Ethics in Law and Politics after Jim Wright

By Richard J.Phelan

Today we are faced with the ethical obligations of a profession in metamorphosis; a profession that requires a fresh look almost monthly just to keep pace.

Our ethics bind us together as a profession. They separate us from being mere scriveners, paid actors, or counselors. It is to these ethics that upon entering our profession we pledge our ultimate fidelity.

Never has the relationship between ethics and professionalism been so severely strained as it is today; nor has it become more inextricably intertwined with our profession.

Ethical and professional standards remind us that the end does not justify the means, Professionalism means rejecting "Rambo style" litigation tactics - abusive discovery practices, discourteousness, and other tactics designed solely to harass or intimidate an opponent. That such conduct may sometimes result in a temporary improvement in our client's position - and I emphasize temporary - is beside the point. Inevitably, such tactics cost us all. Not only because they naturally result in greater litigation costs, but because such tactics help enshrine the public's view of attorneys as part of the problem, not part of the solution. In restraining such practices, despite our clients' preference for a scorched-earth policy, our ethical standards make us truly independent professionals with some goals beyond those of our client's immediate interest.

Political ethics serve much the same purpose by preserving the politician's independence from improper influence. Standards of political conduct, if followed, ensure that the politician remains an independent professional with goals beyond those of a particular constituent or campaign contributor. At the most basic level, political ethics prohibit the blatant purchase and sale of influence. And yet, in our complex world, the tactics of influence peddling need not be so obvious as the proverbial over-stuffed envelope left on a desk.

These subtleties were presented in a most dramatic way by our investigation and prosecution of the former Speaker of the House, James C. Wright, Jr. May I share with you my own experience and some thoughts based on that experience.

The story begins with the House Ethics Committee, the only bipartisan committee in the House. Its six Democrats and six Republicans are charged with investigating alleged violations of the House rules and other laws and standards. These twelve men, led by Chairman Julian Dixon of California, sat in judgment of the man who appointed them to their posts: Speaker Jim Wright. The investigation began with a complaint filed by conservative Congressman Newt Gingrich and an unlikely bedfellow, Common Cause, the liberal political watchdog group.

First, a word about the office of Speaker of the House.

The Constitution establishes the office of Speaker. Unlike Senators, House members have always been chosen in popular elections. Until constitutional amendment, the President was elected only by the Electoral College, whose electors were appointed by the state legislatures. Not surprisingly, at the time of the founding of our republic, the Speaker was considered the country's highest popularly elected official. Recognizing this preeminence, federal law places the Speaker directly behind the Vice President in the line of succession to the presidency.

The Speaker wields enormous power over this country's political and legislative agendas. In addition to appointing the chairman of the various House committees, the Speaker's control of the all-powerful Rules Committee gives him almost total control over the legislative calendar. He decides when and whether a particular bill will come up for a vote and he set the terms of debate for the legislation which does reach the House floor.

Jim Wright won the post of Majority Leader by one vote in 1976, and in 1987, the House chose him as its Speaker. At the time, Jim Wright had served 32 years in the House.

In the summer of 1988, the Ethics Committee voted unanimously to conduct a "Preliminary Inquiry" into Mr. Wright's conduct based on the complaints filed by Congressman Gingrich and Common Cause. Shortly thereafter, the Ethics Committee appointed me as its Special Outside Counsel.

The rules of the House and the Ethics Committee lay out the procedural framework for its investigations. Although a preliminary inquiry is somewhat analogous to a grand jury procedure, it differs in many respects. For example, no subpoena could issue without the signatures of both Committee Chairman Dixon and the senior Republican member, John Myers of Indiana. All hearings were conducted as closed committee meetings and each required the presence of at least two Members. The Members present could and almost always did ask questions and review documents. The hearing Chairman generally performed the tasks of a trial judge, including ruling on objections to questions and subpoenas.

The rulings of the Chair were unappealable. Federal law permits enforcement of the committee's contempt findings through a laborous procedure requiring a vote by the full House and enforcement by the justice Department in United States District Court.

All witnesses were afforded the right to counsel, and all, save a few, had representation. Unlike courtroom testimony, or even deposition testimony, the witness was generally allowed to consult with his or her lawyer following the propounding of every question. All witnesses were afforded an opportunity to make statements at the conclusion of their, testimony. These hearings lasted as short as a few minutes and as long as five days.

