

# WISCONSIN ETHICS

June 6, 2023  
Wisconsin County Highway Association

Attorney Jake Curtis

*“There is no odor so bad as that which  
arises from goodness tainted.”*

**— Henry David Thoreau**

*“It takes 20 years to build a reputation and  
five minutes to ruin it.”*

**— Warren Buffett**

# ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Which entities are covered? S. 19.42(7u)
  - Local Government Units includes all cities, villages, towns, counties and special purpose districts (school districts).
  - Instrumentalities or corporations of political subdivisions or special purpose districts.
  - Combinations of subunits of political subdivisions or special purpose districts.
  - Instrumentalities of the state and any of the foregoing.

# ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Persons who are covered – s. 19.42(7w)
  - Local public officials:
    - Elective officers of local government;
    - County administrator or administrative coordinator;
    - Appointive office in which employee is appointed for a specific term;
    - Appointive office filled by the head of the local government;
    - The position of member of the board of directors of a local exposition district not serving for a specified term.

# ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Prohibited conduct is codified in s. 19.59 – first category
  - Ban on use of public position to obtain financial gain or anything of substantial value for the benefit of:
    - The individual;
    - The individual's immediate family (defined as an individual's spouse and an "individual's relative by marriage, lineal descent or adoption, who receives, directly or indirectly, more than one-half of his or her support from the individual or from whom the individual receives, directly or indirectly, more than one-half of his or her support." Wis. Stat. s. 19.42(7)(b).
    - An organization with which the individual is associated.

# ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Prohibited conduct – second category:
  - Ban on offering or giving, directly or indirectly, anything of value to a local public official “if it could be reasonably expected to influence the local 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 local official.”
  - Same prohibition on acceptance under such circumstances.

# ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Prohibited conduct – third category:
  - Ban on “directly or by means of an agent, give, or offer or promise to give, or withhold, or offer or promise to withhold, his or her vote or influence, or promise to take or refrain from taking official action with respect to any proposed or pending matter in consideration of, or upon condition that, any other person make or refrain from making a political contribution, or provide or refrain from providing any service or other thing of value, to or for the benefit of a candidate, a political party, any committee registered under ch. 11, or any person making a communication that contains a reference to a clearly identified local public official holding an elective office or to a candidate for local public office.”



# ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Prohibited conduct – fourth category:
  - Ban on taking “any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.”

# ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Interpretive exception:
  - HOWEVER, the official may participate in the action “even though the action will affect the official or an organization with which the official is associated” as long as:
    - The official’s action affects a whole class of similarly situated interests;
    - Neither the official’s nor the business’ or organization’s interest is significant when compared to all affected interests in the class; and
    - The effect of the official’s actions on the interests of the official or of the related business or organization is neither significantly greater nor less than upon other members of the class.

# ETHICS FOR LOCAL GOVERNMENT OFFICIALS

- Prohibited conduct – fifth category:
  - Ban on “use of 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.”

# ETHICS FOR LOCAL GOVERNMENT OFFICIALS

State statutes do not prohibit a local official from taking action on salaries, benefits or reimbursements or from voting on a county or municipal ordinance.

# ENFORCEMENT OF THE ETHICS CODE FOR LOCAL GOVERNMENT OFFICIALS

- Forfeiture of not more than \$1,000 for each violation.
- Violation of s. 19.59(1)(br) (related to political contributions in exchange for official action) results in additional forfeitures and possibility of prosecution as a Class I felony, punishable by a fine not to exceed \$10,000 or imprisonment not to exceed 3 years and 6 months or both.

# ENFORCEMENT OF THE ETHICS CODE FOR LOCAL GOVERNMENT OFFICIALS

- GET OUT OF JAIL FREE – Avoiding Liability through Advisory Opinions:
  - Pursuant to s. 19.59(5)(a), an individual may request an advisory opinion.
  - Doing so insulates the official from liability under the Ethics Code IF the opinion is followed
  - Must be directed to either the local county or municipal ethics board if there is one.

## COUNTY ETHICS CODE

- Pursuant to s. 19.59(1m)-(4), any county, city, village or town may enact an ordinance establishing a code of ethics for public officials and employees of the county or municipality and candidates for county or municipal elective offices.
- Ordinance must specify to which positions it applies.
- Can apply to members of the immediate family of individuals who hold positions or who are candidates for positions to which the ordinance applies.

## COUNTY ETHICS CODE

- May contain the following provisions:
  - Identify any economic interests specified in s. 19.44;
  - Directing the clerk or board of elections commissioners to omit the name of any candidate who fails to make such economic disclosures from the election ballot;
  - Directing the county or municipal treasurer to withhold payment of salaries or expenses from any public official or employee who fails to disclose his or her economic interests in accordance with the ordinance requirements;



## COUNTY ETHICS CODE

- May contain the following provisions:
  - Vesting administration and civil enforcement of the ordinance with an ethics board appointed in the manner specified in the ordinance;
  - Prescribing ethical standards and prohibiting conflicts of interest on the part of public officials or employees or former public officials or former employees.
  - Prescribing forfeitures for each offense not to exceed \$1,000.

