

WHAT REP. LORIE FOWLKE GETS WRONG IN HER ANALYSIS OF THE ETHICS REFORM INITIATIVE

Utahns for Ethical Government

Rep. Fowlke has authored an 11-page opposition commentary on the UEG ethics reform initiative. UEG has reviewed her paper and believes it is mostly argumentative, non-factual, and based on either a misunderstanding of the initiative or various misstatements of its provisions. The following points deal with only the most egregious distortions of our ethics commission, code of conduct, and hearing procedures. The bolded text is verbatim statements from her paper.

1. *On legislator conflicts of interest.* **“Many believe that the best antidote for that dilemma is full disclosure and the ballot box. Or, we can hire a full-time legislature.”**

Existing conflict of interest disclosure requirements are minimal and while some legislators disclose potential conflicts in some detail, other disclose next to nothing. Rep. Fowlke doesn't tell us what “full disclosure” might entail, but she quite objects to the enlarged disclosure requirements of our bill (which do not even begin to approach “full” disclosure): **“Some experts believe this could be an unconstitutional invasion of privacy. . and it could discourage worthy men and women from serving in a demanding part time position.”** No such experts are cited, and the weight of U.S. judicial decisions finds no such “privacy rights” regarding conflict of interest disclosure for public officers.

Rep. Fowlke is just wrong to claim that the only other antidote for conflicts of interest is a full-time legislature. A better remedy, which our bill provides, is to prohibit legislators from self-creating even more conflicts of interest than they bring to the position when elected.

2. *On appointments to boards of directors.* **“It is questionable whether removing legislators from all corporate and non-profit boards [of directors] will make government more ethical. While serving as a legislator, an individual cannot be affiliated with any other business.”**

Our bill makes no such prohibition, and Rep. Fowlke has created a false argument. Our bill only makes board appointments unethical if two conditions simultaneously exist: (1) status as a legislator is a consideration in the appointment; and (2) the position pays compensation. The president of XYZ Corp. can also be a member of the legislature, and it is a distortion to claim otherwise. Legislators could still be appointed to non-profit boards, provided the position is not compensated. Warren Buffet could be elected and serve on any business board he cared to; the target is not business leaders – it is legislators self-creating additional conflicts of interests and employers hoping to co-opt a vote. Legislators should not be soliciting jobs from lobbyists.

3. *On using campaign funds for personal expenses.* **“[It is] NOT true [that] legislators can spend campaign funds on personal expenses.”**

Rep. Fowlke's statement is incorrect, as is her analysis of what SB 162 (last session) prohibits. There is no law which regulates the expenditure of campaign money by sitting legislators or candidates in campaigns. Campaign contributions have been used to make house payments and buy spouses' clothes. UEG believes that when a campaign contribution is received, it creates a sort of implied “trust” that the money will be used to assist with the direct electioneering expenses of a candidate, and that a campaign account should not be considered “free money.” SB 162 applies only to persons who are no longer officeholders, and thus its prohibitions do not apply to sitting legislators – and in any event it provides no penalty for the conversions it prohibits.

4. *On legislative leadership elections financed by lobbyist money.* **“Full disclosure provides the best remedy [against “buying” elections].”**

Rep. Fowlke misses the point. The reason for UEG’s prohibition of campaign account transfers between legislators is simple: the current practice of legislators going back to special interest donors again and again for leadership and caucus PAC and special project contributions (in unlimited amounts) is just another unnecessary, self-created conflict of interest. Legislators always claim that they pay no attention to money; if you believe that, ask yourself this question: how would you feel about having your case in court decided by a judge who had received \$30,000 from your opponent? Full disclosure does nothing to resolve the problem of buying influence. If Rep. X wants to spend his own money running for Speaker, that’s fine, but if he’s spending XYZ Corp.’s money, what is XYZ Corp. expecting to get out of it? If the answer is nothing, then why do they always write a check?