Although as an arm of Congress, the Committee had national subpoena power, could enforce contempt orders, and could obtain "use immunity" for witnesses, the investigation, like any other, was a pursuit of the controlling facts. We all believed that if this investigation was not clearly fact-driven, it would not survive congressional and public scrutiny, particularly in the politically explosive environment of the U.S. House of Representatives.

The actual investigation was the essence of a trial lawyer's job: collecting facts, analyzing documents, interviewing and examining witnesses, corroborating statements, drawing inferences, directing investigators and, finally, drafting a report.

Our own ethical dilemma was in constantly maintaining our neutrality, a thorough, non-partisan investigation of the allegations. Specifically, we struggled with questions such as: How do we walk down the middle of the road? How do we stay within the parameters of the charged allegations? Should we open every door and investigate every lead? We decided we must not advocate a position; we must listen to all sides. In fact, we subpoenaed all of the witnesses suggested by the Speaker, including his staff and friends. We challenged all of our own factual findings and we accepted all of the Speaker's statements as true, unless we had clear and convincing evidence to the contrary In order to protect the Speaker during the investigation, I charged all of the staff to talk to no one about the investigation, and to never communicate with the news media.

When we completed our investigation, many questions remained unanswered; the Committee accepted our recommendation that they continue to be pursued. We also recommended dismissal of some of the original charges, a recommendation the Committee accepted.

After the investigation, we drafted and submitted our written report to the Committee, in which we concluded that the Speaker had broken the House rules of conduct on 116 occasions. The Committee members began a reading period in which they studied our report. To prevent pretrial publicity and prejudice to the Speaker, access to the report was permitted only in the Committee Room and only in the presence of a member of our investigation team. The Committee members were not allowed to remove either the report book or even their notes from the room.

Following the reading period, and before holding a vote on whether an indictment - the Committee to issue a statement of alleged violation decided, at the behest of the Chairman, that the Speaker's lawyer would be given a full opportunity to rebut the charges. This step was extraordinary, unprecedented, and not provided for by the rules of the House.

In confidential hearings, the Speaker's lawyer and I argued to the committee for over 18 hours each over a two-week period. Additionally, I was questioned by the Committee for over 8 hours. Every member was furnished with our report, the response of the Speaker's lawyer, the entire 7,200 pages of hearing transcripts, all of the exhibits, and a briefing on the House rules and the law.

Notwithstanding any biases, preconceived notions, and personal experiences, each Committee member now had to judge one of their own on the fact-driven report. These congressmen, who almost always act collectively, now had to act individually. They had to look into their conscience, their experience, and decide whether the facts mandated the violations we described in our report. In performing this awesome task, they had to set aside their fears of retribution should their indictment fail or be overturned by the full House, a very real risk.

Following these oral arguments, the Committee began its deliberations. The Committee first decided to release our report to the public regardless of their ruling, to record and publish the individual votes of the members, and to vote on individual violations. The Committee deliberated for almost three weeks before deciding that the Speaker had violated the House rules on 69 occasions.

Hence, on April 13, 1989, the Ethics Committee publicly announced that by a vote of 12-0, the committee's 6 Democrats and 6 Republicans had found that the Speaker has violated the rules 69 times. They specifically found that there was reason to believe that the Speaker had received improper gifts from a person with a direct interest in legislation, that he had failed to report the same, that he had schemed through sales of his book *Reflections of a Public Man* to evade the limits placed on outside income, and that he had failed to report that income as honoraria.

The Ethics Committee chose not to pursue our determination that Mr. Wright had also violated House rules with respect to certain oil wells and his interventions with the Federal Home Loan Bank Board on behalf of several savings and loan officials. Since then, the Senate has taken a harder look at similar Bank Board interventions by five Senators now known as the "Keating Five."

Following televised hearings on the legal sufficiency of the above charges, Mr. Wright announced his intention to resign his speakership and his seat. On June 30, Mr. Wright walked out of the Capitol where he had served for 34 years. He was the first Speaker in the history of the United States forced to resign his speakership.

Stripped to their essence, the various charges against Speaker Wright revealed a common core: by willingly accepting gifts and favors from friends and contributors, he subjected himself to improper influence. Similar charges now confront five respected Senators in relation to their efforts in aiding a failing savings and loan: a savings and loan controlled by a generous contributor to their campaigns.

Was the Wright affair just another political tragedy? A confirmation in the public that "political ethics" in an oxymoron? Or, as with Watergate, do the questions raised by Jim Wright's rise and fall portend a new and characteristically different spirit of ethical responsibility? One that makes elected officials more than mere politicians as lawyers are more than mere scriveners?

