Your Mission, Should You Choose to Accept It
Identifying the Client in the Legislative Context

or
The Perils of the Attorney-Client Relationship in the Legislature

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Who is the client?

I am invited to consider whom I regarded as my client when I was Legal Counsel to the Senate Foreign Relations Committee. Happily, I can answer succinctly: I do not know.

—Michael J. Glennon, 61-SPG Law & Contemp. Probs. 21 (1998) (9 pages)
Memogate

- In 2002, George Bush is working to confirm judicial nominees
  - Priscilla Owen
  - Charles Pickering
  - Miguel Estrada
- Republicans are surprisingly prepared.
- In November 2003, Coalition for a Fair Judiciary releases several memos from Democratic Senate Judiciary Committee staffers.
Memogate

- Memos say nasty things about nominees and discuss unseemly strategies.
- Republican staffers accused of hacking.
- Referred to Senate Sergeant-At-Arms.
- Sergeant-At-Arms releases report.
Change

January 2001
- Republicans take control of presidency, House, and 50-50 Senate (because of the vice president).

June 2001
Jim Jeffords caucuses with the Democratic Party.

Patrick Leahy becomes Senate Judiciary Chairman.

Orrin Hatch is the ranking member—Republican committee staffers report to him.
July 2001
Brian Wikner starts as Senate Judiciary Committee System Administrator.
“Hacking”

September 2001
Jason Lundell becomes Senate Judiciary Committee Nominations Clerk.
November 2001
Lundell observes Wikner accessing the network drives of other users in the committee.

S: \JUDICIARY\ LUNDELL_J

S: \JUDICIARY\ JOHNSON_O
Lundell finds several interesting documents and presents them to his boss and the office’s senior attorney.

“This is not the way we do things here.”

Documents shredded.

No notification of Democratic Party staffers or IT staff.
December 2001
Manuel Miranda begins working at the Senate Judiciary Committee as a staff attorney for the Nominations Unit.

Lundell shows Manny the files.
Miranda instructs Lundell to print Democratic Party staffer files. Guides Lundell about which directories to look in, which files to copy.
Miranda Instruction

- **January 2003**
  - Republicans take control of Senate.
  - Orrin Hatch becomes chairman of Senate Judiciary.
  - Miranda takes new job in Majority Leader Frist's member office.
Miranda Instruction

March 2003
Computers are upgraded.

Lundell can no longer see other staffers’ computer files.
- At least 16 months of access.
- Lundell kept over 4,000 files.
- Miranda admits to having looked at around 5%.
- Documents kept in the “AmEx” (opposition research) folder.
Miranda Instruction

From: Miranda, Manuel (Frist)  
Sent: Thursday, March 06, 2003 10:48 AM  
To: Lundell, Jason (Judiciary)  
Subject: Am Ex

Importance: High

Jason,

Can I ask you to undertake a discreet mission. [Coalition for a Fair Judiciary Executive Director] Sean Rushton should get a complete replicate of the Ame Ex binder. He needs to get up to speed with our best info as he builds relationships with the press.

Let me know how soon...assuming you accept, Mr. Phelps.

Manny
Manny,

Of course I would be happy to assist in this covert action. The question is: exactly how much should I provide? You know, we have loads on information.
Miranda Instruction

From: Miranda, Manuel (Frist)  
Sent: Thursday, March 06, 2003 3:50 PM  
To: Lundell, Jason (Judiciary)  
Subject: Am Ex  

Importance: High  

Whatever is in the binder and whatever gives him a sense of the facts in rebuttal to the recurring themes.

His e-mail stated that the documents were from Democratic Party staffers, but we do not know which documents were sent.

Was there an ethical violation:
1. When Miranda orchestrated the copying of documents from Democratic staffers' hard drives?
2. When Miranda looked at the documents?
3. When Miranda looked at and reviewed committee documents while in a member office and the member was not on the committee?
4. When Miranda used those documents to develop talking points for Republican members?
5. When Miranda shared the documents with a party outside the legislature?
Miranda Instruction

Miranda says:
1. Party in litigation must exhibit due diligence in preventing the opposing party from seeing its documents.
2. These documents were not confidential, since they belong to the public and will be archived.
3. "I was not in a relation of confidence to the Senators or documents in question."
Who Is the Legislative Client?

Rule 1.06, Texas Rules of Disciplinary Conduct

Conflict of Interest: General Rule

(a) A lawyer shall not represent opposing parties to the same litigation.

(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

(c) A lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

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Who Is the Legislative Client?

Rule 1.09, Texas Rules of Disciplinary Conduct

Conflict of Interest: Former Client

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
   (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
   (2) if the representation in reasonable probability will involve a violation of Rule 1.05 (Confidentiality).
   (3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10 (Successive Government and Private Employment), when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

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Who Is the Legislative Client?

