


**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

Date: July 13, 2010

MEMORANDUM

PRIVILEGED: ATTORNEY-CLIENT/ATTORNEY WORK PRODUCT

TO: Mayor Dave Cieslewicz

FROM: Michael P. May, City Attorney 

RE: Congress for New Urbanism – Issues in Soliciting Funds

Factual Background

The Congress for New Urbanism (CNU) is a private non-profit organization that supports sustainability in urban centers. Each year, CNU sponsors an annual convention which brings some 1500 architects, designers, planners, public officials, and developers from around the world. The convention is normally held in larger cities; it was in Atlanta in 2010. The CNU wishes to have Madison host the convention in 2011.

You indicated that there is substantial public benefit to the convention. It utilizes the City's convention center, and will have economic benefits for the City. Attendees will also be interacting with the community and the public will be invited to some of the lectures at the conference.

In order to be the host city, Madison must raise about \$280,000 as a contribution to CNU. The funds are used both to host the convention and for ongoing support of the organization.

You indicated that you have received some commitments from private entities and that there may be some funds in the City's budget from the room tax to

assist in the money that needs to be raised. However, in order to ensure that the conference will come to Madison, the City needs to raise the money. You would like to be the chair of the finance committee for the event and to take the lead in soliciting funds for the convention.

Issues

Does your role in soliciting funds for the CNU convention raise any potential legal issues? If so, can they be resolved?

Brief Answer

Yes, soliciting funds for an outside organization such as this raises issues under several provisions of the City's Ethics Code. Decisions by the State Ethics Board under similar state statutes provide some guidance, but do not provide a clear answer. Resolution of the issues is not obvious.

I strongly suggest that you seek an advisory opinion from the City Ethics Board to help delineate what you may or may not do under these circumstances.

Discussion

Several sections of the City's Ethics Code are implicated in the raising of funds. Specifically, Sec. 3.35(5) (a) provides in part:

1. Use of Office or Position. No incumbent may use . . . her or his position of office to obtain financial gain or anything of value or any advantage, privilege or treatment for the private benefit of . . . an organization with which she or he is associated.
...
2. Influence and Reward. . . . no incumbent may solicit or accept from any person or entity, directly or indirectly, anything of value if it could reasonably be expected to influence the incumbent's vote, official actions or judgment, or could reasonably be considered as a reward for any official action . . .

3. Limitation on Actions. . . . no incumbent may:
 - a. Take any official action affecting, directly or indirectly, a matter in which . . . an organization with which she or he is associated has a financial or personal interest.
 - b. Use her or his office or position in a way that produces or assists in the production of a benefit, direct or indirect, or . . . an organization with which the incumbent or her or his immediate family is associated.

In the definitions of the Code of Ethics, the following terms are defined in

(3.35(2)(b), (f), MGO):

- (b) "Associated," when used with reference to an organization, includes any organization in which an individual . . . is a director or officer or owns or controls, directly or indirectly, and severally or in the aggregate, at least 2% of the outstanding equity. . . .
- (f) "Personal interest" means any interest greater than nominal, direct or indirect, arising from . . . close business, political or other associations.

1. Is the CNU an organization with which the Mayor is "associated" under the ordinance?

The first question is whether the CNU is an organization with which you are "associated." The plain language of the ordinance suggests you are not, as you are not a director or officer, nor do you own any equity in the organization.

However, there have been contradictory rulings on these issues by the State Ethics Board. In a 1994 ruling, the Ethics Board found that a state public official could use his or her official letterhead to solicit contributions on behalf of a not for profit organization with which the official has no other connection. 1994 Wis. Eth. Bd. 1 (February, 1994).¹ That opinion stated:

¹ All the Ethics Board Opinions referenced in this memorandum are attached.

The Ethics Board advises that a state public official may use his or her official letterhead to solicit contributions on behalf of a not-for-profit organization with which the official has no other connection.

In a later opinion, the Ethics Board appeared to make nearly the opposite conclusion. In 1998 Wis. Eth. Bd. 6, the Ethics Board suggests that the use of the word "including" in the definition of organization in the state law (which parallels the Madison ordinance) meant that there could be other ways in which an official could become "associated" with an organization beyond the definitions given in the law. The Ethics Board stated:

It is well established that an official may associate himself or herself with an organization by lending his or her name to it for the organization's solicitation of funds. Thus, as a matter of law there is a substantial basis to support the conclusion that your acting in concert with, and at the request and suggestion of, the organization associates you with that organization, and that Wisconsin's Ethics Code prohibits your using the title of prestige of your state government position to solicit funds for that organization.

I am troubled by these apparently contradictory conclusions. Although the Madison General Ordinance does use the term "including", if it may include any number of ways of being "associated" with an organization, it is difficult to draw any line as to what would constitute being associated. Moreover, the two decisions of the State Ethics Board seem directly contradictory to me. In addition, in the remaining opinions of the State Ethics Board on solicitations noted below, the Board never again asserts that the mere act of soliciting contributions means that the state agency officials become "associated" with the organization. Moreover, in the guidelines published by the State Ethics Board on solicitations, no mention is made of this expanded definition of "associated." I consider the one opinion of the State Ethics Board to be an anomaly.

If this were the only issue under the City's Ethics Code, I would likely opine that the one Ethics Board opinion could be rejected. While I concur that the word "including" would allow other than the identified relationships to "associate"

oneself with an organization, it seems to me that the relationship must be a very close one, similar in nature to the ones in the definition. Merely being a member or helping to raise funds for an organization does not, in my opinion, rise to that level. If the official were the CEO or high in the organization, then the official might be associated with the organization. In such instances, it also is likely that the official would have some financial or personal interest in the organization, bringing other portions of the Ethics Code into play. Because there are additional issues under the Code and because an advisory opinion of the Ethics Board would help clarify these matters, I think the issue of being "associated" should also be brought to the Board.

2. Does the Solicitation of Contributions Suggest that it Might Impair Your Future Judgment?

This is the test set out in section 3.35(5) (a) (2.) MGO. It is also discussed in a number of the State Ethics Board opinions mentioned below and attached to this memo.

The question is whether the solicitation of funds on behalf of the organization could "reasonably be expected to influence the incumbent's vote, official actions or judgment, or it could reasonably be considered as a reward for any official action or inaction . . ."

This question is dealt with in a number of the related Ethics Board Opinions. In opinion after opinion, the Board allowed solicitation, but recommended that such funds not be solicited from any organization that is regulated by or regularly does business with the state agency involved. See, for example, 1991 Wis. Eth. Bd. 6 (Legislator may solicit funds so long as no solicitation is made from those who "have a special interest in the Legislature's actions."); 1996 Wis. Eth. Bd. 14, (An agency may solicit funds from others but "only from individuals, businesses, and organizations that do not do business with the agency and are not regulated by the agency."); 1998 Wis. Eth. Bd. 2, (A state department may use state

resources to sponsor an annual conference, but may not solicit contributions to host the conference from "individual or entities that are likely to be materially affected by laws or rules which the department is called upon to interpret or apply."); 1998 Wis. Eth. Bd. 5, (State officials may solicit funds so long as they do not include "an employee of a business or organization that is regulated by or does business with the agency.)"

The gist of these decisions is that it is necessary to create a bright line with entities that do business with or are regulated by a state agency, in order to insulate the official from any claim that the solicitation might be considered something that would influence the official's action or be viewed as a reward for prior action. The argument would be that, although there is no personal financial gain for the Mayor, business entities wishing to ingratiate themselves would be driven to make contributions.

