

DISQUALIFICATION; EMPLOYMENT CONFLICTING WITH OFFICIAL  
RESPONSIBILITIES; BOARDS, COMMISSIONS AND AGENCIES

A person who is a state public official by virtue of his or her membership on a state board may not participate in that board's consideration of an appeal concerning a controversy involving the official or the official's partner, but the Ethics Code will not ordinarily pose an obstacle to the official's participation in the board's decisions in which the official does not have a financial stake. The Ethics Code does not pose an impediment to an official's participation in votes, deliberations, and discussions concerning the board's work and its employment of independent contractors as long as the official's action affects a large class of similarly situated people and businesses, the official's presence in the class is insignificant when compared to the number of members of the class, and the official's actions' effects upon his or her own self interest are neither significantly greater nor less than upon other members of the class.

If an agency's selection and payment of independent contractors is a ministerial function not requiring the exercise of discretion by members of the board which directs the agency, the Ethics Code does not pose an obstacle to the agency's entrance into a contract with a member of that board or with the member's partner.  
Eth. Bd. 242

March 25, 1982

Facts

This opinion is based upon these understandings:

- a. You have been nominated for appointment to a board which heads a state agency. Membership on that board is a state public office to which Wisconsin's Code of Ethics applies.
- b. *Wisconsin Statutes* assign these duties to members of the board:
  1. Appointment of the agency's chief executive and establishment of his or her salary;
  2. Approval of the agency's budget;
  3. Establishment of rules governing the agency's work and its employment of independent contractors;
  4. Review of the agency's decisions concerning the payment of bills submitted by independent contractors; and
- c. You are one of more than 5,000 independent contractors eligible to enter into contracts with the agency.

Questions:

The Ethics Board understands your questions to be:

- a. What impediment, if any, does Wisconsin's Ethics Code pose to your accepting work assigned to you by the agency while you are a member of that board?
- b. What impediment, if any, does Wisconsin's Ethics Code pose to your membership on the board during a period when one of your partners performs work for the agency as an independent contractor?

Discussion

The Ethics Code recognizes that citizens who serve as state public officials retain their rights as citizens to interests of a personal or economic nature, that standards of ethical conduct for state public officials need to distinguish between those minor and inconsequential conflicts that are unavoidable in a free society and those conflicts which are substantial and material, and that state public officials may engage in business activities that do not conflict with specific provisions of the Ethics Code.<sup>1</sup>

The Code's specific provisions forbid you to use your public position to obtain anything of substantial value for the private benefit of yourself or for an organization with which you are associated.<sup>2</sup> We understand that your firm is an organization with which you are associated.<sup>3</sup>

The Ethics Code does not bar a state public official's participation in a program administered by a state agency of which he or she is a member of the policy-making board provided (1) the official neither seeks nor receives any consideration with regard thereto that the official would not receive were he or she not a state public official and (2) the official does not act officially with respect to a matter in which he

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<sup>1</sup> Sec. 19.45(1), *Wisconsin Statutes*.

<sup>2</sup> Sec. 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.

<sup>3</sup> Sec. 19.42(2), *Wisconsin Statutes*, provides:

**19.42(2)** "Associated", when used with reference to an organization, includes any organization in which a person or a member of his or her immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity.

or she has a personal interest except to the extent that the official's personal interest in the matter is insignificant when compared with the interests of others in the same matter.<sup>4</sup>

### Appointment of independent contractors

The Board of which you are a member maintains a list of independent contractors it has certified as eligible to perform work for your agency. Annually, your agency notifies more than 5,000 independent contractors of the procedure for applying for that certification. Your board certifies every independent contractor who requests certification and who meets the prescribed standards of eligibility.

Whenever work is assigned to independent contractors, it is assigned in the order in which their names appear on the list of contractors who have been certified as eligible.

In the case of disputes over a person's eligibility or the amount to be paid a contractor, your board may affirm, modify or reject its staff's decision.

The hearing of appeals of decisions concerning a contractor's eligibility or the payment of bills is a quasi-judicial function in which you should not participate if the appeal involves your own claim or a claim submitted by a partner or employe of your firm. Your board's other duties, however, have a legislative character; that is, they deal not with the merits of individual claims but with establishment of general policy. Unless an action contemplated by the board would affect you or your firm in a way that differed substantially from the way it would affect the vast majority of contractors, the Ethics Code is no impediment to your participation in that decision.

