

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

VOLUME 68

January 1, 1979 through December 31, 1979

BRONSON C. LA FOLLETTE
ATTORNEY GENERAL



MADISON, WISCONSIN
1979

STUDY

1970

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IN MEMORIAM: GEORGE L. FREDERICK

The unexpected death of Assistant Attorney General George L. Frederick on May 9, 1979, came as a saddening shock to those colleagues of his in the Wisconsin Department of Justice who had worked closely with him, and the many others who knew and liked George.

George, born on December 1, 1929, at Walnut, Iowa, did his undergraduate work at the University of Iowa. After military service with the United States Air Force, he attended the University of Wisconsin Law School, graduating from it in 1963. He went on to enjoy an interesting and varied legal career, commencing it in 1964 as a law clerk with a Federal judge; then teaching law at the University of Wisconsin-Extension for 5 years; going on to work as an Assistant District Attorney of Dane County for several years; and then starting his career as an Assistant Attorney General on December 28, 1970.

In his 8½ years with the Department, George made a substantial contribution to its legal work; and his death in the prime of life, at 49, deprived the State of Wisconsin of an intelligent, hard-working, devoted civil servant, who always gave his best—and gave generously of it—to the assignments that came his way. George Frederick was no “clockwatcher.” One could and did find him frequently at work on weekends, using his own time in the service of his employer, after already having worked vigorously throughout the work-week.

It was typical of George—and symbolic of the full measure of devotion he always gave to his work—that it was only after George had been in the enervating grip of a serious illness for several weeks, throughout which period he worked industriously as always, that he finally consulted a physician who placed him in the hospital; and that, then gravely ill, and faced with the serious surgery which preceded his death by some weeks, George nevertheless managed to obtain a “leave of absence” from the hospital for a few hours, in order to make out for his unit head a list of pending matters and deadlines in his work.

As a lawyer, George’s forte was complete and competent preparation of a case. His thorough research and attention to detail were tools he used diligently in such preparation; and he also had a command of the English language and a broad knowledge of law that enabled him to articulate his position clearly and convincingly in the

many cases assigned him. Among his other talents, George possessed impressive briefing skills, and he used them to good advantage.

George, however, was not, "all work and no play." As a colleague, he was well known as a person blessed with an excellent sense of humor who enjoyed being "ribbed," and in the art of ribbing "gave as good as he got," all without rancor and with George's own deep and readily-recognized laughter often heard in such exchanges.

Shakespeare said, "This above all: to thine own self be true, And it must follow, as the night the day, Thou canst not then be false to any man." George Frederick, as his colleagues in the Department well knew, was consistently true to his own distinctive, hard-working, humorous, able self; and in being so, he was true to all around him, a credit to his profession, and a reliable "pillar of strength" in legal work of real importance to Wisconsin and its citizens.

ATTORNEYS GENERAL OF WISCONSIN

FROM THE ORGANIZATION OF THE STATE

JAMES S. BROWN, Milwaukee from June 7, 1848, to Jan. 7, 1850
S. PARK COON, Milwaukee from Jan. 7, 1850, to Jan. 5, 1852
EXPERIENCE ESTABROOK, Geneva from Jan. 5, 1852, to Jan. 2, 1854
GEORGE B. SMITH, Madison..... from Jan. 2, 1854, to Jan. 7, 1856
WILLIAM R. SMITH, Mineral Point..... from Jan. 7, 1856, to Jan. 4, 1858
GABRIEL BOUCK, Oshkosh..... from Jan. 4, 1858, to Jan. 2, 1860
JAMES E. HOWE, Green Bay..... from Jan. 2, 1860, to Oct. 7, 1862
WINFIELD SMITH, Milwaukee..... from Oct. 7, 1862, to Jan. 1, 1866
CHARLES R. GILL, Watertown..... from Jan. 1, 1866, to Jan. 3, 1870
STEPHEN S. BARLOW, Dellona from Jan. 3, 1870, to Jan. 5, 1874
A. SCOTT SLOAN, Beaver Dam from Jan. 5, 1874, to Jan. 7, 1878
ALEXANDER WILSON, Mineral Point..... from Jan. 7, 1878, to Jan. 2, 1882
LEANDER F. FRISBY, West Bend from Jan. 2, 1882, to Jan. 3, 1887
CHARLES E. ESTABROOK, Manitowoc..... from Jan. 3, 1887, to Jan. 5, 1891
JAMES L. O'CONNOR, Madison from Jan. 5, 1891, to Jan. 7, 1895
WILLIAM H. MYLREA, Wausau..... from Jan. 7, 1895, to Jan. 2, 1899
EMMET R. HICKS, Oshkosh from Jan. 2, 1899, to Jan. 5, 1903
LAFAYETTE M. STURDEVANT, Neillsville.... from Jan. 5, 1903, to Jan. 7, 1907
FRANK L. GILBERT, Madison from Jan. 7, 1907, to Jan. 2, 1911
LEVI H. BANCROFT, Richland Center..... from Jan. 2, 1911, to Jan. 6, 1913
WALTER C. OWEN, Maiden Rock..... from Jan. 6, 1913, to Jan. 7, 1918
SPENCER HAVEN, Hudson..... from Jan. 7, 1918, to Jan. 6, 1919
JOHN J. BLAINE, Boscobel from Jan. 6, 1919, to Jan. 3, 1921
WILLIAM J. MORGAN, Milwaukee from Jan. 3, 1921, to Jan. 1, 1923
HERMAN L. EKERN, Madison from Jan. 1, 1923, to Jan. 3, 1927
JOHN W. REYNOLDS, Green Bay..... from Jan. 3, 1927, to Jan. 2, 1933
JAMES E. FINNEGAN, Milwaukee..... from Jan. 2, 1933, to Jan. 4, 1937
ORLAND S. LOOMIS, Mauston from Jan. 4, 1937, to Jan. 2, 1939
JOHN E. MARTIN, Milwaukee from Jan. 2, 1939, to June 5, 1948
GROVER L. BROADFOOT, Mondovi from June 5, 1948, to Nov. 15, 1948
THOMAS E. FAIRCHILD, Milwaukee..... from Nov. 15, 1948, to Jan. 1, 1951
VERNON W. THOMSON, Richland Center from Jan. 1, 1951, to Jan. 7, 1957
STEWART G. HONECK, Madison from Jan. 7, 1957, to Jan. 5, 1959
JOHN W. REYNOLDS, Green Bay..... from Jan. 5, 1959, to Jan. 7, 1963
GEORGE THOMPSON, LaCrosse from Jan. 7, 1963, to Jan. 5, 1965

BRONSON C. La FOLLETTE, Madison from Jan. 5, 1965, to Jan. 6, 1969
ROBERT W. WARREN, Green Bay from Jan. 6, 1969, to Oct. 8, 1974
VICTOR A. MILLER, Saint Nazianz.....from Oct. 8, 1974, to Nov. 25, 1974
BRONSON C. La FOLLETTE, Madisonfrom Nov. 25, 1974, to

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JOHN E. KOFRON	Assistant Attorney General
BEATRICE LAMPERT	Assistant Attorney General
CHARLES R. LARSEN	Assistant Attorney General
ROBERT W. LARSEN	Assistant Attorney General
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PAMELA MAGEE-HEILPRIN	Assistant Attorney General
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MICHAEL S. WEIDEN ¹	Assistant Attorney General
SALLY L. WELLMAN ²	Assistant Attorney General
STEVEN B. WICKLAND	Assistant Attorney General
GERALD S. WILCOX	Assistant Attorney General
WILLIAM C. WOLFORD.....	Assistant Attorney General
E. WESTON WOOD	Assistant Attorney General
E. GORDON YOUNG	Assistant Attorney General
MICHAEL L. ZALESKI	Assistant Attorney General

¹Resigned, 1979

²Appointed, 1979

³Died, 1979

PREFACE

INITIALS AT THE END OF OPINIONS

The Wisconsin Department of Justice hires a number of law students to serve as law clerks each year. These law clerks contribute significantly to the legal research and writing done in the Department.

Beginning with this volume, credit will also be given to any law students who have a substantial part in drafting a particular opinion, beyond the mere submission of legal memoranda for consideration. The initials of such law students will appear in lower case initials immediately preceding the lower case initials designating the secretary who typed the opinion.

OPINIONS
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Volume 68

Compensation; County Judge: If Senator Kepler assumes judicial office to which he was elected during his term as legislator, his compensation during his entire judicial term would be that which was applicable to the office of county judge of Sheboygan County which was in effect prior to the effective date of any increase which occurred within the term for which he was elected as legislator, which began in January, 1977. OAG 2-79

JANUARY 11, 1979.

KEN TIMPEL, *Fiscal Officer*
Administrator of Courts

You have requested my opinion whether sec. 13.04(1)(d), Stats., applies to Senator Ernest Kepler, whose term as Senator commenced in January, 1977, and expires January, 1981, but who was, at the April, 1978, spring election and during his term in the Senate elected to the office of county judge for a term commencing January, 1979, which office was by reason of ch. 449, Laws of 1977, changed to circuit judge.

The compensation of county and circuit judges was increased, subject to the provisions of Wis. Const. art. IV, sec. 26, by chs. 29, 114, 418 and 449, Laws of 1977. The first two chapters became effective prior to his election as judge, and all four will be effective by the time he assumes office in January, 1979.

It can be argued that such increases would make the legislator ineligible for the judicial office to which he was elected during his term. *See* Wis. Const. art. IV, sec. 12. It can also be argued that ch. 449, Laws of 1977, created a new office, that of circuit judge, and that the aforementioned constitutional provision would bar the legislator from eligibility to such office.

On this issue, I adopt the conclusion of 63 Op. Att'y Gen. 127 (1974), upholding the constitutionality of sec. 13.04(1)(d), Stats., when applied to members of the Legislature who are *elected* to the judiciary during their legislative terms.

I am also mindful of the fact that Senator Keppler was elected to the office of county judge and that subsequent legislation, adopted pursuant to constitutional authorization voted by the electorate in April, 1978, merged the office of county judge with that of circuit judge. But Senator Keppler essentially will assume the *judgeship* for which he was the successful candidate notwithstanding the legislative change of duties, jurisdiction and title of the office.

I am of the opinion that if Senator Keppler is not constitutionally barred from the judicial office to which he was elected, the provisions of sec. 13.04(1)(d), Stats., apply. Such statute is presumed constitutional and provides:

Any incumbent member of the legislature who, during the term for which he was elected to the legislature, by appointment or election assumes any judicial office ... for which the compensation or other emoluments were increased during the member's current legislative term ... shall be entitled to the compensation or other emoluments for such office or position only at the rate in effect prior to such increase.

The "term" referred to in this paragraph is the current term the Senator now is serving. If he assumes the office of circuit judge, his compensation as circuit judge would be that which was applicable to the office of county judge of Sheboygan County which was in effect

prior to the effective date of any increase which occurred within Kepler's term as Senator which began in January, 1977. It follows that his compensation could not be increased or decreased during his term as circuit judge by reason of any increases granted pursuant to chs. 29, 114, 418 and 449, Laws of 1977, and could not be changed until after January, 1981, the date on which the term for which he was elected, as legislator, would have expired.

BCL:RJV

Eminent Domain; Public Lands; Limited to a specific fact situation the Department of Natural Resources need not comply with the eminent domain procedure of ch. 32, Stats., when acquiring property if there is a bona fide intention not to condemn the property sought, but it must comply with Wisconsin relocation assistance law if it has the statutory power to condemn the property acquired. OAG 3-79

January 12, 1979.

ANTHONY S. EARL, *Secretary*

Department of Natural Resources

Your letter requests an opinion on whether the Department of Natural Resources must comply with ch. 32, Stats., as amended by chs. 438 and 440, Laws of 1977, when engaging in land acquisition, even if the use of the Department's eminent domain power is not contemplated.

I have been advised that the situation you have in mind is the not uncommon occasion when a property owner initiates the acquisition of his property by the Department. Prior to the contact by the owner, the Department had no scheduled program for the acquisition. Thus, the acquisition, while it serves a clear public purpose, is an accommodation to the owner who wishes to sell his property. In short, under these circumstances, and if the Department has a bona fide intention not to condemn the property, it need not comply with ch. 32, except for secs. 32.19 to 32.27, Stats. Sections 32.19 to 32.27, Stats., deal with relocation payments and assistance, and must be complied with if the Department is authorized by statute to condemn the property.

The intention of the Department is irrelevant in determining the applicability of these sections of ch. 32.

The Department of Natural Resources' power to acquire land, by condemnation or otherwise, derives from sec. 23.09(2)(d), Stats., as amended by ch. 29, Laws of 1977:

Lands, acquisition. Acquire by purchase, lease or agreement, and receive by gifts or devise, lands or waters suitable for the purposes enumerated in this paragraph, and maintain such lands and waters for such purposes; and may condemn lands or waters suitable for such purposes after obtaining approval of the appropriate standing committees of each house of the legislature as determined by the presiding officer thereof:

1. For state forests for the purpose of growing timber, demonstrating forestry methods, protecting watersheds or providing public recreation.
2. For state parks for the purpose of preserving scenic or historical values or natural wonders.
3. For public shooting, trapping or fishing grounds or waters for the purpose of providing areas in which any citizen may hunt, trap or fish.
4. For fish hatcheries and game farms.
5. For forest nurseries and experimental stations.
6. For preservation of any species defined in s. 29.415 (2).
7. For state recreation areas as defined in s. 23.091.

By its terms, the statute seems to contemplate two separate grants of power: one to "acquire by purchase, lease or agreement," and two, to "condemn lands or waters suitable." Nevertheless, both purchase or condemnation can be exercised only for the seven purposes enumerated. This indicates that any property that can lawfully be acquired by purchase by the Department could potentially be condemned by the Department.

The caveat in sec. 23.09(2)(d), Stats., that the Department must seek approval of the appropriate standing committees of the Legislature before condemning, is procedural, and does not affect the Department's status as a condemnor under the law.

The distinction as to when the Department is using its acquisition power under sec. 23.09(2)(d), Stats., or its condemnation power under the same statute is difficult to draw. Chapter 32, Stats., as amended by ch. 438, Laws of 1977, makes clear that certain substantive rights are granted to property owners during the negotiation phase of the condemnation process, and this provision makes it crucial that the Department comply with ch. 32, Stats., if there is any possibility of condemnation.

However, in view of the dual nature of the power to acquire or condemn under sec. 23.09(2)(d), Stats., it is my opinion that the Department need not comply with ch. 32, Stats., procedure for exercising the power of eminent domain unless it actually intends to condemn the specific property involved. In other words and limited to the described situation if there is no possibility of condemnation of the property, the Department can negotiate without the strictures of ch. 32, Stats. It is important that there be no intent, under any circumstances, to condemn, otherwise the purpose of ch. 32, Stats., is circumvented.

Once the Department of Natural Resources Board passes a resolution of the necessity for the taking of a certain property, pursuant to sec. 32.07, Stats., all of the requirements of ch. 32, Stats., are applicable. But, if there is any chance, even before a Board resolution, that the property may be condemned, ch. 32, Stats., should be followed. If a project is planned and the Department will condemn land for the project, if necessary, sec. 32.06, Stats., must be followed as to *all parcels* for such a project.

Sections 32.19 to 32.27, Stats., deal with property owners' rights to relocation assistance and payments. For the purposes of these sections, sec. 32.185, Stats., defines a "condemnor" as follows:

CONDEMNOR. "Condemnor", for the purposes of ss. 32.19 to 32.27, means any municipality, board, commission, public officer or corporation vested with the power of eminent domain which acquires property for public purposes either by negotiated purchase when authorized by statute to employ its powers of eminent domain or by the power of eminent domain.

In my opinion, this definition indicates that the Department must comply with secs. 32.19 through 32.27, Stats., even when it is not and does not contemplate using the procedure under sec. 32.06, Stats., to

condemn the property. The words "when authorized by statute to employ its powers of eminent domain," and the coterminus power to acquire or condemn under sec. 23.09(2)(d), Stats., compels this result.

There seems to be an inconsistency in the requirements of sec. 32.19(2m), Stats., with the mandate of sec. 32.185, Stats. By its terms, sec. 32.19(2m), Stats., provides:

Information on payments. Before initiating negotiations to acquire the property under s. 32.05(2a), 32.06(2a) or chapter 275, laws of 1931, as amended (Kline Law), the condemnor shall provide displaced persons with copies of applicable pamphlets prepared under s. 32.26(6).

Strictly construed, the requirement for informational booklets does not attach unless the Department is operating under sec. 32.06, Stats. Therefore, it seems that even though the Department is required to make relocation payments and provide relocation assistance when vested by statute with the power of eminent domain as to a specific property, the plain words of sec. 32.19(2m), Stats., do not require that informational booklets on relocation benefits be distributed unless the Department is proceeding under sec. 32.06, Stats.

My conclusion, then, is that under the described situation where the Department of Natural Resources has no intention to condemn the property, it can lawfully negotiate for its purchase under sec. 23.09(2)(d), Stats., without compliance with the eminent domain procedure of ch. 32, Stats. Once there is intent to condemn, typically but not necessarily manifested by the Board's passing a resolution of necessity, all of the requirements of ch. 32, Stats., are applicable. Sections 32.19 through 32.27, Stats., with the possible exception of sec. 32.19(2m), Stats., apply even if the Department does not intend to condemn, so long as it is authorized by statute to condemn. My interpretation is that all property acquisition of the Department is subject to Wisconsin relocation assistance law as it is expressed in these sections.

BCL:CAB

Garnishment; Statutes; Sections 812.04(1) and 814.21(1)(a), Stats., concerning suit tax in small claims garnishment actions, construed as conflicting. Because tax cannot be imposed without clear statutory authority, lower suit tax in sec. 812.04(1), Stats., should be collected. OAG 5-79

January 22, 1979.

EDWIN M. WILKIE, *Administrative Director of Courts*
Supreme Court

You have asked how much suit tax should be collected by the clerk of court in small claims garnishment actions. The question arises because sec. 812.04(1), Stats., states that a suit tax of \$2.50 shall be collected in small claims garnishment actions, and sec. 814.21(1)(a), Stats., states that the suit tax in small claims actions shall be \$4.00.

I am unable to construe the two statutes so as to avoid a conflict. I conclude that clerks of court should apply and enforce sec. 812.04(1), Stats. That section, effective January 1, 1976 provides in relevant part:

812.04 GARNISHMENT ACTIONS; HOW COMMENCED;
SUMMONS.

(1) Upon payment to the clerk of court of a clerk's fee of \$2 and a suit tax of \$2.50 in actions under s. 299.01 (4) (b) and a suit tax of \$5 in other garnishment actions, the clerk shall issue a garnishee summons together with sufficient copies to the plaintiff or his attorney; the summons form may be in blank, but must carry the court seal.

Section 814.21(1)(a), formerly sec. 271.21 until January 1, 1976, provides:

(1) In each civil action, special proceeding, except probate proceedings, and cognovit judgment in the circuit or county court, excluding all matters brought into the probate branches, a suit tax of \$11 shall be paid at the time the action is commenced, except that:

(a) In actions by small claim type procedure, the suit tax is \$4.

The lower suit tax for small claims proceedings was first enacted by ch. 315, Laws of 1959, which contained language substantially similar to the present statute with respect to small claims suit tax.

Chapter 299, Stats., also created by ch. 315, Laws of 1959, addresses in detail the subject of small claims actions. Section 299.08 provides: "Clerk's fee. At the time of issuance of every summons ... the plaintiff shall pay to the clerk of the court, a clerk's fee of \$3 and the applicable suit tax *prescribed by s. 814.21 (1) (a)*, except that the state or a municipality need not advance these fees."

Because ch. 299 is the Legislature's most detailed and extensive statement on small claims actions, one could argue that the sec. 299.08 reference to sec. 814.21 is the definitive statement on suit tax in any small claims action. Conversely, sec. 812.04(1), Stats., could be viewed as the more specific statute, making small claims garnishments a subcategory of small claims generally.

It is also reasonable to assume that the Legislature's true intent as to the amount of a suit tax will be stated in the statute headed "Suit tax" (sec. 814.21), rather than in a statute on garnishment procedure.

On the other hand, there is a strong line of cases in Wisconsin which hold that no tax can be imposed by implication, but must be authorized by clear and express language. Where ambiguity and doubt exist in a taxing statute, doubt must be resolved in favor of the person on whom the tax is sought to be imposed. *See Wis. Dept. of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, at 48-49, 257 N.W.2d 855 (1977).

Applying this principle, I have first determined that secs. 812.04(1) and 814.21(1)(a) are in conflict. It would be reasonable to assume that *either* statute specifically prescribes the correct suit tax in a small claims garnishment action; to ignore the dollar tax specified in sec. 812.04 because sec. 814.21 deals more directly with taxes would be to render a portion of the former statute superfluous—a construction which courts do not favor.

Accordingly, sec. 812.04(1), Stats., should be applied and enforced by clerks of court in small claims garnishment actions. You

may wish to take steps to encourage the Legislature to remove the conflict between the two statutes.

BCL:MVB

Fish And Game; Licenses And Permits; Words And Phrases; Discussion of effect and constitutionality of law broadening endangered species protection to include threatened species. Definition of endangered and threatened species. Law gives protection to any species so designated, whether or not commercial fishing interests are affected. Provisions requiring incorporation of federal rules may be invalid, if text incorporated is not set forth in detail in state rule and if future as well as existing federal rules are included in the incorporation. Contract or permit fishing for protected species is disallowed. Existing fishing licenses are subject to new restrictions. OAG 6-79

January 23, 1979.

COMMITTEE ON ASSEMBLY ORGANIZATION

Legislature

You have requested my opinion regarding the section of Assembly Bill 432 relating to the authority of the Department of Natural Resources (DNR) to classify and protect various plant and animal species whose existence is threatened or endangered. Since Assembly Bill 432 has recently been enacted into law by ch. 370, Laws of 1977, I will refer to the pertinent provisions of ch. 370 in the discussion below.

The first question is:

What constitutes an endangered or threatened species of fish?

The answer is found in sec. 11 of ch. 370, Laws of 1977, repealing and recreating sec. 29.415(2), Stats.:

(2) DEFINITIONS. For purposes of this section:

(a) "Endangered species" means any species whose continued existence as a viable component of this state's wild fauna or flora is determined by the Department to be in jeopardy on the basis of scientific evidence.

(b) "Threatened species" means any species of wild fauna or flora which appears likely, within the foreseeable future, on the basis of scientific evidence to become endangered.

(c) "Wild animal" means any mammal, fish, wild bird, amphibian, reptile, mollusk, crustacean, or arthropod, or any part, products, egg or offspring thereof, or the dead body or parts thereof.

(d) "Wild plant" means any undomesticated species of the plant kingdom occurring in a natural ecosystem.

Since the chapter not only protects Wisconsin species, but also incorporates the federal threatened and endangered species lists, sec. 6, ch. 370, amending sec. 29.415(3), Stats., one must refer to the federal definitions as well. Presumably, the federal lists referred to in ch. 370 are those established under the federal endangered species act of 1973, Pub. L. 93-205, and the Lacey Act, 16 U.S.C.A. sec. 701, *et seq.* Section 3(4) of Pub. L. 93-205 defines "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range," and sec. 3(15) defines "threatened species" as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." The language of the federal and state definitions, though not identical, is sufficiently similar as to yield a harmonious result when the federal lists are incorporated into the state lists. Concrete determinations of species falling within the definitional limits of the state statute will, of course, be made in the Department's fact-finding process.

The second question is:

Under this bill, would it be possible that the Department of Natural Resources could expand its authority and designate chubs, perch or any other species which the commercial fishermen depend upon for their livelihood as endangered and have that said livelihood cut off?

In answering this question, it is first important to note that the DNR has had a long-standing duty to regulate fishing in state waters, including commercial fishing, secs. 23.09, 29.085, and 29.174, Stats. The Department has also been required to protect all fish and wildlife species whose continued existence is endangered, sec. 29.415, Stats.

(1975). Section 29.415(3), Stats., as amended by sec. 6, ch. 370, Laws of 1977, requires the Department to protect species threatened with extinction as well. Once a species has been designated as either threatened or endangered, sec. 29.415(4), Stats., as amended by sec. 6, ch. 370, Laws of 1977, prohibits the taking, transporting, possessing, processing, or selling of that species. No exception is made for species which commercial fishermen may depend upon for their livelihood. Therefore, unless commercial permit fishing were allowed under sec. 29.415(6)(a), Stats., as amended by sec. 7, ch. 370, Laws of 1977, an unlikely event, commercial fishermen would be prohibited from taking any listed species. (See answer to question 4 below.) If the facts so warranted, the Department would be empowered to include chubs or perch on the prohibited list.

It has been firmly established that the state may constitutionally limit commercial fishing to protect any species whose continued existence is in jeopardy. Since the title to all wild animals is in the state in trust for the public, the state has the undoubted right in the exercise of its police power to protect and preserve such animals in the public interest. As a trustee the state may conserve and regulate or prohibit the taking of wild animals in any reasonable way it may deem necessary for the public welfare. *State v. Herwig*, 17 Wis. 2d 442, 446, 117 N.W.2d 335 (1962); *Krenz v. Nichols*, 197 Wis. 394, 400, 222 N.W. 300 (1928); *State v. Nergaard*, 124 Wis. 414, 420, 102 N.W. 899 (1905). If a species is facing extinction, perhaps the only reasonable measure is to prohibit its taking altogether, at least until such time as the threat to its continued survival has passed.

Furthermore, in my opinion, the Legislature could reasonably determine that such species preservation measures must begin before the species has become so depleted that only a few members remain. Indeed, if the DNR has been exercising its full authority under secs. 23.09, 29.085 and 29.174, Stats. (1975), to close commercial fishing seasons and to generally regulate the taking of particular species in the interests of conservation, then there will be few additions to the threatened and endangered species list, absent unforeseen predation, disease or loss of suitable habitat. Therefore, the new law may have only minimal effect on the interests of commercial fishermen. Nevertheless, it should be noted that a commercial fishing license is a privilege, not an absolute right, and the license holder agrees to exercise this privilege in accordance with all pertinent state laws and regula-

tions. *Le Clair v. Swift*, 76 F. Supp. 729 (E.D. Wis. 1948). Moreover, the Legislature may constitutionally impose new burdens on existing licenses, or revoke them altogether. *Olson v. State Conservation Comm.*, 235 Wis. 473, 484, 293 N.W. 262 (1940). Therefore, if a certain species such as the chub were determined to be endangered or threatened, existing licenses could be nullified insofar as they permitted taking of chub, and no new licenses to take chub would be issued.

Recent decisions of the United States Supreme Court confirm that no one has the right to hunt or fish a species out of existence. In a series of cases entitled *Puyallup Tribe v. Dept. of Game*, the Court declared that even those Indians whose commercial fishing rights are protected by federal treaty are subject to state regulations necessary for species conservation or preservation. *Puyallup III*, 433 U.S. 165 (1977); *Puyallup II*, 414 U.S. 44 (1973); *Puyallup I*, 391 U.S. 392 (1967). *Accord, State v. Gurnoe*, 53 Wis. 2d 390, 192 N.W.2d 892 (1972).

In any event, the revised delegation of power to the Department under the new law is accompanied by sufficient safeguards to protect the individual from arbitrary action on its part and to ensure that it acts within the legislative purpose. In sec. 29.415(3), Stats., as amended by sec. 6, ch. 370, Laws of 1977, the Legislature provides statutory standards to guide the agency in promulgating or amending its list of species requiring protection. The Department must base its decision-making on the best scientific and commercial data available to it. It must solicit comments, consult with other state game directors, federal agencies and other interested persons and organizations and comply with the rule-making procedures in ch. 227, Stats., in promulgating its list. A public hearing is expressly required before the list may be revised or amended, sec. 29.415(3)(b), (c), Stats., as amended by sec. 6, ch. 370, Laws of 1977.

Thus, commercial interests may be advanced and should be considered at any time the DNR promulgates a new list or periodically revises an old one. Moreover, if at any time commercial fishermen possess evidence that a listed species is no longer threatened or endangered, any three of them together may petition the Department to review its status. After holding a public hearing, the Department may by rule remove such species from the list, sec. 29.415(3)(c), Stats., as amended by sec. 6, ch. 370, Laws of 1977.

In short, as part of its scheme to ensure that DNR action conforms to the legislative purpose, the Legislature has provided the mechanism by which commercial fishermen, among others, may participate in the process by which the status of any species is determined.

The legislative scheme does, however, present potential constitutional difficulties in requiring incorporation of the federal list of endangered and threatened species into the state list, sec. 29.415(3)(a), Stats., as amended by sec. 6, ch. 370, Laws of 1977:

(3) (title) **Endangered and threatened species list.** (a) The Department shall by rule establish an endangered and threatened species list. The list shall consist of 3 parts: wild animals and wild plants on the U.S. list of endangered and threatened foreign species; wild animals and wild plants on the U.S. list of endangered and threatened native species; and a list of endangered and threatened Wisconsin species.

If read to require incorporation of the federal list by mere reference in the state list, this section may not provide adequate notice to those affected by it.

Under secs. 227.01(1) and (9) and sec. 227.023, Stats., the DNR is required to file a copy of every rule it adopts with the Revisor of Statutes. Pursuant to sec. 227.025, Stats., the text of every rule so filed must be published in full. The agency may, with the consent of the Revisor and Attorney General, incorporate standards established by organizations of recognized national standing by reference "only in rules that are of limited public interest." Notice of a prohibition on the hunting, fishing or taking of endangered or threatened plant or animal species is without doubt of wide public interest. If consent were given to limited notice in the present situation, the practical effect would be to ensure that the new legislation could not achieve its intended purpose, *viz.*, to eliminate further reduction in the numbers of particular species.

The statute further requires that the incorporated standards be "readily available in published form" before the Revisor and Attorney General may consent to publication of rules in abbreviated form. Such requirement is consistent with the mandate of Wis. Const. art. VII, sec. 21, which has been viewed as requiring full text publication of all general laws and administrative rules having the effect of law. 63 Op. Att'y Gen. 347 (1974). The reason for the requirement of

publication is to ensure that persons affected by new laws have notice of their existence before such laws go into effect. *O'Connor v. City of Fond du Lac*, 109 Wis. 253, 261, 85 N.W. 327 (1901). Where professional engineers are subject to standards established by technical societies and as a matter of practice have easy reference to these standards in technical publications, permitting incorporation of these standards into Wisconsin law by mere reference or citation is consistent with the requirements of full and fair notice. Where, however, the typical lay citizen is required to search the Federal Register to determine which species he or she may lawfully hunt, fish or otherwise take, full and fair notice of requirements under Wisconsin law is probably not given. The Federal Register is likely to be found in only a few counties in the state, and thus constitutes too remote a source to require the typical resident to consult. The citizen should have to look no farther than the state's administrative code, wherein agency rules are set forth. Any potential difficulties regarding adequacy of notice can be avoided simply by reading the new law as requiring that the DNR rule incorporating the federal rule set out in detail the specific provisions of the federal rule. Fortunately, such a construction of the law is the one most compatible with the language used by the legislative drafter.

A potentially more difficult problem is raised by the question whether changes in the federal rules after the date of enactment of the state law are to be automatically included in the state rules. If the law is read to require automatic adoption or incorporation not only of existing federal rules, but also of future amendments, this section might be held by a court to be invalid under the aforementioned Wis. Const. art. VII, sec. 21, requiring full publication of agency rules. My predecessor in office has specifically ruled that it is improper under this constitutional provision to incorporate by reference or citation federal statutes or regulations, and that any attempt to incorporate prospective standards or amendments would be invalid. 59 Op. Att'y Gen. 31 (1970). Such an attempt may also contravene Wis. Const. art IV, sec. I, which vests legislative power only in the Wisconsin Legislature and its proper delegates and makes invalid any attempt to delegate that authority to another governmental entity without due process safeguards. *See generally, Wagner v. Milwaukee*, 177 Wis. 410, 188 N.W. 487 (1922); 16 Am. Jur. 2d, *Constitutional Law* sec. 245, p. 495; 82 C.J.S. *Statutes* sec. 391, p. 936; 63 Op. Att'y Gen. 229 (1974); 50 Op. Att'y Gen. 107 (1961).

The obvious purpose of the new legislation is to create a state species conservation program consistent with the purposes and policies of the federal program. Under sec. 6, Pub. L. 93-205, any state establishing an adequate and active program for the conservation of endangered and threatened species is eligible for federal assistance, including funding, to implement its program. Presumably, ch. 370, Laws of 1977, is intended to establish this eligibility. Nevertheless, notwithstanding this admirable goal, the Wisconsin Legislature could not, in 1978, constitutionally require the DNR to adopt any list promulgated by the Secretary of Interior under the federal endangered species act in, say, 1980. To do so would abrogate its duty to act as the sole legislative body for the people of the State of Wisconsin. *See generally, State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 440, 208 N.W.2d 780, 809 (1973); *Clintonville Transfer Line v. P.S.C.*, 248 Wis. 229, 230-231, 21 N.W.2d 5, 11 (1945). *See also* 50 Op. Att'y Gen. 107, 113 (1961), which states the general rule that while a state legislature does not invalidly delegate its legislative authority by adopting an existing law or rule of Congress, the adoption of prospective federal laws or rules does constitute an unconstitutional delegation of legislative power, Wis. Const. art IV, sec. 1; art. VII, sec. 21. The Wisconsin Constitution prohibits any delegation that would result in an abdication of legislative authority to an agency which is not accountable to the people of this state.

The Wisconsin Supreme Court has recently ruled that the Department must modify permits issued under the Wisconsin Pollution Discharge Elimination System (WPDES) program to conform to final rules adopted by the federal Environmental Protection Agency (EPA) and the DNR subsequent to issuance of the permits. *Niagara Of Wisconsin Paper Corporation v. Wisconsin Department of Natural Resources*, 84 Wis. 2d 32, 268 N.W.2d 153 (1978). In my opinion, this ruling does not contradict the general prohibition against automatic adoption of prospective federal rules by a state body. The issue before the court was not whether EPA rules were to be automatically incorporated into state law, but whether previously issued WPDES permits must be modified to reflect new regulations adopted by both the EPA and the DNR. The court carefully noted that EPA rules do not automatically become administrative law in Wisconsin, that the DNR still makes the rules and that, therefore, the process ensures both full publication of the rules and the safeguard of public scrutiny at the state level, 84 Wis. 2d at 52. Both of these elements

may be missing in any attempt to read the new endangered species law as requiring automatic incorporation of future amendments to federal rules into our state rules.

The constitutionality of this provision can be preserved by concluding that it is limited to requiring the DNR to adopt those federal lists in effect at the time the state law is enacted. Such a construction accords with the general rule that, in the absence of legislative direction to the contrary, when a statute adopts by reference only limited and particular provisions of another statute, the reference does not include subsequent amendments. Only when a statute adopts the general law on a given subject is the reference construed to mean the law as it reads thereafter at any given time, including amendments subsequent to the time of adoption. *Union Cemetery v. City of Milwaukee*, 13 Wis. 2d 64, 108 N.W.2d 180 (1961); *George Williams College v. Village of Williams Bay*, 242 Wis. 311, 7 N.W.2d 891 (1943); 2A Sands' *Sutherland Statutory Construction*, sec. 51.08 (4th Ed. 1972). Since the reference here is to a limited and particular provision of federal law, and since the Legislature has expressed no intent to incorporate subsequent amendments, in my opinion such amendments in the federal rules will have no automatic effect on the state rule. Any subsequent changes in the federal lists would provide only guidance under the new statute for the promulgation by DNR of revised lists of endangered or threatened species. In short, the federal rule is made merely a standard by which to measure DNR adopted rules.

There are several constitutional methods by which the Legislature can assure similarity between DNR and federal lists to fulfill its goal to create a species conservation program in harmony with the federal program. One is the present method of legislative review of DNR rules under sec. 227.018, Stats. The Legislature could simply respond to each rule-making process under the new statute and insist on similarity to current lists promulgated under the federal endangered species act. The Legislature could require the DNR to regularly review federal changes to ascertain whether they accord with Wisconsin legislative policies. Another approach is for the Wisconsin Legislature itself to enact or amend species conservation lists as statutes in response to federal activities. In these ways, the Legislature could avoid requiring adoption by this state of unknown rules.

The third question is:

Would this bill permit contract or permit fishing?

Chapter 370, Laws of 1977, provides no express authority for either contract or permit fishing for removal of endangered or threatened species from state waters for commercial purposes. The DNR could authorize it only if the legislative purposes were thereby served, which, in my opinion, is unlikely to occur in the foreseeable future. The very designation of a species as endangered or threatened means that it needs protection from commercial interests, among others, to assure its continued survival for the aesthetic, recreational and scientific benefit of present and future generations.

The fourth question is:

Could this result in denying commercial fishermen the right to harvest currently allowable fish by mandate of the Department?

The answer is yes, assuming that the listing of the species is supported by sufficient scientific and other evidence. Furthermore, it is my opinion that any commercial fishing licenses issued before the promulgation of the endangered or threatened species list are subject to the restrictions contained in the list. *See* sec. II above; *Le Clair v. Swift*, 76 F. Supp. 729 (E.D. Wis. 1948); *Olson v. State Conservation Comm.*, 235 Wis. 473, 293 N.W. 262 (1940).

BCL:NLA

District Attorney; Public Records; District attorneys do not presently possess legal authorization to destroy documentary materials, made or received in connection with the transaction of public business, and retained by them as evidence of their activities or functions because of the information they contain, even though the documents are found in closed files. OAG 7-79

February 2, 1979.

MARK A. MANGERTSON, *District Attorney*
Oneida County

You ask whether district attorneys are authorized by law to destroy closed files, and, if so, whether any such authorization is limited in terms of time and content.

A preliminary inquiry must be whether there is some legal requirement that district attorneys retain closed files, for, unless there is an express obligation to preserve them in the first place, there is no need for an express authorization to destroy them later.

I am unaware of any provision of law which requires district attorneys to retain closed files as such. Section 19.21 (1), Stats., however, requires district attorneys, as county officers, to preserve some papers in the nature of public records which ordinarily are placed in their files. That statute directs every public officer to:

[S]afely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

Although at first glance this language appears to compel the preservation of every item that ever comes into the possession or control of district attorneys, as long as their possession of it is not illegal, in my opinion the statute should be construed more sensibly to require only the preservation of papers of a documentary nature, evidencing the activities of the prosecutor's office.

Such a construction is suggested by the carefully limited opinion of the supreme court in *International Union v. Gooding*, 251 Wis. 362, 29 N.W.2d 730 (1947). The court made clear that public officers were not constrained by the preservation statute to keep "purely fugitive papers having no relation to the function of the office." *Id.*, 251 Wis. at 370, 371. And, while the court declined to list the items which are required to be preserved, it limited those things generally to papers specifically required to be kept by public officers, and to "written memorials" made by public officers within their

authority when the writings "constitute a convenient, appropriate, or customary method of discharging the duties of the office." *Id.* at 371. Use of the word "memorials," which the opinion's subsequent discussion shows was informed, indicates that those papers which are required to be preserved are ones which were written at least in part for the purpose of preserving remembrance or memory of what the author had done to discharge the duties of his office. *See generally Webster's Third New International Dictionary*, "memorial," p. 1409.

That same construction also is suggested by a recent opinion of this office. 63 Op. Att'y Gen. 272, 276 (1974) indicated that sec. 19.21(1), Stats., was to be read in *pari materia* with what is now sec. 16.61, Stats., providing more particularly for the preservation and destruction of the records of state agencies and officers. Those state records which are required to be retained are "documentary materials" made or received "in connection with the transaction of public business and retained by that agency or its successor as evidence of its activities or functions because of the information they contain." Sec. 16.61(2)(a), Stats.

Viewing sec. 19.21(1) together with secs. 59.715, 59.716 and 59.717, Stats., which expressly permit the destruction of specified county records, further supports the construction that I find appropriate. In naming the records which might be destroyed, the Legislature provided insight into the sort of records which it had intended county officers to preserve. Each of the records enumerated is a documentary memorial of some sort.

It is not practical to list all the types of papers which district attorneys must preserve as public records pursuant to sec. 19.21(1), Stats. As a rule of thumb, though, these include such documents as a district attorney would want his predecessor to have placed and retained in a file if he were attempting later to learn what had occurred in a case. Examples include statements of witnesses, reports of scientific testing, charging documents, transcripts, motions with supporting affidavits and legal memoranda and written decisions of the court.

In identifying these documents as public records I do not mean to intimate that they necessarily are open to public inspection. It long has been the rule that documentary evidence in the files of a district attorney constitutes an exception to the rule permitting citizens to inspect papers in the possession of public officials. *State ex rel. Lynch*

v. County Court, 82 Wis. 2d 454, 463-468, 262 N.W.2d 773 (1978); *International Union v. Gooding*, 251 Wis. at 372. *See also Beckon v. Emery*, 36 Wis. 2d 510, 516, 153 N.W.2d 501 (1967); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 681, 137 N.W.2d 470 (1965).

Informal notations having particular significance only to the person who prepares a file need not be retained. As was recognized in 63 Op. Att'y Gen. 272, *supra* at 276, county officers have discretion to destroy fugitive papers, scrap papers, work sheets, preliminary drafts, surplus copies and similar papers deemed unnecessary to evidence the functions and activities of their respective offices. *See also International Union v. Gooding*, 251 Wis. at 371, 372.

Regrettably, I have been unable to find any provision of law which permits district attorneys to destroy after a time those papers which they initially are required to retain. Since the Legislature has provided for the destruction of the records of all state officers, secs. 16.61(4) and (5), Stats., of all municipal officers, secs. 19.21(5) and (6), Stats., and of many county officers including county courts, secs. 59.715, 59.716 and 59.717, Stats., it seems that failure to provide for the destruction of the records of district attorneys is simple oversight. Perhaps appropriate remedial legislation paralleling sec. 59.715(20), Stats., dealing with court records and exhibits, could be proposed by the Wisconsin District Attorneys Association.

Since any records which might be subject to discovery by the defense in the event a new trial is ordered must be preserved as public records, there is no need to discuss further your next question, whether a district attorney must preserve some of his records on the contingency that a conviction may be reopened at some subsequent time.

BCL:TJB

Birth Control; Under recent United States Supreme Court decisions, subsecs. (2), (3), (4) and (5) of sec. 450.11, Stats., relating to the sale and advertising of contraceptives, are constitutionally infirm.
OAG 9-79

February 9, 1979.

KARL W. MARQUARDT, R.PH., J.D., *Executive Secretary*
Pharmacy Examining Board

You request my opinion as to the constitutional status of sec. 450.11, Stats., which contains provisions similar to those of a New York statute held to be unconstitutional by the United States Supreme Court. See *Carey v. Population Services International*, 431 U.S. 678 (1977).

Section 450.11, Stats., reads:

ADVERTISING OR DISPLAY OF CONTRACEPTIVE ARTICLES, SALE IN CERTAIN CASES PROHIBITED. (1) As used in this section, 'contraceptive article' means any drug, medicine, mixture, preparation, instrument, article or device of any nature used or intended or represented to be used to prevent a pregnancy.

(2) Except for sales to physicians and surgeons licensed under s. 448.06 (1), no person may exhibit, display, advertise, offer for sale, or sell any drug, medicine, mixture, preparation, instrument, article or device of any nature used or intended or represented to be used to produce a miscarriage.

(3) No person may exhibit, display or advertise any contraceptive article for commercial purposes.

(4) No person may manufacture, purchase, rent, or have in the person's possession or under the person's control, any vending machine, or other mechanism or means so designed and constructed as to contain and hold contraceptive articles and to release the same upon the deposit therein of a coin or other thing of value.

(5) No person except a pharmacist registered under s. 450.02, a physician or surgeon licensed under s. 448.06 (1), or a professional nurse registered under s. 441.06, may offer to sell or sell contraceptive articles.

(6) Any person violating this section shall be fined not less than \$100 nor more than \$500 or imprisoned for not to exceed 6 months or both.

In the case above cited, *Carey v. Population Services International*, a mail-order distributor of nonprescription contraceptive devices advertised its products in various New York periodicals. An action was commenced in federal court challenging the constitutional validity of various provisions of a New York statute which, among other things, prohibited the distribution of nonprescription contraceptives except through licensed pharmacists and which proscribed the advertising of such devices.

The High Court held that any statute which prohibits advertising and displays of contraceptive drugs or articles would be unconstitutional. The Court reasoned that "a State may not 'completely suppress the dissemination of concededly truthful information about entirely lawful activity,' even when that information could be categorized as 'commercial speech.'" 431 U.S. at 700. *Also see Va. St. Bd. of Pharm. v. Va. Cit. Cons. Council*, 425 U.S. 748, 773 (1976).

In view of the foregoing pronouncement, subsec. (3) of sec. 450.11, Stats., which proscribes exhibits, displays and advertising of contraceptives for commercial purposes, could not withstand a constitutional challenge.

Although the *Carey* decision dealt with statutes relating to contraceptives, it equated the right to prevent conception with the right to terminate pregnancy. 431 U.S. at 694. Thus, the ban against exhibiting, displaying and advertising drugs, articles and devices to produce a miscarriage contained in subsec. (2) of sec. 450.11, Stats., is constitutionally overbroad under the holding in the *Carey* and *Va. St. Bd. of Pharm.* cases, *supra*.

The High Court also ruled that the portion of the New York statute which limited distribution of contraceptive articles by pharmacists imposed a significant burden on the right of individuals to use contraceptives. 431 U.S. at 689. The Court noted that such a ban as applied to nonmedical contraceptives had no relationship to the state's interest in protecting health.

Accordingly, subsec. (5) of sec. 450.11, Stats., which restricts the sale of contraceptives by a small class of licensed professional people, is unduly limited with respect to retail distribution of nonmedical contraceptives. This subsection is also constitutionally infirm. Similarly, subsec. (2) is unconstitutional to the extent it bans sales or offers of sales of nonprescription items.

Subsection (4) of sec. 450.11, Stats., as construed in *State v. Arnold*, 217 Wis. 340, 347, 258 N.W. 843 (1935), effectively prohibits the sale of contraceptive articles through vending machines. The supreme court expressed no opinion on whether restrictions on the distribution of nonhazardous contraceptives through vending machines are constitutional. 431 U.S. at 691, fn. 11. The court's comment seems to indicate that restrictions reasonably related to the objective of quality control may be constitutionally permissible. Section 450.11(4), Stats., cannot be saved by such a construction, however, since the intention of the Legislature in passing the statute has been determined authoritatively as prohibiting "the sale of such articles to unmarried persons or by anyone except a physician or pharmacist." 217 Wis. 340 at 347. Since these two purposes were held to be unconstitutionally impermissible in *Carey*, sec. 450.11(4), Stats., is also constitutionally infirm.

BCL:WLJ

Counties; Towns; County which has received payments from the federal government in lieu of taxes under sec. 1 of Pub. L. No. 94-565, 90 Stat. 2662, cannot distribute such payments to the towns in which the national forest lands are located. OAG 10-79

February 13, 1979.

WILLIAM D. BUSSEY, *District Attorney*
Bayfield County

In an opinion issued on December 7, 1978, 67 Op. Att'y Gen. 277 (1978), it was stated that:

I must conclude that the distribution of payments received from the federal government under 31 U.S.C. sec. 1601, *et seq.*, is not governed by sec. 59.20(13), Stats., but rather is paid directly to the counties for any governmental purpose and should be received under the general authority contained in sec. 59.20(1), Stats.

(Emphasis added.)

You now inquire, "May a county which has received payments in lieu of taxes under Section 1 of P.L. 94-565 (90 Stat. 262) [2662] distribute such payments to the towns in which national forest lands entitling the county to such payments are located?"

I am of the opinion that the county is without power to distribute such payments to the towns in question. Your question is concerned with sec. 1 payments. Whereas the federal statute and regulations require a county to pass through to other units of government and local school districts a proportion of payments received pursuant to sec. 2 of Pub. L. No. 94-565, 90 Stat. 2662, there is no similar provision with respect to sec. 1 payments. *See* 31 U.S.C. secs. 1601, 1602 and 1603 and 42 Fed. Reg. 51,581 (1977).

Title 31, sec. 1 monies are not payable to the states but are payable directly to the units of government which the Secretary of the United States Department of Interior has determined to be qualified to receive the payments. Such authority has designated counties as the principal provider of governmental services affecting the use of entitlement lands and as the unit of general government to receive payments under the act in Wisconsin. *See* 42 Fed. Reg. 51,581 sec. 1881.0-5(b)(1) and interpretation at 51,580. 42 Fed. Reg. 51,582 sec. 1881.2 provides: "The monies paid to entitled units of local government may be used for any governmental purpose" I do not find legislative intent at the federal level which would encourage local units of government, which have been deemed entitled by federal authorities as the principal providers of governmental services, to directly share any of the federal funds provided with smaller units of local government which may provide certain of the enumerated governmental services with respect to the entitlement lands.

Counties have statutory authority to "[a]ccept donations, gifts or grants for any public governmental purpose within the powers of the county." Sec. 59.07(17), Stats. The funds when received under sec. 59.20(1), Stats., are part of the general fund and can be appropriated by action of the county board for any governmental purpose within the powers of the county.

County boards have only such legislative powers as are conferred upon them by statute, expressly or by clear implication. *Maier v. Racine County*, 1 Wis. 2d 384, 385, 84 N.W.2d 76 (1957); *Dane County v. H & SS Dept.*, 79 Wis. 2d 323, 255 N.W.2d 539 (1977);

and *State ex rel. Conway v. Elvod*, 70 Wis. 2d 448, 234 N.W.2d 354 (1975). I am not aware of any statute which would authorize a county board to directly appropriate all or part of the federal monies received by the county to a town on the premise that certain of the entitlement lands are located within the boundaries of the town. In any event, in Wisconsin the computation of the amounts due the county is based on the number of acres of entitlement land *within the boundaries of the county* and the *population of the county*. See 31 U.S.C. sec. 1602.

There are many statutes, however, which would enable a county board to indirectly aid the town in which the entitlement lands are located. The location, construction, operation and improvement of county buildings, recreational projects or roads in a town having national forest or national park lands within its boundaries could be considered. Intergovernmental cooperation pursuant to sec. 66.30, Stats., could be considered in areas where a town has substantially similar powers as the county. In my opinion the county board could properly consider the fact that the county had received monies from the federal government for entitlement lands and the location of such entitlement lands within smaller units of local government in determining the desirability and need for locating, constructing, operating or improving projects, buildings or roads within the boundaries of such town or towns.

BCL:RJV

Employer And Employee; Discussion of sec. 230.36, Stats.—continuation of pay to employe injured in hazardous employment, with respect to long-term disability. OAG 11-79

February 14, 1979.

HUGH HENDERSON, *Secretary*
Department of Employment Relations

Your predecessor requested my opinion as to the intent of sec. 230.36, Stats., as renumbered from sec. 16.31 by sec. 57 of ch. 196, Laws of 1977, in relation to long-term disability. The statute provides

for salary continuation for employes in hazardous employment positions who are injured or subjected to disease *during* performance of their duties. She stated that she understood that sec. 230.36, Stats., is intended for short-term situations until a determination can be made whether the employe should be on worker's compensation, income continuation or disability retirement, etc.

Whereas speculations as to intended meaning may be accurate as to sec. 16.31, Stats., as originally enacted in ch. 262, Laws of 1961, it is my opinion that the Legislature did not necessarily intend that the preferred treatment of an employe, who qualifies under sec. 230.36, Stats., should only continue on a short-term or interim basis. I base this opinion on the language of the section itself as well as the various changes in this section since its enactment.

Rights granted by the statute to persons engaged in hazardous employment injured in the course of that employment are substantial. The statute currently provides:

[T]he employe shall continue to be fully paid by the employing agency upon the same basis as paid prior to the injury with no deduction from sick leave credits, compensatory time for over-time accumulations or vacation. Such full pay shall continue, while the employe is unable to return to work as the result of the injury, or until the termination of his or her employment upon recommendation of the appointing authority. At any time during the employe's period of disability the appointing authority may order physical or medical examinations to determine the degree of disability at the expense of the employing agency.

Former sec. 16.31, Stats., was created by ch. 262, Laws of 1961, as an outgrowth of a bill introduced at the request of the Wisconsin Employees Association. As originally enacted it provided, in part:

(1) Whenever a conservation warden ... [list of employes omitted] suffers injury while in the performance of his duties, as defined in subs. (2) and (3), he shall continue to be paid his full monthly salary by his employing department upon the same basis as he was paid prior to the injury. *Such full monthly salary shall be paid to the employe while he is unable to work as the result of the injury for not to exceed 3 months.* When the employe is paid such salary under this section there shall be no

deduction from his sick leave credits, compensatory time for overtime accumulations or vacation.

Subsection (4) of sec. 16.31, as enacted, gave the employe the right to appeal to the state personnel board from any denial of benefits by the employing department and on appeal granted the board power to grant or deny the application for benefits or to make an order as to the duration thereof.

Chapter 171, Laws of 1965, amended sec. 16.31(1), to provide in part that full pay continue “for not to exceed 3 months *upon recommendation of the appointing officer and approval of the director of personnel.*”

The same chapter amended sec. 16.31(4) to provide for an appeal by the employe to the state personnel board from a denial of benefits by the employing department “*or the director of personnel.*”

In the 1965 Legislative Session, attempts were made to increase the three-month limit to six or nine months or to eliminate it entirely; and proponents of the latter alternative were successful. Chapter 655, Laws of 1965, amended sec. 16.31(1) to eliminate the three-month limitation. That act provided in material part:

Whenever ... [a listed employe] *suffers* injury while in the performance of his duties, as defined in subs. (2) and (3), he shall continue to be paid his full monthly salary by his employing department upon the same basis as he was paid prior to the injury. Such full monthly salary shall be paid to the employe while he is unable to work as the result of the injury ~~for not to exceed 3 months~~ *or until the termination of his employment upon recommendation of the appointing officer and approval of the director of personnel.* When the employe is paid such salary under this section there shall be no deduction from his sick leave credits, compensatory time for overtime accumulations or vacation. *At any time during the employe's period of disability the director may order physical or medical examinations to determine the degree of disability at the expense of the employing department.*

Chapter 270, Laws of 1971, rearranged the language of sec. 16.31(1), provided that the appointing authority rather than the

director or head of the personnel function could require an examination and amended sec. 16.31(4) to provide for appeal to the director of the bureau of personnel. In material part, ch. 270, Laws of 1971, changed sec. 16.31(1) as follows:

(1) Whenever ... [a listed employe] suffers injury as defined in sub. (2) he shall continue to be fully paid his full monthly salary by his employing department upon the same basis as he was paid prior to the injury with no deduction from sick leave credits, compensatory time for overtime accumulations or vacation. Such full monthly salary pay shall be paid to the employe continue, while he is unable to return to work as the result of the injury, or until the termination of his employment upon recommendation of the appointing officer and approval of the head of the personnel function. ~~When the employe is paid such salary under this section there shall be no deduction from his sick leave credits, compensatory time for overtime accumulations or vacation authority.~~ At any time during the employe's period of disability the ~~head of the personnel function~~ appointing authority may order physical or medical examinations to determine the degree of disability at the expense of the employing department.

