

# You Are (Not) the Boss of Me

Identifying the client in the legislative context

Jon Heining - General Counsel - Texas Legislative Council

February 8, 2024

# How Often?

140 days

Odd-numbered years



# Legislative Statistics

## **31 Senators**

Population = +/- 940,000 (North Dakota = 774,948)

8,664 sq. miles (New Jersey = 8,722 sq. miles)

## **150 State Representatives**

Population = +/- 194,000 (McKinney = 195,300)

1,791 sq. miles (Rhode Island = 1,545 sq. miles)



# Legislative Statistics

## **88<sup>th</sup> Regular Session (2023)**

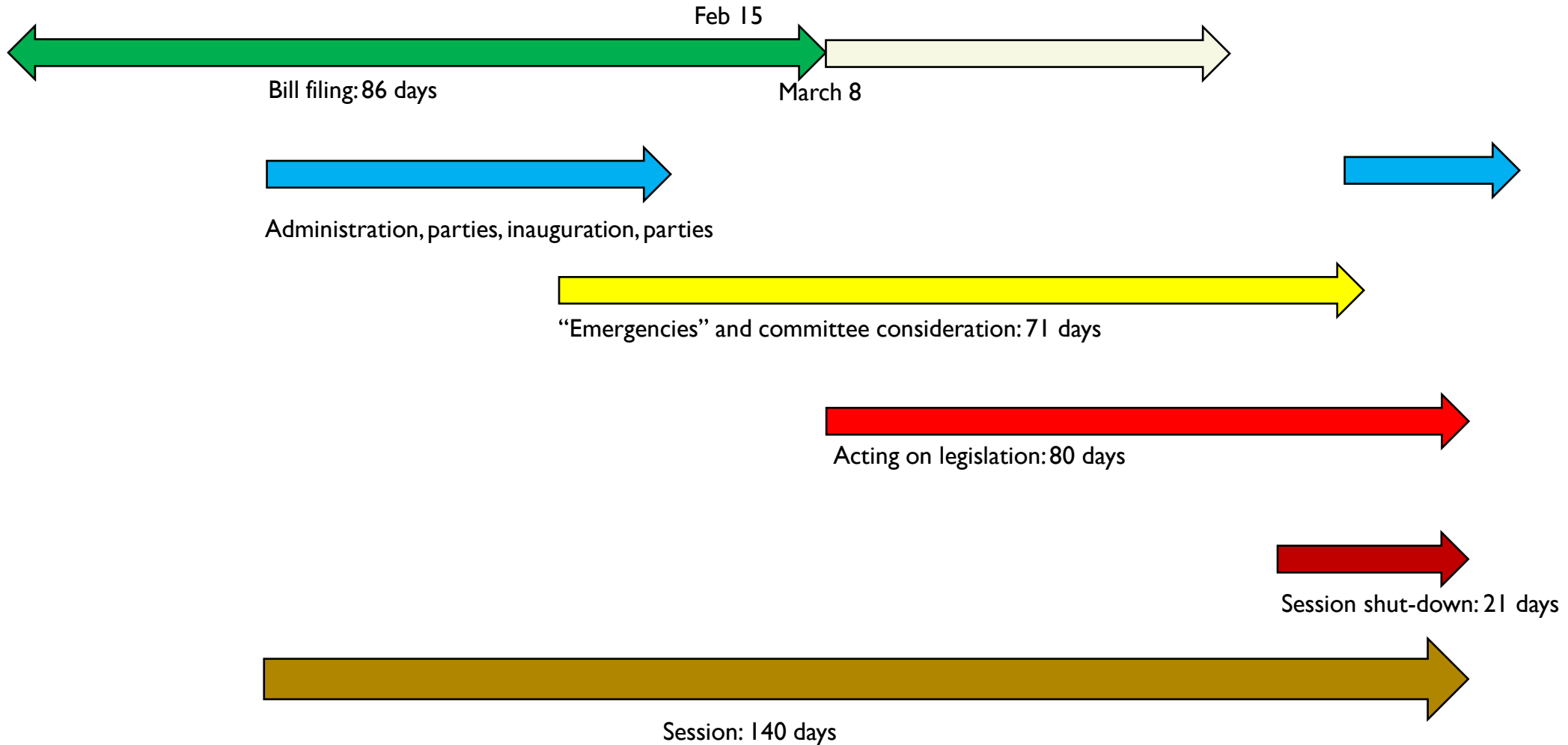
HBs and SBs Introduced = 8,046

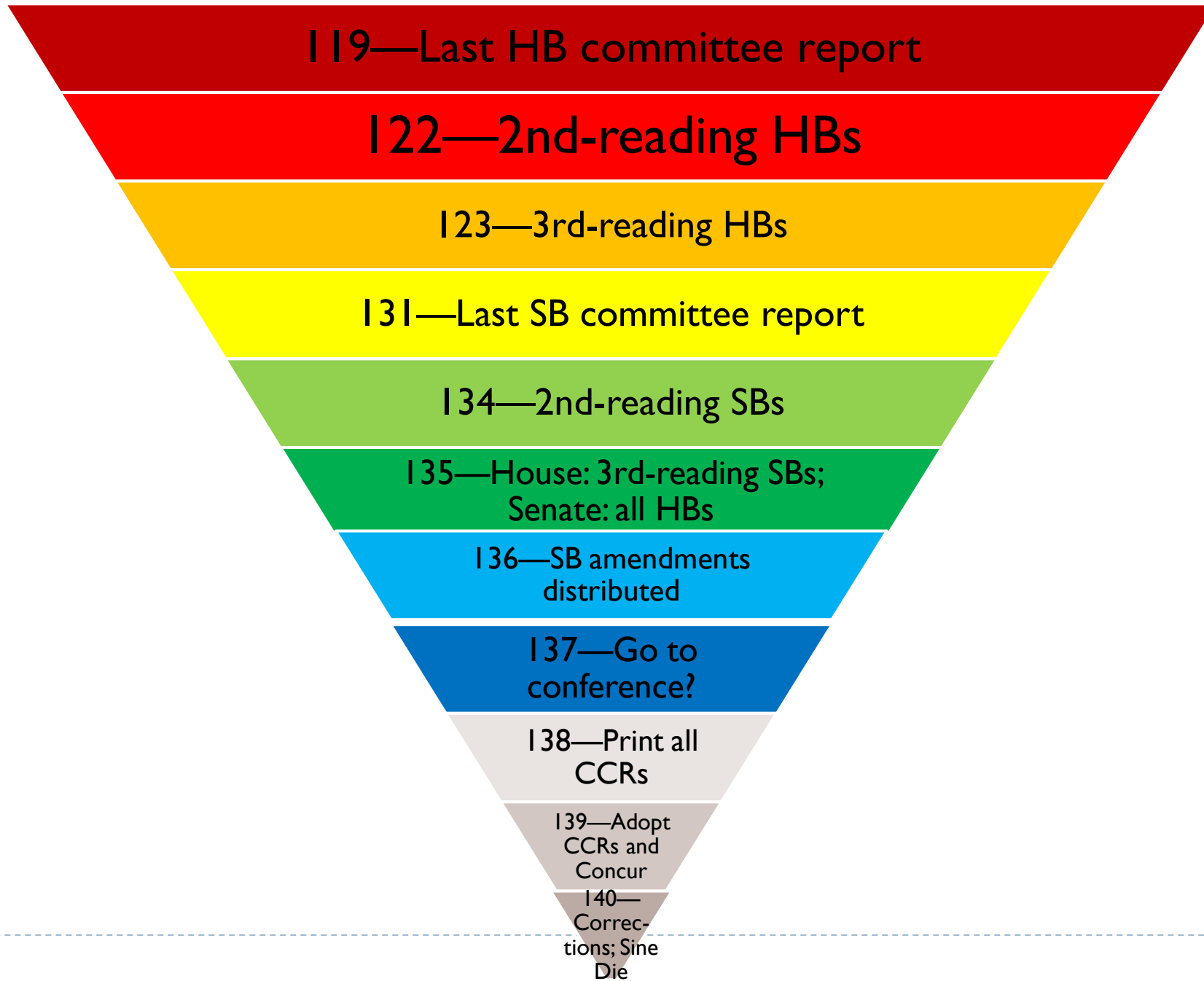
HBs and SBs Passed = 1,246



# Legislative Deadlines

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# Council Operations

## **88<sup>th</sup> Regular Session (2023)**

Documents drafted that change law: ~21,000

Attorneys: 55



# Council Operations

## **88<sup>th</sup> Regular Session (2023)**

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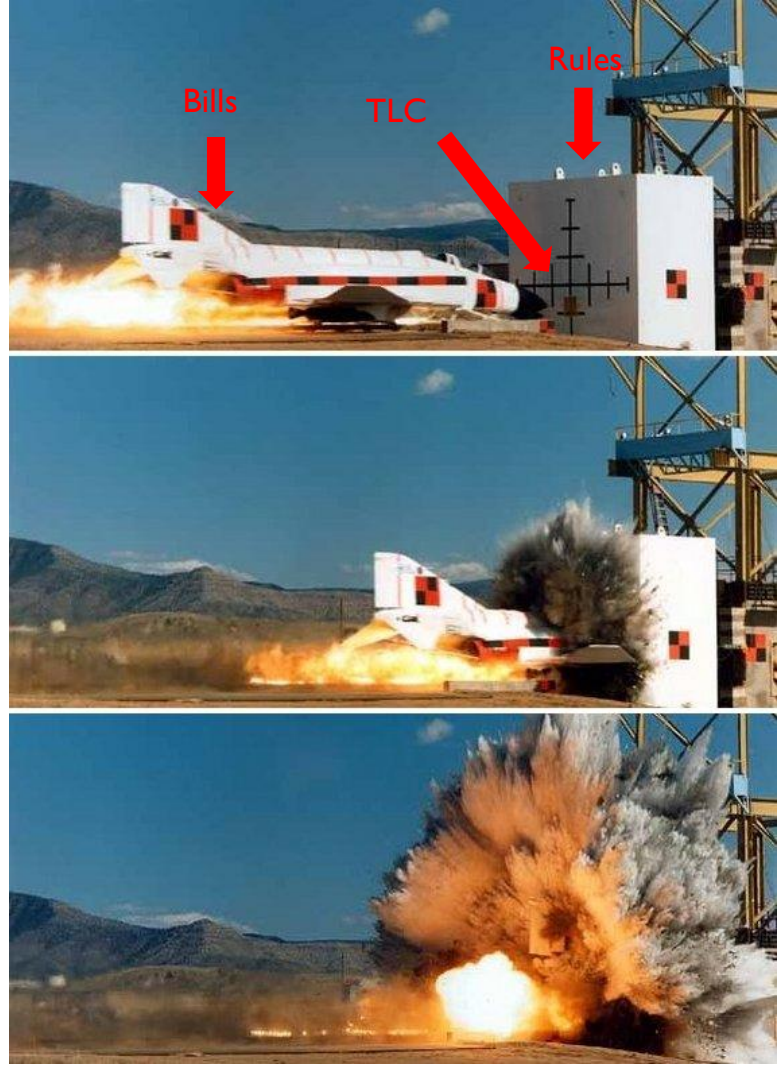
Attorneys: 55

