



WISCONSIN LEGISLATIVE COUNCIL

Jessica Karls-Ruplinger, Acting Director

TO: SENATOR ROGER ROTH

FROM: Jessica Karls-Ruplinger, Acting Director

RE: Considerations Relating to Statutory Confidentiality and Attorney-Client Relationships in a Merger of the Legislative Council and Legislative Reference Bureau

DATE: February 11, 2019

During my presentation to Speaker Vos, Senator Shilling, Representative Hintz, and you on February 7, 2019, about a proposed merger of the Legislative Council (LC) and Legislative Reference Bureau (LRB), I raised questions for you to consider relating to: (1) LC and LRB confidentiality under state statute; and (2) LRB's recognition of an attorney-client relationship between LRB attorneys and persons with drafting privileges.

This memorandum, prepared at your request, provides background information on statutory confidentiality and on LRB's policy on attorney-client relationships, and it identifies questions relating to these issues for the Legislature to consider and address prior to any merger of the LC and LRB. This memorandum is intended as an overview of these issues and not as a comprehensive discussion. If you have any questions or would like additional information, I am available to discuss these issues in further detail with you.

STATUTORY CONFIDENTIALITY

Under state statute, each of the nonpartisan legislative service agencies is required to observe the confidential nature of certain communications. There is a unique statutory confidentiality requirement for each agency. The following are the confidentiality requirements for the LC and LRB:

- **Legislative Council:** "The legislative council staff ... shall at all times observe the confidential nature of the research and drafting requests received by it." [s. 13.91 (intro.), Stats.]

- **Legislative Reference Bureau:** “The legislative reference bureau ... shall at all times observe the confidential nature of the reference or drafting requests received by it.” An exception is made for drafting files of introduced legislation; however, “[r]ecords of drafting requests which did not result in legislation introduced shall remain confidential at all times.” [s. 13.92 (intro.) and (1) (a) 3. and (c), Stats.]

ATTORNEY-CLIENT RELATIONSHIP

LRB’s Policy

According to its *Drafting Manual*, the LRB recognizes an attorney-client relationship with each member of the Legislature and other persons with drafting privileges:

1.01 CLIENT AND CONFIDENTIALITY. LRB attorneys maintain an attorney-client relationship with each member of the legislature and other persons with drafting privileges under s. 13.92 (1) (b) 1., stats., with respect to the provision of drafting and other legal services. Communications between a legislative attorney and a legislator or his or her staff or agent, or other person with drafting privileges, are confidential. The following communications, however, are not confidential:

- (1) Communications that are included within the drafting file of an introduced proposal. See s. 13.92 (1) (c), Stats.
- (2) Communications that the legislator, directly or through staff or other agents, has consented to be disclosed.
- (3) Communications that are otherwise exempt from confidentiality under the supreme court rules of professional conduct.

[LRB, *Bill Drafting Manual 2019-2020*, s. 1.01 (Sept. 2018).]

Under the statutes, all of the following persons have drafting privileges with the LRB and, as a result of LRB’s policy, have an attorney-client relationship with LRB attorneys:

- Any member or member-elect of the Legislature and, on behalf of each committee thereof, the chairperson.
- Any agency, as defined in s. 16.70 (1e), Stats.,¹ created under ch. 13, 14, 15, or 758, Stats., which includes agencies in the executive and judicial branches.

¹ Section 16.70 (1e), Stats., defines “agency” as an office, department, agency, institution of higher education, association, society or other body in state government created or authorized to be created by the constitution or any law, which is entitled to expend moneys appropriated by law, including the Legislature and the courts, but not including an authority.

- The chief clerk of either house of the Legislature for requests pertaining to the operation of the Legislature.
- A party caucus of either house of the Legislature.

Rules of Professional Conduct

An attorney licensed in Wisconsin must comply with rules of professional conduct adopted by the Wisconsin Supreme Court. The rules are codified in ch. 20 of the Supreme Court Rules (SCR). When an attorney has an attorney-client relationship with a client, the attorney must comply with certain requirements in that attorney-client relationship. For example, the attorney has a duty of confidentiality and a duty of loyalty to a client.

Under the duty of confidentiality, an attorney generally may not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation. In addition, an attorney must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. [SCR 20:1.6 (a) and (d).]²

Under the duty of loyalty, an attorney may not represent a client if the representation involves a concurrent conflict of interest.³ However, an attorney may represent a client, notwithstanding the existence of a concurrent conflict of interest, if: (1) the attorney reasonably believes that the attorney will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the attorney in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in a writing signed by the client. [SCR 20:1.7.]

CONSIDERATIONS

Statutory Confidentiality

The LC has a broader statutory confidentiality requirement than the LRB. As described above, the LC must treat research and drafting requests as confidential. The LRB must treat reference and drafting requests as confidential, except the material contained in drafting files

² Related to confidentiality is the attorney-client privilege, which is typically asserted in a judicial proceeding. Under the attorney-client privilege, an attorney's client has a right to withhold and prevent others, including the attorney, from disclosing information about communications between the attorney and client. [s. 905.03, Stats.]

³ 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 attorney's responsibilities to another client, a former client, or a third person or by a personal interest of the attorney. [SCR 20:1.7 (a).]

for introduced legislation. The LC does not have an exception to its confidentiality for introduced legislation.

Given the differences between the LC and LRB confidentiality statutes, the Legislature should consider the statutory confidentiality of a merged agency and how to reconcile the existing statutes. In reconciling the confidentiality requirements, the Legislature might consider the following questions:

- If the LC and LRB attorneys serve as both drafters and committee staff in a merged agency, will the drafting exception apply to the drafting work product of all attorneys?
- Will the research now prepared by LC staff be subject to the drafting file exception under a merged agency?
- Should research that is not for purposes of bill drafting be confidential?
- Should the structure of two sets of attorneys remain in place, with one set retaining the LC confidentiality and the other set retaining the LRB confidentiality?
- If a drafting file exception is retained in a merged agency, what material should be included in a drafting file?

Attorney-Client Relationship

If the LC and LRB are merged into a single agency, the Legislature should consider whether the LRB's policy on attorney-client relationships applies to all attorneys in a merged agency or whether the merged agency should recognize, through its structure and functions, alternatives to LRB's policy on attorney-client relationships. For example, alternatives could include recognizing: (1) an attorney-client relationship between legislative attorneys and the Legislature as a client under an organization as a client model, rather than a model of individual legislators as clients; (2) limited scope representations, rather than the seemingly broad attorney-client relationship that is articulated in LRB's policy; or (3) no attorney-client relationship. The Legislature might also consider whether legislative attorneys should take additional steps to increase the likelihood that an attorney-client relationship would be recognized by a court.

If the LRB's policy is applied to all attorneys in a merged agency, the Legislature should consider all of the following questions:

- If drafting attorneys also serve as committee staff:
 - How would the drafting attorneys reconcile their duty of confidentiality with serving the needs of the committee in responding to questions? Under the duty of confidentiality, the drafting attorney should only reveal the information contained in the drafting file because it appears that the client (i.e., the author) has provided consent to disclose the drafting file contents. How should a drafting attorney

respond when the attorney is asked about information that was part of the drafting process but not contained in the drafting file?

- How would the drafting attorneys reconcile their role in serving all members of the committee with their duty of loyalty to the bill author? Serving that dual role may give rise to a conflict under rules of professional conduct.
- Should all attorneys in a merged agency have an attorney-client relationship with any person who has drafting privileges, including those in the executive and judicial branches? Should the attorney-client relationship only recognize legislators as clients?

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

JKR:ksm