yet more concerning approach would be for legislatures to delegate to the executive the authority to do so. Such an amendment was recently made to the Ontario statute on the health professions, which are governed by regulatory colleges analogous to law societies.<sup>138</sup> The new provision authorizes the cabinet, on the recommendation of the Minister of Health, to appoint a "supervisor" with "the exclusive right to exercise all the powers of a Council," which is the board of a regulatory college such as the College of Physicians and Surgeons.<sup>139</sup> There could be specific situations in which this power may seem uncontroversial on the facts. For example, its only use to date was in response to an audit of the College of Denturists of Ontario that detailed unfairness in examinations and admissions and the College's failure to follow its own bylaws.<sup>140</sup> Nonetheless, such a broad power constitutes a standing threat, even if not intended as such, to self-regulation – and its responsible use in one instance is no guarantee against its abuse in the future.<sup>141</sup> While it could be meant as a reminder of the obligation to govern in the public interest, it could also function as a strong incentive – whether intentional or not – against incurring the displeasure of the government in other ways, such as investigating or disciplining politicians.

Canadian law societies are left with a practical dilemma regarding the approach to lawyer-politicians. In order to justify the continued self-regulation of the legal profession, they must maintain the confidence of the public in their ability to enforce the relevant ethical norms against all members, including lawyer-politicians. As Hopkins has put it:

If the legal profession's ability to govern itself indeed has been successful in insuring the public confidence in the legal system, which is required to preclude government intervention and regulation, then the bar's ability to discipline its members who hold

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<sup>137</sup> *Tsang, Re*, 2006 LSBC 17 at para 16 (available on CanLII) [emphasis added].

<sup>138</sup> *Regulated Health Professions Act, 1991*, SO 1991, c 18, s 5.01, as amended by SO 2009, c 26, s 24(2).

<sup>139</sup> *Ibid*, ss 5.01(1), (6).

<sup>140</sup> Nicholas Keung, "Province takes over denturists' regulator; Supervisor named after audit raises concerns over its governance" *The Toronto Star* (28 March 2012) 1, 2012 WLNR 6570991.

<sup>141</sup> For an analysis of the implications of this amendment, see Lynne Golding and Laurie Turner, "Governance Control Over Regulated Health Professional Colleges" (2010) 30(4) *Health L Can* 178 at 187-190.

high public offices for misconduct, even when the lawyer is not engaged in the practice of law, would be necessary to preserve its self-regulatory status.<sup>142</sup>

The profession's success in doing so, however, is potentially constrained by politicians – including some lawyer-politicians – who have the ability to restrict or even abolish self-regulation if they do not like the manner in which it is executed. These conflicting pressures leave a fine line to tread.

### 6. *Potential Approaches and Solutions*

The application of the rules of legal ethics to lawyer-politicians constitutes a pressing challenge for the regulation of the legal profession. The very real potential for ethics complaints to become a political weapon and to swamp the investigative capacity of law societies is a legitimate concern that warrants consideration. To some extent, these outcomes could impede the oversight of practicing lawyers, especially in the unlikely but not impossible event that increased scrutiny provokes a political backlash against self-regulation itself. The ultimate goal of the law societies – to safeguard the public interest and maintain public confidence in the legal profession and the administration of justice – cannot, however, be achieved if some of the most visible members of the profession appear to be committing misconduct free of disciplinary consequences. Indeed, there could be a reasonable apprehension that a longstanding rule (that “[a] lawyer who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law”)<sup>143</sup> is not being enforced. Such an apprehension is only furthered by comments, such as those by a former LSUC counsel, that it is not appropriate to investigate lawyer-politicians when they are acting in a political capacity.<sup>144</sup> Law societies should thus enforce ethical rules against lawyer-politicians insofar as they can as a matter of law – that is, subject to the constraints of parliamentary privilege and ministerial immunity.

If the ethical rules are to be applied to lawyer-politicians, the next question becomes *which* rules are applicable. Recall that the commentary to FLSC rule 7.4 focuses on “conduct ... that reflects adversely upon the lawyer’s integrity or professional competence” and characterizes misconduct by lawyer-politicians as a threat to the reputation of the legal profession.<sup>145</sup> Moreover, the rules explicitly impose on all lawyers “a duty

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<sup>142</sup> Hopkins, *supra* note 2 at 935.

