Professional Responsibility for Legislative Lawyers

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Agenda

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• Hypotheticals
• Audience Participation!
• Thoughts from John and Matt
• End
A Snapshot of the Practice of Law in the Legislative Arena
Who are the lawyers at the legislature?

• Legislators
• Nonpartisan staff
• Partisan staff
• Agency Staff
• Attorney General and the Attorney General’s staff
• Lobbyists/Citizen Activists
• Academic Experts/Political Pundits
Who might be a client?

• Legislators
• The “legislative branch”
• Individual legislative bodies
• Legislative employees
• Governor/executive branch
• Lobbyists/Citizen Activists (represented by a third party)
• Citizens (represented by a third party)
What makes professional responsibility requirements awkward for legislative lawyers?

- Are legislative staff lawyers practicing law?
- Who is the client?
- Who speaks for the client?
- Do the interests of the legislature conflict with the interests of a legislator? Does it matter if the legislator is a member of the majority or minority caucus?
- Does attorney-client privilege apply to legislative staff lawyer communications with a member? Leadership staff? The speaker?
Rules of Professional Conduct and Application to Everyday Legislative Work
Hypothetical: Whoops

You are an attorney working for the legislature. It’s the last day to submit your CLE report, and you realize you are one short on ethics CLE credit. Consequently, you expect your license will be suspended, at least a few days. What do you do?
Are you practicing law?

BRIEF ANSWER: A person not admitted to practice law in the State of Washington IS NOT engaged in the unauthorized practice of law when he or she is employed in the position of ‘staff counsel’ to a committee of the Washington State House of Representatives as that position is described to this board.

SUMMARY OF FACTS: The position of ‘staff counsel’ to a state House of Representatives committee provides legislators with legal and policy analysis relating to proposed legislation. In this position, he or she has the following responsibilities:

1. Case research and analysis related to the legal and constitutional soundness of legislation being considered by legislators;
2. Drafting Bills;
3. Analyzing Bills drafted by others; and
4. Presenting Bills, including testimony.
Are you practicing law?

(a) General Definition: The practice of law is the *application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s)* which require the knowledge and skill of a person trained in the law. This includes but is not limited to:

1. Giving advice or counsel to others *as to their legal rights* or the legal rights or responsibilities of others for fees or other consideration.

2. Selection, drafting, or completion of legal documents or agreements which *affect the legal rights of an entity or person(s)*.

3. *Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding* or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

4. *Negotiation of legal rights or responsibilities* on behalf of another entity or person(s).

*Washington Court Rules, General Rules, GR 24*
Are you practicing law?

[2] As a representative of clients, a lawyer performs various functions. As **advisor**, a lawyer provides a client with an informed understanding of the **client’s legal rights and obligations** and explains their practical implications. As **advocate**, a lawyer zealously **asserts the client’s position under the rules of the adversary system**. As **negotiator**, a lawyer **seeks a result advantageous to the client** but consistent with requirements of honest dealings with others. As **evaluator**, a lawyer **examines a client’s legal affairs and reports about them to the client or to others**.

*Preamble: A Lawyer’s Responsibilities; ABA Model Rules of Professional Conduct*
Are you practicing law?

UNAUTHORIZED PRACTICE OF LAW.

Subdivision 1. Prohibitions. It shall be unlawful for any person or association of persons, except members of the bar of Minnesota admitted and licensed to practice as attorneys at law, to appear as attorney or counselor at law in any action or proceeding in any court in this state to maintain, conduct, or defend the same, except personally as a party thereto in other than a representative capacity, or, by word, sign, letter, or advertisement, to hold out as competent or qualified to give legal advice or counsel, or to prepare legal documents, or as being engaged in advising or counseling in law or acting as attorney or counselor at law, or in furnishing to others the services of a lawyer or lawyers, or, for a fee or any consideration, to give legal advice or counsel, perform for or furnish to another legal services, or, for or without a fee or any consideration, to prepare, directly or through another, for another person, firm, or corporation, any will or testamentary disposition or instrument of trust serving purposes similar to those of a will, or, for a fee or any consideration, to prepare for another person, firm, or corporation, any other legal document, except as provided in subdivision 3.

Minnesota Statutes, section 481.02, subdivision 1
Are you practicing law?

Factors for consideration:

• Job description
• Departmental/organizational expectations
• Perceptions of your work
• Depth (or limits) of your expertise
• Rules or other restrictions on your practice
Are you authorized to provide representation?