Assuming we were to apply the same rules under the City's Ethics Code, it would create a difficult situation for the Mayor. Almost any entity from which funds would be solicited for the conference would be entities that would have some dealings with the City of Madison, either through contracts or approval of development plans, or the like. Some of the opinions referenced above suggest that a cleaner line can be drawn by having some outside entity solicit the funds.

I am not sure of any clear way around these opinions, which is why I urge seeking an advisory opinion from the City's Ethics Board. One possible option would be to adopt a formal resolution authorizing such solicitation. Under a related provision of the City's Ethics Code, sec. 3.35(5)(b), MGO, which forbids use of City equipment for the special benefit of others, the Common Council may authorize such action. This was done, for example, to allow City employees to work on the Combined Campaign fundraising for local charities. Arguably, a similar action here would bring the matter into the open and insulate the Mayor –

although the legal rule is that a resolution may not amend rules set out in an ordinance.

Another option, as suggested in some of the State Ethics Board opinions, would be for a private, outside entity or group to do the soliciting with some minimal action by the Mayor. How far that action by you could go is unknown; is a letter of support allowed? Could you be named as honorary chair of the fundraising group with no real duties?

Finally, note that in several of the State Ethics Board opinions and in the published guidelines, the State Departments of Tourism and Commerce appear to be exempt from some of the limitations. It may be that we could modify our ordinance in a similar vein to allow the Mayor and Economic Development Division to engage in solicitations for groups bringing conferences to the City.

3. Lobbying Restrictions

Many of the opinions of the State Ethics Board also address a state statute that prohibits solicitation of funds from a lobbying principal. The City's Ethics Code and lobbying ordinance have no such similar restriction.

4. Public Purpose or Benefit

Another issue is whether the solicitation of those funds meets the public purpose or public benefit test period. I think there is little question that the solicitations of funds for this conference would meet that test. However, again, it might be wise to include such findings in a resolution of the Common Council.

Conclusion

Solicitation of funds for an outside organization, even for a public purpose such as supporting a convention where there is no financial benefit for the public official, raises serious questions under the Ethics Code, questions that I suggest be put

before the City's Ethics Board in a request for an advisory opinion. The Board is scheduled to meet again on August 31, and such a request should be made well in advance of the meeting.

1991 Wis Eth Bd 6
SOLICITATION

You may solicit contributions for a foundation if: (1) you do not invoke the title or prestige of your office to solicit; (2) you do not rely upon the state's time, facilities, supplies or services not generally available to all Wisconsin citizens; (3) any response to your solicitations could not reasonably be expected to influence your official judgement or be considered a reward for past actions; and (4) you do not solicit any lobbyist or lobbyist's employer. Eth. Bd. 640.

February 21, 1991

Facts

[1] This opinion is based upon these understandings:

- a. You are a state public official.
- b. You have been asked to solicit funds for an organization associated with a non-profit foundation.
- c. **You are a director and an officer of the foundation and the state agency's appointee to the foundation's board.**

Question

[2] The State of Wisconsin Ethics Board understands your question to be:

Does the Ethics Code pose any obstacles to your soliciting funds for the organization on behalf of the foundation?

Discussion

[3] Two provisions of the Ethics Code seem most pertinent to your inquiry -- §§ 19.45(2) and 19.46(1)(b), *Wisconsin Statutes*. Reduced to its elements 19.45(2) provides:

No state public official
May use his or her position
To obtain financial gain or anything of substantial value
For the official's private benefit or for an organization with
which the official is associated;¹

¹ § 19.45(2), *Wisconsin Statutes*, provides:

[4] and 19.46(1)(b) provides:

No state public official
May use his or her public position
In a way that produces a substantial benefit
For an organization with which the official is associated.²

[5] You are a state public official. You are associated with the foundation by virtue of your being a director of the foundation.³

[6] The Ethics Board consistently has found that use of public position includes use of the position's title or prestige.⁴ Accordingly, the Board has advised state public officials not to solicit funds for organizations with which they are associated, including charitable organizations, if the solicitation involved the prestige or other use of the officials' public positions.⁵ Thus, as we have said, any "solicitation should not mention your official title or the state office you hold or link you in any way to your public position unless your name is only set forth in a list of the organization's directors and your name and information about you is listed in the same manner and with the same degree of prominence as is information about all the other directors."⁶

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.

² § 19.46(1)(intro.) and (b), *Wisconsin Statutes*, provides:

19.46(1) Except in accordance with the board's advice under sub. (2) and except as otherwise provided in sub. (3), no state public official may:
(b) Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

³ §§ 19.42(2) and (11), *Wisconsin Statutes*, provide:

19.42(2) "Associated", when used with reference to an organization, includes any organization in which an individual 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.

(11) "Organization" means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, trust or other legal entity other than an individual or body politic.

⁴ 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).

⁵ 5 Op. Eth. Bd. 97 (1982); 3 Op. Eth. Bd. 53 (1979).

⁶ 3 Op. Eth. Bd. 53, 54 (1979)

And, of course, you should not use the state's time, facilities, supplies, or services not generally available to all Wisconsin citizens in your solicitations.

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[7] In addition, § 19.45(3), *Wisconsin Statutes*, would be an obstacle to your soliciting contributions for the foundation if it could be demonstrated that an organization's or individual's contribution or failure to contribute could reasonably be expected to influence your official judgment or was a reward for past actions.⁸ Thus, you should not solicit from individuals or organizations that have a special interest in the Legislature's actions.

[8] Finally § 13.625(3), *Wisconsin Statutes*, also prohibits an elected official from soliciting anything of pecuniary value from a lobbyist or a lobbyist's employer.⁹

Advice

[9] The Ethics Board advises that consistent with the Ethics Code, you may solicit contributions for the foundation if: (1) you do not invoke the title or prestige of your office to solicit; (2) you do not rely upon the state's time, facilities, supplies or services not generally available to all Wisconsin citizens; (3) any response to your solicitations could not reasonably be expected to influence your official judgment or be considered a reward for past actions; and (4) you do not solicit any lobbyist or lobbyist's employer.

⁷ Id.

⁸ § 19.45(3), *Wisconsin Statutes*, provides:

19.45(3) No person may offer or give to a state public official, directly or indirectly, and no state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the state public official. This subsection does not prohibit a state public official from engaging in outside employment.

⁹ § 13.625(3), *Wisconsin Statutes*, provides:

13.625(3) No candidate for an elective state office, elective state official, agency official or legislative employe 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) and (7). 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).

1994 Wis Eth Bd 1

**SOLICITATION; IMPROPER USE OF OFFICE;
OFFICERS, DIRECTORS, AND MEMBERS OF ORGANIZATIONS;
LOBBYING AND LOBBYISTS**

A state public official may use his or her official letterhead to solicit contributions on behalf of a not-for-profit organization with which the official has no other connection. The solicitation should be structured so that it is evident that a contribution would be unlikely to influence the official's judgment. It would be unreasonable for anyone to believe the official's judgment would be influenced if the identities of who contributes and who does not are unknown to the official. The solicitation letter may not be sent to lobbyists or lobbying principals. OEB 94-1 (February 21, 1994)

Facts

- [1] This opinion is based upon these understandings:
- a. You are a state public official under the Ethics Code and an agency official under the lobbying law.
 - b. You have been asked to sign a letter on your official letterhead soliciting membership on behalf of a private not-for-profit organization.
 - c. You are neither an officer nor director of the organization nor do you have any other connection with it.

