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May 13, 2010

Mr. Geoff Obrzut  
 President  
 Illinois Community College Board  
 401 East Capitol Avenue  
 Springfield, IL 62701

**Re: ICCB Board Member Qualification Question**

Dear Geoff:

You have asked whether Illinois law prohibits a member of the Illinois Community College Board (the "Board") from simultaneously being a party to a consulting contract with an Illinois public community college. Based on our review of the relevant Illinois statutory provisions we are of the opinion that Illinois law does not prohibit such a simultaneous relationship, however, we are further of the opinion that such a relationship will from time to time require the board member to abstain from voting on and otherwise participating in the discussion of issues presented to the Board which could raise the potential of a conflict of interest between the Board member's duty to the public and the Board member's duty under the Board member's contract with the public community college.

The Relationship in Question

It is our understanding that this request for guidance has arisen due to the fact that a current Board member has voluntarily disclosed to the Board that he has entered into a consulting agreement with an Illinois public community college which calls for the Board member to consult with the community college's president on special projects identified by that president, drawing upon the Board member's expertise in matters of public education.<sup>1</sup> The Board member receives a flat monthly fee for services rendered that does not vary based on the nature or volume of services requested. The agreement has a stated one year term, but may be

<sup>1</sup> The Board member in question first discussed with the undersigned the potential of his entering into a relationship with a public community college on March 24, 2008. No opinion letter was requested at that time, but the opinion expressed herein is consistent with the advice rendered by the undersigned to the Board member at that time.

canceled on five days notice with or without cause by either party to the contract. Upon early termination of the agreement, the Board member is entitled to payment only for services rendered up to the date of the agreement's termination. The agreement does not provide for renewal upon completion of the one year term.

### The Public Community College Act

The starting point for determining the qualifications and any limitations imposed upon an ICCB Board member is the Public Community College Act, 110 ILCS 805 (the "PCCA"). The PCCA provides that members of the Board shall be:

1. Citizens and residents of the State of Illinois;
2. Knowledgeable, interested, and/or experienced in community colleges;
3. Not a member of a school board or board of trustees of a public or non-public university or technical institute; and
4. Not an employee of the State or federal government, with the exception that a Board member may be employed by a public community college.

110 ILCS 805/2-2. Examination of this provision tells us that the General Assembly has addressed both who can be and who cannot be a member of the Board. Nothing set forth therein excludes the Board member in question from serving on the Board due to his agreement with the community college in question.

A review of the history of this part of the PCCA provides further guidance. As originally enacted, the PCCA excluded two additional classes of individuals from Board service; namely,

1. Those holding public employment for which he or she receives a regular salary from public funds; and
2. Those engaged in education as a profession.

The first of these two limitations was eliminated by the General Assembly in 1989, effective January 1, 1990 (Public Act 86-485) and the second in 2005, effective July 8, 2005 (Public Act 94-157). The 2005 amendment to the PCCA in fact required the Governor to appoint at least one community college district trustee and one community college faculty member to the Board beginning on July 1, 2005. Thus the General Assembly has over the years moved from envisioning the Board as made up of private citizens interested in but not engaged in the business of education, to a Board which recognizes that those directly and currently involved with public community colleges can bring insight and perspective to Board deliberations. We accordingly find nothing in the PCCA that prohibits a current Board member from holding a consulting agreement with an Illinois public community college.

### Conflicts of Interest

While the PCCA does not prohibit the relationship in question, do other statutes and considerations effectively prohibit it? Gubernatorial appointees are required to swear or affirm that they will “faithfully discharge” the duties of their appointed office to the best of their abilities. 5 ILCS 250/10, Illinois Constitution, Art. XIII, Sec. 3. The Illinois Supreme Court advises that “the faithful performance of official duties is best secured if a governmental officer, like any other person holding a fiduciary position, is not called upon to make decisions that may advance or injure his individual interest.” City of Chicago v. Keane, 64 Ill.2d 559 (1976). Moreover, federal law prohibits the use of one’s public position to fraudulently deprive the public of its intangible right to “honest services” from that individual. 18 U.S.C. §1346.