**LEGAL REPRESENTATION.** An employee of the nonpartisan House Research Department may not represent the House or its members as counsel of record, in a judicial or administrative proceeding.

*Minnesota House Rule 8.30*
Hypothetical: A Dispute Over Pensions

You are a nonpartisan attorney providing general counsel services to the state assembly. You’re widely-recognized in your state as the expert on legislative procedure.

At the recently-concluded session, the legislature approved a highly-contentious bill related to pensions. The bill was sent to the governor, who vetoed and returned it to the legislature. However, it was a busy time for bill signings, and due to a recent snowstorm the governor was short-staffed. As a result, the veto paperwork was delivered to the legislature one hour past the state constitution’s deadline for doing so. If improperly vetoed, the bill becomes law without the governor’s signature.
Hypothetical: A Dispute Over Pensions

A well-respected committee chair, who opposes the bill, has asked you to write a memo arguing that the one hour delay was caused by adverse weather conditions and does not render the veto invalid. It is likely that your memo will be forwarded to the governor’s staff for use in an expected lawsuit.

What should you do?
The organization as client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

...

(f) In dealing with an organization’s ... constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its ... constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required ... the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders...”

• ABA Model Rule 1.13
The organization as client

“The duty defined in this rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. ... Although in some circumstances the client may be a specific agency, it may also be a branch of government...”

_Minnesota Rule of Professional Conduct 1.13, Comment [8]: “Government Agency”_
Are there other clients?

“[13b] When the client is a governmental legislative body (such as the Utah Legislature, a city council, or a county council or commission), a lawyer representing that legislative body may concurrently represent the interests of the majority and minority leadership, members and members-elect, committee members, and staff to the legislative body. In representing the legislative body and the various interests therein, the lawyer is considered to be representing one client and the rules related to conflict of interest and required consent to conflicts do not apply.”

Utah Rules of Professional Conduct 1.13, Comment 13b.
Are there other clients?

“(a) The director of the office of legal services and the director's legal staff shall maintain the attorney-client relationship with each member of the general assembly with respect to communications between the member and the attorney, except as otherwise provided by the rules of either house of the general assembly.

(b) All materials arising out of this relationship including, but not limited to, proposed bills and amendments, analyses, opinions, and memoranda prepared by an attorney are not public records nor subject to title 10, chapter 7, part 5, except as otherwise provided by the rules of either house of the general assembly or when released by the member for whom the material was prepared.”

*Tennessee Code section 3-12-106.*
Are there other clients?

Summary of Position Statement on Attorney-Client Relationship, Office of Legislative Legal Services

“Applying the Rules of Professional Conduct, together with historical practices, the Office of Legislative Legal Services takes the position that the legislative lawyer maintains an attorney-client relationship with the legislature, as an organization, and not with each legislator.

The legislative lawyer is bound to observe requirements that a communication with a legislator be held confidential. However, a legislative lawyer should not be expected to engage in conduct that affects the legislative lawyer's allegiance to the legislature.”

Are there other clients?

“(a) The Legislative Counsel shall maintain the attorney-client relationship with each Member of the Legislature with respect to communications between the member and the Legislative Counsel except as otherwise provided by the rules of the Legislature...

(b) (1) The Legislative Counsel shall maintain the attorney-client relationship with the Governor with respect to communications between the Governor and the Legislative Counsel...

(2) Whenever the Legislative Counsel issues an opinion to the Governor analyzing the constitutionality, operation, or effect of a bill or other legislative measure that is then pending before the Legislature, or of any amendment made or proposed to be made to that bill or measure, the Legislative Counsel shall deliver two copies of the opinion to the first-named author of the bill or measure as promptly as feasible after delivery of the original opinion, and shall also deliver a copy to any other author of the bill or measure who requests a copy.”

California Government Code, Section 10207
Attorney Client and Legislative Privileges: Conquering Confidentiality Conundrums
Chris DeLaForest
@CDLobbyist

I'm really enjoying the open mics at the legislature this time of year. #mnleg

12:07 PM - 23 May 2019

Torey Van Oot @toreyvanoott

New Rep. @TinaLiebling tells @jesswamb and me that no version of the conversion therapy ban made it into the final HHS bill. Still waiting on.

