



The State of Wisconsin
Department of Justice
Madison
53702

UNPUBLISHED

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OAG 67-79

Mr. John B. McCarthy, Administrator
Board of Attorneys Professional Responsibility
Room 406, 110 East Main Street
Madison, Wisconsin 53703

Dear Mr. McCarthy:

The Board of Attorneys Professional Responsibility has among its responsibilities the investigation of the moral character of persons seeking admission or readmission to the bar.

You state that the typical steps involved in considering a petition for reinstatement are as follows:

Upon receipt of a petition, the Administrator commences an investigation. Frequently the matter is referred to one of the Board's 16 District Professional Responsibility Committees for investigation. Notice of the petition is published in the Bar Bulletin and a newspaper of general circulation in the county or counties wherein the lawyer last practiced law. ... Routinely, the District Committee will hold an investigative meeting with the petitioner. [The Board has] adopted a policy of treating these investigative meetings as open meetings. Following the investigative meeting, the District Committee will prepare findings and a recommendation which will be forwarded to the Administrator. The Administrator reviews the matter and makes his report and independent recommendation to the Board of Attorneys Professional Responsibility.

You request my opinion with respect to the following questions:

1. Pursuant to the open meeting law, should this Board treat the appearance of a petitioner for reinstatement as an open meeting?

2. If the answer is yes, should the Board treat cases involving medical incapacity the same as those involving misconduct?

I have considerable doubt whether the open meeting law applies to the Board. The court in State ex rel. Lynch v. Dancy, 71 Wis. 2d 287, 295, 238 N.W.2d 81 (1976), held that the provisions of the former open meeting law, sec. 66.77, Stats., were not applicable to the Wisconsin Judicial Commission. The court based its holding on a brief quotation from In re Cannon, 206 Wis. 374, 240 N.W. 441 (1932). In that case the court struck down a special statute which purported to reinstate a former member of the bar on the ground that it constituted an unconstitutional invasion of the powers of the judicial branch. The court stated that "[t]he judicial department of government is responsible for the plane upon which the administration of justice is maintained. Its responsibility in this respect is exclusive." Id. at 383, quoted in State ex rel. Lynch v. Dancy, 71 Wis. 2d at 295. Moreover, at 81 Wis. 2d xxi the court stated that the Board "is established as an arm of the Supreme Court."

Even if the open meeting law does not by its terms apply to the Board, the court has shown a willingness to consider the Legislature's views in determining the public policies it will adopt in bar-related activities. In re Admission of Certain Persons to the Bar, 211 Wis. 337, 340, 341, 247 N.W. 877 (1933); Application of Miss Goodell, 48 Wis. 693, 694, 81 N.W. 551 (1879). The Legislature has expressed the policy of the open meeting law in the broadest possible terms. Section 19.81(1), Stats., declares the policy of this state to be that "the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." To that end, the Legislature declares that "all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law." Sec. 19.81(2), Stats.

Section 19.85, Stats., lists the exemptions from the open meeting requirements. It provides in relevant part:

(1) Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. . . . A closed session may be held for any of the following purposes:

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....

(b) Considering dismissal, demotion, licensing or discipline of any public employe or person licensed by a board or commission or the investigation of charges against such person, or considering the grant or denial of tenure for a university faculty member, and the taking of formal action on any such matter; provided that the faculty member or other public employe or person licensed is given actual notice of any evidentiary hearing which may be held prior to final action being taken and of any meeting at which final action may be taken. The notice shall contain a statement that the person has the right to demand that the evidentiary hearing or meeting be held in open session. This paragraph and par. (f) do not apply to any such evidentiary hearing or meeting where the employe or person licensed requests that an open session be held.

....

(f) Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

It is my opinion that under the open meeting law the meetings you describe fall within the exemption of sec. 19.85(1)(b), Stats. Therefore, in answer to your first question, a closed meeting would be permissible under sec. 19.85(1)(b), Stats. This answer makes it unnecessary to address your second question.

There is some uncertainty as to the necessity under Board rules of the Board's current practice of holding open investigative meetings with the petitioner concerning his or her reinstatement as public meetings. If such a meeting were before a referee, Board Rule 18 requires the hearing to be public. The meetings in question are investigative and not before a referee. Rule 24, 81 Wis. 2d at xxix, provides that

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"[a]ll papers, files, transcripts and communications in an investigation and the proceedings before the board before the filing of a formal complaint or petition are confidential," with certain exceptions.

If the petition of the attorney for reinstatement is a "petition" within the meaning of Rule 24, then probably the investigative meeting must be open under the terms of that Rule. On this construction, there is a conflict between the Rule and sec. 19.85(1)(b), Stats., and if the question were submitted to the Supreme Court, it probably would conclude that the Rule supersedes sec. 19.85(1)(b), Stats. On the other hand, if the attorney's petition is not contemplated by Rule 24, there is no conflict with sec. 19.85(1)(b), Stats., and, pursuant to its noted policy, the court could exercise its authority and adopt the legislatively expressed policy.

In view of the uncertain application of the open meeting law to Board proceedings and the uncertain character of such meetings under existing Board Rules, I suggest that the Board seek direction from the supreme court if further guidance is desired.

Sincerely yours,



Bronson C. La Follette
Attorney General

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CAPTION:

If there is no conflict between the Rules of the Board of Attorneys Professional Responsibility and the open meeting law, it lies within the discretion of the court to defer to legislative policy. If there is a conflict, the court probably would conclude that the open meeting law is inapplicable.