

# Ethics and Conflicts of Interest

## Part 1: The State Ethics Code\*

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*Author's Note:* \*This is the first article in a 3-part series that will cover (1) the state ethics code applicable to local public officials, (2) the law prohibiting private interests in public contracts, and (3) the Compatibility of Offices doctrine and miscellaneous statutes prohibiting certain conduct.

The state ethics code establishes minimum standards of ethical conduct that prohibit local public officials from using their public office to benefit or enrich themselves, their immediate families, or organizations with which they are associated. Local officials must understand these standards to avoid running afoul of the law. The state ethics code authorizes municipalities to adopt local ethics codes that are more stringent and expansive than the state law, so local officials must also be familiar with any existing local ethics laws.

Because the state code establishes minimum standards, there may be situations where the law does not clearly prohibit certain conduct but engaging in that conduct may cast the official in a bad light or serve to undermine public confidence in local government. In situations like these, local officials should balance the benefits of involvement (e.g., representing constituents, using the official's experience) against the potential drawbacks (e.g., adverse public perception, the risk of violating the law). An official who is uncertain about a situation may want to seek advice from the municipal

attorney. Local officials may also contact League attorneys with general questions about the state ethics law.

### STATE CODE OF ETHICS FOR LOCAL OFFICIALS, EMPLOYEES, AND CANDIDATES

The state ethics code applicable to local government officials is found in Wis. Stat. § 19.59. Many of the terms used therein are defined in Wis. Stat. § 19.42. These definitions are key to understanding what behavior is prohibited.

#### Key Definitions

The law applies to *"local governmental units,"*<sup>1</sup> which includes counties, cities, villages, and towns, as well as special purpose districts, such as town sanitary districts. City redevelopment authorities or similar instrumentalities or subunits of city or village governments are also subject to the code.

Section 19.59 applies to *"local public officials,"* defined as individuals holding a *"local public office."*<sup>2</sup> The definition of *"local public office"* includes elective offices; city and village managers; appointive offices and positions where the individual serves for a specified term; and also appointive offices or positions filled by the governing body or executive or administrative head where the appointee serves at the pleasure of the appointing authority.<sup>3</sup> *"Local public office"* does not include independent contractors and persons who perform only ministerial (i.e., non-discretionary) tasks, such as clerical workers. The way *"local public*

*office"* is defined creates gaps in coverage. For example, police and fire chiefs appointed by police and fire commissions are not subject to the law because they do not serve for a specified term, and do not serve at the pleasure of the appointing authority since they may only be removed for cause.<sup>4</sup> Municipal judges are considered state public officials and are governed by the ethics code applicable to state officials.

*"Organization"* includes any *"corporation, partnership, proprietorship, firm, enterprise, franchise, association, trust or other legal entity other than an individual or body politic."*<sup>5</sup> An official is *"associated"* with an organization for purposes of the state ethics code when the individual or a member of the individual's immediate family is an officer, director or trustee, or owns at least 10% of the organization, or is an authorized representative or agent.<sup>6</sup>

*"Immediate family"* means an official's spouse or relative by marriage, lineal descent or adoption who receives, directly or indirectly, more than one-half of their support from the official or from whom the official receives more than one-half of his or her support.<sup>7</sup>

*"Anything of value"* is broadly defined and includes money, property, favors or services but does not include campaign contributions reported as required by state law.<sup>8</sup>

#### Prohibited Conduct

The state ethics code prohibits local public officials from engaging in the following conduct:

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## 1. Using their office to obtain financial gain or anything of substantial value for the private benefit of themselves, their immediate families, or organizations with which they are associated.<sup>9</sup>

The restriction on “using” an office encompasses more than voting. The Wisconsin Ethics Commission (WEC) interprets this to prohibit a local official from accepting any item or service, including food or drink, and travel, of more than nominal value offered and available because the official holds public office.<sup>10</sup> WEC guideline ETH-1219 suggests that officials ask themselves the following questions regarding any item or service being offered:

- a) Is it being offered because of my public position?
- b) Is it of more than nominal or insignificant value?
- c) Is it primarily for my personal benefit rather than for the benefit of my local unit of government?

If the answer to all 3 questions is yes, the official may not accept the item or service.