IT services

Printing services

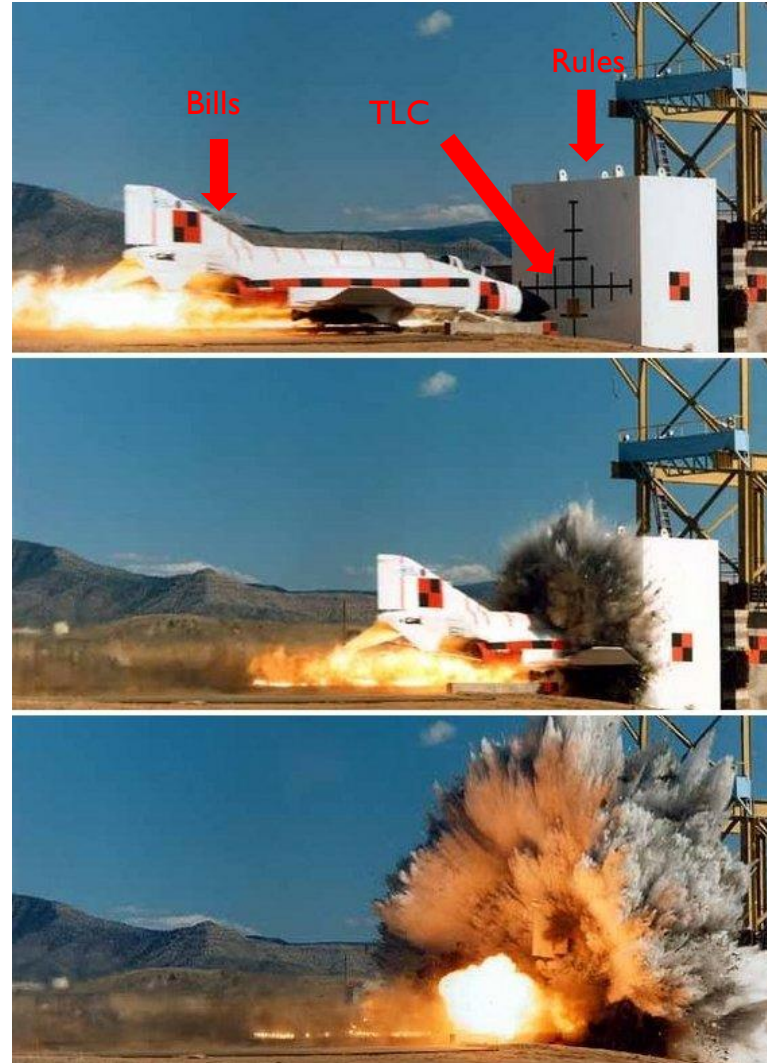
Research





# Who do we work for?

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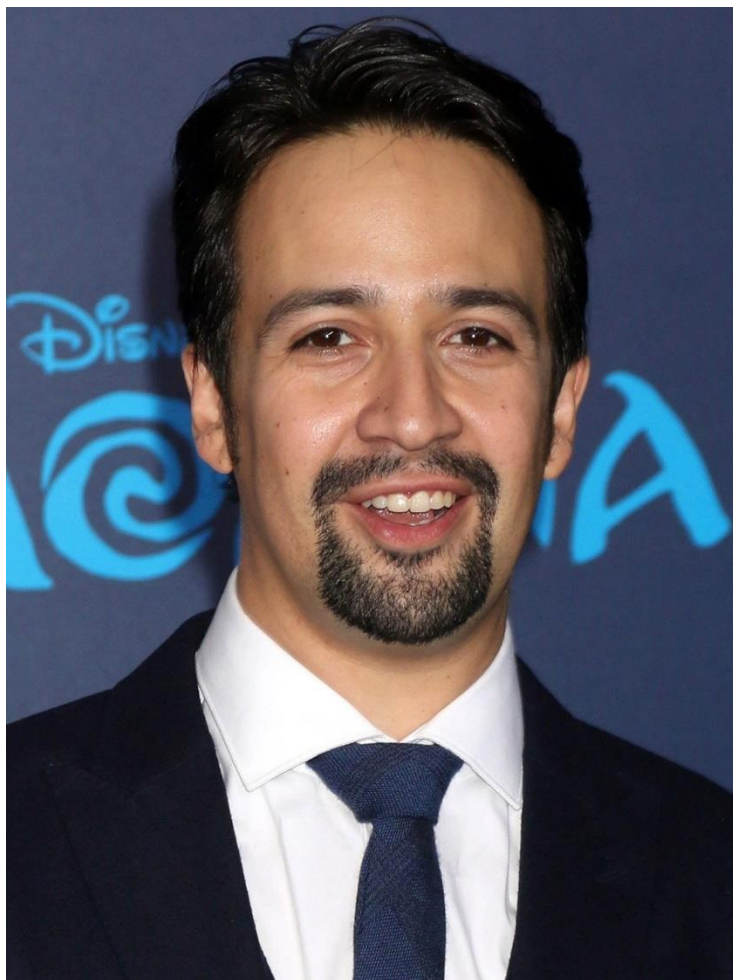
I am invited to consider whom I regarded as my client when I was Legal Counsel to the Senate Foreign Relations Committee. Happily, I can answer succinctly: ***I do not know.***

—Michael J. Glennon, 61 Law & Contemp. Probs. 21 (Spring 1998) (emphasis added)

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# 2002 judicial confirmations debate

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Priscilla Owen, 5<sup>th</sup> Circuit



Charles Pickering, 5<sup>th</sup> Circuit



Miguel Estrada, DC Circuit



# 2001: A legislative odyssey

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- January 2001: Republicans have unified control of government



- May - June 2001: Jim Jeffords (VT) leaves Republican Party, caucuses with Democrats
- 
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# 2001: A legislative odyssey

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- July 2001: Brian Wikner becomes Senate Judiciary Committee's network administrator



# 2001: A legislative odyssey

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- September 2001: Jason Lundell becomes clerk for minority members of Senate Judiciary Committee



# 2001: A legislative odyssey

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- November 2001: Wikner works on Lundell's computer



# 2001: A legislative odyssey

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S: \JUDICIARY\ LUNDELL\_J

S: \JUDICIARY\ JOHNSON\_O



# 2001: A legislative odyssey

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“Hacker”

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# 2001: A legislative odyssey

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Alex Dahl

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# 2001: A legislative odyssey

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- December 2001: Manny Miranda becomes staff attorney to the appointments section



# “Hackers”

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- March 2003: Computers replaced



# “Hackers”

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- March 2003: Computers replaced
- Lundell took > 4,000 files



# “Hackers”

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- March 2003: Computers replaced
- Lundell took > 4,000 files
- Senate allies, White House, and outside groups get copies, other information



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“Memogate”

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Was there a legal ethics violation:





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Was there a legal ethics violation:

1. When Miranda orchestrated the copying of documents from Democratic staffers' hard drives?



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Was there a legal ethics violation:

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4. When Miranda shared information gleaned from those documents with parties outside the legislature?
5. When Miranda shared the documents with a party outside the legislature?



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Miranda says:



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Miranda says:

- ▶ Party in litigation must exhibit due diligence in preventing the opposing party from seeing its documents.



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- ▶ These documents were not confidential, since they belong to the public and will be archived.





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Miranda says:

- ▶ Party in litigation must exhibit due diligence in preventing the opposing party from seeing its documents.
- ▶ These documents were not confidential, since they belong to the public and will be archived.
- ▶ I was not in a relation of confidence to the Senators or documents in question.



# Who is the legislative client?

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- ▶ **Rule 1.06(b), Texas Disciplinary Rules of Professional Conduct**

... a lawyer shall not represent a person if the representation ...:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse ...; or

(2) reasonably appears to be or become adversely limited ....



# Who is the legislative client?

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- ▶ **Rule 1.06(c), Texas Disciplinary Rules of Professional Conduct**

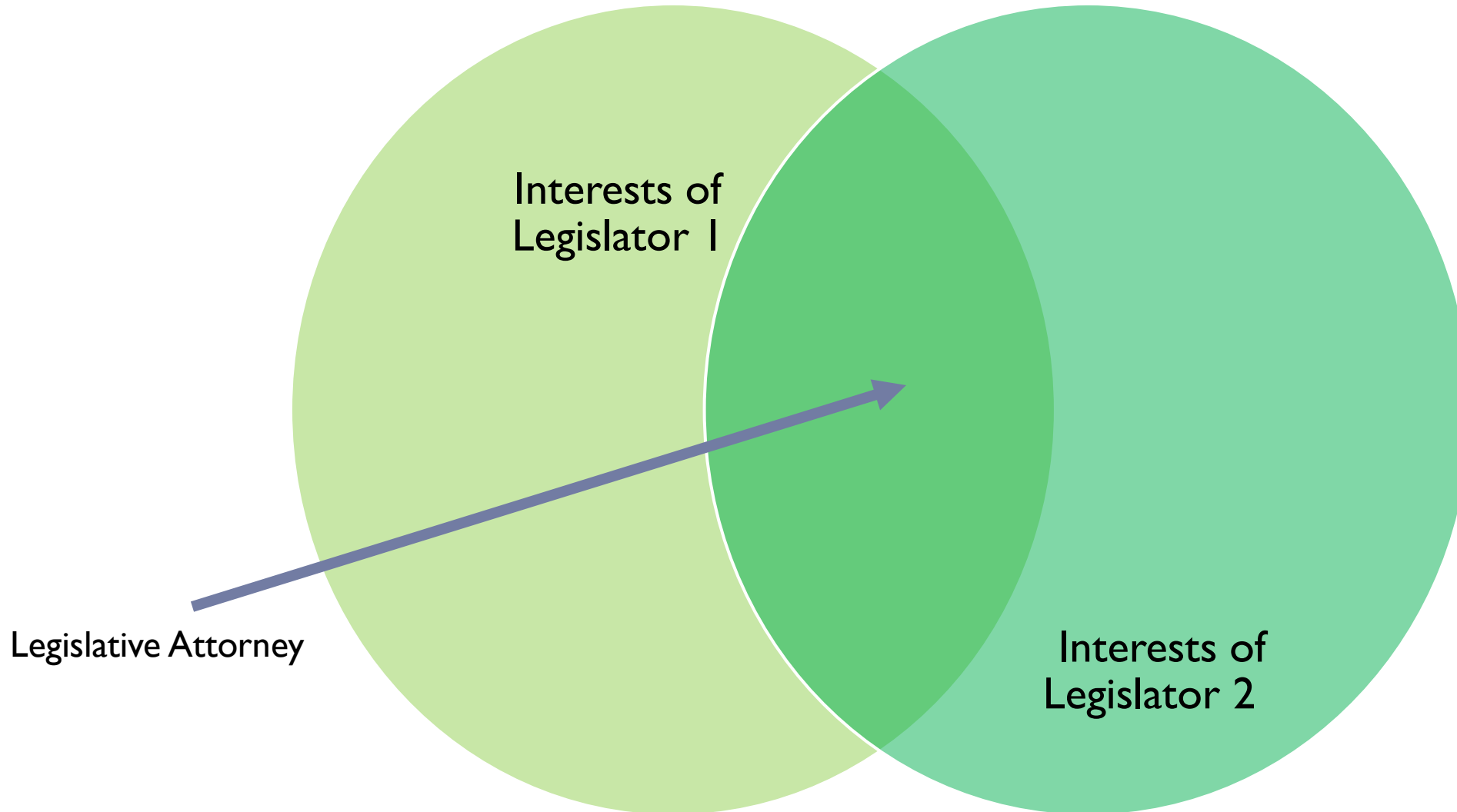
A lawyer may represent a client ... if:

- (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
- (2) each ... client consents ... after full disclosure ....



