Lawyers as legislators walk tightrope

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By Stan Freeman
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Electing lawyers to the Statehouse, some might say, is like letting foxes guard the henhouse.

There can be obvious conflicts of interest.

In 2003, when Massachusetts was among a handful of states that had not passed a tough drunken-driving standard, one that would have made a blood alcohol content of .08 percent proof of inebriation, many asked how a state known for its progressive politics could be so regressive on a crime that accounts for more than 200 deaths, 3,000 serious injuries and 20,000 accidents on the state's highways each year.

Was it coincidence that Massachusetts had the highest percentage of lawyers in its Legislature of any state in the nation, and that some of those lawyers earned outside income defending drunken drivers, an income that would have been diminished if the tough standard were adopted?

Barbara B. Harrington thinks not.

"This bill had no other real opponents. The opposition was in the Statehouse," said the executive director of the Massachusetts chapter of Mothers Against Drunk Driving.

Despite studies showing that toughening the standard to .08 reduced highway deaths in states that had adopted it, and despite the threat of the loss of millions of dollars in federal highway funds if Massachusetts did not adopt the standard as proof of drunkenness, for nearly a decade in the commonwealth the measure died each year, without coming to any kind of vote, in a legislative committee whose members were overwhelmingly lawyers, the Criminal Justice Committee.

"Even though attorneys are only one-third of the Legislature, these legislators were very adept at explaining why they didn't want this. Of course they wouldn't explain in terms of (the impact on their income). They would explain it on the basis of the Constitution and protection of individual rights. They were very influential over their colleagues," she said.

In 2003, when the federal government toughened its warning, threatening to withhold $54 million for bridge and road repairs in the state through 2007 if the measure didn't pass, it finally became law.

History repeats

Now, only two years later, Massachusetts again finds itself among the last states (five are holdouts) to approve another tough drunken-driving measure promoted by the federal government.

And again, the state finds itself threatened with the loss of federal funding, $9 million, for bridge and road repair if action is not taken by October.

And again, it is a measure that could diminish the billable hours for lawyers representing those charged with drunken driving, since trials would be less frequent.

And again, the measure sits in a legislative committee, the Joint Committee on the Judiciary, dominated by lawyers (15 of 17 members). In fact, both the Senate and House chairmen of the committee, Sen. Robert
Creedon, D-Brockton, and Rep. Eugene O'Flaherty, D-Chelsea, are active criminal defense lawyers whose law firms handle drunken-driving cases. And both were on record through the years opposing the .08 percent standard.

The committee’s only member from Western Massachusetts and one of two members without a law degree, Senate Minority Leader Brian P. Lees, R-East Longmeadow, said the undue influence of lawyers in the Statehouse has been long-standing.

"It's very frustrating from my standpoint in trying to serve my constituents. On issues like drunk driving and medical malpractice, things get stalled by the lobby of lawyers who are looking out for their own self-interest and not for their constituents. They have a lot of clout," he said.

Resents implication

However, O'Flaherty said he has heard the charge before and resents it.

"To say that the only thing that motivates (lawyers in the Legislature) is their business outside the building - that is such a disparaging comment to make. It attacks the integrity of every single member who happens to be a lawyer. Some of us do have concerns about the constitution," he said.

According to the American Bar Association, 33 percent - 65 of 200 - members of the Massachusetts Legislature have law degrees, the highest percentage of any state and twice the national average. Some are legislators only, but about 75 percent continue to practice law either full or part time outside their hours in the Statehouse.

Indeed, practicing the law and making the law can be a natural fit, Lees said.

"There are few professions where you can work full time on the outside and still be in the Legislature. A lot of them are eastern Massachusetts lawyers who can practice because they live so close to the Statehouse. Some make more money as lawyers than they do as state legislators," he said.

However, Eric J. Gouvin, associate dean of the Western New England School of Law, said lawyers are often better suited than those without a law background for the job of formulating laws.

"Having practiced law in a state, Maine, where there is a true citizen legislature, I can say there are benefits of having a lot of lawyers in a legislature. They are more likely to make laws that are consistent. If your legislators are car salesmen and real estate agents, people who might be unsophisticated about the law, it can be treacherous. I've seen laws written so that no one really understands them," he said.

Lawyers have long been drawn to Massachusetts politics, said state Sen. Stephen Brewer, D-Barre, who is not an attorney. "About 100 years ago, something like 75 or 80 percent of the Legislature was attorneys. It was abnormal that a person who was not a lawyer was running for office."

For lawyer-legislators, conflicts of interest can be hard to avoid, he said.

"It is somewhat ironic. If you're an electrician and you were voting on electrical codes, you might have to recuse yourself from the process. But for practicing attorneys in the Legislature, legal issues are part and parcel of the process," he said.

"There are a myriad of issues that have a direct effect on the administration of justice, from tort reform to judicial line items for the courts. Those who practice law may have some conflicts of interest, but they are people who know the law. They should not have to be the only people who can't be duly elected officials," Brewer said.

Real estate law

Rep. Gale D. Candaras, D-Wilbraham, an attorney who specializes in real estate law, said, "Every time there is an issue involving lawyers in the Statehouse, we face this criticism from some group that we are just concerned
about loss of income. So it's not just drunk driving. It's real estate, divorce law, family law, fathers’ rights."

