

NOTICE OF OPEN AND CLOSED MEETING

Wisconsin Ethics Commission

101 E Wilson Street, St. Croix Room
Madison, Wisconsin

Friday, March 22, 2024, 2:00 p.m.

Open Session Agenda

- A. Call to Order
- B. Report of Appropriate Meeting Notice – Administrator Verbal
- C. Closed Session
 - 1. Complaints and Investigations
 - 2. Legal Advice Concerning Pending Litigation/Potential Litigation
- D. Return to Open Session
- E. Referral of Probable Cause Findings to Contiguous District Attorneys Page 3
- F. Adjourn

Future Ethics Commission Meetings Scheduled:

- Tuesday, May 14, 2024, at 9:00 AM
- Tuesday, July 23, 2024, at 9:00AM
- Tuesday, October 15, 2024, at 9:00 AM
- Tuesday, December 17, 2024, at 9:00 AM

The Ethics Commission will convene in open session but may move to closed session under WIS. STAT. § 19.85(1)(g), (h), or WIS. STAT. § 19.851. This notice is to inform the public that the Commission intends to convene in open session but may move to closed session. The Commission plans to return to open session following that closed session, as outlined in the above agenda. WIS. STAT. § 19.85(2).

WIS. STAT. §§ 19.50 & 19.55(3) No employee of the Commission may disclose information related to an investigation or prosecution under ch. 11, subchapter III of ch. 13, or ch. 19.

WIS. STAT. § 19.85(1) Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. No motion to convene in closed session may be adopted unless the chief presiding officer announces to those present at the meeting at which such motion is made, the nature of the business to be considered at such closed session, and the specific exemption or exemptions under this subsection by which such closed session is claimed to be authorized. Such an announcement shall become part of the record of the meeting. No business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer's announcement of the closed session. A closed session may be held for any of the following purposes:

- (g) Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.

WIS. STAT. § 19.851(2) The commission shall hold each meeting of the commission for the purpose of deliberating concerning an investigation of any violation of the law under the jurisdiction of the commission in closed session under this section.



Wisconsin Ethics Commission

Campaign Finance | Lobbying | Ethics
101 E. Wilson Street | Suite 127 | P.O. Box 7125 | Madison, WI 53707-7125
(608) 266-8123 | ethics@wi.gov | <https://ethics.wi.gov>

DATE: For the Commission Meeting on March 22, 2024

TO: Members, Wisconsin Ethics Commission

FROM: David Buerger, Staff Counsel

SUBJECT: Subsequent Referrals After District Attorney Declination

FOR COMMISSION ACTION

Pursuant to WIS. STAT. § 19.49(2)(b), after a district attorney declines to prosecute a referred matter, the Commission may refer the matter to another district attorney. This memo explains the process for subsequent referrals. The Commission may:

1. Refer the matter to a contiguous district attorney by drawing lots, or
2. Take other action consistent with today's discussion.

I. Background

At its meeting on February 20, 2024, the Commission found probable cause to believe there were campaign finance violations in several matters pursuant to [WIS. STAT. § 19.49\(2\)\(b\)9](#). The Commission referred those matters to the district attorneys where the alleged violator resided or, if the alleged violations were by nonresidents, to the district attorney where the alleged violation occurred as required by [WIS. STAT. § 11.1401\(2\)](#).

The District Attorneys for Chippewa County, Florence County, and Langlade County have informed the Commission that they will not be prosecuting the matters referred to them. This memo explains the statutory processes for subsequent referrals. The Commission may either choose to make a subsequent referral or take other action consistent with today's discussion.

II. Applicable Law

11.1401 Criminal penalties; prosecution.

...

(2) Except as otherwise provided in ss. [19.49\(2\)\(b\)13](#), and [14](#), and [\(h\)](#) and [19.554](#), and only after the commission has determined probable cause, all prosecutions under this section shall be conducted by the district attorney for the county where the defendant resides or, if the defendant is a nonresident, by the district attorney for the county where the violation is alleged to have occurred. For purposes of this subsection, a person other than an individual resides within a county if the person's principal place of operation is located within that county.

19.49 Administration; enforcement.

(2) ENFORCEMENT.

