
2002 Wis Eth Bd 06
LOBBYING, IMPROPER USE OF OFFICE

The Ethics Board advises:

A legislator is free to commence a lawsuit to challenge the constitutionality of a law and to seek and retain legal counsel to represent himself or herself.

If a legislator wants to join an existing lawsuit, the Ethics Board recommends that the legislator direct a letter to the Court asking that he or she be permitted to join the plaintiffs as a party or as amicus curiae, representing himself or herself.

The Board further advises that a legislator not permit a lobbying organization to pay or arrange for legal services for the legislator.

Facts

- ¶1 This opinion is based upon these understandings:
- a. You are a member of the Legislature.
 - b. You want to join as a plaintiff in a lawsuit challenging the constitutionality of a recently enacted law.
 - c. One lawsuit has been filed by a number of organizations that employ lobbyists.
 - d. In that lawsuit, the lobbying organizations are paying the attorney fees.
 - e. A second lawsuit has been filed by another organization that employs a lobbyist.
 - f. In that lawsuit, the attorney has agreed to represent the organization and you, without charging a fee. The attorney has indicated that he will rely solely on collecting court-ordered attorney fees if the plaintiff prevails.

Question

- ¶2 The Ethics Board understands your question to be:

Do laws administered by the Ethics Board forbid you to accept or forbid a person or organization to furnish you with legal services in either of the two lawsuits challenging the constitutionality of a law?

Discussion

¶3 You are free to support or oppose any act of the legislature and you are free to pursue either of those courses by resort to the courts. You are at liberty to commence a suit and, if you wish, to retain your own legal counsel. At issue is whether, consistent with Wisconsin's lobbying laws and ethics code, others may pay or arrange for your legal expenses. Because we conclude that they may not, we advise that, if you want to join the existing lawsuits, you petition the Court to permit you to join the plaintiffs in the suits as a party or as *amicus curiae*, representing yourself. This will permit you to be a part of the lawsuit without accepting valuable legal services paid or arranged by lobbying principals.

Application of lobbying law

¶4 Except in limited circumstances not pertinent here,¹ Wisconsin's lobbying law, Chapter 13, subchapter III, *Wisconsin Statutes*, forbids an elected state official from soliciting or accepting anything of pecuniary value from an organization that employs a lobbyist. This restriction plainly encompasses a lobbying principal's payment of an official's legal expenses. 1992 Wis Eth Bd 24.

¶5 The thrust of the governing statute is to foreclose a lobbying organization's furnishing an elected government official with valuable services as a reward for, or to influence, the official's using his or her position to further the organization's legislative goals. Here, the lobbying organizations are offering either to pay, or arrange for, an attorney to represent you as an additional party in the organizations' lawsuits. For the first eighteen months of the legislative session, those organizations alone reported spending about two million dollars to influence the policies of Wisconsin's government. It is to bolster citizens' confidence in their government officials that Wisconsin has, for many years, prohibited those organizations trying to influence the legislature to provide favors for individual legislators. §13.625, *Wisconsin Statutes*. For this reason we advise you not to permit any of these organizations to defray your legal fees.

Application of Ethics Code

¶6 Independent of the lobbying law, the Ethics Code leads to the same result. Section 19.45(2), *Wisconsin Statutes*, reduced to its elements, provides:

No state public official

¹ §13.625(3), *Wisconsin Statutes*, provides:

13.625(3) No candidate for an elective state office, elective state official, agency official or legislative employee of the state may solicit or accept anything of pecuniary value from a lobbyist or principal, except as permitted under subs. (1)(b)3 and (c), (2), (5), (6), (7), (8) and (9). No personal campaign committee of a candidate for state office may accept anything of pecuniary value from a lobbyist or principal, except as permitted for such a candidate under subs. (1) (b) 3 and (c), (2) and (6).

May use his or her public position
To obtain financial gain or anything of substantial value
For private benefit.²

¶7 You are a state public official and the provision of legal services or the payment of legal fees clearly is something of substantial value.³ Two elements of inquiry remain:

- Would this arrangement result in a private benefit for you?
- Would your acceptance of legal services in this instance be a use of public position?

Would this arrangement result in a private benefit for you?

¶8 Yes. That you are not seeking monetary damages from the lawsuit and believe the lawsuit serves the interests of the public does not clear the way for a lobbying organization to pay or arrange for the costs of your legal bills.

¶9 We emphasize that in spite of the good motives that spur your interest in challenging an act of the Legislature, your lawsuit is a personal matter. There is a mechanism whereby the Legislature can seek legal redress and authorize the initiation of a suit in the courts. This is decidedly not the case here. You propose to act on your own; in fact, we understand that you, as an individual, wish to contest an act of the Legislature. That, of course, you may certainly do, but it is important to note that legal fees under discussion would be for a matter you take on in a private capacity, not as a government official. In an earlier circumstance the Ethics Board noted that participation as a litigant in a lawsuit is not normally part of the official function or duties of a legislator.⁴ Election to the legislature simply does not

² §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 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.

³ Substantial value is more than nominal or token value. 11 Op. Eth. Bd. 1 (1989); 5 Op. Eth. Bd. 107 (1982).

⁴ 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. 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

give a blanket commission to participate in lawsuits as a part of holding office.⁵ 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.

Would your acceptance of legal services in this instance be a use of public position?

¶10 Yes. The critical question is whether you would be using your office to obtain free legal services or whether the organizations are providing or arranging legal services for you primarily for a reason independent of your holding public office. That is, would they be allowing you to join as a plaintiff in their lawsuits if you were not a legislator? 1992 Wis Eth Bd 23; 1992 Wis Eth Bd 24.

¶11 The Ethics Board has long interpreted the prohibition on "use of office" to include an official's use of the status or prestige of office to obtain items or services of value.⁶ It appears to us that the lobbying organization approached you to join its lawsuit precisely because you are a member of the Legislature and that the other organizations want you to join as a plaintiff for the same reason. Moreover, we understand that your standing in the lawsuit will be based, at least in part, on your holding elective office and the parties believe that may bolster their legal arguments. As we have previously held, if a legislator's standing in a lawsuit is dependent on the individual's position as a legislator, then, *a fortiori*, the provision of legal services or payment of legal fees is not independent of the individual's holding public office. 1992 Wis Eth Bd 23; 1992 Wis Eth Bd 24.

Advice

¶12 The Ethics Board advises that you are free to commence a lawsuit to challenge the constitutionality of a law and to seek and retain legal counsel to represent you.

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).

⁵ 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 is one made by the legislature in the normal course of exercising its authority.

⁶ 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).

We propose that if you want to join the existing lawsuits, you direct a letter to the Court asking that you be permitted to join the plaintiffs as a party or as amicus curiae, representing yourself.

The Board further advises that you not permit a lobbying organization to pay or arrange for legal services for you.

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