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IMPROPER USE OF OFFICE; LOBBYING LAW

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Facts

You provided the following background information. You are currently an attorney licensed to practice in the State of Wisconsin, and also currently serve IN THE Wisconsin Legislature. As some legislators do, you are considering practicing law on a limited basis in addition to your legislative work. The practice of law that you are considering would remain secondary to your responsibilities to fully represent your constituents. You seek the advice of and clarification from the Government Accountability Board as to how to ensure that your work relationships and responsibilities as an attorney remain consistent with applicable laws and regulations governing ethics and conflicts of interest.

You further provide some additional specific information about the type of law practice with which you intend to seek employment. The firm you are considering is a small general practice law firm located in Madison, Wisconsin, serving individuals, businesses, and other organizations in a variety of legal matters. Your proposed relationship with the firm would be an “of counsel” relationship, not as an associate or shareholder attorney. Your practice would be limited to the specific issues to which you would be assigned as of counsel, but could potentially involve a variety of the firm’s clients. You would not draw a fixed salary but would be paid based on your time and effort as of counsel, primarily on the potentially billable hours chargeable to clients that are billed on that basis. As a part-time law firm employee, you may be eligible to receive limited fringe benefits from the law firm, such as participation in the firm’s retirement plan, after certain eligibility criteria are met. Your effort devoted to practice of law will depend upon the time available after legislative duties are fulfilled, and there will be no minimum effort requirement.

Questions: 1-10

You present nine detailed and specific questions in your Request for Advisory Opinion. In addition, you ask whether there are other issues to consider and request that the Government Accountability Board address those as well. Your questions and requests are divided into subject categories and are lengthy. Each will be addressed individually in the order that you presented them, followed by a discussion of each individual question or request and advice from the Government Accountability Board.

Lobbying Related Issues:

1. The firm’s legal practice includes representation of a limited number of clients that are also lobbying principals. Under the proposed arrangements with the law firm, you would not undertake any legal work on any Wisconsin legislation-related issues, although you might ordinarily be asked to undertake legal work on wholly unrelated issues for clients that are lobbying principals, for example, on issues involved in litigation

or contract negotiations. However, you understand from previous conversations with the G.A.B. that it takes the view that a legislator could not do any legal work for a client that is a lobbying principal, if you would be paid based on your work, (even if your work had nothing to do with any legislative issues), because that payment could be deemed as receiving something of value not generally available to the public. By contrast, the G.A.B. had indicated earlier that if a legislator would be paid a fixed salary (as an associate attorney might), that legislator could potentially work for all of the firm's clients, even those that are lobbying principals, and potentially even on some legislative issues. It would seem to you that if the legislator's work had no relationship to any legislative issues, and the payment to the legislator as an attorney related to the work that the attorney accomplished for the client, the legislator would not be receiving anything of value except for the work that was done for the law firm. This seems akin to an "arm's length" transaction.

Discussion and Advice: Pursuant to §13.625(1)(b), (2), and (3), Wis. Stats., Wisconsin's lobbying law prohibits an organization that employs a lobbyist ("principal") from furnishing anything of pecuniary value to a legislator and prohibits the legislator from accepting anything of pecuniary value from a principal. This prohibition includes compensation for employment. See 1992 Wis. Eth. Bd. 26, ¶3; 1992 Wis. Eth. Bd. 03; 1992 Wis. Eth. Bd. 05; and 77 Op. Atty. Gen. 160 (1988). In interpreting this prohibition as it applies to lobbyists and officials, the Wisconsin Attorney General has stated:

The question of whether a lobbyist who is furnishing something of pecuniary value to an official's employer, relative or corporation is actually furnishing the item or service to the state official will always be a question of fact. I agree with your conclusion that the law not only prohibits a lobbyist from furnishing things of pecuniary value directly to an official, but also prohibits a lobbyist from furnishing those things indirectly if the official will receive something of pecuniary value from the transaction. Therefore, an official would not be in violation of the law if the official's employer did business with a lobbyist but the official's compensation from the company was totally unrelated to and not determined by the income derived from that business. On the other hand, if a lobbyist were purchasing products from a company which employed an official, knowing that the official's compensation from the company would be enhanced by the purchases, a violation of the law would occur.

