

CORPORATION COUNSEL

Brown County

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April 20, 2012

Mr. J.B. VanHollen,
Wisconsin Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Re: Request for Attorney General Opinion

I am the Corporation Counsel for Brown County. I request you review the following issues presented and give a legal opinion. Your opinion will be most helpful to Brown County. There is no imminent litigation on these questions.

- 1) Can a County Board of Supervisors retain a private attorney to represent the board and the human resources department independent of corporation counsel on a permanent basis?
- 2) Does a County Board of Supervisors have the authority to execute a contract for legal services independent of the corporation counsel?

FACTS: In June 2008, the Executive Committee of the Board of Supervisors considered and approved a written proposal from a private attorney to furnish legal services to the Board of Supervisors and to the Human Resources Department. The committee approved the proposal and incorporated it into its minutes. At the June 18, 2008 meeting of the Board of Supervisors, the Board approved the attorney's proposal after amending a section of it.

No contract was executed with the attorney following this meeting. In subsequent years, the Executive Committee and the Board have approved other proposals and contracts with the same attorney for the same services but no contracts were ever executed by a representative of the County or the attorney.

The proposals are for legal services in two distinct areas: Legal services to the Human Resources Department and legal services to the Board of Supervisors. In both instances the services furnished by the private attorney supplanted legal services traditionally furnished through the county Corporation Counsel. The legal services are provided to the Board and the Human Resources Department independent of the County's Corporation Counsel. In 2008 and 2010, the private

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attorney submitted documents entitled Proposal for Legal Services, Retainer Agreement, and Labor Negotiation Contract (See attached exhibits A-1 to A-4).

The effect of the Board of Supervisors' actions is to create two separate sources of legal services to different parts of the County. Corporation Counsel provides legal services to the County Executive, elected county officers and all departments except the Human Resources Department. The private attorney provides legal services to the Board of Supervisors and to the Department of Human Resources. This situation existed from 2008 to February 2012. Because of a budget veto in the 2012 budget, the private attorney continues to provide legal services to the Human Resources Department but is no longer the Board of Supervisors' attorney.

ANALYSIS:

Can a County Board of Supervisors retain a private attorney to represent the board and the human resources department independent of corporation counsel on a permanent basis?

Answer: No.

Wis. Stat. § 59.42 sets forth the duties and responsibilities of a county corporation counsel. Wis. Stat. §59.42(1)(b)&(c) are the provisions applying to Brown County's Corporation Counsel.

Wis. Stat. §59.42(1)(b) states the corporation counsel is appointed by the county executive and confirmed by the county board. The corporation counsel is supervised by the county executive. The county executive may remove the corporation counsel with the concurrence of the county board. Appointment and removal of corporation counsel are responsibilities shared by the county executive and the county board but supervision is the executive's sole responsibility.

Wis. Stat. § 59.42(1)(c) states in part: "the duties of the corporation counsel shall be limited to civil matters and may include giving legal opinions to the board and its committees and interpreting the powers and duties of the board and county officers."

The county board's appointment of a private attorney to provide services to the county board and the Department of Human Resources is done pursuant to Wis. Stat. §59.42(3): "In lieu of employing a corporation counsel under sub. (1) or in addition to employing a corporation counsel under sub. (1) or (2)(a), a board shall designate an attorney to perform the duties of corporation counsel as the need arises." The Brown County Corporation Counsel is not employed under (1) or (2)(a). Sub. (1) applies to counties without a county executive or county administrator and sub. (2)(a) applies to counties with a population greater than 500,000. Accordingly sub. (3) should not apply in Brown County.

Assuming the Wis. Stat. §59.42(3) does apply to Brown County, despite the language of the provision, the county board's authority is limited by the phrase "...as the need arises." This language indicates the county board's authority to employ an attorney in addition to the corporation counsel is limited to specific situations. For example the county board could employ an attorney in addition to the corporation counsel if the corporation counsel could not represent the county in a matter because of a conflict of interest under the Rules of Professional Conduct for Attorneys. The private attorney serving the county board was employed continuously from July 2008 to February 2012. The same attorney has provided legal services to the Human Resources Department from July 2008 to the present. The attorney's provision of these services is not situational; it is an alternative to legal services from corporation counsel for every matter.

The Attorney General has addressed the duties and responsibilities of county corporation counsel on several occasions in the past and has consistently opined legal services to a county are provided by corporation counsel. In 72 Wis. Op. Atty Gen. 114 (1983) the Kenosha County Corporation Counsel asked about the circumstances under which the county board could retain special counsel not responsible to the corporation counsel under the predecessors to Wis. Stat. § 59.42. The statutes setting out the duties and responsibilities of corporation counsel at that time were somewhat different than the current statute. The opinion contains several important statements pertaining to Brown County's questions. The Attorney General States: "There is no special statute authorizing a county board to retain independent counsel to engage in labor litigation. Unless a conflict of interest situation has arisen, counsel who performs labor litigation must therefore be an assistant district attorney or an assistant corporation counsel or be supervised by the district attorney or corporation counsel under section 59.44(3)." 72 Wis. Op. Atty. Gen. 117. In repealing the prior statutes and enacting Wis. Stat. §59.42, the legislature did not enact a provision authorizing the county board to retain an attorney to perform labor litigation independent of the corporation counsel.

