

# State of Wisconsin\Government Accountability Board

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JUDGE DAVID DEININGER  
Chair

KEVIN J. KENNEDY  
Director and General Counsel

**WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD**  
**Room 150, Risser Justice Building**  
**120 Martin Luther King, Jr. Blvd.**  
**Madison, Wisconsin**  
**March 26, 2008**  
**9:30 a.m.**

Open Meeting Minutes

<u>Summary of Significant Actions Taken</u>	<u>Page</u>
A. Approved proposed changes to Board's 2008 review schedule	2
B. Modified and reaffirmed three Ethics Board's opinions pertaining to State officials' representation of clients before a district attorney	2
C. Requested materials and staff recommendation on the issue of regulation of express advocacy; took no action on EIBd. 1.28	3
D. Declined to reaffirm administrative rule EIBd. 1.29	3
E. Reaffirmed 11 opinions and three informal opinions pertaining to the scope of campaign finance regulation	3
F. Reaffirmed one opinion and two administrative rules, and modified one opinion pertaining to coordination of campaign activity and independent expenditures	3
G. Reaffirmed six opinions and declined to reaffirm one opinion pertaining to use of government resources and state employee activity	3
H. Reaffirmed 10 opinions and one set of administrative rules pertaining to voter registration	3

**Present:** Judge David Deininger, Judge Michael Brennan, Judge Thomas Cane, Judge William Eich, Judge James Mohr, Judge Gerald Nichol

**Staff present:** Kevin Kennedy, Jonathan Becker, George Dunst, Sharrie Hauge, Kyle Richmond, Nat Robinson, Tommy Winkler

**A. Call to order**

Chairman Deininger called the meeting to order at 9:35 a.m.

**B. Director Kevin Kennedy's report of appropriate notice of meeting**

The Director reported that the meeting had been properly noticed.

**C. Approval of minutes of the previous meeting**

**MOTION:** Approve minutes of the February 25, 2008 meeting of the GAB.  
Moved by Eich, seconded by Nichol. Motion carried.

**D. Public Comment**

1. **Patrick Fuller**, Wisconsin Assembly Chief Clerk, appeared to comment on the issue of legislative per diems.
2. **Deborah Goldberg**, Brennan Center for Justice, appeared to comment on item E.1., Scope of Campaign Finance Regulation. Ms. Goldberg also provided written testimony to the Board. Prior to Ms. Goldberg's testimony, Chair Deininger asked Director Kennedy to provide background on the topic of express advocacy.
3. **Mike McCabe**, Wisconsin Democracy Campaign, appeared to comment on item E.1., Scope of Campaign Finance Regulation. Mr. McCabe also provided written testimony to the Board.
4. **Shane Falk**, former Elections Board chair, appeared to comment on item E.1., Scope of Campaign Finance Regulation.
5. **Mike Wittenwyler** appeared to comment on item E.1., Scope of Campaign Finance Regulation.

Hearing no objections, the Chairman called a 25-minute lunch recess and reconvened the meeting at 12:15 p.m.

**E. Proposed Review Schedule Revisions (Kevin Kennedy)**

**MOTION:** Approve proposed review schedule revisions.  
Moved by Nichol, seconded by Brennan. Motion carried.

The following segments (Items E.1.-3.) were presented to the Board by Jonathan Becker.

**E.1.) State officials representing clients before district attorneys**

**MOTION:** Amend the opinion 4 Op. Eth. Bd. 77 (1981) to remove the holding that a district attorney is a judicial officer.

Moved by Eich, seconded by Cane. Motion withdrawn.

**MOTION:** Modify 2008 Wis Eth Bd 1, 1998 Wis Eth Bd 3 and 4 Op. Eth. Bd. 77 (1981) by adding to each the following language:

The Government Accountability Board reviewed this opinion on March 26, 2008 as part of the review of Ethics Board opinions mandated in 2007 Wisconsin Act 1. The Board is not of the opinion that a District Attorney is a judicial office. The cases on which the Ethics Board opinion relies hold that a district attorney is a *quasi*-judicial office in the sense that it is a district attorney's duty to administer justice rather than to obtain a conviction and that a district attorney has discretion in charging and is not purely an administrative officer in that regard. Nor is there any evidence of a legislative intent to exclude district attorneys from the meaning of "department" at the time the statute was created.

In 1989 Act 31, in which the Legislature created the state prosecution system and made assistant district attorneys state employees, the definition of "department" was amended by the addition of the following sentence: "In the case of a district attorney, 'department' means the department of administration unless the context otherwise requires." Under §19.45 (7), the context requires that "department" for a district attorney means the district attorney's office. There is no discernable reason why the Legislature would intend that district attorneys' offices should be excluded wholesale from the prohibition on a state official representing persons before any department. There simply is no evidence that the Legislature intended this result when it amended the definition of "department" in 1989. Indeed, the 1989 Act created the state prosecution system and made assistant district attorneys state employees. If anything, the policy behind §19.45 (7) assumes even more importance since the act gave legislators a greater and more direct role in the operations of district attorney's offices than previously.