No material change in the section occurred since the section was renumbered sec. 230.36(1) by ch. 196, Laws of 1977.

Thus, at present a covered employe who is injured within the meaning of the statute is entitled to be carried on a full-pay, no-work status "while the employe is unable to return to work as the result of the injury, or until the termination of his or her employment upon recommendation of the appointing authority." See sec. 230.36(1) as amended by chs. 26 and 196, Laws of 1977. If the appointing authority denies benefits, the employe may appeal to the personnel commission by reason of sec. 230.36(4), Stats. If the appointing authority grants benefits, he or she can later require the employe to submit to an examination to determine the employe's disability, if any, and whether said employe is capable of returning to work. The statutes do not expressly require the appointing authority to require the employe to submit to a medical or physical examination but rather provide that the appointing authority "may" order or "may" require such examinations. See secs. 230.36(1) and 230.37(2), Stats. But, Wis. Adm. Code section Pers 28.04(3) provides in part: "Periodic reports

on the status of the employe's disability and anticipated date of return to work *shall be required* by the appointing authority." (Emphasis added.)

Wisconsin Administrative Code section Pers 28.05(1) does require the employe to submit to such examinations "as may be required by the appointing authority"; and Pers 28.05(2) provides that refusal of the employe to submit to such examinations "shall constitute grounds for disciplinary action." Wisconsin Administrative Code section Pers 28.05(3) contemplates that where medical examinations are required the appointing authority has an affirmative duty to "determine the extent to which leave with pay shall be granted or take action to terminate employment." Section 230.36, Stats., provides that the full-pay, no-work status shall continue "while the employe is unable to return to work as the result of the injury, or until the termination of his or her employment upon recommendation of the appointing authority."

In my opinion, in a case where the employe could not return to work within a reasonable period, the appointing authority could proceed to terminate such employe from the service under sec. 230.37(2), Stats., which provides:

When an employe becomes physically or mentally incapable of or unfit for the efficient and effective performance of the duties of his position by reason of infirmities due to age, disabilities, or otherwise, the appointing authority shall either transfer him to a position which requires less arduous duties, if necessary demote him, place him on a part-time service basis and at a part-time rate of pay or as a last resort, dismiss him from the service. The appointing authority may require the employe to submit to a medical or physical examination to determine his fitness to continue in service. The cost of such examination shall be paid by the employing *agency*. In no event shall these provisions affect pensions or other retirement benefits for which the employe may otherwise be eligible.

Where coverage had been approved by the appointing authority as provided in Wis. Adm. Code section Pers 28.04(2), and where the appointing authority did not thereafter seek medical examination of the employe, deny benefits or proceed to terminate the employe, the

employe would have a right to continue in the full-pay, no-work status for an extended period of months or years until some action to change the status is initiated.

An employe on full-pay, no-work status under sec. 230.36, Stats., could voluntarily terminate, return to work if not disabled or seek lesser benefits under the worker's compensation or retirement laws. This opinion cannot speculate on all of the complications which might arise in specific cases where conflicts exist between the various benefits available to employes injured while on duty. The worker's compensation law does have an exclusive remedy provision. Section 102.03(2), Stats., provides: "Where such conditions exist the right to the recovery of compensation pursuant to this chapter shall be the exclusive remedy against the employer and the worker's compensation insurance carrier." In my opinion such provision would not bar an employe in a hazardous employment position, who was injured in the course of the performance of his or her duties, from receiving the full-pay, no-work benefits under sec. 230.36, Stats.

BCL:RJV

Licenses And Permits; Real Estate Examining Board; Neither secs. 440.20, 452.10(2), Stats., nor rules of the Department of Regulation and Licensing require the Board to hold hearing where citizen files verified complaint with Board requesting institution of disciplinary proceedings against a licensee. Discretion of Board discussed in light of secs. 440.03, 440.20 and 452.10(2), Stats. (1977), and Wis. Adm. Code sections RL 2.01-2.17.

Where Examining Board utilizes hearing examiner to conduct disciplinary hearing without the presence of a majority of officials who are to render a final decision, hearing examiner has power to entertain a motion to dismiss proceedings. Where denied, it amounts to an interim order and need not be preceded by proposed decision; however, where granted, it must be in form of proposed decision and include findings of fact, conclusions of law and order as required by sec. 227.09(2), Stats. Where disciplinary proceedings are involved, it would be a rare case where circumstances would permit dismissal of the proceedings prior to the conclusion of a meaningful evidentiary hearing on other than jurisdictional grounds or failure of complaint to state a cause of action. OAG 12-79

February 15, 1979.

ALVIN M. TANDBERG, *Executive Secretary*
Wisconsin Real Estate Examining Board

I.

You state that in the past the Wisconsin Real Estate Examining Board took the position that where a written verified complaint was filed with the Board by an individual charging a licensee with violations of the subsections set forth in sec. 452.10(2), Stats. (1975), a hearing "had" to be set pursuant to sec. 452.10(4), Stats. (1975), which provided in part that "[t]he examining board shall thereupon set the matter for hearing as promptly as possible and within 30 days after the date of filing the complaint."

The Board also had rules in the area which utilized the word "shall." See Wis. Adm. Code sections REB 3.02 and 3.03(3).

You indicate that this procedure was followed in some cases even where an investigation by the Board indicated that no action was necessary. In certain instances a civil action involving some or all of the transactions was pending, and the attorney for the complainant may have wished to develop additional information for the civil action.

Section 452.10(4), Stats., was repealed by ch. 418, Laws of 1977; and the same chapter created secs. 440.03 and 440.20 and amended sec. 452.10(2), Stats., to provide:

440.03 GENERAL DUTIES AND POWERS OF THE DEPARTMENT.

(1) The department [of regulation and licensing] may adopt rules defining uniform procedures to be used by the board of nursing and all examining boards attached to the department for receiving, filing and investigating complaints, for commencing disciplinary proceedings and for conducting hearings.

440.20 DISCIPLINARY PROCEEDINGS. Any person may file a complaint before any examining board or the board of nursing and request any board to commence disciplinary proceedings against any permittee, registrant or license or certificate holder.

452.10(2)(intro.) Subject to the rules promulgated under s. 440.03 (1), the examining board may also on its own motion, or

upon complaint in writing, duly signed and verified by the complainant, and upon not less than 10 days' notice to the broker or salesman, suspend any broker's or salesman's license or registration if it has reason to believe, and may limit or revoke such license or registration or reprimand the holder thereof as provided hereafter, if it finds that the holder of the license or registration has:

You inquire:

Does the wording of section 452.10(2) stats., which reads "the examining board *may* on its own motion, or upon complaint in writing, _____", and of section 440.20 stats. which reads "any person may file a complaint before any examining board or the board of nursing and request any board to commence disciplinary proceedings against any permittee, registrant or licensee or certificate holder", make it permissive and discretionary for the board to order or deny a hearing upon the filing of a written complaint, or is it mandatory that such hearing be held?

Neither sec. 440.20 nor sec. 452.10(2), Stats., imposes a mandatory requirement upon the Examining Board to hold a hearing where a verified complaint is filed. In my opinion the use of the word "may" in both sections makes it a matter of discretion for the Board as to whether it shall proceed to formal hearing. *See Wisconsin Fertilizer Asso. v. Karns*, 39 Wis. 2d 95, 107, 158 N.W.2d 294 (1968). The breadth of that discretion would, in part, depend upon the circumstances in each case.

Section 227.075(1), Stats., which grants a person a right to a hearing under certain circumstances, is not applicable, because sec. 227.075(3), Stats., provides that the section does not apply "to actions where hearings at the discretion of the agency are expressly authorized by law." That is the case here.

The Department of Regulation and Licensing has promulgated rules pursuant to sec. 440.03(1), Stats. Such rules became effective November 1, 1978. *See Wis. Adm. Code sections RL 2.01-2.17*. The Department did consider a proposal for a rule which would have required a board to proceed to hearing where a verified complaint was filed. It can be argued that the Department is without power to require a licensing board to proceed to hearing in such case. In any

event, the Department did not adopt such proposal. Wisconsin Administrative Code section RL 2.06(3) provides that a complaint include:

A request in essentially the following form: "Wherefore, the complainant demands that the board hear evidence relevant to matters recited herein, determine, and impose the discipline warranted;" and, (Emphasis added.)

Wisconsin Administrative Code sections RL 2.08(1) and 2.09(4) permit service of the complaint on the respondent-licensee and, where service is made, require that a verified answer shall be filed with the board and a copy be served on the complainant or on the complainant's attorney. At present, the Wisconsin Real Estate Examining Board has administrative rules, Wis. Adm. Code sections REB 3.02 and 3.03(3), which utilize the word "shall" and which have been interpreted by the Board over a period of time as imposing a mandatory requirement on the Board to hold a hearing. The Board should continue to comply with the terms of its own rules unless they are altered.

II.

You state that the Wisconsin Real Estate Examining Board no longer hears its own cases but uses a hearing officer in all of its hearings; and that as hearings are ordered by the Board, whether on its own motion or written complaint, the entire file is turned over to the Consumer Complaints Division of the Department of Regulation and Licensing for hearing before a hearing officer. You indicate that a problem arises when a preliminary motion to dismiss is filed before hearing.

You inquire whether the Board or the hearing officer has power to dismiss the hearing or deny the motion. You further inquire whether, if the hearing officer denies the motion to dismiss, he or she must render a proposed decision for the Board's consideration and action prior to proceeding to a hearing.

At the outset, I advise that the Examining Board has a duty to preside over the proceedings itself or to utilize a hearing officer as permitted by sec. 227.09, Stats., as amended by ch. 418, Laws of 1977. The proceeding remains before the Real Estate Examining

Board and is not a proceeding before the Department of Regulation and Licensing.

Most of the proceedings before your Board involve the denial, limitation, suspension or revocation of licenses; and the Board's present practice of having the hearing examiner conduct the hearing without the presence of a majority of the officials of the agency who are to render the final decision necessitates the use of the procedure set forth in sec. 227.09(2), Stats. In my opinion, no contested motion to dismiss should be granted until an actual hearing is convened on notice. The hearing need not always be an evidentiary hearing. At the outset of the hearing, the hearing officer would have power to entertain such motion. Under the circumstances above, the hearing officer rather than the Board would make the initial decision as to whether to grant or deny the motion. If the hearing officer decides to deny the motion, it will be unnecessary for the officer to render a proposed decision, since a denial of such a motion is not a final decision subject to court review. *Cf. State v. WERC*, 65 Wis. 2d 624, 632-633, 637, 223 N.W.2d 543 (1974). On the other hand, if the officer decides that the motion should be granted, such officer should prepare a proposed decision of dismissal and include findings of fact, conclusions of law, opinion and order in a form which may be adopted by the Examining Board as the final decision in this case. The Examining Board could thereafter direct that the hearing examiner's decision be the final decision of the Board. *See* sec. 227.09(3)(a), Stats. Such decision would be subject, if the complainant or respondent were aggrieved, to judicial review pursuant to sec. 227.16, Stats. Dismissal prior to evidentiary hearing would be proper if based on lack of jurisdiction, lack of timeliness and in certain other cases. Where the proceedings involve revocation or denial of a license, for reasons other than failure to pass a written examination, it would be a rare case where circumstances would permit dismissal of the proceedings prior to the conclusion of a meaningful evidentiary hearing on other than jurisdictional grounds or failure of the complaint to state a cause of action. *See* secs. 452.11(1) and 227.075, Stats., *Mutual Fed. S & L Asso. v. Sav. & L. Adv. Comm.*, 38 Wis. 2d 381, 391, 157 N.W.2d 609 (1968), and *State ex rel. Dept. of Pub. Instruction v. ILHR*, 68 Wis. 2d 677, 687, 229 N.W.2d 591 (1975).

BCL:RJV

County Board: Section 59.025, Stats., does not authorize a county board of supervisors to alter the number of commissioners of the county housing authority or the terms of office of such commissioners, as established by sec. 66.40(5)(a), Stats. OAG 13-79

February 15, 1979.

WILLIAM G. THIEL, *Corporation Counsel*
Eau Claire County

You ask:

Does Section 59.025 (3) (b) grant the authority to Eau Claire County to alter the number of members and membership upon the Eau Claire County Housing Authority?

The answer to your question is no. The powers of counties must be exercised within the scope of the authority ceded to them by the state. *Dane County v. H & SS Dept.*, 79 Wis. 2d 323, 255 N.W.2d 539 (1977). In my opinion, sec. 59.025, Stats., does not authorize the Eau Claire County Board of Supervisors, expressly or by implication, to alter the number of commissioners of the county housing authority in your county or the terms of office of such commissioners, as established by sec. 66.40(5)(a), Stats.

In my opinion none of the provisions of sec. 59.025, Stats., giving to county boards of supervisors the authority to "consolidate, abolish or re-establish any county office, department, committee, board, commission, position or employment," apply to a county housing authority or its officers and employes. The powers granted to county boards of supervisors under sec. 59.025, Stats., are intended to apply only to the "administrative structure of county government." Sec. 59.025(1), Stats. A county housing authority is not a part of the administrative structure of county government. As earlier pointed out in 37 Op. Att'y Gen. 626, 627 (1948), a housing authority "is an independent autonomous unit." And, as stated more recently, in 64 Op. Att'y Gen. 106, 108 (1975):

Section 66.40 (4), Stats., provides that when a housing authority is created it is a "public body corporate and politic."

In 62 Op. Att'y Gen. 333 [303] (1973), it was stated that such authority is not an arm, department, or agency of the municipality which created it but is an independent entity separate and distinct from such municipality. 45 Op. Att'y Gen. 180 (1956); 37 Op. Att'y Gen. 626 (1948).

See sec. 66.40(4)(a) and (9), Stats.

Thus, sec. 59.025(3), Stats., only applies to "county" departments, committees, boards, officers, positions or employment. Since, as previously stated, the housing authority is completely independent of and distinct and separate from the county, it can hardly be termed a "county" department, etc., nor can its officers or employes be termed "county" officers or employes, under the provisions of sec. 59.025(3), Stats. This conclusion is consistent with the various provisions of secs. 66.40 to 66.404, Stats., which detail a housing authority's organization and operation. For instance, sec. 66.40(5)(a), Stats., which provides that the principal officers of each housing authority are the five persons appointed as commissioners of the authority, also requires that no more than two of the commissioners may also be officers of the county in which the authority is created. It is, therefore, obvious that housing authority commissioners are not considered county officers. Likewise, sec. 66.40(5)(c), Stats., provides that an authority may employ such "officers, agents and employes, permanent and temporary, as it may require, and shall determine their qualifications," despite the fact that, if authority employes were appointive county officers or employes, such provision would be made unnecessary by the provisions of sec. 59.15(2), Stats. Similarly, under sec. 66.40(9)(t), Stats., it is the housing authority, not the county, which determines whether the authority will participate in the employe retirement or pension system of the county.

In addition, ch. 118, Laws of 1973, which created sec. 59.025, Stats., also amended a companion statute, sec. 59.15(2)(a), Stats., to read, in part:

Appointive officials, deputy officers and employes. (a) The board has the powers set forth in this subsection, sub. (3) and s. 59.025 as to any office, department, board, commission, committee, position or employe in county service (other than elective offices included under sub. (1), supervisors and circuit

judges) created under any statute, the salary or compensation for which is paid in whole or in part by the county

Under the terms of this statute, sec. 59.025, Stats., would not appear applicable to county housing authorities, since the salaries of the officers and employes of a county housing authority are paid by the authority and are not "paid in whole or in part by the county." See 64 Op. Att'y Gen. 106, 108 (1975).

Finally, sec. 59.025, Stats., is "subject to ... such enactments of the legislature of statewide concern as shall with uniformity affect every county." Sec. 59.025(2), Stats. Section 66.40(2), Stats., in turn, specifically declares that the subject matter of secs. 66.40 to 66.404, Stats., is "of state concern" and that "the necessity in the public interest for the provisions hereinafter enacted, is declared as a matter of legislative determination." Section 66.40(6), Stats., also provides that the housing authority and its commissioners "shall be under a statutory duty to comply or to cause compliance strictly with all provisions of sections 66.40 to 66.404 and the laws of the state." Section 66.40(5)(a) and (b), Stats., provides that five persons "shall" be appointed commissioners and that, after the initial term, their term of office "shall be five years."

Although not all counties may have a housing authority, secs. 59.075 and 66.40 to 66.404, Stats., may nevertheless be said to uniformly affect every county, in the sense that the creation of a housing authority is required in every county where the county board has found the adverse housing conditions identified in those statutes to exist. Arguably, since under sec. 66.40(2), Stats., the Legislature has found that insanitary or unsafe housing exists in the state and that there is a shortage of safe or sanitary low income housing in the state, the role of the local government under sec. 66.40, Stats., is not to create a housing authority but only to identify whether either of these conditions exist within the particular local governmental unit. If a governing body finds that insanitary or unsafe housing exists in the community or that there is a shortage of safe or sanitary low income housing, subsec. (4)(b) of the statute does provide that the governing body "shall adopt a resolution declaring that there is need for a housing authority" in the governmental unit. Subsection (4)(a), Stats., further states that upon adoption of that resolution "a public body corporate and politic shall then exist" and it "shall then be authorized to transact business and exercise any powers herein

granted to it." Therefore, while the creation of a housing authority is dependent upon an initial finding of fact by the governing body, once that finding is made, all else is mandated by the statute and a separate public housing corporation is created for the governmental unit by the statute.

BCL:JCM

Counties; County Board; Under sec. 59.07(3), Stats., the county board has power to require that all bills and claims be examined by it, or with respect to current accounts, its standing committee before payment, but prior audit by the whole board or its standing committee is not required by statute in every case. OAG 14-79

February 19, 1979.

WILLIAM F. BOCK, *Corporation Counsel*
Racine County

You request my opinion whether the bill-paying procedure presently used by Racine County complies with statutory requirements.

You state that bills (claims) first go to an employe in the office of the county executive who determines (1) whether they are proper, (2) whether they are within the amounts budgeted and appropriated by the county board and (3) whether there is sufficient money in the particular account to pay for the particular item. If approved by the designee of the county executive, the claims are submitted to the county clerk and county treasurer for payment. Although the county board's finance committee meets twice a month to review the approved claims, such review is primarily concerned with claims which have been paid. Claims questioned by the county executive are submitted to the finance committee prior to payment. You also indicate that Racine County has a purchasing agent appointed pursuant to sec. 59.07(7), Stats. You state that the county has appointed the State of Wisconsin, pursuant to sec. 59.72(2), Stats., to perform the duties of county auditor and that a state employe reports to Racine County for several days or weeks each year to conduct an audit. Such

auditor has questioned the payment of county funds from the treasury without the specific approval of the county board or its designated committee.

I am of the opinion that bill-paying procedures currently used by Racine County do not comply with statutory requirements. The primary deficiency in the procedure is that certain accounts and claims which may be required by statute to be examined by the county board prior to payment are not presented to the board or its delegated standing committee until after payment is made.

The State Department of Revenue employe who performs certain audit services for the county, serves pursuant to sec. 73.10(6), (7) and (8), Stats., and is not a county auditor appointed in place of the county clerk under sec. 59.72(2), Stats., to perform audit duties otherwise performed by the county clerk under sec. 59.72(1), Stats. The Department of Revenue employe performs only post-audit services. In my opinion, the duties of such county clerk under sec. 59.72(1), Stats., include a duty to preaudit.

You also inquire:

2. What procedure is necessary under state law for payment of bills by Racine County?

This opinion is confined to statutes concerning counties with less than 300,000 population and can only discuss claim requirements and approval procedures in general terms. Claims of different types and amounts may require different procedures. Some claims are liquidated and others are not. Claims may be based on sales of goods or equipment; furnishing of services on a fee, wage or contract basis; welfare or other benefits; furnishing of materials or rentals involving special projects such as highways and claims involving tort liability, etc.

A discussion of some of the applicable statutes will indicate what is required as to processing many claims.

Claims Should Be Filed With The County Clerk

Sections 59.76 and 59.77(1), Stats., as recreated by ch. 285, Laws of 1977, provide:

59.76 No action may be brought or maintained against a county upon a claim or cause of action unless the claimant complies with s. 895.43.”

59.77(1) **In general.** *Every person, except jurors, witnesses and interpreters, and except physicians or other persons entitled to receive from the county fees for reporting to the register of deeds births or deaths, which have occurred under their care, having any claim against any county shall comply with s. 895.43.*

Section 895.43(1)(b), Stats., requires that a claim containing the address of the claimant and an itemized statement of the relief sought be presented to the appropriate clerk. In the case of the county, that clerk is the county clerk. *See sec. 59.81(2), Stats., which is quoted below.*

*County Treasurer Cannot Issue Check For Payment
Unless Proper Approvals Are Secured*

Section 59.20(2), Stats., empowers the county treasurer to:

Pay out all moneys belonging to the county only on the order of the county board, signed by the county clerk and countersigned by the chairman, except when special provision for the payment thereof is otherwise made by law; and, except in counties having a population of 500,000 or more, pay out all moneys belonging to the county road and bridge fund on the written order of the county commissioner of highways, signed by the county clerk and countersigned by the chairman of the county board.

Section 59.81(2), Stats., provides:

Disbursements on. In all counties having a population of less than three hundred thousand, all disbursements from the county treasury shall be made by the county treasurer upon the written order of the county clerk after proper vouchers have been filed in the office of the county clerk; and in all cases where the statutes provide for payment by the treasurer without an order of the county clerk, it shall hereafter be the duty of the county clerk to draw and deliver to the treasurer an order therefor before or at the time when such payment is required to be made by the treasurer. The provisions of this subsection shall apply to

all special and general provisions of the statutes relative to the disbursement of money from the county treasury.

Also see check-order requirements in secs. 66.042(1) and (3) and 59.17(3), Stats., as amended by ch. 305, Laws of 1977.

Failure to have all claims initially filed with the county clerk would not preclude the county treasurer from paying certain bills or claims under authority of sec. 59.20(2), Stats., providing that approvals required by other statutes were obtained, such as approval by the county board or its standing committee under sec. 59.07(3), Stats., or the county highway committee pursuant to secs. 83.01(6) and 83.015(2), Stats., the county clerk, and in some cases the county commissioner of highways and chairman of the county board, but would place the county at a disadvantage with respect to keeping track of and investigating claims which might develop into lawsuits. Failure of any claimant to file such claim in proper form with the county clerk might well result in a bar to such person's standing to bring suit on such claim.

*County Highway Commissioner And County Highway
Committee Have Duty To Preaudit Or Approve
Certain Claims*

Section 83.01(6), Stats., provides that:

[S]alaries, expenses of maintaining an office and the necessary traveling expenses ... may be paid monthly out of the general fund *after being audited and approved by the county highway committee.*

Section 83.015(2), Stats., provides in part:

The county highway committee shall purchase and sell county road machinery as authorized by the county board ... direct the expenditure of highway maintenance funds received from the state or provided by county tax, meet ... to audit all pay rolls and material claims and vouchers resulting from the construction of highways

As noted hereafter, the power of the county highway committee in the area of preaudit is not exclusive.

*By Reason Of Sec. 59.07 (3) , Stats., The County Board
Or Its Standing Committee Has The Power To Examine
And Approve All Accounts And Claims Before Payment*

In a lengthy opinion at 32 Op. Att'y Gen. 347 (1943), it was stated that except as otherwise provided by law it is contemplated by secs. 59.07(3), 59.17(3) and 59.20(2), Stats., that all claims against the county are to be audited by the county board before payment. I am of the opinion that a preaudit by the county board can be required but is not necessarily a prerequisite to approval by the county clerk and county treasurer in every case.

Section 59.07(3), Stats., provides that the county board is empowered to:

Examine and settle all accounts of the county and all claims, demands or causes of action against the county and issue county orders therefor. In counties ... less than 50,000, the board may delegate its power in regard to current accounts against the county to a standing committee where the amount does not exceed \$2,500 and in all counties ... of 50,000 or more, the board may delegate its power in regard to current accounts against the county to a standing committee where the amount does not exceed \$5,000.

This section must be read in light of the introduction to sec. 59.07, Stats., which provides:

The board of each county *may* exercise the following powers, which shall be broadly and liberally construed and limited only by express language.

In 36 Op. Att'y Gen. 601 (1947), it was stated that where a contract for the construction of public works had been entered into by the county, *partial payments* could be made as required by terms of the contract as work progressed without audit by the entire county board under sec. 59.07(3), Stats. The board's entry into the contract, which provided for partial payments as the work progressed, constituted a vote or resolution within the meaning of sec. 59.17(3), Stats., authorizing the county clerk to sign orders in accordance with the provisions of the contract, and sec. 59.20(2), Stats., authorizing the county treasurer to pay the same.

In my opinion sec. 59.07(3), Stats., does not require specific prior approval by the whole board or its standing committee of every bill or voucher, even where there is no special statute such as secs. 59.80 or 83.01(6), Stats., providing for the department head or committee to approve and directly certify to the county clerk, *provided that* the county board has not required such procedure by resolution *and provided that* the account is current and the bill or voucher is for an item or items reasonably included in the executive budget approval and adopted by the county board for the specific county agency.

It is my opinion that the board has power to examine and settle accounts and claims even where some other statute would appear to permit certain bills and vouchers to be approved by some other officer, such as a department head or statutory committee, and be submitted directly to the county clerk and county treasurer for payment. *See* 63 Op. Att’y Gen. 136.2 (1974). Where there is such special statute, such as sec. 59.80, Stats., which pertains to salaries and automobile allowances, prior audit by the whole board or its standing committee is not required unless such board requires it by resolution.

In 67 Op. Att’y Gen. 47 (1978), it was stated that the power of a county highway committee to preaudit and approve certain expenditures by reason of sec. 83.015, Stats., did not authorize such committee to “finally audit, settle and pay claims for tort liability or disputed claims for work performed, equipment or materials furnished, growing out of the construction and maintenance of highways, and that such claims must be filed with the county clerk and finally acted upon by the county board pursuant to secs. 59.07(3), 59.76 and 59.77, Stats.”

It is noted that under sec. 59.07(3), Stats., the power of a county board to delegate to a standing committee *its authority* to examine and settle accounts of the county exists only with regard to current accounts which do not exceed the \$2,500 or \$5,000 limitation amounts applicable to counties which qualify under the population figures set forth.

In my opinion, the words “standing committee” mean a committee of members of the county board appointed pursuant to sec. 59.06, Stats.; and I conclude that the board is without power to delegate *its* power to finally examine and settle claims involving current accounts to some other officer. But powers of preaudit which exist in certain

officers can be delegated to other officers, at least in part. The power to preaudit accounts and claims is not exclusively in the county board or its standing committee. The county clerk has a duty to preaudit claims under the provisions of sec. 59.72(1), Stats.; and such officer has often conducted preaudit procedures to aid the county highway committee, the county board or a standing committee of the county board with respect to their duties to preaudit certain claims. As stated in 63 Op. Att’y Gen. 220, 226 (1974), “duties of pre-audit are not immemorial and important duties which characterize the office of County Clerk and hence can be transferred to” a county auditor by reason of express provision in sec. 59.72(1) and (2), Stats., as amended by ch. 265, Laws of 1977, and therefore could be transferred to another officer under the provisions of sec. 59.025(3)(b), Stats. Nevertheless, even where duties of a county clerk with respect to audits is transferred to a county auditor or some other officer, the county clerk would retain some power with respect to preaudit of claims and accounts, as sec. 59.17(3), Stats., requires such officer to ascertain that certain facts exist before he or she can sign an order for payments of money directed by the board to be issued.

Section 59.17(3), Stats., as amended by ch. 305, Laws of 1977, provides that the county clerk shall:

Sign all orders for the payment of money directed by the board to be issued, and keep in a book therefor a true and correct account thereof, and of the name of the person to whom each order is issued; but he or she shall not sign or issue any county order except upon a recorded vote or resolution of the board authorizing the same; and shall not sign or issue any such order for the payment of the services of any clerk of court, district attorney or sheriff until the person claiming the order files an affidavit stating that he or she has paid into the county treasury all moneys due the county and personally collected or received in an official capacity; and shall not sign or issue any order for the payment of money for any purpose in excess of the funds appropriated for such purpose unless first authorized by a resolution passed by the county board under s. 65.90(5).

The county board cannot, under sec. 59.025(3)(c), Stats., transfer the above powers from the county clerk to another officer, as they are expressly given the clerk by statute; and sec. 59.025(3), Stats., excepts the office of county clerk from its terms.

Your third question is:

3. What changes, if any, are necessary in state law to allow for an office of comptroller for counties with the same authority as given to comptrollers for cities?

Substantial legislative changes would be needed. It is presently possible for counties to establish an office of comptroller under the provisions of secs. 59.025(3) and 59.72, Stats. However, legislation would be necessary to transfer statutory or important immemorial duties from officials elected under Wis. Const. art. VI, sec. 4, which would include the county clerk, or duties which are presently exercised by reason of statute by the county executive, to a comptroller. See 63 Op. Att'y Gen. 220 (1974) and 65 Op. Att'y Gen. 132 (1976).

BCL:RJV

County Board; Nursing Homes; Ordinances; Milwaukee County does not have authority to enact and enforce an ordinance which would establish certain rights of residents of nursing homes, group foster homes, residential care facilities and hospitals which contract for the care of residents. The state has given the Department of Health and Social Services preemptive authority over community-based residential facilities and nursing homes. OAG 15-79

February 19, 1979.

ROBERT P. RUSSELL, *Corporation Counsel*
Milwaukee County

You state that the Health Committee of the Milwaukee County Board is considering an ordinance which would establish certain rights of residents of nursing homes, group foster homes, residential care institutions and "patients in hospitals and domiciliaries committed or admitted to the Combined Community Services Board of Milwaukee County for services." The ordinance purports to adopt the standards as promulgated in ch. 119, Laws of 1975, by reference and concedes that the State of Wisconsin is solely charged with the enforcement of ch. 119, Laws of 1975, which amended secs.

146.30(2), (10)(a) and (c); 146.305(2), (9)(a) and (c); 146.32(2), (5)(a) and (c); and which created secs. 146.309 and 940.29(8) and (9), Stats. The proposed ordinance sets forth the legal rights of residents, in language identical to sec. 146.309, Stats., since renumbered to sec. 50.09, Stats., by ch. 170, Laws of 1977, with the exception of an attempt to extend those rights to "patients in hospitals and domiciliaries," etc., which contract with the Community Services Board. It further proposes to establish rights of advocates with respect to residents or patients and as sanctions incorporates by reference the statutory provisions on enforcement set forth in secs. 146.30(10)(a), 146.305(9)(a) and 146.32(5)(a), Stats. (1975). It is noted that none of the three sections last referred to are printed in the 1975 Statutes, such sections having been affected or repealed by ch. 413, Laws of 1975.

You inquire whether the Milwaukee County Board of Supervisors has power to adopt and enforce such an ordinance.

In my opinion it may not. The Legislature has empowered the County Board only to perform inspections of licensed facilities to assure compliance with state law and to institute certain enforcement actions respecting state law only. Section 50.03(2)(b) and (7)(c), as created by ch. 413, sec. 3, Laws of 1975, provides:

(2)(b) With approval of the department, the county board of any county having a population of 500,000 or more may, in an effort to assure compliance with this section, establish a program for the inspection of facilities licensed under this section within its jurisdiction. If a county agency deems such action necessary after inspection, the county agency may, after notifying the department, withdraw from the facility any persons receiving county support for care in a facility which fails to comply with the standards established by this section or rules established under this section.

(7)(c) *Enforcement by counties maintaining inspection programs.* The county board of any county conducting inspections under sub. (2) (b) may, upon notifying the department that a facility is in violation of this subchapter or the rules established under this subchapter, authorize the district attorney to maintain an action in the name of the state in circuit court for injunction or other process against the facility, its owner, operator,

administrator or representative, to restrain and enjoin repeated violations where the violations affect the health, safety or welfare of the residents.

First, the proposed ordinance is not made contingent upon approval of the Department of Health and Social Services as required by sec. 50.03(2)(b), Stats. Moreover, the ordinance goes far beyond the inspection and enforcement of state law contemplated by sec. 50.03(2)(b) and (7)(c), Stats. Counties are arms of the state, and county boards can exercise only such powers as are conferred upon them by statute or as are necessarily implied therefrom. *Spaulding v. Wood County*, 218 Wis. 224, 260 N.W. 473 (1935); *Maier v. Racine County*, 1 Wis. 2d 384, 84 N.W.2d 76 (1957).

Finally, it is evident that the Legislature intended the Department of Health and Social Services to be the central supervising agency in the area of community-based residential facilities and nursing homes. Section 50.02(1), Stats., as repealed and recreated by ch. 170, sec. 5, Laws of 1977, provides:

Departmental authority. The department shall have authority to provide uniform, statewide licensing, inspection and regulation of community-based residential facilities and nursing homes as provided in this subchapter. Nothing in this subchapter may be construed to limit the authority of the department of industry, labor and human relations or of municipalities to set standards of building safety and hygiene, but any local orders of municipalities shall be consistent with uniform, statewide regulation of community-based residential facilities.

Also see sec. 50.02(2)(a), Stats., as repealed and recreated by ch. 170, sec. 5, Laws of 1977. Further, “[t]he department may authorize the county in which the facility is located to carry out, under the department’s supervision, any powers and duties conferred upon the department in this subsection,” the subsection relating to removal of residents. Sec. 50.03(5m), Stats., created by ch. 170, sec. 25, Laws of 1977. In addition, the Department may “designate and use full-time city or county agencies as its agents in making such inspections and investigations.” Sec. 50.03(4)(a), Stats., as created by ch. 413, sec. 3, Laws of 1975.

It follows that even if the county could enter this area under other general powers, the central supervisory role of the state agency

preempts all county action unless otherwise specifically provided. *See Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 535-537, 271 N.W.2d 69 (1978).

BCL:CDH

Licenses And Permits; Pharmacy; The Pharmacy Examining Board may utilize the services of a national examining board in passing on applicants for licensure, but the Board must make the final decision as to licensure. The conditions of post-examination review with applicants discussed. OAG 17-79

February 21, 1979.

KARL W. MARQUARDT, R.PH., J.D., *Executive Secretary*
Pharmacy Examining Board
Department of Regulation And Licensing

You state that the Pharmacy Examining Board (Board) has contracted with the National Association of Boards of Pharmacy (NABP) for the purpose of using an examination prepared by NABP and a national testing service in testing applicants for licensure before the Board. You also state that the scoring answer key is not available to the Board, precluding the Board from conducting post-examination reviews with licensure applicants, as was the practice prior to using the national examination. The scoring answer key is not available to the Board for reasons of maintaining examination security and confidentiality of its contents. You ask for a legal opinion regarding the right of the Board and professional testing service to maintain confidentiality of the examination's content versus the right of an applicant to review his examination.

Your question presumes that the Pharmacy Board has not unlawfully delegated its authority to examine licensure applicants by use of a national examination as the testing instrument. Although I conclude that the Board may use a national examination, the importance of the issue requires discussion.

The statutory provisions governing the Board are broad enough so as to allow the Board to adopt a national examination for its testing

instrument. This is so despite the fact that other examining boards, such as the Optometry Examining Board, *see* sec. 449.04, Stats., are specifically authorized by statute to use examinations prepared by national boards. Section 15.40(2)(c), Stats., provides that examining boards shall:

Be the supervising authority ... of all personnel ... engaged in the review, investigation or handling of information regarding ... examination questions and answers

Use of a national examination is permissible so long as the Board exercises this supervisory function. Section 15.40(2)(c), Stats., cannot reasonably be read to require that the Board's personnel be the only people involved in constructing or grading the examination.

The Pharmacy Examining Board, however, must exercise final authority over who shall be deemed to have passed the examination. Section 450.02(3), Stats., as amended by ch. 29, sec. 1544, Laws of 1977, states in part as follows:

Applicants filing proofs, satisfactory to the examining board, of qualifications and training as outlined in sub. (2) shall, *after having passed the examination by the examining board* and upon payment of the fee, be granted certificates as registered pharmacists.

The phrase, "after having passed the examination by the examining board," does not require the Board to construct or grade the examination. The legal definition of the word "by" includes "through the means, act, agency or instrumentality of." *Black's Law Dictionary* 251 (rev. 4th ed. 1968); *5a Words and Phrases* 796. *See also Webster's Third International Dictionary* 306 (1961). Therefore, the examination contracted for by the Board is its examination within the statutory terms. My opinion to Senator Berger, dated September 7, 1976, a copy of which is enclosed, concluded that the Examining Board of Architects, Professional Engineers, Designers and Land Surveyors could utilize the examination of the National Council of Architectural Registration Boards as its testing instrument in order to secure the advantages of reciprocal licensure. That opinion stated at p. 3:

[T]he Wisconsin Board may draw on any legitimate sources it chooses in developing a proper examination. It may go so far as

to adopt in total an examination developed by a private organization, so long as the subject matter of the examination fulfills the Wisconsin statutory requirements.

Unquestionably, the Board cannot delegate its authority to make the final decision as to who is suitable for licensure as a pharmacist. The Legislature has reposed that power in the Board and has not granted it power to subdelegate this ultimate responsibility.

Although the Board must make the final decision and cannot be a rubber stamp of a national examining board, nevertheless it is free to use such agencies to perform the mechanical acts of examining the applicants. *See Aylward v. State Board of Chiropractic Examiners*, 31 Cal. 2d 833, 192 P.2d 929, 934 (1948), and *Fitzgerald v. Conway*, 195 Misc. 397, 90 N.Y.S.2d 351 (1949) *aff'd.*, 275 App. Div. 205, 88 N.Y.S.2d 649 (1949). In addition, the Board may use and consider the expertise of a national examining board as a properly qualified advisor. *See Eagles v. United States*, 329 U.S. 304, 313-316 (1946).

You indicate that the testing service has agreed to furnish evidence of the examination's validity and reliability and provide comparative scoring data. The Board must be satisfied that the examination fairly and adequately measures the pharmaceutical knowledge of applicants for licensure. Despite the advantages of reciprocal licensure and validation among a larger pool of applicants, making use of a national examination especially desirable, the Board nevertheless has a burden of showing that the examination furthers the statutory purposes. Evidence which tends to show the NABP and the national testing service are organizations of high professional standing, that the scoring process is accurate, that the pass/fail point selected is appropriate, and documentation that the examination in fact validly measures performance capability, are appropriate to sustain the reasonableness of the examination. I note that the contract allows the Board to retain a copy of the applicant's answers along with one copy of the examination if an appropriate rule is adopted. The Board is well advised to adopt such a rule, thus enabling it independently to assess the examination's validity by noting the subject matter covered and by comparing an applicant's answers with what the Board would determine to be reasonable answers and the score the applicant received from the NABP.

Accordingly, I conclude that the Board may utilize an outside examining agency both to perform the examination process and as an advisor as to the fitness of applicants for licensure but that that Board must exercise the final responsibility of deciding who should be licensed.

You ask if the Board and a national testing service may refuse to disclose the examination's content and presumably the correct answers to an applicant requesting an examination review.

The statutes do not require the Board to conduct post-examination reviews with applicants for licensure, and therefore, the applicant does not have a statutory right under ch. 450, Stats., to review his examination. In a challenge under ch. 227, Stats., the Board may be required to show that its refusal to license the applicant because such applicant failed the examination was not arbitrary and capricious. The Board must be able to show the examination was reasonable, utilizing the same types of evidence indicated above concerning the test's validity. Further, the Board would be well advised to be prepared to demonstrate that a particular applicant's answers justify the determination of a pass or fail. It is thus essential that the Board retain each applicant's answers, as recommended above, in order to make that determination.

If an applicant claims the right to review the examination on the grounds that it is a public record, different issues are raised. Section 19.21(2), Stats., provides that any person shall have full access to all public records for purposes of examination and copying. The right of full access, however, is not unlimited. First, the right to inspect is subject to such reasonable regulations with respect to hours and procedures that the custodian may prescribe to limit unreasonable interference with the ordinary operations of his or her office. Moreover, the custodian may refuse inspection of certain records if he or she determines that the public interest in nondisclosure outweighs the public interest in having full public access to any public records. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 681, 137 N.W.2d 470 (1965), 139 N.W.2d 241 (1966).

In making the determination, the custodian must bear in mind that public policy favors the right of inspection of public records, and it is only in the unusual case that inspection should be denied. *Beckon*

v. Emery, 36 Wis. 2d 510, 516, 153 N.W.2d 501 (1967). If the custodian decides not to disclose the records, he or she must give as concrete an explanation as possible for nondisclosure to the person requesting inspection of the record. *Beckon v. Emery, supra* at 516. If the person seeking inspection is unsatisfied by such explanation, his remedy is in a mandamus action in circuit court. *State ex rel. Youmans v. Owens, supra* at 682. See 63 Op. Att’y Gen. 400 (1974), 60 Op. Att’y Gen. 284 (1971) and 60 Op. Att’y Gen. 470 (1971) for further discussion concerning disclosure of public records.

In the event an applicant requests a review of his or her examination, the Board may inform such applicant of the evidence demonstrating the validity of the test, the appropriateness of the pass/fail score and the reasonableness of the Board’s reliance on the national exam as the testing instrument. The decision on whether to disclose the testing instrument should be made in accordance with the principles outlined above concerning public records, and it would be appropriate for the Board to consider that disclosure might destroy the future effectiveness of the examination process.

BCL:CDH

Waters; The Department of Natural Resources has authority under state law to issue Wisconsin Pollution Discharge Elimination System permits to federal agencies pursuant to ch. 147, Stats. A federal agency or any officer, agent or employe thereof responsible for the discharge of any pollutant into the waters of the state is a “person” within the meaning of secs. 147.02(1) and 147.015(1), Stats. OAG 18-79

February 21, 1979.

ANTHONY S. EARL, *Secretary*
Department of Natural Resources

You state that the United States Environmental Protection Agency has requested that the Department of Natural Resources (hereinafter “the Department”) obtain from me an opinion as to whether the Department has the authority under state law to issue Wisconsin Pollutant Discharge Elimination System (hereinafter

“WPDES”) permits to federal facilities. You ask whether a federal agency or an officer, agent or employe thereof is a “person” within the meaning of secs. 147.02(1) and 147.015(1), Stats.

I am of the opinion that the Department does have the authority under state law to issue WPDES permits to federal facilities. I am further of the opinion that a federal agency, or any officer, agent or employe thereof, responsible for the discharge of any pollutant into any waters of this state, is a “person” within the meaning of sec. 147.02(1), Stats.

Section 147.02(1), Stats., provides in pertinent part:

The discharge of any pollutant into any waters of the state or the disposal of sludge from a treatment work by any person shall be unlawful unless such discharge or disposal is done under a permit issued by the department.

Section 147.015(1), Stats., defines “person” in the following manner:

“Person” for purposes of this chapter and ch. 144 means an individual, owner or operator, corporation, partnership, association, municipality, interstate agency or state agency.

“[O]wner or operator” is defined by sec. 147.015(17), Stats., to include “any person owning or operating a point source of pollution.”

To the extent that a federal facility constitutes a point source of pollution, the federal agency, officer, agent or employe responsible for the operation of that federal facility is an “owner or operator” within the meaning of secs. 147.015(1) and (17), Stats., and therefore a “person” within the meaning of sec. 147.02(1), Stats. And since sec. 147.02, Stats., grants the Department the authority to issue a WPDES permit to any “person” discharging water pollutants, the conclusion follows that the Department has the authority under state law to issue WPDES permits to federal facilities.

I agree with you that federal agencies, officers, agents and employes are no longer immune from the exercise of the Department’s permit-issuing authority under the doctrine of federal supremacy. As recently as two years ago, this was not the case. In 1976, the United States Supreme Court held that while federal installations discharging water pollutants were obliged under the

Federal Water Pollution Control Act Amendments of 1972 to comply to the same extent as non-governmental facilities with state requirements respecting the control and abatement of water pollution, obtaining a permit from the state was not among those requirements. *EPA v. California State Water Resources Control Board*, 426 U.S. 200 (1976). The decision of the Court centered around the familiar principle of federal constitutional law that federal installations are subject to state regulation only when and to the extent that the requisite Congressional authorization is clear and unambiguous. The relevant Congressional authorization before the Court was sec. 313 of the Federal Water Pollution Control Act Amendments of 1972, which provided:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges.

33 U.S.C. sec. 1323 (Supp. IV).

The Court determined that this language did not subject federal facilities to state permit requirements with the necessary degree of clarity, and invited the Congress to draw up clearer language if it was Congress's intent to subject federal facilities to state permit requirements. 426 U.S. at 227-228.

The Congress accepted the Court's invitation in enacting the Clean Water Act Amendments of 1977, P.L. 95-217. Section 313(a) of the 1977 Amendments, 33 U.S.C. sec. 1323, provides in pertinent part:

Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate,

and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable services charges. The preceding sentence shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, *any requirement respecting permits* and any other requirement, whatsoever), (B) to the exercise of any Federal, State, or local administrative authority, and (C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.

In my opinion, this language is a clear and unambiguous statement of the intent of Congress to subject federal facilities to state permit requirements such as the WPDES permit requirement of your Department.

BCL:SBW

Coroner: With one exception, sec. 979.125, Stats., does not operate as a limitation on the authority of the coroner to order the conducting of autopsies under secs. 979.01 and 979.121, Stats. OAG 20-79

February 27, 1979.

WILLIAM G. THIEL, *Corporation Counsel*
Eau Claire County

You have asked for an interpretation of sec. 979.125, Stats., enacted by ch. 246, Laws of 1977.

You ask:

[W]hether the express provisions allowing the parents to prevent an autopsy from being performed in the case of Sudden Infant Death Syndrome would preclude the Medical Examiner

[or coroner] from performing an autopsy where, in his professional judgment, pursuant to Section 979.20(1)(a) said death occurred under circumstances which are unexplained, unusual or suspicious?

You go on to state that the Eau Claire County Medical Examiner has "related that it is extremely difficult, if not impossible, to ascertain whether child abuse has occurred, or on the other hand, what the actual circumstances were which occasioned the death of the infant unless an autopsy is performed."

With one exception stated below ("Conclusion," item "c"), I have concluded that sec. 979.125, Stats., was not intended to, and does not, operate as a limitation on the authority of the coroner under secs. 979.01 and 979.121, Stats.

Although your question refers to autopsies performed pursuant to sec. 979.20(1)(a), Stats., that is not the operative section authorizing the taking of an autopsy. Rather, sec. 979.20(1)(a), Stats., sets forth one of the circumstances in which the reporting of a death ultimately to the medical examiner or coroner is mandatory. The circumstances under which an autopsy may be conducted or ordered by a coroner (or medical examiner pursuant to sec. 979.15, Stats.) are dictated by sec. 979.121, Stats., which reads as follows:

AUTOPSIES. The coroner may conduct an autopsy or order the conducting of an autopsy upon the body of a dead person any place within the state and disinter the body if necessary in cases where a coroner's inquest might be had as provided in s. 979.01 notwithstanding that no such inquest is ordered or had.

Therefore, the actual conditions under which a coroner or medical examiner may conduct or order the conducting of an autopsy are to be found in sec. 979.01, Stats., being precisely those conditions under which a coroner or medical examiner is to make an inquest into a death. Section 979.01, Stats., reads in pertinent part as follows:

INQUESTS. Whenever the district attorney has notice of the death of any person and from the circumstances surrounding the same there is any reason to believe that murder, manslaughter, homicide resulting from negligent control of vicious animal,

homicide by reckless conduct, homicide by negligent use of vehicle or firearm, or homicide by intoxicated user of vehicle or firearm may have been committed, or that death may have been due to self-murder or *unexplained or suspicious circumstances* ... he shall forthwith order and require the coroner or deputy coroner to make an inquest as to how the person came to his death Nothing herein contained shall be construed as preventing such coroner from holding an inquest under the circumstances hereinabove specified without being first notified by the district attorney to hold such inquest.

Section 979.125, Stats., as created by ch. 246, Laws of 1977, effective April 22, 1978, reads as follows:

AUTOPSY FOR SUDDEN INFANT DEATH SYNDROME. If a child under the age of 2 years dies suddenly and unexpectedly under circumstances indicating that the death may have been caused by sudden infant death syndrome, the coroner or medical examiner shall notify the child's parents or guardian that an autopsy will be performed, at no cost to the parents or guardian, unless the parents or guardian object to the autopsy. The coroner or medical examiner shall conduct or shall order the conducting of an autopsy at county expense, unless parent or guardian requests in writing that an autopsy not be performed. If the autopsy reveals that sudden infant death syndrome is the cause of death, that fact shall be so stated in the autopsy report. The parents or guardian of the child shall be promptly notified of the cause of death and of the availability of counseling services.

Although "sudden infant death syndrome" is nowhere defined in the statutes, an accepted definition was set forth in a Legislative Council staff memorandum to the Senate Committee on Human Services, dated September 14, 1977, relating to Senate Substitute Amendment 2 to 1977 Senate Bill 122, the bill that spawned ch. 246 of the Laws of 1977. The definition as set forth in that memorandum was taken from a 1975 publication of the U.S. Department of Health, Education and Welfare, *The Sudden Infant Death Syndrome*, by J. Bruce Beckwith, M.D. That definition is as follows: "The sudden death of any infant or young child, which is unexpected by history,

and in which a thorough postmortem examination fails to demonstrate an adequate cause for death.” (Interestingly, a thorough postmortem examination (autopsy) is a prerequisite to come within this definition.)

The staff memorandum goes on to explain that the studies have indicated a strong correlation between the age of the infant or child and the incidence of sudden infant death syndrome, citing the *Beckwith* article as stating that half of sudden infant death syndrome deaths occur by age three months and ninety-one percent occur by age six months. In a study conducted by Beckwith involving 425 infant death syndrome cases, none occurred after one year, although Beckwith indicated that he was aware of a few cases which occurred as late as a year and a half after birth. Although not mentioned in the staff memorandum, the Beckwith study also revealed that fifteen percent of “sudden and unexpected infant deaths” were found, after postmortem, to be explained by traditional causes, *i.e.*, not sudden infant death syndrome. *Beckwith, supra* at 2, 3. A coroner or medical examiner will certainly want to take such statistical factors into consideration in initially evaluating the possibility that the cause of infant death may have been other than sudden infant death syndrome.

To the extent that the term “unexplained ... circumstances” in sec. 979.01, Stats., overlaps the definition of sudden infant death syndrome, it may be considered to create an ambiguity with regard to the interpretation of sec. 979.125, Stats. The latter section mandates the conduct of an autopsy in cases of sudden and unexpected infant death, unless parent or guardian objects. The former section, read in conjunction with sec. 979.121, Stats., would permit the conduct of an autopsy in such cases, *i.e.*, “unexplained ... circumstances,” without restriction. This ambiguity may be resolved, however, by a determination of legislative intent which, I believe, may be best ascertained here from a reading of the new law itself, there being no legally admissible pertinent legislative history on this bill.

Before the true meaning of a statute can be determined where there is genuine uncertainty as to how it should apply, consideration must be given to *the problem in society to which the legislature addressed itself*, prior legislative consideration of the problem, the legislative history of the statute under litigation,

and the operation and administration of the statute prior to litigation.

2A Sands, *Sutherland Statutory Construction* sec. 45.02, p. 5 (4th ed. 1973). (Emphasis supplied.)

Certainly, the Legislature has manifested a concern for both the victims and families of victims of sudden infant death syndrome. Section 1 of ch. 246, Laws of 1977, created sec. 146.025, Stats., which reads as follows:

SUDDEN INFANT DEATH SYNDROME. (1) The department shall prepare and distribute printed informational materials relating to sudden infant death syndrome. The materials shall be directed toward the concerns of parents of victims of sudden infant death syndrome and shall be distributed to maximize availability to the parents.

(2) The department shall make available upon request follow-up counseling by trained health care professionals for parents and families of victims of sudden infant death syndrome.

Section 979.125, Stats., is a recognition by the Legislature of the need for thorough postmortem examinations (autopsies), presumably as an aid to research and manifestly as an initial step to follow-up family counseling for parents and families of victims of sudden infant death syndrome. Additionally, the Legislature saw fit to balance this new mandatory requirement for autopsy with the private concerns of a parent or guardian obviously having no responsibility for the cause of death. There is no evidence of a contrary legislative intent or of any other legislative intent to restrict the rights of the coroner or medical examiner in carrying out his or her duties of office in accordance with the other provisions of ch. 979, Stats.

Further support for this position is found in the application of other pertinent rules of statutory construction. Chapter 246, Laws of 1977, is titled "An Act to create 146.025 and 979.125 of the statutes, relating to autopsies for victims of sudden infant death syndrome and providing information and counseling and increasing an appropriation." It is an act independent and original in form not expressly purporting to amend any existing statutory provision. By implication only, secs. 979.121 and 979.01, Stats., may be considered to be amended in the limited situation involving an autopsy of a child under

the age of two who dies suddenly and unexpectedly under circumstances indicating that the death may have been caused by sudden infant death syndrome. There is a presumption against any change in legal rights arising out of acts that are independent and original in form and, even “an amendatory act is not to be construed to change the original act or section further than expressly declared or necessarily implied.” *See Sutherland, supra* at Vol. 1A, sec. 22.30, p. 179.