This provision does not prohibit a local public official from using the title or prestige of their office to obtain permitted campaign contributions that are reported as required by state law. It also does not prohibit a local public official from obtaining anything of value from the Wisconsin Economic Development Corporation or the department of tourism, as provided under Wis. Stat. § 19.56 (3)(f).

## 2. Receiving “anything of value” if it could reasonably be expected to influence the local public official’s vote, official action or judgment, or could reasonably be considered as a reward for any official action or inaction.<sup>11</sup>

As noted earlier, “anything of value” is defined broadly. To analyze this, WEC guideline ETH-1219 suggests that officials ask themselves whether it would be reasonable for someone to believe that the item or service is likely to influence their judgment or that it is a reward for action. If the answer is yes, the official may not accept the item or service. Note that the standard for judging behavior is what is reasonable and not the official’s subjective belief.

## 3. Taking official action substantially affecting a matter in which the official, an immediate family member, or an organization with which the official is associated has a substantial financial interest or using his or her office in a way that produces or assists in the production of a substantial benefit for the official, an immediate family member, or an organization with which the official is associated.<sup>12</sup>

Wisconsin Stat. § 19.59(1)(d) provides a limited exception to the prohibition on taking official action for lawful payments of salaries, expenses, benefits, or reimbursements, or actions on proposals to modify an ordinance.

WEC guideline ETH 1232 suggests that local officials can take action in situations where they are part of a similarly situated class of interests and their interest is not significantly greater or less than other members of that class or where the law will have general application (e.g., like an ordinance). For purposes of this exception the guideline distinguishes between *making* policy and *applying* policy.

### When Abstention is Necessary -

When a matter in which a local official should not participate comes before a body which the official is a member of, the official should refrain from discussion, deliberations, and votes related to the matter and request that

the body’s minutes reflect the member’s withdrawal.<sup>13</sup>

## 4. Offering or providing influence in exchange for campaign contributions.<sup>14</sup>

### Enforcement and Penalties

Local officials may request in writing advisory ethics opinions from the municipal ethics board or, if there is none, from the municipal attorney. The municipal ethics board or attorney may issue a written advisory opinion. If the official follows the advice in the opinion, it is evidence of intent to comply with the law.<sup>15</sup> Ethics opinions are confidential unless that confidentiality is waived.<sup>16</sup>

The state ethics code is enforced by the local district attorney upon verified complaint of any person.<sup>17</sup> If the district attorney fails to commence an action within 20 days after receiving such complaint or refuses to commence an action, the person making the complaint may petition the attorney general to act on it.<sup>18</sup>

The ethics code provides civil and criminal penalties for violations. A local official who intentionally violates any part of § 19.59, except 19.59(1)(br), may be fined not less than \$100 nor more than \$5,000 or imprisoned not more than one year in the county jail or both.<sup>19</sup> In the alternative, a civil forfeiture of up to \$1,000 may be imposed against a local official for violating any part of the state ethics code.<sup>20</sup> Intentional violation of § 19.59(1)(br) (offering or providing influence in exchange for campaign contributions) is a Class I felony.<sup>21</sup>

### Local Ethics Codes

Municipalities may adopt local ethics codes governing local public officials, municipal employees, and candidates for municipal elective office. Local codes can be more stringent than state law but cannot be less restrictive.<sup>22</sup> A local ethics

code must specify the positions to which it applies. The ordinance may apply to immediate family members of individuals who hold positions or who are candidates for positions to which the ordinance applies. Section 19.59(3) explicitly authorizes local ethics codes to contain the following provisions:<sup>23</sup>

1. Financial disclosure requirement.
2. A provision directing the municipal clerk or board of election commissioners to omit from an election ballot the name of any candidate who fails to disclose economic interests as required by the ordinance.
3. A provision directing the treasurer to withhold payment of salary or expense to any local public official or other municipal employee who fails to disclose economic interests as required by the ordinance.

