

LEGISLATIVE ETHICS IN INDIANA: A MATTER OF PERCEPTION—AND PERCEPTION MATTERS

EDWARD D. FEIGENBAUM*

Few things are as critical to the effective and efficient performance of a democracy as the understanding by public officials that public service is a public trust. The system can only function properly if those responsible for legislating, implementing, and adjudicating our laws are motivated by public service, rather than by self-interest.¹

In a state such as Indiana, where service in the General Assembly is a part-time responsibility, this altruistic motivation becomes even more important as lawmakers must insulate—or separate—themselves from assorted outside influences that might adversely affect their ability to make impartial decisions and vote on matters without having their motives questioned over the perception or reality of those actions.

When one considers “Models and Directions for Indiana” in the realm of legislative ethics, there are two approaches to take. One is to consider Indiana legislative ethics in a national context, measuring our progress and standing against Congress or other states across the country. The other option is to evaluate Indiana legislative ethics in a vacuum, and consider whether we can simply do a better job of ensuring that our legislators are responsive to their constituents and the needs of the state, and not swayed by other considerations—illegal or morally questionable—that can be interposed in the relationship between a legislator and his or her district.

When one views the extensive litany of public corruption cases in other states and the daily news reports from other states about questionable ethical activities,² Indiana’s legislature appears to be largely above the fray in terms of legislative activities, and has been relatively free of high-profile scandals—admittedly as measured against some significant transgressions in other states—for many years. Indiana appears to be headed in the right direction.

Certainly, the ethical climate is better today than it was in the late 1970s. At that time, two successive Republican Senate president pro tempores were convicted of public corruption charges, the legislature operated in a closed environment accessible only to veteran lobbyists, with control centralized in a handful of members and committees, and a citizen outside of Indianapolis proper had little ability to access news or information about legislative activities.³ In Indiana, legislative ethics had long resembled the line from *Huckleberry Finn*, where one of the Twain characters asked: “[W]hat’s the use you learning to do right when it’s troublesome to do right and ain’t no trouble to do wrong, and the

* B.A., with honors, 1978, Indiana University; M.B.A., 1982, Indiana University School of Business; J.D., 1982, Indiana University School of Law.

1. Edward D. Feigenbaum & Stephan W. Stover, *Privacy and Government Ethics*, in *PRIVACY LAW AND PRACTICE 16-1* (George B. Trubow ed., 1987).

2. DAVID E. FREEL, *COGEL BLUE BOOK 2005 ETHICS UPDATE* (2005).

3. See JUSTIN E. WALSH, *THE CENTENNIAL HISTORY OF THE INDIANA GENERAL ASSEMBLY, 1816-1978*, at 643-45 (1987).

wages is just the same?”⁴

Why is it better in Indiana today? We seem to benefit from a better class of people in public service for the right reasons. We have more stringent statutory laws and chamber rules proscribing unethical conduct on the part of both lawmakers and those seeking to influence them.⁵ Citizens—and prosecutors—have additional tools at their disposal, such as personal financial disclosure forms,⁶ to help evaluate whether lawmakers are acting in their own self-interest. We scrutinize conduct more carefully, both as a law enforcement priority and because members of the news media are less dependent on personal relationships with lawmakers and more aggressive in their work.⁷ We are home to a generation of Hoosier citizens who appear to have a much lower public tolerance of misconduct than their parents and grandparents. We afford legislators more tools for assessing their own conduct, including a more active Senate ethics committee that provides counsel to colleagues about conflicts (albeit privately, with no public disclosure of the actions), and the Internet, which allows lawmakers to quickly—and anonymously—determine how their colleagues in other states have approached similar situations. Finally, we enjoy greater transparency, through the Internet availability of almost real-time information about legislation and legislative action, and streaming video of legislative floor proceedings and some key committee meetings.

But despite these advances, Indiana is far from perfect for several reasons. First, promoting legislative ethics is a thankless task. Although the public professes to desire high standards, it has low expectations of lawmakers as a group. Put another way, although legislative bodies perennially rank low in public opinion polls—in Indiana and elsewhere—Hoosiers only infrequently speak ill of their own legislators and turn them out of office at a rate that some once joked trailed only that of turnover in the old Soviet Politburo.

Lawmakers also believe that they are largely honest and abide by high standards, and typically take umbrage when their individual respective or collective ethics are questioned.⁸ Some even will explain that they are supposed to represent a cross-section of their constituents, and no one claims to hail from a district comprised of Hoosiers whose ethical value systems are above reproach, or represent a district bereft of criminals.