5. *On the fiduciary responsibilities of legislators.* **Fiduciaries are bound by certain principles that do not apply to legislators.”**

A fiduciary relationship is one where one person relies upon and trusts another to act in good faith and fairness. Many courts have described the relationship between citizens and legislators as a fiduciary relationship. So, what principles of fairness and good faith should not apply to legislators? Rep. Fowlke doesn’t say. In the business world, fiduciaries may not actively create conflicts of interest for themselves. Rep. Fowlke doesn’t explain why legislators should have lower standards.

6. *On the need for an independent ethics commission.* **“There is no way to know whether the provisions of this initiative will bring about more ethical government. Does [having] no ethics commission mean we are not ethical? These questions should be answered before we spend more time and money in this direction.”**

If Rep. Fowlke is arguing that proof of effectiveness must precede passage, then why is the legislature in such a rush to cobble together its own version of an ethics commission – not necessarily independent – to be passed in February? If the whole idea is terrible, why the bother to pass a weaker version of ours?

7. *On definitions.* **“By broadly interpreting all the definitions “in furtherance of its remedial goals” almost everyone could be included in one of these categories, meaning no one will be qualified to be part of the legislature.”**

With respect, this is absurd. The definitions and language we have used in the initiative come from definitional language used in existing state and federal law, as does the phrase “broadly interpreted in furtherance of its remedial goals.” For example, the definition of a “relative” comes straight from UCA 36-11-102(18). Under our initiative, business leaders may still serve in the legislature so long as they are not simultaneously lobbyists or, as noted in Item 2 above, on a company’s board for the purpose of creating a conflict between legislative service and a special interest.

8. *On commissioner selection.* **“The permanent ability [of five initiative sponsors] to select the commissioners [if legislative leaders fail to do so] is a naked power grab by unelected self-selected individuals. There are constitutional concerns.”**

Rep. Fowlke misstates the very limited and contingent authority of the sponsors. (1) They would be involved in selecting commissioners ONLY if the legislative leadership cannot agree on a list of names to be drawn at random – and Rep. Fowlke doesn’t say why she believes legislative leaders are

unlikely to agree; (2) in the event the sponsor-selection provision is triggered, they have to follow the same blind, random selection process required of legislative leadership; (3) the sponsors are a bi-partisan group. Moreover, if the initiative passes, they will have been “approved” to fulfill that limited responsibility by a majority of Utah voters. That’s hardly a “power grab.”

Whatever constitutional concerns Rep. Fowlke may have, none are specified.

9. *On the commission’s administrative rulemaking authority.* **“The commission can make its own rules [and] is authorized to issue subpoenas and compel the production of documents. [T]his is usurping the role of the legislature and the judiciary.”**

We gave the commission administrative rulemaking authority in recognition of the practical limitations of a statute to foresee and deal with every possible permutation of circumstance. The power to issue subpoenas is necessary to assure its independence and capability of functioning. Rep. Fowlke is incorrect to argue that this usurps the power of either the legislature or the judiciary. Any rule adopted by the commission can be reviewed and changed by the legislature. Far from “usurping” the role of the legislature and the judiciary, the commission’s subpoena power tracks the legislature’s current subpoena process in Utah Code § 36-14, a process which includes the judiciary. If the initiative passes, the commission becomes an advisory entity to the legislature. As a legislative act of the voters, it is entirely consistent with Article VI, Section 10 of the state constitution, which makes the legislature the sole judge of the qualifications of its members. Our code of conduct is not framed as a “qualification” for office any more than the legislature’s current rules on ethical governance can be read in this light. The qualifications for election to office are prescribed in Section 5 of Article VI.

10. *On attempting to unduly or unconstitutionally influence the outcome of any matter to be decided by a public body or public official.* **“This could mean that legislators are unable to persuade their colleagues to vote for legislation pending in the House or Senate . . . influencing the outcome of legislation is what legislators are elected to do.”**

Judicial cases are very clear about the sanctity of a legislator’s core voting function, even as to conflicts, and UEG has scrupulously avoided any intrusion upon that. The initiative section which Rep. Fowlke takes out of context is intended (as its very qualified text shows) to deal with legislators who seek to “throw their weight around” with other state agencies, local governments, and special service districts.