In fact, there is currently a bill in the Legislature that would allow non-attorneys to handle real estate closings, something which will make her vulnerable to the same charge should a vote come up, she said.

There is no doubt drunken-driving measures can pose a conflict of interest for some lawyer-legislators. For many criminal defense lawyers, drunken-driving cases are the most lucrative they will handle on a regular basis. Many crimes are committed by poor people who have a limited ability to pay their lawyers, but those arrested for drinking and driving come from all economic brackets. And because of the consequences of being found guilty, including fines, loss of license and higher insurance rates, many clients are willing to pay thousands of dollars (often $5,000 to $10,000 to go to trial) to get off.

But without a trial, a lawyer cannot accumulate as many billable hours. Simply helping a client who has pled guilty find his or her way through the legal system does not produce the paycheck that a trial does, win or lose. As a result, a drunken-driving law with a large "gray area," where there are many potential issues to contest in court, is a criminal defense lawyer's best friend financially. And that is what Massachusetts had for many years.

"I remember listening to training tapes from the organization that provides continuing education for attorneys in Massachusetts," Harrington recalled.

"It was for lawyers who wanted to improve their practices. In one of these tapes, the principal presenter, who was a defense attorney, said something like, 'You need to be grateful you are living in the best state in the nation for someone defending drunk drivers.' So do I think they knew they had a good thing going? Of course, they knew," she said.

Prior to 2003, the law in Massachusetts had been that .08 was only evidence of drunkenness, not proof. Therefore, a lawyer could still argue in a trial that the defendant was not actually drunk, despite failing the breath test. However, once the measure passed making .08 percent proof of inebriation, the gray area of the law shrank and the opportunities for trials became fewer.

"That really took away an awful lot of potential defenses from a defense attorney and it made a full-blown trial unsuitable in most instances," said Reed V. Hillman, a former commander in the Massachusetts State Police and a graduate of Suffolk University Law School, who represented the 1st Hampden District from 1999 to 2004 before choosing to retire from politics.

Harrington said that the way the .08 percent standard and other unwanted measures would typically die in committee is by never seeing the light of day. Committee chairmen have the responsibility of putting bills in the order they will be considered.

Bottom of the pile

"Each year, the (.08 percent) bill was put onto the bottom of the study pile, and time would run out before it could be considered. Then they can say they weren't killing the bill, but they were. Of course it's deliberate. They make the decision. They have the control," she said.

Because the bill was never allowed to make it to the full House or Senate, no legislator ever had to go on record opposing a measure that would have saved lives and that was popular with the public. In fact, in 2003, when the measure finally did make it to the full Legislature under the threat of the loss of millions dollars of federal funds for road and bridge work, not one senator or representative voted against it, not even those who had denounced it in the press over the years.

However, both Hillman and Lees said the .08 percent standard eventually passed because of support from certain key attorneys in the Legislature.

"I don't want to paint all of them with the same broad brush," Hillman said. "A lot of the lawyers saw the potential effect on their practice and still voted to do the right thing."
Lees said there have been other pressing problems over the years that the lawyers’ lobby in the Legislature has held up. Still in that category is medical malpractice reform. With high jury awards in malpractice cases in Massachusetts, the costs for malpractice insurance for doctors has soared to the point that they are among the highest in the nation, prompting some physicians to move out of state. Attempts in the Legislature to put limits on awards by juries in such cases, in order to reduce insurance costs for the doctors, have been consistently thwarted by the defense lawyers in the Statehouse, Lees said.

"We've had numerous discussions and meetings and bills over the years to try and correct the problem, but you just can't seem to get the bills past the lawyers. Those cases can be a lawyer's dream. You're talking about very substantial amounts of money, even if it doesn't go to trial," he said.

However, Gouvin of the Western New England School of Law said the malpractice issue, like others that raise the charge of conflict of interest against lawyer-legislators, is many-sided and only saying that it is about lawyers' fees does not do the issue justice.

"The thing that is really frustrating about this debate is that people who have a dog in the fight want to reduce it to a bumper sticker. But it is too complex. It is just not susceptible to that. There is just such a complex relationship between the medical profession, the insurers and the bar. Limiting jury awards seems like a simple solution. But I think people who have really thought about this are concerned that many of the proposals are too simplistic," he said.

The latest drunken-driving measure before the Legislature, named "Melanie's Bill" after a Marshfield girl who was struck and killed by a repeat drunken driver in 2003, was submitted by Gov. W. Mitt Romney in May. The measure aims to stiffen penalties for repeat drunken drivers and for those who drive drunk with a child in the vehicle. It would also raise from 180 days to one year the length of time a person's driving license would be revoked for refusing to take a breathalyzer test, a feature that is likely to further reduce trials and increase guilty pleas.

Romney estimates that if the measure becomes law it will decrease alcohol-related fatalities on the state's highways by 25 to 50 percent each year. The Joint Committee on the Judiciary held its first hearing on Melanie's Bill two weeks ago.

LEGISLATORS WHO ARE LAWYERS, 2005

Most lawyer/legislators

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<th>lawyers</th>
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Least lawyer/legislators

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National average

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SOURCE: American Bar Association