## QUESTIONS TO ASK YOURSELF (SMELL TEST)

1. Am I, my immediate family, or an organization with which I am associated receiving anything of value for private benefit because of the position I hold?
2. Am I using the influence of my position to solicit something for the private benefit of myself, my family or an organization with which I am associated?
3. Am I, my immediate family or an organization with which I am associated, receiving, from a non-relative, anything of value for which we have not paid?

## SMELL TEST (CONT.)

4. Will an official action on my part possibly result in private benefit to me, my immediate family or an organization with which I am associated?
5. Will the use of my staff or the public facilities benefit me in my private capacity?
6. Am I using public time, resources or facilities for my personal gain?

## UNIQUE ETHICS ISSUES: COMPATIBILITY

- The common-law doctrine of incompatibility is a long-standing doctrine and exists independent of any statute, ordinance or other regulation.
- The doctrine prohibits the same person from holding two offices or positions simultaneously if a person is incapable of faithfully discharging the duties imposed by law of both positions.
- “The acceptance by a public officer of another office which is incompatible with the first vacates the first office; that is, the **mere acceptance of the second incompatible office per se terminates the first office as effectively as a resignation.**”  
3 McQuillin Mun. Corp. § 12:112 (3d ed.) (emphasis added).

## UNIQUE ETHICS ISSUES: COMPATIBILITY

- In Wisconsin, offices are incompatible when “one office [is] superior in some respect to another, so that the duties exercised under each might conflict to the public detriment.” *Otradovec v. City of Green Bay*, 118 Wis. 2d 393, 396, 347 N.W.2d 614 (Ct. App. 1984).
- “The common law doctrine of incompatibility extends to positions of public employment as well as public offices.”
- In *Otradovec*, the employee/official had the power to vote on contracts setting the terms of his employment and could vote on approval of the appointment of the city assessor in whose office he worked. *Id.* at 396-97.
- The Court emphasized it did not matter that he was able to abstain from voting on such matters. *Id.* at 397.

## UNIQUE ETHICS ISSUES: COMPATIBILITY

Key Attorneys General Opinions have established the framework:

*Incompatibility is to be found in the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties and functions which attach to them. They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. Two offices or positions are incompatible if there are many potential conflicts of interest between the two, such as salary negotiations, supervision and control of duties, and obligations to the public to exercise independent judgment. If the duties of the two offices are such that when placed in one person they might dissuade the public interests, or if the respective offices might or will conflict even on rare occasions, it is sufficient to declare them legally incompatible. **Incompatibility has been said to exist when there is a built-in right of the holder of one position to interfere with that of the other, as when the one is subordinate to, or subject to audit or review by, the second; obviously, in such circumstances, where both posts are held by the same person, the design that one act as a check on the other would be frustrated.***

# UNIQUE ETHICS ISSUES: PRIVILEGED INFORMATION

- Disclosure of confidential/privileged information received during a closed session is not a violation of the Wisconsin Open Meetings law.
- But it *may* be a violation of a local ethics code.

# UNIQUE ETHICS ISSUES: PRIVILEGED INFORMATION

- What are the consequences of disclosing privileged information?
- Very likely to undermine the trust placed in the Board or a Committee by employees and the public - disclosure of sensitive information that pertains to a specific individual or information that, if disclosed, would irreparably harm the interests of tax payers is not looked upon favorably. Employees and the public trust that the Board will act **professionally and ethically** in protecting their collective interests. Disclosing closed session discussions undermines this goal.
- Improperly disclosed closed session information may also create flash point issues that become impossible to combat in the public arena:
  - If one member discloses closed session discussions, which, in turn, leads to a flurry of rumors in the community, the Board is unable to publicly confirm or deny such rumors without likely further disclosing additional closed session discussions.
  - This could lead to improper conclusions about specific individuals, such as employees, which could result in **lawsuits for violation of privacy, reputational damage, or defamation.**



Conflict of interest and the  
dreaded “f” word (felony)

PUBLIC/  
PRIVATE  
PERSONAL  
CONFLICT

Section 946.13(1)(a):

*Public officials or employees may not, in their private capacity, negotiate, bid for, or enter into a **contract** in which she has a private pecuniary interest, direct or indirect, if at the same time she is authorized or required by law to participate in her capacity as such officer or employee in making of that contract or to perform in regard to that contract, some official function requiring the exercise of discretion on her part.*

## ELEMENTS OF THE CRIME

- Elements of s. 946.13(1)(a):
  - The defendant was a public officer or employee;
  - The defendant negotiated, bid for, or entered into a contract in a private capacity;
  - The defendant had a private pecuniary interest in the contract; and
  - The defendant was authorized or required by law to participate in the making of the contract in his capacity as a public officer or employee.