Even though sec. 979.125, Stats., may by implication amend prior existing statutory provisions, it should be read together with those provisions as if they had been originally enacted as one section. “Effect is to be given to each part, and they are to be interpreted so that they do not conflict.” *Id.*, sec. 22.34, p. 196. “All the provisions of both are to be given effect and reconciled if possible.” *Id.*, sec. 22.35, p. 197.

Conclusion

Applying those rules, together with the aforementioned analysis of legislative intent, to the construction of sec. 979.125, Stats., it is my opinion that:

a) In every situation in which the coroner or medical examiner believes that the death of a child under two years may possibly have been caused by sudden infant death syndrome, he or she has a duty to notify the child’s parents or guardian and, further, to conduct or order the conducting of an autopsy at county expense if the parent or guardian does not object in writing.

b) Notwithstanding the objection of parent or guardian, if the coroner or medical examiner has any reason to believe that a child’s death may have been caused other than by sudden infant death syndrome, but under circumstances set forth in sec. 979.01, Stats., he or she may conduct an autopsy or order the conducting of an autopsy pursuant to the provisions of sec. 979.121, Stats.

c) If the coroner or medical examiner has no reason to believe that the death of a child under the age of two was caused

by circumstances set forth in sec. 979.01, Stats., other than sudden infant death syndrome, he or she is precluded from conducting or ordering the conducting of an autopsy over the written objection of the parent or guardian.

BCL:JDH

Police; Sheriffs; Previous opinion at 65 Op. Att'y Gen. 273 (1976), to the effect that sec. 66.11(1), Stats., is unconstitutional to the extent that it requires U.S. citizenship of police officers and deputy sheriffs is withdrawn in light of a United States Supreme Court decision with respect to a similar requirement in New York. OAG 21-79

February 26, 1979.

HOWARD G. BJORKLUND, *Administrator*
Division of Law Enforcement Services
Department of Justice

On November 11, 1976, I rendered an opinion to you to the effect that sec. 66.11(1), Stats., requiring United States citizenship of county deputy sheriffs and city police officers, would be unconstitutional under the equal protection clause of the fourteenth amendment to the United States Constitution when applied to resident aliens. 65 Op. Att'y Gen. 273 (1976).

Section 66.11(1), Stats., provides in part: "No person shall be appointed deputy sheriff of any county or police officer for any city unless he is a citizen of the United States."

I have decided to withdraw that opinion in light of the United States Supreme Court decision in *Foley v. Connelie*, 435 U.S. 291, 46 USLW 4238, announced March 22, 1978, in which the Court upheld the constitutionality, on the equal protection issue, of a New York statute challenged by a resident alien seeking employment as a New York State Trooper.

The New York statute, Executive Law sec. 215(3), provides: "No person shall be appointed to the New York State police force unless he shall be a citizen of the United States."

Because of the similarity between the Wisconsin and New York statutes, I consider this decision current authority, and I now conclude that the citizenship requirement of sec. 66.11(1), Stats., is constitutionally valid.

The Court in *Foley, supra*, applied the same analysis that I applied in 65 Op. Att’y Gen. 273 (1976). Generally, a classification based on citizenship is “suspect.” The courts will strictly scrutinize it. And absent a compelling state interest to justify a law treating resident aliens and citizens differently, the classification will fall under the equal protection clause of the fourteenth amendment. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). As I noted previously, however, the Court in *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973), suggested there may be an exception to the “strict scrutiny” standard of review in some cases. There the Court stated that citizenship may be a relevant qualification for fulfilling those “important nonelective executive, legislative and judicial positions,” held by “officers who participate directly in the formulation, execution, or review of broad public policy.” But the *Sugarman* case did not turn on this statement.

Since the possible exception to *Graham* carved out in *Sugarman*, was dictum, one could do little more than speculate regarding its scope and authoritativeness. On the basis of the legal authority existing in 1976, I concluded that sec. 66.11(1) did not come within the *Sugarman* exception. I stated that police officers do not participate directly in “formulating or reviewing” questions of broad public policy. I reasoned that chiefs of police and sheriffs, who have a broader police function, need not be United States citizens. *State ex rel. Evjue v. Weatherly*, 255 Wis. 225, 228, 38 N.W.2d 472 (1949). Therefore, I could not conclude that citizenship was essential to the quality of police officers and sheriff’s deputies.

But in *Foley, supra*, the Court adopted the *Sugarman* exception in its holding, and it extended it to the question you posed two years ago. I must now advise you that sec. 66.11(1), Stats., constitutionally falls within the exception. The *Foley* Court stated:

Police officers in the ranks do not formulate policy, *per se*, but they are clothed with authority to exercise an almost infinite variety of discretionary powers. The *execution* of the broad powers vested in them affects members of the public significantly and often in the most sensitive areas of daily life

....

Clearly the exercise of police authority calls for a very high degree of judgment and discretion.

435 U.S. 298, 46 USLW 4239.

The fact that chiefs of police and sheriffs need not be citizens in Wisconsin does not detract from the highly discretionary duties of the line police officer. Moreover, the citizens of Wisconsin may exercise more direct control over these officers than they may over appointed police officers and sheriff's deputies. Sheriffs are accountable to all electors of the county. Wis. Const. art. VI, sec. 4. These electors must be United States citizens. Wis. Const. art. III, sec. 1; sec. 6.02, Stats. Police chiefs are accountable to the city's police and fire commissioners, sec. 62.13(3), Stats., who must be citizens, sec. 62.13(1), Stats.

Thus, *Foley* is controlling for the proposition that police officers fall within the category of "important non-elective ... officers who participate directly in the ... *execution* ... of broad public policy." 435 U.S. 300, 46 USLW 4240. We are bound by the Court's holding that the citizenship requirement bears a rational relationship to a legitimate state concern in protecting the right of citizens to choose their governors. 435 U.S. 300, 46 USLW 4240.

There now may be resident alien police officers or deputy sheriffs who were appointed as a result of the 1976 opinion. I do not believe my opinion today mandates that existing resident alien police officers or deputy sheriffs be terminated. Such result would be harsh and inequitable. *Foley* does not state that resident aliens may not be police officers; merely that it is constitutionally permissible to make United States citizenship a condition for appointment. And the 66.11(1), Stats., proscription applies to the appointment of a deputy sheriff or police officer.

BCL:WHW

Elections; The statutory prohibition against political contribution and disbursements by corporations or cooperatives in support of or in opposition to any referendum to be submitted to the voters in sec. 11.38(1)(a)1., Stats., is unconstitutional. Other prohibitions in sec. 11.38(1)(a)1., Stats., are severable and constitutional. 65 Op. Att’y Gen. 145 (1976) and 65 Op. Att’y Gen. 237 (1976) are modified to the extent they are inconsistent with this opinion. Companion opinion to 67 Op. Att’y Gen. 211 (1978). OAG 22-79

February 28, 1979.

GERALD J. FERWERDA, *Executive Secretary*
Elections Board

In an opinion dated August 9, 1978, 67 Op. Att’y Gen. 211 (1978), I advised you that the ban on corporate financing of referendum elections imposed by sec. 11.38(1)(a)1., Stats., was unconstitutional in light of the United States Supreme Court’s decision in *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407 (1978).

In the request which prompted that opinion, you also sought directions as to what action the Elections Board should take if it determined that the statutory ban could not be constitutionally applied, either in whole or in part. This opinion will answer the question specifically reserved by the earlier opinion.

Your question concerns whether the offending unconstitutional provisions of sec. 11.38(1)(a)1., Stats., are severable. I believe they are.

The general rule regarding severability is found in *Madison v. Nickel*, 66 Wis. 2d 71, 223 N.W.2d 865 (1974). Quoting *State ex rel. Reynolds v. Sande*, 205 Wis. 495, 503, 238 N.W. 504 (1931), the court states at pp. 79-80:

“... If a statute consists of separable parts and the offending portions can be eliminated and still leave a living, complete law capable of being carried into effect ‘consistent with the intention of the legislature which enacted it in connection with the void

part,' the valid portions must stand. This is the rule and it has been consistently followed."

Chapter 11, Stats., the Wisconsin Campaign Financing Law, evinces a general legislative intent to restrict and regulate an extraordinarily broad scope of financial transactions undertaken for political purposes. In addition, ch. 11, Stats., regulates many nonfinancial political activities, including the disclosure of the sources of political contributions, disbursements and communications in sec. 11.30, Stats.; the regulation of compensation for political advertising in sec. 11.32, Stats.; and the ban on solicitation by state employes in sec. 11.36, Stats. In furtherance of that apparent legislative intent, this office has construed the language of ch. 11, Stats., narrowly and the provisions of ch. 11, Stats., as severable, to the extent possible and appropriate, so as to preserve its constitutionality. See 65 Op. Att'y Gen. 10 (1976), 65 Op. Att'y Gen. 145 (1976) and 65 Op. Att'y Gen. 237 (1976). Such a construction is consistent with the legislative declaration of policy in sec. 11.001, Stats., which treats the system of campaign regulations created by ch. 11, Stats., as basic to the protection of the integrity of the elective process and the maintenance of a democratic system of government.

The provisions of sec. 11.38, Stats., indicate that the Legislature intended to prohibit a broad range of corporate contributions and disbursements. In addition, the section describes the prohibited categories of corporate disbursements or contributions disjunctively as concerning "any political purpose," "the candidacy of any person" or "any referendum." The statutory language used clearly makes any one of these categories capable of separation in fact. As pointed out in *2 Sands Sutherland Statutory Construction* (4th ed.) sec. 44.03, p. 338, the disjunctive word "or" has been held to indicate "a clear legislative intent of separability." I conclude that a similar legislative intent of separability is evident under the provisions of sec. 11.38(1)(a)1., Stats.

Section 11.38(1)(a)1., Stats., provides:

No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, to any political party, committee, group, candidate or individual for any political purpose or to promote or defeat the candidacy of any person for nomination or election

to any public office or any referendum to be submitted to the voters.

It is clear that the prohibition created by the last phrase, "or any referendum to be submitted to the voters," is contrary to the decision in *Bellotti, supra*, and must be severed from the statute to save the statute's validity. When that is done, the statute should be interpreted and applied as if it read:

No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, to any political party, committee, group, candidate or individual *for any political purpose* or to promote or defeat the candidacy of any person for nomination or election to any public office.

But simple excision of the offending phrase is not sufficient to conform the statute to the requirements of *Bellotti, supra*, in light of sec. 11.01(16), Stats., which includes referendum in the definition of "political purpose."¹ The remaining statute would still appear to prohibit (unconstitutionally) corporate receipts or corporate spending in support of referenda because corporate contributions or disbursements "for any political purpose" are still prohibited; and political purposes, as defined in sec. 11.01(16) specifically includes "support or opposition ... to a present or future referendum."

In my opinion, it is not necessary, however, that in order to save the statute the phrase, "for any political purpose or," be deemed excised. Such an excision would go beyond the mandate of *Bellotti, supra*, and remove the restriction on corporate contributors, for example, from acting in support or opposition to a person's present or future candidacy. Further, to cast out the phrase, "for any political purpose or," leaves the preceding portion of the statute so broad and vague as to be subject to further constitutional vulnerability.

Therefore, applying the severability doctrine and striving to maintain legislative intent consistent with the mandate of *Bellotti, supra*, I

¹ Section 11.01(16), Stats., reads in material part: "An act is for 'political purposes' when by its nature, intent or manner it directly or indirectly influences or tends to influence voting at any election. Such an act includes support or opposition to a person's present or future candidacy or to a present or future referendum."

conclude that the definitional sec. 11.01(16), Stats., must be so construed *when applied and only where applied to sec. 11.38 (1) (a) 1., Stats.*, as though the phrase, "or to a present or future referendum," had been stricken therefrom.

Any prior opinions of this office construing sec. 11.38, Stats., including those reported in 65 Op. Att'y Gen. 145, 158 (1976) and 65 Op. Att'y Gen. 237 (1976), are modified to the extent they may be inconsistent with this opinion.

BCL:JEA

Ordinances; University; Campus police have jurisdiction to arrest only on campus unless deputized by a sheriff. Local ordinances are not applicable on campus. OAG 23-79

March 1, 1979.

JAMES CARLSON, *District Attorney*
Walworth County

In your letter of February 21, 1978, you ask two questions:

1. Do campus police have jurisdiction to arrest off campus?
2. Does Whitewater Municipal Court have jurisdiction to handle violations of local ordinances occurring on the campus or must they be prosecuted as State offenses.
[sic]

The answer to your first question is no.

Section 36.11(2), Stats., clearly provides that campus police have jurisdiction to arrest only on campus, *i.e.*, on property subject to the jurisdiction of the Board of Regents of the University of Wisconsin System. It should be noted, however, that such property includes the roads on campus because they are "private roads or driveways" within the definition of sec. 340.01(46), Stats. *Henkel v. Phillips*, 82 Wis. 2d 27, 30, 260 N.W.2d 653 (1978).

It should also be noted that nothing in sec. 36.11(2), Stats., prohibits a sheriff from deputizing campus police pursuant to ch. 59,

Stats., thus enabling them to arrest for state violations while off campus under the authority granted by sec. 59.24(1), Stats.

Essentially, your second question is whether local ordinances are applicable on campus. The answer is no.

Property of the state is exempt from municipal regulation in the absence of waiver on the part of the state of the right to regulate its own property. *Milwaukee v. McGregor*, 140 Wis. 35, 37, 121 N.W. 642 (1909); 62 C.J.S. *Municipal Corporations* sec. 157, pp. 319-320. Therefore, since there is no statute waiving the right of the state to regulate its campus property, local ordinances would not be applicable on campus.¹

This does not mean, however, that local police are powerless to arrest for violations of state law which occur on campus property. Section 36.11(2)(a), Stats., expressly provides that it "does not impair the duty of any other peace officers within their jurisdictions to arrest and take before the proper court persons found violating any state law on property under the jurisdiction of the board."

BCL:JJG

Public Records; Right to privacy law, sec. 895.50, Stats., does not affect duties of custodian of public records under sec. 19.21, Stats.
OAG 24-79

March 1, 1979.

ANTHONY S. EARL, *Secretary*
Department of Natural Resources

You state that the Department of Natural Resources has developed certain mailing lists in conjunction with programs the Department is charged with administering. Examples of these lists include conservation and environmental organizations, citizen committees for resource management and environmental purposes and subscriber

¹ For a narrow exception, see sec. 13.48(13), Stats., making the state subject to local zoning on new construction.

lists to *Natural Resources Notes* and the *Wisconsin Natural Resources*. The Department has received requests for copies of these lists from persons who supposedly may or will use these lists for private benefit or financial gain. You ask what effect the new right of privacy law, ch. 176, Laws of 1977, may have upon your duties as custodian of these records.

Chapter 176, Laws of 1977, created a cause of action in Wisconsin for an invasion of one's right of privacy. By this act the Legislature created a tort, that is, a civil wrong, enabling a person who believes his right to privacy has been invaded to sue, in a civil action, the person whom he believes has invaded his right of privacy and to collect money damages and obtain other relief. The new law contains no criminal penalties, such as a fine or imprisonment, and thus is not a criminal law. Section 895.50, Stats., provides in part:

(1) The right of privacy is recognized in this state. One whose privacy is unreasonably invaded is entitled to the following relief:

(a) Equitable relief to prevent and restrain such invasion, excluding prior restraint against constitutionally protected communication privately and through the public media;

(b) Compensatory damages based either on plaintiff's loss or defendant's unjust enrichment; and

(c) A reasonable amount for attorney fees.

(2) In this section, 'invasion of privacy' means any of the following:

(a) Intrusion upon the privacy of another of a nature highly offensive to a reasonable person, in a place that a reasonable person would consider private or in a manner which is actionable for trespass.

(b) The use, for advertising purposes or for purposes of trade, of the name, portrait or picture of any living person, without having first obtained the written consent of the person or, if the person is a minor, of his or her parent or guardian.

(c) Publicity given to a matter concerning the private life of another, of a kind highly offensive to a reasonable person, if the defendant has acted either unreasonably or recklessly as to

whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record.

(3) The right of privacy recognized in this section shall be interpreted in accordance with the developing common law of privacy, including defenses of absolute and qualified privilege, with due regard for maintaining freedom of communication, privately and through the public media.

Section 19.21, Stats., deals with public records, including the duties of custodians of public records and the right of any person to examine or copy public records. This office has issued numerous opinions dealing with public records. 61 Op. Att'y Gen. 297 (1972) advised the state director of the Board of Vocational, Technical and Adult Education that a list of students who were on a waiting list for a particular program was a public record within the meaning of sec. 19.21(1), Stats., and subject to inspection and copying under sec. 19.21(2), Stats. The opinion further advised that the fact that a private organization which operated a school or service giving a somewhat related course intended to use the list to solicit students would not be sufficient reason for denying inspection or copying.

Likewise, I conclude that the lists you have described are public records within the meaning of sec. 19.21(1), Stats., and subject to inspection and copying within the meaning of sec. 19.21(2), Stats. I have taken into consideration the provisions of ch. 176, Laws of 1977, and particularly the newly created sec. 895.50, Stats., and conclude that this does not affect your duties as custodian of public records. This conclusion is supported not only by principles of statutory construction, but by the express language of sec. 895.50(2)(c), Stats., which provides in part: "It is not an invasion of privacy to communicate any information available to the public as a matter of public record."

Under sec. 19.21(2), Stats., a custodian may prescribe reasonable regulations concerning the examining and copying of public records. Unless specifically required to do so by another statute, a custodian may, but is not required to, furnish copies for a reasonable fee. Sec. 16.61(11), Stats.; 60 Op. Att'y Gen. 470, 483 (1971); *Musback v. Schaefer*, 115 Wis. 357, 361, 91 N.W. 966 (1902). Although there

may be exceptions, the general rule is that a custodian of public records in this state cannot be concerned with the purposes behind a person's request to view records. 58 Op. Att'y Gen. 67, 72 (1969); 63 Op. Att'y Gen. 400, 406 (1974).

BCL:JEA

Criminal Law; A forfeited cash bond may not be used to pay restitution to the victim of the crime. OAG 25-79

March 2, 1979.

JAMES MOHR, *District Attorney*
Vilas County

Prior to the recent expiration of his term, your predecessor, Timothy Vocke, had asked whether a cash bond which has been declared forfeited, as authorized by sec. 969.13, Stats., may be used to pay restitution to the victim of the crime with which the forfeiting defendant was charged. My opinion is that a forfeited cash bond may not be used for that purpose.

A court's order declaring the bail to be forfeited may be set aside if justice does not appear to require its enforcement. Sec. 969.13(2), Stats. Prior to the time that judgment for the amount of the bail and costs of the court proceeding is entered and the proceeds of the judgment are paid to the county treasurer, sec. 969.13(4), Stats., the cash bond is still subject to being returned to the defendant. *State v. Brown*, 149 Wis. 572, 574, 136 N.W. 174 (1912); sec. 969.13(2), Stats.

The forfeiture statute directs that the proceeds of the judgment should be utilized first to pay costs and that any remaining amount should be applied to payment of the forfeiture judgment. Sec. 969.13(5), Stats. It was suggested that restitution might be regarded as a "cost."

In the context of forfeitures, the term "costs" is understood to refer to court costs involved in processing the judgment of forfeiture. Sec. 969.13(4), Stats.; *State ex rel. Commissioners of Public Lands v. Anderson*, 56 Wis. 2d 666, 672, 203 N.W.2d 84 (1973). Although

the loss suffered by a victim of crime is a cost of the activity which underlies the criminal charge and the payment of a cash bond, it is not a cost connected with the forfeiture of the bond.

The statutes provide that proceeds of the judgment of forfeiture “shall be paid to the county treasurer.” Sec. 969.13(4), Stats. Forfeited cash bonds are to be retained by the county for county use. *State ex rel. Guenther v. Miles*, 52 Wis. 488, 491, 9 N.W. 403 (1881); *State v. Wettstein*, 64 Wis. 234, 243, 25 N.W. 34 (1885); 8 Op. Att’y Gen. 26, 27 (1919); 41 Op. Att’y Gen. 166, 167 (1952); 58 Op. Att’y Gen. 142 (1969); 62 Op. Att’y Gen. 247, 248 (1973).

A defendant’s forfeiture of a cash bond is unrelated to his or her liability on the underlying charge. It does not amount to paying a fine upon conviction.

The forfeiting of bail does not in any way atone for or dispose of the criminal charge against a defendant and, therefore, he may be brought into court and subsequently tried on the criminal charge and if found guilty as charged, may be fined, said fine having no connection with the amount already forfeited on the bail bond.

41 Op. Att’y Gen. 166, 168 (1952); *see also Guenther*, 52 Wis. 488; 58 Op. Att’y Gen. 142 (1969); 62 Op. Att’y Gen. 247 (1973). *Cf.* sec. 194.175(2), Stats., dealing with certain traffic offenses regarding which findings of guilt *in absentia* are permissible.

I am aware of a program such as that which you propose having been utilized in only one other jurisdiction. There the statutes specifically directed that the alleged victim should receive the amount forfeited. *See Commonwealth v. Jakub*, 182 Pa. Super. 418, 128 A.2d 98, 100 (1956); *Commonwealth v. Friedman*, 121 Pa. Super. 591, 184 A. 672 (1936); 8 C.J.S. *Bail* sec. 109. The Wisconsin Legislature has not demonstrated an intent that bail bond deposits be passed on to crime victims under any circumstances.

BCL:KK

Per Diems; Public Officials; County board supervisor who is also member of a committee of the county board or of county highway committee can only receive one per diem on days board meets but can receive mileage allowance provided for in sec. 59.03(3)(g), Stats., for each mile traveled to and returning from meetings of the board by the most usual traveled route and can also *be reimbursed* at the rate established by the board pursuant to sec. 59.15(3), Stats., as the standard mileage allowance for officers for necessary expenses incurred for any additional miles traveled in performance of committee of county board duties or highway committee duties on the same day. OAG 28-79

March 8, 1979.

MATTHEW F. ANICH, *District Attorney*
Ashland County

You request my opinion on a number of questions relating to per diem, mileage and expense payments to supervisors who also serve on committees of the county board or on the county highway committee. We are concerned with a county under 500,000 population which has not elected to become self-organized pursuant to sec. 59.03(1), Stats., and which has not elected to provide for alternative compensation pursuant to sec. 59.03(3)(i), Stats.

1. Can a county board supervisor who is also a member of a committee of the county board, appointed pursuant to sec. 59.06, Stats., receive an additional per diem or additional mileage allowance for attending a meeting of such committee held on a day the board was in session or be additionally compensated for performing services for such committee on a day the board was in session?

I am of the opinion that such supervisor is not entitled to an additional per diem payment, but may become entitled to additional mileage allowance if he or she actually traveled additional miles in fulfilling his or her duties as a committee member.

Section 59.03(3)(f) and (g), Stats., provides:

(f) *Compensation.* Each supervisor shall be paid a per diem by the county for each day he attends a meeting of the board.

Any board may, at its annual meeting, by a two-thirds vote of all the members, fix the compensation of the board members to be next elected. Any board may also provide additional compensation for the chairman.

(g) *Mileage.* Each supervisor shall, for each day he attends a meeting of the board, receive mileage for each mile traveled in going to and returning from the meetings by the most usual traveled route at the rate established by the board pursuant to s. 59.15 as the standard mileage allowance for all county employes and officers.

Section 59.06(2), Stats., provides in part:

Committeemen shall receive such compensation for their services as the board allows, not exceeding the per diem and mileage allowed to members of the board and such committee members shall receive such compensation, mileage and reimbursement for other expenses as the board allows for their attendance at any school, institute or meeting which the board directs them to attend. *No supervisor shall be allowed pay for committee service while the board is in session, nor for mileage except in connection with services performed within the time herein limited.*

In my opinion the emphasized phrase does not prohibit the payment of additional mileage for additional miles necessarily traveled in fulfilling the supervisor's duties as a committee member, even though this office has stated that "mileage" as used in sec. 59.03(3)(g), Stats., is in part a form of compensation and that the supervisor has a right to mileage at the "rate" provided for "each mile traveled in going to and returning from the meetings by the most usual traveled route," regardless of whether he walks, rides a bicycle, drives his own car or is given a free ride. *See* 24 Op. Att'y Gen. 688 (1935), 33 Op. Att'y Gen. 229 (1944) and 47 Op. Att'y Gen. 309 (1958).

2. Can a county board supervisor be paid more than one per diem on any day for service in attending meetings of separate committees of the board appointed pursuant to sec. 59.06, Stats.?

This question has been answered in the negative by several attorneys general, and I am in agreement. See 42 Op. Att'y Gen. 326 (1953) and 50 Op. Att'y Gen. 187 (1961).

3. Can a county board supervisor who is also a member of the county highway committee, appointed pursuant to sec. 83.015, Stats., receive an additional per diem or additional mileage allowance for attending a meeting of such committee held on the day the board is in session or be additionally compensated for performing services for such committee on a day the board is in session?

The supervisor cannot be paid two per diems for services performed for different units of the same governmental entity, the county, in the absence of a specific statute authorizing the payment of two or more per diems for services to the county on the same day. See 50 Op. Att'y Gen. 187 (1961). There is no statute which would permit payment of an additional per diem under the facts stated.

The county highway committee is not a committee appointed pursuant to sec. 59.06, Stats., and its members need not be county board members. See 48 Op. Att'y Gen. 241 (1959) and 54 Op. Att'y Gen. 191 (1965). Compensation and reimbursement for necessary expenses are in part controlled by sec. 83.015(1)(a), Stats., which provides:

The members of such committee shall be reimbursed for their necessary expenses incurred in the performance of their duties, and shall be paid the same per diem for time necessarily spent in the performance of their duties as is paid to members of other county board committees, not, however, exceeding \$500 for per diem, in addition to necessary expenses, to any member in any year.

Although a highway committee is not literally included within sec. 59.06, Stats., this office has construed the limitations in sec. 59.06(2), Stats., as applicable to such committee. See 51 Op. Att'y Gen. 183 (1962).

I am of the opinion, however, that sec. 83.015(1)(a), Stats., provides that highway committee members be reimbursed for *necessary expenses*, and that, under the facts stated, the supervisor could receive the mileage allowance as a supervisor authorized by sec. 59.03(3)(g), Stats., for attendance at the county board meeting and

could also be *reimbursed*, at the rate established by the board pursuant to sec. 59.15(3), Stats., at the standard mileage allowance for officers *for necessary expenses incurred* for any additional miles traveled and other expenses incurred in the performance of highway committee duties on the same day.

BCL:RJV

Municipalities; Taxation; A statute which would allow any city, village or town to elect to apply so-called "land value taxation," *i.e.*, the taxation of land as defined in sec. 70.03, Stats., exclusive of buildings or structures, to all lands within its boundaries, would be unconstitutional under the provisions of Wis. Const. art. VIII, sec. 1, which requires that general property taxation be uniform. OAG 29-79

March 8, 1979.

MARCEL DANDENEAU, *Assembly Chief Clerk*
Committee on Assembly Organization
Wisconsin State Assembly

You request my opinion on whether a law patterned after that previously proposed by 1977 Assembly Bill 1207 would be constitutional under Wis. Const. art. VIII, sec. 1. 1977 Assembly Bill 1207, like a number of similar bills proposed during every legislative session since 1971, sets forth certain statutory provisions intended to exempt buildings and improvements from general property taxes. Papers forwarded with your opinion request indicate that the principal features of the plan currently proposed for introduction during the 1979 session include:

- (1) Creation of a statute allowing any taxation district to elect to apply "land value taxation," to all lands within its boundaries, *i.e.*, the taxation of land as defined in sec. 70.03, Stats., but exclusive of buildings or structures.
- (2) Creation of one assessment roll for "land value taxation" and another assessment roll for "all other purposes," including calculation of equalized valuation.

(3) A ten-year “phase-in” period during which a progressively diminishing tax is imposed on buildings and improvements, ending with a total exemption of such buildings and improvements.

(4) A statement in the proposed statute indicating that: This section is intended to be a reasonable exercise of the power invested in the Legislature under Wis. Const. art. VIII, sec. 1, to empower taxation districts to collect and return taxes on real estate located therein by optional methods.

Wisconsin Constitution art. VIII, sec. 1, provides in part, as follows: “Section 1. The rule of taxation shall be uniform but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods. Taxes shall be levied upon such property ... as the legislature shall prescribe.”

For a tax to be constitutionally uniform it must meet the following standards:

1. For direct taxation of property, under the uniformity rule there can be but one constitutional class.
2. All within that class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden equally on an *ad valorem* basis.
3. All property not included in that class must be absolutely exempt from property taxation.
4. Privilege taxes are not direct taxes on property and are not subject to the uniformity rule.
5. While there can be no classification of property for different rules or rates of property taxation, the legislature can classify as between property that is to be taxed and that which is to be wholly exempt, and the test of such classification is reasonableness.
6. There can be variations in the mechanics of property assessment or tax imposition so long as the resulting taxation shall be borne with as nearly as practicable equality on an *ad valorem* basis with other taxable property.

Gottlieb v. Milwaukee, 33 Wis. 2d 408, 424, 147 N.W.2d 633 (1967).

The apparent intent of the proposed legislation is to create a class of property, *i.e.*, buildings and structures—severed from the land, which would be exempt from the general property tax within any city, town or village adopting “land value taxation” but which would be subject to the general property tax in tax districts not adopting “land value taxation.” During the ten-year “phase-in” period, the property in the proposed class would also be subjected to a partial tax and, by the same token, a partial tax exemption.

In my opinion, a law with such features would be unconstitutional under the standards imposed by Wis. Const. art. VIII, sec. 1. The plan would create more than one class of property for the purpose of direct taxation, the so-called exempt property would not be “absolutely exempt from property taxation” and such property would neither “bear its burden equally on an *ad valorem* basis” with other property within the district nor with similar property outside the district.

Under the Wisconsin Constitution, it is in the hands of the Legislature, not local taxing entities, to determine what property will be taxed. Thus, in *Nash Sales, Inc. v. Milwaukee*, 198 Wis. 281, 287, 224 N.W. 126 (1929), our court states:

If we leave out superfluous words the mandate is: “The rule of taxation shall be uniform ... upon such property as the legislature shall prescribe.’ ... *The right of the legislature to prescribe what property shall be taxed* includes the right to prescribe what shall not be taxed. The right of choosing some from the multiplicity of kinds, classes, species, use and ownership of property *in the state*, and the rejection of others, includes the absolute power to discriminate between what shall be chosen and what rejected, except in so far as it may be limited by the requirement of a uniform rule.” *Wis. Cent. R. Co. v. Taylor County*, 52 Wis. 37, 92, 8 N.W. 833.

(Emphasis added.) And, in *Gottlieb, supra* at 420: “It was conceded in *Knowlton*, and the proposition has never been seriously challenged, that the phrase, ‘as the legislature shall prescribe,’ confers upon the legislature the right to select some property for taxation and to totally omit or exempt others.”

If the Legislature determines that a property is to be taxed, the rule of uniformity extends to such taxable property wherever it may be found. Thus, whatever property is made taxable at all, should be taxed by a uniform rule, which is designed to secure equality of burden as between all taxable property in the state. *State ex rel. Att'y Gen. v. Winnebago Lake & Fox River Plankroad Co.*, 11 Wis. 34 [*35], 41 [*42] (1860).

It should further be appreciated that: “[T]he uniform rule of taxation ... extends to all taxes levied for the purpose of revenue, or the support of the government, whether the moneys were used in defraying the expenses of municipal corporations, such as towns, villages, cities and counties, or those of the state at large.” *Lumsden v. Cross*, 10 Wis. 225 [*282], 227 [*284] (1860). See also, *State ex rel. Reedsburg Bank v. Hastings*, 12 Wis. 52 [*47], 53 [*48] (1860).

Proponents of “land value taxation” apparently argue that uniformity of taxation is achieved where the exemption of all buildings and improvements from general taxation is total within a particular tax district. But this argument ignores the fact that under such a system buildings and improvements would be uniformly taxed as a class in other tax districts and, during the proposed ten-year “phase-in” period, would also be taxed, in part, even in tax districts adopting “land value taxation.” In the seminal case interpreting Wis. Const. art. VIII, sec. 1, *Knowlton v. Supervisors of Rock County*, 9 Wis. 378 [*410] (1859), the court rejected the argument that uniformity exists when certain taxable property is classified for separate tax treatment and is treated uniformly within that separate class, saying at p. 390 [*421-422]: “The answer to this argument is, that it creates different *rules* of taxation to the number of which there is no limit, except that fixed by legislative discretion, whilst the constitution establishes but one fixed, unbending, uniform rule upon the subject.”

The proposal here establishes many rules for the taxation of buildings and structures attached to land. Within the “land value taxation” district, the rule would depend on which stage of the ten year “phase-in” is applicable. Outside the district, the rule would depend on whether or not the local taxing district had chosen “land value taxation,” and different rules on the tax liability of buildings and structures would prevail among such districts, not only in reference to

local general taxes, but also as to property taxes imposed on a county and state-wide basis.

Under the proposed legislation the local city, village or town determines, in each individual instance, whether to adopt "land value taxation." Nothing in the proposal sets forth standards for exercising such an option by which the reasonableness of such a classification could be tested. The only basis referred to as justifying the proposed delegation is the apparent reliance on that language of Wis. Const. art. VIII, sec. 1, which authorizes the Legislature to empower local tax districts "to collect and return taxes on real estate located therein by optional methods." Nevertheless, the creation of a class of taxable property and the creation of exemptions from taxation, as well as the assessment of property and the levy of the tax, precede the actual "collection and return" of such taxes and are completely separate steps in the taxation of property. The latter steps may be accomplished by optional means, but the former may not.

Some of the stages in the taxation of property under Wis. Const. art. VIII, sec. 1, were discussed in *Knowlton, supra* at 388-389 [*420-*421], as follows: "The act of laying a tax on property consists of several distinct steps, such as the assessment or fixing of its value, the establishing of the rate, etc.; and in order to have the rule or course of proceeding uniform, each step taken must be uniform." The language, "but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods," added to the constitutional provision by amendment adopted in April, 1941, only relieved the Legislature of the need to retain uniformity in reference to the final collection and return of such real estate taxes. In fact, the records of the Wisconsin Legislative Reference Library and the language of 1941 Enrolled Joint Resolution 18, which submitted the constitutional amendment question to the electorate, indicate that the amendment was actually designed principally to permit the Legislature to authorize local tax districts to provide various types of installment tax payments. Significantly, shortly after the ratification of the constitutional amendment, the Legislature adopted ch. 133, Laws of 1943, which dealt with installment payment of real estate taxes, and created sec. 74.031, Stats., permitting the payment of such taxes in three or more installments, outside cities of the first class, at the option of the city, village or town; and made provision for the return of delinquent taxes. Thus,

this constitutional language does not provide an exception to the uniformity provisions of Wis. Const. art. VIII, sec. 1, which would permit the adoption of a statute allowing local tax districts the option of exempting buildings and improvements from general property taxes.

BCL:JCM

Counties; Words And Phrases; County boards do not have authority to legally proscribe deer shining since the Legislature has delegated such authority to the Department of Natural Resources. OAG 30-79

March 13, 1979.

E. WAYNE WORTH, *Corporation Counsel*
Wood County

You have requested my opinion as to whether Wood County can enact an ordinance prohibiting deer shining.

Deer shining has been defined as "directing a light into woods or fields where deer are likely to be." *State v. Erickson*, 55 Wis. 2d 150, 154, 197 N.W.2d 729 (1971).

It is well established that county boards have only such powers as are expressly granted or necessarily implied from the statutes. *Dodge County v. Kaiser*, 243 Wis. 551, 11 N.W.2d 348 (1943); *State ex rel. Conway v. Elvod*, 70 Wis. 2d 448, 234 N.W.2d 354 (1975). The only statutory provision which could possibly be construed as authorizing counties to regulate deer shining is sec. 59.07(64), Stats., which empowers county boards to "[e]nact ordinances to preserve the public peace and good order within the county." It is my opinion that that section cannot be so interpreted.

In *Maier v. Racine County*, 1 Wis. 2d 384, 84 N.W.2d 76 (1957), the county argued that sec. 59.07(64), Stats., authorized it to enact an ordinance prohibiting the sale of beer to persons under the age of twenty-one. The court rejected that contention, holding, at p. 386, that:

While the argument based on sec. 59.07(64), Stats., might be persuasive if that legislation stood alone, we think other statutory provisions negative legislative purpose to authorize county boards to enact the type of ordinance now in question.

The court went on to explain that since the State Legislature had itself enacted statewide regulations controlling the sale of fermented malt beverages, and delegating enforcement powers to cities and villages, it could not have intended "to confer like powers on county boards by the broad language of sec. 59.07(64), Stats." *Id.* at 387.

The Legislature has explicitly delegated to the Department of Natural Resources the authority to enact such rules as may be necessary to protect and conserve the state's wildlife. Section 29.01(1), Stats., provides as follows:

The legal title to, and the custody and protection of, all wild animals within this State is vested in the state for the purposes of regulating the enjoyment, use, disposition, and conservation thereof.

The Department of Natural Resources has, pursuant to that section and sec. 15.341, Stats., enacted the following Wis. Adm. Code sections:

NR 10.07 Hunting, prohibited methods.

....

(3) No person shall have in possession or under control any firearm, bow and arrow or crossbow in or on any vehicle or automobile while shining any area inhabited by wild animals.

NR 10.10 Deer and bear hunting. (1) PROHIBITED METHODS. No person shall hunt deer or bear by any of the following methods:

(a) *Shining.* With the aid of artificial light.

NR 10.102 Deer hunting. (1) PROHIBITED METHODS.
(a) No person, while hunting or in possession of firearms, bow and arrow or crossbow, shall have in possession or under control any light used for the purpose of shining deer.

The Legislature has provided for the enforcement of these rules in sec. 29.99(5), Stats., which states:

For the violation of any statutes or any department rules relating to the hunting or shooting of deer with the aid of artificial light ... by a fine of not more than \$200 or imprisonment for not more than 90 days, or both, and a mandatory 3-year revocation of all licenses issued under this chapter.

It is thus apparent that the authority to restrict deer shining lies not with county boards but with the state itself and one of its agencies.

I think the rationale of *Maier* is applicable here. The Legislature having delegated to the Department of Natural Resources the power to enact rules to protect wild animals, "it would do violence to the rather plain manifestation of legislative intent, to hold that counties, though not mentioned have the same authority." *Id.* at 387.

BCL:SE

Appropriations And Expenditures; Bonds; Waters; A joint sewerage commission is empowered within the territorial limits of its district to enact and enforce regulations which would be required of it under the mandates of the Clean Water Act of 1977, but it cannot make appropriations or issue bonds without the approval of the governing bodies which established it. OAG 31-79

March 14, 1979.

ANTHONY S. EARL, *Secretary*
Department of Natural Resources

You have requested my opinion on several matters which relate to the capacity of a joint sewerage commission under Wisconsin law to meet federal requirements for the discharge of pollutants from a publicly owned treatment work (POTW). Most of the requirements of concern have their analog in Wisconsin law, ch. 147, Stats.

Under this chapter the discharge of certain pollutants is prohibited. Discharge of those pollutants which are not expressly prohibited may be undertaken if the discharger first receives a Wisconsin Pollutant Discharge Elimination System (WPDES) permit. Thereafter, lawful discharge is conditioned upon compliance with the terms and conditions of the permit. In Wisconsin such a permit must be

approved by the United States Environmental Protection Agency (U.S. EPA); the U.S. EPA issues no permit of its own.

The fundamental working premise of the WPDES permit program is that some mode of technology will be employed to either eliminate the discharge altogether or to reduce by separate treatment those types of pollutants which are discharged. POTW's rely on wastewater treatment as their method of compliance.

The actual minimum level of treatment is expressed and enforced through effluent limitations which are required by federal and state law to be at least as stringent as the Clean Water Act Amendments of 1977 and the federal regulations adopted pursuant thereto.

Within these constraints a WPDES permittee, such as a POTW, which receives wastes from more than one source, is required to insure that one or more of the sources does not by the type or quantity of waste conveyed for treatment damage the treatment facility or impair the treatment process. These protective requirements are known collectively as pretreatment standards. Their enforcement depends initially on the POTW's ability to require the source to monitor the type and strength of the waste it conveys. This data is then used to determine, among other things, the charge back to each tributary source for wastewater treatment.

Regarding the enforceability of these related requirements by a joint sewerage commission, you ask:

1. Is a joint sewerage commission formed under sec. 144.07, Stats., empowered to enact and enforce ordinances consistent with the mandates of the Clean Water Act Amendments of 1977 (P.L. 95-217) and the federal regulations adopted pursuant thereto, most particularly 40 C.F.R. 403, dealing with pretreatment requirements of permit holders?
2. Is a joint sewerage commission empowered to enact and enforce ordinances consistent with the requirements of the Wisconsin Pollutant Discharge Elimination System (WPDES) permit program, specifically secs. 147.02(4), 147.07(2), 147.08 and 147.15, Stats?

These two questions can be answered together.

I am of the opinion that joint sewerage commissions are empowered to enact and enforce regulations which would be required of them under the mandates of the Clean Water Act Amendments of 1977 (P.L. 95-217; hereinafter CWA), the federal regulations adopted pursuant thereto, and the parallel statutory and administrative law of Wisconsin. The bases upon which I have reached these conclusions are set forth below.

As a preliminary matter, it should be noted that state law empowers a multiplicity of units of local government to construct, operate and maintain sewage treatment systems. For those treatment systems which are themselves special units of local government and which go beyond the territorial limits of a single city, village or town, state law provides for the formation of a metropolitan sewerage district or a joint sewerage district. Secs. 66.067 and 144.07, Stats. Both types of districts are administered by a commission. The powers of the metropolitan commission are set forth in general terms in sec. 144.07, Stats., and in more detail in secs. 66.22 through 66.26, Stats. In the case of the joint commission the general powers are set forth in sec. 144.07 and, by reference, in sec. 62.11(5). The relevant portions of sec. 144.07, Stats., provide:

(4)(a) Any 2 or more governmental units, including cities, villages, town sanitary districts or town utility districts not wishing to proceed under sub. (2) may *jointly construct, operate and maintain* a joint sewerage system, inclusive of the necessary intercepting sewers and sewerage treatment works

....

(4)(c) The sewerage commissioners *shall* project, plan, construct and *maintain* ... intercepting and other main sewers ... [and] *disposal works* The sewerage commissioners may also project, plan, construct and maintain intercepting and other main sewers for the collection and disposal of storm water which shall be separate from the sanitary sewerage system. ... The sewerage commissioners may employ and fix compensation ... or *do such other things as may be necessary for the due and proper execution of their duties*

Under sec. 144.07(4), Stats., these powers are to be exercised within the following bounds and in the following manner:

(d) Such sewerage commission shall constitute a body corporate by the name of “(Insert name of governmental units or area) Sewerage Commission,” by which in all proceedings it shall thereafter be known. It may purchase, take and hold real and personal property for its use and convey and dispose of the same. This grant of power shall be retroactive to September 13, 1935 for commissions formed prior to January 1, 1972. Except as provided in this subsection the *sewerage commissioners shall have the power and proceed as a common council* and board of public works *in cities* in carrying out the provisions of par. (c). All bond issues and appropriations made by said sewerage commission shall be subject to the approval of the governing bodies of the respective governmental units.

By reference to the common council, the Legislature has empowered a joint sewerage commission to function as follows:

Powers. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine, imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language.

Sec. 62.11(5), Stats. In other words, where the commission has a duty to operate and maintain sewage treatment facilities, it has the power to act through regulation and to seek appropriate civil remedies.

Subsection 147.015(2), Stats., provides that an owner or operator of a treatment facility may be a permittee.

As the operator of a sewerage treatment system, a joint commission is a discharger of pollutants and can serve as the permittee for a WPDES permit. As a permittee its obligations are numerous; they include:

147.02(4)(f) That, if the permit is for a discharge from a publicly owned treatment work, *the permittee shall*:

1. Inform the department of any new introduction of pollutants into the treatment works under s. 147.14 (2);
2. *Require* that any industrial user of such treatment work comply with the requirements of ss. 147.07 (2), 147.08 and 147.15.

The requirements of subpara. 147.02(4)(f)2., Stats., encompass pretreatment, monitoring and user charges. These facets of 40 CFR 403 are, therefore, the obligations of a joint sewerage commission when it acts as the permittee for its waste treatment facilities. Thus, if the Legislature has empowered a joint sewerage commission to serve as a permittee and to act by regulation where its duties and obligations so require and has expressly made such matters a duty of a WPDES permittee, it follows that a joint sewerage commission has the power to carry out its duties with respect to monitoring, pretreatment and user charges.

You ask a third question as follows:

Are joint sewerage commissions empowered to enact and enforce ordinances regulating the discharge of pollutants to their systems in order to meet federal *grant* requirements which may be different from federal discharge permit requirements? (Emphasis in the original.)

This question requires some speculation on my part since no federal grant requirements which regulate the discharge of pollutants, but which are not also tied to the CWA or the federal regulations which were adopted pursuant thereto, have been brought to my attention. Nonetheless, it can be said that if such requirements are reasonably and directly tied to the construction, operation or maintenance of the joint sewerage system, that the commission has the power under sec. 144.07(4)(c), Stats., to enact and enforce ordinances which regulate such discharges.

You ask a fourth question as follows:

If authority exists allowing joint sewerage commissions to adopt regulatory ordinances,

- a) What procedure must a commission observe regarding the enactment of such ordinances?
- b) What is the geographical jurisdiction of a joint sewerage commission regarding the application and enforcement of such ordinances?
- c) What specific judicial means of enforcing such regulatory ordinances are available to joint sewerage commissions?

As indicated above a joint commission is directed by statute to proceed "as a common council and board of public works in cities," sec. 144.07(4)(d), Stats. A board of public works in cities is "under the direction of the common council," sec. 62.14, Stats. Thus, the paramount procedure is that of a common council; that procedure is outlined in sec. 62.11(3), Stats.

The Legislature has apparently made the formation of a joint sewerage district available to any combination of consenting local governmental units. In this respect the statute reads as follows:

144.07(4)(a) *Any 2 or more governmental units, including cities, villages, town sanitary districts or town utility districts not wishing to proceed under sub. (2) may jointly construct, operate and maintain a joint sewerage system, inclusive of the necessary intercepting sewers and sewerage treatment works*

After formation of the joint sewerage district the commission has the authority to construct, operate and maintain the sewerage system. *See* sec. 144.07(4)(c), (d) and (e), Stats. Since the permit requirements dealing with pretreatment or the various aspects of monitoring dischargers which are tributary to the system are clearly associated with the proper operation and maintenance of the sewerage system, a joint sewerage commission would be under the duty to legally bind and actively enforce these terms and conditions.

Within the geographical boundaries of the governmental units which established it, the commission may achieve these goals through properly adopted regulations.

Since a joint sewerage commission has been granted the power of a common council as to those matters which relate to construction, operation or maintenance of the sewerage system, it is empowered

within its boundaries to enforce its ordinances by "fine, imprisonment [upon failure to pay such a fine], confiscation and other necessary or convenient means." Sec. 62.11(5), Stats. In other words, a joint sewerage commission could seek to levy a fine for past violations, terminate service for the future or pursue a number of other modes of judicial relief encompassed by the phrase, "civil remedy."

Despite the apparent breadth of the grant to joint sewerage commissions, the Legislature has withheld the right to seek judicial relief for a public nuisance. That right has been granted to the individual municipalities (including towns) and metropolitan sewerage commissions but not to joint sewerage commissions. *See* sec. 823.02, Stats.

While the commission is empowered to establish a site for the treatment facility outside of the district boundaries, I can find no statutory authority for the commission to exercise extraterritorial regulatory powers. Therefore, I am of the opinion that the jurisdiction of the commission to enact and enforce regulations for pretreatment, monitoring and user charges is limited to the boundaries of the government units which formed it.

Nonetheless, a joint sewerage commission could accept a contract to receive and treat discharges from a facility outside of its legal jurisdiction. Within the constraints of the laws of contract the commission could, however, act by regulation to affect the terms of such a contract. *Village of Butler v. Renner Manufacturing Co.*, 70 Wis. 2d 1, 233 N.W.2d 380 (1975). Therefore, I am of the opinion that if the commission enters into a contract with an extraterritorial discharger it must include in the contract the pretreatment and monitoring requirements and the user charges which are required by federal and state law. The commission must also draft the contract with sufficient flexibility to assure that future requirements of federal and state law can, within the constraints of the laws of contracts, be incorporated. Failure to do so would conflict with the national and statewide legislative intent of the pollutant discharge elimination programs and jeopardize the certification of the WPDES permit program.

The commission could seek enforcement of the terms of the contract as it would any other contract the terms of which had not been complied with, including equitable relief.

Your fifth question reads as follows:

In light of 30 Op. Atty. Gen. 468, does a joint sewerage commission have "...the legal...and *financial capability* to insure adequate construction of the treatment works" (Emphasis supplied) required of an applicant for a federal wastewater treatment grant under 40 CFR 35.925-5? (Emphasis in the original.)

The provision about which you inquire reads as follows:

Sec. 35.925 LIMITATIONS ON AWARD.

Before awarding initial grant assistance for any project for a treatment works through a grant or grant amendment, the Regional Administration shall determine that all of the applicable requirements of sec. 35.920-3 have been met and shall further determine:

....

-5 FUNDING AND OTHER CAPABILITIES.

That the applicant has:

(a) Agreed to pay the non-Federal project costs, and

(b) Has the legal, institutional, managerial, and financial capability to insure adequate construction, operation, and maintenance of the treatment works throughout the applicant's jurisdiction.

For the reasons given below, I am of the opinion that a joint sewerage commission has the financial capability to insure adequate construction of the treatment works only if the various governmental units which were involved in the establishment of the commission have approved in advance the funding necessary to achieve an adequate level of construction. This precondition is required by the plain language of sec. 144.07(4)(d), (e), Stats., which reads in pertinent part:

(d) *Except as provided in this subsection* the sewerage commissioners shall have the power and proceed as a common council and board of public works in cities in carrying out the provisions of par. (c). *All bond issues and appropriations made*

by said sewerage commission *shall be subject to the approval* of the governing bodies of the respective governmental units.

(e) *Each such governmental unit shall* pay for its proportionate share of such sewerage system, including additions thereto, and also its proportionate share of all operation and maintenance costs as may be determined by the sewerage commission. *Each governmental unit* may borrow money and issue revenue or general obligation bonds therefor, for the acquisition, construction, erection, enlargement and extension of a joint sewage disposal plant or refuse or rubbish or solid waste disposal plant or system or any combination of plants provided under this section, and to purchase a site or sites for the same. *Each governmental unit* may, if it so desires, proceed under s. 66.076 in financing its portion of the cost of the construction, operation and maintenance of the joint sewage disposal plant or plants provided for in this section, or system.

From the above language it is clear that the Legislature intended that the power of the purse for joint sewerage commissions remain in the hands of the local units of government and not be placed directly with the commission. This is in accord with 30 Op. Att'y Gen. 468 (1941). "The sewerage commission has no source of revenue except the amounts paid to it by the respective cities involved. It has no power to levy a tax of its own but must obtain its revenues through the action of the [governmental units which comprise it]." *Id.* at 468-469.

In 1972 the Legislature amended sec. 144.07, Stats., and created new secs. 66.22 to 66.26, Stats. See ch. 276, Laws of 1971. These changes expanded the number and type of local units of government which could participate in the formation of metropolitan sewerage districts. Even though the metropolitan sewerage districts have the power of the purse (*see* particularly sec. 66.25, Stats.), the Legislature did not amend the language of sec. 144.07(4)(d), Stats., which applies to the issuing of bonds and the making of appropriations by joint sewerage commissions. It must, therefore, be assumed that it was not the intent of the Legislature to deviate from the past financial constraints it had placed on joint sewerage commissions. Such commissions must, therefore, operate within those constraints. This qualification on the powers of a joint sewerage commission does not, in my

opinion, affect its ability to demonstrate the financial capability required by 40 CFR 35.925-5.

BCL:RMR

County Executives; Ordinarily, where a county has a county executive, "operating" or "servicing" committees of the county do not have authority to exercise day-to-day administrative supervision and direction of county departments or functions. OAG 32-79

March 16, 1979.

WILLIAM F. BOCK, *Corporation Counsel*
Racine County

You advise that many discussions and disagreements have arisen in your county over the dividing line of authority between the county executive and county board committees as their respective duties involve the operation of the various county departments. You ask the following question:

The basic question which seems to surface in all of the discussions is what authority does a servicing committee have over the various departments regarding their day-to-day operation, and likewise what authority does the County Executive have over the various departments, and is his power limited in any way or does it come in conflict with the County Board's authority over the departments?

The significant evolution which has taken place in the law relating to county administrative practice in Wisconsin in the past ten years, particularly as it relates to the elective executive, is obviously at the core of your question.

Although the county board of supervisors historically has functioned both as a legislative body and as the central executive in Wisconsin counties, the actual administration and direction of county functions has been exercised primarily by county commissions, boards and committees, including the standing committees of the county board appointed under the provisions of sec. 59.06, Stats. See

59 Op. Att’y Gen. 1, 2 (1970). Some county committees are “operating” or “servicing” committees in the sense that they have the responsibility of supervising or overseeing specific county departments or functions. In some instances these committees are only exercising delegated administrative authority of the county board, which arises principally by necessary implication from the general powers of the county board which are set forth in sec. 59.07, Stats. Conversely, in a number of instances such committees exercise, in differing degrees, independent administrative and management authority based on separate, specific statutory enactments. *See*, for instance, sec. 59.97(2), Stats. (county planning and zoning committee); sec. 83.015(2), Stats. (county highway committee); and secs. 59.87(6) and 92.06, Stats. (county committee on agriculture and extension education).

Except in Milwaukee County, there was no potential for change in this pattern of administrative control through an elective county executive until the enactment of sec. 59.032, Stats. (1967), by ch. 306, Laws of 1967. That statute authorized such an officer in other counties, but with duties and powers which were largely limited to those delegated by the county board. Shortly thereafter, the recommendations of the Tarr Task Force on Local Government Finance and Organization for reform of the office of county executive included the recommendation that the executive be granted powers and duties directly by statute rather than through the county board of supervisors and that those powers and duties include control over all but certain administrative functions specifically vested in certain boards, commissions and elected officers. These recommendations were apparently stimulated at least in part by concern that the above-described splintering of the counties’ administrative duties could produce a relatively inefficient system with no person having responsibility for the implementation of the policies of county government and for its overall management. *See* Tarr Task Force, Government Organization Reports No. 1 (Government Administrative Organization, dated July 22, 1968) and No. 6 (County Executive and County Administrator - Bill Draft, dated October 28, 1968). Subsequent amendment of Wis. Const. art. IV, secs. 23 and 23a, in April, 1969, and of sec. 59.032(2), Stats., by ch. 214, Laws of 1969, allowed these recommendations to be largely realized.

