Who is the Client?

Mark Kuster
Senior Legislative Counsel

Who is the Texas Legislative Council?

• TLC is a state agency of the legislative branch of state government (Chapter 323, Government Code)

• The governing body of the council consists of:
  • the lieutenant governor;
  • the speaker of the house of representatives;
  • the chairman of the house administration committee;
  • six senators appointed by the president of the senate; and
  • five other members of the house of representatives appointed by the speaker.

• The lieutenant governor and the speaker are joint chairs of the council.
TLC Services

Sec. 323.006. POWERS AND DUTIES. (a) The council shall: . . .

(7) assist the legislature in drafting proposed legislation; . . .

(b) By agreement with either house of the legislature or a legislative agency, the council may perform other services or functions for or on behalf of the house or agency.

Drafting Services

Drafting Services Quick Reference

The council staff provide comprehensive drafting services to members of the legislative community.

Types of Documents

Legal Division. If you have questions or concerns about a document prepared by the legal division, contact the appropriate attorney or Deborah Fulton, Legal Division Director, (512) 463-1155.

- DFR
- Conference committee report texts
- Joint resolutions for matters other than Texas constitutional amendment proposals, including applications to Congress to call a U.S. constitutional convention
- Petitions to use the state legislature
- Rules resolutions
- Texas constitutional amendment proposals
- Amendments or substitutes for the types of legislative documents listed above

Related Links

- LDH (Legislative draft request system)
- LDH Authorization Form
- LDH document types
- LDH list for legal division requests
- House bill analysis preparation tips
- Confidentiality policy
- Attorney subject area assignment list
- LDH drafts by initials
- Drafting process
- TLC Drafting Manual
Other TLC Services

Legal Memoranda
Legal division attorneys and paralegals prepare confidential written memoranda addressing legal issues during legislative sessions, bill drafting receives a higher priority. Some restrictions apply; see the written legal opinions page for details.

Legal Memoranda Request. Request a legal memorandum by one of these methods:
- In writing: deliver a written request to the Committee or Executive Director.
- By telephone: call (512) 463-1155.

Information to Provide:
- Statement of problem or issue
- Statement of legal question to be answered
- References to relevant cases, constitutional provisions, statutes, or attorney general opinions (if known)
- Related newspaper articles or media stories
- Persons or agencies to contact or inform 
- Legislators or officials of the request or to be delivered to a person other than the Capitol office of the requestor

Written Legal Opinions
On request of a legislator or the lieutenant governor, the legal staff prepare written legal opinions that relate to the conduct of the Legislature. Written opinions prepared by the staff are confidential and confidential. Where the staff can provide their best professional advice, the staff will avoid giving a definite answer to a question that presents an unresolved legal question.

During a legislative session, the drafting workload demands that written legal opinions receive a lower priority than drafting requests. A request for a written legal opinion can be honored only if the staff can do so without jeopardizing the ability to meet drafting deadlines.

A request may not require the staff in preparing a written opinion, to provide private legal advice to a constituent concerning the consequences of a private matter or to state a particular conclusion.

The staff may decline to provide a written legal opinion in the following circumstances:
- Refers to a particular conclusion that, in the professional judgment of the staff, is not supported by a reasonable basis of authority.
- Request for a written legal opinion is prepared by a staff member who is not a legal opinion specialist.

Written Legal Opinion Request. To request a written legal opinion, contact Mike Marshall, Legal Division Director, (512) 463-1155.
Other TLC Services

Legal Counseling and Special Projects

Legal Counseling
Legal counseling involves telephone and face-to-face consultation with legislators and legislative staff.
Council attorneys are available to provide legal advice about current law and about what changes to it may be necessary to implement proposals prepared by a legislator. In addition, council attorneys are familiar with the details of the legislative process and can advise legislators and staff generally in regard to the process.

Note: Inquiries as to the interpretation and application of a parliamentary rule should be directed to the parliamentarians of the respective houses or their advisors. Legislative attorneys do not make advisory rulings on parliamentary questions.

Legal Counseling Request: To request legal counseling, contact the appropriate attorney or describe the general method to which you are referring, (512) 463-1139. Now the "Attorney subject area assignment list" to determine the appropriate attorney.

Special Projects
Council attorneys provide necessary legal support work for special legislative projects such as renewal proceedings and election contests. Attorneys work closely with committee chairs and members appointed to conduct those proceedings and provide for that purpose legal research, analysis, and advice. Also, with specific approval of leadership, the council has occasion produced excise briefs for filing with the Texas Supreme Court on significant issues affecting the legislature.