Question

- [2] The Ethics Board understands your question to be:

What restraints, if any, do laws administered by the Ethics Board place on your ability to send the fundraising letter?

Discussion

Several sections of the Ethics Code are pertinent to the question you have asked.

Use of Office for Gain

[3] Sections 19.45(2) and 19.46(1)(b), *Wisconsin Statutes*, apply to the circumstances about which you have asked. Reduced to its elements, 19.45(2) provides:

No state public official
May use his or her office or position
To obtain financial gain or anything of substantial value
For the benefit of an organization with which the official is associated;¹

[4] and 19.46(1)(b) provides:

No state public official
May use his or her public position
In a way that produces a substantial benefit
For an organization with which the official is associated.²

[5] The Ethics Board consistently has found that use of public position includes use of the position's title or prestige and that the restrictions apply to soliciting even for charitable organizations with which the official is associated.³ The important issue then is whether the organization is one with which you are "associated."

[6] The Ethics Code provides that:

"Associated," when used with reference to an organization, includes any organization in which an individual 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 of which an individual or a member of his or her immediate family is an authorized representative or agent.

§19.42(1), *Wisconsin Statutes*.

[7] Your only connection with the organization is its request that you send out a fundraising letter on its behalf. If you are associated with the organization, it would be because you are its authorized representative or agent. This

¹ §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.

² §19.46(1)(intro.) and (b), *Wisconsin Statutes*, provides:

19.46 Conflict of Interest Prohibited; Exception. (1) Except in accordance with the board's advice under sub. (2) and except as otherwise provided in sub. (3), no state public official may:

(b) Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

³ E.g., 1991 Wis Eth Bd 06; 10 Op. Eth. Bd. 47 (1988), 43 (1987); 9 Op. Eth. Bd. 45 (1987), 21 (1986).

last part of the definition of "associated" was added by 1991 Act 269, the budget bill. Ordinarily, in interpreting statutes, words are to be given their plain meaning. See §990.01(1), *Wisconsin Statutes*; *Wisconsin v. Williquette*, 129 Wis. 2d (1986). However, when a statute is capable of being understood by reasonably well-informed persons in two or more different senses, the statute is ambiguous and one must look to legislative intent. *Ervin v. City of Kenosha*, 159 Wis. 2d 464 (1991); *McLeod v. Wisconsin*, 85 Wis. 2d 787, 792 (Ct. App. 1978).

[8] In our view, the language of the statute with which we are dealing is ambiguous. For example, an authorized representative or agent could be understood to mean any individual who is asked to do something by a person and who acts pursuant to that request or it could mean only an individual generally empowered to act for a person under concepts of the law of agency. There is no legislative history or other information that helps explain what the legislature meant by "authorized representative or agent." But we think the legislature intended that it mean something more than helping out an organization by agreeing to sign a fundraising letter on its behalf.

[9] Signing a fundraising letter to be sent out by an organization does not in itself suggest that one is authorized to represent the organization in any of its other dealings or to act on its behalf in any way that would bind it. An interpretation of the new language that would mean that any official acting in any way at the behest of an organization is associated with that organization would result in a profound departure from prior law. It could bar any public official from sponsoring a fundraising event or appearing as signatory on a fundraising letter simply because the official was asked to do so. The Board does not believe that the legislature intended that result or that such a reading is warranted either from the language of the statute or by a clear expression of legislative intent.

[10] The Board believes that you have not become associated with the organization merely by its request to you that you send a letter on its behalf soliciting membership in the organization and that the restrictions of §§19.45(2) and 19.46(1)(b) do not apply.

Solicitations Influencing Judgment

[11] Section 19.45(3), *Wisconsin Statutes*, also applies to the situation you have presented. That section prohibits your solicitation of anything of substantial value where the response to the solicitation could reasonably be expected to influence your official judgment or actions.⁴ This provision establishes an objective, rather than a subjective, standard. Thus, you should not solicit from individuals, businesses or organizations that have an interest in matters in which you may become involved unless the solicitation response is structured so that you are not reasonably likely to be influenced by responses to the solicitation. This can be done by asking only for

⁴ §19.45(3), *Wisconsin Statutes*, provides:

relatively small contributions or by ensuring that you remain unaware of individual responses to the solicitation.

[12] Whether a solicitation is reasonably likely to influence judgment is a question that can only be answered based on the totality of the circumstances. In this instance, given the distant relationship between the work of the organization and issues likely to come before you as a state official and assuming that you do not have an interest in, or knowledge of, individual responses, §19.45(3) does not restrict your ability to sign the proposed solicitation letter.

Soliciting from Lobbyists and Lobbying Principals

[13] Finally, §13.625(3), *Wisconsin Statutes*, prohibits you from soliciting anything of pecuniary value from a lobbyist or an organization that employs a lobbyist.⁵ This restriction applies whether you solicit on behalf of yourself or another.

Advice

[14] The Ethics Board advises that a state public official may use his or her official letterhead to solicit contributions on behalf of a not-for-profit organization with which the official has no other connection. The solicitation should be structured so that it is evident that a contribution would be unlikely to influence the official's judgment. It would be unreasonable for anyone to believe the official's judgment would be influenced if the identities of who contributes and who does not are unknown to the official. The solicitation letter may not be sent to lobbyists or lobbying principals.

19.45(3) No person may offer or give to a state public official, directly or indirectly, and no state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the state public official. This subsection does not prohibit a state public official from engaging in outside employment.

⁵ §13.625(3), *Wisconsin Statutes*, provides:

13.625(3) No candidate for an elective state office, elective state official, agency official or legislative employe 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), (4), (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).

1996 Wis Eth Bd 14
SOLICITATION

A state agency may solicit donations for the agency's gifts and grants account as long as the agency solicits donations only from individuals, businesses, and organizations that do not do business with the agency, are not regulated by the agency, and are neither lobbyists nor lobbying principals. The agency should not use solicited funds for rewarding state public officials. Consistent with statutes administered by the Ethics Board, the agency may use solicited funds to reward other employees for exceptional accomplishment or outstanding performance as long as the use of such funds does not conflict with applicable collective bargaining agreements or with statutes or rules administered by the Department of Employment Relations.
OEB 96-14 (August 7, 1996)

Facts

- [1] This opinion is based upon these understandings:
- a. You are a state public official in a state agency.
 - b. The agency has a gifts and grants account.
 - c. The agency would like to solicit donations from individuals, businesses, and organizations for this account.
 - d. The agency would not solicit donations from those with whom it contracts or to whom it awards grants, or those it licenses or regulates.
 - e. The agency will use the donations to recognize employee achievement.
 - f. The agency will publicize the names of donors to the account.

Questions

- [2] The Ethics Board understands your questions to be:

1. What impediment, if any, do statutes administered by the Ethics Board pose to officials' of a state agency soliciting donations from individuals, corporations, and businesses (other than those to which the agency awards grants or licenses, regulates, or with which it does business) to support the agency's program for recognizing special employee achievement above and beyond normal responsibilities?

2. What impediment, if any do statutes administered by the Ethics Board pose to the agency's acknowledging publicly the donors to this program?