The Attorney General goes on to state: "In general, the district attorney or corporation counsel assumes office *cum onere* and is required to provide all needed legal services" 72 Wis. Op. Atty. Gen. 117. There is nothing in the current statute that would contradict this observation.

In the opinion addressing the Kenosha County Corporation Counsel's questions, it is implicit there is conflict between the county executive and the county board. The Attorney General states for corporation counsel "There is no inherent conflict between providing representation to the county board and providing such representation to the county executive or other county officers" 72 Wis. Atty. Gen 119. This observation would certainly hold true today.

The opinion goes on to discuss potential legal complications for corporation counsel in representing the various elected officials of the county and then states "although the true client of the district attorney or corporation counsel is the county, there may be situations where potential conflicts of interest arise in attempting to serve that client. While it is impossible to predict all situations in

which conflicts may occur, a district attorney or corporation counsel may well face a potential conflict if there is litigation between the county board and the county executive. 72 Wis. Op. Gen. 120. The current provision, Wis. Stat. §54.42(3) appears to apply to this situation described by the Attorney General. The county board has authority to retain counsel in addition to the corporation counsel when a conflict of interest or other impediment makes it impossible for corporation counsel to represent some component of the county including the county board or the county executive.

There is no statute authorizing the Brown County Board to retain a private attorney to provide it legal representation and legal services to the Department of Human Resources independent from the corporation counsel.

Does a County Board of Supervisors have the authority to execute a contract for legal services independent of the corporation counsel?

Answer: No

The answer to the second question is in part answered above. If the corporation counsel is responsible for legal services to the county then it would naturally be the corporation counsel's responsibility to enter contracts with private attorneys to provide legal services to the county.

The Attorney General has repeatedly opined that indeed that is the case. In 65 Atty Gen. 245 (1976) the Attorney General stated the county board was without authority to retain an attorney as "police legal advisor" to a sheriff's department and that those services had to come from corporation counsel or the district attorney.

In 70 Atty. Gen. 136 (1981) the Attorney General was asked if a county department of social services could retain legal representation from a source outside of the corporation counsel or district attorney. The Attorney General stated "no" that without some specific statutory authority the services were to be provided by corporation counsel or the district attorney.

In 73 Atty. Gen 8 (1984) the Attorney General was asked if a combined human services board for three counties could retain its own private representation. Here there was a statute authorizing the human services board to contract for legal services if the corporation counsel or district attorney for each county could not provide the services in a timely matter. The Attorney General stated the board could retain a private attorney only after each corporation counsel/district attorney declined to perform the work.

In 70 Wis. Op. Atty. Gen 234 (1981) the Attorney General was asked if a county board had authority to retain a private attorney to represent the county's soil conservation district in complex litigation. A statute stated the district attorney

was to provide legal services to the district. The Attorney General concluded neither the county board nor the district had authority to retain a private attorney and the legal services had to be furnished by the district attorney despite the district attorney's limited resources for complex litigation.

These opinions deal with widely differing factual circumstances but they all conclude that corporation counsel or the district attorney provides legal services to the county in its entirety unless there is a statutory provision stating otherwise. In Brown County's situation, it would be the corporation counsel's responsibility to decide how legal services will be provided to the County Board, and the Human Resources Department and to negotiate, execute and enforce a retainer agreement with a private attorney hired to represent the county those entities.

In purporting to execute contracts with a private attorney through majority approval by the county board, the board confuses its substantial authority to approve or not approve entry into county contracts with the administrative functions of negotiation, execution and enforcement of contracts. In 80 Wis. Op. Atty. Gen 49 (1991) the Attorney General addressed a conflict between the county board and the county executive over the negotiation and sale of county property. The Attorney General notes chapter 59 specifically authorizes the county board to direct the county clerk to sell county property. The decision to sell and the sale terms are policy decisions to be made by the board. The Attorney General states the actual negotiation of a contract may involve administrative duties given to the county executive. The Attorney General concludes the administration of a contract is primarily an administrative or management function. Accordingly, a county board could require approval of a retainer agreement for legal services and require terms consistent with the statutes for that approval but the actual negotiation, execution and enforcement of the contract is an administrative function and falls outside the county board's policy making authority. The line between policy making and administration is often blurred but the County Board's action here on the various agreements appears to be over the line and administrative. Here, the County Board's purported negotiation, execution and enforcement of these various agreements, (A-1 to A-4) infringes on the administrative authority of the corporation counsel and the county executive.

Thank you for your consideration of these questions.

Respectfully,

A handwritten signature in black ink, appearing to read "John Luetscher", with a long, sweeping underline that extends to the right.

John Luetscher

CORPORATION COUNSEL