As you describe your prospective pay arrangement with the firm, you "would be paid based on your time and effort as of counsel, primarily on the potentially billable hours chargeable to clients that are billed on that basis." While this pay arrangement would not result in your receipt of compensation directly from a principal, you would be receiving compensation indirectly from a principal. Clearly, if you are paid based upon your time and effort and billable hours charged to a client-principal, then your pay is derived from specific work for that specific client-principal. Your pay would not be unrelated to the firm's retention by such principals, but rather is actually determined by the scope of the firm's retention by such principals. You receive compensation indirectly from the client-principal because your pay from the firm is specifically tied to the billings the firm charges to the client-principal. In other words, the firm's income from the principal and your compensation for doing work for the principal are directly linked. In fact, by your receipt of compensation on an hourly basis for services to a principal, your compensation

from the principal is wholly enhanced by the principle's purchases because you would be compensated by the firm precisely for the services rendered to the principal. You should not perform any work or services specifically for a principal, so long as your pay arrangement with the firm includes payment for your legal services charged to a principal on an hourly or project basis.

However, if you do not perform any work or services specifically for a principal, the lobbying law is not an impediment to the firm continuing to pay you an hourly wage, even if the firm derives a portion of its income from the provision of legal services to a principal. This applies only so long as the firm can clearly and convincingly demonstrate that (1) your level of compensation is unrelated to your firm having one or more principals as clients and (2) the principal's purchase of legal or other professional services from the firm is unrelated to your hiring or continued employment with the firm.

In addition to the lobbying restrictions noted above, please also note that the Ethics Code for Public Officials and Employees, specifically §19.45(2) and (3), Wis. Stats., prohibits you from using state time or resources in connection with your private employment and from accepting compensation for work on behalf of clients, if acceptance of such compensation could reasonably be expected to influence your official judgment on issues of concern to those clients. Furthermore, §§19.45(2) and 19.46(1)(b), Wis. Stats., prohibits you from using your office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for you, a member of your immediate family, or an organization with which you are associated (which includes the firm, if you are an authorized representative or agent.) Finally, §19.45(4), Wis. Stats., prohibits you from intentionally using or disclosing information gained in the course of or by reason of your official position or activities in any way that could result in the receipt of anything of value for yourself, your immediate family, or for any other person, if the information has not been communicated to the public or is not public information.

2. The firm represents some entities that are members of statewide organizations that are lobbying principals. Are you permitted to work on legal issues for these clients that are not lobbying principals themselves?

Discussion and Advice: The prohibitions of §13.625, Wis. Stats., do not impede your ability to work for firm clients who are not themselves lobbying principals, but may be members of statewide organizations that are lobbying principals. However, caution is advised as the lobbying principal may direct or obligate the firm client to perform an action on behalf of the lobbying principal, such as write a letter to a state department or employee. Pursuant to §19.45(7)(a), Wis. Stats., you are prohibited from representing such a firm client before a state department or any employee thereof for compensation. See generally, 2008 GAB 01; 1998 Wis. Eth. Bd. 3. "Represent before" embraces a concept much broader than legal representation and includes an official's writing, telephoning, visiting, bargaining or negotiating with or otherwise coming under the department's consideration. See the more detailed discussion and advice in response to question 5 below.

Please also note that the Ethics Code for Public Officials and Employees, specifically §19.45(3), Wis. Stats., prohibits you from accepting compensation for work on behalf of clients, if acceptance of such compensation could reasonably be expected to influence your official judgment on issues of concern to those clients. See generally, 2004 Wis. Eth. Bd. 06 and Supplemental (Advice: A legislator should not accept payments for offering consultation, advice, or strategy on issues if there is a reasonable possibility that those issues will be addressed by Wisconsin's Legislature.) In addition, §19.45(4), Wis. Stats., prohibits you from intentionally using or disclosing information gained in the course of or by reason of your official position or activities in any way that could result in the receipt of anything of value for yourself, your immediate family, or for any other person, if the information has not been communicated to the public or is not public information.

3. The firm has among its shareholders a registered lobbyist. Are there particular interactions that must be avoided, other than avoidance of legislative issues related to any of that lobbyist's lobbying principals?

Discussion and Advice:

Pursuant to §13.625(1)(b), (2), and (3), Wis. Stats., Wisconsin's lobbying law prohibits an organization that employs a lobbyist ("principal") from furnishing anything of pecuniary value to a legislator and prohibits the legislator from accepting anything of pecuniary value from a principal. The Government Accountability Board assumes that the firm is not also a lobbying principal. If it were, your employment with the firm would be in violation of §13.625(1)(b), (2), and (3), Wis. Stats.