Wisconsin Constitution art. IV, sec. 23, now authorizes the Legislature to provide that counties may elect “a chief executive officer ...

with such powers of an administrative character as they [the Legislature] may from time to time prescribe” Wisconsin Constitution art. IV, sec. 23a, grants such chief executive veto powers over “Every resolution or ordinance passed by the county board.”

Section 59.032, Stats., which applies generally outside Milwaukee County, provides in part:

County executive in other counties.

....

(2) **Duties and powers.** The duties and powers of the county executive shall be, without restriction because of enumeration, to:

(a) Coordinate and direct, by executive order or otherwise, *all* administrative and management functions of the county government *not otherwise vested by law in boards or commissions, or in other elected officers.*

The language set forth in sec. 59.032(2)(a), Stats., first appeared in sec. 59.031(2)(a), Stats. (1959), which originally created the office of county executive only for populous counties. Ch. 327, Laws of 1959. The apparent intended effect of the statutory language was discussed prior to its enactment, as follows:

1. The Office of County Executive

The County Executive officer, as proposed in Bill 441, S., of 1959, occupies the position of an executive secretary of the Milwaukee county board. He takes over the administrative and executive functions of the county board which are presently to a large extent in the hands of standing committees of the county board. He is not a “county manager,” that is, he does not replace the various elective administrative and executive county officers now required by the constitution and the statutes of Wisconsin.

Administrative and management functions vested by law in specific boards or commissions do not become subject to the powers of coordination and direction of the county executive under this bill. ...

2. The Administrative Functions of the County Executive

As the executive officer of the county board, the county executive assumes responsibility for the performance of all administrative functions now carried out by the county board of Milwaukee County. The county board thus becomes a purely legislative body.

The general powers of county boards, and the additional powers vested specifically in the board of Milwaukee County, are set out in Section 59.07 of the Wisconsin Statutes. The administrative and executive functions of the county board are largely inherent in the powers granted under this section. We may therefore assume that the main administrative functions to be taken over by the county executive are those of Sec. 59.07 Wis. Stats.

The County Executive Officer under Bill 441, S., of 1959, compiled by Wisconsin Legislative Reference Library, April 1959, Document 352.923;W7.

Thus, the traditional mode of administration is altered considerably in a county, such as yours, which has an elected county executive. In such a county, the role of the county board is primarily policy-making and legislative, and the county executive exercises substantial direct and indirect control over personnel performing administrative and management functions for the various county departments and offices. 63 Op. Att'y Gen. 220, 227, 228 (1974).

To the extent that a county committee may be exercising quasi-legislative authority delegated directly by the Legislature or through the county board or is engaged in activity essential to the legislative process, the county executive may not intrude. But, the net effect of sec. 59.032(2)(a), Stats., is to place the coordination and direction of all administrative and management functions exercised by county committees in the hands of the county executive, since such committees are not "boards or commissions, or ... other elected officers," and, with but few exceptions, such committees exercise delegated administrative and management authority rather than authority which is specifically vested in them "by law," *i.e.*, by statute. Like-

wise, in some instances the county board may also deem it appropriate to transfer to the county executive, under the provisions of secs. 59.025(3)(c) and 59.15(2)(a), Stats., certain administrative functions of a board, commission, committee or certain other officers created under statute. *See* 63 Op. Att'y Gen. 256 (1974). On the other hand, if administrative and management authority which is "otherwise vested by law" in a board, commission or officer of the county is properly transferred to a county committee, under the provisions of secs. 59.025(3)(c) and 59.15(2)(a), Stats., the independent character of that authority persists in the committee, and it may be exercised by the committee free of control by the executive.

Some generalizations can be made concerning the probable result when a county executive and a county committee come into conflict in reference to the operation of a particular department or function. Ordinarily, an "operating" or "servicing" committee of the county does not have authority to exercise day-to-day administrative supervision and direction of such department or function, where the county has a county executive. Each dispute, however, must be reviewed individually since the committee may be exercising legislative rather than administrative power or may be properly exercising administrative power which is beyond the control of the county executive.

Counties choosing a county executive may well experience transition problems caused by friction arising naturally and perhaps unavoidably from the fact that certain county board operating committees were formerly responsible for many of the administrative concerns which are either conferred on the office of the executive by statute or are delegated to the executive by the county board. As to powers delegated to the executive by board action, the board would appear to have inherent power to attempt to resolve jurisdictional disputes which may arise. While a board may lack such inherent authority with regard to jurisdictional disputes over powers now conferred by statute on the executive, as a practical matter, a board could well exert considerable influence over the peaceful and speedy resolution of such controversies.

BCL:JCM

District Attorney; Under sec. 55.06(1)(c), Stats., the duty of corporation counsel is to assist the court and not to act as counsel for private parties petitioning.

Under sec. 55.06(9)(a), Stats., court should order protective placement in an existing facility.

Under sec. 51.20(2), Stats., court can entertain proceedings for involuntary commitment of person who has been admitted in some facility as a voluntary inpatient. OAG 34-79

March 20, 1979.

ROBERT P. RUSSELL, *Corporation Counsel*
Milwaukee County

Assistant Corporation Counsel Robert A. McKnight of your office has requested my opinion on three questions relating to civil commitments under ch. 51, Stats., and protective placements under sec. 55.06, Stats.

I

The first question is related to sec. 55.06(1)(c), Stats., which provides: "If requested by the court, the district attorney or corporation counsel shall assist in conducting proceedings under this chapter."

Section 55.06, Stats., is concerned with procedures to provide protective placement of wards and proposed wards who are or are alleged to be developmentally disabled or have special needs because of infirmities of aging or other like incapacities. Under the section, petition for protective placement and for guardianship can be made by the State Department of Health and Social Services, a county or private agency, a guardian or any interested person.

Your first question is whether sec. 55.06(1)(c), Stats., imposes a duty on the district attorney and corporation counsel to "represent" the petitioners in ch. 55 proceedings.

I am of the opinion that the provisions of sec. 55.06(1)(c), Stats., do not impose a duty on such officers to represent the petitioners. The duty imposed is to assist the court, if requested, and such duty could

involve assistance in presentation of evidence, limited investigation and the drafting of certain necessary papers relating to the proceeding. The duties are similar to those required under former sec. 51.02(3), Stats., which in 1968 provided that “[i]f requested by the judge, the district attorney shall assist in conducting proceedings under this chapter.”

That section, which is similar to sec. 55.06(1)(c), Stats., was construed in 57 Op. Att’y Gen. 122 (1968) as not including the duty to draft routine papers such as notices of hearing and findings of fact. Please see the discussion in that opinion. Present sec. 51.20(5), Stats., places a somewhat broader duty on the district attorney or corporation counsel with respect to assistance in ch. 51 proceedings.

A district attorney or corporation counsel may have a duty by reason of secs. 59.47(1), 59.456(1) and (5), Stats., and any ordinance creating the office of corporation counsel in a county under 500,000, to represent a petitioner where the state department or a county agency is the petitioner. Section 55.06, Stats., recognizes the right of a petitioner to legal counsel and provides for a guardian ad litem in certain cases. See sec. 55.06(1)(a) and (b), (5), (6) and (17), Stats. Even where petitioners are represented by private legal counsel and a guardian ad litem has been appointed, there may be occasions where the district attorney or corporation counsel could appear for the interests of the state and county. See discussion in 25 Op. Att’y Gen. 549, 551, 552 (1936), 42 Op. Att’y Gen. 231 (1953) and 57 Op. Att’y Gen. 122 (1968). In my opinion, if a situation arises where there is a conflict between the duty of such officer to assist the court and a duty to represent state or county petitioners or the general interests of the county, such officer should apprise the court of such conflict and request to be relieved from duties of assisting the court.

II

Your second question involves sec. 55.06(9)(a), Stats., which provides:

The court may order protective services under s. 55.05 (2) (d) as an alternative to placement. *When ordering placement, the court, on the basis of the evaluation and other relevant evidence shall order placement through the appropriate board*

designated under s. 55.02 or an agency designated by it. Placement shall be made in the least restrictive environment consistent with the needs of the person to be placed. Factors to be considered in making protective placement shall include the needs of the person to be protected for health, social or rehabilitative services and the level of supervision needed. Placement under this section does not replace commitment of a person in need of acute psychiatric treatment under s. 51.20 or 51.45 (13). Placement may be made to such facilities as nursing homes, public medical institutions, centers for the developmentally disabled, foster care services and other home placements, or to other appropriate facilities but may not be made to units for the acutely mentally ill. The prohibition of placements in units for the acutely mentally ill does not prevent placement by a court for short-term diagnostic procedures under par. (d). Placement in a locked unit shall require a specific finding of the court as to the need for such action. A placement facility may transfer a patient from a locked unit to a less restrictive environment without court approval.

You state that you are often faced with a situation wherein a person is an appropriate subject for guardianship or prospective placement, but due to the peculiar needs of the individual, an appropriate facility is unavailable at the time of the final hearing.

You inquire:

Under sec. 55.06(9)(a), Stats., and especially the second sentence thereof, "is it appropriate for the court to order placement to the local board or agency while a facility is being sought?"

You state that you "believe the intent of the law is to present to the court all the information necessary to permit the court to reach a determination as to the *type of facility* and *level of services* required for the individual and that the court is then *to order the agency or board to provide what has been ordered* as soon as possible." (Emphasis added.)

I am of the opinion that the answer to your question is no. The statute does not contemplate placement "to" a board designated under sec. 55.02, Stats., or an agency designated by it but rather

“through” such board or agency. Whereas it is the duty of the designated board or state department to provide an appropriate facility or contract for one, the statute contemplates that *placement* be to a facility which is in existence and available or contracted for and available. The court does the placing. Under sec. 55.06(8), Stats., the board or designated agency has a duty to “cooperate with the court in securing available resources.”

After initial placement by the court, the “guardian or placement facility” may transfer the ward between placement units or to a medical facility without prior court approval. Where transfer is to a more restrictive placement, prior court approval is needed in certain cases. *See* sec. 55.06(9)(b), (c), (d) and (e), Stats.

III

Your third question is:

May a detention order issue under s. 51.20(2) against a person who is a voluntary inpatient at a mental health facility at the time a three-party petition is filed, if the petition alleges all of the information required under s. 51.20(1), and if the “individual presents a substantial risk of serious physical harm to himself or herself or to others based on information regarding recent overt acts, attempts or threats to inflict such harm to the subject individual or to others”?

I am of the opinion that it can.

The legislative intent of ch. 51, Stats., includes the proposition that there be provision for a full range of treatment and rehabilitation services and that the least restrictive treatment alternatives are to be utilized. *See* sec. 51.001(1), Stats. Section 51.001(2), Stats., provides: “to protect personal liberties, no person who can be treated adequately outside of a hospital, institution or other inpatient facility may be involuntarily treated in such a facility.”

Provisions of the statute provide for outpatient treatment and for voluntary admissions for treatment.

All of this does not mean, however, that there may not be need for involuntary commitment of a person who has been voluntarily admitted to some facility for treatment. I agree with the position taken by your office. If the petition demonstrates facts sufficient to warrant

the issuance of a detention order, the fact that the subject individual has voluntarily entered a mental health facility does not prevent the court from issuing a detention order, appointing counsel and immediately scheduling a probable cause hearing.

This conclusion is in part based upon sec. 51.20(1)(a), Stats., which requires the state to prove that the person is a proper subject for involuntary treatment and that voluntary treatment is inappropriate. Support is also found in sec. 59.20(9)(b), Stats., renumbered from sec. 59.20(10)(b), Stats., by ch. 428, Laws of 1977, which requires the court-appointed examiner to make a recommendation "concerning the appropriate level of treatment" and concerning "the level of inpatient facility which provides the least restrictive environment consistent with the needs of the individual." Finally, sec. 51.20(13)(a)3., Stats., renumbered from sec. 51.20(14)(a)3., Stats., by ch. 424, Laws of 1977, requires the court, in considering disposition, to decide between inpatient and outpatient care. The *court* rather than the *subject* involved is to determine whether involuntary commitment is required to deliver the type and level of treatment which is required. I am aware that there are certain checks on voluntary admissions. *See* sec. 51.10, Stats. Section 51.10(5)(c) and (6), Stats., amended and renumbered from sec. 51.10(e)3. and (f) by ch. 428, Laws of 1977, indicate some preference for voluntary admissions over involuntary commitments but provide that the discretion is with the court.

BCL:RJV

Loans; Veterans; The Federal Equal Opportunity Act does not apply to the Wisconsin veterans loan program under ch. 45, Stats., since the latter is an assistance program authorized by law for an economically disadvantaged class. OAG 35-79

March 20, 1979.

ED JACKAMONIS, *Chairman*
Assembly Committee on Organization

The Assembly Committee on Organization requests that I render an opinion concerning the effect of the Federal Equal Credit Opportunity Act (ECOA) on the eligibility requirements of Wisconsin's loan programs for veterans. The request is prompted by a Report of the Legislative Audit Bureau in which the Bureau "found that under the federal ECOA, veterans are able to legally circumvent the need requirements of the ... [veterans] loan programs" (*Audit Report 78-23*, July 18, 1978). Specifically, the Committee asks (1) whether ECOA preempts the need requirements of Wisconsin's veterans loan programs, (2) whether the veterans loan programs are exempt from ECOA as "credit assistance program(s) expressly authorized by law for an economically disadvantaged class of persons" and (3) whether ECOA unconstitutionally restricts the exercise of Wisconsin's police powers to the extent that ECOA preempts the need requirements of the veterans loan programs.

ECOA, 15 U.S.C. secs. 1691-1691f, is part of the federal government's effort to provide consumer credit protection.

(1) It is my opinion that ECOA does not preempt the field occupied by Wisconsin Statutes relating to veterans' loans. 15 U.S.C. 1691(b)(4)(c) provides in part:

ADDITIONAL ACTIVITIES NOT CONSTITUTING DISCRIMINATION

(c) It is not a violation of this section for a creditor to refuse to extend credit offered pursuant to—

(1) any credit assistance program expressly authorized by law for an economically disadvantaged class of persons;

An interpretive rule of the foregoing is contained in 12 C.F.R. 202.8(a):

Sec. 202.8 SPECIAL PURPOSE CREDIT PROGRAMS.

(a) *Standards for programs.* Subject to the provisions of paragraph (b) of this section, the Act and this Part are not violated if a creditor refuses to extend credit to the applicant solely

because the applicant does not qualify under the special requirements that define eligibility for the following types of special purpose credit programs:

(1) Any credit assistance program expressly authorized by Federal or State law for the benefit of an economically disadvantaged class of persons; or

The question, then, is whether Wisconsin's laws providing for veteran's loans is "for the benefit of an economically disadvantaged class." The Legislature adopted specific provisions to show that purpose.

Loans under sec. 45.351 are "to prevent want or distress."

Under the legislative findings in sec. 45.70(1), Stats., the program is for "veterans, who have sacrificed in the service of their country, valuable years of their lives and considerable earning potential."

The intent declared in sec. 45.70(2), Stats., is to provide loans for homes "without requiring down payments beyond the reach of families of modest means."

Section 45.73(1), Stats., provides that if applications exceed available funds the department shall give priority to "the most necessitous cases."

Section 45.74, Stats., provides that no person may receive a loan if the department determines that: "He does not require a loan in addition to his own funds."

Since the state's assistance program is for an economically disadvantaged class, the restrictions of the federal law do not preclude the department from making inquiries relating to family income.

(2) It follows from the foregoing that since ECOA does not apply to the Wisconsin loan program, no question of constitutionality arises.

(3) Your third question is answered in the negative in the discussion above of your first question.

BCL:BL

Labor; Prisons And Prisoners; State Patrol; Upon appropriate call, state traffic patrol officers may act as peace officers during a prison riot or other disturbance even when this occurs during a strike of prison guards; they may not, however, perform other duties of guards. OAG 36-79

March 20, 1979.

LOWELL JACKSON, *Secretary*

Department of Transportation

Your predecessor asked what role the state traffic patrol may play when a riot or other disturbance occurs in a state correctional institution during a labor dispute between prison employes and the state.

Our attention was directed to secs. 22.165 and 110.07, Stats., which contain the restriction that state patrol officers shall not "be used in or take part in any dispute or controversy between employer or employe concerning wages, hours, labor or working conditions." Section 22.165, Stats., provides:

STATE TRAFFIC PATROL AND CONSERVATION WARDEN DUTIES DURING CIVIL DISORDER. Without proclaiming a state of emergency, the governor may, in writing filed with the secretary of state, determine that there exists a condition of civil disorder or a threat to the safety of persons on state property or damage or destruction to state property. Upon such filing, he may call out the state traffic patrol or the conservation warden force or members thereof for use in connection with such threat to such life or property. For the duration of such threat, as determined by the governor, such officers shall have the powers of a peace officer as set forth in s. 59.24, except that such officers shall not be used in or take part in any dispute or controversy between employer or employe concerning wages, hours, labor or working conditions.

Another statute which may have a bearing on the question is sec. 53.07, Stats., which provides:

MAINTENANCE OF ORDER. The warden or superintendent shall *maintain order, enforce obedience, suppress riots and prevent escapes*. For such purposes he may command the aid of the officers of the institution *and of persons outside of the prison*; and any person who fails to obey such command shall be punished by imprisonment in the county jail not more than one year or by a fine not exceeding \$500.

The Legislature has provided no further definition of the term "dispute or controversy." In secs. 103.62(3) and 111.02(8), Stats., the term "labor dispute" relates to differences between employers in the private sector and their employes. In secs. 111.70(1)(i), Stats., the term "labor dispute" relates to disputes between municipalities and their employes. In sec. 111.81(8), Stats., the term "labor dispute" refers to certain disputes between the state and its employes. The question is whether the words "dispute or controversy" are meant to include a strike at state facilities by state employes.

I am of the opinion that the Legislature did not intend to prohibit the use of state traffic officers at state facilities where their presence is required because of a strike by state employes. Strikes by state employes are prohibited by sec. 111.89, Stats. While there are causes for every strike, the strike itself is not a *bona fide* protected dispute and it would be against public policy to provide protection in the form of noninterference with such prohibited activity. I note that there is no such restriction on the National Guard.

Moreover, the state has an unquestionable interest in maintaining peace in its penal institutions; and the statutory provisions above cited should not be construed to prevent the use of its facilities for that purpose. Under the circumstances stated, the restrictions in secs. 110.07(2m) and 22.165, Stats., to which your predecessor referred, would probably be interpreted to exclude disputes between the state and its employes. *See State ex rel. Dept. of Pub. Instruction v. ILHR*, 68 Wis. 2d 677, 680, 229 N.W.2d 591 (1975).

That does not mean, however, that traffic patrol officers may perform all duties of prison guards, unless authority can be found in other statutory provisions. If the Governor determines that there is a state of civil disorder under sec. 22.165, Stats., traffic patrol officers have the powers of peace officers as defined in sec. 59.24, Stats. This would authorize them to take the steps needed to preserve peace and

suppress activities that threaten it. Similarly, if called under sec. 53.07, Stats., traffic patrol officers may engage only in duties which "maintain order, enforce obedience, suppress riots and prevent escapes."

According to the job descriptions of prison guards issued by the personnel directors under ch. 16, such guards have responsibilities additional to keeping the peace. They are required, for example, to assist in training and rehabilitation, to supervise work of inmates, to receive visitors and guide tours. Those are not usual duties of peace officers. I find no statutory authority for traffic patrol officers to perform such functions. If assigned by the Governor under sec. 22.165, Stats., or drafted by the warden under sec. 53.07, Stats., it is my opinion that traffic patrol officers are not authorized to perform any functions of prison guards except those directly related to preservation of the peace, including prevention of escapes.

BCL:BL

Marriage And Divorce; Interpretation of certain statutory sections enacted pursuant to ch. 105, Laws of 1977. The provisions of sec. 247.265, Stats., require every order for support or maintenance listed therein to include a wage assignment order. Section 247.02(1)(i), Stats., allows all actions to modify a judgment in an action affecting marriage to be commenced in any court having jurisdiction under sec. 247.01, Stats. OAG 39-79

April 5, 1979.

FRED A. RISSER, *Chairman*
Senate Committee on Organization

The Senate Committee on Organization has requested my opinion on two questions relating to ch. 105, Laws of 1977 (hereinafter Divorce Reform Act). First, is the wage assignment provision under sec. 247.265, Stats., mandatory or directory? Second, has sec. 247.02(1)(i), Stats., changed the Kusick Rule? *Kusick v. Kusick*, 243 Wis. 135, 9 N.W.2d 607 (1943).

In *Scanlon v. Menasha*, 16 Wis. 2d 437, 443, 114 N.W.2d 791 (1962), the Wisconsin Supreme Court stated:

Generally, the word "may" is permissive when used in the statute, [footnote omitted] and this is especially true where the word "shall" appears in close juxtaposition in other parts of the same statute. [citation omitted] The general rule is that the word "shall" is presumed mandatory when it appears in a statute.

Prior to the Divorce Reform Act sec. 247.265, Stats., read in part:

At any time after judgment in any action affecting marriage ... the court *may* make an order directing the parent to assign such salary or wages ... as will be sufficient to pay the allowance, as adjudged by the court, for his or her spouse or for the support, maintenance and education of the minor children of the parties or both.

Section 247.265, Stats., now reads in part:

Each order for child support ... family support ... support by a spouse ... or for maintenance payments ... *shall* include an order directing the payer to assign such salary ... as will be sufficient to meet the maintenance payments, child support payments or family support payments imposed by the court for the support of the spouse or minor children or both.

Applying the general rule of *Scanlon v. Menasha, supra*, the wage assignment provisions of sec. 247.265, Stats., must be presumed to be mandatory.

Certain exceptions to the general rule provide that "shall" may be construed as permissive where it appears that this was the legislative intent, or where such a construction is necessary to uphold the statute on constitutional grounds. 73 Am. Jur. 2d *Statutes* sec. 25. I have found nothing in this bill's legislative history that would indicate the Legislature intended the wage assignment provisions of sec. 247.265, Stats., to be directory. It is my opinion that the Legislature, through actions repealing the discretionary language of the earlier sec. 247.265, Stats., and reenacting that section using mandatory language, has plainly indicated its intent that these wage assignment provisions be mandatory.

It is also my opinion that a construction making the wage assignment provisions of sec. 247.265, Stats., mandatory would not cause that section to be unconstitutional. It is true that Wis. Const. art. VII, sec. 2 vests the state's judicial power in the state courts. Nevertheless, it has long been recognized that divorce is a statutory proceeding, *Miller v. Miller*, 67 Wis. 2d 435, 439, 227 N.W.2d 626 (1975); *Chase v. Chase*, 20 Wis. 2d 258, 263, 122 N.W. 2d 44 (1963), and that "[t]he limit of judicial authority therein does not extend beyond that specified in the written law." *Boehler v. Boehler*, 125 Wis. 627, 629, 104 N.W. 840 (1905). As early as 1891 the Wisconsin Supreme Court stated in *Barker v. Dayton*, 28 Wis. 367, 379 (1871):

It is an undoubted general principle of the law of divorce in this country, that the courts, either of law or equity, possess no powers except such as are conferred by statute; and that, to justify any act or proceeding in a case of divorce, whether it be such as pertains to the ground or cause of action itself, to the process, pleadings or practice in it, or to the mode of enforcing the judgment or decree, authority therefor must be found in the statute, and cannot be looked for elsewhere, or otherwise asserted or exercised.

Therefore, it is my opinion that the wage assignment provisions of sec. 247.265, Stats., are mandatory.

The committee's second question concerns whether sec. 247.02(1)(i), Stats., as created by the Divorce Reform Act, overrides case law requiring that applications to change or vacate judgments be made in the action in which the judgment was entered and to the court that rendered it. *Kusick v. Kusick*, 243 Wis. 135, 9 N.W.2d 607 (1943). I believe it does. Section 247.02(1)(i), Stats., was enacted as part of the Divorce Reform Act and created, as a new and separate action affecting marriage, actions "[t]o modify a judgment in an action affecting marriage granted in this state or elsewhere."

Section 247.01, Stats., reads in part:

JURISDICTION. The circuit courts have jurisdiction of all actions affecting marriage ... and have authority to do all acts and things necessary and proper in such actions and to carry their orders and judgments into execution as prescribed in this chapter. All such actions shall be commenced and conducted

and the orders and judgments therein enforced according to these statutes in respect to actions in circuit court

It is my opinion that the Legislature specifically enacted sec. 247.02(1)(i), Stats., to make a petition to modify a judgment in an action affecting marriage a new and separate action affecting marriage; one which may be commenced independently of the original divorce or support proceeding in any court having jurisdiction under sec. 247.01, Stats.

BCL:WHW

Legislature; Words And Phrases; Meaning of "absence" within Wis. Const. art. V, sec. 7, discussed. OAG 41-79

April 18, 1979.

FRED A. RISSER, *Chairman*

Senate Committee on Organization

The Senate Organization Committee has requested my opinion on the following question:

Is the tie breaking vote cast by Lieutenant Governor Russell Olson on the date of February 27, 1979, on the question of indefinite postponement of 1979 Senate Bill 5, as shown on page 183 of the Senate Journal, in violation of Articles IV and V of the Wisconsin Constitution in that, at the time the vote was cast, Governor Lee Sherman Dreyfus was out of the State?

Presumably, your question makes reference to the following provisions of the Wisconsin Constitution: art. V, sec. 8, which provides that the lieutenant governor shall be president of the Senate but may only cast a tie-breaking vote therein; art. V, sec. 7, which provides that, in the event of the "absence [of the governor] from the state, the powers and duties of the office shall devolve upon the lieutenant governor ... until the governor ... shall have returned"; and art. IV, sec. 9, which provides that "the senate shall choose a temporary president when the lieutenant governor shall not attend as president, or shall act as governor."

Under Wis. Const. art. V, sec. 7, it is evident that, when the governor is "absent" from the state and the powers and duties of that office devolve upon the lieutenant governor, the lieutenant governor does not become governor and does not vacate the office of lieutenant governor. *State ex rel. Martin v. Ekern*, 228 Wis. 645, 659, 280 N.W. 393 (1938). It is likewise clear that, since the lieutenant governor is *ex officio* president of the Senate by virtue of Wis. Const. art. V, sec. 8, he is not divested of that office by virtue of the absence of the governor. Under Wis. Const. art. IV, sec. 9, however, it is contemplated that the Senate will choose a temporary president when the lieutenant governor "shall act as governor."

The Wisconsin Supreme Court has never directly considered what constitutes the governor's "absence from the state" within the meaning of Wis. Const. art. V, sec. 7. Although a number of other jurisdictions have considered this issue, in reference to constitutional language either similar or virtually identical to that used in our constitution, there is a clear split of authority on the issue of what constitutes "absence" under such a constitutional provision. 38 Am. Jur. 2d *Governor* sec. 13, p. 942. Some jurisdictions hold that even a very short, temporary absence results in the devolution of the governor's powers. *Ex Parte Crump*, 10 Okla. Crim. 133, 135, 135 P. 428 (1913); *Montgomery v. Cleveland*, 134 Miss. 132, 98 So. 111, 32 A.L.R. 1151 (1923); *Walls v. Hall*, 202 Ark. 999, 154 S.W.2d 573, 136 A.L.R. 1047 (1941); *State v. Garvey*, 67 Ariz. 304, 195 P.2d 153 (1948), by implication; *State v. Patterson*, 197 Or. 1, 251 P.2d 123, 126 (1952). Thus, in *Ex parte Crump*, 135 P. at 436, the court states:

[T]he plain intention of the framers of the Constitution and the people in adopting it was to provide that in his [the Governor's] absence from the state for any purpose or for any period of time, however short, his constitutional functions shall devolve upon the Lieutenant Governor as acting Governor. ... [T]he constitutional functions of his office belong to the public and are confined to the state and cannot be exercised out of the state; when he leaves the state, the constitutional functions of his office devolve pro tempore upon the Lieutenant Governor; and, when he returns to the state ipso facto, he resumes all of the powers, functions, and duties of his office, and the Lieutenant Governor theretofore administering the executive functions temporarily under the Constitution ceases to be acting Governor.

On the other hand, other jurisdictions hold that only an "effective absence," *i.e.*, an absence which will effectively prevent the governor from exercising the powers and duties of his office, results in the devolution of the governor's powers and that a mere temporary absence which would not so injuriously affect the public interest is not included within the constitutional provision. *State ex rel. Warmoth v. Graham*, 26 La. Ann. 568, 21 Am. Rep. 551 (1874); *State ex rel. Crittenden v. Walker*, 78 Mo. 139 (1883); *In re An Act Concerning Alcoholic Beverages*, 130 N.J.L. 123, 31 A.2d 837 (1943); *Sawyer v. First Judicial District Court*, 82 Nev. 53, 410 P.2d 748 (1966). Thus, in *Sawyer*, 410 P.2d at 749, the court states:

All agree that the governor was not physically present in Nevada at the moment in question. The dispute is whether "absence from the state" as contained within Sec. 18 was intended by the framers of our state Constitution to mean simply physical nonpresence, however brief, or whether it was written into our Constitution to indicate some other condition. The overwhelming majority of states which have examined identical or nearly identical provisions have found that "absence" as contained within rules for orderly succession in government means "effective absence"—*i. e.*, an absence which is measured by the state's *need* at a given moment for a particular act by the official then physically not present.

We find no reason to contradict this century-long compilation of decisions. Rather, we consider their logic proper and reasonable and conclude that it most nearly satisfies the role of any government.

The *Sawyer* case citations include a number of cases interpreting the word "absence" as used in laws which provide that the duties of a mayor shall be performed by another officer in his absence. The application of such cases was rejected by the majority and cited in the dissent in *Montgomery*.

Wisconsin Constitution art. V, sec. 7, provides:

In case of the impeachment of the governor, or his removal from office, death, inability from mental or physical disease, resignation, or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term or until the governor, absent or impeached, shall

have returned, or the disability shall cease. But when the governor shall, with the consent of the legislature, be out of the state in time of war, at the head of the military force thereof, he shall continue commander in chief of the military force of the state.

This section can be read one of two ways. First, "absence" could refer to any physical absence. This interpretation is supported by reading the last provision to mean that the governor retains his powers on leaving the state only in regard to heading the military and only if the Legislature consents to his absence for that purpose. Arguably, this language by implication means that in the case of any other absence, the powers of governor immediately devolve upon the lieutenant governor. On the other hand, it can be argued that "absence" refers only to an "effective absence," *i.e.*, only an absence which prevents the governor from discharging duties which need to be done before his return. The framers of the constitution presumed, as they quite reasonably would in the mid-nineteenth century, that any absence from the state would prevent the governor from discharging the duties of his office. At this point in our history, an absence was a threat to the continued operation of the government. This construction is reinforced by contrasting absence with the other situations giving the lieutenant governor the powers of governor, namely, death, resignation, and inability to perform by reason of mental or physical disease. With the subsequent advent of efficient air travel and instant world-wide telephonic communication, this construction would conclude that the word "absence" will subserve its historical purpose by construing it to mean "effective absence," *i.e.*, only such an absence as prevents the governor from discharging duties which need to be done before his return.

There is some reason to believe that the Wisconsin Supreme Court would adopt the "effective absence" approach. *See*, for example, *State ex rel. Olson v. Lahiff*, 146 Wis. 490, 131 N.W. 824 (1911), where the court took this approach in regard to a municipal ordinance which provided that a city council president had the powers of mayor during the mayor's absence from the city. If the court took this approach under the state constitution, the lieutenant governor would have the powers of the office of governor during the latter's physical absence from the state only in respect to those absences which prevent the governor from discharging duties which need to be performed before his return. Further, should the court take this

approach, the lieutenant governor's tie-breaking vote on February 27, 1979, would be valid unless in fact he was, at the material time in question, discharging the duties of the office of governor.

Although there is some hazard in speculating whether the Wisconsin Supreme Court would apply the "effective absence" approach to the state constitution, I am persuaded that it would refuse to rule whether the lieutenant governor's tie-breaking vote was valid. First, the issue has become moot by reason of the referendum of April 3, 1979, in which the voters chose to amend the constitution by removing the lieutenant governor from the role of president of the Senate. The issue never will arise again. Second, the question does not deal with a final vote of the Senate on a piece of legislation. It relates only to the adoption of a motion to indefinitely postpone the bill, the effect of which the Senate can reverse at any time it chooses. Wis. Const. art. IV, sec. 8. Ordinarily under such circumstances, allegations of illegal legislative procedure will not be reviewed by the courts or by this office. 63 Op. Att'y Gen. 305 (1974). As stated in *Outagamie County v. Smith*, 38 Wis. 2d 24, 41, 155 N.W.2d 639 (1968):

This court will not interfere with the conduct of legislative affairs in the absence of a constitutional mandate to do so or unless either its procedure or end result constitutes a deprivation of constitutionally guaranteed rights. Short of such deprivations which give this court jurisdiction, recourse against legislative errors, nonfeasance, or questionable procedure is by political action only.

Finally, one of the venerable principles of constitutional law is that the courts will decide cases on constitutional grounds only where there is no other way to dispose of the case.

Accordingly, it is my view that although the Wisconsin Supreme Court probably would construe "absence" within the meaning of Wis. Const. art. V, sec. 7, as meaning "effective absence," it would refuse to rule whether the lieutenant governor's tie-breaking vote was valid because that issue has become moot, never will recur, concerns a procedural vote which the Senate itself can overturn, and affects no constitutionally guaranteed rights.

BCL:CDH

Condemnation; Highways; Tenants operating a business or farm are entitled to business or farm replacement costs payable pursuant to sec. 32.19(4m), Stats. OAG 42-79

April 19, 1979.

PAUL J. FIEBER, *Chief of Relocation Services*
Division of Housing
Department of Local Affairs and Development

You have asked whether sec. 32.19(4m), Stats., as created by ch. 440, Laws of 1977, pertains to tenants operating business or farms on acquired property. Section 32.19(4m), Stats., provides in part:

In addition to amounts otherwise authorized by this chapter, the condemnor shall make a payment, not to exceed \$50,000, to *any displaced person* who is displaced from *any business or farm operation* which the person *has owned* for not less than 180 days prior to the initiation of negotiations for the acquisition of the real property on which the business or farm operation lies, and who actually purchases a comparable replacement for such acquired property within 2 years after the date the person vacates the acquired property or receives payment from the condemnor, whichever is later. The additional payment under this subsection shall include the following amounts:

Section 32.19(1), Stats., describes the policy of the Relocation Act as "that persons displaced ... be fairly compensated by payment for the property acquired and other losses."

The Wisconsin Relocation Act is a remedial law designed to obviate, or at least minimize, economic hardship occasioned by public acquisitions. Accordingly, the section is to be liberally construed, *Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 243 N.W.2d 422 (1976); *Aero Auto Parts, Inc. v. Dept. of Transp.*, 78 Wis. 2d 235, 253 N.W.2d 896 (1977). Before statutory construction is possible or proper, it must first be determined whether the statute is ambiguous. *Robinson v. Kunach*, 76 Wis. 2d 436, 251 N.W.2d 449 (1977).

The section in question provides that payments of up to \$50,000 shall be made "to *any displaced person* who is displaced from *any*

business or farm operation which the person has owned." The language "has owned" relates back to the "business" or "farm operation" and does not necessarily connote ownership of real estate.

Prior to the creation of sec. 32.19(4m), Stats., the Legislature, in sec. 32.19(2), Stats., defined certain words in the Act as follows:

(a) "Person" means:

1. Any individual, partnership, corporation or association which owns a business concern; or
2. Any owner, part owner, tenant ... operating a farm

"Displaced person" is defined in sec. 32.19(2)4.(c), Stats., as:

[A]ny person who moves from real property or who moves his personal property from real property, on or after July 1, 1970, as a result of the acquisition of such real property, in whole or in part or subsequent to the issuance of a jurisdictional offer under this chapter, for public purposes or, as the result of the acquisition for public purposes of other real property on which such person conducts a business or farm operation.

A "displaced person" includes an owner of real estate, as well as a tenant business and tenant farmer. Accordingly, there does not appear to be any ambiguity and, at first blush, it seems that any "displaced person," tenant or owner of real estate, who is displaced from any business or farm operation falls within sec. 32.19(4m), Stats., and is entitled to a payment up to \$50,000.

However, there seems to be some ambiguity if we consider sec. 32.19(4m), Stats., in conjunction with its subsections. The subsections provide:

(a) *The amount, if any, which when added to the acquisition cost of the property (other than any dwelling on such property) equals the reasonable cost of a comparable replacement for such acquired property, as determined by the department of local affairs and development and the department of industry, labor and human relations, jointly. Such replacement property shall be within reasonable proximity of the property being acquired and shall be suited for the same type of business or farm operation as that which is being conducted by the displaced person at the time of acquisition.*

(b) *The amount, if any*, which will compensate such displaced person *for any increased interest cost* which such person is required to pay for financing the acquisition of any replacement property, if the property acquired was encumbered by a bona fide mortgage which was a valid lien on the property for at least 180 days prior to the initiation of negotiations for its acquisition. The amount under this paragraph shall be equal to the excess in the aggregate interest and other debt services cost of that amount of the principal of the mortgage on the replacement property which is equal to the unpaid balance of the mortgage on the acquired property, reduced to discounted present value. The discount rate shall be the prevailing interest rate paid on savings deposits in commercial banks in the general area where the replacement property is located.

(c) Reasonable expenses incurred by the displaced person for evidence of title, recording fees and other closing costs incident to the purchase of the *replacement property*, but not including prepaid expenses.

The subsections prescribe the criteria for determining the amount of the payment and, obviously, must be considered in relation to the whole statute. *State v. Wachsmuth*, 73 Wis. 2d 318, 243 N.W.2d 410 (1976); *Aero Auto Parts, Inc., supra*.

The emphasized language in subsecs. (4m)(b) and (c), is capable of suggesting that the intent of subsec. (4m) was to limit this benefit to those persons who actually own the acquired real estate upon which the business or farm operation is conducted. But, the criteria describing how the payment is to be determined do not actually define eligibility for payment. In fact, the criteria would also be appropriate for determining the payment to be made to tenant business and tenant farm operations.

Nor, in considering subsec. (4m), in conjunction with subsecs. (a), (b) and (c), can we overlook the fact that a lease is an interest in the real estate and, in a sense, the tenant becomes the owner of the leased property. *Holcomb v. Szymczyk*, 186 Wis. 99, 202 N.W. 188 (1925).

Accordingly, a tenant whose property interest (leasehold) is acquired is, in my opinion, entitled to the benefits provided in sec. 32.19(4m), Stats.

BCL:CAB

County Treasurer; Register In Probate; Section 851.74(3), Stats. (1977), which requires registers in probate to make payments to the county treasurer on the first Monday of each month, does not preclude more frequent payments. OAG 43-79

April 19, 1979.

RICHARD L. HAMILTON, *Corporation Counsel*
Outagamie County

You have requested my opinion as to whether the word "shall" contained in sec. 851.74(3), Stats., which was created by ch. 449, Laws of 1977, limits the authority of the register in probate to make payments to the county treasurer to one a month on the first Monday of the month.

In my opinion the answer is no.

You state that the question has arisen because the auditors for Outagamie County, in their commentary section of the 1977 audit, suggested that the register in probate should deposit her receipts with the county treasurer at least weekly. You further state that the finance director has requested that this procedure be adopted; and it is the position of the register in probate that she must make her deposit with the county treasurer only on the first Monday of each month.

The pertinent portion of sec. 851.74(3), Stats. (1977), reads: "The register in probate *shall, on the first Monday of each month*, pay into the office of the county treasurer all fees collected by him or her and in his or her hands and still unclaimed as of that day." A review of the legislative history of this subsection disclosed that the words, "shall, on the first Monday of each month," have always appeared in the prior statutes concerned therewith.

The word "shall" when used in connection with duty is mandatory and excludes the idea of discretion. *In Re Mann*, 151 W. Va. 644, 154 S.E.2d 860, 864 (1967); *State ex rel. Maloney v. Proctor*, 249 Wis. 377, 380a, 24 N.W.2d 698, 25 N.W.2d 742 (1946). Courts generally have held that the word "shall" is mandatory, particularly when the word is addressed to a public official. *People v. Nicholls*, 45 Ill. App. 3d 312, 359 N.E.2d 1095, 1099 (1977); *Schmidt v. Abbott*, 261 Iowa 886, 156 N.W.2d 649, 651 (1968); *Dosker v. Andrus*, 342 Mich. 548, 70 N.W.2d 765, 768 (1955).

Concluding that the word "shall" is mandatory, however, does not dispose of the question of what is mandated. This statute can be read as mandating that the register make payments no less frequently than on the first Monday in each month. It also can be read as mandating that the payments be made no more frequently than on the first Monday of each month.

The first construction unquestionably furthers a valuable legislative purpose in having minimal and regular accounting periods. The second construction, however, serves no apparent legislative purpose. In fact, that construction could frustrate the overall legislative purpose to enable counties to discharge their missions with substantial flexibility and efficiency. *See, e.g.*, secs. 59.025 and 59.07(5), Stats.

Accordingly, I conclude that under sec. 851.74(3), Stats., the register in probate must make payments to the treasurer at least on the first Monday of each month but that nothing precludes the register from making payments more frequently.

BCL:CDH

Circuit Judge; County Board; Sections 20.923(3m) and 753.071, Stats., constitutionally empower counties to reduce the county supplements to the state-paid salaries of circuit judges between August 1, 1978, and June 30, 1980, provided that there is compliance with the minimum and maximum salary parameter established in those sections. OAG 44-79

April 23, 1979.

KENNETH J. BUKOWSKI, *Corporation Counsel*
Brown County

You request my opinion whether a county board of supervisors has power to reduce the county supplements to the state-paid salary of a circuit court judge between August 1, 1978, and June 30, 1980, provided that the minimum and maximum salary parameters established by the Legislature are complied with.

I am of the opinion that it does have such power by reason of the specific authorization in secs. 20.923(3m) and 753.071, Stats., as created and amended by ch. 449, Laws of 1977.

Section 20.923(3m), Stats., reads as follows:

Circuit judges. The annual salary for any circuit judge, including county supplements paid under ss. 752.016 (2) [753.016 (2)] and 752.071 [753.071] and any other cost of living or salary adjustment paid by a county shall not exceed the midpoint of executive salary group 6 as determined for constitutional and other elected state officials under s. 20.923 (2) (a) (intro.), except that during the period from January 1, 1977, to June 30, 1979, such annual salary shall not exceed the midpoint of executive salary group 6 as determined for constitutional and other elected state officials under s. 20.923 (2) (a) (intro.) in effect for fiscal year 1978-79. *Each county shall reduce its county supplement and any other cost of living or salary adjustment paid by the county to any circuit judge in such an amount that the county supplement and such other salary adjustments together with the portion of the annual salary paid by the state does not at any time exceed such maximum amount.* The supreme court shall assure that county supplements and such other salary adjustments are lowered as required under this subsection. This subsection does not apply after July 1, 1980.

The references to secs. 752.016(2) and 752.071 are in error and should be secs. 753.016(2) and 753.071, Stats. See ch. 418, sec. 208, Laws of 1977, which was the predecessor section of sec. 20.923(3m), Stats., before repealed and recreated by ch. 449, secs. 39 and 40, Laws of 1977.

Section 753.071, Stats., provides that:

JUDGE'S SALARY FROM COUNTY. (1) In every judicial circuit each county may elect to pay to each circuit judge of the circuit a salary in addition to compensation provided by the state except as provided under s. 20.923 (3m). The salary shall be determined by each county on the basis of work load and judicial services performed but not to exceed the salary limitation including supplements under s. 20.923 (3m). The additional salary shall be the same for each circuit judge within the circuit. Except in counties to which s. 753.016 applies, the salary authorized by counties is subject to subch. I of ch. 41 with fund contributions to be paid by the county without reference to whom services are rendered. *A county may reduce the additional salary of a judge under this section, except that no such reduction may reduce the judge's total state and county judicial salary below the greater of the following amounts:*

(a) The total state and county judicial salary the judge received as of July 31, 1978.

(b) The salary specified in s. 20.923 (2) (a) 2.

(2) This section does not apply after July 1, 1980.

In requesting my opinion, you state that these two above-cited provisions are in apparent conflict in authority with secs. 59.15(1), 66.195, and 256.02(4), Stats., *State ex rel. Conway v. Elvod*, 70 Wis. 2d 448, 234 N.W.2d 354 (1975), as well as Wis. Const. art. IV, sec. 26.

Section 59.15(1), Stats., reads in part as follows:

(a) The board shall, prior to the earliest time for filing nomination papers for any elective office to be voted on in the county (*other than supervisors and circuit judges*), which officer is paid in whole or part from the county treasury, establish the total annual compensation for services to be paid him (exclusive of reimbursements for expenses out-of-pocket provided for in sub. (3)). The annual compensation may be established by resolution or ordinance, on a basis of straight salary, fees, or part salary and part fees, and if the compensation established is a salary, or part salary and part fees, it shall be in lieu of all fees, including per diem and other forms of compensation for services

rendered, except those specifically reserved to the officer in such resolution or ordinance. The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the board.

This subsection by its terms expressly excludes circuit judges. Chapter 449, sec. 491, Laws of 1977, denominated all county judges as circuit judges and made the "compensation of county courts and county judges identical to the circuit court and circuit judges." Being a more specific provision, it prevails over the general language in sec. 59.15(1), Stats., which otherwise would be applicable to county judges. Since county judges now are treated as circuit judges, both in name and for purposes of compensation, sec. 59.15(1), Stats., does not conflict with secs. 20.923(3m) or 753.071, Stats., which concern the reduction of supplements to the salaries of circuit judges.

Section 66.195, Stats., which gave a county the authority to increase the salary of a county judge during the term of office, was repealed in full by ch. 449, sec. 177, Laws of 1977.

Section 256.02(4), Stats., which was renumbered sec. 757.02(4), Stats., ch. 187, sec. 135(6), Laws of 1977, provided that:

The county board is prohibited from reducing the salary or additional salary of a county or circuit judge for the term for which elected.

Section 757.02(4), Stats., was also repealed in full by ch. 449, sec. 344, Laws of 1977.

State ex rel. Conway v. Elvod, supra, applied only to the attempted reduction by a county to a *county judge's* county supplement. Citing the then applicable secs. 59.15(1), 66.195, and 256.02(4), Stats., the court prohibited such reduction. But since two of the sections relied upon by the court are now repealed, and the third provision in sec. 59.15(1), Stats., does not apply to circuit judges, the *Conway* case, *supra*, has been legislatively nullified, and in any event, is not in conflict with secs. 20.923(3m) and 753.071, Stats. In *Conway*, there was no Wis. Const. art. IV, sec. 26 involvement, as the court had held that county judges were not covered by the restrictions therein. *See also State ex rel. Sachtjen v. Festge*, 25 Wis. 2d 128, 130 N.W.2d 457 (1964).

Turning to your concern that the new statutory duties to reduce county supplements may violate Wis. Const. art. IV, sec. 26, I first note absurdities which would follow if county supplements fall within the meaning of "compensation" in that section. This section prohibits any change in a judge's compensation during his/her term of office, except that when a change "provided by the legislature ... become [s] effective as to any ... judge, it shall be effective ... as to each of such ... judges." This would mean that a new judge commencing a new term after August 1, 1978, the effective date of sec. 20.923(3m), Stats., any reduction compelled for that judge by sec. 20.923(3m), Stats., also would compel reductions for all sitting circuit judges in the state on the same date. Because of the wide disparity in county practices in providing supplements, it is not reasonable to suppose the intent or purpose of this provision included empowering one county to dictate pay changes statewide. Further, interpreting supplements as "compensation" within Wis. Const. art. IV, sec. 26, also would lead to the absurd result that if another county shortly thereafter should increase the supplement, all other judicial salaries—including those recently reduced—immediately must follow suit. Finally, two counties simultaneously could produce a contradiction, one increasing a supplement and another decreasing it effective the same day, each supposedly having statewide effect.

Ordinarily, the fact of these absurd consequences would justify the conclusion that county supplements are not "compensation" within the meaning of Wis. Const. art. IV, sec. 26, without further discussion. I must note that the court held that they do constitute "compensation" within that section in *State ex rel. Sullivan v. Boos*, 23 Wis. 2d 98, 126 N.W.2d 579 (1964). The court reasoned, 23 Wis. 2d at 112:

Sec. 10, art. VII, forbids compensation to circuit judges in addition to their salary. Sec. 7, art. VII, requires that such compensation be prescribed by the legislature. Sec. 26, art. IV, prohibits an increase, or diminution of compensation during a term. Reading these provisions together, it must follow that no county salary can be paid to a circuit judge unless it constitutes a part of the salary prescribed by the legislature, and whatever salary has been prescribed by the legislature must not be increased nor diminished during the circuit judge's term.

In my opinion, *Boos* no longer is applicable because of the subsequent amendments to each of the three sections of the constitution on which it relied. I already have noted the absurd consequences which follow if that decision controls current Wis. Const. art. IV, sec. 26, which now gives statewide effect to any change in a single judge's compensation. Moreover, Wis. Const. art. VII, sec. 10, no longer forbids "other compensation than ... salary," and Wis. Const. art. VII, sec. 7, no longer provides that circuit judges shall receive the compensation as the Legislature "shall prescribe." Under those sections as they then read, it was reasonable to conclude that supplements must be "compensation" for those sections as well as for Wis. Const. art. IV, sec. 26. But Wis. Const. art. VII, sec. 7, no longer says anything about compensation, and Wis. Const. art. VII, sec. 10, now provides that the judges shall receive such compensation as the Legislature "may authorize by law."

With these subsequent amendments, a distinction must be drawn between the compensation "provided by the legislature" in Wis. Const. art. IV, sec. 26, and that "authorize [d] by law" in Wis. Const. art. VII, sec. 10(2). The former is narrower and refers to the compensation the Legislature itself directs, whereas the latter is broader and includes compensation the counties are authorized to pay.

Accordingly, I conclude that any county supplement paid to a circuit judge is a part of his/her compensation which the Legislature has authorized by law within the meaning of Wis. Const. art. VII, sec. 10(2), but that it is not "provided by" the Legislature and does not constitute a part of compensation within the meaning or for the purposes of Wis. Const. art. IV, sec. 26. *Accord, State ex rel. Slinger v. Boos*, 44 Wis. 2d 374, 380, 171 N.W.2d 307 (1969). Further, I am of the opinion that a change in one county's supplements is not subject to the requirement of Wis. Const. art. IV, sec. 26, that when a change in compensation becomes effective as to one judge it becomes effective statewide although sec. 753.071, Stats., requires that these changes have circuitwide effect. Further, it is my opinion that an increase or a decrease in a county supplement would apply to a given judge upon the effective date of the resolution or ordinance effecting the change.

Thus, in view of the changes promulgated by ch. 449, Laws of 1977, and in view of the amendments to Wis. Const. art. IV, sec. 26, and Wis. Const. art. VII, secs. 7 and 10, I see no constitutional or

other conflict with the authority given counties in secs. 20.923(3m) and 753.071, Stats., to reduce judicial supplements of circuit judges within the parameters and time periods prescribed.

BCL:CDH:RJV:JPS

Civil Service; Deputy Sheriffs; Public Officials; Section 63.065, Stats., applies to county having a population of less than 500,000 which has adopted a civil service program for deputy sheriffs pursuant to sec. 59.21(8)(a), Stats., and which operates under a civil service commission. Where an application for leave is applied for by a deputy who has been elected to a county or state office, leave without pay must be granted and continues for the entire period of his or her service as an elected county or state officer. OAG 45-79

April 24, 1979.

WILLIS J. ZICK, *Corporation Counsel*
Waukesha County

You advise that Waukesha County has adopted civil service provisions for deputy sheriffs pursuant to sec. 59.21(8)(a), Stats., and operates with a civil service commission. You state that Edward J. O'Connor served as a deputy sheriff with civil service status for many years and that he was granted a leave of absence during his first elected term as sheriff as permitted under the county ordinance, but that pursuant to county policy he was not granted a leave of absence during his last terms as elected sheriff. You state that the issue of whether he was on leave of absence by reason of the mandatory provisions of sec. 63.065, Stats., is material to a determination of whether he is eligible for certain benefits during retirement and that he is not presently interested in reinstatement to his former position.

You inquire whether sec. 63.065, Stats., is applicable to counties having a population of less than 500,000 which have adopted a civil service program for deputy sheriffs pursuant to sec. 59.21(8)(a), Stats., which operates under a civil service commission.

I am of the opinion that it is.

Section 59.21(8)(a), Stats., provides in part:

In counties having a population of less than 500,000, the county board may by ordinance fix the number of deputy sheriffs to be appointed in said county ... and may further provide by ordinance, that deputy sheriff positions shall be filled by appointment by the sheriff from a list of 3 persons for each position, such list to consist of the 3 candidates who shall receive the highest rating in a competitive examination Such competitive examinations may be by a county civil service commission or by the department of administration at the option of the county board and it shall so provide by ordinance *If a civil service commission is decided upon* for the selection of deputy sheriffs, then ss. 63.01 to 63.17 shall apply *so far as consistent with this subsection*, except ss. 63.03, 63.04 and 63.15 and except the provision governing minimum compensation of the commissioners.

Section 63.065, Stats., as amended by ch. 271, Laws of 1977, provides in part:

A permanent employe in the classified service of any county having a population of 500,000 or more, who is elected to a county or state office shall be granted a leave of absence without pay from a position for the period of his or her entire service as an elected county or state officer and thereafter shall be entitled to return to the former position or to one with equivalent responsibility and pay in the classified service without loss of seniority or civil service status.