Late last year, Congress passed the Ethics Reform Act of 1989 in a package that included pay raises for Congress and executive branch officials. The Act eliminates honoraria for House members at the end of this year. Although Senators kept their honoraria, they decreased the limit on such income to $23,586 from $35,800.

For the first time, the Act limits the acceptance of gifts from non-family members, regardless of whether the gift giver has an interest in legislation. As the Wright investigation proved, determining who has an interest in legislation can be a difficult task. On the other hand, does anyone really believe that wealthy individuals or corporations would give large gifts to a congressman and not expect anything in return? By banning all such gifts from non-family members, we no longer must ponder the reasons for such graciousness.

The Act also limits the acceptance of personal hospitality from any single source to 30 days in any calendar year. It also imposes an affirmative obligation on the Member to make a "documentable effort" to ascertain that the personal hospitality qualifies as an exempt gift where the Member accepts such hospitality for more than 4 days or 3 nights.

In one lessening of the rules, the Act now permits spouses or other family members to accompany the Congressman on qualified trips paid by private sponsors.

Do the new rules go far enough? Not quite. Although it is now illegal for generous "friends" to give gifts to their favorite representative, these same friends may still organize and contribute to Political Action committees and Independent Expenditure Committees.

We see all around us the cancer of money placing insurmountable pressures on politicians to obtain campaign contributions, PAC contributions, and honoraria. This money makes legislators slowly give up their independence in order to get re-elected. The costs of getting elected and being re-elected have become astronomical.

According to Common Cause, the political watchdog group, successful candidates for the U.S. Senate in the 1988 elections spent an average of $4 million each. That's almost $13,000 per week for six years! The average congressional race costs an incumbent $500,000.

How do congressmen finance these sums? Common Cause reports that PAC contributions to congressional candidates have climbed from $12 million in the 1974 elections to $150 million in the 1988 campaigns. Special interest PACs gave House and Senate incumbents $115 million for their 1988 campaigns. Challengers received only $17 million. For the 1988 elections, PAC gave House Members $8 for every $1 given to their challengers. Seventeen winning Senators each raised over $1 million in PAC money.

The too obvious result: 98 percent of incumbents who sought reelection won! More troubling, what is the quid pro quo for the contributions? Good government? Easy access for the donee? Favorable treatment? Whatever the reason, whether pure or innocent, the public believes that there is no such thing as a "free lunch." The public believes that these contributions, however well intentioned, win be reciprocated in some other form.

Moreover, 40 to 60 percent of a Congressman's time is spent in returning contributors' calls and in fundraising. Every Congressman I met and discussed this problem with complained that if they could eliminate one practice, it was the contributor phone calls, the fundraising party, and the meeting to ask for money.

Legislation is pending that would dramatically reduce the role of PACs in congressional elections and limit overall campaign spending and the use of personal wealth. The honoraria, the PACs, and the campaign contributions must be eliminated. This needed reform is not a hopeless ideal, not a pious platitude, but is an actual, moral imperative which must be enacted now.

At the federal level, Congress and the president have started raising salaries for Congress, the judiciary, and executive branch officials. We still need legislation for publicly financed elections patterned after presidential elections, with limited but free radio and TV., as in Europe.

Are these proposals too naive or too idealistic? Have we begun to answer the questions of political trust by saying that by its public nature, it requires obedience to a permanent core of political ethics; one that sets public men and women apart, or shall we assume that life after Wright will be "business as usual?" Or, perhaps there is a pragmatic reason for ethics in government -the restoration of the public's confidence in government which is essential to a functioning democracy.

We, as lawyers, have always enjoyed a special role in the government of this country. As lawyers, we understand the need for ethical restraints and independence. We must keep the fire of ethics and integrity alive. For if we do not keep the flame alive, the government, which is lawyer-driven, will not either. If we truly believe in this noble and privileged profession, we must now, more than ever, stand up and be counted - not by simply paying lip service to ethics but by living them.

Without reform, the "rule of the law" becomes the rule of lobbyists, the rule of leverage, or the rule of legislators for life.

Let us together rededicate ourselves to the proposition that, above all, our commitment as lawyers is to the rule of law and that leadership in ethics is absolutely necessary if we are to sustain our profession and our country. Let us, therefore, in whatever way we choose, here and now rededicate ourselves to these principles for which so many have given so much for so long.