(b)

9. If the commission finds that there is probable cause to believe that a violation under subd. [1.](#) has occurred or is occurring, the commission may, in lieu of civil prosecution of any matter by the commission, refer the matter to the district attorney for the county in which the alleged violator resides, or if the alleged violator is a nonresident, to the district attorney for the county where the matter arises, or if par. [\(h\)](#) applies, to the attorney general or a special prosecutor. For purposes of this subdivision, a person other than an individual resides within a county if the person's principal place of operation is located within that county.

13. Except as provided in subd. [15.](#), if the commission refers a matter to the district attorney specified in subd. [9.](#) for prosecution of a potential violation under subd. [1.](#) or [12.](#) and the district attorney informs the commission that he or she declines to prosecute any alleged civil or criminal violation related to any matter referred to the district attorney by the commission, or the district attorney fails to commence a prosecution of any civil or criminal violation related to any matter referred to the district attorney by the commission within 60 days of the date of the commission's referral, the commission may refer the matter to the district attorney for another prosecutorial unit that is contiguous to the prosecutorial unit of the district attorney to whom the matter was originally referred. If there is more than one such prosecutorial unit, the chairperson of the commission shall determine the district attorney to whom the matter shall be referred by publicly drawing lots at a meeting of the commission. The district attorney may then commence a civil or criminal prosecution relating to the matter.

14. Except as provided in subd. [15.](#), if the commission refers a matter to a district attorney under subd. [13.](#) for prosecution of a potential violation under subd. [1.](#) or [12.](#) and the district attorney informs the commission that he or she declines to prosecute any alleged civil or criminal violation related to any matter referred to the district attorney by the commission, or the district attorney fails to commence a prosecution of any civil or criminal violation related to any matter referred to the district attorney by the commission within 60 days of the date of the commission's referral, the commission may refer the matter to the attorney general. The attorney general may then commence a civil or criminal prosecution relating to the matter.

Upon review of a complaint, if the Commission finds probable cause of a violation, it may refer the matter to a district attorney pursuant to [WIS. STAT. § 19.49\(2\)\(b\)9.](#) [WIS. STAT. § 11.1401\(2\)](#) separately provides that prosecutions under [WIS. STAT. § 11.1401](#) may only be conducted after the Commission has determined probable cause. [WIS. STAT. § 11.1401\(2\)](#) requires the referral to be made to the district attorney for the county in which the defendant resides or, if the defendant is a nonresident, to the district attorney for the county where the violation is alleged to have occurred. This language is slightly different from [WIS. STAT. § 19.49\(2\)\(b\)9.](#), which provides that referrals of nonresidents go to the district attorney “where the matter arises” but otherwise these provisions are nearly identical.

By cross-referencing WIS. STAT. § [19.49\(2\)\(b\)13.](#) and [14.](#), the Legislature incorporated the procedures for subsequent referrals into [WIS. STAT. § 11.1401\(2\).](#) Because there is some ambiguity in those provisions, further consideration of those statutes is warranted. Before proceeding, it is important to note that no special prosecutor has been appointed under s. 978.045. Therefore, the cross-reference to [WIS. STAT. § 19.49\(2\)\(b\)15.](#) is inapplicable.

[WIS. STAT. § 19.49\(2\)\(b\)13.](#) is the statutory provision that first addresses the situation where, after a referral is made pursuant to WIS. STAT. §§ [11.1401\(2\)](#) and [19.49\(2\)\(b\)9.](#), a district attorney either declines to prosecute or fails to commence a prosecution within 60 days. If either occurs, the statute says that the Commission may refer the matter to a district attorney for a prosecutorial unit that is contiguous to the prosecutorial unit of the district attorney to whom the matter was referred originally. Stated more simply, the Commission may refer the matter to a contiguous district attorney. According to Merriam-Webster's Online Dictionary, "contiguous" means being in actual contact, touching along a boundary or at a point. The statute also states that, if there is more than one contiguous prosecutorial unit, the Commission's chair shall determine which district attorney the matter will be referred to by drawing lots. Drawing lots must occur at a public meeting of the Commission. Finally, this section authorizes the subsequent district attorney to commence a civil or criminal prosecution of the matter.