However, public and legislative perceptions of what is appropriate do not appear to be consonant. One veteran Indiana political reporter once wrote that

4. MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* 94 (Penguin Books ed. 1999).

5. *See* IND. CODE §§ 2-7 (2005).

6. IND. CODE § 2-2.1-3-2 (2005).

7. *Ethics: Senate Bans Lobbyist-Funded Trips*, 2006 LEGISLATIVE UPDATE (Indiana State Senator Luke Kenley Post-Session Newsletter, Indianapolis, Ind.), Apr. 2006, at 2, available at <http://www.in.gov/S20/2006postsession.pdf>.

8. *See* Indiana Lobby Registration Commission, COMMENTARY OF THE INDIANA LOBBY REGISTRATION COMMISSION 5 (2001), available at <http://www.in.gov/ilrc/pdf/commentary2001.pdf> (describing “the quickest override action in state history to that date” by legislators of a gubernatorial veto of a bill weakening lobbying reporting standards related to legislators).

the then-chair of the House Ethics Committee spoke at a panel discussion on legislative ethics where “he bemoaned not the legislators who give them all a black eye but the public perception that they deserve that shiner.”⁹ Lawmakers often seem to live in an atmosphere of denial and largely seem to believe that they spend long hours at their public business and that their ethics are above reproach.¹⁰ One also, however, hears from entities monitoring their activities that many lawmakers seem to have a sense of entitlement, and that having a lobbyist pick up a tab for a lunch or offer a ticket to an athletic event has no meaning to them.

Legislators often protest that their votes cannot be bought for a “\$10 dinner” or a ticket to an Indiana Pacers basketball game. However, \$10 does not generally even cover the cost of a business lunch in downtown Indianapolis these days, and expensive dinners paid for by lobbyists are more the norm than the exception during legislative sessions. Tickets to sporting events and concerts are far more expensive than they were a decade ago, and many lobbying organizations are able to offer premier seating at courtside, on the fifty-yard line, or in luxurious suites with full food and beverage service. Few Hoosiers have access to such premium tickets—particularly for events such as playoff games or the top concerts—and even then, the price would be daunting for the average Hoosier.

Perhaps more important than the actual meal, hospitality, or gift is the relationship that is built between lobbyists and lawmakers over the course of such events—or on the golf course. Further, Indiana does not bar a lobbyist from serving as a campaign treasurer for a legislative candidate, or from raising money for them, one of the considerations that helped to catapult lobbying reform to a critical mass at the congressional level in early 2006.¹¹

Not only does the ability to provide such favors afford a lobbyist access to legislators that few individual Hoosiers can aspire to—despite lawmaker protestations—but relationships are built over the course of such social events that make it far easier for a lawmaker to “help out a friend” and not “just say no” in the context of many legislative actions where the lawmaker’s constituency would not be directly affected, or his or her philosophy would not be invoked.

Ethics issues in Indiana also do not tend to arise as frequently during a legislative session as they do during an election campaign, reducing their salience at a time when solons might be spurred into action to remedy a real or perceived problem. Despite what many elected officials suggest about the ballot box being the appropriate place to resolve most ethical transgressions, the election campaign and ballot box generally are not the best places to address systematic and institutional issues—absent, as we shall see, other changes. However, the

9. Mary Beth Schneider, *Panel Discussing State Lawmaking Proves Clueless on Ethics Issues*, INDIANAPOLIS STAR, Dec. 8, 1996, at D1.

10. See Mary Dieter, *Political Corruption “Can Happen Anywhere,” Expert Says—Even Here*, LOUISVILLE COURIER-J., Apr. 12, 1992, at B1.