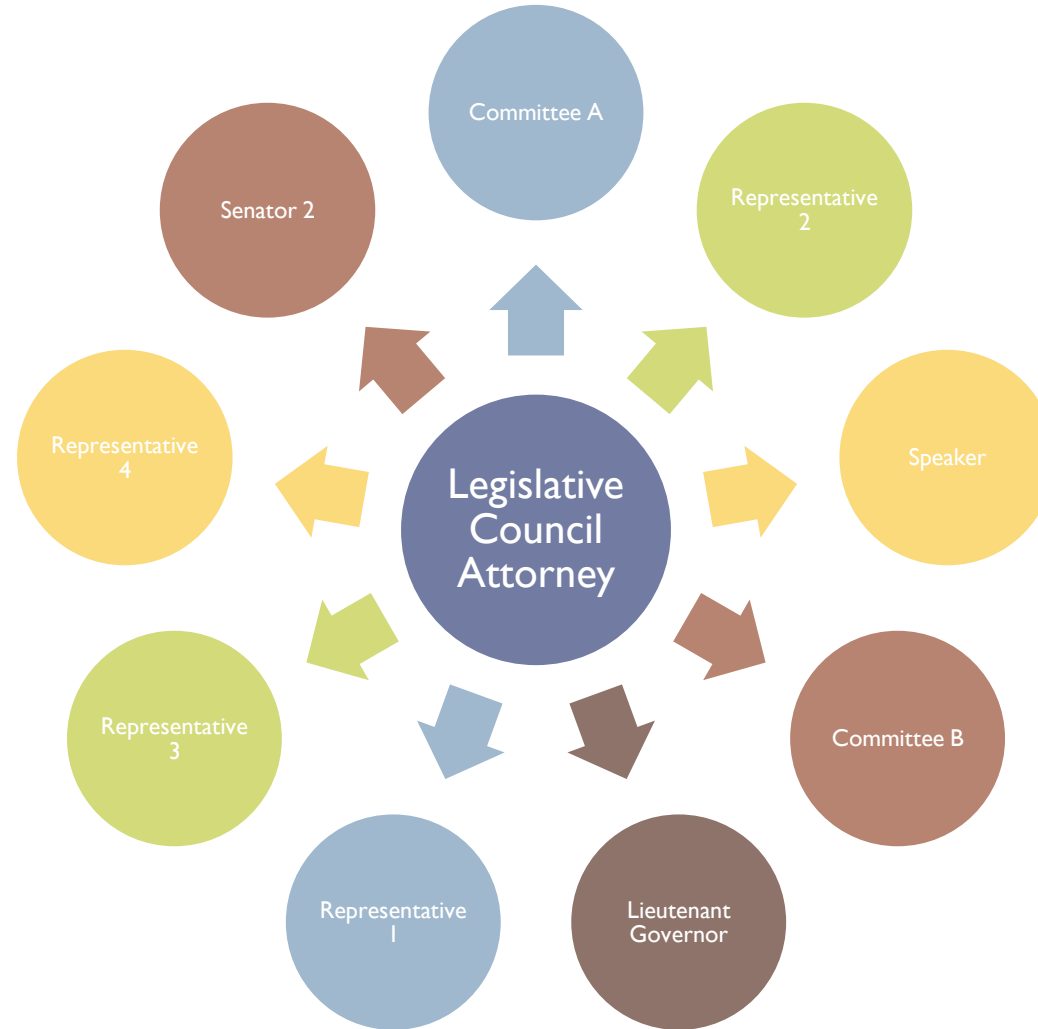
# Who is the legislative client?

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# Who is the legislative client?

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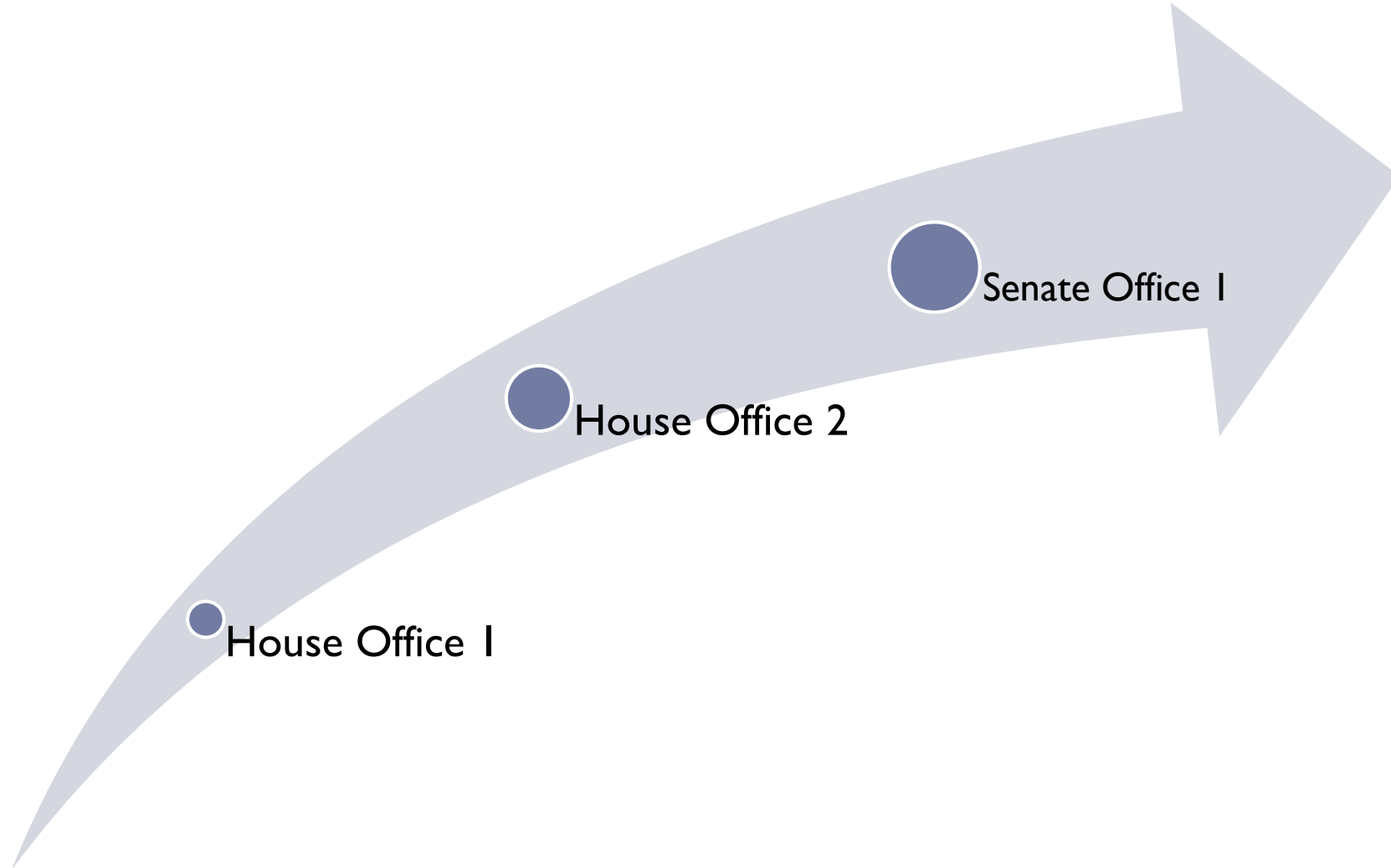
- ▶ **Rule 1.09(a), Texas Disciplinary Rules of Professional Conduct**

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 . . . if it is the same or a substantially related matter.



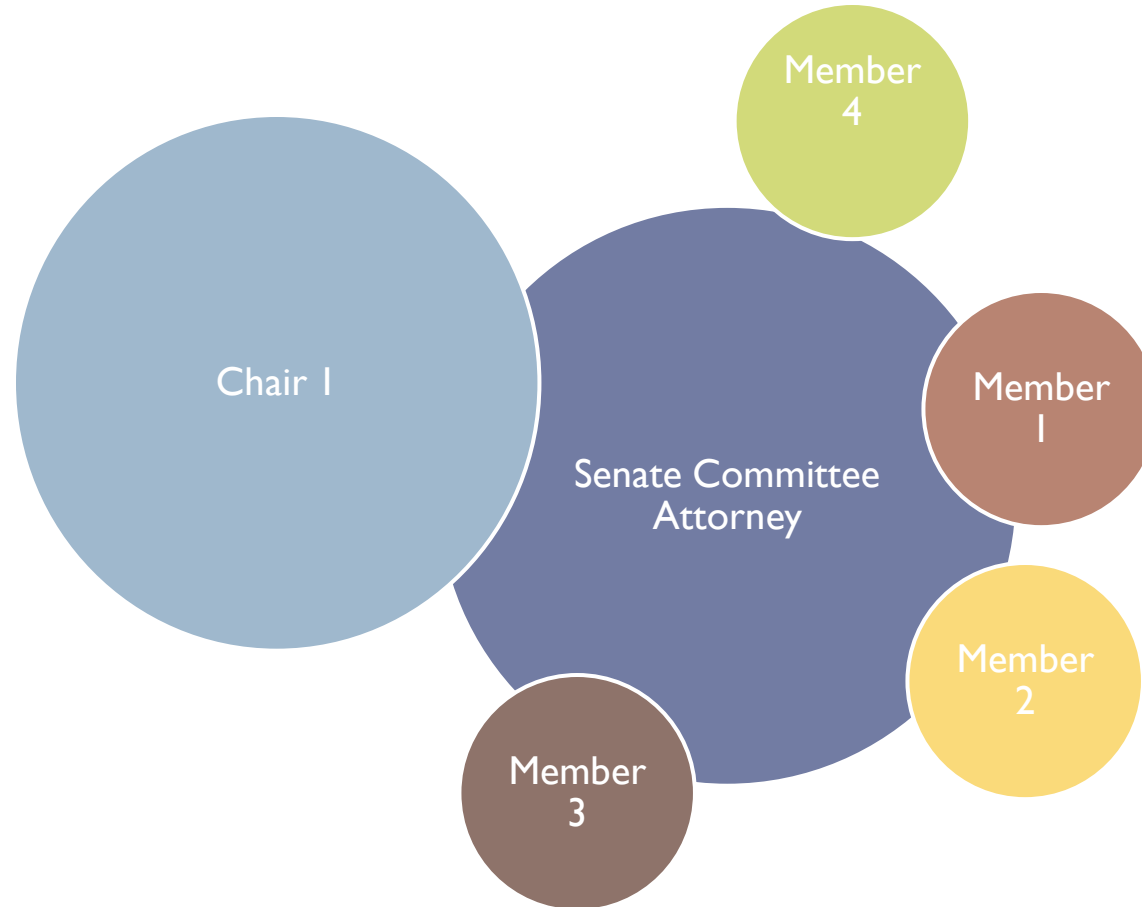
# Who is the legislative client?