The fact that the firm has among its shareholders a registered lobbyist is not necessarily an impediment to the firm continuing to compensate you for services rendered to the firm, even if the firm derives a portion of its income from the provision of legal or other professional services to a principal. However, as discussed above in response to your first question, you will be paid hourly for work performed for specific clients of the firm and you should not perform any work or services specifically for a principal. You should not accept any work assignments from the firm which originate from client-principals. In addition and as discussed above in response to your first question, the firm must be able to clearly and convincingly demonstrate that (1) your level of compensation is unrelated to your firm having one or more principals as clients and (2) a principal's purchase of legal or other professional services from the firm is unrelated to your hiring or continued employment with the firm.

Pursuant to §13.625(1)(b)3., Wis. Stats., Wisconsin's lobbying law prohibits a lobbyist from furnishing the following to any elective state official or candidate for an elective state office, or to the official's or candidate's personal campaign committee:

Food, meals, beverages, money or any other thing of pecuniary value (except that a lobbyist may make a campaign contribution as authorized by §13.625(1)(c), Wis. Stats.)

In addition, §13.625(3), Wis. Stats., prohibits a candidate for elective state office and elective state officials from accepting anything of pecuniary value from a lobbyist. The lobbying law contains a very strict standard. As an official, you may only accept an item

from a lobbyist, if it has no pecuniary value. Almost any item is likely to have a pecuniary value. See 2006 Wis. Eth. Bd. 04, ¶11. As you describe your prospective pay arrangement with the firm, you could receive work assignments from a partner or other firm employee and then will be paid hourly for the work you perform. This has pecuniary value as your compensation is directly related to receipt of a work assignment. You should not accept any work assignments directly from the partner of the firm who is also a lobbyist, regardless of subject matter of the work assignment, because you would receive a pecuniary benefit from the lobbyist in the form of entitlement to and, ultimately, compensation from the firm. Furthermore, you should not accept free legal or other professional assistance from the partner of the firm who is also a lobbyist because this too would provide you with something of pecuniary value.

#### Potential Conflicts of Interest

4. The firm represents some clients with ancillary relationships to public entities, such as companies that may provide certain services to public buildings. Under what circumstances may you work for these clients, and as an elected official, what if anything must you disclose about your work for them?

Discussion and Advice: In general, neither the Ethics Code nor lobbying law restricts your work for clients with ancillary relationships to public entities, such as companies who may provide certain services to public buildings. The only restrictions that would apply are: (1) that you not receive any payment from a lobbyist or from an organization that employs a lobbyist (§13.625, Wis. Stats.); (2) that you be able to demonstrate that you have not used the prestige or resources of your office to obtain or to perform the work (§19.45(2), Wis. Stats.); and (3) that you not represent the client before a state department or employee unless an exception applies (§19.45(7), Wis. Stats.)

There may be reporting implications with respect to your Statement of Economic Interests as a result of your representation of clients. Absent you or a member of your immediately family receiving \$1,000 or more of income in any taxable year from an individual or company (in which you, a member of your immediate family, severally or in the aggregate has a 10% or greater interest), the only item that would need to be reported on your Statement of Economic Interests is whether any organization (i.e. company) authorized you to represent them in their dealings with others or before a tribunal as an attorney-at-law, agent, spokesperson, or representative. §19.44(1)(a), Wis. Stats.

5. Should the circumstance arise, may you represent individuals or entities in actions against the State of Wisconsin?

Discussion and Advice: Section 19.45(7), Wis. Stats., provides:

**(7)(a)** No state public official who is identified in §20.923 may represent a person 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.

Legislators are state public officials identified in §20.923(2)(b), Wis. Stats., so this provision applies to you. Please note that “represent before” embraces a concept much broader than legal representation and includes an official’s writing, telephoning, visiting, bargaining or negotiating with or otherwise coming under the department’s consideration.

