

WHAT THEY DO NOT SAY!

REPLY TO UEG CRITICISM OF LORIE FOWLKE ANALYSIS OF ETHICS REFORM INITIATIVE

The group, UEG [Utahns for Ethical Government] that has sponsored the "Ethics Initiative" recently released a response to Rep. Lorie Fowlke's analysis of the Initiative, claiming that it is "argumentative, non-factual" and based on "misunderstanding" or "misstatements." In their unsigned response, the author for UEG makes several claims and references that need to be answered. Interestingly, they have published their Response on their website, but not the analysis to which they are responding; it will be telling to see if this Reply will not be on their website as well. It appears that the UEG Response is not a true effort to explain the Initiative, but simply another avenue to stand on their soapbox and mislead voters. In the interest of those who have actually read the Initiative and are making an effort to understand it and the consequences it would bring, Rep. Fowlke's reply to UEG criticisms is below.

1. Conflict of Interests. UEG takes two statements in the Fowlke analysis, out of context, and uses them as a platform for more misinformation about requirements for disclosing conflicts of interest. They state, a full time legislature is not the only remedy for a conflict of interest.

Fowlke agrees. It is not the only remedy. There are alternatives; however, the best and most democratic remedy is still disclosure and the ballot box, meaning legislators disclose their financial interests, and if the public is concerned, the public will vote them out. Instead, UEG wants to circumvent the public and require legislators to provide extensive disclosures for them and all family members, which they claim will ostensibly "prohibit legislators from self-creating even more conflicts of interest than they bring to the position when elected." What is "self-creating" more conflicts of interest? Does the Initiative disclosure statement, below, stop legislators from "self-creating" conflicts of interest? Why is it better than what is already required? Would you want to do what is required by the following initiative language? –

Initiative §36-27-301(2)(c). "The disclosure statement shall be in a form prepared by the commission, and shall include, at a minimum, the following information: (i) the full names of the legislator and the legislator's spouse; (ii) the name, headquarters address, and telephone number of every person (excluding clients) from which the legislator or spouse received compensation or benefits of any kind of a value in excess of \$3,000 during the previous year and a description of such compensation and benefits; (iii) any trusteeships, directorships, offices, or positions of any nature, whether compensated or uncompensated, held by the legislator or spouse with any person; (iv) the names, addresses, and telephone numbers of any person with which the legislator has an agency relationship, including any client of a legislator, and from which, in the year previous, the legislator has received amounts in excess of \$10,000; (v) the location, nature of, and fair market value of any property, real or personal, tangible or intangible (other than a primary personal residence), in which the legislator or spouse, directly or indirectly, holds an interest which is or is proposed or likely to be the subject of acquisition, trade, or regulation by any public body; (vi) the names, addresses, and telephone numbers of any insider of the legislator where such insider holds or seeks contracts for services with any public body; (vii) the amount and nature of any loans to the legislator or spouse which, within the previous 12 months, have been forgiven or compromised by or through any insider of the legislator or spouse or by or through any lobbyist, giving the name, address, and telephone number of the lender; (viii) the names, addresses, and telephone numbers of all insiders of the legislator which are lobbyists; and (ix) an itemization of all transfers received from lobbyists and to the legislator or and any insider of the legislator within the preceding year."

This is the current code of conduct for conflict of interest: " (b) "Conflict of interest" means legislation or action by a legislator that the legislator reasonably believes may cause direct financial benefit or detriment to him, a member of the legislator's immediate family, or a business in which the legislator is

associated, and that benefit or detriment is distinguishable from the effects of that action on the public or on the legislator's profession, occupation, or association generally." This conflict must be declared on a form available to the public and "before or during" any legislative vote where the legislator has a conflict."

The reality, as many states which have numerous ethics rules and regulations, have unhappily discovered, is that you cannot legislate honesty. The more rules you make, the more people you exclude, and the more fodder you provide for anyone looking to make an accusation.

****Constitutionality.*** UEG states that there are many times that Rep. Fowlke questions the constitutionality of certain Initiative provisions, and the unnamed UEG author complains that the Constitutional experts are not identified, and then UEG simply alleges that there are no constitutional problems.