11. See Dana Milbank, *For Would-Be Lobbying Reformers, Money Habit Is Hard to Kick*, WASH. POST, Jan. 26, 2006, at A6.

most readily available alternative to the ballot box—short of seeking an indictment of a lawmaker—is the recourse available through the respective statutory ethics committees in the House and Senate.¹²

One would be hard-pressed to recall the last time that the Senate Ethics Committee sanctioned a lawmaker for inappropriate public conduct of a non-sexual nature. The House Ethics Committee was largely dormant until called upon to rule on two unrelated matters in 1997. At that time, the panel issued reprimands to two lawmakers for their respective transgressions (which ultimately boiled down to full disclosure of certain relationships on personal financial disclosure forms); one legislator was from such a safe district that it was of no practical impact, and the other was ultimately indicted for conduct that was part of the same issue.¹³

The latter incident was particularly intriguing for the light that it shed on just how difficult it is for one lawmaker to sit in judgment of a colleague—particularly one whom the House Ethics Committee Chair described as “not just a friend of mine; he is one of my very best friends.”¹⁴ Although some might suggest that the chair voting to reprimand his friend and colleague indicates that the process works, the panel reduced the charges to the least severe option, and the sanction was not particularly meaningful (the whole House never had the opportunity to ratify the action because the hearing took place after that year’s legislative session was completed, and the lawmaker in question did not seek re-election).

Importantly, neither the chair nor any of the House Ethics Committee members chose to recuse themselves from the proceedings, which one would assume a judge would do in a similar situation involving a “best friend” or colleague. Of course, there is no alternative in legislative rules for someone to substitute for a member of the body on an ethics panel. As the Senate Ethics Committee Chair acknowledged that same year, “I’m somewhat protective of my fellow senators.”¹⁵

As the *Indianapolis Star* recognized in its far-reaching “Statehouse Sellout” series a decade ago, “Lawmakers police themselves. They handpick the commission that oversees lobbyists. And they sit on their own ethics committees, which rarely meet.”¹⁶

What may be the overarching circumstance, however, is the

12. IND. CODE § 2-2.1-3-5 (2005).

13. *Wurster v. State*, 715 N.E.2d 341, 350 (Ind. 1999) (ruling that so-called “retainer bribery” was not technically a crime under Indiana law and throwing out the indictment).

14. Jeffrey M. Linder, *Friend’s Political Death Time of Pain, Mourning*, SHELBYVILLE NEWS, Jan. 14, 1997, at Opinion Page. “To be very honest, I felt horrible about having to make that decision, and at times I felt like I was deserting one of my best friends,” wrote the chair, who added that “[h]e is honorable, and despite the fact that I led the committee that voted to reprimand him, I would trust him with anything and everything I have.” *Id.*

15. Linda Graham Caleca & Janet E. Williams, *Statehouse Sellout: Conflicting Loyalties*, INDIANAPOLIS STAR, Feb. 12, 1996, at A1.

16. *Id.*; see *Common Cause, Inc. v. State*, 691 N.E.2d 1358, 1362 (Ind. Ct. App. 1998).

misunderstanding that many lawmakers seem to have about ethics laws. They are not always to be wielded as a weapon by a prosecutor or the opposite political party, but they can be an incentive as well. For example, a study by the Connecticut Center for Economic Analysis at the University of Connecticut concludes that honest government may be more important than a favorable tax environment in sustaining strong economic performance.¹⁷ Additionally, a positive stance on ethics by a lawmaker may also give him or her a political edge and offer a bright line by which a lawmaker can clearly avoid transgressions.

What is needed in Indiana—to benefit both legislators and all Hoosiers—is a new legislative ethics code. Before drafting an appropriate legislative ethics code, however, lawmakers and their constituents need to take a step back and make several assessments and value judgments. Those involved in the process of devising a new code must decide whether to address actual problems or the perception of problems. Legislators might automatically assume that only real problems need to be remedied, but they may also benefit from addressing issues of perception, so that their motives are not questioned at every juncture. Indeed, perception can be critical, because even absent actual problems, public confidence in the system may negatively impact individual lawmakers and the public's collective assessment of the legislative process.

Perception of legislative ethics can take many different forms. Indiana reformed its lobbying law in the early 1990s—largely as a legislative response to what it perceived as overly broad interpretations of the existing law by two statewide officials with their eyes on other statewide offices. When lawmakers enacted the law, they removed lobby regulation from the Secretary of State's office and created a new "Legislative Ethics Commission," which quickly recommended to the General Assembly that it be renamed the "Indiana Lobbying Commission," rejecting a suggestion from Common Cause to recommend to the legislature a change to the "Indiana Lobbying Enforcement Commission." In the end, the House bill recommending the name change to the "Indiana Lobbying Commission" was amended in the Senate Ethics Committee to the "Indiana Lobby Registration Commission."¹⁸

The initial evaluation must consider what is trying to be achieved and then proceed from there. Are the drafters concerned about too much money skewing the legislative process or with the impact of campaign contributions by wealthy individuals or key interest groups? Is government secrecy the evil? Is government accountability critical? Are friends and family wielding too much influence? Are public officials and employees benefitting from public service? Should we recognize the unique conflict dilemmas fostered by our desire for a part-time legislature? Is legislator coziness with lobbyists an issue, either through personal or campaign relationships? Are conflicts of interest the concern? Are gifts to legislators problematic? Should legislators be employed

17. Steven P. Lanza, *The Economics of Ethics: The Cost of Political Corruption*, 12 THE CONNECTICUT ECONOMY 4, 4-5 (2004).