Special Project Assistance Request: To request legal assistance for special legislative projects, contact Mike Marshall, Legal Division Director, (512) 463-1135.
TLC Does Not . . .

- act as the attorney of record for the legislature in litigation
- represent the legislature in purchasing or contract negotiations
- act as an advocate for the legislature

Is there an Attorney-Client Relationship?

- An attorney-client relationship exists “when:
  (1) a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and . . .
  (a) the lawyer manifests to the person consent to do so . . . .” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 & cmt. c (2000).
Is TLC Attorney Performing Legal Services?

• In the Texas statutes governing the unauthorized practice of law, the practice of law is defined by Section 81.101(a), Government Code, as follows:

• (a) In this chapter the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

Bill Drafting

• In drafting a bill a legislative lawyer must be knowledgeable regarding state and federal constitutional, statutory, and common law.

• The legislative lawyer uses legal skill and knowledge to advise the legislator on various legal issues related to the implementation of the legislator’s policy initiatives and create a bill to implement those initiatives.
Who is the Client?

• Is the client the legislature?
  Rule 1.12, Texas Disciplinary Rules of Professional 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. . . .
  ***
  (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

• 9. The duty defined in this Rule applies to
governmental organizations. However, when the
client is a governmental organization, a different
balance may be appropriate between maintaining
confidentiality and assuring that the wrongful
official act is prevented or rectified, for public
business is involved. In addition, duties of lawyers
employed by the government or lawyers in military
service may be defined by statutes and
regulations. Therefore, defining precisely the
identity of the client and prescribing the resulting
obligations of such lawyers may be more difficult
in the government context. . . .
• Sec. 323.006 refers to "assist[ing] the legislature" and performing services for "either house of the legislature."

• Sec. 323.017. Communications, including conversations, correspondence, and electronic communications, between a member of the legislature or the lieutenant governor and an assistant or employee of the council that relate to a request by the official for information, advice, or opinions from an assistant or employee of the council are confidential. Information, advice, and opinions given privately by an assistant or employee of the council to a member of the legislature, or the lieutenant governor, acting in the person's official capacity, are confidential. However, the member or lieutenant governor may choose to disclose all or a part of the communications, information, advice, or opinions to which this section applies, and such a disclosure does not violate the law of this state.

• The existence of the attorney-client privilege with respect to the work of council attorneys is recognized in House Rule 2, Section 10(a), Standing Rules of the Texas House of Representatives, 84th Legislature. House Rule 2, Section 10(c), recognizes that only the individual legislator involved may waive the privilege. Rule 2, Section 10, in its entirety reads:

  Section 10. Legislative Council Employees: Confidentiality — (a) Communications between an attorney employed by the Texas Legislative Council and the speaker, another member of the house, or an employee of a member or committee of the house are confidential in accordance with the rules and laws concerning attorney-client privilege.
  (b) Communications between any employee of the Texas Legislative Council and the speaker, another member of the house, or an employee of a member or committee of the house are confidential. The General Investigating and Ethics Committee of the House may investigate an alleged violation of this subsection.
  (c) This section does not prohibit the speaker, member, or committee from waiving a privilege as otherwise permitted by law or from waiving confidentiality under this section.

• Form signed by legislators to access the TLC Legislative Drafting Request System acknowledges that:

  the TLC provides legal services directly to the legislator or to the legislator through the legislator’s staff; and
  communications with TLC are confidential in accordance with law and council policy and are privileged to the extent provided by law.
Legislator as Client

- Rule 1.06, Texas Disciplinary Rules of Professional Conduct

Conflict of Interest: General Rule

(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.

- What are the legislator’s interests to be protected?
- Legislators can waive conflict. Can the waiver be an implied waiver?
Agency as the Client

- TLC agency contracting
- Amicus briefs in the name of the TLC (*Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278 (Tex. 1999))
- Code revision projects (Sec. 323.007(c), Government Code)
  - (c) As part of the statutory revision program, the council shall:
    - Prepare and submit to the legislature in bill form statutory revisions on a topical or code basis;

Former TLC Employees

**Rule 1.05, Texas Disciplinary Rules of Professional Conduct**
Confidentiality of Information

- (b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:
  - (1) Reveal confidential information of a client or a former client to:
    - (i) a person that the client has instructed is not to receive the information; or
    - (ii) 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.
  - (3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.
  - (4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.
• 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.
   (3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, 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).

***