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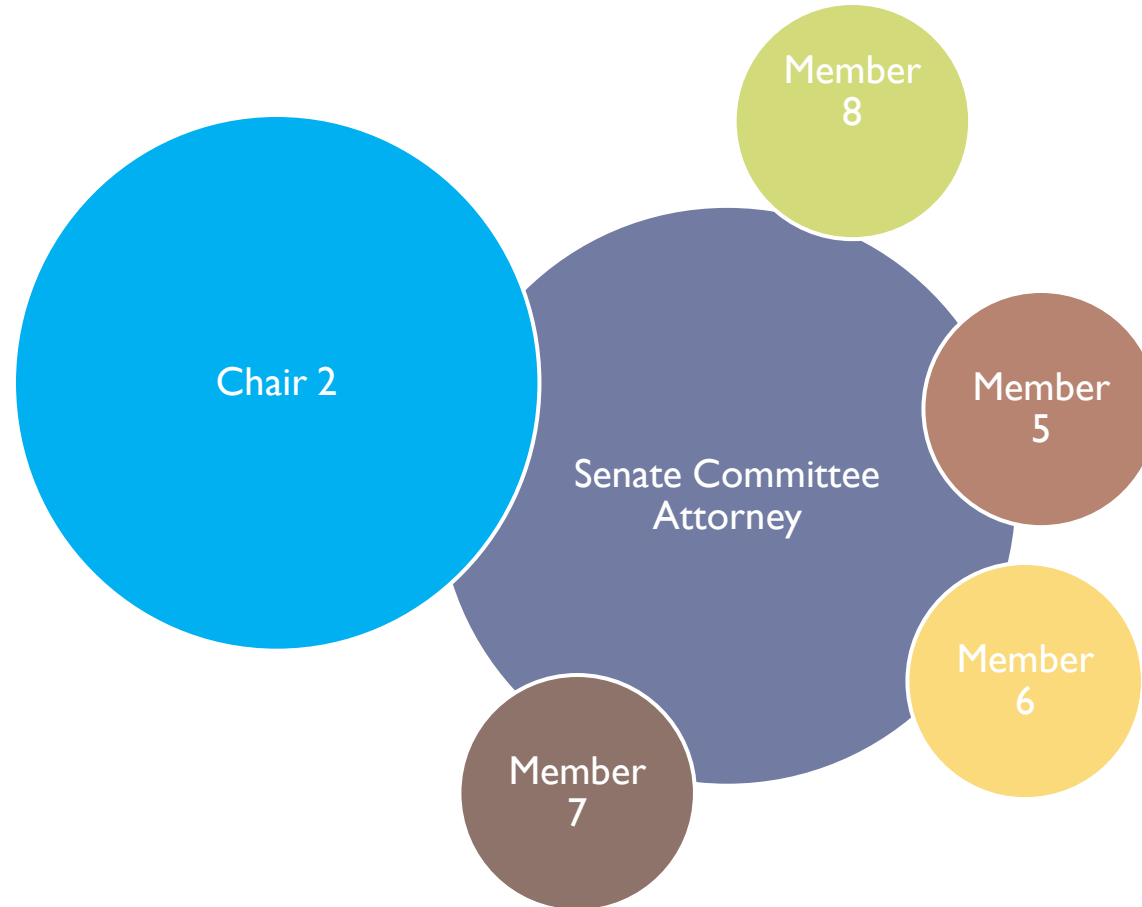
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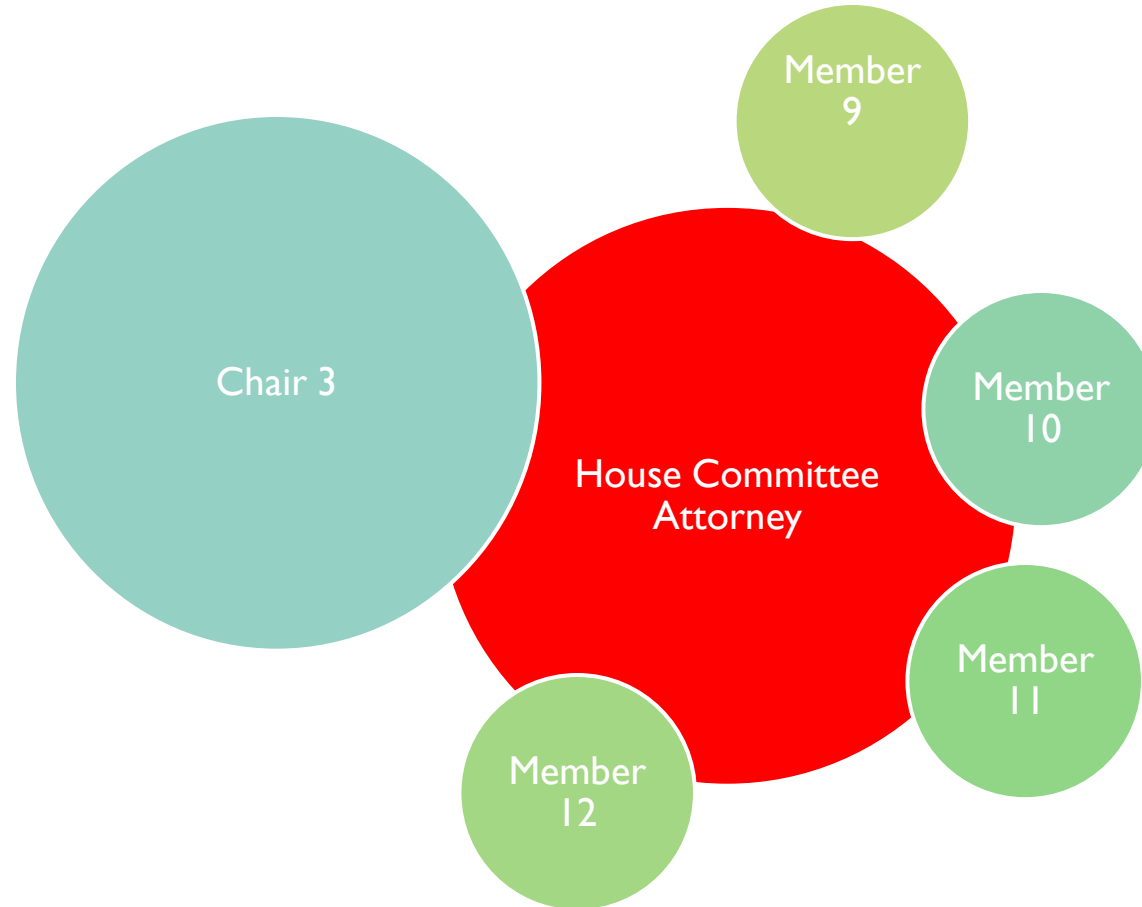
# Who is the legislative client?

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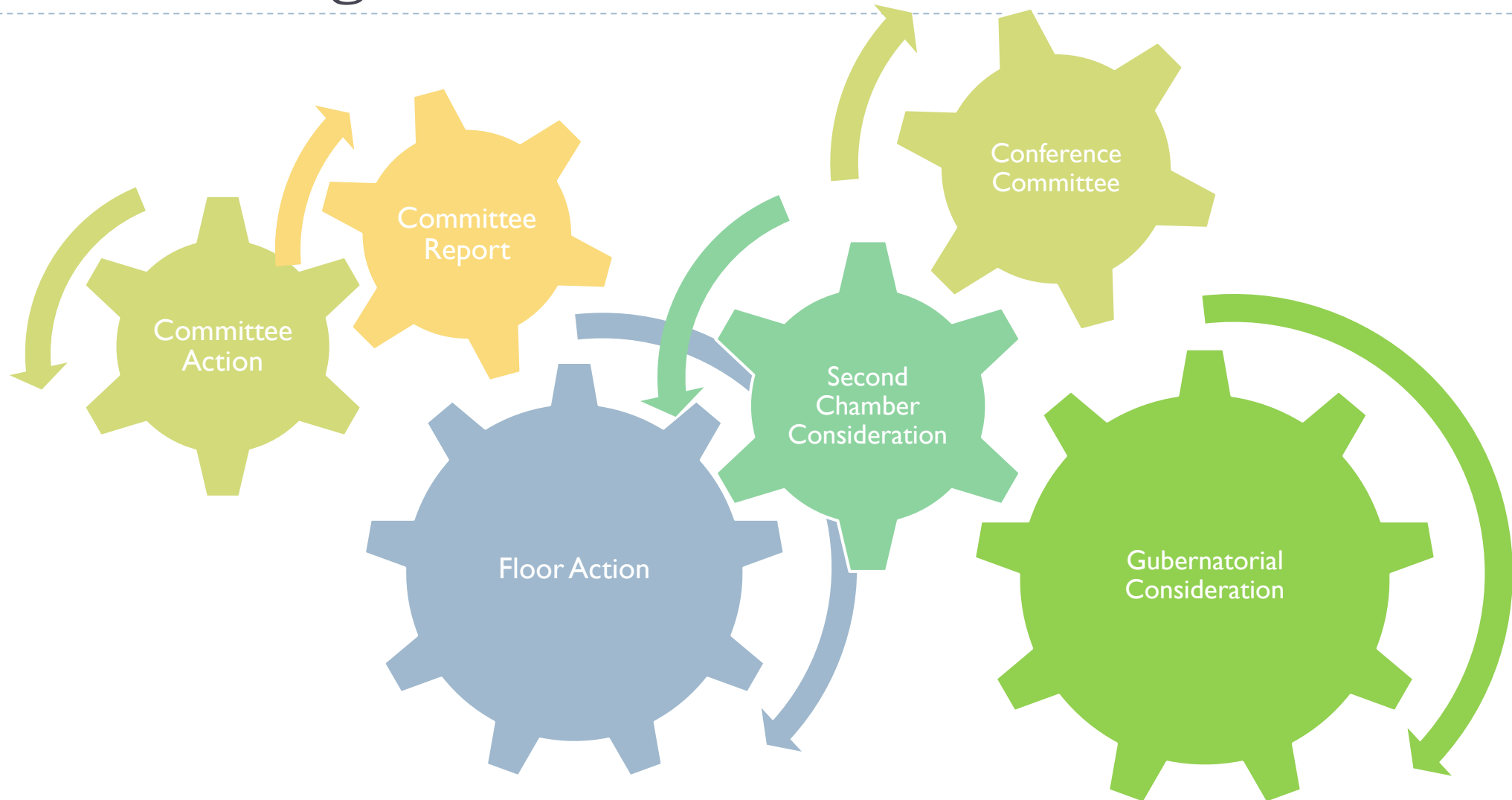
# Who is the legislative client?

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# Who is the legislative client?

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# Conflict resolution

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- ▶ **Rule 1.06(c), Texas Disciplinary Rules of Professional Conduct**

A lawyer may represent a client . . . if:

- (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
- (2) each . . . client consents . . . after full disclosure . . . .



# The bar to the rescue!

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## Proposed Amendments to the Texas Disciplinary Rules of Professional Conduct and Texas Rules of Disciplinary Procedure

### *Terminology*

#### Texas Disciplinary Rules of Professional Conduct

##### Rule 1.00. Terminology

3. With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

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# Conflict resolution

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## 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.