Since the 9 Justices of the U.S. Supreme Court cannot agree on what is a constitutional problem, clearly anyone asserting there is or is not a problem is expressing an opinion. Rep. Fowlke is a lawyer, has consulted with several private attorneys in Utah County, other lawyers in the legislature and with legislative counsel and based on these sources, has concerns in several areas regarding constitutionality. Some of the sponsors of UEG are also lawyers. Neither side has the crystal ball on this issue. It would take a consultation with an experienced constitutional lawyer, such as Mike Lee, to have a more informed opinion. Even then, the Supreme Court may or may not agree.

2. Appointment to board of directors. UEG takes part of two statements made in widely separate parts of Fowlke's analysis, and claims board appointments are only prohibited if the legislator is appointed to the board because of his legislative position and if he is paid. However, the relevant language in the Initiative does not say this and is another reason, among so many, why the public must read it, and not rely on misleading summaries. The actual language proposed in 36-27-301(2).a.(i) provides: ". . . no legislator, *while* serving in office, may be a control person of any corporation where (A) status as a legislator was a contributing factor in such selection as a control person and (B) being a control person in such corporation furthers any personal interest of the legislator.

To understand this, you must reference back to the definition of "control person" and "personal interest". "Control person" includes "any person with a control status or actual control within a corporation, including any member of a board of directors, any officer, any managing member, any general partner, any equity holder having more than 10 percent ownership". Personal interest in the Initiative is defined as: "(i) potential or actual profit or benefit to a person or an insider of such person, and (ii) potential or actual partisan political benefit to a person or an insider of such person,"

So the actual language is that a legislator cannot serve if being a legislator is part of the reason they were asked to be on the board, and it "furthers any personal interest". That is not the same as being "paid compensation". There are many benefits that are not financial; there may be "potential" benefits that may be unknown to anyone at the time of selection for appointment; there may be benefits to an "insider" (i.e. relative, including spouse's nieces or nephews) completely unknown to the legislator. (Some may not even know what their spouse's nieces and nephews do for a living, but since there could be several dozen, it is a virtual certainty that at least one of them might be affected.)

3. Campaign funds for personal expenses. UEG again manipulates words and statements in Fowlke's analysis as a basis for faulty claims, and asserts that Fowlke is wrong about what SB 162 accomplishes. They state that nothing prohibits legislators from spending campaign funds on anything they want and they assert campaign funds should be spent ONLY on campaigns.

What Fowlke actually provided was an explanation of the complexity in defining "personal

expenses". Regarding SB162, her statement was: "The legislature began addressing this issue last session by passing SB 162, which prohibits use of campaign funds for anything that would count as income under the IRS regulations." UEG is accurate that SB 162 only addressed campaign funds for legislators who were no longer serving. Fowlke did not make that distinction as clear as it could have been, but was not aware at the time that UEG would take words and phrases, rearrange them and provide them as quotes that could then be discounted. The intent was to show that the legislature was beginning to address the issue. Hence the phrase: "began addressing".

There is much greater difficulty in defining personal expenses for sitting legislators, but it has been the subject of a great deal of debate and discussion with legislators. If it is defined by the language in SB 162, i.e. the IRS definition, what happens to a legislator if the IRS later determines an expense that it originally deemed a business expense, should now be called income? Anyone who regularly works in IRS cases knows this is a real possibility. Then a legislator violated this proposed Code of Conduct.

What is wrong with letting the public decide if a certain expenditure is inappropriate? The public did not like the way some legislators spent their money and voted them out of office. In other cases, the public did not seem to mind and voted their legislator back into office. Does UEG believe the public is not smart enough to make those decisions?

4. Legislative leadership races via lobbyist money. UEG claims that if one legislator uses his campaign funds to donate to another legislator, that they are buying something, such as a leadership position.

That is akin to saying that when a corporation, or lobbyist for a corporation donates to a legislator, that corporation is buying that legislator's vote. UEG evidently derides the idea that disclosure of such payments has any benefit to the public and prefers to prohibit any transfer of campaign funds whatsoever. This is an opinion issue where policy arguments can be made on both sides. Whenever a legislator donates to another's campaign, the public is aware of it. Again, why does UEG not trust the public to determine if the donations and expenditures legislators receive and pay are appropriate?

5. Legislators as "fiduciaries". UEG claims Fowlke does not explain why the term "fiduciary" is inappropriate to describe the relationship between the public and the legislature, and asks what duties of "fairness and good faith should not apply to legislators?"

