

Legislative Ethics Board

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ADVISORY OPINION 2020 – NO. 2 Outside Employment of Legislator to include Fundraising December 2020

This Advisory Opinion is submitted on the Board's own motion pursuant to RCW 42.52.320 and Board Rule 1.K.

I. BACKGROUND

Many legislators are employed outside the legislature in a variety of professions. Recently, the Board has experienced an increase in questions about whether certain outside employment or the particular responsibilities of that outside employment are permitted under the Ethics in Public Service Act (Act). The Board has also been asked on several occasions whether the outside employment of legislators can include fundraising duties on behalf of the outside employer and whether it matters under the Act who the target of the fundraising activities is.

II. QUESTIONS

- A. What are the ethical considerations for a legislator who is employed by an outside employer?
- B. Can a legislator's outside employment include fundraising on behalf of that employer? If the answer is yes, does it matter from whom such donations are solicited?

III. OPINION

It is a violation of the Act for legislators, even without the use of state resources, to solicit a lobbyist or lobbyist employer for a donation to the legislators' outside employer. It is not automatically a violation of the Act for legislators, without the use of state resources, to solicit donations for their outside employer provided the legislators do not use their positions or their legislative titles in doing so. However, the Board cautions legislators whose outside employment requires fundraising because fundraising has the potential to bear substantial ethical risk.

III. ANALYSIS

A. Outside Employment of Legislators

The Board has frequently dealt with the issue of the outside employment of legislators. Washington has a citizen legislature the concept of which is based in the Washington state Constitution.¹ Other than

¹ WASH. ST. CONST. Art. II, § 12.
Advisory Opinion 2020-No. 2
December 2020

the civil office prohibition in Article 2, Section 14, the Constitution does not limit a legislator's ability to hold outside professions. The only other written limits on legislators' non-legislative jobs arises within the Ethics Act itself.

Under Washington's system, many legislators must earn their living outside the legislature. This fact brings a diversity of background and experience to legislative deliberations that is very valuable. When presented with different employment situations, the Board must determine where and under what circumstances it must draw the line as to what outside employment is within defined ethical boundaries and what is not. *See Senate Board of Ethics Advisory Opinion 69-3 (cited as precedent in Advisory Opinion 95-1).*

While there are several provisions of the Act applicable depending on the type of outside employment or the specific job duties of the outside employment, the following provisions of the Act are those most often used in analyzing whether the outside employment of legislators is within the ethical confines of the Act:

RCW 42.52.330 (Citizen-Legislature)

By constitutional design, the legislature consists of citizen-legislators who bring to bear on the legislative process their individual experience and expertise. The provisions of this chapter shall be interpreted in light of this constitutional principle.

RCW 42.52.020 (Conflict of Interest)

No state officer or state employee may have an interest, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or incur an obligation of any nature, that is in conflict with the proper discharge of the state officer's or state employee's official duties.

RCW 42.52.070 (Special Privileges)

Except as required to perform duties within the scope of employment, no state officer or state employee may use his or her position to secure special privileges or exemptions for himself or herself, or his or her spouse, child, parents, or other persons.

The Board has previously held that RCW 42.52.330 establishes a presumption in favor of outside employment for legislators and that the question for them, in most cases, is whether the Act requires the legislator to refrain from certain functions of either the outside job or the legislative position. *Advisory Opinion 2001 – No. 1; Advisory Opinion 1999 – No. 1; Advisory Opinion 1998 – No. 6.*

1. Conflict of Interest

When looking at whether outside employment presents a conflict of interest with the legislator's official duties, the Board has used two tests: *per se* and functional. *Senate Board of Legislative Ethics Advisory Opinion 69-1 (cited as precedent in Advisory Opinion 95-1).*

The *per se* test looks at whether the legislator's outside employment presents such a direct conflict with his or her official duties that the employment itself would violate .020. The Board has previously found that the following jobs presented a *per se* violation of .020:

- Legislator as Executive Director of organization focusing on the development of grass roots lobbying (*Advisory Opinion* 1998 – No. 6);
- Legislator paid for lobbying the legislature on behalf of his outside employer (*Advisory Opinion* 1999 – No. 5);
- Legislator worked for college board and was paid to work with legislators on legislation (*Advisory Opinion* 95 – No. 1 - citing Senate Board of Legislative Ethics *Advisory Opinion* 69-1)
- Executive Director of trade organization having promotion of legislation as one of its paramount purposes (*Advisory Opinion* 95-1 – citing Senate Board of Legislative Ethics *Advisory Opinion* 69-3)

Under the functional test the question is whether there are any activities of an “outside” job that would conflict with a member’s legislative duties, thereby requiring the legislator to refrain from such duties. Several opinions recognize substantial flexibility for legislators to introduce legislation and advocate its passage when such legislation would, or could, benefit a legislator’s outside employer or benefit the legislator equally with a sufficiently large class. See *In re Armstrong*, 2011 – No. 1; *In re Sheldon*, 2005 – No. 6; *Advisory Opinion* 1995 – No. 4.

The general rule regarding a legislator voting on legislation or taking actions to influence legislation that would benefit his or her employer is that a legislator does not have an interest which is in conflict with the proper discharge of legislative duties if no benefit or detriment accrues to the legislator as a member of a business, profession, occupation, or group, to a greater extent than to any other member of such business, profession, occupation or group. *Advisory Opinion* 95-1 (adopting the provisions of Joint Rule 2 of the former Code of Legislative Ethics).

2. Special Privileges

Generally, the Board has held that the outside employer cannot condition employment on legislative results or pay the legislator to push or advance the employer’s legislative agenda or to oppose legislation disfavored by the employer. Absent facts that the legislator is engaged in any of these types of prohibited employment, the Ethics Act does not prohibit a legislator from introducing, supporting, advocating or voting for legislation that may benefit the outside employer or from opposing legislation disfavored by the outside employer. *In re Armstrong*, 2011 – No. 1.

In any outside employment situation, legislators must be careful not to use their positions as legislators or their legislative titles to coerce, pressure or intimidate others on behalf of their employer. To do so could violate RCW 42.52.070 irrespective of the position the other person or persons occupy and whether the agency employing the other person or persons is a governmental or private agency. Furthermore, in their outside employment role, it is important that legislators conduct themselves in a manner which does not give rise to the appearance that legislators used their official positions to accomplish something on behalf of their employer. House Board of Ethics *Advisory Opinions* 88-1 & 85-2 (cited as precedent in *Advisory Opinion* 95-1).

Promises of employment could violate RCW 42.52.140 (reasonable expectation or quid pro quo violation) if the facts are such that it could be reasonably expected that the employment itself would influence the legislator’s action or judgment or be considered a reward for action or inaction. *Advisory Opinion* 1995 – No. 5.

A last provision of the Act potentially applicable to an outside employment position is RCW 42.52.120² dealing with compensation for outside employment. Although the provisions of this statute are beyond the scope of this opinion, members should be aware that it could be implicated.

B. Soliciting Donations from Lobbyists

In its prior opinions dealing with solicitation, the Board generally has applied two provisions of the Act to determine whether such conduct violated the Act: RCW 42.52.070 (special privileges) and RCW 42.52.140 ("reasonable expectation" rule).

RCW 42.52.070 provides in pertinent part as follows:

- (1) *Except as required to perform duties within the scope of employment, no state officer or state employee may use his or her position to secure special privileges or exemptions for himself or herself, or his or her spouse, child, parents, or other persons. . . .*

² (1) No state officer or state employee may receive any thing of economic value under any contract or grant outside of his or her official duties. The prohibition in this subsection does not apply where the state officer or state employee has complied with *RCW 42.52.030(2) or each of the following conditions are met:

- (a) The contract or grant is bona fide and actually performed;
 - (b) The performance or administration of the contract or grant is not within the course of the officer's or employee's official duties, or is not under the officer's or employee's official supervision;
 - (c) The performance of the contract or grant is not prohibited by RCW 42.52.040 or by applicable laws or rules governing outside employment for the officer or employee;
 - (d) The contract or grant is neither performed for nor compensated by any person from whom such officer or employee would be prohibited by RCW 42.52.150(4) from receiving a gift;
 - (e) The contract or grant is not one expressly created or authorized by the officer or employee in his or her official capacity;
 - (f) The contract or grant would not require unauthorized disclosure of confidential information.
- (2) In addition to satisfying the requirements of subsection (1) of this section, a state officer or state employee may have a beneficial interest in a grant or contract or a series of substantially identical contracts or grants with a state agency only if:
- (a) The contract or grant is awarded or issued as a result of an open and competitive bidding process in which more than one bid or grant application was received; or
 - (b) The contract or grant is awarded or issued as a result of an open and competitive bidding or selection process in which the officer's or employee's bid or proposal was the only bid or proposal received and the officer or employee has been advised by the appropriate ethics board, before execution of the contract or grant, that the contract or grant would not be in conflict with the proper discharge of the officer's or employee's official duties; or
 - (c) The process for awarding the contract or issuing the grant is not open and competitive, but the officer or employee has been advised by the appropriate ethics board that the contract or grant would not be in conflict with the proper discharge of the officer's or employee's official duties.
- (3) A state officer or state employee awarded a contract or issued a grant in compliance with subsection (2) of this section shall file the contract or grant with the appropriate ethics board within thirty days after the date of execution; however, if proprietary formulae, designs, drawings, or research are included in the contract or grant, the proprietary formulae, designs, drawings, or research may be deleted from the contract or grant filed with the appropriate ethics board.
- (4) This section does not prevent a state officer or state employee from receiving compensation contributed from the treasury of the United States, another state, county, or municipality if the compensation is received pursuant to arrangements entered into between such state, county, municipality, or the United States and the officer's or employee's agency. This section does not prohibit a state officer or state employee from serving or performing any duties under an employment contract with a governmental entity.
- (5) As used in this section, "officer" and "employee" do not include officers and employees who, in accordance with the terms of their employment or appointment, are serving without compensation from the state of Washington or are receiving from the state only reimbursement of expenses incurred or a predetermined allowance for such expenses.

RCW 42.52.140 provides as follows:

No state officer or state employee may receive, accept, take, seek, or solicit, directly or indirectly, anything of economic value as a gift, gratuity, or favor from a person if it could be reasonably expected that the gift, gratuity, or favor would influence the vote, action, or judgment of the officer or employee, or be considered as part of a reward for action or inaction.

In *Advisory Opinion 1995 – No. 17*, the Board was asked if it would violate the Ethics Act if public resources were used to solicit funds to be paid to a non-profit corporation which would then apply those funds to pay for a legislators' travel expenses and registration fees to enable them to attend an educational conference on legislative issues. The Board determined that since most if not all of those solicited would be lobbyists, the solicitation did not fall within the member's legislative duty, and that such solicitation would violate both RCW 42.52.070 and RCW 42.52.160.

In *Advisory Opinion 1996 – No. 1*, the Board was asked whether it would violate the Act for a legislator to solicit funds to pay for the attendance of legislators at an educational conference on legislative issues. No public funds would be used in the solicitation and some or all of those solicited would be lobbyists or involved in lobbying activities before the legislature. In holding that such a solicitation would violate the Act, the Board applied the reasonable expectation rule (RCW 42.52.140) to reach this conclusion. Further, the Board held that when the reasonable expectation rule is applicable, it prohibits acceptance as well as solicitation.

In *Advisory Opinion 1998 – No. 5*, the Board determined it would violate the Act for a legislator or legislative staff person to accept or solicit contributions from lobbyists for legislative "events," such as member and/or staff meetings or retreats; end of session "appreciation" events; and member gifts on the occasion of a first floor speech. The Board held that "by soliciting such assistance from those who have a direct interest in legislative action, there would be a use of official position to obtain 'special privileges' in violation of the statute." The Board added that such a solicitation creates a clear impression of a relationship with mutual obligations which is in violation of the "reasonable expectation" statute and raises the appearance of reasonable expectation to the outside observer. Further, from the standpoint of the person being solicited, there could be a concern that refusal to participate could have negative consequences in terms of access and good will." "Solicitation implies a demand for special privileges and a reasonable expectation of influence. *Id.* at 3.