# Conflict resolution

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## **Rule 1.12, Texas Disciplinary Rules of Professional Conduct**

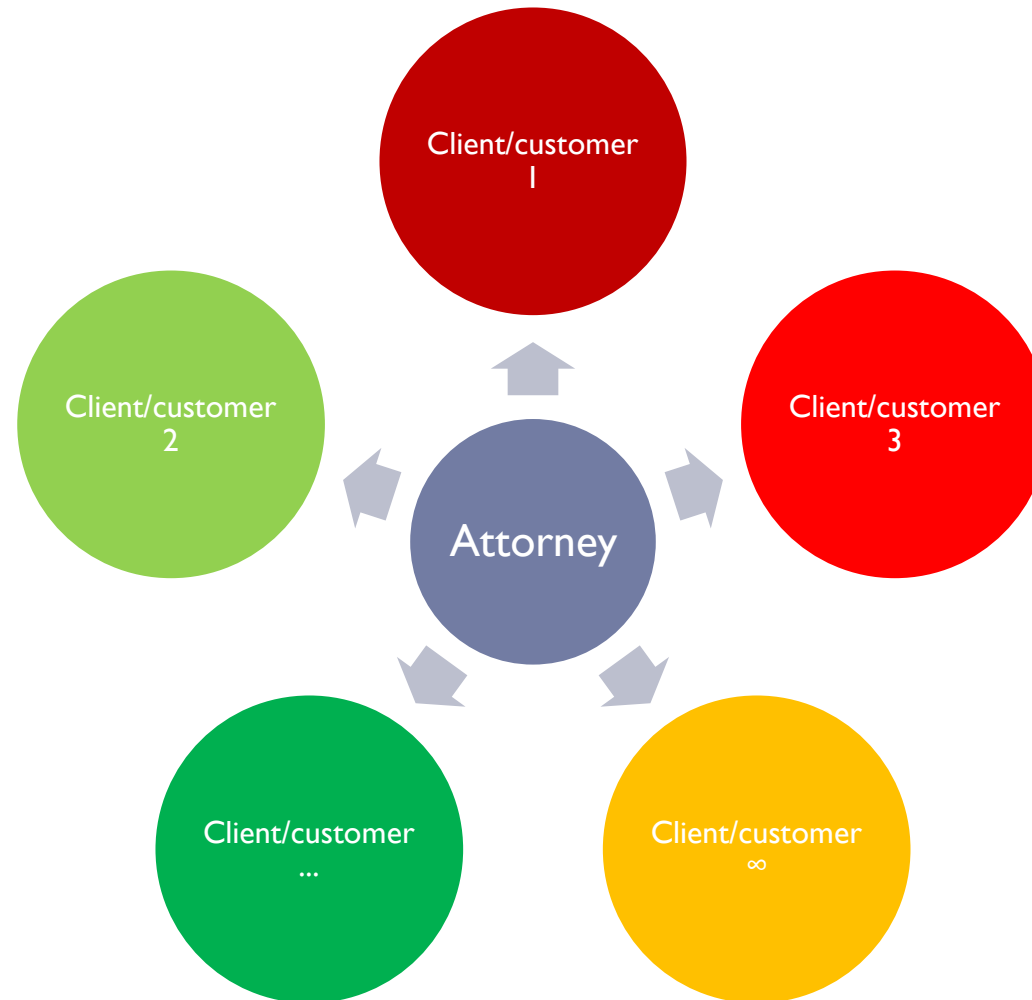
### Comment 9

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. . . .



# Typical attorney-client relationship

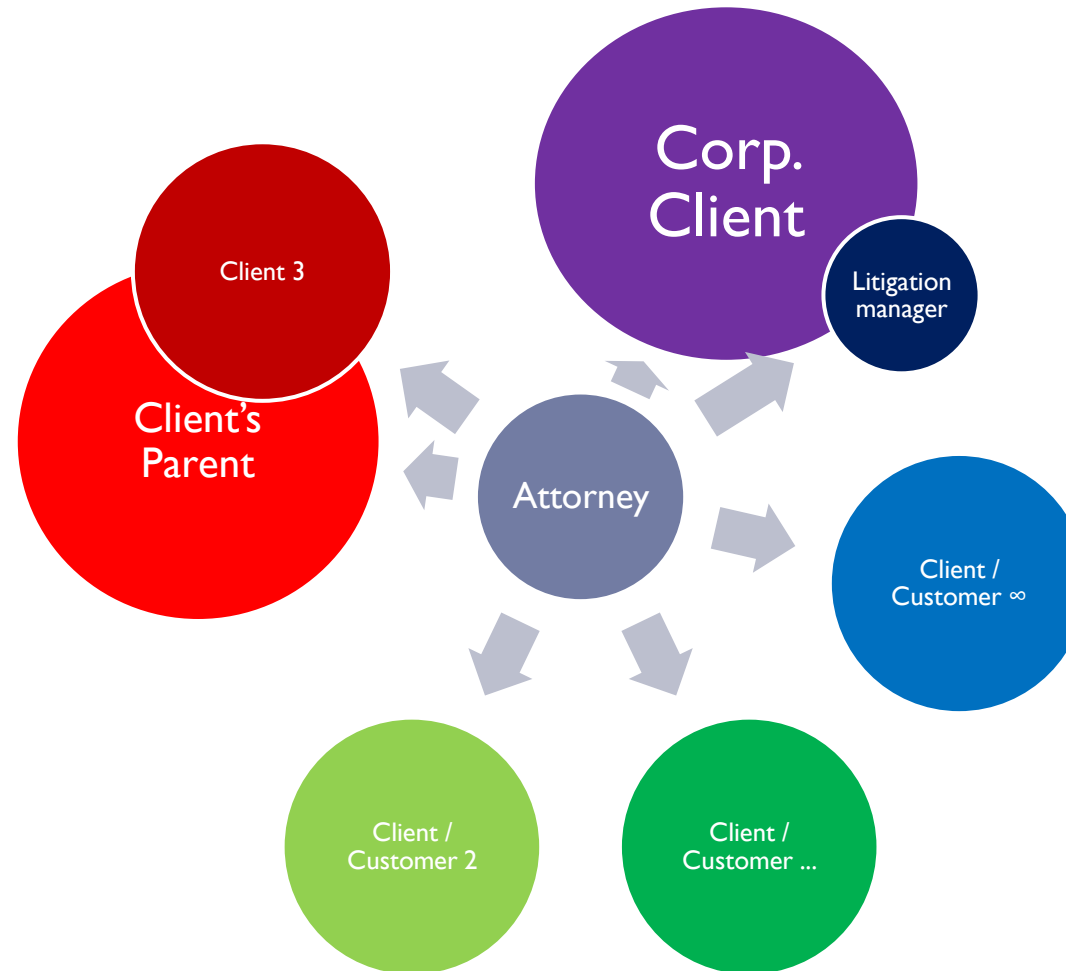
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# Typical attorney-client relationship

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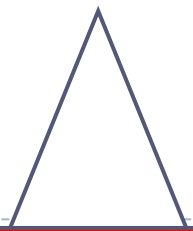
**State of Texas**



