

**Wisconsin Ethics Memorandum Opinion EM-16-01:
Crime Prevention Funding Boards**

July 18, 2015

The creation of Crime Prevention Funding Boards (CPFBS) is authorized by Wis. Stat. §59.54(28).¹ Under this law, a County Board of Supervisors may approve a resolution to create a CPFBS. Once a CPFBS is created, a \$20.00 surcharge is added to all felony and misdemeanor convictions in that county. The county treasurer collects the money, and the CPFBS then distributes the funds in grant form to entities that have as their primary purpose preventing crime, providing a funding source for crime prevention programs, encouraging the public to report crime, or assisting law enforcement agencies in the apprehension of criminal offenders.

By statute, a county's CPFBS must include the following members or their designee: the presiding judge of the circuit court; the district attorney; the sheriff; the county executive, the county administrator, or the chairperson of the county board; the chief elected official of the largest municipality in the county; a person chosen by a majority vote of the sheriff and all of the chiefs of police departments located wholly or partly within the county; and a person chosen by the county's public defender's office.

Questions

The State Public Defender seeks guidance from the State's Bar Standing Committee on Professional Ethics on the following questions.

1. Does a public defender violate SCR 20:1.7 by serving on a CPFBS?
2. Does a public defender violate SCR 20:1.7 by choosing a person to serve on a CPFBS?
3. Does a public defender violate SCR 20:6.3 by serving on a CPFBS?

The State Public Defender also seeks guidance on whether a judge or prosecutor commits any ethical violations by participating on a CPFBS. We are unable to comment on whether a judge violates the Rules of Judicial Conduct. We also limit our memorandum opinion to the behavior of the lawyer or law firm requesting the opinion and not the behavior of other lawyers or law firms.

Answers

1. Yes, a public defender has a conflict of interest. As a member of the CPFBS, the public defender has a fiduciary duty to act in the best interest of the CPFBS. While the CPFBS does not assess or collect the surcharge, it depends on the surcharge being assessed and collected. However, the public defender may, in many cases, request that the surcharge be waived because it is prohibitive for the public defender's indigent clients. Consequently, the public defender is unable to fulfill his or her fiduciary duty to act in the best interest of the CPFBS without limiting or foregoing his or her choices in defending his or her client.

2. No, a public defender does not violate SCR 20:1.7 or SCR 20:8.4(a) by choosing a person who is not employed by or supervised by the public defender to serve on a CPF. Merely choosing a person to serve on a CPF does not make that person an agent of the public defender. The public defender would not be requesting or instructing the chosen person to act or refrain from acting in certain ways. As long as the person chosen did not have the same conflict as the public defender, then the public defender would not violate SCR 20:1.7 or SCR 20:8.4(a).
3. No, SCR 20:6.3 is not applicable because the CPF is not a legal services organization.

Analysis

1. Does a public defender violate SCR 20:1.7 by participating on a CPF?

The public defender is concerned that his or her mandatory participation on a CPF creates a conflict of interest with current clients as prohibited under SCR 20:1.7(a)(2) because it presents a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to the CPF.

SCR 20:1.7, which governs conflicts of interest for current clients, provides:

(a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

...

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Comment [9] to SCR 20:1.7 acknowledges that a lawyer's service on a board of directors may create a significant risk that a lawyer may be materially limited in his or her representation of current clients.

In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

The critical question is whether the difference in interests will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Determining whether there is a significant risk of a material limitation requires identification and analysis of the relevant facts

The following facts are relevant. First, Wis. Stat. §59.54(28)(c)7 provides that a CPF B must include “[a] person chosen by the county’s public defender’s office.” While the statute does not require that a public defender serve on the CPF B, it does require that the person be chosen by the county public defender’s office.

Second, the CPF B does not assess or collect the \$20.00 surcharge. Wis. Stat. § 973.0455 states:

(1) If a court in a county that has established a crime prevention funding board under s. 59.54 (28) imposes a sentence or places a person on probation, the court shall impose a crime prevention funding board surcharge. The surcharge is the total amount calculated by adding up, for each misdemeanor or felony count on which a conviction occurred, \$20.

(2) After the clerk determines the amount due, the clerk of court shall collect and transmit the amount to the county treasurer under s. 59.40 (2) (n). The county treasurer shall then distribute the moneys under s. 59.25 (3) (gm).

However, while the court - and not the CPF B - assesses or collects the surcharge, a public defender may, in many cases, request that the surcharge be waived because the surcharge would be prohibitive for the public defender’s indigent clients.