## PRIVATE/PUBLIC PERSONAL CONFLICT

- Section 946.13(1)(b) prohibits:
  - Public officers or employees from participating in the making of a contract in her capacity as an officer or employee, in which she has a private pecuniary interest, direct or indirect, or performs in regard to the contract, some function requiring the exercise of discretion.

# ELEMENTS OF THE CRIME

- Elements of s. 946.13(1)(b):
  - Defendant was a public officer or employee;
  - Defendant participated in
    - the making of a contract in a capacity as a public officer or employee; OR
    - the defendant, in her capacity as a public officer or employee, performed a function requiring the exercise of discretion in regard to a contract; and
  - Defendant had a private pecuniary interest in the contract.

# CONFLICTS OF INTEREST

- Examples of the statute's application:
  - County board member who owns a business with which the county contracts for goods and services;
  - County board member sells land to the county, owned by a partnership in which the board member has an interest, for purchase price in excess of the statutory amount;
  - A board member accepts a community development block grant program loan in excess of the statutory sum or performs work for a third person who has obtained a loan under the program in excess of the statutory sum.

# CONFLICTS OF INTEREST

- Exceptions to the statute:
  - Contracts in which any single public officer or employee does not receive more than \$15,000 a year from the state or political subdivision. Wis. Stat. s. 946.13(2)(a).
  - Contracts involving the deposit of public funds into public depositories. Wis. Stat. s. 946.13(2)(b)
  - Contracts involving loans under s. 67.12 (temporary borrowing or temporary promissory notes). Wis. Stat. s. 946.13(2)(c).

# CONFLICTS OF INTEREST

- Consequences
  - Class I Felony (fine not to exceed \$10,000 or imprisonment not to exceed 3 years and 6 months, or both).
  - A contract procured in violation of the conflicts of interest statute IS VOID and the state or political subdivision on whose behalf the contract was made incurs no liability thereon. Wis. Stat. s. 946.13(3).
  - So the real kicker is that you go to jail AND you don't get to keep any of the money.



## CONFLICTS OF INTEREST

- Avoiding liability
  - According to the Attorney General, abstention from voting on or debating the contract or any matter relating to the contract and refraining from personally or by agent negotiating or entering into the contract in a private capacity or performing in regard to the contract some official function requiring the exercise of discretion insulates an individual from liability.

## CONFLICTS OF INTEREST

- Avoiding liability
  - HOWEVER, abstaining from voting does not avoid a violation of s. 946.13(1)(a) because a violation requires only the authority to act, not the actual action.
  - ALSO, performance of some official function requiring the exercise of an official's discretion with regard to the contract either before or after the execution violates s. 946.13.

# PUBLIC OFFICIALS AND CONFLICTS OF INTEREST

- Proof of Liability
  - Notably, a violation of Wis. Stat. s. 946.13 does not require proof of criminal intent.
  - Section 946.13 is a STRICT LIABILITY STATUTE.

The background features a series of concentric, overlapping circles in light gray, some solid and some dashed, creating a ripple effect. In the center, there is a large orange callout box with a pointed bottom edge. Inside this box, the text "REAL WORLD" and "EXAMPLES" is written in white, uppercase letters.

“REAL WORLD”  
EXAMPLES

## EXAMPLE 1

- Your good friend asks for some help in moving some furniture for his church. He would like a crew of two employees and the use of one of the highway department's trucks for 2 hours. All of the members of the highway committee are also members of the church. The highway committee has gone on record as supporting the use of the employees and the vehicle as a way of "giving back to the community." What do you do?

## EXAMPLE 2

- Your neighbor advises you that her daughter has applied for a job with the zoning department. She has also asked that you “put in a good word for her” with the director and committee of jurisdiction. What is your response? What if the neighbor starts inviting you over for cocktails and cookouts while the hiring process is taking place? Can you take the food and cocktails?

## Example 3

- An attorney that does a lot of work with Wisconsin counties and assists county officials to ensure that they comply with the law is in attendance at a Conference where you are also an attendee. The attorney picked up the tab (a minor expense for some, but a major expense for others) at the bar one evening. Did you violate the ethics code by not at least offering to reimburse the attorney?



Questions? Comments?





## Contact Information

Attorneys Jake Curtis  
Attolles Law, s.c.  
700 W. Virginia Street, Suite 307  
Milwaukee, WI 53204  
[jcurtis@attolles.com](mailto:jcurtis@attolles.com)