This is disingenuous, since obviously everyone believes legislators should act with fairness and good faith. The concept is more complex and deserves a thoughtful response. A fiduciary is someone selected to protect the interests of another and does owe a duty of good faith. The problem becomes claiming that a legislator is a fiduciary for all his constituents. How does that work when the constituents do not all agree on what is in their best interests? Sometimes you could say it should be based on the majority vote, and frequently that is what legislators do. However, sometimes legislators have access to information not generally available; sometimes, legislators have strong feelings about certain issues. Our system is a republic, which provides that legislators use their best sources of information and judgment, and voters select them accordingly. It is simply impossible to please all the people all the time, and therefore, inappropriate to be a fiduciary in this context.

6. Independent Ethics Commission. Again UEG takes Fowlke's comments out of context and manipulates their meaning to claim Fowlke wants no ethics commission at all until their effectiveness is first proven. UEG says, "Why the lather to pass a weaker version of ours?"

In the introduction to Fowlke's analysis, she asks rhetorical questions directed towards questioning how we measure ethics in the legislative context, questions which UEG does not answer, by the way. There are several ethics commission proposals at the moment, including the one in the Initiative, the one the legislative ethics committee has proposed, and the one most recently proposed by the Governor's Commission on Representative Democracy. UEG's claim

that the legislative proposal is a “weaker version” than theirs is not explained. It is certainly different and, if by claiming theirs is “stronger”, they mean it can be used more effectively for a witch hunt, they are surely correct. Whether it will improve legislative ethics and provide for better government is much more doubtful.

7. Definitions. E.G. claims Fowlke’s statement, that almost everyone will be excluded from serving in the legislature, is “absurd” because they got their definitions from other parts of the Utah Code, and business leaders can serve so long as they do not have a conflict of interest.

It is accurate that UEG used the same definition of relative that is in our current election code. However, the current code does not require that a legislator provide disclosures of the finances of all these relatives, as does the Initiative. This goes back to the broad definition of a “control person,” “personal interest” and “conflict of interest.” Providing more detail in a conflict of interest form is not necessarily a bad idea; however, providing the names of all clients, for some professions, creates an ethical dilemma. Providing or even knowing the finances of all “insiders” is problematic, when “insider” includes all relatives, clients, and “control persons” over or under the legislator and their relatives. Many talented and good people will be excluded from service or simply elect not to serve.

8. Commissioner selection. UEG disputes Fowlke’s statement that commissioner selection is a power grab by self-selected unelected individuals. UEG claims that Fowlke does not explain why the legislative leadership might not all agree on the pool of individuals for the draw for Commissioners, and that the sponsors would not be unelected, since they will follow the same process to select Commissioners and besides, if the Initiative passes, that means that voters “approved” them.

The problem with this rationale is that it, again, leaves out a few very relevant facts. Anyone in politics, including the experienced UEG sponsors, understands that it is not unusual for the leaders in the House and Senate of the majority and minority parties, to disagree. In fact, it is not inconceivable that some in leadership positions might want to trigger selection by the sponsors of the Initiative. In that case, even though the sponsors follow the same process, the 20 names will be selected by the sponsors who are much more closely aligned than the leadership of the legislature, and the sponsors will be the same individuals, permanently, as opposed to changing leadership at the legislature. Further, to claim that the voters “approved” of the sponsors of the Initiative to select the Commissioners of the ethics commission, is nothing more than a play on words. The names of the sponsors are not part of the Initiative. Most voters do not know who the sponsors are and their “election” will not have been vetted as part of the voting process.

9. Commission’s rulemaking authority. UEG states that any “rule adopted by the commission can be reviewed and changed by the legislature.”

This is what UEG is now saying about their Initiative in general, i.e. the legislature can always change any part of the Initiative that needs fixing. UEG neglects to tell the public the political realities of the legislature trying to change anything that has been voted on by Initiative. As with the bail forfeiture Initiative in years past, whenever the legislature attempts to make such a change, the opponents cry foul, claiming the legislature is trying to change the “will of the people.” So what we have is a proposed statute which the proponents admit has flaws, but they cover up by claiming the legislature can always “fix” it later, all the while knowing that such a legislative “fix” is politically unfeasible.

10. Unconstitutionally influencing the outcome. Fowlke criticizes the language of the Initiative that states that no legislator shall “attempt unduly or unconstitutionally to influence the outcome of any matter to be decided by a public body of public official.” UEG claims this is taken out of context and is intended to “deal with legislators who “throw their weight around.””