Section 63.065, Stats., was first enacted by ch. 116, Laws of 1963. The legislative history reveals that it was intended to grant rights to civil service employes in populous counties, "Milwaukee County," who were elected to county or state office. At the time it was adopted, sec. 59.21(8)(a), Stats. (1961), had the same language of exception and inclusion as it does now, to wit: "[T]hen ... ss. 63.01 to 63.17 shall apply so far as consistent with this subsection, except ss. 63.03, 63.04 and 63.15."

Section 63.065, Stats., is incorporated by reference into sec. 59.21(8)(a), Stats., even though it was created after the incorporating language had been passed. *Layton School of Art & Design v.*

WERC, 82 Wis. 2d 324, 338, 262 N.W.2d 218 (1977); *Union Cemetery v. Milwaukee*, 13 Wis. 2d 64, 68, 108 N.W.2d 180 (1961).

It is my opinion that the provisions of sec. 63.065, Stats., are consistent with those of sec. 59.21 (8), Stats., and are, therefore, applicable to a county with less than 500,000 population which has adopted a civil service program for deputy sheriffs pursuant to sec. 59.21(8)(a), Stats., and operates under a civil service commission.

I am of the opinion that, where an application for leave is applied for by a deputy who has been elected to a county or state office, leave without pay must be granted and continues for the entire period of his or her service as an elected county or state officer.

BCL:RJV

Agriculture; Soil Conservation; Votes And Voting; An ordinance formulated and proposed by the supervisors of a county soil and water conservation district, created pursuant to sec. 92.05, Stats., is not necessarily invalid simply because its effect is limited to the regulation of agricultural practices and uses on land currently utilized for agricultural purposes. All resident electors of the "area to be affected" by such an ordinance may vote in a referendum election on the ordinance whether or not they reside on the specific kind of property which may be the subject of such regulations. OAG 46-79

April 24, 1979.

PATRICK J. FARAGHER, *Corporation Counsel*
Washington County

You request my opinion on whether the supervisors of a soil and water conservation district created pursuant to sec. 92.05, Stats., may formulate and propose an ordinance regulating agricultural uses on land currently used for agricultural purposes which lies within the district but outside of the limits of incorporated cities and villages.

Any county board of supervisors may declare its county to be a soil and water conservation district. Sec. 92.03(1), Stats. Under sec. 92.09(1), Stats., the supervisors of such districts are clearly authorized to formulate regulations and propose ordinances regulating the

use of district lands in the interest of conserving soil and water resources and controlling erosion, runoff and sedimentation:

The supervisors of any soil and water conservation district may formulate proposed regulations for the use of *lands lying within the district* but outside of the limits of incorporated cities and villages, *or for any parts of such lands*, in the interest of conserving soil and water resources and controlling erosion, runoff and sedimentation. ... [T]he supervisors may draft an ordinance embodying proposed land-use regulations and designating *the area* to which they shall apply, and recommend to the county board that it enact such ordinance.

Section 92.09(5), Stats., specifies the types of land use regulations which may be adopted by ordinance of the county board. The supervisors' proposed ordinance regulating the agricultural use of land currently utilized for agricultural purposes must embody the types of regulatory activities authorized in sec. 92.09(5), Stats. Likewise, as pointed out in sec. 92.09(1), Stats., as far as practicable such regulations must be based on a comprehensive plan for the district. On the other hand, legislation may be limited to that phase of a problem which seems most acute, based on knowledge and experience with local conditions. *State ex rel. Baer v. Milwaukee*, 33 Wis.2d 624, 634, 148 N.W.2d 21 (1967). Therefore, regulations which would only affect agricultural practices and uses on land utilized for agricultural purposes would not be necessarily invalid simply because so limited.

You next ask whether the supervisors of the district may restrict those persons eligible to vote in a referendum election to approve or reject such ordinance to "owners and operators" of lands used for agricultural purposes in the unincorporated portion of the county. The answer is no. The language of sec. 92.09(1), Stats., is clear and unambiguous on its face in this regard: "The county board may enact such ordinance provided a simple majority of the electors as defined in s. 6.02 residing in the area to be affected and who vote in the referendum thereby approve such ordinance in a referendum held within such area."

Although the Legislature may confer local legislative power only upon county boards under Wis. Const. art. IV, sec. 22, and cannot authorize the county board to delegate the board's legislative power

to the electorate, it is well established that a county board resolution or ordinance which a county can otherwise legally pass may be contingent upon the result of a referendum. *See* 62 Op. Att’y Gen. 14 (1973) and citations therein. *See also* sec. 59.025(1) and (6), Stats. (1977). In this instance the electorate is specifically defined as anyone who qualifies as an elector under the general election laws, sec. 6.02, Stats., and the only limitation imposed by sec. 92.09(1), Stats., is that which limits the vote to those electors “residing in the area to be affected.”

While sec. 92.09, Stats., and ordinances or regulations adopted thereunder must be liberally construed, sec. 92.09(2), Stats., I agree with your rejection of an interpretation of sec. 92.09(1), Stats., proposed by the supervisors of the Washington County Soil and Water Conservation District, which would extend the vote to nonresident “owners and operators.”

Prior to 1971, that portion of sec. 92.09(1), Stats. (1969), which described who could vote, did provide in part as follows: “provided at least two-thirds of the land occupiers of the area to be affected thereby approve such ordinance.” A “land occupier” was then, and is now, defined as a holder of title to land within the district. Sec. 92.03(4), Stats. But ch. 323, Laws of 1971, amended sec. 92.09(1), Stats. (1969), to state: “provided a simple majority of the electors as defined in s. 6.02 residing in the area to be affected and who vote in the referendum.”

Therefore, the legislative history of sec. 92.09(1), Stats., clearly demonstrates the Legislature’s intention not to restrict voting to land owners but to extend the vote to all who are resident electors of the “area to be affected” by the ordinance. An attempt by the supervisors of the district to restrict the voting to land “owners and operators” would be contrary to the express provisions of the statute and inject ambiguity into a statute which is otherwise clear on its face.

The phrase “area to be affected,” as used in sec. 92.09(1), Stats., is not defined. You suggest that the “area to be affected” by the type of regulation you have described above would only include the specific properties directly subjected to the regulations, *i.e.*, lands used for agricultural purposes in the unincorporated portion of the county, and that those eligible to vote in a referendum on the proposed ordinance would be limited to those residing on such land. I cannot agree.

It is evident under sec. 92.09(1), Stats., that the Legislature intended that the lands to be regulated lie within a designated geographical area. In designating the area, the legislative body should identify an area having common characteristics which constitute a homogeneous whole within the scope of a comprehensive plan. It is not necessary to regulate all land within the designated area, but all regulated land must be within the designated area. Consequently, the county could regulate land within a designated area on the basis of use, such as that currently used for agricultural purposes.

The eligible voters, however, are those within the designated or affected area whether or not their lands are regulated.

The question whether the designated area can comprise only the regulated lands depends on all the facts and circumstances and does not admit of a definitive answer in this opinion. It is conceivable that in certain counties the designated area which has common characteristics and constitutes a homogeneous whole within the scope of a comprehensive plan also comprises only the regulated lands. In other counties, however, such designated area may also contain islands of lands not within the scope of the regulations, *e.g.*, recreational land. The resident of such land is eligible to vote. The county can carve out such lands from the designated area only if in doing so there remains a homogeneous whole containing common characteristics within the scope of a comprehensive plan. To exempt such lands solely to deprive the residents of a voting right, however, would defeat legislative intent. In recognizing the need for regulation of lands or parts of lands within an area, the Legislature nevertheless recognized that the residents on unregulated lands within that area also have interests in the decision to impose regulations.

Unless there is a rational basis for distinguishing one part of the district from another, the "area to be affected" by any soil or water conservation regulation would include the entire district outside of the limits of incorporated cities and villages. Even if rational distinctions are found to exist, however, any elector residing within any district subdivision which is created would be entitled to vote in a referendum concerning regulations within that subdivision whether residing on the class of land sought to be regulated or not.

BCL:JCM

County Board; Elections; Chapter 220, Laws of 1977, effective April 7, 1978, expressly authorizes a county board to conduct a county referendum for advisory purposes or as a conditional element which would determine whether an enactment becomes effective. OAG 48-79

April 25, 1979.

RICHARD L. HAMILTON, *Corporation Counsel*
Outagamie County

You have requested my opinion on three questions:

1. May a county establish an ordinance which would require all capital expenditures in excess of a designated amount to be submitted to the electorate by a referendum, the results of which would be binding upon the county's ability to make that expenditure?

2. What is, basically, the ability of the County Board of Supervisors to submit any questions, by its own initiation, to the electorate for vote, either binding or advisory?

....

3. In those instances where the Statutes specifically provide for the submission of a question to the electorate by referendum upon their filing of proper petition within a specified period of time, may a petition for referendum be effectively filed after the expiration of the stated period of time if, at the time of filing, no bonding has yet taken place and/or no construction has yet been started?

It is a well-established principle of law that a county board has only such powers as are expressly conferred upon it or necessarily implied from those expressly given. *Dodge County v. Kaiser*, 243 Wis. 551, 11 N.W.2d 348 (1943); *Spaulding v. Wood County*, 218 Wis. 224, 260 N.W. 473 (1935). Stated another way, a county board's powers are derived solely from statute, and it has no power to act in the absence of statute. *Frederick v. Douglas County*, 96 Wis. 411, 71 N.W. 798 (1897).

On April 7, 1978, ch. 220, Laws of 1977, took effect and reads as follows:

SECTION 1. 59.025 (title) and (1) of the statutes are amended to read:

59.025 (title) County organization; advisory referendum. (1) PURPOSE. The purpose of this section is to improve the ability of county government to organize its administrative structure *and to govern*, within constitutional limits. The state constitution now authorizes the legislature to establish one or more systems of county government. Consistent with this constitutional authority, it is the intent of the legislature to increase the organizational discretion which county government may exercise in the administration of powers conferred upon county boards of supervisors by the legislature. *The legislature intends to allow county governments to conduct advisory and contingent referenda.*

SECTION 2. 59.025 (6) of the statutes is created to read:

59.025 (6) ADVISORY REFERENDUM. A county board may conduct a county referendum for the purpose of enacting a resolution contingent on a favorable outcome in such a referendum or for advisory purposes.

As a result of this legislation, the answer to your second question is clear—a county board now has the express authority to conduct a referendum for advisory purposes or as a conditional element which would determine whether an enactment becomes effective.

In order to answer your first question, though, it is necessary to consider Wis. Const. art. IV, sec. 22, which provides that the Legislature may confer upon the respective county boards of this state “such powers of a local, legislative and administrative character as they shall from time to time prescribe.” Under this constitutional provision, any statute which purported to vest legislative or administrative powers in the electors of a county would be unconstitutional. *Marshall v. Dane County Board of Supervisors*, 236 Wis. 57, 294 N.W. 496 (1940); *Meade v. Dane County*, 155 Wis. 632, 145 N.W. 239 (1914).

In my opinion, an ordinance which would require all capital expenditures in excess of a designated amount to be submitted to the

electorate by a referendum, the results of which would be binding upon the county's ability to make that expenditure, would constitute an attempted delegation to the electors of the county of powers of a local, legislative and administrative character, and, therefore, if ch. 220, Laws of 1977, or any other statute were construed to authorize such a delegation of power, it would be held to be unconstitutional if the issue were submitted to the Wisconsin Supreme Court.

What we have to contend with here is the artificial distinction approved by the court in *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 324, 325, 125 N.W. 961 (1910), between the delegation to the electors of a county of powers of a local, legislative and administrative character, which, in the court's view, would be unconstitutional, and the enactment of a resolution or ordinance which is contingent upon a referendum, which, conversely, would be constitutional. Specifically, and as pointed out in 62 Op. Att'y Gen. 14 (1973), in order to avoid an unconstitutional delegation, the county board must *first* provide a full and complete ordinance or resolution and *then* make its effectiveness contingent upon the result of a referendum.

I do not believe the proposal contained in the first question satisfies this requirement since what would be submitted to the electorate by a referendum would not necessarily be a full and complete ordinance or resolution. Rather, there apparently would be an automatic submission to the electorate of any matter involving a capital expenditure in excess of a designated amount.

There would be no problem with the proposal in the first question if what was submitted to the electorate was an enactment with the result of the referendum determining only whether the enactment would become effective.

The answer to your first question, therefore, is no unless the submission to the electorate is a full and complete ordinance or resolution as discussed above.

Finally, with respect to your third question, since the time limit for filing a petition for referendum is mandatory (*see* 42 Am. Jur. 2d *Initiative and Referendum* sec. 33; 82 C.J.S. *Statutes* sec. 129), a petition for referendum may not be effectively filed after the expiration of the time limit. Therefore, the answer to your third question is no. But, because of ch. 220, Laws of 1977, the county board would be

authorized to conduct an advisory or contingent referendum even without the submission of such a petition.

BCL:JJG

Counties; County Treasurer; The county treasurer does not have power to manage and administer the investment of county funds, such powers by reason of sec. 59.75(1), Stats., being for the county board or of a committee thereof, and since they involve the exercise of discretion on a continuing basis, cannot be delegated to the treasurer. The county board may authorize the treasurer to *deposit* certain funds in inactive deposits at interest in county depositories under strict standards established by the board. OAG 49-79

April 26, 1979.

ROBERT P. RUSSELL, *Corporation Counsel*
Milwaukee County

Deputy Corporation Counsel James J. Bonifas, on your behalf, has requested my opinion whether the county treasurer has, or can be delegated, authority to manage and administer the investment of county funds.

He states:

The county treasurer currently has control of county funds approximating one hundred fifty million dollars. Upon receipt they are initially deposited in public depositories designated by the county board in conformity with Ch. 34 and s. 59.75, Wis. Stats. Of the total, he has been authorized pursuant to s. 59.75(3), Wis. Stats., to retain not in excess of two hundred fifty thousand dollars for current operating expense.

The county board by ordinance, copy attached, has authorized the treasurer to implement an investment policy established by it. He selects the form of investments, maturity dates to insure the availability of funds to meet expenditures and pursues a full investment policy to maximize income. Normally, he invests in certificates of deposits, United States government and

agency obligations and repurchase agreements. He uses his discretion in making investments and, apart from the directives of the ordinance, receives no direction from and is not controlled by the county board of supervisors or any of its committees.

I am of the opinion that the county treasurer does not have general authority to manage and administer the investment and reinvestment of county funds and that such power, since it involves the exercise of discretion on a continuing basis, cannot be generally delegated to such officer. I am of the further opinion, however, that the county board can authorize such officer to *deposit* certain funds in his hands not immediately needed in "inactive deposits" in the form of interest-bearing time deposits *in county depositories* designated by the county board pursuant to standards established by the board as to amounts, desired interest rates, time periods and sufficiently specific so that no investment judgment is vested in the treasurer.

Section 59.20, Stats., imposes upon the county treasurer the duty to receive all money from all sources belonging to the county. Section 59.75(3), Stats., provides that, in counties having a population of 200,000 or over, the county board shall fix the amount of money which may be retained by the treasurer. Section 34.05(3), Stats., provides that the treasurer shall, "immediately," and sec. 59.75(1), Stats., provides that the treasurer shall, "as soon as received," deposit in the county depository "all funds that come to the treasurer's hands in that capacity in excess of the sum the treasurer is authorized by the board to retain." Sections 34.06 and 59.75(1), Stats., absolve the treasurer from liability resulting from failure or default of the depository when deposit is made to a depository designated under secs. 34.05 and 59.74, Stats.

Section 59.74, Stats., provides in part:

(1) *The county board of each county containing two hundred thousand or more population shall designate two or more ... banks, banking institutions, or trust companies organized and doing business under the Wisconsin or United States laws, located in Wisconsin, as county depositories, one or more of which shall be designated as working banks, all deposits in which shall be active deposits.*

(2) In addition to the depositories specified in sub. (1), the local government pooled-investment fund and the local government trust-investment fund may be designated *as depositories for investment purposes*.

I am of the opinion that the phrase “all deposits in which shall be active deposits” contained in sec. 59.74(1), Stats., above, modifies the preceding phrase “one or more of which shall be designated as working banks” and does not require that all deposits in county depositories be active deposits.

Section 34.01(8), Stats., as amended by ch. 225, Laws of 1977, defines “inactive” and “active deposits.”

(a) “Inactive deposits” means public deposits which have been deposited subject to the public depository’s rules and regulations relative to time accounts and the investment board’s rules relative to amounts invested in the local government trust-investment fund.

(b) “Active deposits” shall mean public deposits which are subject to *withdrawal on demand* and public deposits in regular savings accounts.

Section 66.04(2), Stats., provides in part:

Investments. *Any county ... may invest any of its funds not immediately needed* in time deposits in any bank, savings bank, trust company or savings and loan association which is authorized to transact business in this state, such time deposits maturing in not more than one year, or in bonds or securities issued or guaranteed as to principal and interest of the U.S. government, or of a commission, board or other instrumentality of the U.S. government, or bonds or securities of any county, city, drainage district, vocational, technical and adult education district, village, town or school district of this state or, in the case of a town, city or village, in any bonds or securities issued under the authority of such municipality, whether the same create a general municipality liability or a liability of the property owners of such municipality for special improvements, and may sell or hypothecate the same. Any county, city, village or town may

also invest surplus funds in the local government pooled-investment fund or the local government trust-investment fund. Cemetery perpetual care funds, pension funds under s. 62.13 (9) or (10), or endowment funds including gifts where the principal is to be kept intact may also be invested under ch. 881.

This section is particularly important insofar as it sets forth a broad range of investment vehicles. But neither it nor any provision in ch. 34, Stats., nor sec. 59.20, Stats., which sets forth the powers of the county treasurer, makes any reference to authority of the treasurer to invest county funds and to make investment decisions with respect to such funds. Section 59.75(1), Stats., expressly provides that “[t]he county board or a committee thereof designated by it” shall have such power.

Section 59.75(1), Stats., provides:

Whenever any county board has designated a county depository under s. 59.74 the county treasurer shall deposit therein as soon as received all funds that come to the treasurer’s hands in that capacity in excess of the sum the treasurer is authorized by the board to retain. Any sum on deposit shall be deemed to be in the county treasury, and the treasurer shall not be liable for any loss thereon resulting from the failure or default of such depository. *The county board or a committee thereof designated by it may invest any funds that come into the county treasurer’s hands in excess of the sum the treasurer is authorized by the county board to retain for immediate use in the name of the county in the local government pooled-investment fund, in the local government trust-investment fund or in interest-bearing bonds of the United States or of any county or municipality in the state. The board or committee may sell such securities when deemed advisable.*

This statute separates the deposit duty of the county treasurer from the investment duty of the county board or of “a committee thereof.” Had the Legislature intended that the investment responsibility be shared with or delegated to the county treasurer, it could easily have so provided. The statute has a built-in delegation provision and does not contemplate any other kind of delegation. The county treasurer is not and may not be a county board member, sec. 59.18, Stats., and he cannot serve on or as the investment committee.

2 McQuillin *Municipal Corporations* sec. 10.40 (3rd ed. 1966), p. 847, states: "If the legislature confers power on a municipal corporation, the exercise of discretion by the governing body of the municipality cannot be delegated to a municipal officer or other person or body"

A county board may delegate powers which are purely ministerial and executive to a committee or to an officer. *Duluth, South Shore & Atlantic R. Co. v. Douglas County*, 103 Wis. 75, 79 N.W. 34 (1899). In *French v. Dunn County*, 58 Wis. 402, 405, 17 N.W. 1 (1883), it was held that a county board could delegate power to its committee to purchase a farm for the poor. In that case the board had authorized "purchase [of] a suitable farm for a county poor-farm, provided the cost thereof should not exceed \$3,000." The committee purchased a farm for \$1,900, and the court held that there was proper delegation. But at p. 406 the court stated:

There are, doubtless, powers vested in the county board which could not be delegated to any committee. Powers which are legislative in their character, which are confided *to the judgment and discretion of the board itself*, such as the levying of taxes, must be exercised under the immediate authority of the board.

(Emphasis added.)

Here, the statute permits delegation to a committee of the board, but there is no authority, direct or by implication, which would permit delegation to the county treasurer, except as noted above where the county board has authorized the treasurer to deposit monies in inactive deposits in designated county depositories under strict standards established by the county board.

Section 59.75(1), Stats., provides that the county board or its specially designated committee "may invest" funds and "may sell such securities when deemed advisable." The exercise of such powers involves the exercise of discretion on a continuing basis. It is my opinion that such powers cannot be delegated to the county treasurer.

BCL:RJV

Intoxicating Liquors; Blend of liquor taxed under sec. 139.03(2t), Stats., and other liquor may be taxed proportionately without violating sec. 139.03(3), Stats. OAG 52-79

May 2, 1979.

MARK E. MUSOLF, *Secretary*
Department of Revenue

Your predecessor requested an opinion whether a proposed rule, Wis. Adm. Code section Tax 8.06, would conflict with sec. 139.03(3), Stats., which provides that “[n]ot more than one occupational tax shall be required to be paid on any one container of intoxicating liquor.”

For many years there has been but one occupational tax applicable to the sale of any particular container of intoxicating liquor, although the tax varied according to the amount of liquor and its alcoholic content, and the tax rates have varied over the years. Section 139.03(2m), Stats. (1975), establishes a tax table for intoxicating liquors other than wine, and the wine tax is provided by subsec. (2n). Chapter 81, Laws of 1977, excepted from the coverage of sec. 139.03(2m) “intoxicating liquor taxed under sub. (2t)” and created a subsec. (2t) for the taxation of intoxicating liquor “manufactured or distilled in this state by pollution control facilities as defined in s. 66.521(2)(h) or from whey and brewing wastes which are produced in this state.” Under subsec. (2t), the tax for more than one-half and up to one wine gallon on such liquor is \$1.00, whereas for other intoxicating liquors, except wines, the tax for the same amount of liquor is \$2.60.

Your problem arises from the production of intoxicating liquor made partly with alcohol distilled in Wisconsin from brewing wastes produced in Wisconsin and partly from other alcohol. The new statute is silent as to how such a blend is to be taxed.

You have proposed a rule which would require affixing to containers of such liquor revenue stamps in the amounts specified by sec. 139.03(2m), Stats., and allowing a credit at the end of each month for the percentage of the specially taxed liquor in a container. For

example, if the alcohol in a wine gallon of intoxicating liquor contained equal amounts of (2m) and (2t) taxed alcohols, the required amount of revenue stamps would be \$1.30, one-half of the normal tax of \$2.60 per gallon, and \$.50, one-half of the special tax of \$1.00 per gallon, making a total of \$1.80. The permittee who had paid the normal tax of \$2.60 then could claim a credit of \$0.80.

It has been suggested that such a rule would violate sec. 139.03(3), Stats., by requiring a second occupational tax on a container of intoxicating liquor. I do not agree. Your rule would merely average the two rates to find *the rate* for an equal blend of the two kinds of alcohol. (If the percentages were 30% of regularly taxed alcohol and 70% of specially taxed alcohol, the ultimate tax, after the credit, would be 30% of \$2.60 (or \$0.78) plus 70% of \$1.00 (or \$0.70), making *the tax* on a gallon of that blend \$1.48.) The container holds one mass of liquid to which but one tax is applicable, and your proposed rule sets forth the obvious method for determining the proper tax for a given liquor. The rule does not purport to require payment of "more than one occupational tax" on any one container.

BCL:EWV

Cooperative Educational Service Agencies; Legislative grant of power to CESA districts to "acquire space" includes power to purchase real estate. OAG 53-79

May 2, 1979.

DR. BARBARA THOMPSON, *State Superintendent*
Department of Public Instruction

You have asked for my opinion as to whether cooperative educational service agencies (CESA's) established in ch. 116, Stats., may purchase and own real estate pursuant to sec. 116.03(10), Stats., as amended by ch. 221, Laws of 1977.

In my opinion the answer is yes.

Section 116.03, Stats., provides:

BOARD OF CONTROL; DUTIES. The board of control shall:

....

(10) Authorize the expenditure of money for the purposes set forth in this subchapter and for the actual and necessary expenses of the board and agency administrator and for the acquisition of equipment, space and personnel. All accounts of the agency shall be paid by check signed by the chairperson and secretary.

Unquestionably the phrase "acquire space" is sufficiently broad to include acquisitions of real estate. "Space" itself includes lands. "Acquire" is defined by sec. 990.01(2), Stats., as including acquisition by "purchase, grant, gift or bequest." This definition would enable a CESA to receive a gift of real estate, and the word "grant" definitionally relates to the conveyance of real estate. *See, e.g.*, secs. 990.01(10) and 706.01(5), Stats. Had the Legislature intended that a CESA could only acquire "leasehold interests," or other property interests but not a fee interest it could have said so in explicit terms. To ascribe such a limited definition to "acquire" is inconsistent with normal usage of the word and its general definition in sec. 990.01(2), Stats.

Therefore, I conclude that a CESA may purchase interests in real as well as personal property.

BCL:CDH

Elections; If the Elections Board is presented with a valid petition for the recall of a member of Congress pursuant to Wis. Const. art. XIII, sec. 12, and sec. 9.10, Stats., it must initiate the recall election unless otherwise ordered by a court. OAG 54-79

May 3, 1979.

GERALD J. FERWERDA, *Executive Secretary*
State Elections Board

You request my opinion on the question of whether Wis. Const. art. XIII, sec. 12 or sec. 9.10, Stats., should be applied to provide for recall of a member of the United States Senate. Your question is occasioned by the possibility that petitions for such a recall may be

filed with the Elections Board. Because of your concern regarding the validity of Wisconsin's recall provisions under the United States Constitution you feel it necessary for the Board to determine whether it should carry out its apparent responsibilities under sec. 9.10, Stats.

Wisconsin Constitution art. XIII, sec. 12, approved by vote of the electorate in November, 1926, provides:

The qualified electors of the state or of any county or of any congressional, judicial or legislative district may petition for the recall of any elective officer after the first year of the term for which he was elected, by filing a petition with the officer with whom the petition for nomination to such office in the primary election is filed, demanding the recall of such officer. Such petition shall be signed by electors equal in number to at least twenty-five per cent of the vote cast for the office of governor at the last preceding election, in the state, county or district from which such officer is to be recalled. The officer with whom such petition is filed shall call a special election to be held not less than forty nor more than forty-five days from the filing of such petition. The officer against whom such petition has been filed shall continue to perform the duties of his office until the result of such special election shall have been officially declared. Other candidates for such office may be nominated in the manner as is provided by law in primary elections. The candidate who shall receive the highest number of votes shall be deemed elected for the remainder of the term. The name of the candidate against whom the recall petition is filed shall go on the ticket unless he resigns within ten days after the filing of the petition. After one such petition and special election, no further recall petition shall be filed against the same officer during the term for which he was elected. This article shall be self-executing and all of its provisions shall be treated as mandatory. Laws may be enacted to facilitate its operation, but no law shall be enacted to hamper, restrict or impair the right of recall.

Section 9.10, Stats., was enacted "to facilitate the operation of art. XIII, sec. 12, of the constitution and to extend the same rights to electors of cities, villages, towns and school districts." Section 9.10(7), Stats., as amended by ch. 403, Laws of 1977.

You express the belief that both Wis. Const. art. XIII, sec. 12, and sec. 9.10, Stats., would permit the use of the recall procedure for congressional offices. I agree, since the language "any elective officer" is broad enough to encompass congressional officers, and I am aware of nothing that would indicate otherwise. Indeed, prior to the adoption of the amendment in November, 1926, some critics charged that inclusion of congressmen raised federal constitutional questions. Since no federal constitutional issues would be raised if the recall were not to apply to federal elective officers, it appears that in the mind of some contemporaries of the amendment it was meant to include such officers.

It may be observed that there are two basic elements to the recall procedure under Wisconsin law. First is the referendum on the question of removal of a named incumbent. Second is an election to choose his successor in the event of such removal. Both of these elements raise constitutional questions. Regarding the first element, there is some question whether the United States Constitution vests in each house exclusively the power to remove members of Congress. As to the second element, the question is whether such an election is inconsistent with the scheme of federal regulation of congressional elections. Under the supremacy clause, U.S. Const. art. VI, cl. 2, any state law inconsistent with the Federal Constitution or with validly enacted federal legislation must fall to the extent of its inconsistency.

The provision of the United States Constitution pertinent to the question of removal is art. I, sec. 5, cl. 2, which provides:

Each house may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two-thirds, expel a member.

Does this power to expel so lodged in each house constitute the only method of removing a sitting member under our constitutional system? No definitive answer to this question has been given by competent authority. It has been recognized, however, that in general the right to expel extends to those cases where the action of the offending member is such that his house considers it inconsistent with the trust and duty of continued membership. *In re Chapman*, 166 U.S. 669 (1897).

Powell v. McCormack, 395 U.S. 486 (1969), is instructive in determining whether the expulsion power granted to each house in

art. I, sec. 5, cl. 2 should be viewed as the sole (constitutional) means of removing a sitting member of Congress. One of the issues to be decided in *Powell* concerned art. I, sec. 5, cl. 1, which provides in pertinent part: "Each house shall be the judge of the elections, returns and qualifications of its own members" The question was whether a house of Congress could prevent a member-elect from taking his seat because it did not deem him qualified. The Court held that Congress may only judge whether a member-elect meets the qualifications enumerated in the Constitution, such as those concerning age and residency, but could not add to them. Thus Congress has no power to exclude a member even on grounds of that member's immoral or criminal conduct. In reaching this conclusion the Court traced the history of the legislative power of exclusion from mid-sixteenth century England through the constitutional convention to the present. In demonstrating the framers' intent that the qualifications for membership in Congress be fixed in the Constitution and not be alterable by the Legislature, the Court quoted from Hamilton's speech before the New York convention:

[T]he true principle of a republic is that the people should choose whom they please to govern them. Representation is imperfect in proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed.

2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876), quoted in *Powell*, 395 U.S. at 540-541. The Court laid particular stress on the principle of protecting popular will in the selection of representatives from legislative obstacles:

Had the intent of the Framers emerged from these materials with less clarity, we would nevertheless have been compelled to resolve any ambiguity in favor of a narrow construction of the scope of Congress' power to exclude members-elect. A fundamental principle of our representative democracy is, in Hamilton's words, "that the people should choose whom they please to govern them."

Id. at 547.

Powell is not directly in point, since it deals with the exclusion power under art. I, sec. 5, cl. 1, rather than with the expulsion power

under art. I, sec. 5, cl. 2. Therefore, it is not conclusive in determining whether the power of removal rests solely with the Congress. But it would be unwise to ignore one of the chief underpinnings of that case, namely, that the will of the people in selecting their representatives is not to be frustrated in the absence of clear and specific authority for doing so.

On the other hand, there is considerable evidence that the framers intended to contribute to the stability of the federal government by structuring one house, the Senate, to be more insulated from the potentially volatile popular will. The Wisconsin Supreme Court has said that the intent was: "To secure a house of Congress not so remote from the people as to be unaccountable to them, and yet distant enough to be able to withstand popular outbreaks of passion and vindictiveness and assaults upon the rights of the citizen." *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 345 (1910). See also James Madison's eloquent discourse on this subject in *The Federalist*, Nos. 62 and 63, pp. 376-390 (Mentor ed., 1961). Today, however, the Senate is less insulated from the popular will on account of the seventeenth amendment providing for direct popular election of Senators.

Removal of a member of Congress under Wisconsin's recall procedure is a most direct expression of the people's will in the selection of their representatives. Removal by recall does not on its face conflict with Congress' power of expulsion under art. I, sec. 5, cl. 2. Nor would the effect of recall necessarily thwart the operation of that clause. If removal by recall is deemed to be in conflict with the expulsion power of Congress, it would have to be because the framers intended expulsion by two-thirds of a house to be the sole method of removing a sitting member. It would not be appropriate for me, in an attempt to discern the framers' intent on this matter, to undertake here the same type of exhaustive historical analysis conducted by the Court in *Powell*. For the present, it is sufficient to note the Court's admonition "to resolve any ambiguity in favor of a narrow construction of the scope of Congress' power" when it is weighed against the people's right to "choose whom they please to govern them."

As noted above, the Wisconsin recall provisions, besides being a method of removal, also involve an election. The holding of congressional elections is subject to U.S. Const. art. I, sec. 4, cl. 1, which provides:

The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

Thus, Congress has the power to regulate the time and manner of holding senatorial elections. Under the supremacy clause, state attempts to regulate such elections will survive in the face of congressional regulation (a) if and to the extent that the two are consistent and do not contravene one another, and (b) if Congress has not evinced an intent to occupy the field so that no state regulation will be allowed regardless of whether Congress has passed inconsistent legislation.

Congress has regulated senatorial elections by law. The pertinent provisions are 2 U.S.C. secs. 1 and 7.

Sec. 1. Time for election of Senators

At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

It will be noted that sec. 1 deals with regularly held congressional elections. There is nothing on the face of the statute to suggest that a provision for a special recall election would interfere with the congressional scheme for regulating the regular elections.

Sec. 7. Time of election

The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter. This section shall not apply to any State that has not yet changed its day of election, and whose constitution must be amended in order to effect a change in the day of the election of State officers in said State.

Under sec. 1 standing alone, the time for the regular election of senators was tied to the time a state had established for the biennial election of representatives. Section 7, fixing a uniform date for such elections, was later passed to eliminate the problems resulting from the election of members occurring at different times in different states. *Ex parte Yarbrough*, 110 U.S. 652, 661 (1884). It is relatively clear, therefore, that sec. 7 also regulates the regularly held election. It does not on its face indicate any intention on the part of Congress to prohibit special recall elections.

Thus far it appears that Wisconsin's recall provisions are wholly consistent with Congress' statutory scheme for regulating the times and manner of elections as evidenced by 2 U.S.C. secs. 1 and 7, above. For nothing in connection with the recall would in any way impinge upon the regular election. If our recall provisions are to be deemed preempted, then, it would have to be because Congress intended to occupy the field, in effect precluding all state regulation in the area irrespective of consistency.

"It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952), quoted in *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973). I am not aware of any clear manifestation of Congress' intent to preempt otherwise compatible state regulation in this area. Therefore, I cannot state that our recall provisions would be declared unconstitutional on grounds of federal preemption.

In the foregoing discussion I have attempted neither a resolution nor a comprehensive analysis of the constitutional issue. Enough has been said, however, to show that the question of constitutionality is one that is arguable and open to debate. The Wisconsin Supreme Court has provided guidance to administrative bodies called upon to perform their ministerial duties under circumstances raising doubt as to the constitutional validity of the result.

In *State ex rel. Sullivan v. Hauerwas*, 254 Wis. 336 (1949), the issue was similar to the one here presented. Sullivan was a candidate for the office of circuit judge. Under Wis. Const. art. VII, sec. 10, to be eligible for that office a person must have attained the age of

twenty-five years at the time of his election. After Sullivan had filed his otherwise adequate nomination papers with the Milwaukee County Board of Election Commissioners, he was informed that his name would not be placed on the ballot because he admittedly was not old enough. The circuit court for Milwaukee County granted Sullivan's petition for a writ of mandamus compelling the Board to place his name on the ballot. The supreme court held that the circuit court did not abuse its discretion in issuing the writ. The court noted that the Board was:

[A]n administrative body and may perform only those functions delegated to it by the Legislature. It has no authority to make findings of fact where the statutes are silent, and it has no authority to determine questions of law. The nomination papers were admittedly proper in every respect and the relator has a legal right to have his name appear upon the primary judicial ballot even though he may not be eligible for the office if elected.

254 Wis. at 340.

The position of the Wisconsin Supreme Court on this subject was most recently explained in *State ex rel. Althouse v. Madison*, 79 Wis. 2d 97, 109, 112, 255 N.W.2d 449 (1977):

It is true that, in its [the court's] discussion of *State ex rel. Sullivan v. Hauerwas* ... it pointed out that it would have been proper to deny a petition for a writ of mandamus to place a candidate of doubtful age eligibility on the ballot had that question been previously decided adversely to the petitioner; but it also recognized that, where no prior adjudication had taken place, mandamus was appropriate even though a substantial constitutional doubt was readily apparent.

We have already referred to *Sullivan*, in which this court held that, although a question ... of substantial constitutionality of the proposed action is raised, mandamus will lie unless there has been a prior and explicit adjudication of unconstitutionality on the very subject matter. In other words, where the unconstitutionality is arguable and open to debate, mandamus will nevertheless lie to compel performance. In *State ex rel. Martin v. Zimmerman*, 233 Wis. 16, 288 N.W. 454 (1939), the secretary

of state refused to publish a bill because of his belief in its unconstitutionality. This court rejected his defense and stated:

“It is a thoroughly well-established principle of law that no person may raise the constitutionality of an act of the legislature who is not in his official capacity or personally affected by it.”

Accordingly, in the event petitions for the recall of a United States senator are presented to the Elections Board, you should proceed to carry out your responsibilities under Wis. Const. art. XIII, sec. 12, and sec. 9.10, Stats., unless and until directed otherwise by a court of law.

BCL:GS

Public Health; Schools And School Districts; A school district may contract with a vocational, technical and adult educational district pursuant to sec. 66.30, Stats., for a health occupations course to be taught in the public high school, subject to the teacher's licensing by the Department of Public Instruction. OAG 55-79

May 4, 1979.

DR. BARBARA THOMPSON, *State Superintendent*
Department of Public Instruction

You have asked me to answer three questions bearing on the teaching of health occupation courses in the secondary public schools as well as the vocational, technical and adult education system.

Your first question is: “May a school district contract with a vocational, technical and adult education district, under Section 66.30, for a health occupations course, to be taught in the public high school?”

The answer to this question is yes. Section 66.30 provides, in part:

(1) In this section “municipality” means ... any city, village, town, county, school district

(2) In addition to the provisions of any other statutes specifically authorizing cooperation between municipalities, unless

such statutes specifically exclude action under this section, any municipality may contract with other municipalities, for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law.

It is my opinion that the term "any ... school district" in the context of sec. 66.30, Stats., clearly includes vocational, technical and adult education school districts. The Legislature initially provided for local vocational school boards in ch. 616, Laws of 1911. Moreover, the Wisconsin Supreme Court has consistently referred to elementary and secondary school law in interpreting the statutes implementing the vocational school system. *See, e.g., West Milwaukee v. Area Board of Vocational, Technical and Adult Education*, 51 Wis. 2d 356, 187 N.W.2d 387 (1971), and *Wood County v. Board of Vocational, Technical and Adult Education*, 60 Wis. 2d 606, 211 N.W.2d 617 (1973). Finally, the specific enumeration of "municipalities" in sec. 66.30, Stats., includes both municipalities and such quasi-municipal corporations as school districts. Because school districts have been determined to be municipalities for the purposes of sec. 66.30 agreements, 66 Op. Att'y Gen. 272, 274 (1977), vocational, technical and adult education districts should also be capable of entering into such agreements because they too are quasi-municipal corporations. *See* 63 Op. Att'y Gen. 187, 191 (1974).

In your second question you ask, "would such a health occupations teacher be required to hold a license to teach issued by the Department of Public Instruction?"

It is my opinion that such a teacher must hold a license to teach issued pursuant to sec. 115.28(7), Stats. This subsection provides, in part, that the Superintendent is to: "License or certify all teachers for the public schools of the state, make rules and prescribe standards of attainment for the examination, licensing and certification of teachers within the limits prescribed in ss. 118.19 (2) and (3)" Sec. 115.28(7)(a), Stats.

Section 118.19(1), Stats., clearly addresses your question: "Any person seeking to teach in a public school or in a school or institution operated by a county or the state shall first procure a certificate or license from the department."

The "seeking to teach" language of sec. 118.19(1), Stats., does not restrict an individual without a license who because of his expertise in a given area is invited by a teacher to lecture before a class, *e.g.*, the local police chief discussing the role of the police in the community. In contrast, your question envisions not a guest lecturer but rather an individual holding a position to teach an entire course.

On this point sec. 121.02(1)(a), Stats., dealing with school district standards, provides: "Every teacher, supervisor, administrator and professional staff member shall hold a certificate, license or permit to teach issued by the department before entering on duties for such *position*." Moreover, sec. 121.17(2)(b), Stats., provides in part that the State Superintendent may withhold state aids if a state school district does not employ teachers qualified under sec. 118.19, Stats.

In arriving at this conclusion, I am mindful of that part of sec. 66.30(2), Stats., which provides: "If municipal parties to a contract have varying powers or duties under the law, each may act under the contract to the extent of its lawful powers and duties. This section shall be interpreted liberally in favor of cooperative action between municipalities." In my opinion, this part of sec. 66.30(2), Stats., was not intended to permit a variance in the licensing requirements to be applied to those persons who would perform under a sec. 66.30, Stats., agreement.

Your last question is:

If a school district entered into a contract with a VTAE district under Section 118.15 (1) (c) and (2) for high school students to attend a VTAE school for the purpose of taking a health occupations course, would a teacher of such course need to hold a license issued by the Department of Public Instruction?

The answer to your question is yes. Having determined that a license is needed for a VTAE teacher to teach in high school, I am of the opinion that the underlying policy consideration dictates the same result regardless of which building the instruction is to take place in. To determine otherwise would allow a subversion of the policy of assuring that high school students should only be taught by teachers deemed qualified. This check on teacher quality is controlled by

licensing procedures established by the Legislature and the Department.

Nothing in this opinion should be construed as restricting the power of the Superintendent to determine, through agency rule or otherwise, that VTAE teachers of health occupations courses are qualified to teach such a course to high school students provided that the determination is not in conflict with any statute.

BCL:CDH

Indians; Wisconsin's cigarette tax laws do not apply to Indian persons or Indian tribes selling cigarettes on Indian reservations. OAG 56-79

May 8, 1979.

DANIEL G. SMITH

Department of Revenue

You have asked several questions relating to the enforcement of Wisconsin's cigarette tax statutes, sec. 139.30, *et seq.*, Stats., against Indian persons and Indian tribes within Indian reservations. Your questions will be answered *seriatim*. Before turning to each specific question, however, it may be helpful to outline the state's general taxing jurisdiction over Indian persons and Indian tribes within reservation boundaries since all your questions involve issues of jurisdiction.

For the following reasons, it is my opinion that the state's jurisdiction to collect its taxes from Indian persons and Indian activities within reservations is extremely limited.

As indicated in previous opinions (*see e.g.*, 65 Op. Att'y Gen. 276 (1976); 64 Op. Att'y Gen. 184 (1975)), there are certain basic legal principles which govern the resolution of jurisdictional questions concerning Indians and Indian lands. First, a federally recognized Indian tribe is a legitimate governmental entity possessing attributes of sovereignty over both its members and its territory, and as such has the power to regulate its internal and social relations. Second, the federal government has authority to qualify this power. Third, state law can have no role to play within a reservation's boundaries except with the

consent of the tribe itself or in conformity with treaties and acts of Congress or where the courts have determined that state law shall apply.

Recent Supreme Court decisions make clear that a state's authority to impose taxes on Indian tribes, tribal members, or tribal property within reservation boundaries depends on clear congressional authorization. See, e.g., *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373 (1976); *Moe v. Confederated Salish and Kootenai Tribes, Etc.*, 425 U.S. 463 (1976); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

The Supreme Court outlined the general framework by which state jurisdiction in taxation cases is to be analyzed, in *McClanahan*. The Court, as a starting point, noted that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." Tribal sovereign status, however, was strongly reaffirmed by the Court in two recent cases, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and *United States v. Wheeler*, 435 U.S. 313 (1978). Although tribal sovereignty is still relevant, "because it provides a backdrop against which the applicable treaties and federal statutes must be read," it is not the controlling focus of analysis. *McClanahan* at 172. Rather, it is necessary to carefully analyze the applicable federal statutes to determine whether state jurisdiction has been authorized. Additionally, where the issue involves only state jurisdiction over non-Indian persons within reservation boundaries, the state statute need only satisfy the test laid down in *Williams v. Lee*, 358 U.S. 217 (1958), viz., that it not infringe on the rights of reservation Indians to make their own laws and be ruled by them.

Also, in *Mescalero Apache Tribe v. Jones*, the Court concluded that Indian tribes do not enjoy absolute tax immunity outside reservation boundaries. The Court upheld the imposition of a state tax on the gross receipts of a ski resort operated by the Mescaleros on land located outside the boundaries of their reservation, although the Court struck down the state's use tax imposed on the personalty installed in the construction of the ski lifts.

Although *McClanahan* outlined the general framework by which state jurisdiction in taxation matters is to be analyzed, the Court specifically did not consider federal jurisdictional legislation such as Pub. L. No. 280, 67 Stat. 588 (28 U.S.C. sec. 1360 and 18 U.S.C. sec. 1162), or deal with “exertions of state sovereignty over non-Indians who undertake activity on Indian reservations.” 411 U.S. at 168.

Bryan concerned one question reserved in *McClanahan*; namely, whether the grant of civil jurisdiction to the states conferred by section four of Pub. L. No. 280 (28 U.S.C. sec. 1360(a)), is a congressional grant of power to the states to tax reservation Indians. In answering no, the Court concluded, without qualification, that Pub. L. No. 280 does not confer general state regulatory control over Indian reservations.

The Court held that the congressional grant of jurisdiction to the states through Pub. L. No. 280 was not authorization to the states to subordinate reservation Indians “to the full panoply of civil regulatory powers, including taxation, of state and local governments” because Congress did not clearly express such an intent. *Id.* at 388. In writing the opinion for a unanimous Court Justice Brennan stated:

[C]ongress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws [I]f Congress in enacting Pub. L. No. 280 had intended to confer upon the States general civil regulatory powers ... over reservation Indians, it would have expressly said so.

Id. at 389-90. Accordingly, the Court held invalid the state’s personal property tax as applied to the mobile home of an enrolled Chippewa Indian where such mobile home was located on land held in trust for tribal members. Compare 65 Op. Att’y Gen. 276 (1976).

When read together, *McClanahan* and *Bryan* make clear that in view of federal pre-emption there is now a presumption against state taxing authority over Indians and Indian property located within an Indian reservation and that Pub. L. No. 280 does not alter or otherwise affect that presumption.

In *Moe v. Confederated Salish and Kootenai Tribes, Etc.*, 425 U.S. 463 (1976), the Court, citing *McClanahan* and *Mescalero Apache Tribe v. Jones*, concluded that Montana could not assess a

vendor's license fee against an Indian for selling cigarettes on "reservation land," and could not apply the state cigarette sales tax on "reservation sales" by Indians to Indians. The Court noted that the basis for the invalidity of the taxing measures at issue, which the Court "found to be inconsistent with existing federal statutes," was the Supremacy Clause, U.S. Const. art. VI, cl. 2. *Id.* 425 U.S. at 481, fn. 17.

The Court noted also that the Montana cigarette tax was a direct tax on the retail consumer pre-collected by the seller for the purpose of convenience and facility only. *Id.* 425 U.S. at 482. The Court held that the Indian retailer, thus, could be required to collect the tax for the state on sales to non-Indians.

With these general guidelines in mind, each of your several questions will now be considered.

1. You ask whether your Department can refuse to issue a permit under sec. 139.34, Stats., to an Indian distributor of cigarettes who has his or her place of business on a Wisconsin Indian reservation and declares an intention to buy cigarettes outside this state and sell them to Indian retailers having places of business on Indian reservations in Wisconsin without paying the occupational tax on cigarettes imposed at sec. 139.31, Stats.

The underlying issue in all of your questions is whether the state cigarette tax laws are applicable to Indian tribes and Indian persons on Indian reservations. Accordingly, your questions will be answered in the context of state taxing authority. This analysis, therefore, does not necessarily govern other jurisdictional questions.

Wisconsin's cigarette tax laws, sec. 139.30, *et seq.*, Stats., impose an "occupational tax" on any person selling cigarettes within the state (sec. 139.31(1), Stats.), a "use tax" equivalent to the occupational tax on any person using cigarettes in this state if the occupational tax has not been paid on such cigarettes (sec. 139.33(1), Stats.), and requires individuals engaged in the distribution and sale of cigarettes other than at retail to secure a state permit (sec. 139.34(1)(a), Stats.). Clearly, the purpose of this statutory scheme is to ensure that taxes are paid on all cigarettes entering the state unless specifically exempted.

Section 139.34(1)(a), Stats., makes it unlawful for any person to “sell cigarettes in this state as a distributor, jobber, vending machine operator or multiple retailer and no person shall operate a warehouse in this state for the storage of cigarettes for another person without first obtaining the proper permit to perform such operations from the department of revenue.”

Pursuant to sec. 139.34(1)(b), Stats., the Department can refuse to issue a permit to any person not of “good moral character.” Subsection (c) lists several factors to consider in determining whether an applicant is of good moral character. Unless an applicant is found to be not of good moral character, the Department cannot refuse to issue a permit under sec. 139.34, Stats.

Section 139.31(1), Stats., provides, in part:

An occupational tax is imposed on the sale, offering or exposing for sale, possession with intent to sell or removal for consumption or sale of cigarettes or other disposition for any purpose whatsoever. All cigarettes received in this state for sale or distribution within this state, except cigarettes actually sold as provided in sub. (3), shall be subject to such tax.

Subsection (3) lists various exceptions to the occupational tax.

Your first question requires consideration of both the permit requirement of sec. 139.34(1)(a), Stats., and the application of the occupational tax set forth in sec. 139.31(1), Stats. For the reasons that follow, it is my opinion that the state has no jurisdiction to require an Indian distributor of cigarettes doing business exclusively on a Wisconsin Indian reservation to secure a permit for sale of cigarettes. It is also my opinion that such sales are not subject to the occupational tax imposed by sec. 139.31, Stats.

The sec. 139.31 occupational tax is a tax on carrying on the business of selling cigarettes within the state. An occupational tax is thus imposed upon the seller and not on the product or the purchaser. *See Berlowitz v. Roach*, 252 Wis. 61, 67, 30 N.W. 256 (1947); *see also* 29 Op. Att’y Gen. 283 (1940).

The United States Supreme Court in the leading cases discussed heretofore made clear that a general exemption from state taxes extends to Indian tribes and Indian persons within reservation boundaries. As indicated, the Court in *Moe v. Confederated Salish and*

Kootenai Tribes, Etc., 425 U.S. 463 (1976), specifically struck down Montana's personal property tax on property located within the reservation; the vendor license fee sought to be applied to a reservation Indian conducting a cigarette business on reservation land; and the cigarette sales tax as applied to on-reservation sales by Indians to Indians. It follows that where the burden of the tax sought to be imposed is on an Indian person or Indian tribe located within reservation boundaries, such tax cannot be lawfully imposed. Since the sec. 139.31, Stats., occupational tax is on the individual seller, the above cited cases make such taxes unenforceable against an Indian seller on the reservation. See also *Warren Trading Post v. Arizona Tax Com.*, 380 U.S. 685 (1965).

The sec. 139.34, Stats., permit required for all distributors is intended to give the Department of Revenue additional control over the sale of cigarettes and to facilitate the collection of the occupational tax. It follows that if the state has no jurisdiction to prevent an Indian distributor from selling unstamped cigarettes, it has no jurisdiction to prosecute that person for not securing a sec. 139.34, Stats., permit.

2. You next ask if the answer to question one is yes, or if the Indian person does not apply for a permit and proceeds to distribute cigarettes, is he or she subject to the cigarette taxes imposed at sec. 139.31 or sec. 139.33, Stats.

The answer to this question as it concerns sec. 139.31, Stats., is no for the reasons stated in question one above.

Section 139.33(1), provides in part:

A use tax is imposed and levied upon the use of cigarettes in this state by any person for any purpose if the occupational tax imposed by s. 139.31 has not been paid on such cigarettes. Such tax is levied and shall be collected at the same rates as provided for in s. 139.31.

It is clear that this use tax is intended to complement the occupational tax discussed above.

Use taxes together with sales taxes constitute a general taxing plan under which everything is taxable at the retail level unless specifically exempted. See *Dept. of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 257 N.W.2d 855 (1977). The tax burden of a use tax is

on the consumer. Unlike the general retail sales tax (sec. 77.51, *et seq.*, Stats.), which is to be precollected by the retailer (sec. 77.52, Stats.) the cigarette use tax is not precollected by the seller but rather the burden is on the purchaser to pay the tax. As already indicated, the Indian tax exemption extends to the tribe and individual tribe members and as such the state has no jurisdiction to impose either the sec. 139.31, Stats., occupational tax or the sec. 139.33, Stats., use tax under the circumstances outlined in your question. Non-Indian purchasers are subject to the use tax for purchases made on a reservation. See discussion following question six *infra*.

3. You then ask if the answer to question one is no, is the Indian distributor subject to the cigarette taxes imposed at sec. 139.31, Stats.

The answer to this question is no for the reasons stated in question one above.

4. You next ask if the Indian distributor of cigarettes is subject to the cigarette tax law, what means are available to this Department to enforce payment of the tax under sec. 139.32, Stats. You list a number of current enforcement options available to the Department.

Since it is my opinion that an Indian distributor doing business on a reservation is not subject to the cigarette tax law it is not necessary to consider this question.

5. You next ask whether a retailer selling cigarettes on a reservation is required to obtain a retailer's license under sec. 134.65, Stats., and, if so, who has authority to issue such licenses.

Section 134.65(1), Stats., provides:

No person shall in any manner, or upon any pretense, or by any device, directly or indirectly sell, expose for sale, possess with intent to sell, exchange, barter, dispose of or give away any cigarettes to any person not holding a license as herein provided or a permit under s. 139.30 to 139.41 without first obtaining a license from the clerk of the city, village or town wherein such privilege is sought to be exercised.

This section allows local government to impose an additional burden upon retail sellers of cigarettes in the form of a license fee. This "fee" requirement is separate from and in addition to the permit

requirement under secs. 139.30 to 139.41, Stats. Since it is my opinion that an Indian seller is not required to have the state permit, it follows there also is no jurisdictional basis for requiring the local permit. It is, therefore, my opinion that an Indian tribe or Indian person selling cigarettes on a reservation is not required to obtain a retailer's license under sec. 134.65, Stats.

6. You next ask: When an Indian retailer of cigarettes, having a place of business on an Indian reservation in Wisconsin, purchases unstamped cigarettes from a resident or non-resident distributor, who is either an Indian or non-Indian, with or without a permit, and the retailer sells the unstamped cigarettes on the reservation to Indian and non-Indian consumers, is the Indian retailer subject to the tax imposed at either secs. 139.31 or 139.33, Stats., on such cigarettes?