Discussion

[3] Your proposal has two separate aspects: (1) the solicitation of donations; and (2) the use of donations to recognize an employee's work.

Solicitation

[4] The provisions of the Ethics Code and lobbying law that are most pertinent to this aspect of your question are §§19.45(3) and 13.625, *Wisconsin Statutes*. Section 19.45(3) provides:

Standards of conduct; state public officials. (3) No person may offer or give to a state public official, directly or indirectly, and no state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the state public official. This subsection does not prohibit a state public official from engaging in outside employment.

[5] Section 13.625(3) provides:

Prohibited Practices. (3) No candidate for an elective state office, elective state official, agency official or legislative employe of the state may solicit or accept anything of pecuniary value from a lobbyist or principal, except as [specifically] permitted

[6] The Ethics Board has held that the prohibitions of §19.45(3) and §13.625 apply whether contributions that are solicited are directed toward the official's own benefit or to the benefit of another. 1995 Wis Eth Bd 7; 1994 Wis Eth Bd 1; 4 Op. Eth. Bd. 93 (1981); 4 Op. Eth. Bd. 51 (1980). The statutory bar extends to the solicitation or acceptance of contributions to a state agency. 1995 Wis Eth Bd 7; 10 Op. Eth. Bd. 31 (1988); 9 Op. Eth. Bd. 9

(1986); 7 Op. Eth. Bd. 19 (1983). Moreover, it applies whether a state public official solicits funds personally or through the agency's employees acting at the official's behest.

[7] Section 19.45(3)'s application depends on an objective, not a subjective standard; it proscribes an official's solicitation of anything of value if an impartial observer would reasonably expect the response to the solicitation to influence the official's judgment in matters related to his or her office. 4 Op. Eth. Bd. 93, *supra*; 4 Op. Eth. Bd. 51, *supra*. The Board has said that it is unreasonable to think that an official's actions or judgment would be influenced by contributions given by persons with respect to whom the official's office does not exercise any action at all or only ministerial action or where the contributions are only of modest value. 1992 Wis Eth Bd 23; 7 Op. Eth. Bd. 19 (1983); 4 Op. Eth. Bd. 51, *supra*.¹ Your proposal is to solicit donations only from individuals, businesses, and organizations that do not do business with the agency and are not regulated by the agency. As a result, you are unlikely to run afoul of the provisions of §19.45(3).

[8] Under §13.625 of the lobbying law, once it is established that the parties involved are an agency official and a lobbyist or an organization that employs a lobbyist, no further analysis is required -- the official should not solicit money, either personally or through agency employees acting at the official's behest, from a lobbyist or an organization that employs a lobbyist. Thus, the agency should not solicit donations from lobbyists or lobbying principals.

[9] You have also raised the question whether the agency may selectively solicit donations and publicly acknowledge donors. Neither the Ethics Code nor lobbying law restrict these actions. However, we have recommended that an agency not publicize the name of a donor in such a way as to give the impression that the contribution was made for publicity purposes. 1 Op. Eth. Bd. 27 (1976).

Use of donations to reward employees

[10] Section 19.45(2), *Wisconsin Statutes*, provides:

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

¹ However, the Board has repeatedly advised that state officials not solicit contributions from individuals or entities that are likely to be materially affected by laws or rules which the official's agency is called upon to interpret or apply. 10 Op. Eth. Bd. 31, *supra*; 7 Op. Eth. Bd. 9 (1983). This would include businesses and organizations regulated by your agency. 1992 Wis. Eth. Bd. 23; 9 Op. Eth. Bd. 9 (1986). To do otherwise works against an official's impartiality and harms the agency's credibility. 10 Op. Eth. Bd. 31, *supra*.

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.

[11] In addition, §19.45(3), noted above, prohibits a state public official from accepting anything of value if it could reasonably be considered a reward for prior official action. These two provisions would prohibit the state public officials of an agency from accepting an award for work achievements apart from regular salary and merit pay or merit awards specifically authorized as part of the State's compensation system.

[12] Although the Ethics Board does not administer the ethics code promulgated by the Department of Employment Relations, which applies to state employees other than public officials, we note that it contains similar general restrictions. Wis. Admin. Code ER-MRS §24.04(2). But we also note that there is a specific exception that permits an employee to receive an award for exceptional accomplishment or outstanding performance as long as the administrator of the Department of Employment Relations Division of Merit Recruitment and Selection determines that acceptance of the award would not conflict with the purposes of the rules.

Advice

[13] The Ethics Board advises that a state agency may solicit donations for the agency's gifts and grants account as long as the agency solicits donations only from individuals, businesses, and organizations that do not do business with the agency, are not regulated by the agency, and are neither lobbyists nor lobbying principals. The agency should not use solicited funds for rewarding state public officials. Consistent with statutes administered by the Ethics Board, the agency may use solicited funds to reward other employees for exceptional accomplishment or outstanding performance as long as the use of such funds does not conflict with applicable collective bargaining agreements or with statutes or rules administered by the Department of Employment Relations.

WR941

1998 Wis Eth Bd 2
LOBBYING AND LOBBYISTS; SOLICITATION

The Ethics Board advises, consistent with laws it administers, that:

- (1) a division of a state Department may use state resources in connection with its sponsorship of the annual conference of an association of state regulatory agencies;
- (2) the Department's employees may not solicit contributions to help host the conference from a lobbyist or a lobbying principal or from individuals or entities that are likely to be materially affected by laws or rules which the Department is called upon to interpret or apply or that do business with the Department;
- (3) the Department's employees may solicit attendance at the conference by any person other than a lobbyist or a lobbying principal; and
- (4) the Department's employees may prepare and send written notices of the conference to lobbyists and lobbying principals.

Facts

- ¶ 1 This opinion is based upon these understandings:
- a. You are the administrator of a division in a state department.
 - b. The State of Wisconsin is a dues-paying member of an association, which is a subsidiary body of an international organization .
 - c. The associations are not-for-profit organizations, the members of which include governmental regulatory agencies.
 - d. The division which you head is co-sponsoring the annual conference of the association.
 - e. The conference program is devoted to educational topics concerning a state regulatory program.
 - f. The meeting will be financed principally by registration fees.

- g. The division plans to actively market the event by preparing materials and promoting the conference, through written materials and personal contacts, to insurance companies and others in the private sector.
- h. The conference also traditionally furnishes exhibitor space to insurers and others for a fee.
- i. The association will solicit and negotiate with potential exhibitors.

Question

¶ 2 The Ethics Board understands your question to be:

Do the division's plans for hosting the conference comport with laws administered by the Ethics Board?

Discussion

¶ 3 In general, state agency involvement in hosting a conference of an organization of state governments or government officials raises two issues: (1) use of state resources and (2) solicitation of private sponsors.

USE OF STATE RESOURCES

¶ 4 The Ethics Code provides that no state public official may use his or her office or position to obtain anything of substantial value for the private benefit of an organization with which the official is associated or to obtain unlawful benefits for another.¹ In addition, it is a well-established principle of law that public funds may be expended only for a public purpose.²

¹ Section 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. 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.

Section 19.45(5), *Wisconsin Statutes*, provides:

19.45(5) No state public official may use or attempt to use the public position held by the public official to influence or gain unlawful benefits, advantages or privileges personally or for others.