### Notice of public contract

If you expect that you or your partnership will receive a payment or payments of more than \$3,000 within a 12 month period for entering into contracts with the agency, you should, in accordance with sec. 19.45(6), *Wisconsin Statutes*, direct a brief note to the Ethics Board and to the board in question that sets forth that information.

### Private interest in public contract

Apart from the Ethics Code, sec. 946.13(1), *Wisconsin Statutes*, forbids a public official to enter into a contract in which the official has a private pecuniary interest if at the same time the official is authorized to perform in regard to that contract some official function requiring the exercise of discretion. Among the exceptions to

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<sup>4</sup> The Ethics Board articulated this policy at 4 Op. Eth. Bd. 103 (1981). The Board invoked the same or similar analysis and elaborated upon it when it advised a legislator about the relationship between his legislative duties and a business with which he was associated (5 Op. Eth. Bd. 59 (1981)) and when it offered advice concerning the nomination of a prospective appointee to state public office (5 Op. Eth. Bd. 65 (1981)).

this provision's application are certain contracts which do not involve receipts and disbursements exceeding \$5,000 annually.<sup>5</sup>

Because this provision lies beyond the bounds of the Ethics Code, we do not interpret it, but invite your attention to it.

### Advice

The State of Wisconsin Ethics Board advises you that, while a member of the board about which you asked, you should not participate in that board's consideration of an appeal concerning a controversy involving you or anyone associated with your firm but that the Ethics Code will not ordinarily pose an obstacle to your participation in the board's decisions in which you do not have a financial stake. Moreover, the Ethics Code does not pose any impediment to your participation in votes, deliberations, and discussions concerning the agency's work and its employment of independent contractors, and establishment of other policies of the board as long as:

1. your actions affect a whole class of similarly situated people and businesses;
2. you and your firm's presence in the class is insignificant when compared to the number of members of the class; and
3. your actions' effects upon your firm and your own work are neither significantly greater nor less than upon other members of the class.

Because the agency's selection and payment of independent contractors is a ministerial function not requiring the exercise of discretion by members of the board, the Ethics Code does not pose an obstacle to your acceptance of work

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<sup>5</sup> Sec. 946.13(1) and (2), *Wisconsin Statutes*, provide, in part:

**946.13 Private interest in public contract prohibited.** (1) Any public officer or public employe who does any of the following is guilty of a Class E felony:

(a) In his private capacity, negotiates or bids for or enters into a contract in which he has a private pecuniary interest, direct or indirect, if at the same time he is authorized or required by law to participate in his capacity as such officer or employe in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on his part; or

(b) In his capacity as such officer or employe, participates in the making of a contract in which he has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on his part.

(2) Subsection (1) does not apply to the following:

(a) Contracts in which any single public officer or employe is privately interested which do not involve receipts and disbursements by the state or its political subdivision aggregating more than \$5,000 in any year.

assigned to you by the agency while you are a member of that board; nor will your membership on the board pose an obstacle to your partner's acceptance of work assigned by the agency.

If you expect that you or your firm will receive more than \$3,000 from the board in question within a 12 month period, you should make that declaration to the Ethics Board and to the board of which you are a member prior to undertaking the work that will lead to that payment.

Apart from the Ethics Code's provisions, we invite your attention to sec. 946.13, *Wisconsin Statutes*.

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#### DISQUALIFICATION; EMPLOYMENT CONFLICTING WITH OFFICIAL RESPONSIBILITIES; REPRESENTATION OF CLIENTS

The Ethics Code does not prohibit a state public official's continued employment with a law firm while the official is serving on a part-time board provided (a) the official does not represent the firm before that board, (b) the official does not participate in any vote or discussion concerning a legal proceeding in which the official's law firm represents interests adverse to those of the board, and (c) the official's actions are consistent with the Supreme Court's rules. Eth. Bd. 243

March 25, 1982

#### Facts

This opinion is based upon these understandings:

- a. You have recently been appointed to a state board.
- b. Although not yet licensed to practice law in the State of Wisconsin, you are employed as a law clerk by a law firm.
- c. The law firm represents the plaintiffs in a legal suit to restrain that board from taking certain actions. Named as respondents in that suit are the board to which you have been appointed and the individual members of that board.

#### Question

The Ethics Board understands your question to be:

In light of the facts described above, what impediment, if any, would Wisconsin's Ethics Code pose to your continuing your employment with the law firm while you are a member of the state board?