Third, the purpose of the CPF B is to choose the recipients of the grants. Pursuant to Wis. Stat. § 59.54(28)(d), the CPF B’s role is to direct the county treasurer to distribute the funds that have been collected in the form of grants to 1. nonprofit organizations within the county that have as their primary purpose preventing crime, providing a funding source for crime prevention programs, encouraging the public to report crime, or assisting law enforcement agencies in the apprehension of criminal offenders; and 2. law enforcement agency within the county that has a crime prevention fund, if the contribution is credited to the crime prevention fund and is used for crime prevention purposes.

Fourth, a person serving on the CPF B has a fiduciary duty, which includes the duty of loyalty, to the CPF B.

Given these facts, the question is whether a public defender’s service on the CPF B, even though the CPF B has no authority to assess or collect the surcharge but may only direct the county treasurer to distribute the funds, creates a significant risk that will materially interfere with the public defender’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Conflicts can arise when a lawyer serves as a member of a nonprofit’s board of directors because of the fiduciaries duties imposed on the nonprofit director as well as lawyer’s ethical duties to his or her clients. As part of the duty of loyalty, a director is required to act in the best interests of the nonprofit organization. The lawyer’s ethical duties to his or her clients might preclude the lawyer from acting in the best interests of the organization. In addition, a lawyer’s service on the board of directors of a nonprofit might materially interfere with the lawyer’s choices in representing his or her client.

A public defender serving on the CPFEB would have a conflict of interest. As a member of the CPFEB, the public defender has a fiduciary duty to act in the best interest of the CPFEB. While the CPFEB does not assess or collect the surcharge, it does choose the recipients of the grants. The grants depend on the surcharge being assessed and collected, and the public defender may, in many cases, request that the surcharge be waived because it is prohibitive for the public defender's indigent clients. Consequently, the public defender is unable to fulfill his or her fiduciary duty to act in the best interest of the CPFEB without limiting or foregoing his or her choices in defending his or her client.

2. Does a public defender violate SCR 20:1.7 by choosing a person to serve on a CPFEB?

The public defender is concerned that choosing a person to serve on a CPFEB, when the public defender has a conflict of interest, would violate of the Rules of Professional Conduct because SCR 20:8.4(a) prohibits a lawyer from violating the Rules through the acts of another. Paragraph [2] of the ABA Comment following SCR 20:8.4 provides guidance: "Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf." The public defender does not violate SCR 20:8.4(a) by merely choosing a person to serve on a CPFEB when that person is not employed by or supervised by the public defender. By merely choosing the person to serve on a CPFEB, the public defender does not make that person an agent and is not requesting or instructing the chosen person to act or refrain from acting in certain ways.² As long as the chosen person does not have the same conflict as the public defender, then the public defender would not violate SCR 20:1.7 or SCR 20:8.4(a).

Paragraph [14] of the Preamble to the Rules of Professional Conduct instructs: "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself." It would be an unreasonable interpretation of the Rules to conclude that the public defender would violate the Rules by merely choosing a person who is not employed by or supervised by the public defender to serve on a CPFEB, when that person would not be representing any criminal defendants subject to the surcharge and would not be directed in his or her service on the board by the public defender.

3. Does a public defender violate SCR 20:6.3 by serving on a CPFEB?

The public defender is concerned that his or her mandatory service on a CPFEB potentially violates SCR 20:6.3, which governs membership in legal services organizations. Although the Rule allows a lawyer to be a member of a legal services organization even if that organization serves persons having interests adverse to a client of the lawyer, it prohibits a lawyer from knowingly participating in a decision or action of the organization if participating in the decision would be incompatible with the lawyer's obligations to a client under SCR 20:1.7, or if the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

SCR 20:6.3, which governs membership in legal services organizations, provides:

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) if participating in the decision would be incompatible with the lawyer's obligations to a client under SCR 20:1.7; or
- (b) where the decision could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

“Legal services organization” is not defined in SCR 20:6.3 or in SCR 20:1.0, Terminology. However, “firm” or “law firm” is defined in SCR 20:1.0(d) to include legal services organizations:

- (d) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization, including a government entity.

The CPFB is not a board of a legal services organization. The CPFB provides no legal services, and it does not employ lawyers to provide legal services. Its sole role is to distribute funds in the form of grants to nonprofit organizations or law enforcement agencies for the purpose of crime prevention. Consequently, SCR 20:6.3 is not applicable.