¶ 5 The Department in which you work has elected to become a member of the international organization and the association. It has expended public funds to pay the dues for membership. It has further decided to co-sponsor the conference about which you have asked.³ The Ethics Board is reluctant to second-guess the determination of a state agency, made through applicable agency procedures, that sponsoring or participating in a conference of state governments or government officials is for the benefit of the state and an appropriate expenditure of state funds and resources.⁴ The Board does not possess information that would tend to rebut the Department's conclusion that its use of state resources in connection with its sponsorship of the conference is primarily for a lawful public benefit and purpose.

SOLICITATION

¶ 6 Both the Ethics Code and Wisconsin's lobbying law apply to solicitation by state officers and employees.

Ethics Code

¶ 7 Reduced to its elements, section 19.45(2), Wisconsin Statutes, provides that:

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 an organization with which the official is associated.⁵

² See, e.g., *Hopper v. City of Madison*, 256 N.W.2d 139 (1977); *Wisconsin Solid Waste Recycling Authority v. Earl*, 235 N.W.2d 648 (1975); *State ex re. Warren v. Nusbaum*, 208 N.W.2d 780 (1973).

³ Many state agencies, including the legislature, belong to national organizations of state government bodies or officials. Similarly, many state agencies sponsor the type of conference about which you have asked and authorize employees to attend such conferences.

⁴ 1997 Wis Eth Bd 3, ¶¶ 5 and 6.

⁵ Section 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. 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.

¶ 8 You are a state public official.⁶ Using the title or prestige of office, or state resources, to solicit contributions to, or attendance at, the association conference would be a use of office.⁷ Contributions to, or payment for, attendance at the conference are of substantial value.⁸ However, the statutory reference to an “organization” does not include the state or any body politic.⁹ The division which you head is co-sponsoring the annual conference of the association. Your division’s soliciting contributions to, or attendance at, the conference is primarily for the benefit of the state. Therefore, the restriction in §19.45(2) does not apply.

¶ 9 Reduced to its elements, §19.45(3), *Wisconsin Statutes*, provides that:

No state public official
May solicit or accept anything of value
That could reasonably be expected to influence the official’s
judgment or actions.¹⁰

¶ 10 You are a state public official. This prohibition applies whether contributions that are solicited are directed toward the official’s own benefit or to

⁶ Section 19.42(13)(j), *Wisconsin Statutes*, provides:

19.42(13) “State public office” means:

(j) A division administrator of an office created under ch. 14 or a department or independent agency created or continued under ch. 15.

⁷ 1994 Wis Eth Bd 1, ¶5; 1991 Wis Eth Bd 6; 10 Op. Eth. Bd. 47 (1988); 9 Op. Eth. Bd. 45 (1987); 9 Op. Eth. Bd. 21 (1986).

⁸ Substantial value is something more than token or inconsequential value. 1995 Wis Eth Bd 5, ¶6; 7 Op. Eth. Bd. 2 (1983).

⁹ Section 19.42(11), *Wisconsin Statutes*, provides:

19.42(11) “Organization” means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, trust or other legal entity other than an individual or body politic.

¹⁰ Section 19.45(3), *Wisconsin Statutes*, provides:

19.45(3) No person may offer or give to a state public official, directly or indirectly, and no state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official’s vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the state public official. This subsection does not prohibit a state public official from engaging in outside employment.

the benefit of another.¹¹ The statutory bar extends to the solicitation or acceptance of contributions to a state agency.¹² Moreover, it applies whether an official solicits funds personally or through the agency's employees acting at the official's behest.¹³

¶ 11 Section 19.45(3)'s application depends on an objective, not a subjective standard; it proscribes an official's solicitation of anything of value if an impartial observer could reasonably expect the response to the solicitation to influence the official's judgment in matters related to his or her office.¹⁴ The Board has said that it is unreasonable to think that an official's actions or judgment would be influenced by contributions given by persons with respect to whom the official's office does not exercise any action at all or only ministerial action or where the contributions are only of modest value.¹⁵ However, the Board has repeatedly advised that state officials not solicit contributions to help host an event from individuals or entities that are likely to be materially affected by laws or rules which the official's agency is called upon to interpret or apply or that do business with the agency.¹⁶ In contrast to such contributions, it seems unreasonable to believe that an official's judgment could be influenced by an individual's paid attendance at a conference or seminar sponsored by a state agency.

¶ 12 Thus, the Ethics Board recommends that you not solicit contributions from individuals or entities that are likely to be materially affected by laws or rules which your department is called upon to interpret or apply or that do business with the agency. Under the plans you have described, the association, and not state employees, will solicit and negotiate with potential exhibitors, although state employees may prepare written materials. This comports with our recommendation.

¶ 13 Your plan also calls for employees of the division which you head to promote the conference to the private sector. This is consistent with the

¹¹ 1996 Wis Eth Bd 14, ¶ 6; 1995 Wis Eth Bd 7; 1994 Wis Eth Bd 1; 4 Op. Eth. Bd. 93 (1981); 4 Op. Eth. Bd. 51 (1980).

¹² 1996 Wis Eth Bd 14, ¶6; 1995 Wis Eth Bd 7; 10 Op. Eth. Bd. 31 (1988); 9 Op. Eth. Bd. 9 (1986); 7 Op. Eth. Bd. 19 (1983).

¹³ 1996 Wis Eth Bd 14, ¶6.

¹⁴ 1996 Wis Eth Bd 14, ¶7; 4 Op. Eth. Bd. 93, *supra*; 4 Op. Eth. Bd. 51, *supra*.

¹⁵ 1992 Wis Eth Bd 23; 7 Op. Eth. Bd. 19 (1983); 4 Op. Eth. Bd. 51, *supra*.

¹⁶ 10 Op. Eth. Bd. 31, *supra*; 7 Op. Eth. Bd. 9 (1983). This would include businesses and organizations regulated by your agency. 1992 Wis. Eth. Bd. 23, *supra*; 9 Op. Eth. Bd. 9 (1986). To do otherwise works against an official's impartiality and harms the agency's credibility. 10 Op. Eth. Bd. 31, *supra*.

Ethics Code. We also note that marketing may be done by the association, by the Department of Commerce, or by the Department of Tourism.¹⁷

Lobbying law

¶ 14 Section 13.625(3), *Wisconsin Statutes*, reduced to its elements, provides:

No agency official
May solicit
Anything of pecuniary value
From a lobbyist or a business or organization that employs a
lobbyist.¹⁸

¶ 15 An agency official means any department employee whose responsibilities involve rule-making activities that are other than clerical.¹⁹ Under §13.625 of the lobbying law, once it is established that the parties involved are an agency official and a lobbyist or an organization that employs a lobbyist, no further analysis is required -- the official should not solicit

¹⁷ Section 19.56(3)(e) and (em), *Wisconsin Statutes*, provides:

19.56(3) Notwithstanding s.19.45:

(e) A state public official who is an officer or employe of the department of commerce may solicit, receive and retain on behalf of the state anything of value for the purpose of any of the following:

1. The sponsorship by the department of commerce of a trip to a foreign country primarily to promote trade between that country and this state that the department of commerce can demonstrate through clear and convincing evidence is primarily for the benefit of this state.

2. Hosting individuals in order to promote business, economic development, tourism or conferences sponsored by multistate, national or international associations of governments or governmental officials.

(em) A state public official who is an officer or employe of the department of tourism may solicit, receive and retain on behalf of the state anything of value for the purpose of hosting individuals in order to promote tourism.