But that does not end the analysis. The Ethics Board opinion does not address the meaning of the statutory language which prohibits an official to represent a person for pay before a department or employee thereof. A criminal case is not before a district attorney; it is before the court. For this reason, the statute does not restrict an official to represent a person in a criminal matter once the court's jurisdiction is invoked (that is, once a complaint or a John Doe petition has been filed) even if such representation involves private discussions or negotiations and regardless whether the district attorney or the attorney general is prosecuting the matter. But the statute does apply if an official is meeting with a district attorney's office or with the attorney general's office before such time to negotiate a disposition because, prior to the filing of a criminal complaint, the matter is before the prosecuting authority and not the court.

Moved by Cane, seconded by Nichol. Motion carried.

#### **E.1.) Scope of Campaign Finance Regulation**

The Board deferred an action on administrative rule ElBd.1.28, but requested materials and recommendations from staff concerning so-called issue advocacy.

**MOTION:** Request staff to provide at a future meeting: a) Draft rule from the Brennan Center, b) Transcripts of pertinent advertisements from Supreme Court race, c) Analysis of the Board's statutory authority to promulgate rules in this area, and d) The constitutional limitations on regulation in this area.

Moved by Nichol, seconded by Eich. Motion carried.

**MOTION:** Decline to reaffirm administrative rule ElBd. 1.29.  
Moved by Cane, seconded by Eich. Motion carried.

**MOTION:** Reaffirm opinions El.Bd. 74-4, El.Bd. 76-12, El.Bd. 76-16, El.Bd. 77-3, El.Bd. 79-2, El.Bd. 79-3, El.Bd. 79-4, El.Bd. 86-3 (amended), El.Bd. 00-02, El.Bd. 03-01, El.Bd. 06-01, and three informal opinions.  
Moved by Eich, seconded by Nichol.

**E.2.) Coordination of Campaign Activity and Independent Expenditures**

**MOTION:** Modify opinion El.Bd 78-8, and reaffirm opinion El.Bd. 00-02 and administrative rules ElBd. 1.42 and ElBd. 1.50  
Moved by Eich, seconded by Nichol. Motion carried.

**E.3.) Use of Government Resources and State Employee Activity**

**MOTION:** Reaffirm opinions El.Bd. 74-6, El.Bd. 76-12, El.Bd. 76-16, El.Bd. 78-12, El.Bd. 75-02, and El.Bd. 76-16, and decline to reaffirm El.Bd. 76-02.  
Moved by Eich, seconded by Cane. Motion carried.

**E.4.) Voter Registration (Kevin Kennedy)**

**MOTION:** Reaffirm administrative rules El.Bd. 3.01, El.Bd. 3.02, El.Bd. 3.03, El.Bd. 3.04, El.Bd. 3.10, El.Bd. 3.11, El.Bd. 3.12, El.Bd. 3.13, El.Bd. 3.20, and El.Bd. 3.50, and opinions El.Bd. 76-10, El.Bd. 80-1 and El.Bd. 81-1.  
Moved by Nichol, seconded by Cane. Motion carried.

The Chair noted for the record that the Board members had received opinion and rule summaries electronically and on paper, and that all formal opinions are on the GAB website. The Chair complimented staff for the timely manner in which rules and opinions are posted for GAB members' review.

**F. Director's Report**

**Elections Division Report**

(Presented by Nathaniel E. Robinson)

Report was made for informational purposes; the Board took no action.

**Ethics and Accountability Division Report**

(Presented by Jonathan Becker)

Report was made for informational purposes; the Board took no action.

**Agency Administration and Legal Issues**

(Presented by Kevin Kennedy)

**MOTION:** Authorize the Director or staff counsel to accept service when Board members are named in litigation.

Moved by Brennan, seconded by Eich. Motion carried.

**G. Move to Closed Session**

**MOTION:** Move to closed session pursuant to Sections 5.05(6a), 19.85(g), (h), and 19.851 Wis. Stats. to consider written requests for advisory opinions, the investigation of possible violations of Wisconsin's lobbying law, campaign finance law, and Code of Ethics for Public Officials and Employees, and to confer with counsel concerning strategy with respect to litigation in which the Board is, or is likely to become, involved.

Moved by Nichol, seconded by Eich.

Roll call vote:	Brennan:	Aye	Cane:	Aye
	Deiningner:	Aye	Eich:	Aye
	Mohr:	Aye	Nichol:	Aye

Motion carried, 6-0.

The Board went into closed session at 2:10 p.m.

Summary of Significant Actions Taken in Closed Session Meeting

- A. Requests for Advice: Four items considered; two formal opinions approved.
- B. Investigations: Three items considered; one item closed, two items pending.

**MOTION:** Adjourn the meeting.

Moved by Eich, seconded by Nichol. Motion carried.

The meeting was adjourned at 4:25 p.m.

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The next meeting of the Government Accountability Board is scheduled for 9:30 a.m., Monday, May 5, 2008, in Room 150 of the Risser Justice Center, 120 Martin Luther King Jr. Blvd., Madison, Wisconsin.

March 26, 2008 Government Accountability Board meeting minutes prepared by:



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Kyle R. Richmond, Public Information Officer

April 2, 2008

\_\_\_\_\_  
Date

March 26, 2008 Government Accountability Board meeting minutes certified by:

\_\_\_\_\_  
Judge Gerald Nichol, Board Secretary

\_\_\_\_\_  
Date