Conclusion

A public defender would violate SCR 20:1.7 by serving on a CPFB. As a member of the CPFB, the public defender would have a fiduciary duty to act in the best interest of the CPFB. While the CPFB does not assess or collect the surcharge, it does depend on the surcharge being assessed and collected. However, the public defender may, in many cases, request that the surcharge be waived because it is prohibitive for his or her indigent clients. Consequently, the public defender is unable to fulfill his or her fiduciary duty to act in the best interest of the CPFB without limiting or foregoing his or her choices in defending his or her client.

While the public defender is prohibited by the SCR 20:1.7 from serving on a CPFB, he or she is not prohibited by the Rules from choosing a person who is not employed by or supervised by the public defender to serve on a CPFB. It would be an unreasonable interpretation of the Rules to conclude that the public defender would violate the Rules by merely choosing a person to serve on a CPFB, when that person would not be representing any criminal defendants subject to the surcharge and would not be directed in his or her service on the board by the public defender.

In addition, SCR 20:6.3 is not applicable because the CPFB is not a legal services organization.

¹ Wis. Stat. § 59.54(28) provides:

(28) CRIME PREVENTION FUNDING BOARD.

(a) In this subsection:

1. "Chief elected official" means the mayor of a city or, if the city is organized under subch. I of ch. 64, the president of the council of that city, the village president of a village, or the town board chairperson of a town.
2. "Crime board" means a crime prevention funding board that is created under this subsection.
3. "Municipality" means a city, village, or town.

(b) A county may create a crime board. In a county that creates a crime board, the treasurer shall receive moneys and deposit them as described in s. 59.25 (3) (gm). The funds in such an account may be distributed upon the direction of the crime board under par. (d). The crime board shall meet, and its members may receive no compensation, other than reimbursement for actual and reasonable expenses incurred in the performance of their duties. Members shall serve for the terms that are determined by the crime board.

(c) A county crime board shall consist of the following members:

1. The presiding judge of the circuit court, or his or her designee.
2. The district attorney, or his or her designee.
3. The sheriff, or his or her designee.
4. One of the following county officials, or his or her designee:
 - a. The county executive.
 - b. If the county does not have a county executive, the county administrator.
 - c. The chairperson of the county board of supervisors [, or his or her designee,] if the county does not have a county executive or a county administrator.

NOTE: The language in brackets repeats language in subd. 4. (intro.). Corrective legislation is pending.
5. The chief elected official of the largest municipality in the county, as determined by population, or his or her designee.
6. A person chosen by a majority vote of the sheriff and all of the chiefs of police departments that are located wholly or partly within the county.
7. A person chosen by the county's public defender's office.

(d)

1. The crime board may solicit applications for grants in a format determined by the crime board, and may vote to direct the treasurer to distribute grants to applicants from moneys in the crime prevention fund under s. 59.25 (3) (gm). The crime board may direct the treasurer to distribute grants to any of the following entities, in amounts determined by the crime board:
 - a. One or more private nonprofit organizations within the county that has as its primary purpose preventing crime, providing a funding source for crime prevention programs, encouraging the public to report crime, or assisting law enforcement agencies in the apprehension of criminal offenders.
 - b. A law enforcement agency within the county that has a crime prevention fund, if the contribution is credited to the crime prevention fund and is used for crime prevention purposes.

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2. Not less than 50 percent of the payments made under subd. 1. shall be made to one or more organizations described in subd. 1. a., except that if no organization described in subd. 1. a. exists within the county, all of the payments may be made to a law enforcement agency under subd. 1. b.
- (e) Annually, the crime board shall submit a report on its activities to the clerk of court for the county that distributed the funds, to the county board, and to the legislative bodies of each municipality that is located wholly or partly within the county. The report shall contain at least all of the following information for the year to which the report relates:
1. The name and address of each entity that received a grant, including contact information for the leadership of the entity.
 2. A full accounting of all funds disbursed by the treasurer at the direction of the crime board, including the amount of the funds disbursed, the dates of disbursement, and the purposes for which the grant was made.
- (f) Annually, each recipient of a grant awarded under this subsection shall submit a report on its activities to all of the entities specified in par. (e). The report shall contain at least all of the following information for the year to which the report relates:
1. The name and address of the entity.
 2. The name and address, and title, of each member of the governing body of the entity.
 3. The purposes for which the grant money was spent.
 4. A detailed accounting of all receipts and expenditures of the entity that relate to the grant money.
 5. The balance of any funds remaining.
- (g) Upon the creation of a crime prevention funding board, the initial members of the board specified under par. (c) shall declare that they are serving on the board, or appoint their designees, not later than the first day of the 4th month beginning after a board is created.

² SCR 20:5.1 and 5.3 are not implicated by the public defender merely choosing a person to serve on the CPFB because the person chosen is not employed by or supervised by the public defender.