¹⁸ Section 13.625(3), *Wisconsin Statutes*, provides, in relevant part:

13.625(3) No candidate for an elective state office, elective state official, agency official or legislative employe of the state may solicit or accept anything of pecuniary value from a lobbyist or principal, except as [specifically] permitted.

¹⁹ Section 13.62(3), *Wisconsin Statutes*, provides:

13.62(3) "Agency official" means a member, officer, employe or consultant of any agency who as part of such person's official responsibilities participates in any administrative action in other than a solely clerical, secretarial or ministerial capacity.

money, either personally or through agency employees acting at the official's behest, from a lobbyist or an organization that employs a lobbyist.²⁰

¶ 16 Under the plans you have described, the association, and not state employees, will solicit and negotiate with potential exhibitors, although state employees may prepare written materials. This comports with the lobbying law. However, your plan also calls for employees of your division to promote the conference to the private sector through personal contacts. Although the division may prepare and send written notices of the conference to a lobbyist or principal, an employee of your division who has non-clerical duties related to the promulgation or modification of administrative rules should not, either orally or in writing, solicit attendance from a lobbyist or a lobbying principal. As we said above, that marketing may be done by the association, by the Department of Commerce, or by the Department of Tourism.²¹

Advice

¶ 17 The Ethics Board advises, consistent with laws it administers, that:

- (1) the division which you head may use state resources in connection with its sponsorship of the association annual conference;
- (2) the Department's employees may not solicit contributions to help host the conference from a lobbyist or a lobbying principal or from individuals or entities that are likely to be materially affected by laws or rules which the Department is called upon to interpret or apply or that do business with the Department;
- (3) the Department's employees may solicit attendance at the conference by any person other than a lobbyist or a lobbying principal; and

²⁰ 1996 Wis Eth Bd 14, ¶6. The Ethics Board has consistently held that the law does not sanction doing through an agent what the statute prohibits doing directly. 1996 Wis Eth Bd 5, ¶8; 1992 Wis Eth Bd 29, ¶4; 1992 Wis Eth Bd 27, ¶7; 80 Op. Att'y Gen. 205 (1992).¶

²¹ Section 13.625(9) and (10), *Wisconsin Statutes*, provides:

13.625 (9) This section does not apply to the solicitation, acceptance, or furnishing of anything of pecuniary value by the department of commerce, or to a principal furnishing anything of pecuniary value to the department of commerce, under s. 19.56(3)(e) or (f) for the activities specified in s. 19.56(3)(e).

(10) This section does not apply to the solicitation, acceptance, or furnishing of anything of pecuniary value by the department of tourism, or to a principal furnishing anything of pecuniary value to the department of tourism, under s. 19.56 (3) (em) or (f) for the activity specified in s. 19.56 (3) (em).

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- (4) the Department's employees may prepare and send written notices of the conference to lobbyists and lobbying principals.

WR1002

1998 Wis Eth Bd 5
IMPROPER USE OF OFFICE; LOBBYING AND LOBBYISTS;
SOLICITATION

The Ethics Board advises, consistent with laws it administers, that:

- (1) a state agency may use state resources in connection with its hosting of a convention of a national organization in Wisconsin; and
- (2) state public officials associated with the agency, and the agency's employees may not, either orally or in writing, personally solicit contributions from a lobbyist, an employee of a lobbying organization, or an employee of a business or organization that is regulated by or does business with the agency.

Facts

- ¶ 1 This opinion is based upon these understandings:
- a. You are the legal counsel a state agency, on whose behalf you write.
 - b. A national association is holding a national convention in Wisconsin in 1998.
 - c. The state agency is co-hosting the convention.
 - d. At the request of the agency, the Department of Tourism is soliciting and receiving contributions on behalf of the state to help host the convention.

Question

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

May the state public officials associated with the agency use the title and prestige of their state offices, and state resources, to solicit contributions to the Department of Tourism in support of the convention?

Discussion

¶ 3 In general, state agency involvement in hosting a conference of an organization of state governments or government officials raises two issues: (1) use of state resources and (2) solicitation of private sponsors.

USE OF STATE RESOURCES

¶ 4 The Ethics Code provides that no state public official may use his or her office or position to obtain anything of substantial value for the private benefit of an organization with which the official is associated or to obtain unlawful benefits for another.¹ In addition, it is a well-established principle of law that public funds may be expended only for a public purpose.²

¶ 5 The state agency on whose behalf you have written decided to co-sponsor the convention about which you have asked.³ The Department of Tourism has agreed to assist the agency to host the convention pursuant to §19.56(3)(em), *Wisconsin Statutes*.⁴ The Ethics Board is reluctant to second-guess the determination of a state agency, made through applicable

¹ Section 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. 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.

Section 19.45(5), *Wisconsin Statutes*, provides:

19.45(5) No state public official may use or attempt to use the public position held by the public official to influence or gain unlawful benefits, advantages or privileges personally or for others.

² See, e.g., *Hopper v. City of Madison*, 256 N.W.2d 139 (1977); *Wisconsin Solid Waste Recycling Authority v. Earl*, 235 N.W.2d 648 (1975); *State ex rel. Warren v. Nusbaum*, 208 N.W.2d 780 (1973).

³ Many state agencies, including the legislature, belong to national organizations of state government bodies or officials. Similarly, many state agencies sponsor the type of conference about which you have asked and authorize employees to attend such conferences.

⁴ Section 19.56(3)(em), *Wisconsin Statutes*, provides:

19.56(3) Notwithstanding s.19.45:

(em) A state public official who is an officer or employe of the department of tourism may solicit, receive and retain on behalf of the state anything of value for the purpose of hosting individuals in order to promote tourism.

¶ 9 Reduced to its elements, §19.45(3), *Wisconsin Statutes*, provides that:

No state public official
May solicit or accept anything of value
That could reasonably be expected to influence the official's
judgment or actions.¹⁰

¶ 10 Your question concerns state public officials. This prohibition applies whether contributions that are solicited are directed toward the official's own benefit or to the benefit of another.¹¹ The statutory bar extends to the solicitation or acceptance of contributions to a state agency.¹² Moreover, it applies whether an official solicits funds personally or through the agency's employees acting at the official's behest.¹³

¶ 11 Section 19.45(3)'s application depends on an objective, not a subjective standard; it proscribes an official's solicitation of anything of value if an impartial observer could reasonably expect the response to the solicitation to influence the official's judgment in matters related to his or her office.¹⁴ It is unreasonable to think that an official's actions or judgment would be influenced by contributions given by persons with respect to whom the official's office does not exercise any action at all or only ministerial action or where the contributions are only of modest value.¹⁵ However, the Board has repeatedly advised that state officials not solicit contributions from individuals or entities that are likely to be materially affected by laws or

¹⁰ Section 19.45(3), *Wisconsin Statutes*, provides:

19.45(3) No person may offer or give to a state public official, directly or indirectly, and no state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the state public official. This subsection does not prohibit a state public official from engaging in outside employment.

¹¹ 1996 Wis Eth Bd 14, ¶ 6; 1995 Wis Eth Bd 7; 1994 Wis Eth Bd 1; 4 Op. Eth. Bd. 93 (1981); 4 Op. Eth. Bd. 51 (1980).