<sup>143</sup> FLSC Model Code, *supra* note 11, r 7.4.

<sup>144</sup> *Supra* note 113.

<sup>145</sup> FLSC Model Code, *supra* note 11, r 7.4, comments 1-2.

to uphold the standards and reputation of the legal profession.”<sup>146</sup> This general language, in combination with limited precedent, leaves substantial uncertainty. MacNair has argued that determining which kinds of conduct are relevant “is a difficult role for the law societies to play and one which calls into question the extent to which conduct in office by lawyers can undermine the reputation of lawyers generally.”<sup>147</sup> Given that lawyer-politicians do not practice law, the concern in the commentary for conduct impugning integrity is more relevant for lawyer-politicians than that for conduct impugning professional competence;<sup>148</sup> nonetheless, one could imagine errors that would be relevant to a lawyer-politician’s ability to practice, such as failing to safeguard material that was subject to cabinet or caucus secrecy. Some rules, although directly going to integrity, would seemingly have no application outside of the practice of law – for example, those governing fees and disbursements (such as misuse of trust accounts, reasonable fees and disbursements, or contingency fees) or withdrawal from representation.<sup>149</sup> More general rules on integrity – to “discharge all responsibilities... honourably and with integrity,” and to “be courteous and civil and act in good faith with all persons with whom the lawyer has dealings”<sup>150</sup> - would certainly apply. So would the more specific rules that elaborate on these ideas, such as sending improper correspondence or recording a conversation without notice.<sup>151</sup> These are the kinds of violations at issue in the cases discussed above: deceiving the media, and through them, the public, as in *Yoshimura*; deceiving an independent watchdog, as in *Bayly*; and encouraging unlawful conduct, as in *Rowe*.

The obligations of lawyer-politicians, as lawyers, to the justice system warrant special emphasis. Inappropriate criticism of courts or tribunals (as in *Morgan* and alleged in *Kimmerly*)<sup>152</sup> and interference with fair trial rights (as in *Rowe*)<sup>153</sup> reflect poorly on the integrity of the lawyers involved and the broader legal profession. Unlike other violations, however, they also directly damage the administration of justice. The

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<sup>146</sup> *Ibid*, r 2.1-2.

<sup>147</sup> MacNair, *supra* note 10 at §12:30.

<sup>148</sup> In contrast, a lawyer in public office who did practice law, such as an Attorney General, would have to be wary of both conduct casting doubt on her integrity and conduct raising questions about her professional competence.

<sup>149</sup> FLSC Model Code, *supra* note 11, rr 3.6-1, -2, -10, 3.7.

<sup>150</sup> *Ibid*, rr 2.1-1, 7.2-1.

<sup>151</sup> *Ibid*, rr 7.2-3, -4.

<sup>152</sup> *Ibid*, r 5.6-1: “A lawyer must encourage public respect for and try to improve the administration of justice.”

<sup>153</sup> *Ibid*, r 7.5-2: “A lawyer must not communicate information to the media or make public statements about a matter before a tribunal if the lawyer knows or ought to know that the information or statement will have a substantial likelihood of materially prejudicing a party’s right to a fair trial or hearing.”



commentary to rule 5.6-1 is clear that the duty to “encourage public respect for ... the administration of justice”<sup>154</sup> applies to lawyers outside of practice and especially to lawyer-politicians:

The obligation outlined in the rule is not restricted to the lawyer’s professional activities but is a general responsibility resulting from the lawyer’s position in the community .... A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements.<sup>155</sup>

This increased credibility of lawyer-politicians as compared to other politicians, by virtue of being a lawyer, is in addition to the greater public visibility of lawyer-politicians as compared to other lawyers.<sup>156</sup> For these reasons, it would be beneficial to amend the commentary to rule 7.4 to cross-reference the commentary to rule 5.6-1 and emphasize that in addition to conduct going to integrity or professional competence, lawyers in public office should carefully consider their obligations regarding respect for the administration of justice.

While it seems fairly clear that some ethical rules do apply to lawyer-politicians and others do not, the applicability of some of the remaining rules seems uncertain. These are rules that may or may not be appropriately analogized to public office. Consider, for example, undertakings – “A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given.”<sup>157</sup> Does a campaign promise constitute an undertaking, especially if it is “written ... and absolutely unambiguous in [its] terms,” as the commentary suggests that undertakings should be?<sup>158</sup> While most lawyers would likely agree that the context distinguishes campaign promises from undertakings, a coherent argument could be made otherwise. Similarly, political advertising on behalf of a lawyer-politician would seem an unlikely target for law society regulation, but

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<sup>154</sup> *Ibid*, r 5.6-1.

