

Attorney-Client Relationships in the Legislative Arena

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Lawyers who find themselves in the Legislative area owe a duty to the profession, to the public and to themselves to always conduct themselves in a exemplary way.

The lawyer may be:

1. **Lawyer- Legislator**
2. **Legislature's Attorney**
3. **Lawyers who Lobby**
4. **Lawyers representation of Clients before the Legislature**

For all lawyers the Code of Professional Conduce apply as adopted by their state of admission.

ABA CODE OF PROFESSIONAL CONDUCT

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

...

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

...

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

SCOPE

...

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

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[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intergovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

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NCSL in a Legislative Brief went further to address for all persons in the Legislative area they should adhere to **The Appearance Standard**. In most democracies, public officials are held to higher standards than the average citizen. Avoiding even the appearance of impropriety bolsters public confidence in the legislative institution, says Carol W. Lewis, political science professor at the University of Connecticut. “On the one hand, the appearance standard is rarely, if ever, defined,” she says. She explains that most people would say that appearance is what a reasonable person could reasonably believe. “This definition leaves a good deal to the imagination,” she says:

What is an impropriety?

As it appears to whom?

What role does the media play?

Do facts count?

Some states mention the appearance standard in statutes. Iowa and Kentucky use it as a standard for accepting gifts. Vermont’s Executive Code of Ethics defines the appearance of a conflict of interest as “...the impression that a reasonable member of the public might have, after full disclosure of the facts, that an appointee’s judgment might be significantly influenced by outside interests, even though there is not actual conflict of interest.” Lewis expresses concern that some public servants interpret the appearance standard to imply that looking good is as important as doing good. “This standard is not intended to substitute for ethical action.”

Avoiding conflicts of interests is impossible. It is a legislator’s ethical standard and how he or she represents the public trust that is the deciding factor in how one handles them.

1.Lawyer- Legislators

Who are their client? And to whom do they owe a duty?

- A. The Public
- B. Government at Large
- C. Private Clients:
 - a. Unresolved conflicts of existing clients
 - b. Retainer clients

c. Special advantages

See: "Lawyer-Legislator Conflicts of Interest," 17 Journal of the Legal profession 261 (1992)

2. Legislature's Attorney

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Responsibilities

- A. Drafting Legislation
- B. Interpreting Legislation
- C. Amending Legislation'
- D. Questioning Constitutionality

Who is the Client?

- A. Allegiance to the Legislative Body as a whole
- B. To an individual legislator
- C. To the Director

To who is a duty owed?

- A. Public at Large
- B. Government at Large
- C. Legislature
- D. The Director

Does it matter if the employee is a contract employee during the session that has private clients?

See “Representing the Representatives: Ethical Considerations for Legislature’s Attorneys” by Robert Marchant 6 NYU, No.2, 439 (Fall 2002)

“The Concept of Legislative Lawyering” by Chai Feldblum, Federal Legislation Clinic, Georgetown Law School

State of Texas v. United States, Civil Action No. 11-cr-1303

State of Texas v. United States, Civil Action No. 12-128

Alabama Case in which a summary of a local bill was published sponsored by Representative “A”. The requirement for passage of a “local law” effecting only one county required the prior publication of the act “in full” or a “summary” of the act prior to the introduction of the bill. Representative “A” had published in a local paper a “Summary” of the bill. Representative “B” requested the Director of the Legislative Reference Service (LRS) give Representative “B” a copy of the drafted, yet unfiled local bill. The Director of LRS exerted privileged communication between the drafters and Representative “A”. Representative “A” refused to give LRS a waiver of the privilege.

The Court held once the bill or summary is released for publication the privilege is waived. Subsequently the statute was revised adding the additional language below:

Amended in response to Bassett v. Newton 658 So.2d 398 (Ala 1995)

Alabama Code Section 29-7-6

Powers and duties; requests for assistance; state agencies and departments to submit reports.

(a) The Director of the Legislative Reference Service shall have all of the following powers and duties:

(1) To respond to questions concerning the organization and administration of state government or the operation of constitutional or statutory law.

(2) To render assistance in the drafting of bills and amendments to bills.

...