Sally Jo Sorensen
@saljos

Listening to the live mic at events.qwikcast.tv/public/?wikCast ... while #omnibuzz is in recess. #mnleg

6:40 AM - 14 May 2019

Sally Jo Sorensen
@saljos

One of the fun things about listening to #mnhouse committee and division hearing on live audio is that the microphones are live before and after meetings--and there's a lot of conversations streaming. Lawmakers, lobbyists...if you've ever wanted to be a fly on the wall #mnleg

7:42 AM - 20 Feb 2019

2 Likes
Speech and Debate vs. Attorney-Client Privilege

Speech and Debate Privilege

Sec. 10. Privilege from arrest. The members of each house in all cases except treason, felony and breach of the peace, shall be privileged from arrest during the session of their respective houses and in going to or returning from the same. For any speech or debate in either house they shall not be questioned in any other place.

Minnesota Constitution, Article IV, section 10

Attorney-Client Privilege

(b) An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent.

Minnesota Statutes, section 595.02, subd. 1
Does a statutory protection apply?

Minnesota Statutes, section 3C.05 PROHIBITIONS AND LIMITATIONS.

Subdivision 1. General. The revisor, employees of the revisor's office, and persons assisting the office as part-time employees or independent contractors are subject to the following prohibitions and limitations:

(a) They may not reveal to any person not employed by the revisor's office the content or nature of a request for drafting services. The content of the request and documents and communications relating to the drafting service supplied is not public and is not subject to subpoena, search warrant, deposition, writ of mandamus, interrogatory, or other disclosure.

...

(d) They may not engage in outside activities that violate the ethical considerations concerning independent professional judgment and interests of multiple clients contained in the Code of Professional Responsibility for Lawyers.

...
Does a statutory protection apply?

Section 29-6-7.1, Code of Alabama 1975

(b) For the purposes of this section, the following terms shall have the following meanings:

(1) CLIENT. A member of the Legislature, the Lieutenant Governor, Governor, and any individual to whom the Director of Legislative Services determines the provision of services by the agency is in the best interests of the state.

(2) CLIENT'S AGENT. An individual authorized by a client to act as an agent of the client with legislative staff.

(3) COMMUNICATION. The sharing of information, opinions, advice, or knowledge with another. The term includes a communication in any form and in any draft, memoranda, or other work product related to or resulting from the communication.

(4) LEGISLATIVE STAFF. An officer, employee, or contractor of the Alabama Senate, Alabama House of Representatives, Office of the President Pro Tempore, Office of the Speaker of the House, Legislative Services Agency, and Examiners of Public Accounts.

(c) A communication regarding legislation, potential legislation, the legislative process, or legislative activity between legislative staff and a client or a client's agent is privileged and confidential.

(d) A legislative staff member may not disclose the content of a communication or the fact that a communication occurred unless the privilege under subsection (c) is waived expressly by the client to whom the communication was made or, with respect to a communication made to a client's agent, the client on whose behalf the communication occurred.

(e) The introduction or public discussion of a bill by a client does not waive the privilege under subsection (c) with respect to any communication related to the bill.
Confidentiality of information is of paramount importance in the Legislative Services Agency. To a great extent, the information obtained, created, or utilized by LSA is protected by confidentiality laws that govern the agency and that are set forth in Section 29-6-7.1, Code of Alabama 1975, which is attached to this Employee Manual as Appendix B. LSA employees should read this code section carefully, and shall adhere to the code section at all times and abide by any designation of confidentiality made by the Director. Unauthorized accessing or disclosure of confidential information by any employee is prohibited. If an employee has any questions or concerns regarding the confidential or proprietary nature of any information, including any permissible use thereof, the employee should seek advice from the employee’s supervisor or Deputy Director of his or her division, as applicable, or from the General Counsel or Director.
Who has access to legal opinions?

“(a) The Legislative Counsel shall maintain the attorney-client relationship with each Member of the Legislature with respect to communications between the member and the Legislative Counsel except as otherwise provided by the rules of the Legislature...

(b) (1) The Legislative Counsel shall maintain the attorney-client relationship with the Governor with respect to communications between the Governor and the Legislative Counsel...

(2) Whenever the Legislative Counsel issues an opinion to the Governor analyzing the constitutionality, operation, or effect of a bill or other legislative measure that is then pending before the Legislature, or of any amendment made or proposed to be made to that bill or measure, the Legislative Counsel shall deliver two copies of the opinion to the first-named author of the bill or measure as promptly as feasible after delivery of the original opinion, and shall also deliver a copy to any other author of the bill or measure who requests a copy.”

California Government Code, Section 10207
Wake up early on Friday!

8:00 a.m.: “State Legislatures and Litigation: A Toolkit”
Conflicts of Interest for Attorneys

Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.