4. A provision vesting administration and civil enforcement of the ordinance with an ethics board appointed in a manner specified in the ordinance. Such a board may issue subpoenas, administer oaths and investigate any violation of the ordinance on its own motion or upon complaint by any person. The ordinance may empower the board to issue opinions upon request. Records of the board's opinions, opinion requests and investigations of violations of the ordinance may be closed in whole or in part to public inspection if the ordinance so provides.
5. Provisions prescribing ethical standards of conduct and prohibiting conflicts of interest on the part of current and former local public officials and other municipal employees.

6. A provision prescribing a forfeiture for violation of the ordinance in an amount not less than \$100 for each offense and not greater than \$1,000 for each offense.

This does not limit municipalities from including other provisions in a local ethics code provided the municipality has the authority to regulate that conduct under the constitution or other laws.<sup>24</sup>

### **Hypothetical Ethics Code Problems**

1. *You are a member of the common council. Your 20-year-old daughter who lives at home with you was arrested last night for underage drinking in your city and given a ticket with a fine of \$96. She is begging for your help with the ticket because she thinks an underage drinking conviction will ruin her chances of getting into law school. She says she was not drinking even though a breathalyzer result shows she*

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*was. You call the city attorney and tell her that you believe your daughter and she should dismiss the ticket or amend it to a lesser violation. Have you violated the state ethics code for local officials?*

Probably. Although you are a parent, it is difficult to remove your public official hat in this circumstance. Since dismissal or amendment of the underage drinking ticket will provide relief from the forfeiture and increased insurance rates, a financial gain, something of substantial value, or substantial benefit for you, your call to the city attorney could easily be construed as an attempt to use the influence of your public office contrary to Wis. Stat. § 19.59(1)(a) or 19.59(1)(c)2. Even if your action does not violate the state ethics code, if the contact produces a favorable result, the city attorney's prosecutorial integrity is severely compromised. Any favoritism by the city attorney would call the attorney's future prosecutions into question and expose the attorney and your municipality to charges of selective prosecution. In short, you should not make the call even if you think it does not violate the state ethics code.

*If the person who got the ticket is not your daughter but the daughter of a friend, do you still have a problem with § 19.59(1)(a), or 19.59(1)(c) if you make the call?*

No, unless the action produces a substantial direct or indirect benefit (e.g., campaign contribution, free food at your friend's restaurant, etc.) for you contrary to § 19.59(1)(b) or (c). Nonetheless, the problems regarding the prosecutorial integrity of the city attorney noted above are still implicated and you should not make the call even though it may not violate the state ethics code.

*2. You are a village trustee. While you and your spouse are attending a conference for local public officials, an engineering consulting firm offers to take you and your spouse to dinner. Your village's policy only authorizes meal reimbursement for you*

*and not your spouse. Should you let the firm pay for you and your spouse?*

No. A local public official should not accept an offer to purchase a meal or other item with more than nominal value. *If the Village's expense policy would clearly require the Village to reimburse you for your meal and the meal fits within the official guidelines, can you pay the costs for your spouse's meal and let the firm pay for yours without violating the state ethics code?* Although that arguably removes the private benefit element required for a violation under § 19.59(1)(a), being wined and dined by an engineering firm could possibly violate § 19.59(1)(b) if the firm has or will have business before the municipality and the meal can reasonably be viewed as something that could influence your judgment or be considered a reward for action or inaction under 19.59(1)(b). The better practice is for you to pay for you and your spouse and advise the firm that it can reimburse the village directly if it wishes.

*3. You are on the common council and serve on a committee reviewing bids the city received from several computer consulting firms. One of the firms is owned by your spouse. Can you participate in this matter?*

No. If you participate, you will be violating the prohibition in Wis. Stat. § 19.59(1)(c)1, against taking any official action affecting a matter in which you, a member of your immediate family or an organization with which you are associated has a substantial financial interest.

*At what point should you withdraw from participation?*

You should excuse yourself from participating in any discussion, deliberations or votes related to selecting a computer consultant for the city. The best way to proceed would be to remove yourself from the committee meeting

before the bids are discussed, reviewed, and evaluated and request that the minutes reflect your absence.

*If the firm is owned by your father instead of your spouse, can you participate in the matter without violating the state ethics code?*

Yes. Assuming you do not provide one-half of your father's support or he does not provide one-half of yours, there is no violation of § 19.59(1)(c)1 or any other provision of the state ethics code. However, your local code may be more restrictive and should be checked. You should also consider public perception even if your local ethics code does permit your participation since many, if not most, people will question your ability to place your public obligations over your familial connections.

