

IF IT SMELLS FUNNY, YOU MIGHT HAVE AN ETHICS ISSUE

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*“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**

**CONFLICT OF INTEREST AND THE
DREADED “F” WORD (FELONY)**

PUBLIC/PRIVATE PERSONA 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 PERSONA 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

- Exceptions to the statute:
 - Contracts for publication of legal notices required to be published at a rate not higher than prescribed by law. Wis. Stat. s. 946.13(2)(d).
 - Issuance of tax titles, certificates or instruments secured by any tax fund for the payment of salary or other obligations due to the employee or officer. Wis. Stat. s. 946.13(2)(e).
 - Contracts for the sale of bonds or securities issued by the political subdivision provided the bonds/securities are sold to the highest bidder and the employee or officer has no duty to vote on their issuance. Wis. Stat. s. 946.13(2)(f).

CONFLICTS OF INTEREST

- Exceptions to the statute:
 - Contracts with, or tax credits or payments received by a public officer or employee for wildlife damage claims or abatement. Wis. Stat. s. 946.13(2)(g).
 - Section 946.13(1)(b) does not apply to a public officer or employee by reason of his holding not more than 2% of the outstanding capital stock of a corporate body involved in such contract. Wis. Stat. 946.13(5).
 - Section 946.13(1) does not apply to public officers or employees receiving compensation for services of less than \$10,000 a year. Wis. Stat. s. 946.13(7).
 - Practical Point: Even though exceptions exist, why even test whether they apply to you?

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.

ETHICS FOR LOCAL GOVERNMENT OFFICIALS

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 on-half of his or her support form 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 note 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?

“REAL WORLD” EXAMPLES

EXAMPLE 1

- Your county is in the process of re-routing a county highway to create a more efficient route. Your long-time friend is on the current county highway, but after the re-route will not be. Your friend indicates that the re-route will cause him to lose money because of increased transportation costs associated with his farming operations. Your friend starts having discussions with his county board supervisor about the situation and the supervisor orders up some new plans from the engineering firm assisting with the project. What do you do?

EXAMPLE 2

- 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 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 3

- 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 4

- 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?

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Thank you for your attention and service
to Wisconsin county government!

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