There are occasions upon which the ICCB is called upon to make determinations which directly and solely impact a single community college. Those decisions include:

1. Evaluation and determination of continuing recognition status.
2. Approving new units of instruction, research, and public service.
3. Approving new branch campuses and certain extension centers.
4. Approving certain capital projects.
5. Those which arise out of Board administration of certain grant programs and funds.

110 ILCS 805/2-12.

Casting a vote on any of these matters could allow one to question whether the Board member’s relationship to a particular community college unduly influenced the Board member’s vote. To avoid any appearance of a conflict of interest, we accordingly recommend that any Board member who has a relationship with an individual Illinois public community college abstain from voting upon any motion directly and solely impacting that Illinois public community college. We further recommend that the Board member refrain from any participation in the discussion concerning the merits of such a motion.<sup>2</sup> This will avoid any claim that a decision made by the ICCB should be set aside or reconsidered due to Board member’s conflict of interest being present when the decision was made and should help the member avoid any allegation that he has deprived the State of his “honest services” in fulfilling his duties as a member of the ICCB’s Board. We note that our recommendation is also consistent by way of analogy, to the method of dealing with conflicts of interests in matters of public contracting the General Assembly establishes in the Public Officer Prohibited Activities Act, 50 ILCS 105. Pursuant to

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<sup>2</sup> These recommendations are not meant to extend to the public community college trustee or faculty member appointed to the Board by the Governor. Our understanding is that the scope of your request for opinion and advice does not encompass those positions. We thus express no opinion as to when, if ever, those individuals should refrain from voting or participating in debate of the merits of a motion due to a conflict of interest.

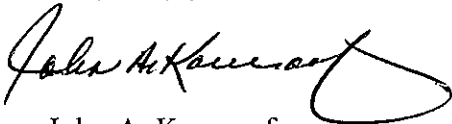
that statute a public official may not vote to approve contracts with entities with whom the public official has a financial interest, but rather must (1) publically disclose his interest in the entity, prior to or during deliberations on the contract in question, and then (2) abstain from voting on said contract. 50 ILCS 105/3. While a Board member with a relationship to a public community college would not have a financial interest in the public community college in the same manner in which he would have in a for-profit business entity, it would seem to us that if disclosure and abstention are appropriate when one has a chance to directly profit from use of government funds, then it would be more than satisfactory to act in the same manner when one only has a more indirect interest in a public decision by virtue of being a consultant to the public entity impacted by that decision.

### Illinois Ethics Acts

During the process of developing this opinion letter, we also reviewed the Illinois Governmental Ethics Act, 5 ILCS 420 and the Illinois State Officials and Employees Ethics Act, 5 ILCS 430. We noted that the Illinois Governmental Ethics Act provides that it is unlawful for an appointed member of a State board to have or acquire a contract "with the State" that "relates to the board" of which he is an appointee. 5 ILCS 420/3A-35. The contract in question, however, is not "with the State," which in this case we would construe to mean the ICCB, and not the local community college. Local community colleges are in fact included in the definition of a "unit of local government," not state government, under this particular act. 5 ILCS 420/1-120. The Illinois State Officials and Employees Ethics Act provides certain restrictions upon the receipt of fees and compensation by former state appointees (5 ILCS 430/5-45) and restrictions upon those with interests in contracts with "state" agencies (5 ILCS 430/5-55). We find these provisions inapplicable to the current situation inasmuch as the Board member is not a former board member and because a community college, by statutory definition, is not a state agency. 5 ILCS 430/1-5. We accordingly do not find either of these statutes to be applicable to the question present to us.

If you have any questions, please feel free to contact me.

Very truly yours,



John A. Kauerauf

JAK:smr