ABA Model Rule 1.7
The legislative branch is not a monolith

• House of Representatives/Assembly
  • Political caucuses, members and staff
  • Nonpartisan staff

• Senate
  • Political caucuses, members and staff
  • Nonpartisan staff

• Joint legislative offices?
The legislative branch is not a monolith

TO: All Members and Staff
FROM: Kelly Knight
DATE: November 8, 2013
RE: Weather Delays or Cancellations

This is to remind you that the House, Senate and Joint Legislative offices are separate from the Executive Branch regarding any weather related closing of state agencies and offices. The Governor is the decision maker for the Executive Branch to close offices due to weather.

Any decisions to delay or close the House of Representatives will be made by the Speaker of the House. The Senate Majority Leader will make the decision for Senate Offices. Before heading out in bad weather, House staff may want to check their House voicemail or email for details regarding a delayed start time or for the closure of House offices. Notices about weather delays and/or cancellations will also be posted by House Public Information Services on Twitter and Facebook.

Time off granted by the Speaker due to a delay or closure should be recorded under "Holiday Pay". Time worked during these holiday hours will be treated in the same manner as work on any other holiday.

If you have any additional questions, please contact Human Resources.
Legal interests are different than political interests
They don’t always align!

Legal Interests
• Separation of powers & federalism
• Procedures of lawmaking (constitutional, statutory, internal rules)
• Regulation of decorum
• Enactment of a state budget
• Personnel obligations
• Office space, supplies and services

Political Interests
• Maintaining (or achieving) a governing majority
• “Successful” negotiations w/ Gov.
• Whipping votes (for/against) a bill
• Enactment of policy preferences
• Constituent services
• Managing public perceptions
"...you’re putting a big cloud over the whole nonpartisan staff."

"With things like this, you’re putting a big cloud over the whole nonpartisan staff."

— Rep. Bob Gunther, R-Fairmont
Other Ethical Conundrums
Hypothetical: Ramp up

It’s the second week of a legislative session in a budgeting year, and your speaker forwards papers indicating that the House has been named as a defendant in a lawsuit: a class of plaintiffs is asserting that recently-installed access ramps for the state capitol do not comply with the size and slope requirements of the Americans with Disabilities Act. The suit alleges that, as a result, some citizens with disabilities are being prevented from attending public legislative hearings.

How should you respond?
Competence and diligence

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

• ABA Model Rule of Professional Conduct 1.1

“A lawyer shall act with reasonable diligence and promptness in representing a client.”

• ABA Model Rule of Professional Conduct 1.3
Competence and diligence

“In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer’s general experience, the lawyers training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question...”

• Minnesota Rule of Professional Conduct 1.1, Comment [1]

“A lawyer’s work load must be controlled so that each matter can be handled competently.”

• Minnesota Rule of Professional Conduct 1.3, Comment [2]
Working with outside counsel

• What’s your relationship with the attorney general?

• Do you have access to other counsel?
  • If so, what is your process for engaging their services? Are they knowledgeable about the challenges of representing the legislature as a client?
  • If not, what is your process for finding competent advice, quickly?
Hypothetical: Join the party

You work in a nonpartisan staff position within your legislature. You have been asked to personally serve on a local county committee for a particular political party, in part due to your role as an attorney working on election and campaign finance policy.

Your role with the committee would be to set the agenda for the party in the county, to discuss the support of various local candidates for county office, as well as candidates for state office with the Legislature, and to assist it in complying with campaign reporting laws.

Should you accept the invitation to serve on the local committee?
Pro Bono Publico Service

“Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the 50 hours of legal services without fee or expectation of fee to:

(1) persons of limited means; or

(2) charitable, religious, civic, community, governmental, and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system, or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.”

ABA Model Rule 6.1
Hypothetical: Human Trafficking

Your nonpartisan office receives a request to draft a bill relating to human trafficking, and you are assigned to the project. Among other things, the legislator requests that the criminal penalties for trafficking be “enhanced” in a way that you think may be unconstitutional.

You reach out to the legislator to inquire more about the direction she wishes to take regarding the criminal penalties, and you receive a short response to “modify the penalties to whatever you think is best.” How should you respond?
Other ethical obligations of legislative staff

• Obligations of public officials
  • Gift Law, conflicts of interest, etc.
  • Financial disclosures

• NCSL Model Code of Conduct for Legislative Staff
  
Opportunities for Further Reading


Today’s Presenters

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