11. *On campaign donations and free speech.* **“Some constitutional experts believe that prohibiting legislators from donating to others could be a violation of First Amendment free speech rights.”**

Rep. Fowlke identifies no such experts, but in any case, she misstates the language of the initiative. We do not prohibit a legislator from opening his or her personal wallet and donating to anyone (although we have placed limits on contributions from individuals, including legislators, to other legislative candidates). Again, the corrupting influence toward which our initiative is directed is the penchant for legislators to ask corporations or unions to pony up the money that legislators wish to use to make campaign contributions (and thus potentially indebted themselves) – and that stands on very different constitutional footing, at least so far.

12. *On making violations of the code of conduct a felony.* **“Frankly, the possibility of five self-selected commission members who already stated they believe legislators refuse to enact ethics reform, determining whether or not an act of a legislator is a felony . . . is frightening, especially with no judicial review.”**

If Rep. Fowlke had read the initiative more carefully, she would not be frightened. First, the commission members are not self-selected, they are selected randomly from a list approved by legislative leaders. Second, since no one now knows who might even be on the commission, we don't know whether they even have an opinion about what the legislature has or has not done regarding ethics. Third, commissioners must be impartial. Fourth, the initiative criminalizes nothing, and it confers no power on the commission to do so. Fifth, there is no judicial review of commission action because it is functioning in an advisory capacity to the legislature, and the legislature is the ultimate reviewing authority for any commission recommendation.

The “frightening” language for Rep. Fowlke is in the initiative for the sole purpose of defining the scope of the immunities provisions of Article VI, Section 8 and a string of court decisions interpreting legislative immunity. The terms “felony and breach of the peace” come from that section, to which we added “action outside the ordinary course of legislative business” and “beyond the scope of a legislator’s duties.” They are used in the disjunctive, which means that a particular act is either this, or that, or something else – but whatever it is, a legislator cannot claim immunity if there is an allegation of an ethical breach. And on THIS issue, judicial review DOES apply, and we have drafted the language to assure a favorable decision.

13. *On a six-year limitation of complaints.* **“There is nothing in the bill’s language that makes this prospective only, meaning that legislators could be responsible for conduct that happened before the statute was passed.”**

Utah Code § 68-3-3 provides that, absent express declarations in a law to the contrary, all statutes in Utah apply prospectively and do not operate retroactively. This has been the legislatively-mandated rule of construction since at least 1953, and our initiative was drafted with this in mind.

14. *On legislator participation in the commission’s initial complaint investigative inquiries.* **“Constitutional experts believe that allowing the accusers to participate fully, while the accused cannot, violates a legislator’s substantive and due process rights.”**

Rep. Fowlke identifies no such experts, and we are unaware of any authoritative basis for this claim. It should be noted that our initiative gives significantly greater procedural due process to legislators than their own rules currently allow. A more careful reading of the initiative will show that in the initial inquiry, which is a preliminary and confidential process, an accused legislator may participate informally, and the initiative puts no limits on this opportunity, leaving such determinations to rulemaking and the informed discretion of an independent, impartial commission. We provide for notice, an opportunity to be heard, right to counsel, an impartial tribunal, and every other element of administrative due process for both a complainant and the accused.

Rep. Fowlke is seemingly oblivious to the “due process” concerns of the complainants, whether they are citizens or legislators. Indeed, the constitutional right of citizens to petition for redress for an ethical grievance (but not the right of lobbyists to give money to legislators) has been ignored and denied by the legislature as a whole for decades.

It is to be expected that most complainants would likely not have a great deal of specific information about an allegation, and one of the reasonable opportunities they should be given is access to subpoena power so that corroborating information may be developed. One of any such commission’s obligations is to treat the parties fairly, and that’s another reason for empowering the commission to adopt administrative rules – of which the legislature has unfettered oversight.

15. *On the burden of proof.* **“It is the legislator’s burden to prove to five non-legally trained people that he/she did not do the act, by a preponderance standard, meaning more likely than not. The legislator is presumed guilty unless he/she can prove a negative.”**

As Rep. Fowlke knows, the legislature has given non-legally trained people all kinds of responsibility to reach factual judgments as jurors in felony and misdemeanor criminal cases, multi-million dollar civil cases, and judicial conduct cases. Members of the State Tax Commission do not have to be legally-trained, nor do members of the Public Service Commission. What makes legislators a special class? For that matter, there is no requirement that legislators be legally trained, and they enact our laws – and sit on ethics committees which review the conduct of fellow legislators.