As you describe your prospective pay arrangement with the firm, you “would be paid based on your time and effort as of counsel, primarily on the potentially billable hours chargeable to clients that are billed on that basis” and, therefore, you will receive compensation from these clients. If none of the exceptions identified in §19.45(7), Wis. Stats., apply to a situation that may arise for you, then you should either (1) not represent a client by writing, telephoning, visiting, bargaining, negotiating, or any other form of representation with or before a state department either directly or through their agents, or (2) not accept compensation for doing so. See generally, 2008 GAB 01; 1998 Wis. Eth. Bd. 3. The Government Accountability Board modified 1998 Wis. Eth. Bd. 3 on March 26, 2008 to clarify that this statute and advice applies to representation of a client before a district attorney with respect to writings, telephone calls, meetings, etc., prior to the filing of a criminal complaint because the matter is still before the prosecuting authority and state department. The Board clarified that once a complaint or a John Doe petition has been filed in a criminal matter, the matter is no longer before a district attorney, rather it is before the court. In that instance, this statute does not restrict an official to represent a person in a criminal matter once the court’s jurisdiction is invoked, even if such representation involves private discussions or negotiations and regardless of whether the district attorney or the attorney general is prosecuting the matter.

This statute’s prohibition serves two purposes: (1) it prevents a state official from bringing undue pressure to bear on agencies and employees over whom the official may have budgetary or other authority and (2) it forecloses even the appearance of impropriety in an official being compensated because of the official’s stature or position.

The Government Accountability Board also notes that the State Bar of Wisconsin 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. See Formal Opinion E-76-2. As an attorney licensed to practice law in Wisconsin, you may also seek an opinion from the Office of Lawyer Regulation regarding other legal-based ethical considerations.

6. Some clients the firm represents may be impacted by legislation passed by the state legislature, particularly legislation on general tax and regulatory issues that are inevitably part of the state budget. Under what circumstances must you recuse yourself

from legislative votes that may have an impact on clients for which you work, or clients that the firm represents for which you do not work?

Discussion and Advice: A general response is provided as conflict of interests analyses are more appropriately addressed on a case- by-case basis. The Government Accountability Board will respond to specific requests as they may occur during your employment with the firm.

First, pursuant to §§19.45(2) and 19.46(1)(b), Wis. Stats., you should not accept payment for legal work, if your firm is being retained because you hold a position as a legislator, as opposed to your simply having desirable political experience and insight.

Second, pursuant to §19.45(3), Wis. Stats., you should not accept payments for legal work if that employment could reasonably be expected to influence your official judgment or actions. Your acceptance of payments from your firm based upon hours billed to a client could reasonably be expected to affect your official judgment and actions in a manner sympathetic to your client. The standard imposed by this statute is objective. It is not enough that you and your client are philosophically aligned, rather the question is whether a reasonable person would expect that your employment would influence your official judgment. In this circumstance, it is recommended that you not accept payments for offering legal work such as consultations, advice, or strategy on issues if there is a reasonable possibility that they will be addressed by the Wisconsin Legislature. See generally, 1993 Wis. Eth. Bd. 5.

You should not simultaneously be paid to promote a specific issue for a client, in a private capacity, while, in a government capacity, participate in the actions of our state's government pertaining to the same subject matter. You should not use your governmental position to advance the issues about which you are providing legal or other professional services to the client that has employed you or issues reasonably and proximately related to them. This means that you should not participate in discussions, deliberations, or votes of the legislature, its caucuses, committees, or components that pertain to the issues or matters proximately related to issues about which you provide legal or other professional services to the client. However, this directive is tempered by a recognition that you may, consistent with this advice, participate in discussions, deliberations, and votes on all other portions of and the passage of the state budget and omnibus bills only small components of which pertain to the subjects on which your governmental action is proscribed. See generally, 2004 Wis. Eth. Bd. 06 and Supplemental.

By accepting employment as an advocate of legislative issues while participating in the Legislature's consideration of those same topics, a government official, who owes an undivided duty of loyalty to the public whom he or she serves undermines and weakens citizens' faith and confidence in government. The duty of undivided loyalty speaks to a legislator's abstaining from participating in a matter if a private interest could materially affect the legislator's judgment or adversely affect the image or effectiveness of the legislative process. Id.

You may cure such conflicts between your private employment and your governmental responsibilities by divesting yourself of one of those relationships. Short of eliminating

the conflict, you may mitigate it by withdrawing from legislative discussions, consideration, or votes on public policy issues, while you are working for the client on the same issues or matters proximately related to those issues. Id.

### Open Records, Attorney-Client Privilege

7. You have said that you intend to adhere to both the letter and spirit of Wisconsin's open records laws and to promote transparency in government. As an attorney, you must also adhere to the ethical requirements to preserve the confidentiality of client information and the attorney-client privilege. To avoid putting these two duties in conflict, you plan to completely segregate your legal practice from your legislative work, and not use any state resources for legal work and vice versa. Are there any particular guidelines or measures that the GAB recommends that you follow for this purpose?