<sup>155</sup> *Ibid*, r 5.6-1, comment 1. The comment also notes, “Yet, for the same reason, a lawyer should not hesitate to speak out against an injustice.” Recall that the decision in *Morgan*, *supra* note 50, cited the equivalent language from the ethics *Handbook* of the Nova Scotia Barristers’ Society, *supra* note 55. That commentary uses the more descriptive language of “broad, irresponsible allegations of corruption or partiality” instead of merely “irresponsible allegations.”

<sup>156</sup> Recall comment 1 to r 7.4, *ibid* (*supra* note 13): “[b]ecause such a lawyer [in public office] is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards.”

<sup>157</sup> *Ibid*, r 7.2-11.

<sup>158</sup> *Ibid*, r 7.2-11, comment 1.

such advertising could easily contravene the rule on marketing.<sup>159</sup> Another open question is the extent to which lawyer-politicians will be held responsible for the conduct of their aides and other political staff, based on the rule that “[a] lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions.”<sup>160</sup> Clarification from law societies, as to which rules of legal ethics apply to lawyer-politicians, would be advisable.<sup>161</sup> While greater certainty is desirable, however, a complete code of conduct specifically for lawyer-politicians would not be appropriate or feasible, given the many ways in which a lawyer-politician could potentially violate ethical rules.<sup>162</sup> Some degree of vagueness in rules of conduct for lawyers is unavoidable;<sup>163</sup> as stated in LSUC rule 1.03(1)(f), “rules of professional conduct cannot address every situation, and a lawyer should observe the rules in the spirit as well as in the letter.”<sup>164</sup>

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<sup>159</sup> *Ibid*, r 4.2-1: “A lawyer may market professional services, provided that the marketing is:

(a) demonstrably true, accurate and verifiable; (b) neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive; (c) in the best interests of the public and consistent with a high standard of professionalism.” Political advertising typically has many of the improper characteristics identified in comment 1: “(b) suggesting qualitative superiority to other lawyers; (c) raising expectations unjustifiably;

(d) suggesting or implying the lawyer is aggressive; (e) disparaging or demeaning other persons, groups, organizations or institutions; ... (g) using testimonials or endorsements that contain emotional appeals.” In the American context, see Housman, *supra* note 2, particularly at 17-18, and Gilius, *supra* note 2.

<sup>160</sup> FLSC Model Code, *ibid*, r 6.1-1.

<sup>161</sup> This call for clarification has been common in the American literature; see e.g. Gilius, *supra* note 2 at 42; Cody, *supra* note 9 at 481; Henry, *supra* note 10 at 276.

<sup>162</sup> Indeed, the lawyer-legislator code of conduct proposed by Kellenberg, *supra* note 2, primarily addresses conflicts of interest, gifts, and outside activities, as do many laws and codes governing politicians (see e.g. *Municipal Conflict of Interest Act*, *supra* note 46; *Members’ Integrity Act, 1994*, SO 1994, c 38; and *Conflict of Interest Code for Members of the House of Commons*, adopted 2004, amended 2007, 2008, 2009, Appendix to the Standing Orders of the House of Commons), as opposed to how the ABA rules would apply to lawyer-politicians.

<sup>163</sup> There is a level of vagueness at which rules become unenforceable. See e.g. *Gentile*, *supra* note 93, where Justice Kennedy held for a majority of the Court on this issue, quoting from *Grayned v City of Rockford*, 408 US 104 at 112 (1972), that the challenged rule was void because it did not give “fair notice to those to whom [it] is directed.”

<sup>164</sup> LSUC Rules, *supra* note 16. Although the FLSC Model Code, *supra* note 11, does not have a rule on interpretation as do the LSUC rules, its preface is to similar effect: The Code assists in defining ethical practice and in identifying what is questionable ethically .... Some circumstances that raise ethical considerations may be sufficiently unique that the guidance in a subrule or commentary may not answer the issue or provide the required direction.

