
2008 Wis Eth Bd 01
REPRESENTATION OF CLIENTS

The Ethics Board advises:

- 1) A legislator may represent clients in criminal matters unless the Department of Justice, rather than a district attorney, is prosecuting the matter but the legislator should account for whether such representation will undermine citizen confidence in government;
- 2) A legislator may represent a client in a licensure or regulatory matter before a state agency only in an open hearing at which a record is maintained; and
- 3) Other lawyers in the legislator's firm whose work, judgment and compensation are not subject to the legislator's review may represent clients in matters before state agencies.

Facts

- ¶1 This opinion is based upon these understandings:
- a. You are a state legislator.
 - b. You are also a lawyer in private practice.

Questions

- ¶2 The Ethics Board understands your questions to be:
1. May you represent a client in a criminal matter?
 2. May you represent a person with interests adverse to the state in a license review or regulatory action?
 3. May other attorneys in your firm represent clients in instances in which laws administered by the Ethics Board prohibit your representation?

Discussion

¶3 Section 19.45 (7) (a), *Wisconsin Statutes*, is the proscription most pertinent to your question. Reduced to its elements, this section provides:

No salaried state public official
May represent a person for compensation
Before a department or any employee thereof.¹

¹ Section 19.45(7), *Wisconsin Statutes*, provides:

¶4 You are a salaried state public official subject to this statute.² Representation under the statute clearly includes legal representation.³

Criminal matters

¶5 The statute does not restrict your representing any person in court. Neither the court system nor judges fall within the definition of “department” as used in the statute.⁴ However, your representation of criminal defendants is also likely to include representation before prosecutors.⁵ In prior opinions, the Ethics Board has said that a district attorney is a judicial officer and excluded from the meaning of “department.”⁶ However, the attorney general’s office and Department of Justice do fall within the definition of “department.”⁷ Thus, you

19.45(7)(a) No state public official who is identified in s. 20.923 may represent a person or organization for compensation before a department or any employee thereof, except:

1. In a contested case which involves a party other than the state with interests adverse to those represented by the state public official; or
2. At an open hearing at which a stenographic or other record is maintained; or
3. In a matter that involves only ministerial action by the department; or
4. In a matter before the department of revenue or tax appeals commission that involves the representation of a client in connection with a tax matter.

(b) This subsection does not apply to representation by a state public official acting in his or her official capacity.

² Section 19.42(13)(c), *Wisconsin Statutes*, provides:

19.42(13) “State public office” means:

(c) All positions identified under s. 20.923(2), (4), (4m), (6)(f) to (h) and (8) to (10), except clerical positions.

Section 20.923(2)(b), *Wisconsin Statutes*, identifies state senators.

³ 1998 Wis Eth Bd 3, ¶5; 4 Op. Eth. Bd. 89 (1981); 4 Op. Eth. Bd. 77 (1981).

⁴ Section 19.42(5), *Wisconsin Statutes*, provides:

19.42(5) “Department” means the legislature, the university of Wisconsin system, any authority or public corporation created and regulated by an act of the legislature and any office, department, independent agency or legislative service agency created under ch. 13, 14, or 15, any technical college district or any constitutional office other than a judicial office. In the case of a district attorney, “department” means the department of administration unless the context otherwise requires.

⁵ “Represent before” includes an official’s writing, telephoning, visiting, bargaining or negotiating with or otherwise coming under a department’s consideration. 1998 Wis Eth Bd 3, ¶6; 9 Op. Eth. Bd. 45, 47 (1987) (“ ‘Representation’ embraces a concept much broader than legal representation. A salaried state public official should not write, telephone, or visit an officer or employee of a state entity in connection with his work for the proposed business except in the narrowly-defined circumstances authorized by 19.45(7).”).

⁶ 1998 Wis Eth Bd 3, n.5; 4 Op. Eth. Bd. 77, 78 (1981).

