2011 GAB 02
IMPROPER USE OF OFFICE – LEGAL FEES

You requested the Board's advice on whether laws administered by the Government Accountability Board permit legislators to accept the services of legal counsel, paid for by an organization, to litigate redistricting. This is a follow-up to an earlier Board opinion of May 31, 2011, in which the Board said:

> Because the hiring of attorneys for each caucus to develop a redistricting plan is primarily for a public, rather than a private benefit, legislators' acceptance of an organization's payment of legal expenses for the caucus during redistricting does not violate the Ethics Code.

But the Board specifically did not address the issue of legislators accepting funds to pay for legal representation in redistricting *litigation*.

Question

The question is whether the payment of attorneys' fees for legislators for expenses related to redistricting litigation is primarily of private or of public benefit. The provision of the Ethics Code that is most pertinent to your inquiry is §19.45 (2), *Wisconsin Statutes*, which provides:

> **(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

Analysis

In the past, the Ethics Board stated that participation as a litigant in a lawsuit is not normally part of the official function or duties of a legislator; election to the Legislature simply does not give a blanket commission to participate in lawsuits as a part of holding office.[1]

Therefore, the resolution of this issue seems to depend upon whether there is something unique about the process of redistricting that leads to a different conclusion.

In analyzing whether an action is for a public purpose, an analogy may be made to Wisconsin's public purpose doctrine. Wisconsin law establishes that state funds and resources may only be used for a 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). In the past, the Ethics Board used this principle to determine 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 Government Accountability Board has adopted these opinions pursuant to 2007 Wisconsin Act 1, Section 209 (3)(f). In *State ex rel. Bowman v. Barczak*, 34 Wis. 2d 57 (1967) the Court said that the factors to be considered in determining whether an activity is for a public purpose are (1) the course or usage of government, (2) whether the object

[1] 1992 Op. Eth. Bd. 24; 1992 Op. Eth. Bd. 23.

is one for which taxes have been customarily levied, and (3) 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).

These factors may cut both ways in this instance, but the Board believes the status of the redistricting legislation is of paramount significance in resolving the issue.

Historically, redistricting has been a unique process in Wisconsin government. With respect to redistricting, public monies repeatedly have been used in the past to finance litigation between Republicans and Democrats and the Legislature has appropriated money to both caucuses for that purpose. But, significantly, this has occurred over a number of decades when a divided Legislature has resulted in litigation being filed upon the Legislature's failure to adopt a plan. Unlike prior redistricting endeavors, the current Legislature, as an institution, has enacted a redistricting plan and that plan, if approved by the Governor, will become law. Any legal challenge, at that point, would thus involve suing the State. In contrast to prior redistricting litigation, it would not be a case where each caucus and other parties proceed to court because the Legislature has failed to act. It appears contradictory to conclude that it is of benefit to the State to permit public officials to accept money from private persons to pay for attorneys to sue the State over an enacted law. In addition, thus far, no public monies have been used by the majority caucus in the litigation which has been filed by outside parties. These factors lead us to conclude that accepting private funds to challenge the redistricting legislation which has been enacted would be primarily for a private benefit and would therefore violate the Ethics Code.

Advice

The Government Accountability Board advises that the Ethics Code bars legislators from accepting payment of attorneys' fees related to litigation of a redistricting map which has already been enacted into law.