The language in 36-27-201(2)(b)(vi), as all language in the Initiative, is to be interpreted “broadly” keeping in mind the “remedial” goal of the Initiative. While UEG may have certain intents, the Commission is bound by the language, not the sponsors’ intent. This particular paragraph actually has several problems. It states:

“(vi) No legislator, while serving in office, shall attempt unduly or unconstitutionally to influence the outcome of any matter to be decided by a public body or public official. In determining whether a legislator has exercised any improper influence in this regard, the commission shall consider all the facts and circumstances of the case, including (A) whether the legislator has any personal interest in the matter; (B) whether the legislator acted officiously; (C) whether the legislator acted ultra vires; (D) whether the legislator communicated on an ex parte basis; and (E) whether the legislator employed inappropriate means, including the use of foul language, the making of threats of reprisal, or the creating of an impression that the legislator is acting for the legislature or other legislators when, in fact, the legislator is not authorized formally to do so.”

- (A) “whether legislator has any personal interest” is already covered elsewhere.**
- (B) “whether the legislator has acted officiously” – this is not an objective standard; what is officious to one individual may be rude to another, and may be ignored by someone else. If a legislator is not sufficiently humble, and chastises a state employee for not doing their job appropriately, can that legislator be accused of being officious?**
- (C) “whether the legislator has acted ultra vires” – a legal term generally meaning outside the corporate authority, which again is not objective. The legislature is not a corporation but what one person may interpret as a humorous remark, another may perceive an offensive, and make an ethics violation claim.**
- (D) “whether the legislator communicated ex parte”- another legal term generally meaning talking to the judge without the other side present. It is not clear how this would apply in a legislative setting. Can a legislator not talk about an issue to someone unless the opponents are present? This is politics, not the courtroom.**
- (E) “whether the legislator used inappropriate means, including foul language, threats, or acting without authorization.” So now legislators cannot swear, threaten or pretend to have legislative authority to act when they do not. Sounds good except sometimes the best of us let a cuss word slip, and now that’s a legislative ethics violation? Threatening someone’s job is usually not taken too favorably, but what if a legislator discovers malfeasance in office? They are prohibited from justifiably telling an employee they need to “shape up or ship out?” Acting without authority sounds good too, until you consider that legislators only have the authority of one vote out of 104, so they individually have very little authority, except maybe to set an agenda as a committee chair. Their authority and ability to enact change lies in their ability to persuade, i.e. “influence” their colleagues and constituents about the issues the legislature is to determine. The language is overbroad and can easily be used to create havoc.**

11. Campaign donations and free speech. This is another reference to legislators using their campaign funds for others who are running for public office. See #4 above.

It seems that if corporations or lobbyists or citizens donate to a candidate, they do so because they trust that candidate to represent their values. They also must trust that candidate’s judgment, since a donator does not know, at the time of the donation, every issue that the candidate will vote on. Why is it so different to trust the candidate’s judgment on issues and not on the candidate’s selection of other candidates to support. Some candidates are excellent fundraisers, while others find that part of their position to be difficult.

12. Making conduct code violations a felony. UEG claims legislators should not be concerned about their attempt to make ethical violations a felony, and that if Rep. Fowlke “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.” UEG then explains why the process is so fair and impartial.

Again, the UEG explanation leaves out the most pertinent facts. The Commission members are self-selected if the legislative leadership does not unanimously agree on the 20 names for the list. In that case, which is not unlikely, the five sponsors of the Initiative do the choosing of Commission members.

UEG continues to state that no one need be all that concerned about what the Commission does, including the lack of any judicial review because they only make recommendations to the legislature who is free to act on them, or not. Of course, the Initiative also requires the Commission recommendations to be published on the state website for one year. This means that, regardless of the outcome of any legislative review, finding or action, the Commission will have ruined the reputation of a legislator. For those who contribute little to the process except for negative criticism, this means little. However, for the rest of us who are interested in encouraging good people to run for office and provide leadership while there, this has a chilling effect.

13. Six year statute of limitations. UEG cites to a statute that has remained unchanged since 1953, when the Utah revised code was created. It clearly states that no law is retroactive, unless it states so clearly. This is correct and, unless there has been common law interpretation otherwise, this need not be a concern.

However, it is not impossible that a clever lawyer could keep this issue in court with the language from section 36-17-401(1): “A legislator may not be charged with misconduct which occurred more than six years prior to the date upon which the complaint is filed, provided however, that this 6 year limitations period shall not begin to run until the misconduct in question could have been discovered by a reasonable person through publicly available information.”