Retailers of cigarettes generally are subject to the occupational tax imposed by sec. 139.31, Stats., if the tax has not already been paid. As indicated above, an Indian seller is not subject to the occupational tax where sales are made on a reservation.

The use tax imposed by sec. 139.33, Stats., is on the purchaser rather than the seller and, therefore, a retailer would not be liable for that tax. Under the factual situation you pose, an Indian retailer has been able to acquire unstamped cigarettes, presumably in other states, for resale to consumers in Wisconsin. If that retailer's sales are to Indian persons on a reservation, such sales are not subject to either the occupational tax or the use tax. Whether sales to non-Indian consumers are subject to the use tax is less clear.

In *Moe v. Confederated Salish and Kootenai Tribes, Etc.*, 425 U.S. 463 (1976), the Court concluded that on-reservation sales by an Indian retailer to non-Indian consumers were subject to the Montana cigarette *sales tax*. The Court concluded that because the Montana tax was a direct tax on the retail consumer, precollected for the purpose of convenience and facility only, it could not be considered a tax on the Indian seller and would therefore constitute a lawful tax. The Court considered whether the Montana requirement (that the Indian seller *precollect* the tax on sales to non-Indians) interfered with reservation self-government or would impair a right granted or reserved by federal law. *Williams v. Lee*, 358 U.S. 217 (1959); *New York v. Martin*, 326 U.S. 496, 499 (1946); *Draper v. United States*, 164 U.S.

240 (1896). The Court in concluding there was no infringement noted:

The State's requirement that the Indian tribal seller collect a tax validity imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax. Since this burden is not, strictly speaking, a tax at all, it is not governed by the language of *Mescalero*, quoted *supra*, at 1642, dealing with the "special area of state taxation." We see nothing in this burden which frustrates tribal self-government, [citation omitted] or runs afoul of any congressional enactment dealing with the affairs of reservation Indians, [citation omitted] We therefore agree with the District Court that to the extent that the "smoke shops" sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof.

Moe v. Confederated Salish and Kootenai Tribes, Etc. at 483.

Wisconsin's cigarette use tax does not seem to come within this exception to proscribed state taxation. As already noted, the Wisconsin Statutes do not require the retailer to precollect the cigarette *use tax*. It is, therefore, my opinion that under the existing state statutes an Indian retailer of cigarettes has no obligation to collect the cigarette use tax on sales to non-Indians.

7. You next ask if my response to questions one through six would be the same if the place of business of the Indian distributor or retailer was on the Menominee Reservation rather than on one of the other Wisconsin Indian reservations. You note that Wisconsin has general civil and criminal jurisdiction over the latter (pursuant to Pub. L. No. 280) and not the former.

As noted in the opening comments to this opinion, *Bryan* forecloses the possibility of reaching a different conclusion regarding taxation in view of Pub. L. No. 280 because the Court held that Pub. L. No. 280's grant of civil jurisdiction only confers jurisdiction over *civil causes of action* involving Indians. See also *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 99 S. Ct. 740 (1979). It is not a general grant of regulatory and taxing power over Indians. It is,

therefore, my opinion that for taxation purposes the Menominee Tribe enjoys the same status as do other Wisconsin tribes.

8. In your next question you ask whether my response to questions one through six would be the same if the distributor or retailer was an Indian tribe rather than an individual Indian.

As already suggested, it is my opinion that under the existing tax statutes both the tribe and tribal members enjoy the tax immunity considered herein. It should be kept in mind, however, that an Indian tribe does enjoy general immunity from suit because of its sovereign status. See *United States v. Wheeler*, 435 U.S. 313 (1978). This could impose added problems regarding any attempt by the state to exercise jurisdiction directly over Indian tribes regardless of purpose; for example, an attempt to require a tribe as opposed to an individual business to precollect sales taxes on sales to non-Indians on the reservation.

9. You next ask whether my response to questions one through six would be the same if the distributor or retailer was a corporation or a partnership with some Indian person investment and, if so, what proportion of Indian person investment would be required. You cite *Eastern Navajo Industries, Inc. v. Bureau of Revenue of the State of New Mexico*, 552 P.2d 805, 89 N.M. 369 (1976), *cert. denied*, 430 U.S. 959, 51 L. Ed. 2d 810.

In *Eastern Navajo Industries, Inc.* the court concluded that incorporation under New Mexico law did not cause the Indian owners of the corporation to lose their tax exempt status. Navajos held a fifty-one percent majority of the corporation's stock, which under various federal programs qualified the corporation for consideration by the federal government as an Indian business. It is not practicable in the absence of a specific fact situation to exhaustively search all federal statutes that may similarly affect the incorporation of tribal businesses established to engage in the sale of cigarettes. The same result reached by the New Mexico court in *Eastern Navajo Industries, Inc.* may very well follow, with respect to Indian businesses incorporated under Wisconsin law, but I believe it best to defer specific comment until an actual fact situation is presented.

10. You next ask if my response to questions one through six would be the same if the Indian distributor or retailer held a federal Indian trader's permit and obtained rights from the tribe to distribute

for retail sale cigarettes on the reservation to Indians and to non-Indians.

Possession of a federal Indian trader's permit may affect the ability of a business to operate within an Indian reservation and reflects federal pre-emption in this area; *see Warren Trading Post v. Arizona Tax Com.*, 380 U.S. 685 (1965); but such permit probably would have little or no bearing on the jurisdiction of the state to impose cigarette taxes to on-reservation sales to non-Indians. *Moe v. Confederated Salish and Kootenai Tribes, Etc.*, 425 U.S. 463 (1976).

As already indicated the state does have jurisdiction to require Indian retailers doing business on a reservation to precollect taxes on sales to non-Indians assuming that state law requires such precollection. *Id.* It is unclear what effect a tribe's exercise of jurisdiction with respect to taxation generally would have on the state's jurisdiction over sales to non-Indians. One three-judge district court recently concluded that tribal ordinances taxing on-reservation sales of cigarettes to non-Indians pre-empted state jurisdiction and the state law thus constituted an unreasonable interference with tribal self-government. *Confederated Tribes of Colville v. State of Wash.*, 446 F. Supp. 1339 (E.D. Wash. 1978). An appeal of that decision is currently pending in the United States Supreme Court (47 U.S.L.W. 3287; No. 78-630 (1978)).

In *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976), the court reached in effect an opposite conclusion. The tax at issue was a possessory interest tax imposed by California on non-Indian lessees of land held in trust by the federal government for the Fort Mojave Indian Tribe. In considering whether the state tax infringed on the rights of the tribe to govern itself (*Williams v. Lee*, 358 U.S. 217 (1958)), the court noted that there was no improper double taxation because the taxes were being imposed by two different and distinct taxing authorities, namely the State of California and the tribe. The Court went on to note that the tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power, 543 F.2d at 1258.

It is my understanding that none of the Wisconsin tribes have enacted laws covering cigarette taxation; therefore, it is not now possible to reach a definitive resolution of issues presented by such

action. In all events, the court's decision in the appeal of *Confederated Tribes of Colville v. State of Wash.*, will probably provide an answer to the question of whether tribal law can pre-empt state taxing jurisdiction over non-members.

11. Your last question asks if my response to questions one through six distinguishes between Indians and non-Indians in the application or enforcement of the cigarette tax law, and, if so, what definition I would apply to the word "Indian."

As already suggested, the tax exemption does not extend to non-Indian consumers, retailers, or other sellers of cigarettes.

To answer your question concerning who is an Indian, it is my opinion that "Indian" for purpose of taxation can be defined as an individual of Indian descent who is recognized in the local community as an Indian or is a member of a recognized federal Indian tribe. Membership in the tribe as evidenced by either a name on the tribal roll or confirmation of such fact by the tribe would probably be considered authoritative evidence that the state does not have jurisdiction over that person for taxation purposes. It follows that persons not of Indian descent and not tribe members cannot claim the exemption.

Finally, in communication with this office subsequent to your formal opinion request, you asked whether sales made by distributors doing business outside reservations to Indian distributors or retailers doing business on a reservation would be exempted from the sec. 139.31, Stats., occupational tax if the Indian purchaser were exempt from the tax. Although the tax exemption does not extend to non-Indian sellers or purchasers, a limited exception under the Wisconsin Statutes may be possible where a non-Indian distributor sells unstamped cigarettes to Indian distributors doing business on a reservation. Section 139.32(1), Stats., provides:

- (1) The tax imposed by s. 139.31 shall be paid by purchase of stamps from the secretary. To evidence the payment, stamps of the proper denomination shall be affixed to each package or other container in which cigarettes are packed, prior to the first sale within this state. *First sale does not include a sale by a manufacturer to a distributor or by a distributor to a permittee who has obtained department approval as provided for in sub. (8) (a) 2.* The tax shall be paid only once on each package or container.

Section 139.32(8), Stats., makes it unlawful for any person to possess in excess of 400 cigarettes unless the required stamps are properly affixed. Subsection (8) provides, however:

(a) This subsection shall not apply to the following:

....

2. Any permittee under s. 139.34 having department approval or person authorized to acquire, possess or sell unstamped cigarettes under s. 139.31(3) provided that said permittee or person maintains a separate inventory thereof and records pertaining thereto in such manner and form as the department prescribes by rule.

It is my opinion that these statutory provisions would allow the Department through appropriate rules and regulations to approve the sale of unstamped cigarettes to Indian distributors by non-Indian distributors without holding the non-Indian distributor responsible for the tax.

BCL:JDN

Taxation; Towns; The statutes do not provide that town taxpayers may be granted special treatment for payment of property taxes even when a reassessment is not completed until shortly before the due date for payment of taxes. OAG 57-79

May 15, 1979.

VICTOR MOYER, *Corporation Counsel*
Rock County

You have asked for my opinion as to whether town taxpayers may be granted the privilege of having two months beyond the last day of February to pay their property taxes in full, or one month beyond said date to pay the first installment, in both cases without interest, when a reassessment of their property was not completed until February, 1979.

The answer is no.

You have furnished me with the following facts:

One of the towns in Rock County was recently reassessed by order of the State. The assessment was completed in late February, 1979. The attorney for the town expressed the opinion that town taxpayers should have two months thereafter to pay in full or one month to pay a first installment without interest charges. On my advice, the County Treasurer has rejected this argument and will charge interest on late payments. She has agreed to account for such interest separately and to escrow it pending receipt of an opinion from your office.

Under sec. 74.03(2), Stats., property tax payments are due on or before the last day of February. In addition, sec. 74.03(2), Stats., provides for the payment of real estate taxes in two equal installments on or before January 31 and July 31. If the real estate taxes are not paid in two equal installments, taxes remaining unpaid on March 1 are delinquent and subject to interest at the rate of one percent per month or a fraction thereof from January 1, as provided in sec. 74.03(4), Stats.

A flat interest charge of eight-tenths of one percent per month initially was adopted by ch. 294, Laws of 1937, in order to simplify the administration of the collection of delinquent taxes. The flat charge was in lieu of penalties, fees and interest of eight percent per annum. See *Munkwitz R. & I. Co. v. Diederich Schaefer Co.*, 231 Wis. 504, 507, 286 N.W. 30 (1939). The charge was increased to one percent per month by ch. 211, Laws of 1975, effective January 1, 1977.

The mode of levying, assessing and collecting taxes is entirely subject to the discretion of the Legislature, limited by the constitutional provision which requires the rule of taxation to be uniform. *Smith v. Cleveland and others*, 17 Wis. 573 [*556], [*565] (1863).

A county board has only such powers as may be expressly delegated to it by statute and those powers necessarily implied from the powers which are expressly given to it. *Spaulding v. Wood County*, 218 Wis. 224, 228, 260 N.W. 473 (1935).

There is no statute authorizing the county treasurer or county board to waive interest charges under these circumstances or otherwise grant special treatment to these taxpayers.

Accordingly, I share your conclusion that in the absence of statutory authority special treatment cannot be granted to residents of the town even though the shortness between notice and due date may have worked some hardship for them.

BCL:APH

Counties; Municipalities; Telephone; If all the municipalities in Milwaukee County establish their own system or combine with several other municipalities to establish a system with a central location, Milwaukee County would be required to establish a system which connects with all central locations of the emergency telephone systems established in the county. It is possible that a mandamus proceeding could be instituted against public officials to obtain compliance with the provisions of the statute. OAG 58-79

May 16, 1979.

ROBERT P. RUSSELL, *Corporation Counsel*
Milwaukee County

You state that sec. 146.70, Stats., created by ch. 392, Laws of 1977, requires, among other things, that every "public agency" establish and maintain within its respective jurisdiction a basic or sophisticated emergency telephone system.

As you also state, sec. 146.70(1)(f), Stats., provides that "public agency" means any municipality as defined in sec. 345.05(1)(a), Stats., which provides or is authorized to provide fire fighting, law enforcement, ambulance, medical or other emergency services. Section 345.05(1)(a), Stats., reads as follows: "'Municipality' means any county, city, village, town, school district (as enumerated in s. 67.01 (1)), sewer district, drainage district and, without restriction because of failure of enumeration, any other political subdivision of the state."

You then state that Milwaukee County is completely made up of nineteen municipalities, each of which provides fire fighting, law enforcement and other emergency services. You then ask my opinion as to what responsibility Milwaukee County has, if any, toward the

implementation of a 911 emergency telephone system within Milwaukee County.

Subsections (d) and (e) of sec. 146.70(2), Stats., provide:

(d) Public agencies, including agencies with different territorial boundaries, may combine to establish a basic or sophisticated system as required by this section.

(e) If a public agency or group of public agencies combined to establish an emergency phone system under par. (d) has a population of 250,000 or more, such agency or group of agencies shall establish a sophisticated system by December 31, 1987.

A note to the proposed bill pertaining to sec. 146.70(2)(d), Stats., which contained the same language, reads as follows:

NOTE: Since federal policy recommends implementation of 911 by the year 1985, every public agency, except a State agency, will be involved in a 911 system. *It does not seem reasonable to expect each agency to have a separate 911 system.* Therefore, agencies are encouraged to combine together to form a central 911 agency wherever practical. Political boundaries and telephone exchange boundaries may greatly influence the type of 911 system each agency adopts.

On the other hand, a large community may well find it advantageous to divide their area into zones to better serve their emergency problems. *It is the intent of this legislation to permit each agency to participate in a 911 program best suited to its own local needs.*

(Emphasis added.)

It is clear that all the municipalities in Milwaukee County could combine and establish a sophisticated system under the jurisdiction of the county. On the other hand, each municipality could establish its own system or combine with several other municipalities to establish a system with a designated central location. It would appear to be desirable that only one system be established under the jurisdiction of Milwaukee County, but that is a matter for the county and municipalities to determine.

It is clear that sec. 146.70, Stats., does not require every public agency to establish a separate emergency telephone system. Nevertheless, every public agency must participate in the emergency services telephone system. In the event that all municipalities in Milwaukee County either establish their own system or combine with several other municipalities to establish a system with a designated central location, it is my opinion that Milwaukee County would be required to establish a system which connects with all the central locations of the emergency telephone systems established in Milwaukee County. Thus, this would enable Milwaukee County to provide assistance when called upon.

You also inquire as to what the penalty would be for failure to establish an emergency telephone system. You are correct that there is no penalty provision contained in the statute in this regard; however, it is possible that a proper person or party could institute a mandamus proceeding against public officials to require compliance with the provisions of the statute.

BCL:GBS

Elections; Schools And School Districts; A school board which informs the electorate of the school district of the facts which are pertinent to an issue which will be the subject of a school district referendum need not register or file campaign financing reports under ch. 11, Stats. OAG 60-79

May 30, 1979.

EDWIN FISHER, *District Attorney*
Washburn County

Your predecessor advised that prior to a recent school district referendum election within your county, the local school board involved mailed a "fact sheet" to the resident electors of the school district concerning the issue which was the subject of the referendum vote. The fact sheet "purported to merely state the facts pertinent to the construction of a new elementary school building within the District." He inquired whether the school board of such a school district, which informs the electorate of facts pertinent to such a public issue,

must register or file campaign financing reports under ch. 11, Stats. He specifically directed my attention to sec. 11.23, Stats., which provides in pertinent part:

POLITICAL GROUPS AND INDIVIDUALS; REFERENDUM QUESTIONS. (1) *Any group or individual may promote or oppose any referendum in this state.* Before making disbursements, receiving contributions or incurring obligations in excess of \$25 in the aggregate in a calendar year for such purposes, the group or individual shall file a verified registration statement under s. 11.05 (1), (2) or (2r). ... The treasurer of a group shall certify the correctness of each statement or report submitted by it under this chapter.

....

(4) Each group or individual shall file periodic reports as provided in ss. 11.06, 11.19 and 11.20.

Section 11.01(9), Stats., defines "group":

"Group" or "political group" means any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes *disbursements for the purpose of influencing the outcome of any referendum* whether or not engaged in activities which are exclusively political.

In 65 Op. Att'y Gen. 145 (1976), which discusses the effect of *Buckley v. Valeo*, 424 U.S. 1 (1976), on ch. 11, Stats., these statutory provisions were specifically discussed at pages 153-154, as follows:

These two sections do not appear to require reporting of all expenditures and disbursements for groups which engage only in part in attempts to influence elections or referenda. The requirement of sec. 11.23 that expenditures be "for such purposes" restricts its application to receiving contributions or making disbursements for the purpose of promoting or opposing any referendum.

....

I am of the opinion that the restrictions in these sections are constitutional when narrowly construed. It is my advice that the

Board adopt a construction of sec. 11.23 which states that it will be applied only to disbursements or receipt of contributions or incurring of obligations *directly* related to express advocacy of a particular result in a referendum.

Upon the issuance of that opinion, the Elections Board promulgated Wis. Adm. Code section El Bd 1.29, which provides, in part:

SCOPE OF REGULATED ACTIVITY; REFERENDA. The requirements of disclosure and recordkeeping of s. 11.23, Stats., are applicable to individuals and groups other than groups formed primarily to influence the outcome of a referendum as to contributions, disbursements and obligations which are *directly related to express advocacy of a particular result in a referendum.*

Examples of express words of advocacy are: "vote for," "elect," "support," "cast your ballot for," "vote against," "defeat" and "reject." *Buckley, supra* at 44, fn. 52.

Based on the foregoing, it is evident that if, as the inquiry suggests, the distribution of information by the school board merely served to inform the electorate of the facts pertinent to the referendum election question and was not directly related to express advocacy of a particular result in the election, sec. 11.23, Stats., would not apply to the actions of the school board.

BCL:JCM

Law Enforcement; Private Detectives; State Seal; Wisconsin Administrative Code section RL 3.24 prohibits use of any badge by those engaged in private detective activity. Non-misleading private use by those not engaged in private detective activity not prohibited by statute. OAG 62-79

June 27, 1979.

JAMES E. DOYLE, JR., *District Attorney*
Dane County

You have asked my opinion concerning the question of whether a licensed private detective agency may use a badge which contains thereon the phrase "Special Deputy" together with the great seal of the State of Wisconsin. The badge also contains the name of the detective agency which is displayed prominently in letters larger than those used in the phrase "Special Deputy."

Wisconsin Administrative Code section RL 3.24 provides in pertinent part as follows:

Licenseses shall not wear, use or display *any* badge, shield or star in the course of private detective activity.

(Emphasis supplied.)

Properly enacted administrative rules have the same force and effect as statutes enacted by the State Legislature. *See Verbeten v. Huettl*, 253 Wis. 510, 34 N.W.2d 803 (1948); *Josam Mfg. Co. v. State Board of Health*, 26 Wis. 2d 587, 133 N.W.2d 301 (1965).

I, therefore, conclude that licenseses may not use such a badge as you describe in the course of private detective activity. The wearing, use, or display of such a badge contrary to the cited rule may in fact constitute conduct which reflects adversely upon professional qualifications and thereby may constitute grounds for revocation of the appropriate license. *See Wis. Adm. Code section RL 3.32(4)*.

You must therefore determine, on a case-by-case basis, whether the person wearing, using, or displaying such badge is, at the time involved, engaged in private detective activity to determine whether the prohibition applies. I refer you to Wis. Adm. Code section RL 3.01(7) and (8) for definitions relevant to such determination.

You also wish to know whether there exists any prohibitions against the use of such a badge by persons other than those engaged in private detective activity.

Wisconsin Constitution art. XIII, sec. 4 provides for the great seal of this state, and sec. 14.45, Stats., provides that the seal shall contain the coat of arms. The coat of arms is provided for in sec. 1.07, Stats.,

while sec. 1.08, Stats., requires that the state flag contain the coat of arms. Section 946.06, Stats., provides criminal sanctions for certain kinds of misuse of the state flag. There appears to be no other statutory provisions regulating or prohibiting the private use of the coat of arms or of the seal.

I, therefore, conclude that the use of such seal on such a badge is not in and of itself prohibited. If such a badge is used with the intent of the part of the bearer to mislead others into believing that the bearer is a peace officer, there may be a violation of sec. 946.70, Stats., entitled "Personating peace officers."

BCL:JM

Open Meeting; Wisconsin Employment Relations Commission; Words And Phrases; Application of subch. IV, ch. 19, Stats. (1975), to subchs. I, III, IV and V of ch. 111, Stats., discussed in relation to duties of the Wisconsin Employment Relations Commission. OAG 63-79

July 10, 1979.

MORRIS SLAVNEY, *Chairman*

Wisconsin Employment Relations Commission

You ask whether subch. IV, ch. 19, Stats. (1975), entitled "Open Meetings of Governmental Bodies" applies to certain meetings held by the Wisconsin Employment Relations Commission (WERC).

The WERC is a three-person commission appointed by the Governor and confirmed by the state Senate for the purpose of administering subchs. I, III, IV and V of ch. 111, Stats. Secs. 15.58 and 15.581, Stats. Chapter 111, Stats., and the stated subchapters therein provide generally that WERC's duties are to aid in the resolution of labor disputes.

Under subch. I, the Commission acts as a quasi-judicial body, hearing and deciding labor disputes based on written complaints and answers. Under subchs. IV and V, the Commission administers the municipal and state employment relations acts which provide for collective bargaining between public employes and public agencies.

Section 19.83, Stats., states that:

Every meeting of a governmental body shall be preceded by public notice as provided in s. 19.84, and shall be held in open session. At any meeting of a governmental body, all discussion shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session except as provided in s. 19.85.

The WERC is a "governmental body." Section 19.82(1), Stats., provides as follows:

"Governmental body" means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. IV or V of ch. 111.

"Meeting" is defined in sec. 19.82(2), Stats., as follows:

"Meeting" means the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. *The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter.*

Subchapter IV, ch. 19, Stats. (1975), replaced sec. 66.77, Stats. (1973), applicable to open meetings of governmental bodies. Subchapter IV, ch. 19, Stats. (1975), made a significant change for purposes of this opinion. That is, the statutes require notice of both open meetings of governmental bodies and contemplated closed sessions thereof. Closed sessions are also to be convened only upon proper announcement and vote of the governmental body. Secs. 19.83, 19.84 and 19.85, Stats.

You state:

In respect to the commission's exercise of its quasi-judicial function, frequently one of the commissioners is assigned to do an in-depth study of the transcript of the hearing, to research the law, and to prepare a proposed decision affirming, reversing or modifying the examiner's findings of fact, conclusions of law and order. In the course of his study the commissioner often wishes to try out an idea about the case with another commissioner, or the other commissioner, knowing about the case, may ask how the case looks and the researching commissioner may respond with his general impressions or tentative thoughts at that stage of his research subject, of course, to his further study and review. This level of discourse generally is at one of two levels: (a) "brainstorming," or simply student-like inquiry into another's opinion as to the applicable law; and (b) deliberating on the correct result in the case for the purpose of helping the researching commissioner to think out his position prior to the meeting at which he will present his recommendation and its reasons for thorough commission discussion, deliberation and action. The commission poses these questions:

1. Is either such brainstorming or preliminary deliberation a meeting?
2. If a commissioner asks the researching commissioner his thoughts on the case, has there been a meeting? Is there a meeting if the question is answered?

The general state policy underlying the open meetings law is to insure the public "the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Sec. 19.81(1), Stats. Such general legislative declaration provides some assistance in applying the specific provisions of the law.

Conversations of individual commissioners concerning business of your agency may be in terms so non-specific, incidental or peripheral or otherwise so removed from the crucial decision/policy-making functions delegated to or vested in the Commission as to require the conclusion that such conferences do not reasonably fall within the intent of the law. As was recognized by our court in *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 683-684, 239 N.W.2d 313 (1976),

which interpreted exemption language in sec. 66.77, Stats. (1973), similar to that emphasized in sec. 19.82(2), Stats., above:

Reading this language with the preceding statements that the public is entitled to the fullest information "as is compatible with the conduct of governmental affairs and the transaction of governmental business," the drafters acknowledged that members of government organizations frequently interact and socialize with their fellow workers. Comment, 45 Miss. L. J. 1151, 1167-1170 (1974). Conversations on actual or potential government business are bound to occur. To declare that such discussions must proceed only after public notice and in a publicly accessible place would be not only impossible of enforcement but ludicrous if attempted. A serious question of deprivation of privacy would also be potential.

The clear intent of the law is to distinguish between informal and occasional "brainstorming" which are not "meetings" and discussions which actually lead to a conclusion which are "meetings." Discussions in such depth, detail, or scope as to render the later formal meeting a charade with a pre-determined outcome are prohibited. The words "intended to avoid this subchapter" are to be given some meaning in interpreting the law as they were in *Conta*.

In this regard, *Conta* is again helpful in interpreting subch. IV, ch. 19, Stats., as it applies to such activities of the WERC.

The revision of our open meeting law when forfeiture was added as a sanction also included the addition of conferences "designed to evade the law." The establishment that such occurred, for prosecution purposes, is obviously a question of fact. Circumstances themselves, however, may dictate that evasion is being designed. If every member of a governmental body is present at a conference and any of the broad activity that composes governmental activity as defined in sec. 66.77 (3), Stats., is undertaken, a question of evasion is posed; the members are exposing themselves to the jeopardy of a prosecution. A chance gathering would not justify governmental activity being intentionally conducted, unless an emergency or other difficulties (other than that engendered by open session compliance) made such action necessary. A planned conference of the whole offers no such exigent excuse. Likewise, when a majority and

thus a quorum gather, it is a rare occasion which can justify any action without open session compliance and therefore not be considered an evasion of the law. *Quorum gatherings should be presumed to be in violation of the law, due to a quorum's ability to thereafter call, compose and control by vote a formal meeting of a governmental body.*

....

When the members of a governmental body gather in sufficient numbers to compose a quorum, and then intentionally expose themselves to the decision-making process on business of their parent body—by the receipt of evidence, advisory testimony, and the views of each other—an evasion of the law is evidenced. Some occurrence at the session may forge an open or silent agreement. When the whole competent body convenes, this persuasive matter may or may not be presented in its entirety to the public. Yet that persuasive occurrence may compel an automatic decision through the votes of the conference participants. The likelihood that the public and those members of the governmental body excluded from the private conference may never be exposed to the actual controlling rationale of a government decision thus defines such private quorum conferences as normally an evasion of the law. *The possibility that a decision could be influenced dictates that compliance with the law be met.*

(71 Wis. 2d 685-686; emphasis added.)

In my opinion, the circumstances you have generally described in reference to your first and second questions could fit the definition of the term "meeting," in sec. 19.82(2), Stats., in some instances and not in others. The determination depends on the nature, scope, and details of the matters discussed as well as the intent of the Commissioners. Discussions or brainstorming of a tentative nature preliminary to focusing on a specific outcome and which are not intended to evade the law are, in my opinion, not covered by the law. While this test may be difficult to apply in practice, it is suggested by the law itself, and is not unlike the various tests which are applied by the courts to determine, for example, whether police suspicion has so focused on a suspect that he need be given *Miranda* warnings or whether there is probable cause to believe that evidence may be found

in a particular place or on a particular person. The general standard can be stated; the specific application turns on the facts. Here a court would look to the intent of the Commissioners and the actual nature and detail of the discussions as the court did in *Conta* with the burden, because a quorum is rebuttably presumed to constitute a meeting, resting with the Commissioners to show lack of intent to evade the law and lack of a final action or determination. The character of later debate and discussion is certainly an item of circumstantial evidence which would be considered by a court in reviewing your actions. Meetings require notice under secs. 19.83, 19.84 and 19.85, Stats., although such meetings could be further convened in closed session, under one or more exemptions, including sec. 19.85(1)(a), Stats., as amended by ch. 260, Laws of 1977, which permits closed sessions for "Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body."

You state:

In respect to the commission's exercise of its mediation function, it always is necessary to assign a mediator to attempt resolution of a particular dispute, and the commission seeks to assign the person who by skill and experience is best suited to gain the trust of the parties and contribute to a resolution. Further, the commissioners themselves frequently need to discuss with each other the progress of bargaining talks and whether present mediation techniques are working or whether a different approach is required. The commission poses these questions:

3. Is all discourse between the commissioners as to which of its staff should be assigned to mediate a particular dispute a meeting?
4. Is all discourse between commissioners as to the correct mediation techniques for resolving a particular dispute a meeting?

Most of my remarks in response to your first two questions are equally applicable here. Quite clearly, it is impossible to state categorically that "all discourse" would necessarily result in a meeting under the open meetings law. Where the Commission itself makes mediation assignments, whether the person be a staff member or

some other person, it exercises a statutory function within the definition of "meeting" under sec. 19.82(2), Stats. See secs. 111.11(1) and 111.87, Stats.

Where the assignment decision is made by the chairman, discussion of the question would not involve a meeting. See answer to questions 6 and 7, *infra*. Where the discussion of mediation techniques involves policy determinations which require joint consideration by the Commission, a meeting rather than a chance gathering or "conference which is not intended to avoid this subchapter" is involved and requires proper notification.

You state:

In respect to its responsibility to respond to inquiries from the general public, the commission regularly receives telephone calls and letters from citizens concerned about matters affecting their employment. The response given may involve one commissioner consulting another to receive approval of the response he is making, as where there may be some ambiguity as to the application of commission policy. The commission poses this question:

5. Is all discourse between commissioners as to the response to be made to a citizen inquiry a meeting?

The "conferences" you describe normally would not have the status of meetings, as defined by sec. 19.82(2), Stats., unless the request or its response would require action by the Commission. Action by the full Commission may be particularly appropriate where the inquiry raises a policy question not previously addressed and decided so that the response necessarily requires policy development. See *Conta* case, *supra*.

You state:

In their employer capacity the commissioners are responsible to evaluate employees. The process of forming an opinion occurs over a period of time, of course, and frequently one commissioner will pass a judgmental remark on an employe to another commissioner. This kind of remark may occur in a chance social gathering, such as during a morning coffee break; or it may occur during or after a quasi-judicial deliberation concerning a particular staff member's findings of fact, conclusions of law

and order; or it may occur during or after review of a particular staff member's success or lack thereof in seeking to bring about a labor settlement through mediation. In addition, the commission must hire people on occasion and, to that end, the commissioners interview applicants for employment. The questions posed are these:

6. Is a value judgment of an employe made by one commissioner to another a meeting?
7. Is an interview with a job applicant and the commissioners a meeting?

Individual personnel matters, as opposed to the establishment of general personnel policies, involve "administrative duties" vested in the chairman of the Commission by sec. 15.06(4), Stats., which provides:

CHAIRMAN; ADMINISTRATIVE DUTIES. The administrative duties of each commission shall be vested in its chairman, to be administered by him under the statutes and rules of the commission and subject to the policies established by the commission.

The evaluation of employes and the interview of applicants for employment are "administrative duties" of the chairman, though they may be delegated to the other Commission members. *See* 64 Op. Att'y Gen. 33, 36 (1975).

If no delegation of these administrative duties takes place, the chairman could discuss such matters with the other commissioners, individually, without such conference resulting in a meeting. But if these duties have been delegated to the other Commission members so that the Commission must consider and act on such matters jointly, a meeting requiring proper notification normally results. Such a meeting could be further convened in closed session in many instances under one or more exceptions, including sec. 19.85(1)(b), (c) or (f), Stats.

BCL:JCM

Taxation; Discussion of the tax uniformity clause (Wis. Const. art. VIII, sec. 1) relating to the amendment of April 2, 1974, for the taxation of agricultural land and undeveloped land. Proposed legislation which places a ceiling on the assessment of agricultural land would be unconstitutional. OAG 64-79

July 11, 1979.

RUSSELL A. OLSON, *Lieutenant Governor*
Executive Office

You have requested my opinion of a bill draft identified as LRB-3147/1 which places a ceiling on the assessment of agricultural land. Your particular concern is whether the proposal violates the tax uniformity clause found in Wis. Const. art. VIII, sec. 1, which was amended on April 2, 1974, to read in part as follows: "The rule of taxation shall be uniform *Taxation of agricultural land and undeveloped land, both as defined by law, need not be uniform with the taxation of each other nor with the taxation of other real property.*" (Amended language underscored.)

In my opinion the proposal is unconstitutional.

The bill draft is sixty-nine pages, but the basic intent of the proposal is found on page 34, and provides:

SECTION 881d. 70.53 (2) of the statutes is created to read:

70.53 (2) No later than September 1 of each year the clerk shall adjust the value of land, exclusive of improvements, entered on the roll as agricultural land under s. 70.32 (2), so as not to exceed 250% of the amount equal to the assessment ratio of the taxation district for agricultural land multiplied by the statewide equalized assessed value per acre of agricultural land, as determined by the department of revenue, revise the statement prepared under sub. (1) and transmit the revised statement to the supervisor of assessments.

An example to illustrate the manner in which the bill's purpose would be carried out follows.

In 1977 the Town of Brookfield in Waukesha County had thirty-seven parcels totalling 855 acres of agricultural land locally assessed for \$192,350, or \$224.97 per acre. This same agricultural land had an equalized full value of \$2,130,000, or \$2,491.23 per acre according to the State Department of Revenue. Thus, this land was being locally assessed at only 9% of its full value, even though by statute it should have been assessed at 100% of its full value.

By way of comparison, on a statewide basis in 1977 there were 17,562,364 acres of agricultural land locally assessed at \$3,322,464,452, or \$189.18 per acre. This same agricultural land had an equalized full value of \$7,749,375,700, or \$441.25 per acre according to the State Department of Revenue. Thus, on a statewide basis in 1977 this land was being locally assessed at 43% of its full value.

By way of further comparison, on a statewide basis in 1977 the following classes of land *and* improvements listed in sec. 70.32(2)(a), Stats., were being assessed at the following percentages of full value:

A. Residential	62% of full value
B. Mercantile	69% of full value
C. Manufacturing	64% of full value
D. Agricultural	50% of full value

Thus, it can be seen that agricultural land is being locally assessed for less than other classes of property to the detriment of the owners of other classes of property, even though state statutes presently provide that all property should be assessed alike according to its full value.

It is with this background in mind that the proposal should be examined. Under the facts stated above and the proposed statutory ceiling, agricultural land in the Town of Brookfield would have to have had its value adjusted on a parcel-to-parcel basis so that its value would not exceed a locally assessed limit of \$99.28 per acre computed as follows:

$$9\% \times \$441.25 \text{ per acre} = \$39.71 \text{ per acre} \times 250\% = \$99.28$$

Assume that one of the prime parcels of agricultural land in the Town of Brookfield consists of 100 acres and has a fair market value of \$5,000 per acre, for a full value of \$500,000. Further, assume that

another parcel of less desirable agricultural land in the same town also consists of 100 acres, but has a fair market value of only \$500 per acre, for a full value of \$50,000. Since the town is assessing at only 9% of full value, the respective locally assessed values of these parcels would be \$45,000 and \$4,500. As previously discussed, the local valuation limit of \$99.28 per acre would require a reduction in the assessed value of the prime parcel not to exceed \$9,928. Consequently, the prime parcel would be exempted from the tax on \$35,072 of assessed value. Instead of being assessed at 9% of its full value, under the proposal it would be assessed at 2% of its full value.

Agricultural property as a whole on a statewide basis is being assessed at only 50% of its full value, and agricultural land on a statewide basis is being assessed at only 43% of its full value, when residential, mercantile and manufacturing property is being assessed respectively at 62%, 69%, and 64% of full value. This proposal would increase those discrepancies and further shift the burden of taxation to nonagricultural property and agricultural property which does not qualify for the exemption.

It is true, as your letter points out, that our state constitution has been amended to provide for the taxation of agricultural land which is not uniform with other classes of property. That amendment provided that agricultural land was to be defined by the Legislature as a separate class of property and that all agricultural land meeting that statutory definition could be taxed in a manner which did not have to be uniform with the taxation of other real property throughout the state. An example of its implementation would be a statute which would assess agricultural land uniformly at only one-half of its fair market value. Whatever method chosen, there still must be uniformity of treatment within the class of agricultural land. *See* 63 Op. Att'y Gen. 3 (1974). It is at this point where the proposed legislation fails to pass muster, because it allows for the different treatment of property within an undefined class of agricultural land. In those areas where the limitation applies, some agricultural lands would not have to contribute as much to the support of the local tax effort as other agricultural lands. In effect, the proposal creates a partial exemption for some agricultural lands and thus creates a class within the class. As a result, each dollar's worth of agricultural land would not be taxed the same as any other dollar's worth of agricultural land. *See*

Ehrlich v. Racine, 26 Wis. 2d 352, 132 N.W.2d 489 (1965); and *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 147 N.W.2d 633 (1967).

The constitutional amendment cited above does not have a period after the word "uniform." The sentence is an exception to the uniformity clause, but somewhat limited. It enables the Legislature to define "agricultural land" and "undeveloped land." There may be numerous ways in which land could meet the requirements of either of these two classifications. Once the requirements have been met, however, and land meets the statutory definitions, then all land falling within each definition must be taxed the same, even though the taxation of such land does not have to be uniform with the taxation of other real property. In my opinion, the constitution does not contemplate the creation of classes within the class of agricultural land so as to allow for different treatment among the subclassifications.

BCL:APH

County Board; County Executives; Resolutions of county board creating special or standing committees under sec. 59.06, Stats., or creating rules of procedure relative to executive matters or the administration of law must be submitted to county executive in counties under 500,000. OAG 65-79

July 13, 1979.

RICHARD L. HAMILTON, *Corporation Counsel*
Outagamie County

Your predecessor requested my opinion whether a county executive in a county under 500,000 population has veto power with respect to:

1. Resolutions creating special or standing committees of members of the county board where the board acts pursuant to sec. 59.06, Stats.
2. Semipermanent rules of procedure proposed by the county board.

You indicate that the board may have power to adopt rules by motion rather than resolution.

It is my opinion that rules of procedure must be adopted by resolution or ordinance and that the county executive has veto power in the two situations referred to first above. Your predecessor indicated that this result places great power in the county executive. I agree. But, the Wisconsin Constitution and statutes provide for a balancing of power and provide that the county board may override a veto by the county executive by vote of two-thirds of the members-elect.

Section 59.02, Stats., provides:

(1) The powers of a county as a body corporate can only be exercised by the board thereof, or in pursuance of a resolution or ordinance adopted by it.

(2) Ordinances and resolutions may be adopted by a majority vote of a quorum or by such larger vote as may be required by law. Ordinances shall commence as follows: "The county board of supervisors of the county of do ordain as follows".

(3) A majority of the supervisors entitled to a seat on the board shall constitute a quorum. All questions shall be determined by a majority of the supervisors present unless otherwise provided.

Section 59.06(1), Stats., provides:

The board may, *by resolution* designating the purposes and prescribing the duties thereof and manner of reporting, authorize their chairman to appoint before June 1 in any year committees from the members of the board, and the committees so appointed shall perform the duties and report *as prescribed in such resolution*.

Much important county business is conducted by committees of the county board. The statute provides that such committees must be established by resolution. Whereas appointment of committee members is solely for the board chairman, it is my opinion that adoption of such resolution involves matters of substance as well as procedure and is subject to submission to the county executive. *See* sec. 59.032(2)(a), Stats., as to the duty of a county executive to

“[c]oordinate and direct ... all administrative and management functions of the county government not otherwise vested by law in boards or commissions, or in other elected officers.”

Wisconsin Constitution art. III, sec. 23A, provides:

Every resolution or ordinance passed by the county board in any county shall, before it becomes effective, be presented to the chief executive officer. If he approves, he shall sign it; if not, he shall return it with his objections, which objections shall be entered at large upon the journal and the board shall proceed to reconsider the matter. Appropriations may be approved in whole or in part by the chief executive officer and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for in other resolutions or ordinances. If, after such reconsideration, two-thirds of the members-elect of the county board agree to pass the resolution or ordinance or the part of the resolution or ordinance objected to, it shall become effective on the date prescribed but not earlier than the date of passage following reconsideration. In all such cases, the votes of the members of the county board shall be determined by ayes and noes and the names of the members voting for or against the resolution or ordinance or the part thereof objected to shall be entered on the journal. If any resolution or ordinance is not returned by the chief executive officer to the county board at its first meeting occurring not less than 6 days, Sundays excepted, after it has been presented to him, it shall become effective unless the county board has recessed or adjourned for a period in excess of 60 days, in which case it shall not be effective without his approval.

Section 59.032(6), Stats., repeats the language of Wis. Const. art. III, sec. 23A, in identical form.

In 9 Op. Att’y Gen. 573 (1920), it was stated that an oral motion when adopted by a county board becomes a resolution. *Also see, Meade v. Dane County*, 155 Wis. 632, 145 N.W. 239 (1914); and *Green Bay v. Brauns*, 50 Wis. 204, 6 N.W. 503 (1880). In 44 Op. Att’y Gen. 205 (1955), it was stated that where the county board adopts the recommendation of one of its committees, such action has the same effect as passing a resolution.

County boards act by resolution or by ordinance in most matters. There is a class of board actions such as motions to table, refer to committee study, and so forth, which are clearly not subject to veto. There is limited case support for the proposition that rules relating to legislative procedure, *e.g.*, rules governing referrals to committee of proposed ordinances or resolutions, or rules governing motions to recess or adjourn, are not subject to veto. See *Morris v. Cashmore*, 3 N.Y.S.2d 624, 253 App. Div. 657 (1938). I note that internal procedural rules of county boards are intended for the orderly administration of board business. Such rules need not be complied with strictly, so far as the board itself is concerned. Failure of a county board to follow its own procedural rules will not void board action, in most cases, so long as the board complies with procedures required by statute. *Bartlett v. Eau Claire County*, 112 Wis. 237, 245, 88 N.W. 61 (1901), 27 Op. Att'y Gen. 21 (1938), 52 Op. Att'y Gen. 57 (1963).

In general, if rules, even though arguably procedural, relate to executive matters and the administration of law, then clearly they are subject to the veto power unless there is express statutory provision to the contrary.

BCL:RJV

County Surveyor; Surveying: A city or village engineer is not required to be registered as a land surveyor when acting pursuant to sec. 59.635(2), Stats. (1977). OAG 66-79

July 23, 1979.

ANN HANEY, *Secretary*

Department of Regulation and Licensing

Your predecessor posed the following question:

May a city or village engineer who is not registered as a land surveyor under Chapter 443, Stats. perform the services described in s.59.635, Stats.

In my opinion the answer is yes.

Section 443.02(1)(a), Stats., prohibits the practice of land surveying except by those who have been issued a certificate of registration or granted a permit to practice. Section 443.02(1)(b), Stats., defines land surveying as:

[A]ny service comprising the determination of the location of land boundaries and land boundary corners; the preparation of maps showing the shape and area of tracts of land and their subdivisions into smaller tracts; the preparation of maps showing the layout of roads, streets and rights of way of same to give access to smaller tracts; and the preparation of official plats, or maps, of said land in this state.

Section 59.635(2), Stats., deals with persons who intend to cover up landmarks, monuments, or corner posts. Those persons are required to give notice to the county surveyor and to the city or village engineer. The subsection continues:

The county surveyor, upon receipt of said notice, shall within a period of not to exceed 30 working days, either by himself or by a deputy, or by the city or village engineer make an inspection of said landmark, and, if he deems it necessary because of the public interests to remove said landmark, he shall erect 4 or more witness monuments or, if within a municipality, may make 2 or more offset marks at places near said landmark, and where they will not be disturbed. He shall make a survey and field notes giving a description of the landmark and the witness monuments or offset marks, stating the material and size of the witness monuments and locating the offset marks, the horizontal distance and courses in terms of the references set forth in s. 59.60(2) that the witness monuments bear from the landmark and, also, of each witness monument to all of the other witness monuments. ... The county surveyor upon completing the survey shall make a certified copy of the field notes of the survey and record it as provided under s. 59.60. The city or village engineer upon completing the survey shall record the notes in his office, open to the inspection of the public, and shall file a true and correct copy with the county surveyor.

It is critical to note that the county surveyor is to perform the survey either by himself, by a deputy, or *by* the city or village engineer. The word "by" was inserted by ch. 499, sec. 9, Laws of 1969. Prior to

that amendment, the subsection provided that the survey could be performed by the county surveyor *or* the city or village engineer. The 1969 amendment in section 9 also added the last words quoted above, *viz.*, that the engineer “shall file a true and correct copy with the county surveyor.”

This legislative history demonstrates that the city or village engineer is not authorized to make an independent survey under sec. 59.635(2), Stats. Whereas the engineers had that power prior to the 1969 amendment, the effect of the amendment is to make the survey that of the surveyor although performed by the engineer. The engineer, therefore, acts under the supervising authority of the county surveyor in this limited area. Not only is the supervising authority illustrated by the engineer’s duty to file his notes with the surveyor and that only the surveyor’s notes may be recorded under sec. 59.60, Stats., but also the word “by” in the 1969 amendment imports agency, *see Liebscher v. Kraus*, 74 Wis. 387, 390, 43 N.W. 166 (1889), and *Stevenson v. Lee Moor Contracting Co.*, 45 N.M. 354, 115 P.2d 342, 349 (1941), and reflects the Legislature’s intent that the engineer serve only as the agent of the surveyor and under his/her direction and control.

As regards the supervisory requirements imposed on land surveyors by the Examining Board of Architects and Professional Engineers *see* Wis. Adm. Code section A-E 4.004. A registered land surveyor is always subject to statutory and examining board requirements, of course. Failure on the part of the county land surveyor to exercise the required standard of supervision, as determined by the examining board on a case-by-case basis, may constitute misconduct as defined in Wis. Adm. Code section A-E 4.003(3)(a).

At the time of the 1969 amendment there also was in effect the same statutory prohibition on the practice of land surveying by those who are uncertified as is now contained in sec. 443.02(1)(a), Stats. Section 1 of the 1969 amendment expressly required that the county surveyor be a “registered land surveyor.” The express mention of the registration requirement for county surveyors in section 1 impliedly excludes that requirement for city and village engineers when acting pursuant to section 9 of the same enactment. Accordingly, I conclude that when acting under sec. 59.635(2), Stats., the city or village engineer is not engaged in the independent practice of land surveying.

Your predecessor also inquired into the validity of a model ordinance for local units of government proposed by the Southeastern Wisconsin Regional Planning Commission acting under sec. 66.945, Stats. Specifically, the question posed is whether an ordinance can empower a city or village engineer to examine final land subdivision plats and make field checks for the determination of survey accuracy without unlawfully infringing on the licensure requirements for land surveyors.

Unquestionably, a local ordinance purporting to authorize a violation of a state licensure law is void. Whether there is such a violation in the proposed ordinance falls within the expertise of the Examining Board of Architects and Professional Engineers. Although licensure in engineering does not *ipso facto* constitute licensure as an architect or land surveyor, these three skilled professions frequently so overlap that the identical service may fall within the licensure of more than one of them. See 5 Am. Jur. 2d *Architects* sec. 3, p. 665; 6 C.J.S. *Architects* sec. 6, pp. 470-471; and 53 C.J.S. *Licenses* sec. 30, p. 561, n. 32. The question calls for an understanding of the overlapping functions of engineers and land surveyors as well as the overall legislative policy in the licensure laws. The Legislature has vested the initial decision-making power in this respect to the Board, and the Board has power to make a declaratory ruling on a proper petition. See sec. 227.06(1), Stats. In these circumstances, it would be inappropriate for me to render an opinion on the question posed. See 63 Op. Att'y Gen. 591 (1974).

BCL:CDH

Taxation; Section 74.025, Stats., as amended, applies only to payment of property taxes by mail. OAG 68-79

August 1, 1979.

MARCEL DANDENEAU, *Chief Clerk*
Legislative Assembly Chamber

On behalf of the Committee on Assembly Organization you ask, in effect, how sec. 74.025, Stats., as amended by ch. 418, Laws of 1977,

is to be interpreted. The statute deals with the payment of property taxes.

The specific question you have referred to me is:

Whether under s. 74.025 of the statutes, as amended by Chapter 418, Laws of 1977, any penalty for late payment should have been assessed at any time since the enactment of Chapter 418, Laws of 1977, by municipalities on any property tax payment made within 5 days of the prescribed payment date, particularly in cases in which the payment is not mailed but is otherwise delivered to the proper official within the 5 day period.

Chapter 418, sec. 519m, Laws of 1977, changed the statute as follows:

74.025 POSTMARKING BY DUE DATE; TIMELY PAYMENT. Whenever in this chapter or in ch. 75 a payment is required to be made by a taxpayer on or before a certain date, ~~such~~ payment shall be considered timely made if mailed in a properly addressed envelope with postage ~~duly~~ prepaid, which envelope is postmarked before midnight of the last date prescribed for the making of ~~such~~ *the* payment ~~and or~~ if received by the proper official to whom directed within 5 days of ~~such~~ *the* prescribed date.

Other than changes designed to modernize language, the most significant change was the substitution of the word "or" for the word "and."

You inquire whether the statute may now be interpreted in either of two ways: first, that the payment would be timely if postmarked subsequent to the due date but received by the proper official within five days of the prescribed date; and second, that the payment would not have to be mailed at all and would not be considered overdue if received by the proper official within five days of the prescribed date.

I am of the opinion that the statute as amended relates only to payments by mail and does not relate to situations where the taxpayer personally delivers payment to the proper official.

In my opinion the second construction erroneously fails to treat the phrase "if received ... within 5 days" as modifying the preceding

phrase "if mailed in a properly addressed envelope with postage pre-paid," and in fact inserts a comma prior to the modifying phrase by construction.

The most reasonable interpretation of the amended statute is that the Legislature intended that payment by mail shall be timely if 1) the properly addressed, stamped envelope is postmarked before midnight of the prescribed date, or 2) the payment by mail be received by the proper official within five days of the prescribed date. Such an interpretation allows for timely payment by mail when taxpayer deposits payment in a proper receptacle for United States mail but the post office does not postmark the envelope at all, postmarks it illegibly or does not postmark it until after the prescribed date, provided, however, that the payment is received by mail by the proper official within five days after due date.

Thus, the person whose mailing is timely postmarked need not worry about subsequent delays in the mails, but the person who mails late bears the risk that there will be no delivery within five days of the prescribed date.

BCL:JEA

Civil Service; Personnel Board; Salaries And Wages; The Personnel Board may not approve the assignment of a classification in the clerical occupational group to a lower pay range than the pay range to which a classification in a different occupational group is assigned if the classifications include positions involving "work of equivalent skills and responsibilities." The phrase "the principle of equal pay for work of equivalent skills and responsibilities" contained in sec. 230.09(2)(b), Stats., requires equal pay only for substantially similar or equal work. The Board may not give retroactive effect to the establishment of classifications and grade levels or the assignment of classifications to the appropriate pay rates or ranges. OAG 69-79

August 1, 1979.

EUNICE GIBSON, *Chairperson*
State Personnel Board

You state that the Personnel Board has been asked to approve a classification survey for the clerical occupational group, and that approval of the survey would include approving the assignment of classes to different pay rates or ranges, as provided in sec. 230.09(2)(b), Stats. The Civil Service Reform Act, ch. 196, Laws of 1977, renumbered and amended sec. 230.09(2)(b), Stats., to provide:

To accommodate and effectuate the continuing changes in the classification plan as a result of the classification survey program and otherwise, the administrator with approval of the board shall, upon initial establishment of a classification, assign that class to the appropriate pay rate or range, and upon subsequent review, the administrator with approval of the board may reassign classes to different pay rates or ranges. *The administrator shall apply the principle of equal pay for work of equivalent skills and responsibilities when assigning a classification to a pay range.*

You request my opinion on two questions:

1. In view of the foregoing statutory requirement, may the Board approve the classification survey if there is evidence that certain clerical workers are assigned to lower pay ranges than those assigned to state employes who perform work of equivalent skill and responsibility, but who are in a different occupational group?
2. In connection with approval of classification surveys as indicated above, does the Board have power to approve a survey retroactively?

The answer to your first question, for the reasons set forth below, is no. The Personnel Board may not approve the assignment of a classification to a disparate pay range than the pay range to which a classification in a different occupational group is assigned if the classifications include positions involving work of equivalent skills and responsibilities. The answer to your second question, for the reasons

set forth below, also is no. The Personnel Board may not approve retroactively the establishment of classifications and grade levels or the assignment of classifications to the appropriate pay rate or ranges.

I. *The Classification Process*

It is the responsibility of the administrator of the Division of Personnel to establish classifications and grade levels for all positions in the classified service. Sec. 230.09(1) and (2)(a), Stats. The administrator also must assign each classification to the appropriate pay rate or range. Sec. 230.09(2)(b), Stats. The establishment of classifications and the assignment of classifications to a pay range are subject to the approval of the Personnel Board. Sec. 230.09(1) and (2)(b), Stats.

In order to maintain and improve the classification plan to meet the needs of the service, the administrator is directed to use methods including *occupational group* classification surveys. Sec. 230.09(2)(am), Stats. Based upon such surveys, the administrator may establish, modify or abolish classifications, and may assign or reassign classifications to different pay rates or ranges. Sec. 230.09(2)(am) and (b), Stats. Such actions of the administrator also are subject to the approval of the Personnel Board. *Id.*

Your first question may be divided into two parts. The first part concerns the meaning of the phrase "the principle of equal pay for work of equivalent skills and responsibilities" contained in sec. 230.09(2)(b), Stats. The second part concerns whether such principle must be applied to classifications in different occupational groups.