[WIS. STAT. § 19.49\(2\)\(b\)14.](#) states that, if the Commission refers a matter pursuant to [WIS. STAT. § 19.49\(2\)\(b\)13.](#), and the district attorney either declines or fails to commence a prosecution within 60 days, the Commission may refer the matter to the Attorney General. The Attorney General may then commence a civil or criminal prosecution of the matter.

Part of the ambiguity arises from the fact that both WIS. STAT. § [19.49\(2\)\(b\)13.](#) and [14.](#) authorizing subsequent referrals use "may" which is permissive in nature. Another potential ambiguity is that [WIS. STAT. § 19.49\(2\)\(b\)13.](#) does not mention [WIS. STAT. § 11.1401\(2\).](#) So, one potential reading of those provisions would be that, after the initial referral, the Commission has an option to do either. However, upon closer inspection, it is clear that that reading would likely be erroneous.

There are a couple of reasons why this reading would be erroneous. First, [WIS. STAT. § 11.1401\(2\)](#) specifically cross-references WIS. STAT. § [19.49\(2\)\(b\)13.](#) and [14.](#) While it would have been better for the Legislature to have included a corresponding cross-reference to [WIS. STAT. § 11.1401\(2\)](#) in WIS. STAT. § [19.49\(2\)\(b\)13.](#) and [14.](#), it is not necessary. The cross-reference in [WIS. STAT. § 11.1401\(2\)](#) to those provisions is sufficient.

Second, while "may" is permissive in nature, it does not create a choice between these two provisions. Before authorizing the referral to the Attorney General upon the district attorney's declination or failure to prosecute, [WIS. STAT. § 19.49\(2\)\(b\)14.](#) states "if the commission refers a matter to a district attorney under subd. [13.](#) for prosecution of a potential violation..." This clause means that the Commission must first make the referral to another contiguous district attorney as provided in [WIS. STAT. § 19.49\(2\)\(b\)13.](#) Then, that district attorney must either decline or fail to commence a prosecution before it can refer a matter to the Attorney General. Rather, using "may" simply gives the Commission discretion to refer a matter. It could also settle the matter or take other action.

Therefore, it appears that the appropriate statutory process in campaign finance matters is:

1. If the Commission finds probable cause it may refer a matter to the district attorney for the county in which the alleged violator resides or, if the alleged violator is a nonresident, to the district attorney for the county where the conduct occurred.
2. If the district attorney declines to prosecute, or fails to commence a prosecution within 60 days, the Commission may refer the matter to a contiguous district attorney. If there is more than one such district attorney, the determination of which district attorney is made by the chair drawing lots publicly at a Commission meeting.
3. Then, if the second district attorney declines to prosecute, or fails to commence a prosecution within 60 days, the Commission may refer the matter to the Attorney General.

III. Analysis

At its meeting on February 20, 2024, the Commission found probable cause to believe that multiple campaign finance violations were committed by several persons and referred those matters to the district attorneys for Chippewa, Florence, Langlade, Racine, St. Croix, and Waukesha counties as required by [WIS. STAT. § 11.1401\(2\)](#). Commission staff communicated each matter to the respective district attorney on February 21, 2024. Commission staff subsequently received written correspondence from the Chippewa, Florence, and Langlade County District Attorneys confirming that none of them will be prosecuting these matters due to a conflict of interest. As such, the Commission may now choose to refer the matters originally referred to these District Attorneys to the district attorney of a contiguous county pursuant to [WIS. STAT. § 19.49\(2\)\(b\)13](#). The contiguous counties are:

Chippewa: Barron, Clark, Dunn, Eau Claire, Rusk, or Taylor

Florence: Forest or Marinette

Langlade: Forest, Lincoln, Marathon, Menominee-Shawano, Oconto, or Oneida

As there are multiple contiguous counties for each, if the Commission chooses to refer these matters, Commission staff has prepared three sets of lots for the Chairperson to draw from to determine to which district attorney each set of matters will be referred.

If that district attorney also informs the Commission that he or she declines to prosecute or fails to commence a prosecution within 60 days, the Commission may then refer the matter to the Attorney General pursuant to [WIS. STAT. § 19.49\(2\)\(b\)14](#).