14. Accusers participate fully while legislators’ participation is limited. UEG provides a great deal of discussion here, including a red herring about the accusers’ due process rights, but the fact remains that the legislator’s participation is limited to “informal participation” while the accusers “participate fully.”

The language of the Initiative is the best source for this issue. Section 36-17-401(3) states: “. . . The persons who filed the complaint may participate fully in the development of evidence during this investigative phase of the proceeding, . . . The accused legislator may participate informally, but shall have no formal rights of participation. . . .” UEG claims that this is not a problem because the process is confidential at this stage. UEG also claims this is necessary because the “complainants would likely not have a great deal of specific information about an allegation”. Of course the reason the complainants likely will not have information about the allegation is because “any 3 persons” can file a complaint against a legislator. Section 36-17-401(1). There is no requirement these persons have any knowledge about the complaint. It could be a rumor, from a blog, the media, or a disgruntled constituent or lobbyist on the other side of an issue. It can be anyone, including former running opponents, personal enemies, unhappy clients—anyone. There is a certainty that this process will keep the Commission busy.

15. Burden of Proof. UEG derides Rep. Fowlke’s claim that the Initiative enacts an “innocent until proven guilty” standard, because that language is “NOWHERE in the bill.” Again, UEG uses a mischaracterization of the language in the bill to confuse the voters.

UEG excuses the language of the Initiative on this issue by claiming that complainants have to first show enough evidence “to establish the elements of a claimed breach” and “THEN the legislator must show, by a preponderance, that there was no inappropriate conduct.” No court currently requires a party to prove a negative. It is a basic tenant of American jurisprudence that individuals are innocent until proven guilty. The complainants, who can be anyone, with any kind

of ax to grind against the accused legislator, should carry the burden of proving that a violation of the Code of Conduct occurred.

UEG justifies this process by claiming it is the standard of corporate business. While legislators have been repeatedly recognized as successful at managing the State of Utah well, this excuse ignores several distinctions between the corporate world and the political world. Specifically, the corporate world is private; the media does not follow every move of corporate leaders. Corporate leaders are not elected by the public, based in large part upon media reports that are often filled with speculation and innuendo. Corporate leaders earn large sums of money, while legislators often are losing money in their respective professions in order to serve the public interest. Finally, even corporate leaders who are brought into court, are still presumed innocent until the other side can prove their guilt, either by a preponderance of evidence in civil court, or beyond a reasonable doubt, in criminal court. Why should legislators be entitled to less protection?

16. No judicial review is not a problem, says UEG, for “anyone familiar with Utah’s constitution and the case law interpreting it.” UEG then mischaracterizes the issue by stating the Utah Constitution prohibits “judicial review in connection with the discipline of legislators” because of separation of powers issues.

What UEG does not say is that the language, “no judicial review or agency review of any commission action,” insulates the Commission from any type of oversight whatsoever. Our system of government is made up of checks and balances, necessary due to human nature. However, the sponsors of this Initiative want the Commission accountable to no one. For an entity that is supposed to enhance government accountability, it is ironic the sponsors have selected a process that does not provide for the Commission to be held accountable by anyone. No other public office, agency, board, commission or other entities has such immunity.

UEG’s claim that the separation of powers prohibits judicial review is misleading, in that the Supreme Court always has the power to determine constitutionality. Jenkins v. Bishop, 589 P.2d 770 (Utah 1978). The sponsors even recognized this fact by adding a severance clause at the end of the bill, separating any provisions found to be unconstitutional from the remaining language, which should still be valid.

17. Right of intervention is already recognized by the Utah Supreme Court, UEG states, in Rule 24 of the Utah Rules of Civil Procedure. They accurately state that Rule 24 recognizes right of someone to intervene in a law suit if it is awarded by statute.

What UEG neglects to tell the voters is that without this language in the Initiative, the original 5 sponsors of this Initiative would most likely have no basis to intervene in any subsequent lawsuit. Rule 24 provides if and when a party, who is not part of a lawsuit, should be allowed in the case. Why not leave this section out of the Initiative and allow a court to decide if the 5 sponsors have anything to do with any subsequent lawsuit under the current court rules? If this was really about ensuring ethical government, why do the sponsors of the Initiative have to be a party to a lawsuit that could happen years from now? Again, clearly the 5 sponsors want to be involved with any lawsuit, so they can protect and justify the language they have created in this Initiative. This smacks of a continued desire for power and control. This is further illustrated by their actions in only placing one side of the argument on their website.