The elephant in the room for any discussion of the applicability of the rules of ethics to lawyer-politicians is civility. Rule 7.2-1 provides that “[a] lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.”<sup>165</sup> It has been argued that the ethical rules on civility “should be considered purely aspirational and have virtually no regulatory impact,”<sup>166</sup> Indeed, the FLSC Model Code acknowledges that some of its content, “in addition to providing ethical guidance, may be read as aspirational.”<sup>167</sup> Moreover, the regulatory pursuit of civility has been criticized.<sup>168</sup> Recalling the commentary to FLSC rule 7.4, however, a principled approach requires that *all* rules that reflect on a lawyer’s integrity or fitness to practice be applied to lawyer-politicians. As an LSUC hearing panel recently observed, “the rationale underlying the requirement of civility reflects a concern with the effect of incivility on the proper functioning of the administration of justice *and public perception of the legal profession.*”<sup>169</sup> The rampant incivility that is a routine feature of politics raises questions of practicality and realistic expectations. However, a failure to enforce civility among lawyer-politicians would have significant costs, undermining either the commitment to regulate lawyer-politicians or the position that incivility adversely impacts the reputation of the legal profession.

Lawyer-politicians who find these ethical constraints unacceptable are free to surrender their licenses. Indeed, this option is implied in many of the cases discussed above.<sup>170</sup> Any politicians that did so would have to be careful to not hold themselves out as lawyers. They could also face some difficulties after leaving office if they wanted to return to the practice of law. Indeed, their conduct in the political arena – if sufficiently disreputable – could be an obstacle to re-admission.<sup>171</sup> The normative

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<sup>165</sup> FLSC Model Code, *supra* note 11.

<sup>166</sup> Dodek, “Canadian Legal Ethics,” *supra* note 3 at 38, referring to the work of Harry Arthurs.

<sup>167</sup> FLSC Model Code, *supra* note 11, preface.

<sup>168</sup> See e.g. Woolley, “Civility,” *supra* note 1. But in contrast see e.g. Michael Code, “Counsel’s Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System” (2007) 11 Can Crim L Rev 97.

<sup>169</sup> *Groia*, *supra* note 64 at para 63 [emphasis added].

<sup>170</sup> *Supra* note 67, discussing *Rowe*, *supra* note 57; *supra* note 92, discussing *Histed*, *supra* note 89; *Woodward*, *supra* note 93.

<sup>171</sup> See e.g. *Gagnon v Bar of Montreal*, 1958 CarswellQue 243, [1959] BR 92. The CBA Code gives the following description of this case, *supra* note 15, ch X, commentary 8, footnote 10: “In *Gagnon v. Bar of Montreal* ... it was held that on the application for readmission to practice by a former judge, his conduct while in office might properly be considered by admissions authorities.” For an assessment of character requirements as they relate to initial admission to practice, see Alice Woolley, “Tending the Bar: The

significance of surrendering one's law license would be weakened if regaining it appeared to be a mere formality.

After deciding whether the rules should be applied to lawyer-politicians, and which rules should be applied, the remaining issue is *how* those rules are to be applied. The pressing question, as raised but not resolved by an LSUC task force in 1999, is "what a lawyer is expected to do when his or her duties as a lawyer and as an individual in public office conflict."<sup>172</sup> As illustrated above, the conflicting precedents on point illustrate three possible approaches. The first, as argued unsuccessfully in *Morgan* but accepted by two members of the disciplinary committee in *Rowe*, is that the duties of the office must prevail. The second, as expressed in the decision in *Morgan* and the ultimate decision in *Rowe*, is that the duties of the lawyer must prevail. The third, as adopted in *Kimmerly*, is that the two sets of duties must be balanced in the particular context.

In the context of this uncertainty, what would be the best course of action for law societies? One option would be to do nothing; that is, simply continue to allow the jurisprudence to develop naturally, as it does in other areas of the law. Like lawyer-politicians who want to engage in unlawyerly conduct, such as lying to the press, those who are concerned that the appropriate execution of their duties of office may lead to disciplinary consequences that they are unwilling to accept would be able to surrender their licenses. This "solution," however, would impose a high cost on those lawyer-politicians who legitimately desired to reconcile their obligations as lawyers with the good-faith execution of the responsibilities of public office. Given the prevalence of lawyer-politicians and their high visibility, and assuming that the relevant case law will continue to grow slowly, it would be appropriate for the law societies to clarify the matter by clearly stating which approach will be taken: that the duties of lawyers prevail, that the duties of the office prevail, or that the duties must be balanced. To adopt the first approach, law societies would only have to clarify that the relevant rule will be enforced as written: "A lawyer who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law."<sup>173</sup> The other two approaches would require amendments to the rules or commentary. For example, a lawyer in public office could be deemed not to have violated the rules if he establishes that the conduct was undertaken in the good-faith execution of the duties of his or her office. If the balancing approach were to be adopted, the rules or commentary