¹² 1996 Wis Eth Bd 14, ¶6; 1995 Wis Eth Bd 7; 10 Op. Eth. Bd. 31 (1988); 9 Op. Eth. Bd. 9 (1986); 7 Op. Eth. Bd. 19 (1983).

¹³ 1996 Wis Eth Bd 14, *supra*, ¶6.

¹⁴ 1996 Wis Eth Bd 14, *supra*, ¶7; 4 Op. Eth. Bd. 93, *supra*; 4 Op. Eth. Bd. 51, *supra*.

¹⁵ 1992 Wis Eth Bd 23; 7 Op. Eth. Bd. 19 (1983); 4 Op. Eth. Bd. 51, *supra*.

rules which the official's agency is called upon to interpret or apply or that do business with the agency.¹⁶

¶ 12 In this instance, the Ethics Board recommends that the agency not solicit contributions from individuals or entities that are likely to be materially affected by laws or rules, if any, which the agency is called upon to interpret or apply or that do business with the agency. We recommend that the same standard be followed by all the employees of the department and that they not be directed to solicit contributions from an organization or business that is regulated by or does business with the agency. Rather, such solicitation may be undertaken by the Department of Tourism.¹⁷

Lobbying law

¶ 13 Section 13.625(3), *Wisconsin Statutes*, reduced to its elements, provides:

No agency official
 May solicit
 Anything of pecuniary value
 From a lobbyist or a business or organization that employs a
 lobbyist.¹⁸

¶ 14 An agency official means any agency employee whose responsibilities involve rule-making activities that are other than clerical.¹⁹ Under §13.625 of the lobbying law, once it is established that the parties include an agency official and either a lobbyist or an organization that employs a lobbyist, no further analysis is required -- the agency official should not solicit money, either personally or through agency employees acting at the official's

¹⁶ 10 Op. Eth. Bd. 31, *supra*; 7 Op. Eth. Bd. 9 (1983). This would include businesses and organizations regulated by your agency. 1992 Wis. Eth. Bd. 23, *supra*; 9 Op. Eth. Bd. 9 (1986). To do otherwise works against an official's impartiality and harms the agency's credibility. 10 Op. Eth. Bd. 31, *supra*.

¹⁷ See n.4, *supra*.

¹⁸ Section 13.625(3), *Wisconsin Statutes*, provides, in relevant part:

13.625(3) No candidate for an elective state office, elective state official, agency official or legislative employe of the state may solicit or accept anything of pecuniary value from a lobbyist or principal, except as [specifically] permitted.

¹⁹ Section 13.62(3), *Wisconsin Statutes*, provides:

13.62(3) "Agency official" means a member, officer, employe or consultant of any agency who as part of such person's official responsibilities participates in any administrative action in other than a solely clerical, secretarial or ministerial capacity.

behest, from a lobbyist or an organization that employs a lobbyist.²⁰ That may be done by the Department of Tourism.²¹

Advice

¶ 15 The Ethics Board advises, consistent with laws it administers, that:

- (1) the state agency may use state resources in connection with its hosting of the convention in Wisconsin; and
- (2) state public officials associated with the agency, and the agency's employees may not, either orally or in writing, personally solicit contributions from a lobbyist, an employee of a lobbying organization, or an employee of a business or organization that is regulated by or does business with the agency.

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²⁰ 1996 Wis Eth Bd 14, ¶6. The Ethics Board has consistently held that the law does not sanction doing through an agent what the statute prohibits doing directly. 1996 Wis Eth Bd 5, ¶8; 1992 Wis Eth Bd 29, ¶4; 1992 Wis Eth Bd 27, ¶7; 80 Op. Att'y Gen. 205 (1992).¶

²¹ Section 13.625(10), *Wisconsin Statutes*, provides:

13.625 (10) This section does not apply to the solicitation, acceptance, or furnishing of anything of pecuniary value by the department of tourism, or to a principal furnishing anything of pecuniary value to the department of tourism, under s. 19.56 (3) (em) or (f) for the activity specified in s. 19.56 (3) (em).

1998 Wis Eth Bd 6
IMPROPER USE OF OFFICE; LOBBYING AND LOBBYISTS;
SOLICITATION

The Ethics Board advises that a legislator should not authorize an organization to draw on the title and prestige of the legislator's state government office to solicit financial contributions if the organization [1] is a lobbying principal that tries to influence legislation and spends money in support of or in opposition to candidates for election to state offices, or [2] is an organization with which the legislator is associated.

Facts

- ¶ 1 This opinion is based upon these understandings:
- a. You are a member of the legislature.
 - b. You have been asked to sign a letter urging recipients to become members of a not-for-profit organization.
 - c. The letterhead will have your name and state title on it as will the signature line.
 - d. You are a member of the organization, but are neither an officer or director.
 - e. The organization is a registered lobbying principal in Wisconsin.

Question

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

Do laws administered by the Ethics Board restrict your signing a letter soliciting recipients to become members of the organization?

Discussion

- ¶ 3 Based on the facts that you have presented, the Ethics Board recommends that you not permit the organization to use the title and prestige of your office to solicit memberships in that organization.

¶ 4 The provision of the Ethics Code most pertinent to your question is §19.45(2), *Wisconsin Statutes*. That section, reduced to its elements, provides:

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 an organization with which the official is
associated.¹

¶ 5 You are a state public official.² Use of office includes using the title and prestige of office.³ Obtaining additional dues-paying members for an organization is a financial gain for that entity. The not-for-profit organization about which you have written is an "organization" within the meaning of the statute.⁴ The only remaining question is whether the organization is an organization with which you are associated.

¶ 6 Section 19.42(2), *Wisconsin Statutes*, provides:

19.42(2) "Associated", when used with reference to an organization, includes any organization in which an individual or a member of his or her immediate family is a director, officer or trustee, or owns

¹ Section 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. 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.

² Section 19.42(13)(c), *Wisconsin Statutes*, provides:

19.42(13) "State public office" means:

(c) All positions identified under s. 20.923(2), (4), (4m), (6)(f) to (h) and (8) to (10), except clerical positions.

Section 20.923(2)(b), *Wisconsin Statutes*, identifies members of the legislature.

³ 1994 Wis Eth Bd 1, ¶5; 1991 Wis Eth Bd 6, ¶6; 10 Op. Eth. Bd. 47 (1988); 10 Op. Eth. Bd. 43 (1987); 9 Op. Eth. Bd. 45 (1987); 9 Op. Eth. Bd. 21 (1986); 5 Op. Eth. Bd. 98 (1982); 3 Op. Eth. Bd. 53 (1979).

⁴ Section 19.42(11), *Wisconsin Statutes*, provides:

19.42(11) "Organization" means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, trust or other legal entity other than an individual or body politic.

or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent.

¶ 7 The proposed solicitation letter would note that you are “affiliated” with the organization. We understand that neither you nor a member of your immediate family is an officer, director, or shareholder of the organization; however, you are a member of the organization and your participation in the proposed letter of financial solicitation would be in concert with, and at the request and suggestion of, the organization.

¶ 8 It is well established that an official may associate himself or herself with an organization by lending his or her name to it for the organization’s solicitation of funds.⁵ Thus, as a matter of law there is a substantial basis to support the conclusion that your acting in concert with, and at the request and suggestion of, the organization associates you with that organization⁶ and that Wisconsin’s Ethics Code prohibits your using the title or prestige of your state government position to solicit funds for that organization.

