
1998 Wis Eth Bd 14
DISQUALIFICATION; IMPROPER USE OF OFFICE

The Ethics Board advises:

(1) That a state public official not accept compensation from the official's private clients for time spent serving as a state public official on a task force created by the Legislature to investigate and report on tax issues affecting the industry of which the clients are a part; and

(2) That a state public official not participate as a member of the task force in matters that could have a substantial financial impact on the official's private clients or that could produce a substantial benefit for them.

Facts

¶1. This opinion is based upon these understandings:

- a. You are a lawyer in the private practice of law.
- b. Among the clients that you represent are businesses engaged in a specific industry.
- c. Your representation on behalf of these clients has included work on tax questions.
- d. The Governor has appointed you to be a member of a task force.
- e. The Legislature created this task force to investigate and report on tax issues affecting the industry.

Question

¶2. The Ethics Board understands your questions to be:

1. May your clients compensate you for the time you spend serving on the task force?
2. Do laws administered by the Ethics Board restrict your serving on the task force?

Discussion

¶3. Three provisions of the Ethics Code apply to the questions you have posed, §§19.45(2) and 19.46(1)(a) and (b), *Wisconsin Statutes*. Reduced to its elements, §19.45(2) provides:

No state public official
May use public office or position
To obtain financial gain or anything of substantial value
For the private benefit of the official or an organization with which
the official is associated.¹

¶4. Section 19.46(1)(b), reduced to its elements, provides:

No state public official
May use public position or office
In a way that produces or assists in the production of a substantial
benefit
For the official or an organization with which the official is
associated.²

¶5. Section 19.46(1)(a), reduced to its elements, provides:

No state public official
May take any official action
Substantially affecting a matter

¹ Section 19.45(2), *Wisconsin Statutes*, provides:

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

² Section 19.46(1)(b), *Wisconsin Statutes*, provides:

19.46 Conflict of Interest Prohibited; Exception. (1) Except in accordance with the board's advice under sub. (2) and except as otherwise provided in sub. (3), no state public official may:
(b) Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

In which an organization with which the official is associated has a substantial financial interest.³

¶6. A state public official includes an individual who holds a position to which individuals are regularly appointed by the Governor.⁴ The legislative provision creating the task force specifies that the Governor appoint a number of its members.⁵ The Governor has appointed you to the task force. You are a state public official.

³ Section 19.46(1)(a), *Wisconsin Statutes*, provides:

19.46 Conflict of Interest Prohibited; Exception. (1) Except in accordance with the board's advice under sub. (2) and except as otherwise provided in sub. (3), no state public official may:

(a) Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.

⁴ Section 19.42(13) and (14), *Wisconsin Statutes*, provide, in relevant part:

19.42(13) "State public office" means:

(a) All positions to which individuals are regularly appointed by the governor, except the position of trustee of any private higher educational institution receiving state appropriations and the position of member of the district board of a local professional baseball park district created under subch. III of ch. 229.

* * *

(14) "State public official" means any individual holding a state public office.

This section's legislative history reveals that early drafts would have defined "state public official" to refer to "all positions to which persons are appointed by the governor. . . ." "Regularly" was later inserted to exclude from the term's meaning sheriffs, coroners, registers of deeds, and district attorneys appointed by the Governor to fill vacancies occurring in those county offices which are regularly filled by election. *See* June 21, 1975 Statement of Frances Hurst in support of 1975 Assembly Bill 784, to Assembly Judiciary Committee. "Regularly" has the meaning of "normally" as opposed to "periodically" as in the instance about which you have asked. The governor *normally* appoints members of a task force when directed by an act of the legislature as distinguished from the governor's appointment of a person to an office that is normally filled by election.

⁵ We note that individuals appointed to the task force by members of the legislature are not state public officials as defined by §19.42, *Wisconsin Statutes*.

Use of office for financial gain for self -- §19.45(2)

¶7. You should not accept compensation from your clients in connection with your service on the task force. Section 19.45(2), *Wisconsin Statutes*, bars a public official from profiting from holding public office, apart from compensation paid by the state. Charging clients for the time you spend performing your public duties on the task force would be a use of office to obtain financial gain for private benefit and a violation of §19.45(2).