Answering the second part first, it is my opinion that the equal pay principle contained in sec. 230.09(2)(b), Stats., must be applied to all classifications which include positions involving work of equivalent skills and responsibilities, *regardless of occupational group*. Although the administrator may establish, modify, or abolish classifications, and may assign or reassign classifications to different pay rates or ranges as the result of an occupational group classification survey, sec. 230.09(2)(am), Stats., the administrator must consider classifications both in that occupational group and in different occupational groups when assigning classifications to a pay range in

accordance with the equal pay principle contained in sec. 230.09(2)(b), Stats. There is nothing express or implied in sec. 230.09(2)(b), Stats., which would limit the administrator's application of the equal pay principle to classifications within the same occupational group.

II. *The Equal Pay Principle.*

Section 230.09(2)(b), Stats., directs the administrator, subject to board approval, to "apply *the principle of equal pay for work of equivalent skills and responsibilities* when assigning a classification to a pay range." The remaining part of your first question requires ascertaining the legislative intent in using the language emphasized above. In order to ascertain the legislative intent, it is helpful and perhaps necessary to examine the history of the equal pay principle under the federal Equal Pay Act, 29 U.S.C. sec. 206(d).

The Equal Pay Act, 29 U.S.C. sec. 206(d), provides in part:

(1) No employer ... shall discriminate ... between employees on the basis of sex by paying wages to employees ... at a rate less than the rate at which he pays wages to employees of the opposite sex ... for *equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions*, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex.

(Emphasis added.)

The legislative history of the Equal Pay Act clearly reveals that the Act was not intended to require equal pay for jobs of *different* content. *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1173 (3rd Cir. 1977); *Hodgson v. William & Mary Nursing Hotel*, 65 CCH L. C. par. 32,497 (M.D. Fla. 1971). As originally introduced, the bill provided for equal pay for "work of *comparable* character on jobs the performance of which requires *comparable* skills." H.R. 8898, 87th Cong., 1st Sess. sec. 4 (1962), and H.R. 10226, 87th Cong., 2d Sess. sec. 4 (1962) (emphasis added). After considerable debate, the House substituted "equal work" for "comparable work."

H.R. 11677, 87th Cong., 2d Sess. (1962); 108 Cong. Rec. 14771 (1962). The bill was not passed, however, in the 87th Congress.

In 1963, the House bill, H.R. 6060, 88th Cong., 1st Sess. (1963), again used the phrase "equal work" instead of "comparable work." The bill was passed by the House even though several legislators expressed concern that the bill did not go far enough and that it had been weakened by the substitution of the word "equal" for the word "comparable." 109 Cong. Rec. 9200-9205 (1963). The House bill added the phrase "equal skill, effort, ... responsibility, and ... similar working conditions" in order to define what is meant by "equal work." 109 Cong. Rec. 9197-9198 (1963); *Corning Glass Works v. Brennan*, 417 U.S. 188, 200-202 (1974). The Senate concurred in the House bill without modification and the result was the Equal Pay Act.

During the House debate, the floor-managers of the bill, Congressmen Goodell and Griffin, engaged in the following colloquy, 109 Cong. Rec. 9197-9198 (1963):

Mr. GOODELL. ... I think it is important that we have clear legislative history at this point. Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.

We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal. I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort, and working conditions, is intended to make this point very clear.

Mr. GRIFFIN. In other words, would the gentleman agree with me that there would be no basis for comparing, say, an inspector with an assembler, for example? The Department of Labor could not say, "Well, now, these two jobs involve about the same level of skill and the same degree of responsibility." It

would be appropriate to compare inspectors with inspectors or assemblers with assemblers, but not to compare an inspector with an assembler.

Mr. GOODELL. We are talking about jobs that involve the same quantity, the same size, the same number, where they do the same type of thing, with an identity to them.

Courts applying the Equal Pay Act have given effect to its legislative history and uniformly have required that the jobs compared be substantially similar or equal. *Shultz v. Wheaton Glass Company*, 421 F.2d 259, 265 (3rd Cir. 1970), *cert. denied*, 398 U.S. 905 (1970); *Angelo v. Bacharach Instruments Co.*, 555 F.2d at 1173-1175; *Hodgson v. Golden Isles Convalescent Homes, Inc.*, 468 F.2d 1256, 1258 (5th Cir. 1972); *Brennan v. City Stores*, 479 F.2d 235, 238-239 (5th Cir. 1973); *see also*, sec. 111.32(5)(g)(1m), Stats. Courts have refused to equalize wages for substantially different jobs merely "to enforce their own conceptions of economic worth." *Brennan v. Prince William Hospital Corporation*, 503 F.2d 282, 285 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975); *Hodgson v. Miller Brewing Co.*, 457 F.2d 221, 227 (7th Cir. 1972).

III. Interpretation of sec. 230.09 (2) (b) , Stats.

Your first question raises the issue of whether the "principle of equal pay" referred to in sec. 230.09(2)(b), Stats., is the same as or broader than that contained in the federal Equal Pay Act. If the equal pay principle referred to in sec. 230.09(2)(b), Stats., is the same as that contained in the federal Equal Pay Act, then the administrator must compare only those classifications which include positions involving substantially similar or equal work. Accordingly, clerical workers must be paid the same as state employes in different classifications, including those in different occupational groups, who perform "equivalent" (meaning substantially similar or equal) work.

On the other hand, if the equal pay principle referred to in sec. 230.09(2)(b), Stats., is broader than that contained in the Equal Pay Act, then the administrator might be required to compare classifications which include positions involving dissimilar work if the "skills and responsibilities" involved somehow are "equivalent" (meaning comparable). Thus, clerical workers would have to be paid

the same as state employes in different classifications, including different occupational groups, who perform "equivalent" (meaning dissimilar but comparable) work.

Section 230.09(2)(b), Stats., uses neither the word "equal" nor the word "comparable" in defining the word "work." The word "work" is defined, however, by the phrase "of equivalent skills and responsibilities." Since the Equal Pay Act uses a similar phrase ("equal skill, effort and responsibility") in defining what is meant by "equal work," and since the word "equivalent" and "equal" are essentially synonymous, Websters, *Third New International Dictionary* (1976), pp. 766-767, 769, it reasonably may be inferred that the equal pay principle contained in sec. 230.09(2)(b), Stats., requires equal pay for "equal" work. Given such construction, sec. 230.09(2)(b), Stats., would not require that clerical workers be paid the same as state employes who perform comparable but not substantially similar or equal work.

In construing a statute, it is permissible to look beyond the language of the statute to its legislative intent only when the statute is ambiguous, *i.e.*, capable of being understood by reasonably well-informed persons in either of two or more senses. *Wis. Environmental Decade v. Public Service Comm.*, 81 Wis. 2d 344, 350, 260 N.W.2d 712 (1978); *State ex rel. West Allis v. Dieringer*, 275 Wis. 208, 218, 81 N.W.2d 533 (1957). To the extent that the word "work" in sec. 230.09(2)(b), Stats., is not preceded by an express modifier such as "equal" or "comparable," one might decide that the statute is ambiguous. Assuming for discussion purposes that the statute is ambiguous, a review of its history is warranted.

On August 12, 1976, Governor Lucey issued Executive Order No. 33, which established an Employment Relations Study Commission to study and recommend changes in the state civil service system. In its interim report on March 1, 1977, the Commission expressed concern "that positions traditionally filled by women are compensated at a lower level than positions with similar duties and responsibilities, but traditionally filled by men." *Report of the Employment Relations Study Committee* (June 30, 1977) Appendix B, p. 72.

In its final report on June 30, 1977, the Commission recommended, *Report*, p. 34, that:

1. The state should provide similar compensation for *job classifications of comparable levels of skill and responsibility*, regardless of whether those job classifications have traditionally been filled by members of one sex or race.

2. Internal equity between similar classifications should be established as soon as possible.

(Emphasis added.)

As commentary to these recommendations, the Commission stated in part, *Report*, p. 34:

Significantly, the differences [in compensation levels between positions requiring comparable levels of skill, knowledge and responsibility] seem to be related to the influence of the general job market and the general societal patterns of paying lower salaries for jobs traditionally filled by women than for comparable jobs filled by men. These are considerations which cannot be ignored by the state as a responsible employer. Ideally, a compensation plan would be oriented entirely on jobs and career structures and would be blind to traits of employees that are not job-related. The legacy of past practices and traditional patterns in society generally, however, can affect a classification system based on position comparisons. Despite this, the principles of equal pay for equal work and the state's obligation in providing leadership in meeting social goals would seem to press for eventual elimination of sex-role based wage differences.

The Commission's commentary raises questions concerning the intent of its recommendations. The phrase "job classifications of comparable levels of skill and responsibility" in the Commission's recommendations had its own distinct connotations by 1977, different from and broader than the language of the Equal Pay Act ["jobs the performance of which requires equal skill, effort, and responsibility"]. Thus, the recommendations seem to suggest that the Commission favored the broader concept of equal pay for "comparable" work.

On the other hand, the commentary suggests that the Commission was endorsing only "the principles of equal pay for equal work ... [in order] to press for the eventual elimination of sex-role based wage differences." By 1977, the phrase "equal pay for equal work" clearly

was understood to require equal pay only for substantially similar or equal work. Thus, the intent underlying the Commission's recommendation is ambiguous. Such recommendations cannot serve as a reliable indicator of the Legislature's intent in enacting sec. 230.09(2)(b), Stats.

On September 9, 1977, Senator Offner, the Commission's co-chairperson, initially recommended that sec. 16.07(2)(b), Stats. (1975) [now sec. 230.09(2)(b), Stats.] be amended to include the following language:

Consideration shall be given to the principle of equal pay for work of equal value when assigning to a pay range a classification having a higher percentage of women and minorities than would be expected based on their percentage in the general labor force where this factor has tended to depress pay rates by other employers.

Memo, September 9, 1977, "Affirmative Action Amendments to SB 516."

Instead, however, Senator Offner introduced Senate Substitute Amendment 2 to 1977 SB 15 which provides in pertinent part:

The administrator shall give consideration to the principle of equal pay for work of equivalent skills and responsibilities, *and other appropriate job evaluation factors*, when assigning a classification to a pay range.

This same language, except for the phrase emphasized above, remained substantially unchanged in 1977 SSB 2 which was passed in a November, 1977, Special Session and became the Civil Service Reform Act. Ch. 196, Laws of 1977.

There is nothing in the language of sec. 230.09(2)(b), Stats., as originally introduced or as finally enacted, which evidences any legislative intent to adopt an equal pay principle broader than that developed under the federal Equal Pay Act. The Legislature specifically did not adopt the recommendation of the Employment Relations Study Commission that equal pay be provided for "comparable" job classifications. Perhaps this is because of the Commission's commentary endorsing the principles of equal pay for equal work. It is more instructive that the Legislature used the phrase "the principle" of

equal pay. That principle has come to have a well-defined meaning under the Equal Pay Act.

In any event, when one considers (1) that Congress purposely chose the language equal pay for "equal" rather than "comparable" work when it enacted the Equal Pay Act, (2) that courts uniformly have interpreted the Equal Pay Act as not requiring equal pay for jobs of different content, and (3) that sec. 230.09(2)(b), Stats., refers to "the principle of equal pay for work of *equivalent* skills" and does not contain the language "*comparable* levels of skill and responsibility" recommended by the Employment Relations Study Commission, it is my opinion that the equal pay principle referred to in sec. 230.09(2)(b), Stats., is the same as that contained in the federal Equal Pay Act. I cannot construe sec. 230.09(2)(b), Stats., as a drastic departure from traditional equal pay principles absent more express legislative direction. The one difference is that sec. 230.09(2)(b), Stats., requires that classifications which include positions involving substantially similar or equal work be assigned to the same pay rates or ranges regardless of the sex of the employes in the classifications. The Equal Pay Act is limited to wage discriminations based upon sex.

IV. *Application of sec. 230.09 (2) (b), Stats.*

In enacting sec. 230.09(2)(b), Stats., the Legislature did not provide for an *immediate* equalization of pay for classifications which include positions involving substantially similar or equal work. As the Employment Relations Study Commission observed, the differences in compensation are "related to the influence of the general job market and the general societal patterns of paying lower salaries for jobs traditionally filled by women ... [and] [t]hese are considerations which cannot be ignored by the state as a responsible employer." *Report*, p. 34. Consequently, the Commission urged the Legislature to adopt as a goal the "eventual elimination" of such wage differences. *Id.*

Section 230.09(2)(b), Stats., is designed to accomplish that goal. Whenever the administrator now and in the future assigns a classification to a pay range, the administrator must compare that classification to other classifications in the same and in different occupational groups which include positions involving substantially similar or equal work. For example, in response to your first question, when the

administrator assigns a clerk classification in the clerical occupational group to a pay range, the administrator should not assign that classification to a lower pay range than the pay range to which a different clerk classification in a different occupational group is assigned if the work performed in the two classifications is "of equivalent skills and responsibilities," *i.e.*, substantially similar or equal. On the other hand, the administrator would not be required to assign a particular classification in the clerical occupational group to the same pay range as a different classification in a different occupational group where the work is dissimilar merely because on some point system the work involves comparable skills and responsibilities.

Further, market forces, as noted by Employment Relations Study Commission, are not to be wholly ignored. In establishing pay rates and ranges, sec. 230.12(1)(b), Stats., requires consideration of "provisions prevalent in schedules used in other public and private employment." Similarly, sec. 230.12(3)(a), Stats., requires that compensation plan proposals "be based upon ... data collected as to rates of pay for comparable work in other public services and in commercial and industrial establishments." Thus, the Legislature did not require that in striving to achieve the equal pay goal, the state should ignore compensation differences which would frustrate the purpose of state civil service law, *i.e.*, "to provide state agencies ... with competent personnel who will furnish state services ... as fairly, efficiently and effectively as possible." Sec. 230.01(1), Stats. Moreover, in providing that the administrator shall "use job evaluation methods which ... are appropriate to the class or occupational groups," sec. 230.09(1), Stats., the Legislature recognized that there may be valuation differences between occupational groups, and this recognition must be taken into account when applying the equal pay principle and determining whether work is of equal skill and responsibility.

The application of the equal pay principle referred to sec. 230.09(2)(b), Stats., in view of the above general guidelines, is committed to the discretion and expertise of the administrator in the first instance. When approving the administrator's actions under sec. 230.09(2)(b), Stats., the Personnel Board must bring to bear its independent discretion and expertise. Both the administrator and the Board must carefully evaluate the available evidence to determine whether the work involved in various classifications is substantially

similar or equal, and must determine the weight to be given to market forces when assigning a particular classification to a pay range.

V. Retroactive Approval of the Classification Survey.

Your second question is whether the Personnel Board is authorized to approve a classification survey retroactively. What you are really asking is whether a classification plan, once approved, can be given retroactive effect. It is my opinion that the Board does not have such authority.

In my opinion, the Personnel Board acts in a quasi-legislative capacity in assigning classifications to ranges when it acts pursuant to sec. 230.09, Stats. Being quasi-legislative, its acts have prospective effect only. In establishing grades and classifications, the administrator is to use appropriate "job evaluation methods." Sec. 230.09(1)(intro.), Stats. The evaluation process is not static; it is continuous and on-going because the value of various services changes with time. The valuation process is part and parcel to the process by which the administrator "may reclassify and reallocate positions." Sec. 230.09(2)(a), Stats. The administrator's duty is to "improve the classification plan to meet the needs of the service," sec. 230.09(2)(am), Stats., and those needs themselves change with time. Subject to the board's approval, the administrator upon "subsequent review ... may reassign classes to different pay ranges." Sec. 230.09(2)(b), Stats.

Essentially, then, the process of assigning classifications to ranges involves reassessment of the value of services in light of changing times, different needs, and improved methods of valuation. It is designed to realign to meet current conditions; it is not designed as a quasi-judicial process to reverse past decisions. Were it so designed, the task would entail a reverse domino effect reducing the range of some and increasing that of others. Such a retroactive reversal of past decisions cannot fairly be implied from the language employed in sec. 230.09, Stats. Moreover, inasmuch as the evaluation process is essentially judgmental as to value and need, this retroactive reversal conceivably would violate Wis. Const. art. IV, sec. 26, which provides that the Legislature shall never grant "any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into." This is not to say, however, that in individual cases nonevaluative and clerical mistakes

could not be corrected, nor that the constitution prevents agreement with an employe to make a tentative classification/range assignment pending a more thorough audit with retroactive adjustments. Rather, it appears to be the legislative intent under sec. 230.09, Stats., that the administrator and the board act prospectively in the implementation of the plan.

BCL:DCR

Civil Rights; Discrimination; Licenses And Permits; Section 66.054(11), Stats., which permits the issuance of bartenders' licenses to persons of "good moral character" does not automatically preclude issuance to a former offender, especially in light of sec. 111.32(5)(h), Stats., which prohibits discrimination in employment or occupational licensing based upon a criminal conviction (with certain exceptions). OAG 70-79

August 6, 1979.

HAROLD D. GEHRKE, *City Attorney*
Wauwatosa

You have requested my opinion on the interrelationship of sec. 66.054(11), Stats., and sec. 111.32(5)(h), Stats. Specifically you have asked the following question:

Bartender licenses as provided for under Wis. Stats. 66.054(11) limit a municipality to issuing a bartender's or "operator's" license "...only to persons...who are of good moral character..."

The newly enacted law [sec. 111.32(5)(h), Stats.] pertains to discrimination based upon a conviction record unless the circumstances of the charge "substantially relate to the circumstances of the particular job or licensed activity." It is my opinion that convictions involving theft, burglary and armed robbery substantially relate to a person's "good moral character" or lack thereof and may properly be considered by a governing body in its determination as to whether to issue a license. It is difficult to think of any crime involving malem in se that would not "substantially relate" to a person's good moral character. Since the

licensing municipality has a duty not to issue a license to a person who is not of good moral character and while at the same time is obligated to comply with the provisions of 111.32(5)(h), your legal opinion would be greatly appreciated for purposes of providing guidelines as to which criminal convictions may be considered.

In answer to your question, it is my opinion that, in light of the newly enacted anti-discrimination statute, when a former offender applies for a license, all of the facts and circumstances bearing on the issue of "good moral character" should be considered as a whole, regardless of the nature of the offense.

Section 66.054, Stats., provides for licenses for fermented malt beverages. Subsection (11) provides as follows:

(11) OPERATOR'S LICENSES. (a) Every city council, village or town board may issue a license known as an "Operator's" license, which may be granted only upon application in writing, and which may not be required of any person or for any purpose other than to comply with par. (b). An operator's license may be issued only to persons 18 years of age or over who are of good moral character. Operators' licenses shall be operative only within the limits of the city, village or town in which issued. For the purpose of this subsection and s. 176.05(11) any member of the immediate family of the licensee or person holding a manager's license shall be considered as holding an operator's license.

(b) There shall be upon premises operated under a Class 'B' license, at all times, the licensee or some person who has an operator's license and who is responsible for the acts of all persons serving as waiters, or in any other manner, any fermented malt beverages to customers. No member of the immediate family of the licensee under the age of 18 years shall serve as a waiter, or in any other manner, any fermented malt beverages to customers unless an operator 18 years of age or over is present upon and in immediate charge of the premises. No person other than the licensee shall serve fermented malt beverages in any place operated under a Class 'B' license unless he possesses an

operator's license, or unless he is under the immediate supervision of the licensee or a person holding an operator's license, who is at the time of such service upon said premises.

Thus, the license entitles the holder to supervise the serving of fermented malt beverages to customers in an establishment operating under a Class B license.

Class B licenses are issued to establishments such as bars, restaurants and hotels, as opposed to grocery stores, which are issued Class A licenses for the sale of fermented malt beverages, sec. 66.054(5), Stats. The only statutory requirements for issuance of Class B licenses are that the person be eighteen years of age or older and be of good moral character. Certain statutes specifically prohibit benefits to persons who have a record of criminal conviction, such as sec. 6.03, Stats., which disenfranchises felons; there is nothing unconstitutional about such outright prohibitions, *DeVeau v. Braisted*, 363 U.S. 144, 158-160 (1960); *Upshaw v. McNamara*, 435 F.2d 1188 (1st Cir. 1970). But, there is certainly nothing contained within the language of this statute which would indicate that persons who have been convicted of a criminal violation should be denied a license on that basis alone, without further inquiry.

On the other hand, sec. 111.32(5)(h), Stats., in conjunction with sec. 111.325, Stats., specifically prohibits discrimination on the basis of an arrest or conviction record, except in certain circumstances:

111.325 UNLAWFUL TO DISCRIMINATE. It is unlawful for any employer, labor organization, licensing agency or person to discriminate against any employe or any applicant for employment or licensing.

Section 111.32(5)(h), Stats., provides, in relevant part:

The term "conviction record" includes, but is not limited to, information indicating that a person has been convicted of any felony, misdemeanor or other offense, placed on probation, fined, imprisoned or paroled pursuant to any law enforcement or military authority. It is discrimination because of arrest record or conviction record:

....

2. For any employer, labor organization, licensing agency or employment agency to refuse to hire, employ, admit or license any person, or to bar or terminate any person from employment, membership or licensing or to discriminate against any person in promotion, compensation, terms, conditions or privileges of employment, membership or licensing, or otherwise to discriminate against any person because such person has an arrest record or a conviction record; provided, however, that it shall not be unlawful:

....

b. For an employer or licensing agency to refuse to employ or license, or to bar or terminate from employment or licensing, any person who has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity.

c. For an employer or licensing agency to refuse to employ or license, or to bar or terminate from employment or licensing, any person who is not bondable under a standard fidelity bond or an equivalent bond where such bondability is required by state or federal law, administrative regulation or established business practice of the employer.

The question, then, is whether a conviction record substantially relates to the statutory requirement of "good moral character" in sec. 66.054(11), Stats., so that refusal to issue a license on the basis of that conviction record is not contrary to the statutory prohibition against discrimination.

The term "good moral character" is crucial to this inquiry; yet, attempts to imbue it with recognizable standards have resulted in nebulous definitions, at best.

The Wisconsin Supreme Court has not had numerous occasions to consider what makes up a "good moral character." In 1889, it said:

To entitle a person to practice law in Wisconsin, he must, in addition to the other requisites, be "of good moral character." ... The words "good moral character" are general in their application, but of course they include all the elements essential to make up such a character. Among these are common honesty and veracity, especially in all professional intercourse.

In re O——, 73 Wis. 602, 618, 42 N.W. 221, 225 (1889). More recent evaluations have recognized the vagueness of the term:

It was Learned Hand who pointed out ... that the statutory phrase "good moral character" defies explicit definition, that it demands an estimate by the court, "necessarily based on conjecture, as to what people generally feel."

In Re Edgar, 253 F. Supp. 951, 953 (E.D. Mich. 1966). The United States Supreme Court has written of the term's ambiguity:

The term "good moral character" has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law.

Konigsberg v. State Bar of California, 353 U.S. 252, 262, 263 (1957). It seems clear, then, that the evaluation of a person's "good moral character" as insufficient to qualify that person to obtain a license for employment should be approached with caution.

Frequently, legislatures provide that prior criminal records may be a factor in determining whether an individual is of "good moral character." This has created difficulty for former offenders who seek employment. A comment in a 1970 article from the Cornell Law Review describes these difficulties:

More than fifty million people in the United States have some form of criminal record. No doubt, most had only minor conflicts with the law and are today socially adjusted and employed. For these the shadow of prejudice may lurk in their minds only. But for those with more serious records, especially for those who have served prison sentences, prejudice and legal barriers regularly deny employment opportunities. Economic need then combines with discrimination to become the chief causative factor sending one in three of the group back to crime.

....

Where private prejudice does not make the ex-offender unemployable, the state may. Approximately sixty occupations in California require state licenses. Thirty-nine of the licensing laws permit denial, revocation, or suspension for conviction of a felony or of an offense involving moral turpitude. All states and a number of municipalities have similar laws. Licensed activity necessary to employment, such as driving, is frequently forbidden after conviction.

....

License denials and revocations have been upheld under these laws whether the statute specifically requires such action or merely outlines a test such as "good moral character", "inspire confidence", or "good repute." Similarly, unless the statute specifically provides otherwise, courts seem unconcerned whether the crime on which the denial is based is in any way related to the licensed occupation.

Comment, *Employment of Former Criminals*, 55 Cornell L. Rev. 306, 308, 309 (1970).

The Legislature of the State of Wisconsin has seen fit to make an effort to remedy the problems highlighted by the foregoing quotation. It has enacted sec. 111.32(5)(h), Stats., *supra*, which has limited the circumstances in which prior criminal convictions may be considered. Along with the enactment of this section, the Legislature mandated that certain statutes be amended so that where conviction of criminal activity formerly would have been an automatic bar to receipt of the benefit conferred by the statute, now such benefit cannot be withheld without consideration of the effect of the anti-discrimination statute. *See, e.g.*, secs. 176.05(9), Stats. (relating to licenses and permits for the sale of intoxicating liquor); sec. 343.65(2), Stats. (relating to denial of driving instructor's license); and sec. 450.02(7)(a), Stats. (relating to revocation of registration as a pharmacist). In other words, it appears that the Legislature is attempting to clear away insofar as possible the legal barriers to future employment for former offenders.

Nevertheless, certain exceptions to the prohibition on discrimination remain. The exception relevant to the instant inquiry is that found in sec. 111.32(5)(h)2.b., which allows employment or licensing discrimination against former offenders if the circumstances of

the offense “substantially relate to the circumstances of the specific job or licensed activity.” The Wisconsin courts have not yet had an opportunity to identify what types of offenses substantially relate to bartender licensing. Although convictions for many types of offenses could arguably relate to such licensing, the policy behind the anti-discrimination statute militates against any automatic disqualification of applicants with criminal records. The thrust of the statute indicates that all of the information presented by the applicant, including but not limited to the former offense, should be considered by the licensing agency.

Federal courts, in judging the effect of prior convictions on an alien’s “good moral character” sufficient to entitle him to naturalization, have found even the most serious offenses not indicative of a bad moral character, if there are mitigating circumstances, such as intervening length of time between offense and application, and record of rehabilitation during the intervening period, *see*, Annot., “Naturalization: Good Moral Character,” 22 ALR 2nd 240 (1952). Thus, when considering applications of former offenders for licenses pursuant to sec. 66.054(11), Stats., such factors as the nature and number of offenses, the circumstances of the offense, the severity of the offense, the time intervening since the offense and any and all information evidencing rehabilitation of the offender, including job history and reputation in the community should be reviewed. Only then can an informed, nondiscriminatory decision be made as to the substantial relation of the conviction to the circumstances of the licensed activity and the applicant’s good moral character.

BCL:PM-H

Implied Consent Law; Under the Implied Consent Law, sec. 343.305, Stats., hospitals must comply with the request of a law enforcement officer to administer chemical tests including a blood test. This assumes that the driver has not withdrawn his or her consent to submit to that test. Drivers who are unconscious or otherwise incapable of withdrawing their consent are presumed not to have withdrawn it. The refusal of hospitals, physicians, nurses, and other health professionals authorized to withdraw blood to comply with such request constitutes the refusal to aid an officer within the meaning of sec. 946.40, Stats. In complying with the request, the professional incurs no civil or criminal liability, except for any negligence in the course of compliance. The person performing the chemical test must report the findings to the Department of Transportation, the law enforcement agency, and the individual involved. Failure to report to the law enforcement agency also constitutes the refusal to aid an officer within the meaning of sec. 946.40, Stats. OAG 71-79

August 7, 1979.

MICHAEL J. MULROY, *District Attorney*
La Crosse County

You have asked for my opinion on some questions related to the Implied Consent Law.

Your first question is whether a hospital must comply with the request of a law enforcement officer to administer a chemical test including a blood test.

In my opinion the answer is yes.

Section 343.305(1), Stats., provides:

Any person who drives or operates a motor vehicle upon the public highways of this state, or in those areas enumerated in s. 346.61, shall be deemed to have given consent to tests of his or her breath, blood or urine, for the purpose of determining the presence or quantity in his or her blood, of alcohol or controlled substances when requested to do so by a law enforcement officer under sub. (2). *Any such test shall be administered upon the request of a law enforcement officer.*

Section 343.305(2)(c), Stats., provides:

A person who is unconscious or otherwise not capable of withdrawing consent is presumed not to have withdrawn consent under this subsection

Section 343.305(3)(b), Stats., provides:

If the person refuses the request of a law enforcement officer to submit to a test under sub. (2), the officer shall immediately prepare a notice of intent to revoke the person's operating privilege under sub. (9)

Section 343.305(6)(a), Stats., provides:

Blood may be withdrawn from the person arrested for the purpose of determining the presence or quantity of alcohol or controlled substance in the blood only by a physician, registered nurse, medical technologist, physician's assistant or person acting under the direction of a physician.

Section 343.305(9)(c), Stats., provides: "Upon refusal to take a test under sub. (2), the court shall revoke the person's operating privilege for 6 months."

The Implied Consent Law does not authorize physical force to require a person to submit to a chemical test. The wrongful refusal to take the test, however, subjects the person to sanctions. The Legislature intended to permit drivers to refuse to take these tests, but only on penalty of a sanction for having wrongfully withdrawn their implied consent to submit.

The driver's right to refuse to submit is evident from the foregoing statutes. "If the person refuses the request" to submit, the officer is to prepare a notice of intent to revoke. Sec. 343.305(3)(b), Stats. On that wrongful refusal, the person's operating privileges shall be revoked for six months. Sec. 343.305(9)(c), Stats. The Legislature did not contemplate a wrestling match to hold a driver to his implied consent.

In the case of an unconscious person, or one who otherwise is incapable of withdrawing consent, the consent to submit to tests, in the eyes of the law, remains operative. Sec. 343.305(2)(c), Stats.

Consequently, except for the unconscious person or one otherwise not capable of withdrawing a consent, a hospital can be called upon to administer a chemical test only where the person does not withdraw consent. In both instances, it is my opinion that the hospital is under a mandatory duty to perform the test. Section 343.305(1), Stats., unequivocally states that the test "shall be administered upon the request of a law enforcement officer," and the Legislature expressly enumerated the health professionals who shall draw blood. Sec. 343.305(6)(a), Stats.

The use of the word "shall" demonstrates the Legislature's intent that the obligation on hospitals and related health professionals is mandatory. The word "shall" is construed as importing a mandatory term unless the statute demands an alternative construction. *Wauwatosa v. Milwaukee County*, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963). Nothing in the Implied Consent Law demands an alternative construction. In fact, this law is to be liberally construed to achieve its overall purpose to facilitate the taking of tests to determine intoxication. *Scales v. State*, 64 Wis. 2d 485, 494, 219 N.W.2d 286 (1974). To construe the word "request" as permitting hospitals, physicians, etc., to refuse to comply with the officer's request would abort the very purpose of the law and would effectively repeal the mandatory word "shall."

Accordingly, a hospital must comply with the request of a law enforcement officer to administer a chemical test including a blood test. It must be understood, however, that the officer cannot force a test on an unwilling person and that, in the eyes of the law, an unconscious person is willing.

Your second question is whether a doctor who refuses to comply with the request of a law enforcement officer to administer a test would violate sec. 946.40, Stats.

In my opinion the answer is yes.

Section 946.40, Stats., provides:

REFUSING TO AID OFFICER. (1) Whoever, without reasonable excuse, refuses or fails, upon command, to aid any person known by the person to be a peace officer is guilty of a Class C misdemeanor.

(2) This section does not apply if under the circumstances the officer was not authorized to command such assistance.

Section 946.40, Stats., reflects the ancient common-law principle and the long-standing rule in this state that citizens have a duty to aid police officers in the discharge of their duties. One of this section's antecedents is ch. 136, sec. 17, Rev. Stats. 1849, which required "any person" to assist these law officers "in the execution of their office." 11 Op. Att'y Gen. 829, 830 (1922) referred to this as a "duty of citizenship." In *Babington v. Yellow Taxi Corporation*, 250 N.Y. 14, 164 N.E. 726 (1928), the court recited the common-law history of the citizen's duty to evoke a "hue and cry" on discovery of a felon as well as to equip himself with the "instruments sufficient for the task" of apprehending. 164 N.E. at 727. Mr. Justice Cardozo, speaking for the court, declared that the modern day citizen has the same duty of assistance.

The ancient ordinance abides as an interpreter of present duty. Still, as in the days of Edward I, the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand. ... An officer may not pause to parley about the ownership of a vehicle in the possession of another when there is need of hot pursuit.

Id.

It remains the law that a law enforcement officer may summon a *posse comitatus* or a sole bystander to lend assistance. 1 *Wharton's Criminal Procedure* sec. 52 (12th ed.). See *West Salem v. Industrial Commission*, 162 Wis. 56, 60, 155 N.W. 929 (1916). In exercising this power, the officer is subject to a duty of reasonableness under the circumstances. See *Williams v. State*, 253 Ark. 973, 490 S.W.2d 117, 122-123 (1973). In the case at hand, it unquestionably is reasonable for the officer to summon a medical health professional to gather evidence by withdrawing blood especially since the Legislature expressly has imposed that obligation on the health professional and, indeed, has instructed the officer to use no other.

Your third question is whether the health professional, in complying with the officer's request, is subject to criminal or civil liability. The answer, quite briefly, is that the health professional has a greater risk of criminal liability in *not* complying with that request.

As noted, if requested by a law enforcement officer, such test "shall be administered." Sec. 343.305(1), Stats. Further, as noted, failure to aid the officer in this circumstance is punishable as a Class C misdemeanor. Sec. 946.40, Stats. Finally, lest there be any remaining doubt, the Legislature expressly exempted from civil or criminal liability those persons withdrawing blood from the arrested person, "except for civil liability for negligence in the performance of the act." Sec. 343.305(6)(b), Stats.

Consequently, the physician, nurse, or other health professional, in complying with a law enforcement officer's request to draw blood from an arrested person for the purpose of determining the presence or quantity of alcohol or controlled substance in the blood, incurs no liability by complying with the officer's request. Such person will incur liability only to the extent of his or her negligence while complying.

Your fourth question is whether the duty of the person performing the chemical analysis to report the findings is mandatory and, if so, whether refusal to report is subject to sec. 946.40, Stats.

In my opinion the duty is mandatory. Section 343.305(4), Stats., provides:

The person who performs a chemical analysis of breath, blood or urine under sub. (2) *shall prepare a written report* of the findings of the test which includes the identification of the law enforcement officer or person upon whose request the test was administered. He or she *shall promptly transmit a copy thereof* to the department, the law enforcement agency and the person from whose breath, blood or urine the analysis was made.

My reasoning in response to the first question is applicable here. As noted there, the word "shall" ordinarily imports a mandatory obligation. The purpose of the Implied Consent Law is to facilitate gathering of evidence of intoxication and is to be liberally construed to that end. Accordingly, the duty to report in sec. 343.305(4), Stats., also is mandatory.

Section 946.40, Stats., relates to refusing to aid a "peace officer." Therefore, it would relate only to refusal to supply a report to the law enforcement agency and would not relate to a refusal to supply the report to the individual involved. The Department, of course, is a law

enforcement agency in respect to cases involving its own state troopers but, in other cases involving local police units, it would not be a peace officer for purposes of sec. 946.40(1), Stats.

Unquestionably, the failure to file the report as required by statute would be a refusal to "aid" the officer within the meaning of sec. 946.40(1), Stats. Since time immemorial the refusal of aid has consisted in the refusal to lay down one's business to supply time and equipment to help the police. In the case of providing the time and equipment to perform a chemical test, the requisite "aid" is incomplete until the results are reported.

Accordingly, the refusal to supply the reports to the law enforcement agency would be violative of sec. 946.40, Stats. There appears to be no express sanction for failure to supply the report to the person involved and the Department (except when it is the law enforcement agency). This is a matter which should be brought to the Legislature's attention to assure the enforceability of the law. In the meantime, the person performing the test could be subjected to appropriate civil remedies of injunction and, in a proper case, to a writ of mandamus. In addition, consideration should be given to the use of the subpoena and search warrant.

BCL:CDH

Constitutionality; Elections; 1979 AB 353, requiring candidates for the Legislature to declare whether they will receive a lower salary, conflicts with election bribery laws, sec. 12.11, Stats. Further, if enacted, it would violate the constitutional principle that the Legislature cannot impose additional qualifications to office. Finally, its constitutionality under the fourteenth amendment to the United States Constitution is subject to question. OAG 72-79

August 8, 1979.

ED JACKAMONIS, *Chairperson*
Assembly Organization Committee

The Assembly Organization Committee has requested my opinion on two questions involving 1979 AB 353.

That bill, as described in the analysis by the Legislative Reference Bureau, provides:

This proposal requires each candidate for the legislature, at the time he or she files a declaration of acceptance of nomination, to declare in writing either that he or she will accept the regular statutory salary (\$19,767 per year on January 1, 1979) or that he or she voluntarily agrees to accept a specified lower salary. If a candidate who agrees to accept a lower salary is elected, that person is paid the lower amount for his or her entire term. If a candidate agrees to accept a higher salary than the regular salary, the agreement is of no effect.

The first question is whether this bill conflicts with sec. 12.11, Stats. In my opinion the answer is yes.

Section 12.11, Stats., prohibits election bribery. Among other things, it forbids promises to give anything of value to any elector in order to induce that elector to vote or refrain from voting for or against a particular person. An offer by a candidate to accept a lesser salary than that fixed by law, or to refund a portion of the salary, violates election bribery statutes. *See* 21 Op. Att'y Gen. 774 (1932); *State ex rel. Newell v. Purdy*, 36 Wis. 213 (1874); *Sparks v. Boggs*, 339 S.W.2d 480 (Ky. 1960); *Tipton v. Sands*, 103 Mt. 1, 60 P.2d 662 (1936); 26 Am. Jur. 2d *Elections* sec. 283; and 63 Am. Jur. 2d *Public Officers and Employees* secs. 393 and 394. As explained in 21 Op. Att'y Gen. 774, 776 (1932):

In view of the express prohibitions of the above quoted statutes, it must be held that an offer to serve for less than the legal salary made by a candidate for office in the course of his campaign for election is in violation of such statutes. Of course, so far as bribery is concerned, it is apparent that the amount which any individual taxpayer would gain through the reduction of a public officer's salary would be insignificant. Nevertheless, a proposal by a candidate to serve for a reduced compensation amounts to an offer to give money to the public, and it is apparent that such an offer would appeal to many voters and would tend to gain their favor for the candidate who makes such an offer. The result is, as the courts have pointed out, that if such offers were permitted, it would tend to put an office up at sale for the lowest bidder. A person of means, having some personal

and perhaps ulterior motive for seeking said office, might secure his election through such an offer, defeating a better qualified candidate, who, for lack of a sufficient private income, could not afford to meet the offer. Thus, the object of an election, which should be to choose public servants on the basis of their merits regardless of wealth or other irrelevant considerations, would be frustrated. Hence, it is well settled by the courts that an offer by a candidate during an election campaign to serve for less than the prescribed salary is not only a violation of the election bribery statutes but is contrary to public policy.

Were 1979 AB 353 to become law, it could be argued that it constitutes a statutory exception to the election bribery laws. But such an enactment would put public office up for auction, and it would discriminate against poorer candidates. As our supreme court stated in *State ex rel. Newell v. Purdy*, 36 Wis. at 225:

So far as we are advised, no judicial tribunal has given any countenance whatever to any practice or act which tends in that direction, but the courts have steadily held that popular elections must be kept free from any taint of corruption, and from all improper or unlawful influences whatever. We have no disposition to depart from this line of adjudication. On the contrary, were the opposite doctrine asserted in any of the cases, we should not follow them. We would not hold that a man may buy a public office ... just as he would buy a horse at auction, that is, by offering to pay more for it than any other person is willing to pay. We can never give the sanction of this court to a doctrine so pernicious.

The second question asks whether such a bill, if enacted, would be unconstitutional. I believe that it would violate at least one constitutional provision, namely, that the Legislature cannot impose additional qualifications for office.

Wisconsin Constitution art. IV, sec. 6, dealing with the qualifications of legislators, provides: "No person shall be eligible to the legislature who shall not have resided one year within the state, and be a qualified elector in the district which he may be chosen to represent." The Legislature cannot add to these qualifications. See *State ex rel. La Follette v. Kohler*, 200 Wis. 518, 553, 228 N.W. 895 (1930). Following this principle, I have said that requiring a candidate to be a

district resident at the time he files his or her nomination papers, rather than at the time of election, imposes an unconstitutional qualification for office. 65 Op. Att'y Gen. 159 (1976).

Unquestionably 1979 AB 353, by requiring candidates for the Legislature to file their salary declaration along with their nomination papers, imposes a qualification for office. This additional requirement is prohibited unless it comes within the exceptions stated by the supreme court. In *Kohler* the court upheld requiring candidates to comply with the Corrupt Practices Act on the ground that its violation negated the election itself. In *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N.W. 961 (1910), the court upheld a requirement that candidates declare whether they are qualified to serve on the ground that the voter's ballot would be useless if the candidate could not serve. In each case, preservation of the integrity of the electoral process was at stake. Here, the required declaration would not assure the integrity of the election process itself. Accordingly, 1979 AB 353 comes within no exception to the rule that the Legislature cannot impose additional qualifications for office.

There may be additional constitutional infirmities. For example, under the fourteenth amendment to the United States Constitution the state cannot deny the equal protection of the laws. 1979 AB 353 requires only candidates for the Legislature to make a salary declaration. I am at a loss to fathom what rational basis there might be for singling out state legislators. Further, since this bill requires what always has been interpreted to be election bribery, if enacted the bill could be independently vulnerable as destructive of the integrity of the electoral process and not rationally related to any permissible legislative objective.

BCL:CDH

Licenses And Permits; Religion; A group of churches is entitled to a permit under sec. 16.845, Stats., to use the Capitol grounds for a planned civic or social activity even if the content of the program is partly religious in nature. OAG 73-79

August 9, 1979.

KENNETH E. LINDNER, *Secretary*
Department of Administration

You ask whether the Department of Administration can issue the Reverend Mr. Splett a permit pursuant to sec. 16.845, Stats., to use part of the Capitol grounds on August 12, 1979, as requested in his letter of May 18, 1979.

In my opinion the answer is yes.

Pastor Splett, of Saint John's Lutheran Church in Madison, in conjunction with downtown Madison churches representing the African Methodist Episcopal, Episcopal, Lutheran, Presbyterian, Roman Catholic, United Church of Christ, and United Methodist denominations, requested a permit to use a part of the Capitol grounds for a "Celebration of Community Life" in connection with a people's fair and picnic in honor of the elderly. His letter further states that the churches hope to provide a community sing-along, responsive reading, and a message.

It is not certain that the proposed program is religious in nature. For example, the program calls for responsive reading and singing, but it is not stated what would be read or sung. The program is denominated a celebration of life in community in downtown Madison as a part of a community picnic in honor of senior citizens. Its purposes include expressing the participating churches' interest in and concern for the downtown community and to affirm life in community. For purposes of this opinion I assume that at least some of what will be said and sung is religious in nature and that at least some of the participants have religious motivations in joining this program. I conclude that the permit must issue.

Section 16.845(1), Stats., permits use of state facilities "for free discussion of public questions, or for civic, social, recreational or athletic activities" at the discretion of the managing authority. Wisconsin Administrative Code section Adm 2.04 establishes the requirements for use of state buildings for the above activities.

That section states in part:

Public meetings. (1) The department of administration as managing authority of the several state office buildings and

facilities may permit the same to be used by any governmental body or official, or any nonprofit, fraternal, *religious*, or veterans' organization for the purpose of governmental business, public meetings for the free discussion of public questions, or for activities of a broad public purpose if such use:

(a) Does not interfere with the prime use of the building or facility.

(b) Does not unduly burden the managing authority.

(c) Is not a hazard to the safety of the public or state employees; nor detrimental to the building or facility.

(d) Does not expose the state to the likelihood of expenses and/or damages which cannot be recovered.

(e) And is appropriate to the physical context of the building or facility.

In my opinion, both the statute and the administrative rule fairly contemplate use of the Capitol grounds for the proposed program. I believe this program is a civic or social activity within the meaning of sec. 16.845(1), Stats., and is a public meeting for discussion of public questions and activity for a public purpose within the meaning of Wis. Adm. Code section Adm 2.04.

The Capitol grounds are a first amendment "public forum." The establishment of the permit system contemplates the use of the property for free expression activities. Such permit systems have been held to "open the forum." *Intern. Soc. for Krishna Consc. v. Wolke*, 453 F. Supp. 869, 874 (E.D. Wis. 1978) (General Mitchell Field, Milwaukee). In addition, the Capitol grounds offer a unique and appropriate setting for the people to express their views. *Compare, A Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975) (Lafayette Park and White House sidewalk, Washington, D.C.).

Once the Capitol ground becomes a "public forum," speakers cannot be constitutionally excluded on the basis of the content of their messages. In *Lawrence U. Bicent. Com'n v. City of Appleton, Wis.*, 409 F. Supp. 1319 (E.D. Wis. 1976), an Association of College Students challenged a school board guideline that prohibited the use of public school facilities for religious or political activities, unless such activities were nonpartisan or nondenominational. In sustaining the

challenge, the court stated: "If the First Amendment means anything, it means that Government shall not look to subject matter in regulating expression. To be sure, reasonable regulation of the time, place, and manner of speaking is permissible." *Id.* at 1324.

Speech on public property does not lose its first amendment protections simply by reason of its religious content. In *Milwaukee County v. Carter*, 258 Wis. 139, 45 N.W.2d 90 (1950), a group of Jehovah's Witnesses challenged a Milwaukee County ordinance that flatly prohibited denominational services in county parks. While the court pointed out that the religious use of tax-supported public school property had been forbidden in *State ex rel. Weiss and others v. District Board, etc.*, 76 Wis. 177, 44 N.W. 967 (1890), it distinguished the use of a public park by the people exercising their constitutional right to peaceably assemble and freely exercise their religion. The court said:

When, in sec. 3, art. I, the Wisconsin constitution guarantees the right of free speech it does not except or restrict speech on the subject of religion and, if it should, such restriction would be void because in conflict with and subordinate to the First and Fourteenth amendments of the United States constitution which neither make nor recognize any such limitation. Speech on religious topics is just as free, and no freer, under the constitution as speech on other subjects and on no subject is it free from reasonable regulation to insure public order and safety and to reconcile the exercise of this right with the simultaneous enjoyment of equally sacred rights by others. ... Government may, in the interests of public order, safety, and the equitable sharing of facilities, exercise reasonable control over when, where, and under what conditions public meetings may be held on public property; *but to deny to the people all use of the people's property for the public discussion of specified subjects is an unconstitutional interference of rights expressly guaranteed by both state and federal constitutions.*

258 Wis. at 145-146. (Emphasis added.) Restrictions on the time, place, and manner, such as those set out in Wis. Adm. Code section Adm 2.04, are proper concerns of the state.

In *A Quaker Action Group v. Morton*, 516 F.2d 717 (D.C. Cir. 1975), Quakers and others sought to use Lafayette Park and the

White House sidewalk. The court, in sustaining a permit requirement, said:

The use of parks for public assembly and airing of opinions is historic in our democratic society, and one of its cardinal values. ... We approve ... the District Court's finding that the White House sidewalk, Lafayette Park, and the Ellipse constitute a unique situs for the exercise of First Amendment rights.

516 F.2d at 724-25. In *Reilly v. Noel*, 384 F. Supp. 741 (D. R.I. 1974), the court held that the rotunda of the State House in Rhode Island was a public forum for purposes of a prayer meeting conducted in protest of certain governmental action. In so doing the court said, 384 F. Supp. at 747:

[T] here is no more appropriate place for citizens to express their views on issues of social and political significance and to communicate their feelings to their elected representatives than at the State Capitol.

Also see, Sellers v. Johnson, 163 F.2d 877 (8th Cir. 1947) (sheriff unlawfully blockaded public highways to prevent Jehovah's Witnesses from holding a meeting in a public park).

This case is clearly different from those in which the three-pronged test set forth in *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 198 N.W.2d 650 (1972), is applicable in order to determine the existence of a violation of the establishment clause of the first amendment to the United States Constitution. The three-pronged test, which requires that the statute or practice have a secular purpose, that it have a primary effect which neither advances nor inhibits religion, and that it not foster an excessive government entanglement with religion is of concern where the government sponsors, financially supports, or is actively involved in a religious activity. *See, for example, Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1963) (government involvement in Christmas pageant), and *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970) (government exempting religious property from taxes). In *Walz* the court stated, 397 U.S. at 668: "It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."

See, 67 Op. Att'y Gen. 180 (1978) (Christmas pageant in the State Capitol is permissible).

None of these elements of establishment is present in the case at hand. The same administrative code section which establishes the permit system, disclaims state sponsorship and sponsorship cannot fairly be inferred. Wisconsin Administrative Code section Adm 2.04(6) provides:

The utilization of state office buildings and facilities by an organization shall not imply endorsement, approval, or approbation by the state of Wisconsin or the department of administration, nor the extension of special privilege. Likewise the refusal by the department of administration to permit use of a state office building or facility shall not be interpreted as disapproval or censure of any organization, but shall be for reasons as set forth in section Adm 2.04 (1) (a) through (e) above.

More importantly, the *Carter* case stands for the proposition that this kind of case requires equal opportunity for free expression and does not involve state sponsorship. Even if the three-pronged test were applicable, there would be no violation of the establishment clause of the first amendment. Section 16.845, Stats., provides for payment by the applicant for the permit "for any expense arising out of any such use and for such sum as the managing authority may charge for such use." There is, therefore, no financial support. Finally, the state's sole involvement is in managing the administrative details. The state has no interest in the content of the program.

Milwaukee County v. Carter is controlling. Like the park in that case, the Capitol grounds in Madison have become a public forum open to all. With proper controls as to time, place, and manner of speaking, the Capitol grounds have been open to all varieties of views including nuclear power advocates and opponents, pro-abortionists and anti-abortionists, and many others. To exclude speech from this public forum because of its religious or anti-religious character would subvert the neutrality toward religion which the first amendment demands. *See, Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 18 (1947).

It is my opinion, therefore, that you should issue the requested permit.

BCL:CDH:GM

51.42 Board; Sheriffs; Section 51.20(14), Stats., requires sheriff to furnish transportation to any individual who is the subject of a petition under sec. 51.20, Stats., at all stages of the proceedings, regardless of any provision for reimbursement for transportation costs. OAG 74-79

August 10, 1979.

EUGENE R. DUMAS, *Corporation Counsel*
Sauk County

You have written as follows:

Your Opinion is requested as to the financial responsibility for transportation costs of individuals involved in Chapter 51 proceedings. Specifically, your interpretation of Section 51.20(15), Wis. Stats., is sought to resolve a dispute between certain county officials as to whether the 51.42 Board is responsible for all transportation costs once an individual has been initially admitted to a facility operated by the Board pursuant to Section 51.15, Wis. Stats.

One possible position is that the sheriff's responsibility ends when the patient has been taken into custody and transported to the inpatient unit of the 51.42 facility. Under this view, the sheriff may refuse to continue to transport such patients to the probable cause and subsequent court hearings if the 51.42 Board continues to refuse to reimburse the sheriff for such later transportation.

Assuming the reference to sec. 51.20(15), Stats., should be sec. 51.20(14), Stats., the questions may be stated:

1. Does the sheriff's responsibility for transporting end after delivering a patient to the inpatient unit of a 51.42 or 51.437 facility? Or, does the sheriff's responsibility continue thereafter so that he/she

must provide transportation between the facility and the court during hearings on the petition?

2. Is the sheriff's duty to transport contingent upon reimbursement from the 51.42 or 51.437 board?

In my opinion the sheriff's duty continues throughout the proceedings and is not contingent upon reimbursement from the 51.42 or 51.437 board.

Section 51.20(14), Stats., provides:

Transportation; expenses. The sheriff or any law enforcement officer shall transport an individual who is the subject of a petition and execute the commitment, or any competent relative, friend or member of the staff of a treatment facility may assume responsibility for the individual and transport him or her to the inpatient facility. The director of the board established under s. 51.42 or 51.437 may request the sheriff to provide transportation for a subject individual or may arrange any other method of transportation which is feasible. The board may provide reimbursement for the transportation costs from its budgeted operating funds.

This subsection admittedly is not a model of clarity. While the sheriff or other law enforcement officer "*shall* transport," friends or relatives "*may* assume responsibility ... and transport him or her to the inpatient facility." Taken alone and apart from the rest of the subsection, it would appear that the law officer's duty is mandatory because of the use of the word "*shall*," but that friends and relatives have a right or privilege to transport because of the use of the word "*may*." Moreover, it would appear that the sheriff's duty is unlimited whereas friends and relatives may exercise their right or privilege only in respect to transporting "*to the inpatient facility*." The next sentence, however, suggests that the friends and relatives have no right to transport but that the director of the respective boards "*may* arrange any other method of transportation" but without limitation as to whether it is merely *to* the facility.

In any event, it is certain that the only restriction, if any there be, to transporting *to* the inpatient facility is on the friends and relatives, but not on the law enforcement officer. There is no limitation in this subsection suggesting that the officer shall transport to the facility

but not back and forth between the facility and the court as the proceedings transpire and may require. It appears more reasonable to conclude that the Legislature vested in the directors the discretion to determine in particular situations whether the transportation shall be by the officer or by others.

It also is clear that the sheriff's duty is not contingent upon receiving monies from the respective boards. At the most the boards are given discretion whether to make payments, and it probably was the legislative intent to grant discretion whether to make payments to the friends and relatives who might be called upon to provide the transportation. This construction is consistent with the long-standing rule that public officers take their offices *cum onere*, and services required of them by law for which they are not specifically paid must be considered compensated by the fees allowed for other services or by their official salaries. *Dodge County v. Kaiser*, 243 Wis. 551, 559-560, 11 N.W.2d 348 (1943). *Also see, Geyso v. Cudahy*, 34 Wis. 2d 476, 488, 149 N.W.2d 611 (1967).

BCL:CDH

Arson Bureau, State; Criminal Law; Fire Department; Landlord And Tenant; State Arson Bureau and local fire and police departments are subject to the fourth amendment warrant requirements of the United States Constitution in conducting searches for evidence of arson. If consent to search is sought, very general guidelines are that a tenant or co-tenant may consent to search of area under his control, while consent to search a common area may be given by landlord or, if objector could not reasonably expect privacy, by a tenant. OAG 75-79

August 13, 1979.