# Texas Legislature

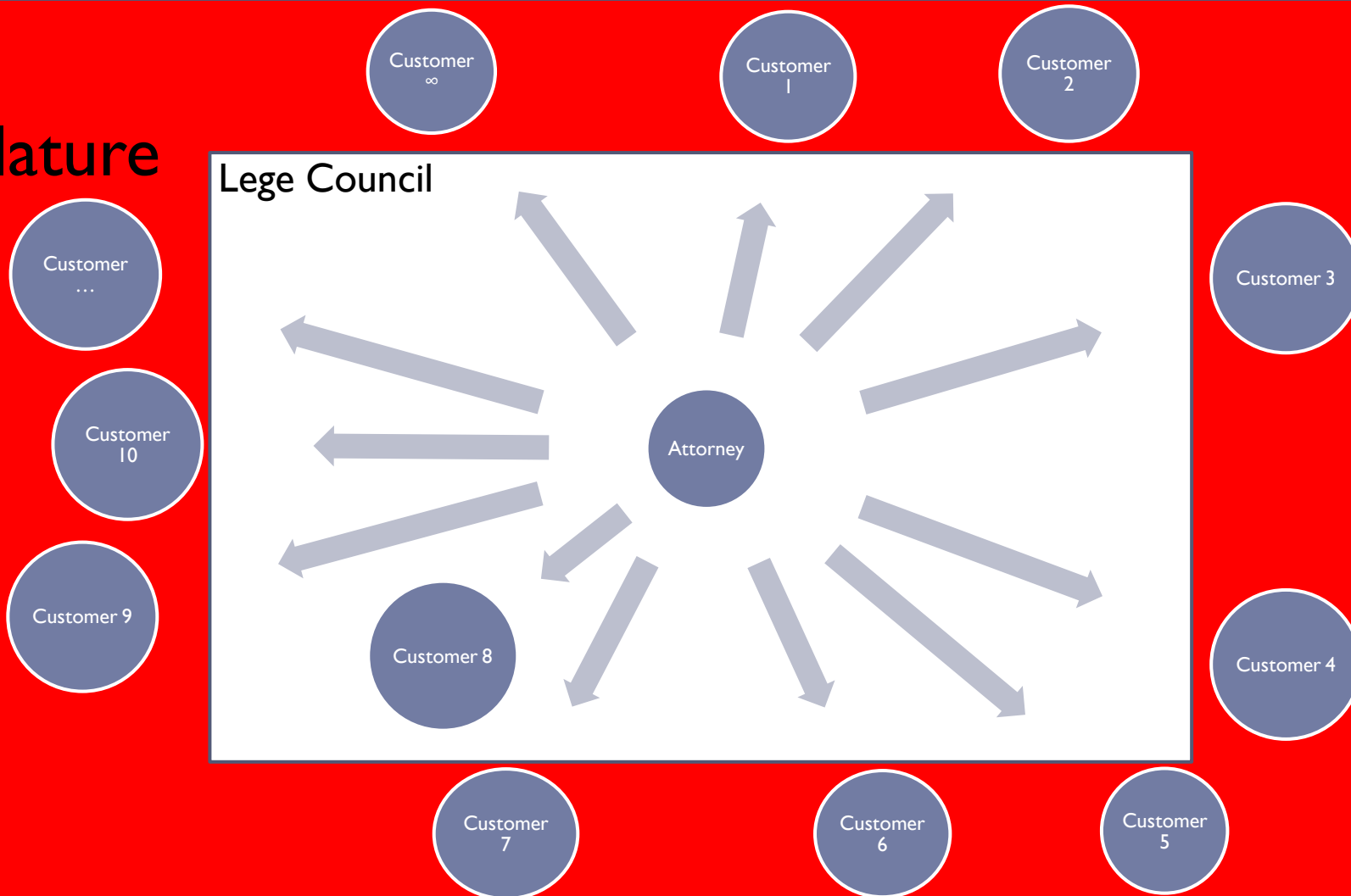
Texas  
Legislature

Employing Authority

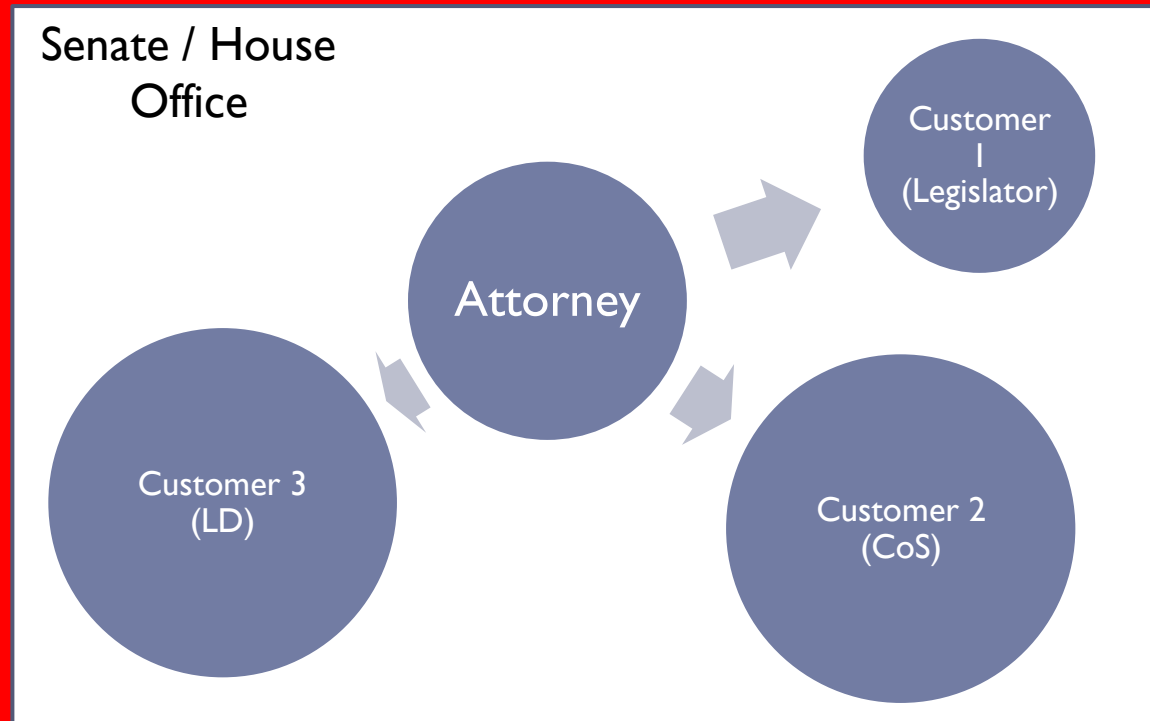


# Texas Legislature

## Legis Council



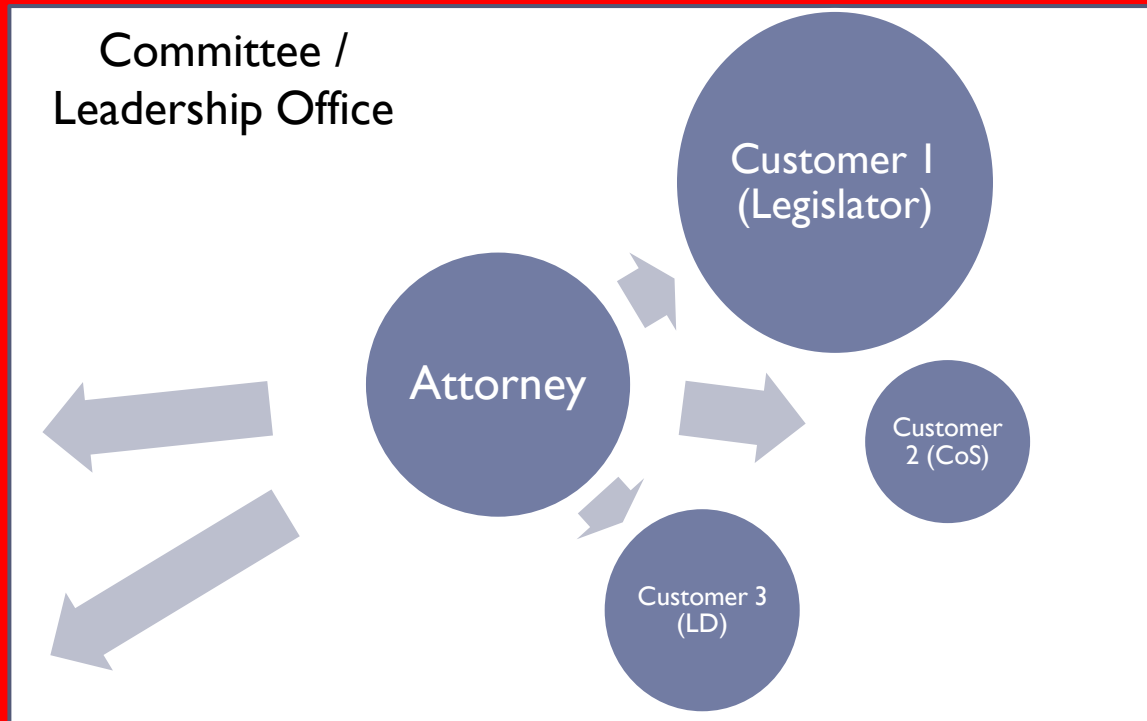
# Texas Legislature



# Texas Legislature

Customer 5  
(Non-office  
staffer)

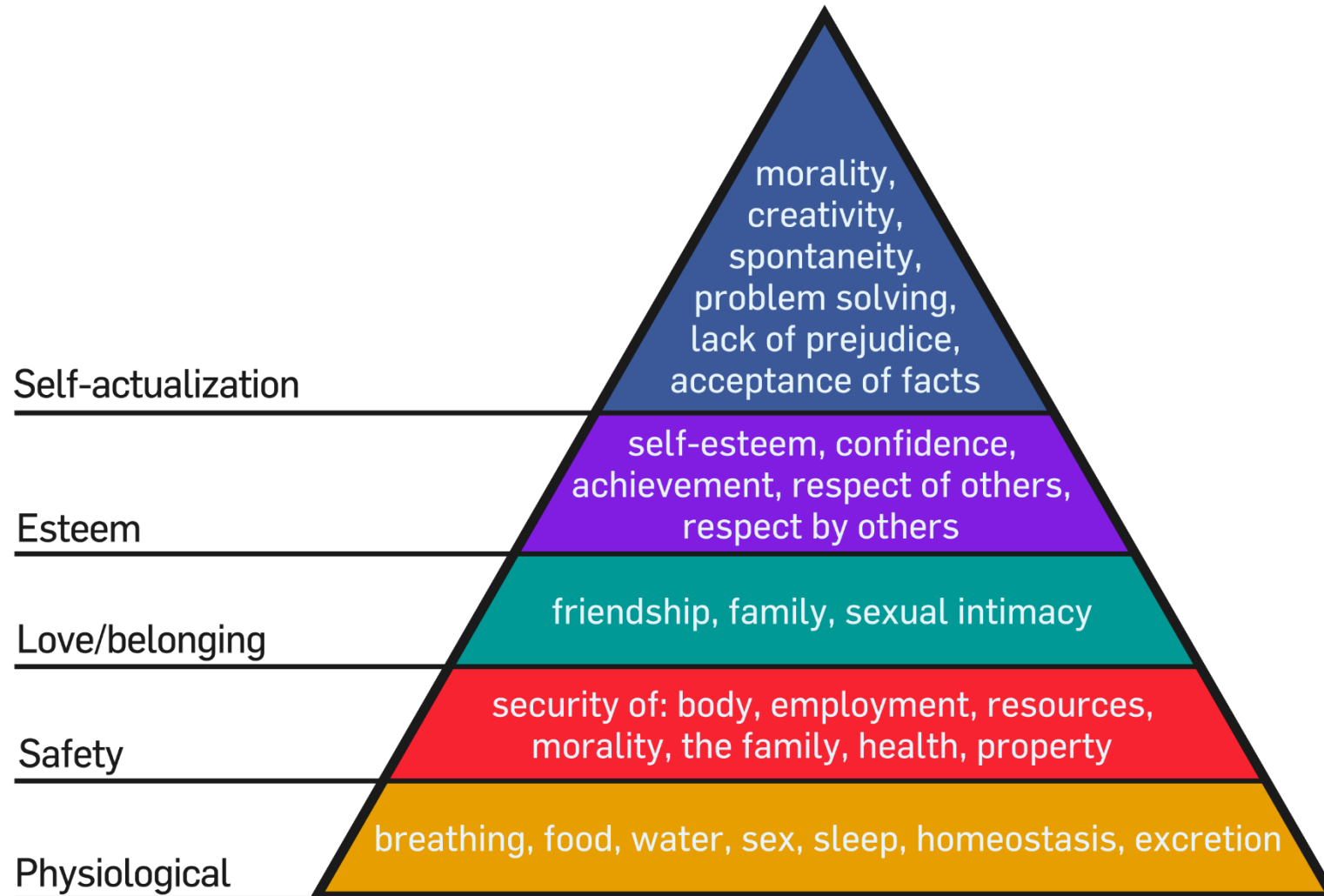
Customer 4  
(Legislator 2)





