
1992 Wis Eth Bd 24
IMPROPER USE OF OFFICE; LEGISLATORS; SOLICITATION

A legislator should not solicit or accept contributions of legal services or money to pay for legal services if the contributions could reasonably be expected to influence judgment or actions or be considered a reward for past action. A legislator should not accept legal services or contributions to defray litigation expenses unless the legislator can demonstrate, clearly and convincingly, that the contribution is made primarily for a reason that is independent of the legislator's holding a public office. OEB 92-24

June 16, 1992

Facts

- [1] This opinion is based upon these understandings:
- a. You are a legislator and a state public official.
 - b. You have intervened as a defendant in a lawsuit concerning a legislative issue.
 - c. You have been involved, with a member of your staff, in this issue at the local and state levels since 1980.
 - d. A third party has expressed willingness to pay the fees of the attorney representing you in the lawsuit.
 - e. The third party is an out-of-state person not seeking to influence any legislative matters in Wisconsin.

Question

- [2] The Ethics Board understands your question to be:

Consistent with the laws administered by the Ethics Board, may you solicit and may your lawyer accept contributions from organizations to cover the costs of pursuing the lawsuit?

Discussion

- [3] There are a number of provisions in the statutes administered by the Ethics Board that are pertinent to analyzing the issues you have raised. We do not have sufficient facts to give completely definitive answers to your

questions. However, this opinion will discuss the relevant factors you should consider in deciding upon a course of action.

Influencing judgment

[4] Wisconsin's Code of Ethics for Public Officials and Employees, at §19.45(3), *Wisconsin Statutes*, provides that no state public official may solicit or accept from any person anything of value¹ if it could reasonably be expected to influence the official's vote, official actions or judgment or could reasonably be considered a reward for past official action.² We do not know enough about the potential source from which you might seek legal fees to advise whether a solicitation or acceptance would violate this section. In general, the Ethics Board has advised that officials not solicit or accept anything of more than nominal value from organizations or individuals that have or are reasonably likely to have issues before an official's agency in circumstances in which that agency has authority to decide those issues or to regulate the organization's conduct. And a legislator should not solicit anything of more than nominal value from an individual or organization that has a special or specific interest in an item or matter likely to be before the legislature. To the extent that the third party is not now, nor is likely in the future to be, interested in a matter before the legislature, any expectation of the receipt of fees influencing your legislative judgment is clearly reduced.

Use of office for private benefit

[5] The next section of the Ethics Code that is pertinent to your inquiry is §19.45(2), *Wisconsin Statutes*.³ That section, reduced to its elements, provides:

¹ §19.42(1), *Wisconsin Statutes*, defines "anything of value" to mean:

any money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment, but does not include compensation and expenses paid by the state, fees and expenses which are permitted and reported under s. 19.56, political contributions which are reported under ch. 11, or hospitality extended for a purpose unrelated to state business by a person other than an organization.

² §19.45(3), *Wisconsin Statutes*, provides:

19.45 Standards of conduct; state public officials.

(3) No person may offer or give to a state public official, directly or indirectly, and no state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the state public official. This subsection does not prohibit a state public official from engaging in outside employment.

³ §19.45(2), *Wisconsin Statutes*, provides:

19.45 Standards of conduct; state public officials. (2) No state public official may use his or her public position or office to obtain financial gain or

No state public official
May use his or her public position
To obtain financial gain or anything of substantial value
For private benefit.

[6] You are a state public official and the provision of legal services or the payment of legal fees clearly is something of substantial value.⁴ It does not matter that the contributions might go directly to your attorney since you still would be the direct beneficiary of those contributions to the extent that they facilitate your ability to pursue the litigation. Thus, you may not solicit or accept legal services, or money to pay legal fees, if you use your office or position to do so in circumstances in which you will receive a private benefit.

