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**1998 Wis Eth Bd 3**  
**REPRESENTATION OF CLIENTS**

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The Ethics Board advises:

that a salaried state public official not represent an individual for compensation in a legal claim against a state authority, its employees, or employees of the state.

Facts

¶ 1 This opinion is based upon these understandings:

- a. You are a member of the Legislature.
- b. You have been asked to represent an individual in connection with a legal claim.
- c. The potential defendants are a state authority (the “Authority”), one or more of the Authority’s employees, and one or more state employees.
- d. No lawsuit has yet been filed in the matter.
- e. Whether or not a lawsuit is filed, your representation could include negotiations with attorneys from the Department of Justice representing employees of the state and with attorneys representing the Authority and its insurer.

Question

¶ 2 The Ethics Board understands your question to be:

Do laws administered by the Ethics Board restrict your representing a client in connection with the legal claim?

Discussion

¶ 3 Section 19.45(7)(a), *Wisconsin Statutes*, is the proscription most pertinent to your question. As a general rule, that section prohibits a salaried state official to represent a person for compensation before a state agency. We recommend that you not represent a client for compensation in

connection with the legal claim about which you have asked. Our analysis follows.

¶ 4 Section 19.45(7)(a), reduced to its elements, provides:

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

¶ 5 You are a salaried state public official.<sup>2</sup> You have been asked to represent an individual for compensation in a medical malpractice case. Representation under the statute clearly includes legal representation.<sup>3</sup>

¶ 6 “Represent before” includes an official’s writing, telephoning, visiting, bargaining or negotiating with or otherwise coming under a department’s consideration.<sup>4</sup> Both the Department of Justice and the Authority are departments within the meaning of the statute.<sup>5</sup> Thus, unless an exception

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<sup>1</sup> Section 19.45(7), *Wisconsin Statutes*, provides:

**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.

<sup>2</sup> 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 members of the legislature.

<sup>3</sup> 4 Op. Eth. Bd. 89 (1981); 4 Op. Eth. Bd. 77, *supra*.

<sup>4</sup> 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).”).

<sup>5</sup> 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 legisla-

applies, you should either (1) not proceed to represent an individual by writing, telephoning, visiting, bargaining, or negotiating with the Department of Justice or the Authority or other state department either directly or through their agents, or (2) not accept compensation for doing so.<sup>6</sup>

¶ 7 There are two exceptions pertinent to your inquiry.

*Exception: Contested case involving a party other than the state with interests adverse to those the official represents*

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ture 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.

In a prior opinion, the Ethics Board, said, based on a number of judicial decisions, that a district attorney is a judicial officer and excluded from the meaning of "department." 4 Op. Eth. Bd. 77, 78 (1981). The office of attorney general is different. 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.

7 C.J.S. Attorney General §7.

The Authority was created by state statute.

With respect to the legal claim, it is likely that you might engage in settlement negotiations with (1) Department of Justice employees representing state employees; and (2) attorneys representing the Authority and its insurer. In the former case you would be appearing before department employees (Department of Justice) as agents of state employees. Section 19.45(7) makes no distinction among the various roles or responsibilities department employees may be fulfilling when an official appears before them. In the latter case you would be appearing before non-employee agents of a department (the Authority), but the agents would be acting on behalf of the Authority and the Authority would be involved in any settlement decision.

<sup>6</sup> 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*. The statute does not prohibit your filing a notice of claim with the state; such a claim simply sets the stage for a later court action. See 2 Op. Eth. Bd. 80 (1978).

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.

¶ 8 This statutory exception would permit your representing a client for compensation in a lawsuit in which at least one of the parties is not a state agency. A civil lawsuit is a contested case. The case would involve a party other than the state<sup>7</sup> with interests adverse to those you represent – namely, the Authority. 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. Moreover, if the Authority ceases to be a party to the lawsuit, through a settlement or dismissal, then this exception would no longer apply.

*Exception: Open hearing*

¶ 9 You may represent a client for compensation at an open hearing at which a stenographic record is kept, regardless whether there is a party other than the state with interests adverse to those you represent. This exception would permit you to represent your client for compensation in a trial before a court. However, this exception would not permit you to participate in a pretrial conference, negotiate a settlement, or otherwise discuss the case, with employees or agents of the Department of Justice. So, as a practical matter, this exception may have limited value.

Advice

¶ 10 The Ethics Board advises:

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<sup>7</sup> The Authority is a body corporate and politic created by the state. This is so even though the Authority falls under the statute's definition of "department." In *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 208 N.W. 2d 780 (1973), the Wisconsin Supreme Court held that the powers the legislature conferred upon the Wisconsin Housing Finance Authority supported the legislative declaration that the authority was an independent entity, and not the state, saying "To the extent the words denote independence and a common identity, the Authority is neither an arm nor an agent of the state." 208 N.W. 2d 780, *supra*, at 801. In that case, the Court found that the authority's members were appointed by the Governor with the advice and consent of the Senate; the authority had perpetual existence; and the authority had the power to sue and be sued, to contract, incur debt, hold and distribute its own funds, and own and sell property. The Authority has those same powers.

that you not represent an individual for compensation in a legal claim against a state authority, its employees, or employees of the state.

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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 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.*