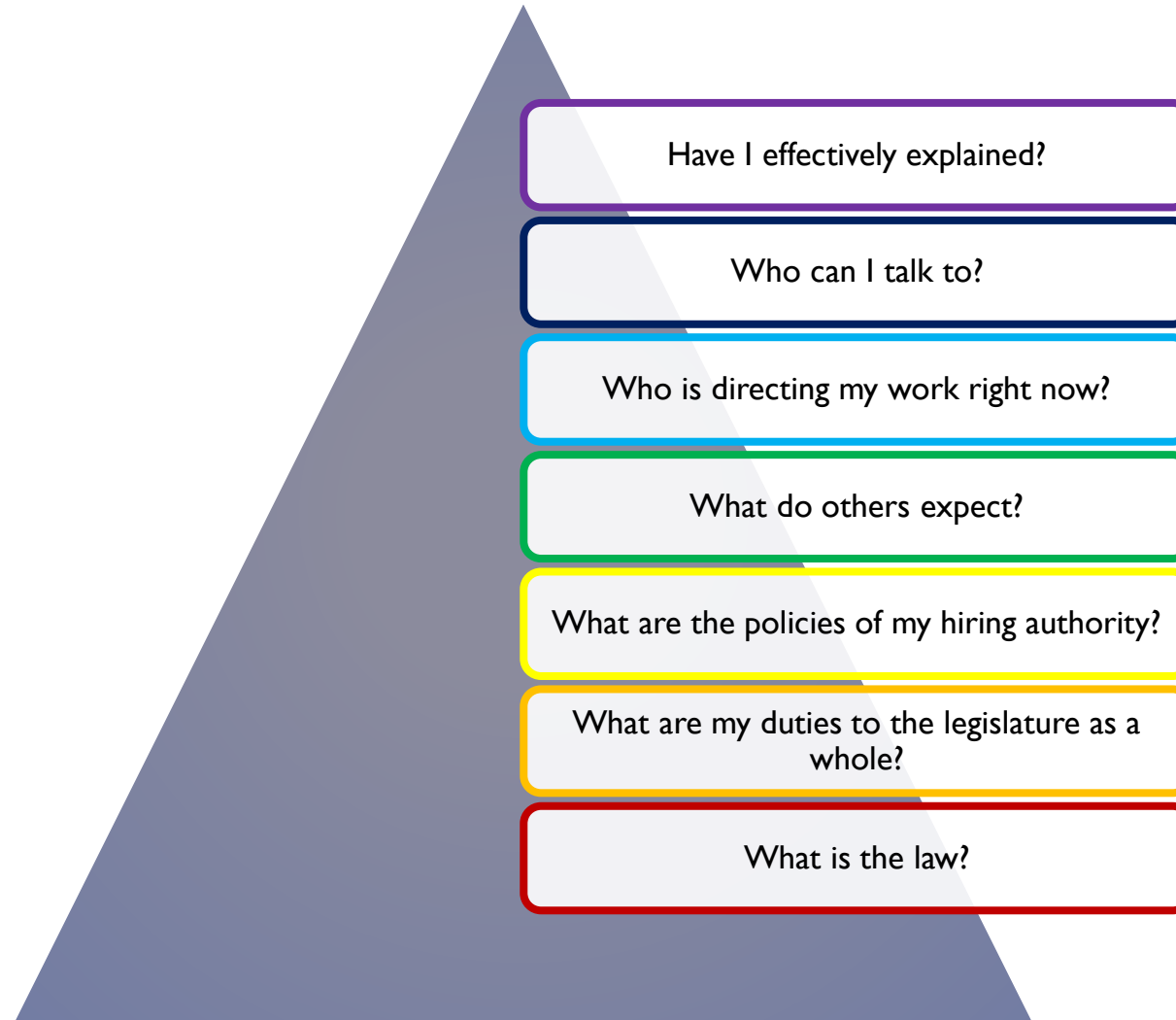
## Maslow's hierarchy of needs

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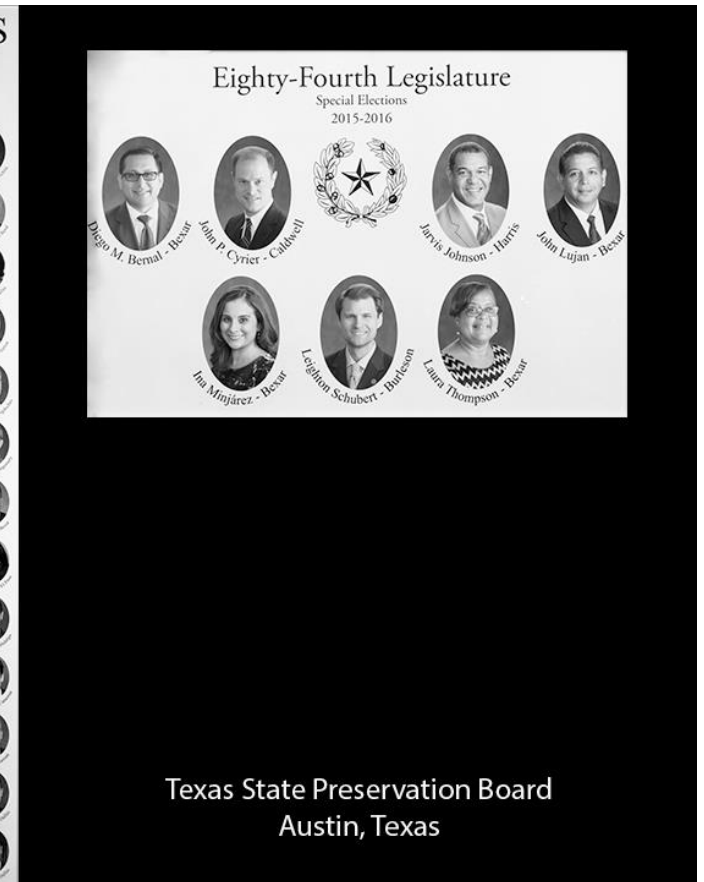
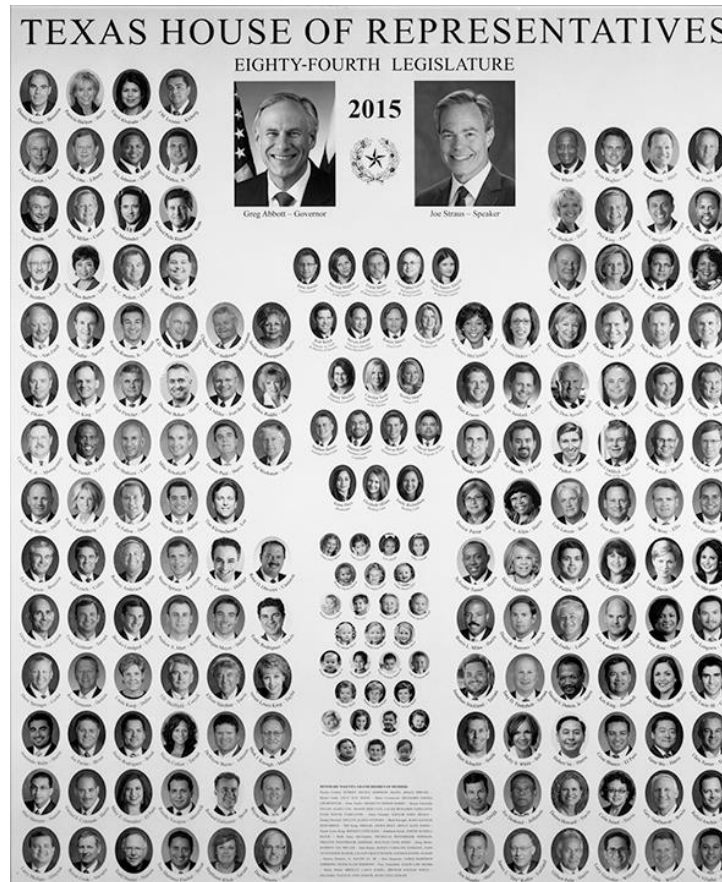
## Heining's hierarchy of continued legislative staffer employment

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# Who is the legislative client?

- ▶ Previous legislatures?



# Conflict resolution

---

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### Comment 9

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# So, what did they do?

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## Civil Cause of Action?

- ▶ Damages?
- ▶ Who is the plaintiff?
- ▶ Cause of action?
- ▶ Politics!



# So, what did they do?

---

## Criminal Prosecution?

- ▶ Hacking--"Whoever intentionally accesses a computer without authorization or exceeds authorized access, ...." 18 U.S.C. § 1030(a).



# So, what did they do?

---

## Bar Grievance?

- ▶ Rule 1.05(b), Texas Disciplinary Rules of Professional 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.

\* \* \*

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



# So, what did they do?

---

## Bar Grievance?

- ▶ Rule 8.04(a), Texas Disciplinary Rules of Professional 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 . . . .



So, what did they do?

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**Speech or debate clause!**



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Complete list of career-damaging process filed:





# Epilogue

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Wikner

Left congressional employment in summer 2003

---



# Epilogue

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Wikner

Now an intellectual property attorney  
specializing in information technology

---



# Epilogue

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Lundell

Left congressional employment in January 2004

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# Epilogue

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Lundell

Now a CPA providing interim and part-time CFO services

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# Epilogue

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- ▶ **Miranda**
  - ▶ “Resigned” in February 2004



# Epilogue

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- ▶ **Miranda**
  - ▶ Helped design Iraqi parliamentary system
  - ▶ Reformed the Iraqi and Kurdistan Region bars
  - ▶ International finance and project development attorney (retired)



# Epilogue



# Epilogue--exception

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Brett Kavanaugh

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# Other considerations

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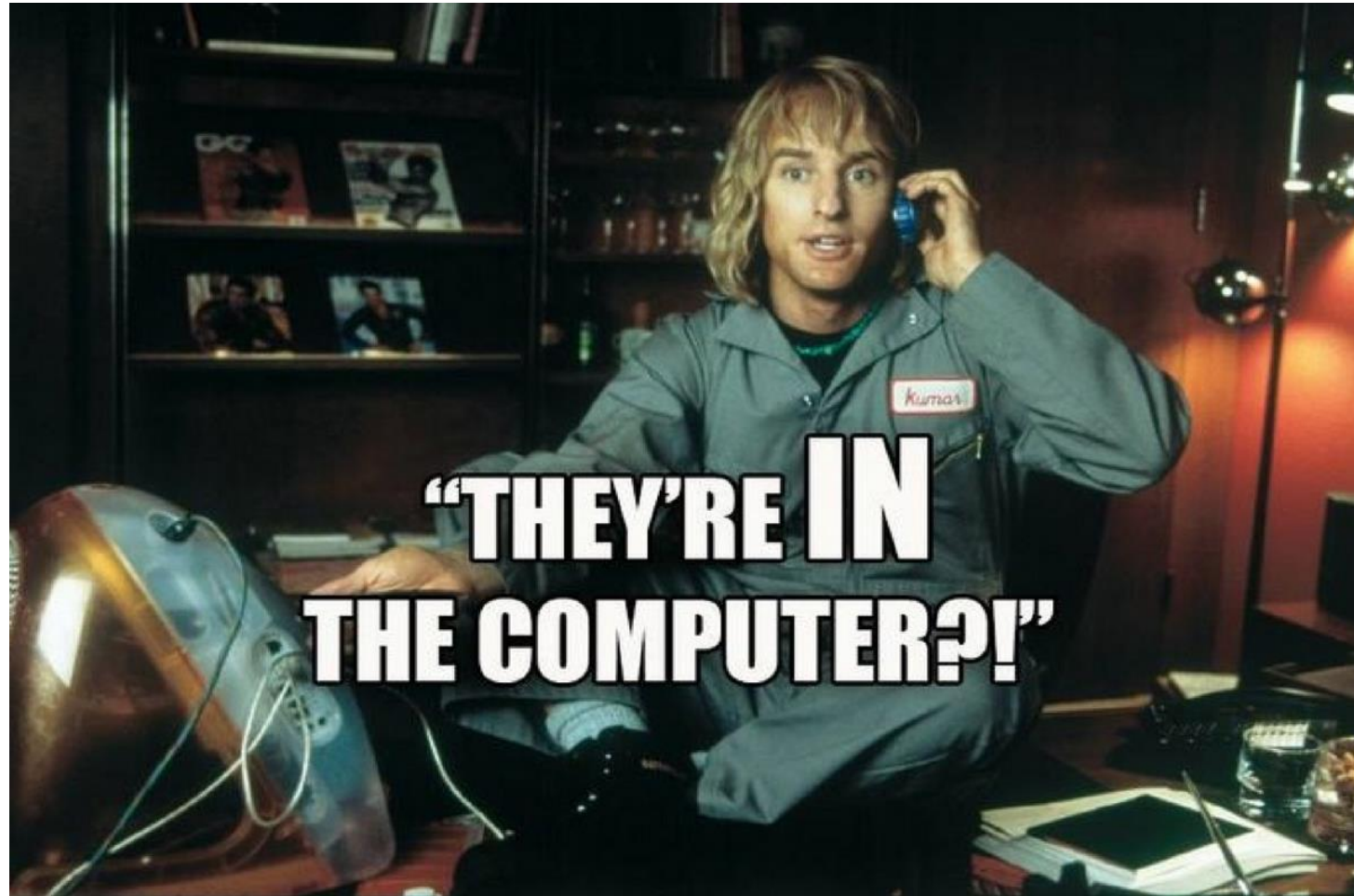
Transition

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## Other considerations

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Comment 8, Rule 1.01, Texas Disciplinary Rules of Professional Conduct

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# Other considerations

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Rules 5.01 and 5.03, Texas Disciplinary Rules of Professional Conduct

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# Other considerations

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Ethics rules are not enough

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# Tools to help you

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# Session tools

The screenshot shows the Texas Legislature Online website. The browser address bar displays "https://capitol.texas.gov/MyTL...". The page header includes "Texas Legislature Online" and "Subject Alert". Navigation links include "Home", "My TLO", "House", "Senate", "Legislation", "Search", and "Committees". A "Bill:" dropdown menu is set to "851" with a "Go" button. The "Subjects" tab is selected in the navigation menu. Below the navigation, there is a section for "My Subjects" and "Add Subjects to My List". The "Add Subjects to My List" section includes a "Category:" dropdown menu set to "General Subject Index", a "Keyword(s):" input field, and a "Filter Subjects" button. Below this, there is a list of subjects to watch, with "Water--General (10885)" highlighted.

Texas Legislature Online  
Subject Alert

Help | FAQ | Site Map | C  
House: Convenes Tue, Jan 8, 201  
Senate: Convenes Tue, Jan 8, 201

Home | My TLO | House | Senate | Legislation | Search | Committees  
Bill: 851 | Go

Calendars

Bills | Calendars | Committee Notices | Committee Minutes | **Subjects** | Adjournment

Receive alerts when bills are assigned a specific subject. A maximum of 15 subjects may be selected.

My Subjects (click here to view or hide my selected subjects)

Add Subjects to My List (click here to view or hide additional subjects)

Category: General Subject Index | Keyword(s): | Filter Subjects

Add Subject(s)

Select one or more subjects to watch.