*4. You are a member of a common council. The council is considering plans and specifications for a major street widening and repair project and a resolution authorizing special assessments to be levied against abutting property owners to pay for the project. Your home abuts the street that is going to be widened and repaired. Should you participate in the matter when it comes before the council?*

The state ethics code would probably not prohibit you from participating in this matter even though the action affects you and your property if the action will affect a whole class of similarly situated property owners abutting the street project and your interest is not significantly different than other members of the class.

*What if the proposed project will greatly improve the value of a piece of commercial property you own but does not have a similar effect on most of the other properties? Can you still participate?*

No. Under the ethics law, you may vote on the project only if your interest is

not significant relative to all the affected persons and the action's effect on your property is neither significantly greater nor less than that upon other property owners abutting the street project.

*5. You are a member of the village plan commission. The commission is considering a conditional use permit request by a person who owns property next door to your father-in-law. Do you participate in the matter?*

If your father-in-law does not receive more than 50% of his support from you

or vice versa, then the state ethics law does not preclude you from voting on the zoning change. However, the state and federal constitutional guarantees of due process require quasi-judicial decisions such as this to be made by an impartial decision maker. If you cannot be impartial, then you should not participate. Even if you believe that you can be impartial, you should advise the applicant that your father-in-law lives next door to the property and determine whether the applicant has any objection to your participation.

*6. You are a common council member and are also on the library board. Can you participate in council discussions that will affect the library?*

Yes. The state ethics code does not prohibit this. Because the library board is a governmental body or body politic, it is not an "organization" as defined by the law.

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1. Wis. Stat. § 19.42(7u).
2. Wis. Stat. § 19.59(7x).
3. *Id.*
4. See Wis. Stat. § 62.13(3).
5. Wis. Stat. § 19.42(11).
6. Wis. Stat. § 19.42(2).
7. Wis. Stat. § 19.42(7).
8. Wis. Stat. § 19.42(1).
9. Wis. Stat. § 19.59(1)(a).

10. Wisconsin Ethics Commission Guideline ETH-1219: Receipt of Food, Drink, Favors and Services, available online at <https://ethics.wi.gov/Resources/1219-ReceiptOfItemsAndServicesByLocalOfficials.pdf>.
11. Wis. Stat. § 19.59(1)(b).
12. Wis. Stat. § 19.59(1)(c).
13. Wisconsin Ethics Commission Guideline ETH-1232: Mitigating Conflicting Interests: Private Interest vs. Public Responsibility, available online at <https://ethics.wi.gov/Resources/ETH-1232.pdf>.
14. Wis. Stat. § 19.59(1)(br).

15. Wis. Stat. § 19.59(5)(a).
16. Wis. Stat. § 19.59(5)(b).
17. Wis. Stat. § 19.59(8)(a).
18. Wis. Stat. § 19.59(8)(c).
19. Wis. Stat. § 19.58.
20. Wis. Stat. § 19.59(7).
21. Wis. Stat. § 19.58(1)(b).
22. Wis. Stat. § 19.59(1m).
23. Wis. Stat. § 19.59(3).
24. Wis. Stat. § 19.59(4).



## Welcome League Law Clerk Kristen Smith

The League welcomes Kristen Smith, who joined the League as a law clerk in May. Kristen is a third-year law student at the University of Wisconsin-Madison. Previously, she served as a Judicial Intern with the Wisconsin Court of Appeals. Kristen has an interest in municipal and property law and is excited at the chance to work with our members. She looks forward to the opportunity to aid our state's communities through the League's legal services. Additionally, Kristen holds a B.A. in history from Boston University. Prior to attending law school, she worked in the pharmaceutical industry in the compliance field. Aside from legal work, Kristen enjoys hiking, skiing, and watching hockey.

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## Congratulations!

Assistant Legal Counsel Maria Davis and her husband are the proud parents of a beautiful baby boy, born May 17. While Maria is out on maternity leave, we will have just one attorney in the office. We thank you for your patience and understanding if it takes us longer than usual to respond to legal inquiries.