18. EDWARD D. FEIGENBAUM, INDIANA LOBBYING LAW COMPLIANCE MANUAL 1997 (2d ed. 1997); see IND. CODE § 2-7-1.6-1 (2005).

by public entities? Does there need to be a restriction on the nature, type, and timing of post-government employment? Is the enforcement process appropriate to address the problems? Are penalties for misconduct a sufficient deterrent?¹⁹

Problems usually are addressed first through increased disclosure (e.g., more details on personal financial disclosure forms and campaign finance reports) and transparency (e.g., public votes, open meetings and sessions, votes on discrete items rather than on unwieldy omnibus measures—and earmarking of appropriations items). This openness can help deter deceit through publicity and forces officials to consider the full implications of any potentially unethical actions. Codes of conduct (that may be either aspirational or offer detailed litanies of appropriate activity) may be appropriate tools. However, proscription of certain types of conduct—definitive standards by which the public and prosecutors can evaluate actions—and active enforcement with meaningful penalties may be necessary to assure the public.

Yet talk of regulating conduct jumps the gun. Drafters must first assess where the state currently stands, decide where they want to go, and *then* fill in the blanks with statutory language that may be prohibitory, may increase transparency, or offer a combination of the two.

Indeed, the initial assessment of the current state of the state with respect to legislative ethics may simply suggest that common practice in certain areas—without respect to the laws or enforcement—is reasonable. The assessment might find that the laws in place today are sufficient as written, if a different emphasis is placed on enforcing them. We may come to the conclusion that leaving legislative ethics to the laws of nature, allowing voters to take care of the wayward, is working—or that it might work better with greater information made available to voters or with a more competitive electoral system, either in terms of party competition, changed campaign finance laws, or a different system for legislative redistricting.

Those looking at revising the law are best-advised to do it comprehensively and with an understanding of the special context within which ethics laws originate and operate. Unfortunately, ethics laws tend to be reactive in nature.²⁰ They are often drafted “[i]n the white heat of public disgust with the breakdown” as a specific response to one problem as lawmakers rush to fix something that has raised their hackles, or placed them in the cross-hairs of the electorate.²¹ Such a “quick fix” reduces the capacity for moral reflection and deliberation. In a more practical sense, piecemeal change also results in inconsistency, both in the application of the laws and in their understanding by both officials and the

19. Robert W. Smith, *A Comparison of the Ethics Infrastructure in China and the United States*, 6 PUB. INTEGRITY 299 (2004) (focusing on a recent comparison of ethics in the United States and China and containing the amusing query, “Should Public Servants Be Executed for Breaches of Ethics—or Is a \$150 Fine Enough?”).

20. See, e.g., Allen Greenblatt, *Altered State*, GOVERNING 15-16 (Feb. 2006); Dieter, *supra* note 10.

21. Earl S. Mackey, *Dismantling the Kentucky Legislative Ethics Law*, 5 PUB. INTEGRITY 149, 150 (2003).

public. Furthermore, like patching the proverbial bicycle tire, a change in one area may simply create unanticipated—or undue—pressure in another.

What many also tend to overlook is that ethics concepts are often elusive, as well. They are very difficult to draft with the right specificity and even borrowing components from other states or from national model laws may not be sufficient because of the piecemeal nature.²²

Lawmakers are often reluctant to be too comprehensive or demanding when the laws they draft apply to them, and Indiana's ethics rules for legislators²³ are briefer and less proscriptive than the code of ethics that Indiana's lobbyists have drafted for themselves.²⁴ Such laws may also suffer from debate over whether they should be aspirational in nature—which would often make them different from similar laws that legislators impose on other state officials or state employees—or more detailed and normative.