¶ 9 We do not, however, find it necessary to resolve this issue definitively because for yet another reason we recommend against your pursuing the course you have asked about. You hold an important and prestigious position in the government of the state of Wisconsin. The people of Wisconsin have entrusted to your care the title and the prestige of the office of state legislator. The Board’s members are unanimous in recommending that you guard the dignity of your government position and preserve it from use in private fundraising efforts by any organization that is both paying

⁵ 10 Op. Eth. Bd. 47, 49, n. 5 (1988); 7 Op. Eth. Bd. 21, 23, n.6 (1983); 5 Op. Eth. Bd. 97, 100-01, n. 15 (1982); 5 Op. Eth. Bd. 59, 61, n.6 (1981); Minutes, closed session of the Ethics Board, July 15, 1980.

In a 1994 opinion, 1994 Wis Eth Bd 1, the Ethics Board held that signing a letter to solicit membership in an organization, alone, did not mean that the official became the organization’s “authorized representative or agent” within the meaning of the statute. However, a person may also be associated with an organization even though the person does not occupy one of the relationships specifically identified by statute. Section 19.42(2), in defining “associated,” states that the word “associated” “includes” the indicated relationships. In contrast, the other definitions contained in §19.42 state that the words that are defined “mean” or “have the meaning of” the indicated words. 10 Op. Eth. Bd. 47, 49, n. 5 (1988) (legislator acted as the organization’s agent for the conduct of its affairs in Wisconsin, including solicitation of funds); 5 Op. Eth. Bd. 97, 100-01, n. 15 (1982) (legislator soliciting for legislative campaign committee).

⁶ Section 11.06(7m), *Wisconsin Statutes*, creates a test for independent campaign expenditures and establishes that a committee’s expenditure is not independent of a candidate if the expenditure is made in concert with or at the request or suggestion of the candidate. This same consideration has application to the issue you have presented.

individuals to influence the creation and modification of Wisconsin's laws and is engaged in influencing the election of individuals to state offices.⁷

¶ 10 Although we accept that you and the organization are joined by common, deeply held conviction and not by an inappropriate motive, we cannot fashion useful guidance on motives alone. "The end justifies the means" is not a public policy Wisconsin's traditions support. In spite of your good motives, the course that the organization has asked you to undertake would permit others to infer that you are using your state government position to solicit money for a group that in turn directs money in support of your own election in exchange for your support of its legislative agenda. That would undermine citizens' faith and confidence in state government, faith and confidence that the Ethics Board was established to foster.⁸

⁷ The Wisconsin Democracy Campaign reports that the organization spent tens of thousands of dollars to influence elections in Wisconsin during 1995-1996, including the expenditure of funds to advance your own re-election.

⁸ In addition to the reason we have already articulated for our recommendation, we note that the lobbying law, at §13.625, *Wisconsin Statutes*, prohibits a lobbying principal to furnish to you anything of pecuniary value and prohibits your acceptance of anything of pecuniary value from a principal. Because of your affiliation with the organization, the facts that you have presented could be characterized as the organization's furnishing you with stationery, envelopes, and postage to enable you to solicit memberships on its behalf, in derogation of §13.625. Section 13.625, *Wisconsin Statutes*, in relevant part, provides:

13.625 Prohibited practices. (1) No lobbyist may:

* * *

(b) Furnish to any agency official or legislative employe of the state or to any elective state official or candidate for an elective state office, or to the official's, employe's or candidate's personal campaign committee:

1. Lodging.
2. Transportation.
3. Food, meals, beverages, money or any other thing of pecuniary value, except that a lobbyist may make a campaign contribution to a partisan elective state official or candidate for national, state or local office or to the official's or candidate's personal campaign committee; but a lobbyist may make a contribution to which par. (c) applies only as authorized in par. (c).

* * *

(2) No principal may engage in the practices prohibited under sub. (1) (b) and (c). This subsection does not apply to the furnishing of transportation, lodging, food, meals, beverages or any other thing of pecuniary value which is also made available to the general public.

(3) No candidate for an elective state office, elective state official, agency official or legislative employe 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), (4), (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)

¶ 11 Consistent with our advice the organization may identify you as someone who supports its work (if that is the case), and you may offer your opinions about the goals and actions of the organization and any other lobbying group. You should not, however, lend the title and prestige of your office to further the fundraising effort about which you have asked.

Advice

¶ 12 The Ethics Board advises that you not authorize the organization to draw on the title and prestige of your state government office to solicit financial contributions if the organization [1] is a lobbying principal that tries to influence legislation and spends money in support of or in opposition to candidates for election to state offices, or [2] is an organization with which the legislator is associated.

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Solicitation of Items or Services

Limitations on solicitation

A state public official may not use his or her public position, including the title or prestige of his or her public position, to obtain anything of more than insubstantial value for:

- the private benefit of the official or the official's spouse or legal dependent; or
- an organization of which the official or the official's spouse or legal dependent is an officer, director, authorized representative or agent, or owner of a 10% or greater interest. [§ 19.45(2), *Wisconsin Statutes*]

A state public official may not solicit anything of value

(even for a charity, a governmental program, an unaffiliated organization, or unrelated person and even if the solicitation is independent of and unrelated to holding a public position)

EITHER

from a lobbyist or from an organization that employs a lobbyist¹ [§13.625(3), *Wis. Stats.*]

OR

from anyone if either the contribution or the failure to contribute could reasonably be:

- **Expected to influence** the official's vote, official action, or judgment OR
- **Considered a reward** for any official action or inaction on the part of the state public official. [§ 19.45(3), *Wisconsin Statutes*]

"Anything of value" means any money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment, but does not include compensation and expenses paid by the state, fees, honorariums and expenses that are expressly permitted in connection with the presentation of a talk or participation in a meeting and reported to the Government Accountability Board, campaign contributions which are permitted and reported to the Elections Board, or hospitality extended for a purpose unrelated to state business by a person other than an organization. [§ 19.42(1)]

"Expected to influence" It would be unreasonable to expect a contribution of not more than \$25 to influence an official's judgment. It would be unreasonable to expect a contribution from an individual or from an organization without any special interest in the actions of a public body to influence an official affiliated with that body.

"Considered a reward" Something is reasonably considered a reward if it is given or received for past behavior.

See other side 

¹ Unless the official is not an elected official or legislative employee and the official's responsibilities do not include participation in the proposal, drafting, development, consideration, promulgation, amendment, repeal, or rejection of administrative rules.

Solutions for instances when solicitation is not permitted

ACTIONS IN OFFICIAL CAPACITY -- GOVERNMENT-RELATED EVENTS FOR WHICH PRIVATE SUPPORT IS WELCOME: Because a state official should not solicit a significant contribution from a person or an organization with a special interest in the actions of the public body with which the official is affiliated, a state agency desiring private support for a government-related activity should, instead of soliciting contributions, rely on the assistance volunteered by a national association with which the agency is affiliated or by a chamber of commerce, visitors and convention bureau, or the like. An agency may also request the Department of Commerce or the Department of Tourism to solicit support for events promoting economic development and tourism or for certain conferences.

ACTIONS IN PRIVATE CAPACITY: Although a state official should not solicit a significant contribution from a person or an organization with a special interest in the actions of the public body with which the official is affiliated, an official affiliated with a private organization usually does not misuse the title or prestige of his or her office by permitting identification of his or her public office on letterhead in the same style and prominence in which other representatives of the private organization are identified.