Discussion and Advice: Wisconsin's Open Records Laws as found in §§19.31-19.39, Wis. Stats., fall outside of the jurisdiction of the Government Accountability Board. Pursuant to §19.39, Wis. Stats., you may request advice from the attorney general as to the applicability of the Open Records Laws to your circumstances. Likewise, any issues surrounding the attorney-client privilege also fall outside the jurisdiction of the Government Accountability Board, but you may receive advice from the Office of Lawyer Regulation.

### Miscellaneous

8. As an elected official, you may consider running for re-election or other elective office. What restrictions apply to your potential use of the firm's office space or office equipment (telephones, internet access, etc.) for occasional personal/campaign activities, including fundraising? You state that you are aware of the prohibition on receiving any in-kind or monetary contributions from corporations, including service corporations, and do not intend to seek "free" general usage of the firm's office resources for campaign purposes. But to the extent that firm employees are permitted to use some firm resources for occasional personal purposes, such as internet access or office telephones for occasional personal calls, can you use some of those resources on an occasional basis for campaign purposes?

Discussion and Advice: Sec. 11.38, Wis. Stats., specifically prohibits direct and indirect corporate contributions to campaigns. Furthermore, §11.01(6L), Wis. Stats., defines "corporation" to include a limited liability company. Based upon your question as you present it, the Government Accountability Board assumes the firm is organized as some type of corporation. Pursuant to §11.38, Wis. Stats., the rule is that your campaign may never receive a direct or indirect corporate contribution. Use of corporate office space and equipment for campaign-related tasks such as fundraising, emailing, faxing, and telephoning has a value and therefore if your campaign uses this corporate office space, equipment, or supplies at no charge, the campaign is receiving an illegal in-kind corporate contribution. This holds true regardless of what your internal company policy may be with regard to personal use of the corporate space, equipment, and supplies.

The Government Accountability Board advises you to keep your campaign completely separate from corporate employment and benefits to avoid any possibilities of direct or indirect corporate contributions to your campaign. However, you may have your campaign pay for use of the corporate space, equipment, and supplies. If you chose this “payment” option, then you must have good financial records to support your campaign’s payment of a “fair market value” for use of the space, equipment, and supplies. “Fair market value” can be determined most simply by what cost your campaign would incur had it purchased the space or equipment (or use of the space or equipment) and supplies in the normal market place. Caution is still advised. If the corporation gets a reduced cost for its space or equipment (or use of the space or equipment) and supplies, or the corporation provides your campaign with a better deal than fair market value, you still have an illegal corporate subsidy of your campaign and would be in violation of §11.38, Wis. Stats.

9. In listing you on the firm’s letterhead, website, and in marketing materials, may the firm refer to your elective office title as “Representative” or “The Honorable?” Are there any other restrictions of which you should be aware to separate your dual roles as a legislator and a practicing attorney?

Discussion and Advice: The provision of the Ethics Code most applicable to your question is §19.45(2), Wis. Stats. Reduced to its elements, this statute provides:

No state public official

May use his or her public position or office

To obtain or assist in producing

A substantial private benefit or anything of substantial value.

Legislators are state public officials identified in §20.923(2)(b), Wis. Stats., so this provision applies to you. See also §§19.42(13)(c) and 19.42(14), Wis. Stats. This means that you may not use your official position, including the title or prestige of office, to obtain private employment. You will receive compensation based upon your time and hours charged to specific clients by the firm and, therefore, you will receive a substantial private benefit or something of substantial value. You should not use your official title in connection with any firm activities or on documents including, but not limited to, references to your elective office title on firm letterhead, website, or marketing materials. See, 1994 Wis. Eth. Bd. 2, ¶4. There may also be legal-based ethics considerations for which you may wish to seek an opinion from the Office of Lawyer Regulation.

10. If there are any other issues that the Government Accountability Board believes are prudent for you to consider, please note or address these as well.

#### Advice

The Government Accountability Board advises:

Based upon the facts as you presented them, you may be employed as an attorney, while also serving as a Representative to the Wisconsin Assembly, provided you comply with applicable laws and adhere to the advice set forth herein. You may also request an opinion from the Attorney General regarding issues of concern with respect to the Open Records Law. As an attorney licensed to practice law in Wisconsin, you may also seek an opinion from the Office of Lawyer Regulation regarding other legal-based ethical considerations.