[7] The Ethics Board has long interpreted the prohibition on "use of office" to include an official's use of the title or prestige of office to obtain items of value.⁵ The critical question is whether a party is providing legal services or money for legal fees primarily for a reason independent of your holding public office. That is, would a party be providing you the money or services if you were not a legislator. You have not provided us with sufficient facts to permit us to definitively answer this question. In examining the situation, the Ethics Board would examine such factors as whether you have a relationship to the potential donor independent of holding public office, whether the donor has displayed a prior interest in the issues involved in the proposed litigation, and whether the donor has a history of providing similar services or funds to non-officials. If your standing in the lawsuit is dependent on your position as a legislator, then, *a fortiori*, the provision of legal services or payment of legal fees is not independent of your holding public office.

[8] Further, it is clear that legal services provided to you as a litigant, or the payment of a monetary obligation you owe an attorney, is something of value from which you personally and directly benefit. The fact that you are not seeking monetary damages from the lawsuit and believe your intervention in the lawsuit serves broad interests does not permit you to use your office to obtain legal fees or services. In an analogous context, the Ethics Board has stated that participation as a litigant in a lawsuit is not normally part of the official function or duties of a legislator.⁶ Election to the legisla-

anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. This subsection does not prohibit a state public official from using the title or prestige of his or her office to obtain contributions permitted and reported as required by ch. 11.

⁴ Substantial value is more than nominal or token value. 11 Op. Eth. Bd. 1 (1989); 5 Op. Eth. Bd. 107 (1982).

⁵ 12 Op. Eth. Bd. 5 (1990); 10 Op. Eth. Bd. 47 (1988), 43 (1987); 9 Op. Eth. Bd. 45, 46 (1987), 21, 22 (1986); 8 Op. Eth. Bd. 61 (1985); 7 Op. Eth. Bd. 22 (1983); 5 Op. Eth. Bd. 98 (1982), 57 (1981); 4 Op. Eth. Bd. 63, 46 (1980); 3 Op. Eth. Bd. 54 (1979).

⁶ See 12 Op. Eth. Bd. 1 (1990). In that opinion, the Ethics Board was asked whether a legislator could use the resources of office in connection with the prosecution of a lawsuit.

ture simply does not give a blanket commission to participate in lawsuits as a part of holding office.⁷ In contrast, a legislator generally would be free to attempt to persuade another party to participate in litigation as long as the legislator has no pecuniary interest in the litigation's outcome.

Advice

[9] The Ethics Board advises that a legislator should not solicit or accept contributions of legal services or money to pay for legal services if the contributions could reasonably be expected to influence judgment or actions or be considered a reward for past action. A legislator should not accept legal services or contributions to defray litigation expenses unless the legislator can demonstrate, clearly and convincingly, that the contribution is made primarily for a reason that is independent of the legislator's holding a public office.

The Board recognized that Wisconsin law establishes that state funds and resources may only be used for public purpose of statewide concern, rather than for a private purpose. See, e.g., *Wisconsin Solid Waste Recycling Authority v. Earl*, 70 Wis. 2d 464 (1975); *State Ex Rel Wisconsin Development Authority v. Dammann*, 228 Wis. 147 (1938); 72 OAG 172 (1983); 66 OAG 43 (1977). The Ethics Board applied the test whether the expenses arise independently of official functions or because of them. 9 Op. Eth. Bd. 1, 2 (1985); 5 Op. Eth. Bd. 49 (1981). The Board determined that use of state resources in connection with legal representation of a private party in a lawsuit is not a public purpose and is prohibited by the Ethics Code. See *State ex rel. Bowman v. Barczak*, 34 Wis. 2d 57 (1967) (factors to be considered in determining whether an activity is for public purpose are the course or usage of government, whether the object is one for which taxes have been customarily levied, and whether the objects and purposes have been considered necessary for government support). See also 66 OAG 43,47, *supra* (incidental benefits to the public which result from the promotion of private interests cannot justify the expenditure of public funds).

⁷ The Ethics Board understands that at times the legislature as an institution is involved in litigation and that state funds may be used to fund that litigation. The distinction in such a case is that the determination to participate in such litigation and to advance specific positions is one made by the legislature in the normal course of exercising its authority.