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'Good Character' Requirement for Law Society Admission" (2007) 30 Dalhousie LJ 27 [Woolley, "Good Character"].

<sup>172</sup> LSUC, "Report on the Rules," *supra* note 49.

<sup>173</sup> FLSC Model Code, *supra* note 11, r 7.4.

should explicitly state that the good-faith execution of the duties of public office will be taken into account, while making clear that political zeal is subject to ethical constraints just as is the zeal of any lawyer acting as advocate.<sup>174</sup>

Of these three approaches – that the duties of lawyers prevail, that the duties of the office prevail, or that the duties must be balanced – the balancing approach is preferable. The other two provide predictability but have serious limitations. The third approach, that the duties *qua* lawyer trump those *qua* politician, features uncompromising adherence to the notion that the law is an honourable profession, but overlooks that service in political office is also an honourable and vital calling for which lawyers are well-suited and is one of the many ways in which they have historically contributed to their communities. It would be undesirable to cause conscientious lawyers to forego this form of public service. The opposite approach, that the duties of a politician trump, recognizes the overarching duty of politicians to their office and their constituents; however, its oversimplified nature offends the notion that there are some things a lawyer cannot do, no matter how understandable the justification. In doing so, it could undermine the public confidence in the regulation of the legal profession and, in turn, in the administration of justice. The balancing approach acknowledges the double standard between lawyer-politicians and other politicians by seeking to increase the room for good-faith execution of the obligations of public office.

### 7. Conclusion

Law societies, and indeed the entire legal profession, should actively engage with the complex issue of how the rules of legal ethics apply to lawyer-politicians. There are three questions that must be addressed: *whether* the rules apply, *which* rules apply, and *how* those rules are applied. Lawyer-politicians are a legitimate and necessary target of regulation because they have the potential to do serious harm to the public reputation of the legal profession and of the administration of justice itself. However, the uncertainty over which specific rules apply and the manner in which those rules will be applied is unhelpful to the public, the profession at large, and lawyer-politicians themselves. A clearly-worded rule – appearing to indicate that the standards of lawyers prevail over those of politicians – has been interpreted inconsistently in situations where the lawyer-politician asserts that her responsibilities as a politician clash with her responsibilities as a lawyer. The most appropriate approach would be

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<sup>174</sup> See generally Frisch, *supra* note 64. See also Stempel, *supra* note 4 at 497: “[P]olitics is a contact sport and one expects partisan advocates to be partisan. But lawyer-partisans should be able to remember that they are lawyers as well as partisans.”

that the two sets of responsibilities will be balanced in context. But whatever approach law societies choose, they should amend the ethical rules and commentary so as to specify that approach and clarify which specific rules apply to lawyer-politicians. The commentary could also be improved by emphasizing obligations regarding respect for the administration of justice. While law society discipline of lawyer-politicians may have resource implications, increase the use of lawyer regulation as a political weapon, and perhaps even provoke provincial or territorial legislatures to limit the self-regulation of the legal profession, the duty to protect the public interest requires it.

Regardless of enforcement and disciplinary considerations, lawyer-politicians themselves should voluntarily accept their ethical obligations as lawyers and attempt to meet them. Politicians that do not want to be bound by these duties, or feel that they will adversely impact the ability to serve the office or constituents, should do the honourable thing and surrender their licenses. However, no matter what approach is taken and which rules are determined to apply to the political setting, the jurisdiction of law societies is limited by the substantive legal barrier of parliamentary privilege. Thus, lawyer-politicians will presumably remain free to violate the rules of legal ethics inside legislatures with complete impunity from any disciplinary consequences. As such, the main effect of increased attention from law societies may be to extend a distinction recognized by all canny Canadian politicians: statements that could have legal consequences – such as defamation – should be made inside, not outside, the doors of the legislature.