Disclosure laws in particular may be fraught with loopholes—intentional or not—e.g., allowing certain activity at out-of-state events that may not be permitted in-state, permitting lobbyists to split tabs for entertaining legislators across multiple clients or between themselves and other lobbyists to avoid more detailed disclosure, or valuation of certain transactions may be artificial (such as the cost of a suite ticket to a sold-out Indianapolis Colts playoff game or a regular ticket to the Super Bowl).

As is the case with many other laws, compromise can also serve to weaken the most important parts, and because ethics issues are not always partisan in nature, party cues may be lacking in such debates.

The very composition of the bodies making the laws has an impact. Legislators may have a self-interest in not seeking or voting in favor of effective ethics reforms.²⁵ And even between the legislative bookends of the sincere reformers and those who may seek to do nothing are those who pay lip service to reforms for image purposes (but really do not want such reform), and those who want to take action—but privately desire that action merely to be token, so as to head off any meaningful initiatives.

A lack of significant public input also potentially weakens ethics laws. When the public is not involved in—or shut out of—the drafting process, this circumstance lowers the level of acceptance and fosters a “business as usual” attitude.

But the public is not always “right,” and an ethics bureaucracy that becomes too unwieldy, technical in nature, or oriented toward a “gotcha” mentality may not be appropriate, either.

22. See Edward D. Feigenbaum, *A Model Process for a Model Law*, 3 PUB. INTEGRITY 1 (2001).

23. See RULES OF THE HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTEENTH GENERAL ASSEMBLY OF INDIANA 2005, at 47 (2005); [SENATE] 2005 STANDING RULES AND ORDERS ONE HUNDRED FOURTEENTH INDIANA GENERAL ASSEMBLY 87-96 (2005).

24. See GOVERNMENTAL AFFAIRS SOCIETY OF INDIANA, CODE OF ETHICS (1996).

25. Beth A. Rosenson, *Legislative Voting on Ethics Reforms in Two States*, 5 PUB. INTEGRITY 205 (2003).

The preferences of the more advanced moralists of society—the so-called “public interest” groups—are frequently accused of advocating such tight restrictions on legislative actions that many would be frozen out of public service, the business of government would be nigh impossible to conduct, and the cost of government would soar.²⁶

Policymakers plead not to criminalize legitimate policymaking, and to offer some “bright-line” tests because much proscribed activity is not always intuitively “wrong.”²⁷

Of course, in the end, the law is but an ethical minimum. Legislators may be technically complying with law, but not necessarily practicing ethical behavior. Some—such as Oliver North—may believe that a given course of activity is right, but it may also be illegal. So we are still ultimately dependent upon the quality of individuals we choose to represent us in office.²⁸

The Sundance Kid once queried cohort in crime Butch Cassidy about Bolivia. Sundance asked Butch, “What could they have here that you could possibly want to buy?”²⁹ But there is a lot at stake in Indiana these days, as evidenced in the deep public policy debate over items such as telecommunications deregulation, and \$3.85 billion highway lease contracts.

As a result, Indiana should give some thought to these concepts and adopt the philosophy that Mark Twain sent in a note to the Young People’s Society at the Greenpoint Presbyterian Church in Brooklyn in 1901: “Always do right. This will gratify some people, and astonish the rest.”³⁰

If it does so, the Indiana General Assembly in 2010 will not be the same as the world of Mark Twain in *Huck Finn* some 150 years ago.

26. See FRANK ANECHARCO, *THE PURSUIT OF ABSOLUTE INTEGRITY: HOW CORRUPTION CONTROL MAKES GOVERNMENT INEFFECTIVE* (1996).

27. *But see* DENNIS F. THOMPSON, *POLITICAL ETHICS AND PUBLIC OFFICE* 84 (1987) (stating “whether the expansion of the legal liability of officials would inhibit legitimate political activity surely depends on what standards of trust we establish for various public offices, and how precisely we formulate them”).

28. See Martin Tolchin, *Suddenly, It’s Open Season on Public Servants*, N.Y. TIMES, Oct. 26, 1986, § 4, 4.

29. BUTCH CASSIDY AND THE SUNDANCE KID (John C. Foreman 1969); see Internet Movie Database, *Memorable Quotes from Butch Cassidy and the Sundance Kid*, <http://www.imdb.com/title/tt0064115/quotes> (last visited May 12, 2006).

30. Mark Twain, *Note to the Young People’s Society* (Feb. 16, 1901), in JOHN BARTLETT, *FAMILIAR QUOTATIONS* § 28:3 (1992).