The preponderance of evidence standard also covers most of those proceedings, although capital punishment and fraud cases require a higher standard of proof. If the preponderance standard is deemed by the legislature to be sufficient due process for the rest of us – where property and liberty are in real jeopardy – why do legislators want a far higher standard in a question of ethics?

It is false for Rep. Fowlke to argue that the initiative “presumes guilt,” because such a presumption is NOWHERE in the bill. Rather, the bill states that in a formal hearing, once the complainants have offered enough evidence to establish all the necessary elements of a claimed breach – which means that there is enough proof to be believed unless rebutted – THEN the legislator must show, by a preponderance, that there was no inappropriate conduct.

That’s the same burden corporate directors and officers or partners in partnerships carry under current business law. So, again, it’s very, VERY odd that legislators – who style themselves as business leaders and who claim credit for making Utah one of the best and most business-like managed states in the nation -- insist on far greater “burden of proof” protections than are allowed to ordinary businessmen in everyday civil proceedings.

16. *On the lack of judicial review.* **“This is one of the most inexplicable provisions. There is no judicial review and no oversight by any other agency in state government. Why are the sponsors of this proposal so opposed to any type of review of their actions, particularly when they have no legal training?”**

Inexplicable? Not to anyone familiar with Utah’s Constitution and the case law interpreting it. There is no judicial review in connection with the discipline of legislators because such review is forbidden by the Utah constitution as interpreted by Utah’s courts. The initiative, in other words, merely restates existing law in this regard. See Utah Constitution, Article 5 and Article 6, Sections 10 and 12; *Ellison v. Barnes*, 63 P. 899, 901-902 (1901); *Brockbank v. Rampton*, 447 P.2d 376, 378 (Utah 1968); *Jenkins v. Bishop*, 589 P.2d 770, 771 (Utah 1978) (Crockett, J., concurring); *State v. Evans*, 735 P.2d 29, 31-32 (1987). Indeed, if Rep. Fowlke truly is serious about making provision for judicial review of legislator discipline by a legislative committee or legislatively created commission, (a) one would expect that she and other legislators would have done so in relation to existing legislative processes before now (they, of course, have not), and (b), in the event, given the constitutional text and case law cited above, any such provision would have been struck down as patently unconstitutional. Like most of Rep. Fowlke’s arguments, the “no judicial review” complaint is at best uninformed and at worst a deliberate attempt to confuse or mislead Utah’s voters.

The sponsors are submitting their proposal to the review and approval of the voters of Utah. They are not persons of no consequence, as Rep. Fowlke suggests. The drafters of the initiative are lawyers, as is Rep. Fowlke. There is no judicial review of commission actions because any such review would violate the separation of powers principle. The commission is performing an advisory legislative

function, and the legislature is the reviewing body for commission actions and the disciplining body if any is appropriate. It is no small irony that the sponsors are more protective of legislative power and prerogative than is Rep. Fowlke. Of course, her real objection is to the voters presuming to tell the legislature what should be considered ethical; however, what is to be considered ethical and the process for investigating breaches is a legislative determination, and because the voters share co-equal legislative power, they can properly legislate as to both.

17. *On the sponsors' right of intervention in any court challenge where constitutionality is an issue.*
“This is an unconstitutional delegation of government powers to non-government people, who also happen to be unelected.”

Rep. Fowlke chooses to ignore what is already the law: the rights of intervention have already been declared by the Supreme Court, with legislative approval, as Rule 24 of the Utah Rules of Civil Procedure. There is no “governmental power” associated with intervention in a lawsuit whether the proposed intervenors are elected officials or ordinary citizens, but in any event, Rule 24 recognizes an “unconditional right of intervention where conferred by a statute.” If the initiative is passed, the sponsors will clearly have that right (which would likely be the case even under permissive intervention). If Rep. Fowlke’s interpretation were correct, only elected or appointed government officers could intervene in cases involving the constitutionality of statutes.