Use of office to obtain a substantial benefit for an organization of which you are an authorized representative -- §19.46(1)(b)

¶8. Use of office under the statutes includes participating in discussions, debates, and votes in an official capacity.⁶ The businesses that you represent as an attorney appear to be organizations with which you are associated.⁷ You may not use your public position in a way that produces or assists in the production of a substantial benefit for your clients.

¶9. In situations in which a state official is asked to participate in a matter that affects the financial interests of an organization with which the official is associated, the Ethics Board has consistently said that an official may participate in and vote on matters that only incidentally affect a business with which the official is associated and that affect the business to no greater or lesser extent than other citizens involved in similar broadly-defined pursuits.⁸ But you have not asked about affecting a broad class of

⁶ 1997 Wis Eth Bd 1, ¶4; 1995 Wis Eth Bd 3, ¶4.

⁷ Section 19.42(2) and (11), *Wisconsin Statutes*, provide:

19.42 (2) “Associated”, when used with reference to an organization, includes any organization in which an individual or a member of his or her immediate family is . . . an authorized representative or agent.

(11) “Organization” means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, trust or other legal entity other than an individual or body politic.

The Ethics Board understands you to be an authorized representative or agent of a client if you provide representation for the client in dealings with third parties. 1993 Wis Eth Bd 7, ¶4. This can include a client you represent before tribunals or other government bodies or in negotiations with private individuals or entities. *Id.* In such instances, you are, of necessity, acting as the representative or agent of the client. In contrast, you are not an authorized representative or agent of a client merely because you provide legal advice or counsel to the client. 1993 Wis Eth Bd 7, *supra*, ¶6.

⁸ *See, e.g.*, 1995 Wis Eth Bd 3, ¶¶7,8.

organizations of which your clients are an insubstantial part. The matters which the task force will address are narrow tax issues affecting your clients. The task force's recommendations are likely to specifically affect your clients but will not have broad application beyond the industry of which they are a part.

Taking official action when simultaneously authorized to represent an organization with financial interest in official act--§19.46(1)(a)

¶10. You also may not participate as an official in a matter in which your clients have a substantial financial interest. Your clients have what is likely to be a substantial financial interest in the continued application of existing law. For this reason as well, you should not participate in task force matters that may affect your clients.

Policy considerations

¶11. The primary purpose of the Ethics Code is to “help [state officials] avoid conflicts between their personal interests and their public responsibilities [to] promote and strengthen the faith and confidence of the people of this state in their state public officials and employees.”⁹ Moreover, a public officer owes an undivided duty of loyalty to the public whom he or she serves.¹⁰ These considerations are particularly prominent where, as here, a public official not only represents organizations with a direct financial stake in the official's decision-making, but provides representation, in his or her private capacity, with respect to the very matters that are before the official in his or her public capacity.

¶12. Public policy favors a state public official's exercise of his or her official duties, and an official should avoid placing himself or herself in a position in which the official must refrain from exercising official responsibilities because a conflict of interest might arise.¹¹ As a general matter, occasional and infrequent conflicts may be dealt with by the official's abstaining from participation in official matters, as required to avoid violating the Ethics Code. However, continuing and frequent conflicts might best be dealt with by divesting either the private interest or the public responsibilities.

⁹ Section 19.41, *Wisconsin Statutes*. See 1995 Wis Eth Bd 1, ¶7.

¹⁰ 1994 Wis Eth Bd 3, ¶8; 1993 Wis Eth Bd 4, ¶5; 1992 Wis Eth Bd 33, ¶4; 1992 Wis Eth Bd 32, ¶3; 8 Op. Eth. Bd. 33, 37 (1985); 63A Am. Jur. 2d, Public Officials and Employees §§321, 322.

¹¹ *Id.*

¶13. We recognize that the Governor may well have selected you to be a member of the task force precisely because of your experience and your representation of a segment of the industry that is affected by the matters that are the focus of the task force's study. Nevertheless, absent a specific legislative directive to the contrary, the statutes do not permit an exception to the requirement that those fulfilling a public responsibility must be free of any special financial interest in the outcome of the work they are called upon to undertake on the public's behalf. The legislature could have specified that the task force be composed of one or more representatives of the industry, but it did not do so.

Advice

¶14. The Ethics Board advises:

- (1) That you not accept compensation from your clients for time spent serving as a state public official on the task force; and
- (2) That you not participate as a member of the task force in matters that could have a substantial financial impact on your clients or that could produce a substantial benefit for them.

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