Committee

- Committee counsels will often identify themselves as employees of the chairman. Loyalty to the chairman is expected.
- Who is the client when the committee's chairmanship changes?
- Do subcommittee attorneys work for the subcommittee chairman or the committee?
- When an attorney works on a conference or interim committee while under the direction of the same member, does he now have a new client?
- Who is the client when the committee's membership changes?
- Does the client change when the committee's jurisdiction or name changes?
- What if you work to change or oppose the committee’s work after it has reported?
Who Is the Legislative Client?

Member Offices

- Staffers regularly move from office to office. Are attorneys who do so required to constantly perform conflicts analyses on issues they handle?
- Do they get permission from previous member-bosses?
- What if the member is no longer in the legislature?
Who Is the Legislative Client?

- Legislative Agency Attorneys
  - Members are constantly in tension. How can an attorney draft a bill and then immediately draft an amendment that guts it?

- All Legislative Employees
  - Legislatures themselves are distinct and transient.
  - Isn’t the 111th Congress a former client?
  - Should each body grant permission to its attorneys to adopt arguments and postures that substantially thwart its goals?
  - Would it?
The Client IS the Legislature

A lawyer cannot function without the entire legislature, or at least a chamber, being the client.
Organization as a Client

Rule 1.12, Texas Rules of Disciplinary Conduct

Organization as a Client

(a) A lawyer employed or retained by an organization represents the entity. . . . [T]he lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents. . . .

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(e) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.
Rule 1.12, Texas Rules of Disciplinary Conduct

Comment 9

The duty defined in this Rule applies to governmental organizations. . . . [D]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. . . .
Another Approach

- Asking who the client is within the legislature is the wrong question from a legal ethics perspective.

- All relationships and duties are creations of the legislature.

- Therefore, YOUR duties are dictated by the rules and traditions of the body, the members, and your employer’s policies.
Another Approach

Instead, ask yourself:

- Who directs my work?
- Who does THAT entity work for?
- To what extent am I allowed to provide services and advice to people other than my boss?
- Whose confidences am I expected to keep?
- Whose interests are to be protected?
Another Approach

- Communicate your answers to these questions to those you work with, preferably before fealty becomes an issue.
- Consider establishing written rules, policies, and guidelines where possible.
- Consider creating opportunities, such as training seminars, to discuss those rules, policies, and guidelines.
- Not a carte blanche: Remember your duties to the legislature and the state.
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Ethical

- Rule 1.05(b), Texas Rules of Disciplinary Conduct:

[A] lawyer shall not knowingly:

(1) Reveal confidential information of a client or a former client to...anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.

(2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.

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(4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.
Ethical

- Rule 8.04(a), Texas Rules of Disciplinary Conduct:
  A lawyer shall not:
  
  1. violate these rules, knowingly assist or induce another to do so, or do so through the acts of another, whether or not such violation occurred in the course of a client-lawyer relationship;
  2. commit a serious crime, or commit any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
  3. engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

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Miranda Instruction—Epilogue

Criminal
- Hacking—"Whoever intentionally accesses a computer without authorization or exceeds authorized access, and...." 18 U.S.C. § 1030(a).
- Would require discussion and disclosure of embarrassing and legislatively privileged documents.

Civil
- Damages?
- Who is the plaintiff?
- Cause of action?
- Would require discussion and disclosure of embarrassing and legislative privileged documents.
Miranda Instruction—Epilogue

- No cooperation from *Wall Street Journal* or Coalition for a Fair Judiciary.
- Desire to avoid private, executive, or judicial investigation.
- No criminal, civil, or ethical censure
Miranda Instruction—Epilogue

Senator Orrin Hatch: “I am mortified that this improper, unethical and simply unacceptable breach of confidential files occurred. . . . There is no excuse to justify these improper actions. None of us would walk into another person's office and take papers from their desk, and this is, in a sense, exactly that.”
Miranda Instruction—Epilogue

Left congressional employment in summer 2003 to go to law school. Now an intellectual property attorney, specializing in information technology.
Left congressional employment in January 2004 to get an advanced accounting degree. Now a CPA, specializing in fraud prevention.
Miranda Instruction—Epilogue

Miranda

- Resigned in February 2004 after he admitted to snooping to Frist's Chief of Staff.
- Remains unrepentant
- Helps foreign governments, including Iraq, develop legislative systems and processes.
Other Considerations

- Transition creates risk.
-Attorneys for ALL members of the committee had a duty to safeguard their documents.
-Attorneys for the Republican members of the committee had the duty to monitor the activities of committee employees.
-EVERYONE had the duty to impart to all employees the ethics and expectations of the legislature.