(c)(1) Communications concerning a request for assistance between the director and each officer and employee of the Legislative Reference Service and an individual authorized by this section to make a request for assistance shall be privileged and confidential. When responding to a request for assistance, the director and each officer and employee of the Legislative Reference Service shall maintain this privilege. All requests for assistance and the contents thereof, including, but not limited to, the fact a request was made, any materials related to the request, and any work product related to or arising from the request, shall be confidential and privileged until this privilege is waived. The privilege is waived when the Legislative Reference Service receives instructions to release the material from the member of the Legislature in whose name the request for assistance was made, or the Lieutenant Governor for a request for assistance made in the name of the Lieutenant Governor, or the Governor for a request for assistance made in the name of the Governor.

(2) The introduction of a bill prepared by the Legislative Reference Service is a waiver of the privilege imposed by this subsection only with respect to the contents of the bill.

(3) The advertising of a local bill by synopsis or in a form less than in its entirety is not, in and of itself, a waiver of the privilege for the purposes of this subsection.

No. 95-567, p. 1185, §1.)

CANON 1

Client-Lawyer Relationship

Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

Rule 1.11 Special Conflicts Of Interest For Former And Current Government Officers And Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

...

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee there from.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

CANON 6

Public Service

Rule 6.4 Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client

3. Lawyers who Lobby

A. Restraints on representation

B. Ethical restraints on lawyers that may not otherwise be on a non-lawyer advocate.

Transactions With Persons Other Than Clients

CANON 4

Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

ETHICAL CONSIDERATIONS

EC 9-3 After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.⁴

4.Lawyers Representation of Clients before the Legislature

CANON 3

Rule 3.9 Advocate In Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

CANON 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship.

EC 4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to

whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus a lawyer should not attempt to sell a law practice as a going business because, among other reasons, to do so would involve the disclosure of confidences and secrets. A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

DISCIPLINARY RULES

DR 4-101 -Preservation of Confidences and Secrets of a Client.

(A) -"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) -Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) -Reveal a confidence or secret of his client.

(2) -Use a confidence or secret of his client to the disadvantage of the client.

(3) -Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) -A lawyer may reveal:

(1) -Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) -Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) -The intention of his client to commit a crime¹⁶ and the information necessary to prevent the crime.

(4) -Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) -A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

ETHICAL CONSIDERATIONS

EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Interests of a Lawyer That May Affect His Judgment

EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will,

or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

Interests of Multiple Clients

EC 5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

CANON 6

Rule 6.4 Law Reform Activities Affecting Client InterestsA lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

CANON 7

A Lawyer Should Represent a Client Zealously Within the Bounds of the Law

EC 7-16 The primary business of a legislative body is to enact laws rather than to adjudicate controversies, although on occasion the activities of a legislative body may take on the characteristics of an adversary proceeding, particularly in investigative and impeachment matters. The role of a lawyer supporting or opposing proposed legislation normally is quite different from his role in representing a person under investigation or on trial by a legislative body. When a lawyer appears in connection with proposed legislation, he seeks to affect the lawmaking process, but when he appears on behalf of a client in investigatory or impeachment proceedings, he is concerned with the protection of the rights of his client. In either event, he should identify himself and his client, if identity of his client is not privileged, and should

comply with applicable laws and legislative rules.

CANON 8

A Lawyer Should Assist in Improving the Legal System

ETHICAL CONSIDERATIONS

EC 8-1 Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.

EC 8-2 Rules of law are deficient if they are not just, understandable, and responsive to the needs

of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.

EC 8-4 Whenever a lawyer seeks legislative or administrative changes, he should identify the capacity in which he appears, whether on behalf of himself, a client, or the public. A lawyer may advocate such changes on behalf of a client even though he does not agree with them. But when a lawyer purports to act on behalf of the public, he should espouse only those changes which he conscientiously believes to be in the public interest.

EC 8-5 Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

EC 8-8 Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

EC 8-9 The advancement of our legal system is of vital importance in maintaining the rule of law

and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

DISCIPLINARY RULES

DR 8-101 -Action as a Public Official.

(A) -A lawyer who holds public office shall not:

(1) -Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(2) -Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.

(3) -Accept any thing of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

DR 8-102 -Statements Concerning Judges and Other Adjudicatory Officers.

(A) -A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) -A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

See “Ethical Considerations of the Public Sector Lobbyist” by Alan Fernandes, McGeorge Law Review

ON the NCSL Web: www.NCSL.org

Representing Others before Government, February 2010

Conflict of Interest, What is it?

Legislator Recusal to Vote on Legislation

Legislators and Elections: Ethics