⁷ Although the attorney general may, in his or her prosecutorial capacity, exercise judicial or quasi-judicial functions, the office of attorney general is essentially a branch of the executive:

The attorney general’s office is a branch of the executive department of state government. So the duties of the attorney general pertain to the executive or administrative branch of government, and, since the functions of the executive, legislative, and judicial departments must be exercised separately by the appropriate division of government, the attorney general cannot exercise any power or possess any function essentially judicial in nature.

may represent clients in criminal matters unless the Department of Justice, rather than a district attorney, is prosecuting the matter.

¶6 Even so, as the Ethics Board said in a prior opinion concerning a state official's representation of a matter involving a state authority that was not a "department":

Even though the Authority is not an arm or agent of the state, it is a creature of the state and closely identified with it. In 1977, when recommending to the legislature the enactment of what is now §19.45(7), the Ethics Board stated that its primary concern was to promote the faith and confidence of the people of this state in their public officials. The Board stated that even the appearance of a state official exerting undue influence over a state agency on behalf of a private client for pay should be avoided. Because the Authority is a creature of the state and maintains a relationship to the state, an appearance of undue influence might be associated with a legislator's negotiating, for pay and in secret, a settlement with, or other concession from, the Authority with respect to which the Legislature exercises some responsibility.

1998 Wis Eth Bd 3, ¶8.

¶7 Similarly, because the Legislature determines the salaries of all District Attorneys and their assistants and may allocate resources available to each office and a legislator may participate in supporting or opposing a District Attorney in an election, a legislator's privately negotiating with a district attorney's office may raise the specter of undue influence and undermine confidence in government.

Licensure and regulatory matters

¶8 The statute forbids you to represent clients before state agencies in any matter except:

1. In a contested case which involves a party other than the state with interests adverse to those represented by the state public official;
or
2. At an open hearing at which a stenographic or other record is maintained; or
3. In a matter that involves only ministerial action by the department;
or
4. In a matter before the department of revenue or tax appeals commission that involves the representation of a client in connection
- 5.

§19.45 (7) (a), *Wisconsin Statutes*.

¶9 It is important to note that, even if a licensure or regulatory matter involves an open hearing at which a record is maintained, it is likely that your representation will call upon you to engage in pre-hearing conferences, settlement negotiations, and other discussions with attorneys representing state agencies. The statute forbids this.⁸

Other lawyers in your firm

¶10 The Ethics Board has consistently held that no person may do through an agent that which the statute forbids the person to do directly.⁹ Thus, we have advised an official in a context similar to that of your question:

The Ethics Code will not be an obstacle to your firm's representing a client before a state agency . . . if that representation is undertaken by a member of the firm whose work, judgment and compensation is not subject to your review.

10 Op. Eth. Bd. 13, 17 (1988).

Advice

¶11 The Ethics Board advises:

- 1) You may represent clients in criminal matters unless the Department of Justice, rather than a district attorney, is prosecuting the matter but you should account for whether such representation will undermine citizen confidence in government;
- 2) You may represent a client in a licensure or regulatory matter before a state agency only in an open hearing at which a record is maintained; and
- 3) Other lawyers in your firm whose work, judgment and compensation are not subject to your review may represent clients in matters before state agencies.

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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

⁸ 1998 Wis Eth Bd 3, n.5 (a legislator may not represent a client in dealings with a state Authority); 4 Op. Eth. Bd. 77, *supra* (a legislator may not represent a client in dealings with an agent of the Department of Health and Social Services in a probation matter unless at an open hearing); 4 Op. Eth. Bd. 89, *supra*.

We also note that State Bar of Wisconsin's Standing Committee on Professional Ethics has said that to avoid even the appearance of impropriety, an attorney who is a legislator should not represent a client for compensation before a state agency. Formal Opinion E-76-2.

⁹ 1997 Wis Eth Bd 17, ¶6; 1992 Wis Eth Bd 29, ¶4 and n. 2; 1992 Wis Eth Bd 27, ¶4 and n. 2; 1991 Wis Eth Bd 8; 80 Op. Att'y Gen. 205, 208 (1992).

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.