In *Advisory Opinion 2000 – No. 1*, the Board was asked whether a legislator, without using state resources, could raise funds for community-based charities and, if yes, whether it mattered from whom such donations were solicited. The Board determined that the Act does not prohibit a legislator, acting without use of state resources, from supporting community-based charities. Such support may include fund-raising, provided the legislator does not "specifically solicit lobbyists or lobbyist-employers." In this opinion, the Board provided examples of non-specific solicitations of lobbyists or their employers which are considered incidental and would not violate the Act: (1) a legislator sits on a board of directors of a non-profit charity and his or her name is included on the letterhead of the charity but the legislator does not sign a fund-raising letter; and (2) a legislator is a member of a local sportsman's group and is asked to sign a fund-raising letter which is sent to a list of sportsmen compiled by the group and the list contains a few individuals who are registered lobbyists.

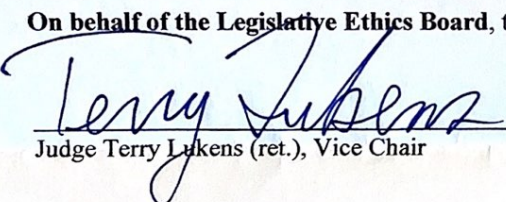
In its latest opinion on this topic, the Board determined that it was not a violation of the Act for a legislator, without the use of state resources, to appear at a fundraising event held by a charitable or non-profit organization and solicit donations for the sponsoring organization as long as the majority of attendees were not lobbyists or lobbyist employers. *Advisory Opinion* 2019 – No. 1. Citing *Advisory Opinion* 2000 – No. 1, the Board determined that this situation constituted a non-specific solicitation and was permitted under the Act.

Each time the Board has been faced with the issue of legislators soliciting items or funds directly from lobbyists or their employers, unless the funds are publicly-reported campaign contributions, the Board has determined that doing so would violate either the special privileges or reasonable expectation portions of the Act.³ In keeping with that trend, the Board in this matter holds it violates the Act when legislators, as part of their fundraising duties for their outside employer or as an independent contractor for an outside client, solicit lobbyists or lobbyist employers⁴ for contributions or donations that benefit their outside employer or client. Specifically, even if a legislator does not use his or her title, “by soliciting such assistance from those who have a direct interest in legislative action, there would be a use of official position to obtain ‘special privileges’ in violation of the statute.” See *Advisory Opinion* 1998-No. 5. Furthermore, for a lobbyist who is solicited, there could be concern that refusal to participate could have negative consequences in terms of access and goodwill. This action is clearly the use of special privileges to accomplish something for an outside employer.⁵

In keeping with the Board’s opinion in *Advisory Opinion* 2000 – No. 1, the Board further holds that legislators may fundraise on behalf of their outside employers or clients provided they do not use their legislative titles in doing so and the person or entity from whom donations are sought is not a lobbyist or lobbyist employer.

The Board cautions legislators that fundraising on behalf of an outside employer or client, even without the use of a legislative title or state resources, and even when donations are not sought from lobbyists or lobbyist employers could still present an ethical risk. Most legislators are well known and that they do not use their title in fundraising does not necessarily eliminate the risk that a person or entity solicited will feel compelled to donate simply because a legislator is asking.

On behalf of the Legislative Ethics Board, this opinion is signed this 19 day of December 2020.


Judge Terry Lukens (ret.), Vice Chair

³ In the *Ethics Alert* issued in April 2019, the Board reiterated that soliciting lobbyists is a violation of the Act but that soliciting charitable donations on a personal social media platform which contains a message that any lobbyists receiving the request should not donate would not violate the Act.

⁴ By “lobbyist employer” the Board means a business or organization that directly employs a registered lobbyist. The Board does not include by use of this term individual businesses who may belong to an association which employs a registered lobbyist.

⁵ RCW 42.52.160 might also be violated under this scenario because if legislators use their title to accomplish a donation they have used state resources for the private gain of another (their outside employer).