- Utilities--Telecommunications--Rural (10829)
- Utilities--Water & Sewer (10002)
- Validating Acts (10835)
- Vehicles & Traffic--Child Restraint (10841)
- Vehicles & Traffic--Driver's Licenses (10840)
- Vehicles & Traffic--DWI & DUID (10863)
- Vehicles & Traffic--Equipment (10855)
- Vehicles & Traffic--General (10865)
- Vehicles & Traffic--Insurance/Financial Responsibility (10850)
- Vehicles & Traffic--Rules of Road (10860)
- Vehicles & Traffic--Vehicle Registration (10845)
- Water--Development (10875)
- Water--General (10885)**
- Water--Navigation & Ports (10880)
- Water--Rights (10870)
- Weapons (10887)
- Women (10925)

Texas Legislature Online

# Session tools

The screenshot shows a web browser window with the URL <https://lrl.texas.gov/legis/billSearch/BillDetails.cfm?legSession=80-0&billTypeDetail=SB&billNumberDetail=3&...>. The page title is "Legislative Reference Libr". The browser's address bar shows "Secure" and the URL. The page content is divided into a left sidebar and a main content area.

**Legislative Archive System**  
Direct search  
Advanced search  
Help  
Project status  
Index to Sections Affected  
Conference committee reports  
Constitutional amendments  
Search  
Analysis  
Election dates  
Sources  
Vetoes  
Overridden vetoes  
State budget  
Appropriations acts  
Redistricting  
Legislation  
Other states  
2001 – 2003  
Signed copies  
Statutory revision  
Texas law timeline  
Water law timeline

**Search results** [Help](#) | [Status](#)

History | Text | Actions | Clips | Articles | Committee information | Additional sources

**SB 3, 80th Regular Session**  
*Relating to the development, management, and preservation of the water resources of the state; providing penalties.*

**Last action:** See remarks for effective date

**Author:** Kip Averitt  
**Sponsor:** Robert Puente

**Remarks:** This Act takes effect September 1, 2007, except Section 2.27 takes effect September 1, 2009, and Articles 4, 9, 10, and 12 take effect immediately.

**Session Law Chapter:**  
Acts 2007, 80th R.S., [ch. 1430](#), General and Special Laws of Texas

**Bill Analyses:**  
[Committee Report \(House Research Organization\)](#)  
[Introduced \(Senate Research Center\)](#)  
[Committee Report \(Senate Research Center\)](#)

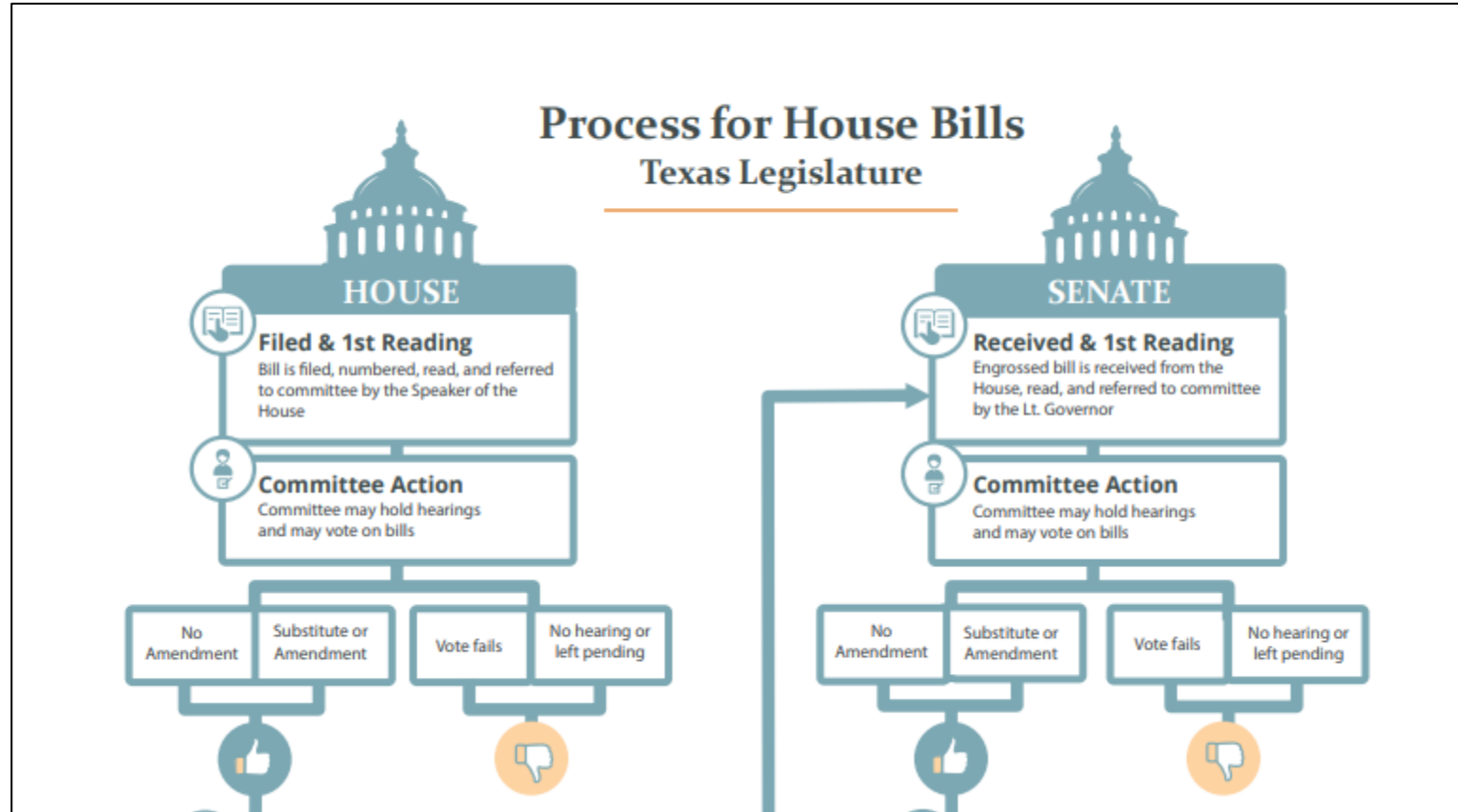
**Conference Committee:**  
[Conference Committee Report](#)  
**House Members:** (appointed 05/26/2007) Robert Puente (Chair) | Bill Callegari | Mike Hamilton | Will Hartnett | Jodie Laubenberg |  
**Senate Members:** (appointed 05/24/2007) Kip Averitt (Chair) | Kevin Eltife | Glenn Hegar | Juan Hinojosa | Florence Shapiro |

**Subjects:**  
[EDWARDS AQUIFER AUTHORITY](#)  
[ENVIRONMENTAL QUALITY, TEXAS COMMISSION ON](#)  
[IRRIGATION & IRRIGATORS](#)

## Legislative Archive System

# Session tools

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Texas Legislative Council

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# Session tools



The screenshot shows the official website for the Texas Senate during the 86th Legislative Session. The header features the Senate seal and the text "WELCOME TO THE OFFICIAL WEBSITE FOR THE TEXAS SENATE NEWS, INFORMATION AND EVENTS OF THE 86TH LEGISLATIVE SESSION". A navigation bar includes links for "Lt. Governor", "Senators", "Secretary", "Committees", "News & Media", "Visitors", and "For Kids". The main content area is titled "Senate Research Center — Publications" and includes a secondary navigation bar with links for "Secretary", "Offices", "Human Resources", "Research", "Agenda", "Room Schedule", "Journal", "Bill Information", "Rules", and "Media Credentials". Below this is a "Recent Online Publications" section listing several documents with their titles and file sizes. At the bottom, there are two sections: "TABLE OF CONTENTS" with a "Regular Publications" list (including "Clearinghouse Update" and "Highlights of the Legislature") and an "Other Publications by Subject" list (including "Border/Immigration" and "Criminal Justice").

WELCOME TO THE OFFICIAL WEBSITE FOR  
**THE TEXAS SENATE**  
NEWS, INFORMATION AND EVENTS OF THE 86TH LEGISLATIVE SESSION

Lt. Governor Senators Secretary Committees News & Media Visitors For Kids

## Senate Research Center — Publications

Secretary · Offices · Human Resources · **Research** · Agenda · Room Schedule · Journal · Bill Information · Rules · Media Credentials

» SRC Home · About · Staff · Bill Analysis · Publications · Contact Us

### Recent Online Publications

- Highlights of the 85th Legislature, Vol I (3.00 MB)
- Highlights of the 85th Legislature, Vol II (3.00 MB)
- Budget 101: A Guide to the Budget Process in Texas – January 2017 (4.60 MB)
- Issues Facing the 85th Legislature – January 2017 (1.00 MB)
- Legislative Lexicon, 85th Session – January 2017 (626 KB)
- Senate Guide to Ethics and Financial Disclosure – 2017 (2.90 MB)
- Invisible Government: Special Purpose Districts in Texas – October 2014 (3.80 MB)

### TABLE OF CONTENTS

- ★ Regular Publications
  - Clearinghouse Update
  - Highlights of the Legislature
- ★ Other Publications by Subject
  - Border/Immigration
  - Criminal Justice

Texas Senate

# Session tools



The screenshot displays the website for the House Research Organization of the Texas House of Representatives. The page is titled "All Publications" and features a navigation menu with links for Home, About the HRO, Contact Us, and Resources. A sidebar on the left contains links for Bill Analyses, All Publications (selected), Floor Reports, Search Publications, and social media icons. The main content area lists various report categories with brief descriptions:

- All Publications**: All HRO reports by date, not including bill analyses, published after January 1, 1997. The HRO maintains hard copy archives of all reports prior to 1997.
- Policy Reports**: Interim News articles and more in-depth Focus reports provide analyses of issues of current interest in the state of Texas.
- State Finance Reports**: Reports on budget issues and analyses of appropriations bills.
- Legislative Session Reports**: Reports pertaining to a particular session, including:
  - Major Issues**: Summarize significant legislation considered during each legislative session.
  - Topics Reports**: Highlights many of the issues that each Legislature may consider during the regular session.
  - Vetoes of Legislation**: Digests of each vetoed bill, the governor's stated reason for the veto, and responses by the author or sponsor of the bill.
  - Legislative Procedures**: Details procedures for enacting legislation and committee proceedings.
- Constitutional Amendments**: Summarizes ballot propositions submitted for voter approval, including arguments for and against each proposition.
- Legislative Staff Lists**: Provide a comprehensive list of the staff of members and committees of the Texas House and Senate for each regular legislative session.

Texas House Research Organization

# Session tools

The screenshot displays a web browser window with the Texas Legislature Online interface. The address bar shows the URL <https://capitol.texas.gov/Search/CurrentHouseA...>. The page title is "Texas Legislature Online Current House Amendment Under Consideration: HR 3 - 2nd Reading Amendment 1 by Schaefer". The navigation menu includes "Home", "My TLO", "House", "Senate", "Legislation", "Search", "Committees", and "Calendars". The document title is "HR00003H21.pdf" and it is page 1 of 1. A barcode is visible above the text. The text of the amendment is as follows:

FLOOR AMENDMENT NO. \_\_\_\_\_ BY: Schaefer

1 Amend H.R. No. 3 (Adopting the Housekeeping Resolution for  
2 the House of Representatives of the 86th Legislature) on page 23,  
3 by striking lines 11 through 15 and substituting the following:  
4 SECTION 5.04. MONTHLY CREDIT. (a) Each member's operating  
5 account shall be credited with:  
6 (1) in Fiscal Year 19, \$15,250 [~~\$14,250~~] for each month  
7 that falls wholly or partly during the regular legislative session  
8 or a special legislative session and in [~~in~~] any other month,  
9 [~~each member's operating account shall be credited~~] with \$13,500;

## Current House Amendment

Fin.

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