

ADVISORY OPINION

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SUMMARY OF CHANGES: Updated format only.

Boards and Commissions

This Advisory Opinion supplements Advisory Opinion 96-09. In that opinion the Executive Ethics Board (EEB) considered the application of RCW 42.52 to boards and commissions whose members are required or permitted to be appointed from identifiable groups or interests. A strict application of RCW 42.52.030 might prevent some of these board and commission members from serving. However, RCW 42.52.903 provides:

Nothing in this chapter shall be interpreted to prevent a member of a board, committee, advisory commission, or other body required or permitted by statute to be appointed from any identifiable group or interest, from serving on such body in accordance with the intent of the legislature in establishing such body.

Based on RCW 42.52.903, the Board approved rules proposed by the Housing Finance Commission that authorized members to disclose particular financial interests in contracts and other transactions, and recuse themselves from discussing and voting on those matters. At the conclusion of Advisory Opinion 96-09 the Board stated that:

The rule proposed by the commission represents an exception to the general application of chapter 42.52 RCW. Such exceptions are only authorized if the board or commission involved adopts a specific rule and such proposed rules should be provided to the Board for its review.

A number of boards and commissions have been considering the adoption of rules that conform to Advisory Opinion 96-09, and the Board had been asked to approve Model Rules that could be adapted by various boards and commissions without each one having to come before the Board for its approval.

The Board agrees that use of such Model Rules is an efficient way for the Board to provide guidance for boards and commissions that chose to adopt rules similar to the rule discussed in Advisory Opinion 96-09. Accordingly, the Board approves the adoption of the Model Rules described below without prior submission to the Board. This prior approval comes with two limitations. First, it only applies to boards and commissions whose members are required or permitted by statute to be appointed by an identifiable group or interest. Second, after the rules have

been adopted a copy should be filed with the Executive Ethics Board.

The following Model Rules are hereby approved and may be adapted to a board or commission's particular needs.

Model Rule #1

(1) When a member of a (*board, committee or commission*) is beneficially interested, directly or indirectly, in a contract, sale, lease, purchase or grant that may be made by, through, or is under the supervision of the (*board, committee or commission*), in whole or in part, or when the member accepts, directly or indirectly, any compensation, gratuity, or reward from any other person beneficially interested in such contract, sale, lease, purchase or grant, the member shall:

(a) Recuse him or herself from the (*board, committee or commission*) discussion regarding the specific contract, sale, lease, purchase or grant;

(b) Recuse him or herself from the (*board, committee or commission*) vote on the specific contract, sale, lease, purchase or grant; and

(c) Refrain from attempting to influence the remaining (*board, committee or commission*) members in their discussion and vote regarding the specific contract, sale, lease, purchase or grant.

(2) The prohibition against discussion set forth in sections (a) and (c) shall not prohibit the member of the (*board, committee or commission*) from using his or her general expertise to educate and provide general information on the subject area to the other members.

(3) Under subsection (1), "any other person" has a beneficial interest in a contract, sale, lease, purchase or grant when the other person bids or otherwise seeks to be awarded the contract, sale, lease, purchase or grant.

In addition to setting out the principle, Model Rules should contain examples of how the rule applies to the particular board or commission.

EXAMPLE:

The Medical Quality Assurance Commission is composed of licensed physicians, physician assistants and representatives of the public interest. A licensed physician member of the commission is employed by a company which conducts drug and alcohol evaluations for the purpose of determining whether licensed health care practitioners require treatment for drug and alcohol addiction. The commission is in the process of selecting a contractor to conduct evaluations for the commission's use during disciplinary activities. The company which employs the physician member of the board has bid for the contract.

The physician member of the commission may use his general expertise regarding the performance of evaluations for chemical addiction to educate the commission as to the general elements of

treatment programs. The member is prohibited from participating in the commission discussion and analysis implementing the criteria for selecting a contractor, and is prohibited from participating in the commission vote to select a contractor.

EXAMPLE:

The Medical Quality Assurance Commission contracts with King Software to provide computer systems for tracking disciplinary cases. King Software's contract with the Commission is almost expired and the Commission must seek bids from software companies for the next contract period. The Commission issues a request for bids to various software companies who offer suitable software, including Medsoft, Inc.

Approximately 9 months ago, one Commission member worked for Medsoft, Inc. and received compensation from that company. The commission member subsequently left Medsoft, Inc. and went to work for the state. The Commission member is not required to recuse herself from selecting a contractor for the Commission's disciplinary tracking system. Medsoft did not have a beneficial interest in the Commission's contract until it bid on the contract.

Therefore, Medsoft was not a person beneficially interested in the contract when the Commission member received the compensation. However, if the Commission member received compensation from Medsoft after it bid on the contract, the Commission member would be required to disclose the fact that she received the compensation from a bidder, and to recuse herself from the Commission's specific discussion and the vote awarding the contract.

Model Rule #2

(1) When a member of a (*board, committee or commission*) either owns a beneficial interest in or is an officer, agent, employee or member of an entity or individual which is engaged in a transaction involving the (*board, committee or commission*), the member shall:

(a) Recuse him or herself from the (*board, committee or commission*) discussion regarding the specific transaction;

(b) Recuse him or herself from the (*board, committee or commission*) vote on the specific transaction; and

(c) Refrain from attempting to influence the remaining (*board, committee or commission*) members in their discussion and vote regarding the specific transaction.

(2) The prohibition against discussion and voting set forth in sections (a) and (c) shall not prohibit the member of the (*board, committee or commission*) from using his or her general expertise to educate and provide general information on the subject area to the other members.

(3)(a) "Transaction involving the (*board, committee or commission*)" means a proceeding, application, submission, request for a ruling or other determination, contract, claim, case, or other similar matter that the member in question believes, or has reason to believe:

- (i) Is, or will be, the subject of (*board, committee or commission*) action; or
- (ii) Is one to which the (*board, committee or commission*) is or will be a party; or
- (iii) Is one in which the (*board, committee or commission*) has a direct and substantial proprietary interest.

(b) "Transaction involving the (*board, committee or commission*)" does not include the following: Preparation, consideration, or enactment of legislation, including appropriation of moneys in a budget, or the performance of legislative duties by a member; or a claim, case, lawsuit, or similar matter if the member did not participate in the underlying transaction involving the (*board, committee or commission*) that is the basis for the claim, case, or lawsuit. Rulemaking is not a "transaction involving the (*board, committee or commission*)."

(4) "(*Board, committee or commission*) action" means any action on the part of the (*board, committee or commission*), including, but not limited to:

- (a) A decision, determination, finding, ruling, or order; and
- (b) A grant, payment, award, license, contract, transaction, sanction, or approval, or the denial thereof, or failure to act with respect to a decision, determination, finding, ruling, or order.

EXAMPLE:

The Nursing Quality Assurance Commission disciplines licensed nurses in Washington. The commission is conducting an investigation involving the nursing services provided by a private hospital. One of the members of the commission sits on the board of directors for that hospital. The member must recuse herself from any commission investigation, discussion, deliberation and vote with respect to disciplinary actions arising from the hospital's nursing services.

Model Rule #3

(1) If recusal occurs pursuant to model rule #1 or #2, the member of the (*board, committee or commission*) shall disclose to the public the reasons for his or her recusal from any (*board, committee or commission*) action whenever recusal occurs. The (*board, committee or commission*) staff shall record each recusal and the basis for the recusal.