FRANK A. MEYERS, *Administrator*
Division of Criminal Investigation
Department of Justice

You ask three questions, each of which will be discussed in turn.

1. Does the opinion of the United States Supreme Court in *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942 (1978), negate or supercede sec. 165.55(9) and (10), Stats.?

Section 165.55(9), Stats., provides that:

The state fire marshal and his subordinates may at all reasonable hours in performance of their duties enter upon and examine any building or premises where any fire has occurred and other buildings or premises near the same, and seize any evidence found as a result of such examination which in the opinion of the officer finding the same may be used in any criminal action which may result from such examination or otherwise, and retain it for a reasonable time or until it becomes an exhibit in the action.

Section 165.55(10), Stats., provides that:

The state fire marshal, his chief assistant and deputies, upon complaint of any person, or without any complaint previously entered, shall have a right at all reasonable hours, for the purpose of examination, to enter into and upon all buildings and premises within their jurisdiction.

Michigan v. Tyler was decided in 1978 by a divided Court. Briefly, its holding was that an early search of a burned-out furniture store where arson was suspected had been conducted lawfully without either an administrative or traditional warrant because on the unique facts of the case, the search could be considered part of the initial lawful entry to extinguish the fire and determine, for fire-fighting purposes, its cause. Separate entries without consent to investigate the fire's cause would have required an administrative warrant, however, and when the investigation yielded probable cause to believe arson had occurred, greater access to gather evidence for prosecution should have been gained only after obtaining a traditional search warrant. Arson evidence gathered during warrantless entries unrelated to the exigency of the fire, and to which consent had not been given, was ruled inadmissible under the fourth and fourteenth amendments.

The *Tyler* decision neither negates nor supercedes sec. 165.55(9) and (10), Stats. Because these subsections are silent on the question of warrant requirements in arson investigations, they could arguably

be construed to contain a grant of search power to the State Fire Marshal in contravention of the limitations set out in *Tyler*. It is a cardinal rule of statutory construction, however, that a statute must be construed so as to preserve it and avoid doubts about its constitutionality. *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 205 N.W.2d 784 (1973). In my opinion, these subsections can be interpreted to mean no more than that the State Fire Marshal, in investigating arson, is on an equal footing with other law enforcement officers of this state in terms of his ability to conduct searches for evidence of a crime. In making searches, the State Fire Marshal, like all other law enforcement officers of this state, is bound by the requirements of the fourth amendment, as interpreted from time to time by the Court. These subsections, in sum, are amenable to a construction as simple enabling laws that are consistent with constitutional requirements for searches under the most recent holdings of the United States Supreme Court. They should be so construed.

2. Absent the statutory authority of sec. 165.55(9) and (10), Stats., do the State Arson Bureau and all local fire and police departments in Wisconsin have to obtain a search warrant to examine a fire scene for the crime of arson if there is a delay between the time of the fire and the time of the investigation?

As stated in the answer to your first question, sec. 165.55(9) and (10), Stats., must be construed to be simple enabling legislation. Thus, regardless of the existence of these statutes and in the absence of proper consent, both the State Arson Bureau and local authorities are bound by the warrant requirements as developed in the *Tyler* case. These requirements were summarized by the Court as follows:

In summation, we hold that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches. [Citations omitted.] Evidence of arson discovered in the course of such investigations is admissible at trial, but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime. [Citation omitted.]

Michigan v. Tyler, 98 S. Ct. at 1951. What constitutes a “reasonable time to investigate” is to be determined both by the exigencies of the situation and the individuals’ reasonable expectations of privacy, *id.* at 1950 n. 6, and may encompass a subsequent entry that is no more than an actual continuation of the first entry, *id.* at 1951.

Thus, it is clear that in the absence of proper consent, warrantless entry and investigation is permissible only when and to the extent required by the exigency of a fire, and that entry by firefighters and officials to fight a fire and to investigate its cause for a “reasonable time” thereafter falls within this “exigency exception” to the warrant requirement. Subsequent entries to investigate the cause of a fire are subject to the warrant procedures governing administrative searches as set forth in secs. 66.122 and 66.123, Stats. It is also clear that evidence of arson discovered during a search conducted under either the administrative warrant procedure or “exigency exception” conditions as outlined above is admissible at trial. *Id.* at 1950, 1951. Thereafter, searches made specifically for the purpose of gathering evidence for possible prosecution must be conducted under the authority of a traditional criminal investigative search warrant. *Id.* at 1951.

As a practical matter, the *Tyler* Court was sharply divided on the questions of what constitutes a “continuation” of the original entry to fight the fire and how long after a fire is extinguished reentry without an administrative warrant is permissible. In *Tyler*, the Court said, at 1951, that “*on the facts of this case*, we do not believe that a warrant was necessary for the early morning reentries.” There, as the fire was being extinguished, the fire chief and his arrestants began to investigate the fire’s cause. Because darkness, smoke, and steam severely limited visibility, the officials left at 4:00 a.m. Their warrantless return shortly after daylight to continue the cause investigation was held legal: “[u]nder these circumstances, we find that the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence,” *id.* It should be noted, however, that the *Tyler* Court set no firm guidelines, an omission that several dissenting Justices in that case viewed as undesirable.

To hold that some subsequent re-entries are “continuations” of earlier ones will not aid firemen, but confuse them, for it will be difficult to predict in advance how a court might view a re-entry.

In the end, valuable evidence may be excluded for failure to seek a warrant that might have easily been obtained.

Id., at 1953 (dissenting opinion). The “continuation” issue will certainly be the basis for numerous pre-trial motions to suppress evidence and subsequent appeals in arson cases where the investigation of cause does not follow naturally from or occur as a part of fighting the fire.

As an additional practical point, though, sec. 165.55, Stats., charges you and your Deputy State Fire Marshals not with fire-fighting, but with investigating “fires of incendiary origin.”

Finally, I would also again call your attention to the *Tyler* requirements, discussed above, that once some evidence of arson is obtained, the search must be halted and a criminal warrant sought absent consent for a further search.

3. If a consent to search is necessary, must it be obtained from the owner, the tenant, both or whom?

Consent of the tenant is generally required if the premises to be searched are under the tenant’s control; a landlord may not consent to a search of his tenant’s premises even where the landlord has retained some right of entry for inspecting or cleaning the premises. *Chapman v. United States*, 356 U.S. 610 (1961). Where a third party has joint access or control for most purposes, as in the case of a co-tenant, his consent may validate a warrantless search. *United States v. Matlock*, 415 U.S. 164 (1964). This last result may be different, though, if there is evidence that the objecting co-tenant did not assume the risk that another tenant would allow a search. *Id.* at 993. *See also, e.g., United States v. Cataldo*, 433 F.2d 38 (2d Cir. 1970) (third-party consent held valid, but the court expressly stated that it found no evidence that risk of search consent had not been assumed).

Precise guidelines for when a third-party consent will validate a warrantless search have not been clearly set. Property interests alone have been held an insufficient basis for giving a valid consent. *United States v. Matlock*, 415 U.S. 164 (1964). On another occasion, the Court, in *Stoner v. California*, 376 U.S. 483 (1964), held that a hotel clerk’s consent to a search of a guest’s room was invalid because in the Court’s view the police there had no reasonable basis for believing that the clerk had authority to consent for the guest. In another case

exploring the limits of third-party consent, the Wisconsin Supreme Court held that under *Matlock*, being a relative of the property owner does not alone provide grounds for a valid consent. *Kelly v. State*, 75 Wis. 2d 303, 249 N.W.2d 800 (1977). Both the Wisconsin Supreme Court, *see, e.g., Kelly*, and the United States Supreme Court, *see, e.g., Matlock, Stoner*, have made it clear that "the rights protected by the [f]ourth [a]mendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority,'" *Kelly v. State*, 75 Wis. 2d 303, 315, 249 N.W.2d 800, 806 (1977), *quoting Stoner v. California*, 376 U.S. 483, 488 (1964).

The cases just discussed, like most cases where consent is an issue, involved areas under the primary control of the occupant of the places to be searched. Where parts of a building not under the exclusive control of a tenant are to be searched, the owner may validly consent to the search. *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950). Whether in this type of case, involving areas used in common with other tenants and the landlord, a tenant may consent for other tenants or the landlord would seem to depend on whether the person objecting to the search had a reasonable expectation of privacy in the areas. *Cf., Piazzola v. Watkins*, 442 F.2d 284 (5th Cir. 1971) (acknowledgment in *Katz v. U.S.*, 389 U.S. 347 (1967), that the fourth amendment may protect what one seeks to keep private, even in a publicly accessible area, is also applicable in cases involving third-party consent to search of student's dormitory room); *United States v. Matlock*, 415 U.S. 164 (1964) (one reason a co-tenant with joint access and control for most purposes of tenants' premises could give consent, was that subject of search who allowed third-party search access and control could not reasonably expect privacy).

BCL:WHW:DJH

Public Records; Regulation And Licensing, Department Of; Neither sec. 19.21(2), Stats., nor any other statute requires or authorizes the Department of Regulation and Licensing to have pre-addressed mailing labels for persons in various licensed professions printed up by computer programs and processes for use by private persons or corporations even where a charge is made. The Department cannot deny inspection and copying to protect licensees from unsolicited mail. OAG 76-79

August 17, 1979.

ANN HANEY, *Secretary*

Department of Regulation & Licensing

Your predecessor asked three questions. The first question is:

Is the Department of Regulation and Licensing permitted to prepare and sell to private parties mailing labels by causing a computer print out of the names and addresses of licensees in the various regulated groups?

The answer to this question is no.

Administrative agencies have only such powers as are expressly granted or necessarily implied, and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. *American Brass Co. v. State Board of Health*, 245 Wis. 440, 15 N.W.2d 27 (1944).

In 59 Op. Att'y Gen. 145 (1970), it was stated that then sec. 16.74, Stats. (1973), would permit the sale of computer programs, as distinguished from printouts or data, as *surplus*, provided that they were not created for resale purposes. In 63 Op. Att'y Gen. 302 (1974), it was stated that the Department of Administration probably had authority under sec. 19.21(1) and (2), Stats., to provide a private corporation with camera-ready copy, which is the product of printout of computer-stored public records, if the costs were minimal, but that the Department could not contract on a continuing basis for the furnishing of such service.

Unlike the Department of Administration situation, your Department already has on hand lists of the licensees' names and addresses. Where a list is available, it is a public record and is subject to inspection and copying, and the list can be furnished to any person at a reasonable copying charge. 61 Op. Att'y Gen. 297 (1972). *Also see* secs. 19.21(2) and 16.61(11)(a), Stats. The custodian, however, is not required to make a search or compile a list or report. 52 Op. Att'y Gen. 8 (1963).

Finally, the gummed mailing labels themselves do not appear to be the type of book report, pamphlet, or document which is subject to sale by the Department or through the Department of Administration. *See* secs. 16.79(2), 20.908, 35.87, and 35.91, Stats. If stocks of mailing labels had been preprinted, those which were not needed could be sold as surplus. It would be improper to create a surplus for the purposes of resale.

Your second question is:

Do the public records statutes, sec. 19.21, Stats., *et seq.*, require the Department to provide mailing labels upon citizen request?

The answer is no.

Section 19.21, Stats., grants any person the right to inspect and copy or duplicate public records at his "own expense," but such person does not have a right to utilize the equipment of the state to copy or duplicate. The statute's principal purpose is concerned with openness in government and a right to know. It was not intended to be utilized to enable any person to secure the same final product, such as a gummed mailing label, properly addressed, as the state secures. I am of the opinion that the labels themselves, once produced, are public records. *See* sec. 16.97(3), Stats., as created by ch. 29, sec. 98, Laws of 1977. Where the information is stored in a computer and such memory bank is the only source of the material, any person can within reasonable limits insist that there be a run so that such person can inspect and copy the information therein contained. The Department, however, has lists of the names and addresses of the various professional persons licensed which contain the same information as is on the mailing labels. As noted, a custodian is not required by sec. 19.21, Stats., to make a search or compile a list or report. 52 Op. Att'y Gen. 8 (1963).

Your third question is:

May the Department deny requests for mailing labels on the basis that providing them is likely to result in the mailing of unsolicited matters to licensees and that the benefit to the public of providing them is outweighed by the licensees' interest in privacy?

The answer is no.

As noted, the Department is without authority to furnish mailing labels to private persons or organizations. In any event, since the right to inspect, copy, or duplicate does not depend on the motive or purpose of the requester, it could not be denied on the basis of the reasons set forth in your question.

BCL:CDH

Fish And Game; Natural Resources, Department Of; Public Access; Department of Natural Resources has the power under secs. 29.50 and 30.77, Stats., to withhold stocking with fish from state hatcheries from bodies of water where public access is inadequate. Determination of adequacy of access rests on consideration of reasonableness of fee charged for use of public boat launching facilities as well as quantity of parking facilities provided. The Department may, but is not bound to, require that reasonable access be afforded at all times to the general public. Larger fees may in some circumstances be imposed on larger boats, and large boat access probably could be regulated. Provision of special facilities for the handicapped is encouraged but not required. OAG 77-79

August 30, 1979.

ANTHONY S. EARL, *Secretary*
Department of Natural Resources

JOANNE DUREN, *Chairperson*
*Assembly Tourism, Recreation and Economic
Development Committee*

I have received requests from both the Department of Natural Resources and the former Assembly Natural Resources Committee to address the matter of the authority under sec. 29.50, Stats., of the Department of Natural Resources to withhold stocking of fish from state hatcheries into waters that lack sufficient public access. Because your requests for information overlap, I am responding in this joint fashion, to you as, respectively, Secretary of the Department of Natural Resources and Chairperson of the new Assembly Tourism, Recreation, and Economic Development Committee.

You are concerned about the relationship between and the effect of secs. 29.50 and 30.77, Stats. The Conservation Act, sec. 23.09, Stats., charges the Department of Natural Resources ["Department"] with providing, among other things, a "system for the protection, development and use of ... fish ... [and] lakes ... in this state." Sec. 23.09(1), Stats. The Department is authorized by sec. 23.09(2)(f), Stats., to provide management services for state waters, and this same statutory section lays the foundation for the Department's engaging in fish-stocking of any state waters. Section 29.50, Stats., though, states that the Department "shall not furnish fish or fry from state hatcheries to private ponds, private clubs, corporations or preserves, and shall not plant them in waters where the general public is not allowed the rights and privileges enjoyed by any individual." By sec. 30.77(1)(b), Stats., local government units are prohibited from enacting "any local regulation which in any manner excludes any boat from the free use of the waters of this state." Any municipality may, however, "charge reasonable fees for the use of public boat launching facilities owned or operated by it," sec. 30.77(3)(b), Stats.

It has been the practice of the Department to construe these statutory provisions together. In deciding where to stock its fish, the Department has traditionally considered the accessibility of a body of

water to the public. Moreover, it has traditionally measured adequacy of public access by the amount and character of public parking facilities, Wis. Adm. Code section NR 1.90(2)(a)(1), (2)(a)(2), and by the reasonableness of any entry fee charged for the use of a body of water, Wis. Adm. Code section NR 1.90(2)(a).

A reasonable fee for the use of access sites has been defined as one consistent with "those currently charged for daily entrance to state parks and forest areas," Wis. Adm. Code section NR 1.92(6)(f). Proposed Wis. Adm. Code section NR 1.93(1), currently being reviewed in the Assembly Natural Resources Committee, similarly defines a reasonable fee for use of a vehicular access site, including use of parking facilities, as that amount "currently charged an individual vehicle for daily entrance to state parks and forest areas."

Some local government units have expressed concern that current limitations on access fees they are permitted to charge are too strict in light of the costs they may incur in establishing and maintaining access facilities. Accordingly, proposed Wis. Adm. Code section NR 1.93 also provides a means by which municipalities may petition for approval of higher fees, and it establishes criteria by which the Department may gauge the reasonableness of such requests.

As posed by Mr. Earl, the first question is:

1. Section NR 1.93, Wis. Adm. Code, as proposed, and section NR 1.90, Wis. Adm. Code, are based upon sections 23.09, 23.11, 29.50 and 30.77, Stats. Does the Department have authority under those sections to look to "reasonable fees" as referred to in section 30.77, Stats., in its interpretation of section 29.50, Stats.?

The Assembly Committee asks if the Department, in administering sec. 29.50, Stats., may consider the quantity of parking facilities provided.

The answer to both questions is yes. In my opinion, the Department is authorized in administering its fish-stocking program to consider the adequacy of public access, measured by both the quantity of parking facilities provided and the reasonableness of the fees charged for their use. I would point out that the answer to this question and those that follow involve questions of discretion about how the

Department operates a program which has clear legislative authorization and not questions about whether the Department has authority to operate the program at all. A department has authority to allocate scarce resources so as to provide maximum public benefit under programs which are authorized by statute, although if the allocation formula or program is of general application and has the effect of law it must be adopted as a rule. The Department of Natural Resources not only has this general management authority but more specific authority for allocating its fish stocking program can be found in the statutes and the constitution.

Section 29.02(1), Stats., states: “[t]he legal title to, and the custody and protection of, all wild animals within this state is vested in the state for the purposes of regulating the enjoyment, use, disposition, and conservation thereof.” To accomplish these purposes, the Department is authorized, among other things, to promote the abundant supply of food fishes in state waters by establishing state hatcheries for the propagation of fish for stocking. Sec. 29.51, Stats. The Department is prohibited, however, from using state hatcheries to supply fish for “waters where the general public is not allowed the rights and privileges enjoyed by any individual,” sec. 29.50, Stats. The obvious purpose of this limitation on stocking is the prevention of the stocking of bodies of water accessible only to riparians.

In addition to the statutory support, the Wisconsin Constitution supports the appropriateness of the Department’s consideration of the quantity of, and fees charged for, access facilities. In Wisconsin, navigable waters are held in trust by the state for the public’s use. Wis. Const. art. IX, sec. 1; *State v. Public Service Commission*, 275 Wis. 112, 81 N.W.2d 71 (1957). Indeed, the public trust doctrine may even extend beyond navigable waters: “[e]arly decisions frequently spoke of navigation, often in a commercial sense, as the purpose of the trust, but all public uses of waters have from time to time been recognized, including pleasure boating, sailing, fishing, swimming, ... and enjoyment of scenic beauty,” *State v. Public Service Commission*, 275 Wis. 112, 118, 81 N.W.2d 71, 74 (1957). (Even assuming *arguendo* that the constitutional trust doctrine were directed solely to navigable waters, Wis. Const. art. IX, sec. 1 does not bar the Legislature’s protecting nonnavigable waters so long as the legislative action is not inconsistent with the constitutional provision, *Omernick v. State*, 64 Wis. 2d 6, 218 N.W.2d 734 (1974).)

Thus, any determinations about the use of waters held in trust for the public, whether made by the Legislature or the Department of Natural Resources, must be consistent with that trust. Local public interests may interfere with the public trust in the same manner as private interests, because many aspects of local regulation are as inconsistent with the broad public interest as are projects of private enterprises. 61 Op. Att'y Gen. 131, 133 (1972).

A locally imposed user or access fee designed to help local residents bear the cost of access facilities that are also used by the public at large undeniably burdens the right of the general citizenry to enjoy the body of water whose access is thus regulated. Nevertheless, the Wisconsin Supreme Court has held that the trust doctrine does not prevent minor accommodations between the interests of the public at large and a more limited set of public or private interests where the purposes of the trust are not thereby substantially affected. *See, e.g., Madison v. State*, 1 Wis. 2d 252, 83 N.W.2d 674, 677 (1957); *State v. Public Service Commission*, 275 Wis. 112, 118, 81 N.W.2d 71, 74 (1957); *Angelo v. Railroad Commission*, 194 Wis. 543, 217 N.W. 570, 577 (1928); *Milwaukee v. State*, 193 Wis. 423, 454-456, 214 N.W. 820, 830 (1927); *Franzini v. Layland*, 120 Wis. 72, 82, 97 N.W. 499, 500 (1903).

In my opinion, a reasonable fee represents a permissible accommodation between the competing interests involved. A high fee, however, might discourage or severely restrict members of the general public in their use of the resource for fishing, boating, or other recreational or scenic purposes. Such a result would obviously contravene the purposes of the public trust policy, *i.e.*, to ensure that the state's public waters are available for all to enjoy. It is elementary that fishing is among the public rights protected under the trust doctrine. *Muench v. Public Service Commission*, 261 Wis. 492, 53 N.W.2d 514 (1952). The general public is entitled to share with local residents of the area containing the stocked water the benefits of any stocking done from state fish hatcheries; consequently, the Department must consider the availability for public use of any body of water it stocks. Because public access might be restricted by the charging of high fees, the Department may consider the matter of fees in making any finding as to adequacy of public access. For the purposes of making this assessment, fees for parking of vehicles and

launching of boats must be considered as a unit. To treat them otherwise would be to ignore the reality that users of boat-launching facilities need a place to park their vehicles and boat trailers while using their boats. For the same reason, adequacy of access is also appropriately measured by the quantity of parking spaces available: limited parking facilities, just as surely as high fees for their use, might discourage or restrict use of a body of water by the general public.

There is ample statutory authority for the position stated above. Although sec. 30.77, Stats., establishes a general rule that a local government unit may not enact regulations that exclude any boat from the free use of state waters, it expressly allows a municipality to recover from users some of the costs it incurs in providing and maintaining public boat-launching facilities. Charging user fees is a customary and accepted method of imposing some of the financial burden created by public facilities on those who most directly benefit from the provision of the facilities in question. The Legislature also recognized, though, that unreasonably high fees might well discourage or exclude potential users from using state waters. The requirement of reasonableness fosters protection of the public's basic right freely to use such waters for recreational and other activities. Even though sec. 30.77(3)(b), Stats., gives fee-charging authority to *municipalities*, the Department is given authority by other statutes to determine whether the fees are reasonable. The Conservation Act authorizes the Department, *inter alia*, to make rules and perform studies it considers necessary to carry out the provisions and purposes of the Act. Sec. 23.09(2), Stats. One such purpose is the protection and development of state lakes, sec. 23.09(1), Stats.; another is the maintenance of state fishing waters, sec. 23.09(2)(d), Stats. The Department may also look to sec. 23.09(2)(d), Stats., which speaks in terms of what the Department may do, unlike sec. 30.77, Stats., which cites activities that may be engaged in by municipalities. Section 23.09(2)(d), Stats., authorizes the Department to maintain lands and waters for fishing.

The Department also has authority to consider the adequacy of public access as measured by the quantity of parking facilities. As noted earlier, sec. 23.09(1), Stats., authorizes the Department, among other things, "to provide an adequate and flexible system for the protection, development and use of ... fish and game, [and] lakes ... in this state"; and sec. 23.09(2), Stats., confers on the Department

authority to effectuate that purpose through rules and services it deems necessary. That the beneficiary of any such efforts must be the general public is made clear by the public trust doctrine. Wis. Const. art. IX, sec. 1. The general public is not benefitted by any program of state fish-stocking in lakes that the general public cannot reach. Direct evidence that the Legislature was concerned with public access in creating the conservation program embodied in sec. 23.09, Stats., is found in the provision in sec. 23.09(9), Stats., for the Department's approval and partial funding of local projects to improve public access.

Further support may be found for the Department's authority to withhold fish-stocking services from lakes to which public access is inadequate because parking facilities are limited and/or unreasonable fees are imposed for their use. Section 23.09(2)(d), Stats., discussed above, read in conjunction with sec. 23.09(2)(d), (3), Stats., authorizes the Department to "maintain" public fishing grounds, and such authority may be read to support regulation of entry fees and parking facilities related, to public fishing grounds.

Moreover, the Department is granted general rule-making power by sec. 23.11, Stats., to use such means as are reasonably necessary to ensure that the general public is the beneficiary of the Department's conservation efforts. Although, sec. 23.11, Stats., might arguably be read as applying only to the care, protection, and supervision of state-owned land—and not to public land and water generally—the Department's authority is not so narrowly circumscribed. Statutes are not to be "so strictly construed as to defeat legislative intent. ... The entire section is to be considered." *Omernick v. State*, 64 Wis. 2d 6, 12, 218 N.W.2d 734, 738 (1974). In *Omernick*, the statute was held applicable to nonnavigable waters because, although part of the statute regulated only "navigable streams," the statute elsewhere covered "any stream." Likewise, while sec. 23.11, Stats., refers, *inter alia*, to "state parks" and "state land," it also speaks of "all lands ... in which [the state] has any interest." The state holds title to the beds of navigable lakes and streams in trust for the public benefit. Section 23.11(1), Stats., also clearly states that the powers it grants are "[i]n addition to the powers ... heretofore conferred," and this would include the power conferred by sec. 23.09, Stats., over "lakes ... and other outdoor resources in this state."

Additionally, sec. 227.014(2)(a), (2)(b), Stats., grants the Department the power to adopt rules interpreting the statutes it enforces or administers, and the power to prescribe forms and procedures in connection with those statutes, as the Department considers necessary to effectuate the purposes of the statutes. Although “nothing in this chapter confers rule-making authority upon or augments the rule-making authority of any agency,” sec. 227.014(1), Stats., it does not diminish the rule-making authority already granted an agency by other sources—such as, in this case, the ones discussed earlier in this opinion, *see* 1955 Committee Note to Wis. Stat. Ann. sec. 227.014 (West). Consequently, “no agency, for fear of lack of authority, should hesitate to promulgate as rules its procedures, interpretations and general policies.” *Id.*

Furthermore, in addition to the just-discussed authority to make rules to interpret and effectuate statutes, the Department may “exercise such legislative power as is necessary to carry into effect the general legislative purpose ... [and] to fill up the details; [and may] make public regulations ... directing the details of its execution.” *Schmidt v. Local Affairs and Development Department*, 39 Wis. 2d 46, 59, 158 N.W.2d 306, 313 (1968). In the instant matter, the Department’s consideration of the quantity of and charge for parking facilities is a permissible approach under *Schmidt* to the following language: “waters where the general public is not allowed the rights and privileges enjoyed by any individual,” sec. 29.50, Stats.; and “excludes any boat from the free use of the waters of this state,” sec. 30.77(1)(b), Stats.

In conclusion, my advice to the Department in administering the fish-stocking program throughout the state is to continue to consider, as measures of the adequacy of public access, the number of facilities provided and the reasonableness of the fees imposed for their use.

Your second question is:

2. If the answer to question no. 1 is yes, may the Department allow graduated fees according to the size of boat being launched or may such graduated fees be charged by a municipality in light of the wording of section 30.77, Stats.?

As stated in the answer to question one, the Legislature’s authorization in sec. 30.77(3)(b), Stats., to local governments to charge user fees for boat-launching facilities indicates a recognition that

such facilities cost money and that user fees may be necessary to help defray these costs. Accordingly, any determination about the reasonableness of the fee a municipality seeks to charge logically takes into account the cost of maintaining the facilities it has provided.

In proposed Wis. Adm. Code section NR 1.93(1), the Department has administratively defined a reasonable fee for boat-launching as any fee less than or equal to that which the state imposes on vehicles for daily entrance to state park and forest areas. This definition eliminates the necessity of evaluating on an individual basis the imposed fees' reasonableness relative to costs incurred at every launch site in the state. In my opinion, however, there is no legal obstacle to Department approval of a higher fee, so long as the determination rests on an evaluation of the costs associated with operating and maintaining the site or sites in question. Proposed Wis. Adm. Code section NR 1.93 requires that such a determination be made before the Department may grant a local government unit the authority to impose a user fee higher than the amount stated in subsection (1) of that section.

If extraordinary or unusual costs are involved in accommodating large boats at launching facilities, I see no legal barrier to Department approval of a fee plan designed to attempt to defray such extra costs by charging a proportionately higher fee to the members of the public who benefit more directly from those expenditures, *i.e.*, the owners of large boats. Such approval would depend, of course, on adequate documentation by the locality that the requested "surcharge" is directly related to additional expenses incurred solely or primarily for boats of a larger size. As a practical matter, it may be very difficult to apportion operation and maintenance costs among users according to the size of their boats. But where extra costs can be documented, a surcharge may be permissible, provided that it remains reasonable and is not designed to prevent owners of large boats from using the body of water in question or does not in fact severely restrict their access.

Your third question is:

3. If the answer to question no. 1 is yes, must access or boat launching fees be reasonable at all times, or may they differ depending on the time of day?

In my opinion, there is no authority for approval of a fee that is unreasonable at any time. As explained above, although the Legislature saw the need to allow municipalities to charge user fees to help recover costs, the protection of public rights in navigable waters requires that individual users be spared high fees that would discourage or restrict them in the exercise of these rights. An unreasonable fee could work just such an impermissible result regardless of the time of day or year it was imposed. It should be noted, however, that the ban on unreasonable fees would not prevent approval of a fee schedule that imposed different fees at different times so long as every fee charged were a reasonable one. *Accord*, Proposed Wis. Adm. Code section NR 1.93.

Your fourth question is:

4. Section 29.50, Stats., provides in part that fish or fry from state fish hatcheries shall not be planted in "waters where the general public is not allowed the rights and privileges enjoyed by *any individual*." (Emphasis added.) Does the Department's management power or rule-making authority grant flexibility in defining the phrase "any individual" or must it be defined in a literal sense to mean all persons including handicapped, etc.?

The legislative intent as disclosed by the statutes is that the Department shall have some flexibility in this matter. Thus, for example, the Conservation Act, sec. 23.09(1), Stats., grants the Department authority to provide "an adequate and flexible system for the protection, development and use of forests, fish and game, lakes, streams, plant life, flowers and other outdoor resources in this state"; subsection (2) of the Act empowers the Department to make all rules and establish all services necessary to carry out the provisions and purposes of the Act. One acknowledged aspect of the objective stated in sec. 23.09(1), Stats., is fish- or fry-stocking from state hatcheries in order to promote the abundant supply of food fishes in the waters of the state. With stocking, as with other activities consistent with the purpose of the Conservation Act, the Department has flexibility. *See also* sec. 23.11(1), Stats., which confers on the Department certain general powers. In addition, sec. 23.09(9), Stats., authorizes the Department to investigate local government units' plans for acquiring or improving lands in order to provide public access, and then to give financial assistance to such units for their use in implementing departmentally approved access projects.

Numerous other statutes assign to the Department in very broad terms the responsibility for safeguarding public rights in our water resources. *See, e.g.*, sec. 144.025, Stats., by which the Legislature has designated the Department, in the area of pollution control, "the central unit of state government to protect, maintain and improve the quality and management of the waters of the state" and has granted the Department all "necessary powers ... for the enhancement of the quality management ... of all waters of the state." *See also, e.g.*, chs. 29, 30, 31, 33, and 147, Stats. Thus, the presumption is strong that the Legislature intended the Department also to have flexibility in the area of responsibility involved in the instant matter.

The object of the stocking site limitation contained in sec. 29.50, Stats., is to ensure that the benefits of state fish management services provided to any body of water are available for use and enjoyment by the general public, not just by riparians. The public generally can enjoy these benefits if adequate parking and boat-launching facilities are provided at reasonable cost to users. The Legislature has not mandated that any specific facilities be provided; therefore, it must be presumed that it left to the Department's decision the matters addressed in your fourth question. This conclusion is consistent with the departmental flexibility envisioned in, *e.g.*, sec. 23.09(1), Stats., and discussed above. The conclusion is also supported by the absence of statutes directed at providing handicapped persons full access to public waters. Section 30.90, Stats., for example, requires only one particular lake, Lake Lions, to have public access provided in a manner that will not interfere with recreational use of the lake by the physically handicapped, as long as such use continues. Another statute aimed at increased access by handicapped persons covers only public buildings and places of employment that one might reasonably expect to be used by such persons; it makes no reference to outdoor resources, and among its exemptions the statute lists boathouses. Sec. 101.13, Stats.

Therefore, I am convinced that the Department is not required to construe sec. 29.50, Stats., as your question may suggest. Nonetheless, I believe that as a matter of sound and enlightened policy, the Department could encourage the provision of facilities for the handicapped wherever practicable.

Your fifth question is:

5. In the Department's interpretation of section 29.50, Stats., must access be afforded to all boats regardless of size before management services may be provided to a body of water?

Very generally speaking, the answer is yes. Under both the terms of its broad duty under the public trust doctrine and the specific prohibition in sec. 29.50, Stats., against stocking private bodies of water, the Department may not provide such management services where the general public is not benefitted. As members of the general public, owners of large boats are presumed to be entitled to share the benefits of these management services in equal measure with all others.

Nevertheless, if it were determined that equal access by large boats as well as small would disserve the public interest, appropriate use restrictions could be imposed consistent with the public trust and statutory prohibition. In this regard it is important to note sec. 30.77(3)(a), Stats., which allows all municipalities on a lake to enact, subject to advisory review by the Department, identical ordinances "relative to the equipment, use or operation of boats or relative to any activity regulated by secs. 30.60 to 30.71." In *Menzer v. Village of Elkhart Lake*, 51 Wis. 2d 70, 81-83, 186 N.W.2d 290, 294 (1971), the court indicated approval of municipal ordinances, enacted under the authority of sec. 30.77, Stats., prohibiting power boating on Sundays, if necessary to serve the public health and safety. The public welfare might likewise require some regulation of larger boats on certain lakes.

Your sixth question is:

6. In its interpretation of section 29.50, Stats., may the Department require that an access site be open to the public at all times?

The answer is yes. As already discussed, the purpose of prohibiting planting of fish or fry in waters "where the general public is not allowed the rights and privileges of any individual," sec. 29.50, Stats., is to ensure that such services do not obtain to the sole benefit of riparians. Riparians, of course, are naturally situated to enjoy the benefits of management services at any time of the day or year

regardless of whether public access is provided. The Department legally may require that the public likewise have access to those advantages at all times.

This is not to say, however, that the Department is *bound* to require public access at all times. Indeed, in some circumstances, limiting access may be the only way to “protect” the water as mandated, for example, in secs. 23.09 and 23.11, Stats. Additionally, both riparians and the general public are equally subject to such other general regulations as may exist, such as those limiting fish and game hunting seasons to certain times of the year.

BCL:NLA

Insurance; Words And Phrases; Transplants For Life, Inc., a plan which encourages members to donate organs for transplant and rewards members for such donations, does not constitute insurance under Wisconsin law. OAG 78-79

September 4, 1979.

SUSAN MITCHELL, *Commissioner*

Office of the Commissioner of Insurance

You have requested my opinion as to whether a certain plan, presented to your office by Transplants For Life, Inc., constitutes “insurance” and is subject to the insurance code.

Based upon documents furnished by your office, particularly copies of recent correspondence from Transplants For Life, Inc. (hereafter the company), the plan would operate as follows. For the asserted purpose of increasing the availability of human organs suitable for transplant, the company will seek to enroll large numbers of members who will pay a once-only lifetime fee of \$10 to enroll. The members will be encouraged and given incentive to donate their organs for transplant while living or after death. The company will pay \$1,000 to the donor or to any person or organization he designates if any of his organs are used in a transplant operation. (It is not clear whether the company will pay an additional \$1,000 for

each additional organ donated.) The company expects that such payments would be made for very few members. The company's stated purpose is that of increasing the number of potential organ donors, and the \$1,000 payment is presented strictly as a marketing device. An agreement to make organs available for transplant is *not* a condition of membership. The company represents that it is selling a program which says to prospective members:

Join this program by paying a \$10.00 lifetime enrollment fee and for that \$10.00, Transplants For Life agrees to solicit more potential donors so that you and/or your family will have a better chance to *receive* a donated organ if you/they should ever need it. And the selection of organs will be greater thereby promising a better transplant match, with increasing chances of success. Further, in order to provide an incentive for you and other *members* to become potential donors, Transplants For Life will make a \$1,000 incentive payment to or for any *member*, if any of your organs are used in a transplant operation.

See letter from the president of Transplants For Life to Mr. Mandt dated May 2, 1979.

Section 600.03(25), Stats., states:

"Insurance" includes:

- (a) Risk distributing arrangements providing for compensation of damages or loss through the provision of services or benefits in kind rather than indemnity in money;
- (b) Contracts of guaranty or suretyship entered into by the guarantor or surety as a business and not as merely incidental to a business transaction.

Although this statutory definition does not purport to be all-inclusive, it is not particularly helpful here.

Spencer Kimball, a nationally recognized authority on insurance, has defined insurance as:

[A]ny formally organized scheme for the distribution of an adventitious economic loss over a large number of persons subject to the risk of such loss, with a view to replacing the uncertain risk of loss by a predictable cost. The loss is distributed by transferring the risk to an insurer, who may be an independent

entrepreneur or may be simply the group of persons insured, operating through some corporate or agency device. The loss may be distributed in advance by charging a premium, or after the event by assessment, or by a combination of the two. For the enterprise to be commercially successful, the incidence of the loss should be reasonably predictable for some class of persons from which the participants will be drawn, and therefore for any sufficiently large number of such participants taken at random.¹

S. Kimball, *Insurance and Public Policy* (special ed. 1960), The University of Wisconsin Press, p. 5.

In an earlier opinion to one of your predecessors, I said: "A contract of insurance is in its nature aleatory, voluntary, executory, conditional, and personal, and except as to life and accident, it is one of indemnity. Volume I, Couch on Insurance, 2d 1959, sec. 1:5, p. 30." 57 Op. Att'y Gen. 87, 90 (1968).

Aleatory contracts have been defined as "those where performance on the part of one is conditioned on a fortuitous event." *South-ern Surety Co. v. MacMillan Co.*, 58 F.2d 541, 549 (10th Cir. 1932).

In 59 Op. Att'y Gen. 134, 137 (1970), it was stated: "[I]t may be said that an insurance contract, with certain exceptions not relevant here, essentially involves a risk (related to an uncertain event, the happening of which may cause a loss) for which one party undertakes to indemnify the other party's loss for a stated consideration (premium)."

In the last cited opinion, it was concluded that a "claims service contract" was not a contract of insurance because it lacked the "characteristic indemnification" even though an element of risk was

¹ The Wisconsin Supreme Court has not taken a rigid position on the definition of insurance.

"Whether a corporation or association is engaged in the insurance business must be determined by the particular objects which it has in view, and not by abstract declarations of general purposes; the business which the organization is actually carrying on, rather than the mere form of the organization, is the test for determining whether it is carrying on an insurance business."

State ex rel. Martin v. Dane County Mut. Ben. Asso., 247 Wis. 220, 232, 19 N.W.2d 303 (1945) (quoting 29 Am. Jur. *Insurance* sec. 4).

involved. In the instant case, however, it is difficult to find any risk of loss to the member because, as I understand it, the member is always free to decide whether or not he wishes to donate an organ for a transplant operation. The only thing a member stands to lose is one of his organs, and there is no risk of loss because there can be no loss without the member's consent.

Further, in order for this plan to be insurance there must be an *indemnity* against a risk of loss. In this case, the argument that the plan is insurance would assert that the indemnity consists either in the payment of \$1,000 for an organ or perhaps even in the increased probability of finding a donor for the recipient's unexpected loss of an organ.

I am persuaded that such argument must fail. The payment of \$1,000 is for a controlled event, *viz.*, the surrender of an organ. It is not in payment for an unexpected or fortuitous loss of an organ.

Moreover, the increased probability of finding a donor for the unexpected loss of an organ lacks the requisite assurance (indemnification) for purposes of this loss. No one is guaranteed or even promised that his loss will be cured by a donated organ.

I conclude on the basis of facts presented to me that the proposed plan submitted by Transplants For Life, Inc., does not constitute insurance within the meaning of the laws of this state and therefore is not subject to regulation by the Commissioner of Insurance.

BCL:JEA

Schools And School Districts; Teachers; Vocational And Adult Education; Discussion of the power of the Superintendent of Public Instruction to license vocational school teachers to teach public school students. OAG 79-79.

September 7, 1979.

DR. BARBARA THOMPSON, *State Superintendent*
Department of Public Instruction

You have asked me to reconsider my opinion issued to you on May 4, 1979, 68 Op. Att'y Gen. 148 (1979).

In material part, that opinion concluded that a high school course in health occupations could be taught to high school students at a school of a vocational, technical, and adult educational district. Although the opinion concluded that a public school district could enter into an agreement with a vocational school district for such instruction, the opinion also concluded that the teacher of the course must be licensed by the Department of Public Instruction.

You have now invited my attention to some additional matters. First, you call my attention to certain provisions in ch. 38, Stats., and, second, you refer to the "superintendent's conflicting duties as vocational, technical, and adult education (VTAE) Board member and state superintendent."

Chapter 38, Stats., relates to vocational, technical, and adult education. Section 38.04(4)(a), Stats., empowers the VTAE Board to establish the qualifications for teachers in the vocational schools.

The VTAE Board's power to establish the qualifications for those who teach vocational school students does not include the power to establish the qualifications for those who teach high school students. The qualifications to teach high school students are to be set by the Superintendent of Public Instruction consistent with statutory standards. Thus, sec. 38.04(4)(a), Stats., does not empower teachers authorized to teach vocational students to teach high school students.

Section 38.14(3), Stats., empowers district vocational boards to contract with public educational institutions for instructional services. This power, however, must be exercised consistent with licensing laws.

Your reference to a conflict as state superintendent and as a member of the VTAE Board, of course, would not authorize disregard of licensing laws. In fact, there can be no conflict in the sense of one

position disqualifying performance of the other, inasmuch as the Legislature has provided that the Superintendent shall be a member of the VTAE Board. *See* sec. 15.94, Stats.

I am persuaded that high school students must be taught by teachers whose qualifications meet the standards of the Department. This is not to say that vocational teachers necessarily may not qualify to teach health occupation courses to high school students. This is to say, however, that the decision whether the vocational teachers are so qualified rests with the Superintendent of Public Instruction under reasonable standards, consistent with statutes. The Legislature expressly provided that instruction "elsewhere than at school may be substituted for school attendance" provided the substitute instruction is "approved by the state superintendent as substantially equivalent to instruction given to children of like ages in the public or private schools." Sec. 118.15(4), Stats. Section 118.19, Stats., enumerates specific criteria for licensing teachers of public school students, and also recognizes that the Superintendent has power to specify by rule any other needed training. Sec. 118.19(3)(a), Stats. *Also see*, sec. 115.28 (7)(a), Stats.

In approving vocational teachers for high school students, the Superintendent must follow the criteria specifically enumerated in sec. 118.19, Stats. In addition, the Superintendent must have some reasonable basis for concluding that the overall educative purposes of the Wisconsin Legislature will adequately be served in recognizing vocational teachers as suitable for high school instruction. While the Superintendent must comply with the standards enumerated in sec. 118.19, Stats., it is not necessary to invariably impose on vocational teachers all the additional requirements that may be imposed on the elementary and high school teachers licensed by the Department. The decision whether to recognize the qualifications of vocational teachers rests in the sound discretion of the Superintendent.

I note that the Department already by rule has set forth a procedure for issuing special permits and licenses for unique situations. Wis. Adm. Code sections PI 3.01 and 3.02. The Department could provide for a similar special licensure to make use of vocational schools and their teachers, provided such rule is consistent with the statutory minimum requirements and otherwise reflects the Superintendent's exercise of sound discretion.

In conclusion, I adhere to my previous opinion that vocational school teachers of high school students must be licensed by the Department and that the Superintendent has power to so license them. The decision to so license must comply with sec. 118.19, Stats., and reflect a sound exercise of discretion.

BCL:CDH

Administrative Procedure; Witnesses; In administrative hearings, a subpoenaed witness has a duty to attend pursuant to the subpoena and to remain in attendance until excused. OAG 80-79

September 10, 1979.

JOSEPH W. WILEY, *Chairman*
Personnel Commission

You ask whether a commission hearing examiner designated under sec. 227.09(1), Stats., has the power to continue the terms of an original subpoena to compel the attendance of a witness at a continued or postponed hearing date.

In my opinion the answer is yes. More precisely, the subpoenaed witness must remain in attendance until excused from the subpoena.

Although your particular question relates to the Personnel Commission's function in administering the Fair Employment Act, secs. 111.31-111.37, Stats., as applied to state employees pursuant to Wis. Adm. Code sections Ind 88.035(2) and 88.08; ch. 196, sec. 129(4), Laws of 1977; and sec. 230.45(1)(b), Stats., I believe the answer is the same for any examiner designated under sec. 227.09(1), Stats.

Section 227.09(1), Stats., provides:

[A]n agency may designate an official of the agency or an employe on its staff or borrowed from another agency ... as a hearing examiner to preside over any contested case. ... Subject to rules of the agency, examiners presiding at hearings may:

....

(b) *Issue subpoenas authorized by law.*

....

(e) Regulate the course of the hearing.

Section 885.01, Stats., provides:

SUBPOENAS, WHO MAY ISSUE. The subpoena need not be sealed, and may be signed and issued as follows:

(1) By any judge or clerk of a court or court commissioner or municipal judge ... *to require the attendance of witnesses*

(2) By the attorney general or any district attorney or person acting in his stead, *to require the attendance of witnesses*

....

(4) By any arbitrator, coroner, medical examiner, board, commission, commissioner, examiner, committee or other person authorized to take testimony ... *to require the attendance of witnesses*

A subpoena is the vehicle for acquiring jurisdiction over a witness to compel his or her attendance and testimony. *See* 97 C.J.S. *Witnesses* sec. 20, p. 370; *Timson v. Weiner*, 395 F. Supp. 1344, 1348 (D.C. Ohio 1975); *Commonwealth v. Wilson*, 158 Pa. Super. 198, 44 A.2d 520, 522 (1945); and *Seattle, L. S. & E. Ry. Co. v. Union Trust Co.*, 79 F. 179, 187 (9th Cir. 1897). Once jurisdiction over the person is acquired, the person must remain in attendance until excused. As stated in 97 C.J.S. *Witnesses* sec. 20, p. 371:

Continued attendance under original subpoena. As a general rule, witnesses may be compelled to attend on court until dismissed by the court or the party who summoned them. So a witness who has once been duly served with a subpoena, and who attends in obedience thereto, must remain, if he is wanted, after the day named in the subpoena for his attendance, without being served with a new subpoena; and it has been held that he is required to attend from term to term, or at the time to which the trial is continued or postponed

Also see 81 Am. Jur. 2d *Witnesses* sec. 5, p. 30 (“[i]t is the duty of every witness to attend court when, and as long as, commanded”), and *Philler v. Waukesha County*, 139 Wis. 211, 213, 120 N.W. 829 (1909) (“[t]he duty ... is to attend as long as commanded”). Even

where the original date in the subpoena was continued to a later date, “[i]t was the duty of the [prospective witness] to respond to the subpoena and to remain ... until excused by the court or by the government’s representatives.” *Blackmer v. United States*, 284 U.S. 421, 443 (1931). A subpoenaed person has a “continuing obligation,” and a telephone call notice from a prosecutor of a later date than that in the subpoena continued the obligation to appear at the later date. *In re Ragland*, 343 A.2d 558, 560 (D.C. 1975). *Accord, In re Grand Jury Subpoenas*, 363 So. 2d 651, 654 (La. 1978).

Since it is the subpoena which generates the duty to remain in attendance, there is no need to examine the question whether the Legislature expressly empowered hearing examiners to continue subpoenas. It suffices to note that the Legislature empowered hearing examiners to issue subpoenas. The subpoena itself imposes the duty to remain until excused. Certainly the Legislature gave no indication that a subpoena means one thing in the courts and something else in the administrative agencies. Quite the contrary. Section 885.01, Stats., establishes uniform terms for subpoenas, whether issued by courts, hearing examiners, or privately retained arbitrators. The duty to attend, generated by the subpoena, is the common denominator to all subpoenas, *see* sec. 885.01 (1), (2) and (4), Stats., and, according to the case law, the duty to attend entails the duty to remain in attendance until excused.

Absurd results would follow if in administrative hearings the duty to attend did not include the duty to remain until excused. If the duty to remain does not continue from day to day, it should not continue from hour to hour, or even from minute to minute. Correctly understood, the hour and date specified in a subpoena only mark the beginning of the duty to attend; they do not mark the end or the middle of that duty. The length of the duty to remain is a different matter and, as seen, it continues until the witness is excused.

For these reasons, it is my opinion that a witness subpoenaed by a hearing examiner to attend an administrative hearing has a duty to remain in attendance until excused. The examiner has the power to “[r]egulate the course of the hearing,” sec. 227.09(1)(e), Stats., which unquestionably includes the power to regulate the order of the witnesses. That order cannot always be known at the time subpoenas are issued, and the smooth functioning of the process requires that the examiner be enabled to hear witnesses without being hamstrung

by the minute of the day marked in the subpoena. The examiner can continue the hearing from day to day for appropriate reasons, and once jurisdiction over the person is acquired through the subpoena the witness must attend at such subsequent times as directed by the examiner and until excused from the subpoena.

BCL:CDH:JEZ

Police; Towns; Powers of town constable are largely statutory and include power to make arrests for violations of state traffic laws and enforce town traffic ordinances. Town board has only limited control over such officer and cannot restrict such officer's statutory law enforcement activities. Annual town meeting of electors establishes compensation in lieu of statutory fees. OAG 81-79

September 10, 1979.

PAUL M. CORNETT, *District Attorney*

Shawano and Menominee Counties

You request my opinion with respect to five questions relating to the office of town constable.

1. Does sec. 60.54(6), Stats., authorize a town constable to issue traffic citations?

Section 60.54(6), Stats., provides that a constable shall “[c]ause to be prosecuted all violations of law of which he has knowledge or information.”

This and other statutory provisions empower a duly elected town constable to issue traffic citations and to make arrests for traffic violations of state laws occurring within his or her town, and of town ordinances of his or her respective town which are enacted in conformity with state regulations pursuant to sec. 349.06, Stats.

2. Can a constable's privately owned vehicle constitute an “authorized emergency vehicle” as defined in secs. 340.01 and 346.03, Stats.?

I am of the opinion that it can. Section 340.01(3)(a), Stats., defines "authorized emergency vehicle" as including "[p]olice vehicles, whether publicly or privately owned." Section 346.03, Stats., need not be quoted here but allows the operator of an authorized emergency vehicle certain privileges when engaged in activities in line of duty.

3. In the absence of a request from the sheriff, may a constable respond to complaints of crimes occurring within his township?

The answer is yes. The constable is only subject to direction of the sheriff in some areas. Such officer has broad statutory powers which he or she may exercise without direction by the sheriff. *See* secs. 59.24(1), 60.54(1), (3), (5), (6), and (7), 170.05, 171.03-171.06, 172.06, 173.05, 173.06, 176.36, and 947.06, Stats.

4. May the town board limit the authority and duties of the constable by resolving:

a. That no vehicles of constables are to be authorized as emergency vehicles pursuant to sec. 340.01(3), Stats.

b. Directing that constables are not authorized to enforce the state traffic code or any traffic ordinance enacted in conformity therewith.

c. That constables are to be paid only for calls authorized by the town board relating to town ordinances and those duties expressly referred to in the statutes?

The answer is no. In most areas the town board does not direct the town constable in the exercise of such officer's duties which are in large part statutory. Under sec. 60.29(8m), Stats., a town board can delegate the duty of maintaining a jail to a constable. A town board, pursuant to sec. 60.29(7) and (8), Stats., can increase law enforcement within a town by appointing police officers who are subject to the direction and control of the town board. *Adamczyk v. Caledonia*, 52 Wis. 2d 270, 190 N.W.2d 137 (1971).

5. If compensation of a constable is fixed at an annual meeting of the town board on a per-call basis, can the town board limit the amount of calls for which a constable can be compensated during his term?

The answer is no. The annual town meeting of the electors of the town, rather than the town board, has power to establish the number of constables to be elected in a town and to provide compensation therefor. *See* secs. 60.07, 60.18, and 60.19(1), Stats. There is doubt whether a town meeting acting pursuant to sec. 60.18(11), Stats., can establish compensation on a per-call basis or per diem basis. That section provides that the electors of a town of the annual town meeting may:

Compensation of constable. To set the total annual compensation of the town constable in lieu of all fees and mileage or any portion of such fees and mileage. The compensation established shall not be increased nor diminished during the officer's term and shall remain the same unless changed by further action of an annual town meeting. Any constable on a salary basis or part fees and part salary shall collect all fees appertaining to his office and file with the town clerk a complete record of all fees received, annually or at such times as the town board may require, and shall remit all such fees not specifically reserved to him to the town treasurer at least once each month.

Statutory fees for constables are set forth in sec. 60.55, Stats.

In closing, and for your use with respect to future requests, I direct your attention to the guidelines to be observed by district attorneys and county corporation counsel when requesting an opinion of the Attorney General which are set forth in 62 Op. Att'y Gen. Preface (1973).

BCL:RJV

Constitutionality; Radar Detector; Proposed legislation to create sec. 347.483 of the statutes, which would prohibit the use and sale of radar detectors meets due process requirements and is constitutionally sound. Moreover, such a law would not violate the commerce or supremacy clauses of the United States Constitution. OAG 82-79

September 10, 1979.

MARCEL DANDENEAU, *Chief Clerk*
Wisconsin Assembly

The Assembly Committee on Organization has requested my opinion on the constitutionality of 1977 AB 987, an act to create sec. 347.483 of the statutes, which would prohibit the use and sale of radar detectors.

The proposed legislation provides in part:

SECTION 1. 347.483 of the statutes is created to read:
347.483 RADAR DETECTING DEVICES.

....

(2) **Use prohibited.** Except as provided in sub. (4), no person may operate on a highway a motor vehicle equipped with a radar detecting device. The presence of any radar detecting device in or upon a motor vehicle upon a highway constitutes prima facie evidence of a violation of this section.

(3) **Sale prohibited.** Except as provided in sub. (4), no person may sell or offer for sale in this state any radar detecting device.

Subsection (4) exempts the receipt of licensed frequencies, the use of detectors by law enforcers, and the transportation of detectors for lawful use or sale if properly stored.

First you ask whether the statutory presumption that "presence of any radar detecting device in or upon a motor vehicle upon a highway constitutes prima facie evidence of a violation" is unconstitutional.

My answer is "no."

Section 903.01, Stats., governing presumptions in general, states that:

Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is

directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

Although the cases dealing with the constitutionality of various statutory presumptions are conflicting, the United States Supreme Court consistently has held that due process in criminal cases requires a certain rational connection between the fact proved and the fact presumed therefrom. At least, the presumed fact must flow "more likely than not" from the proved fact. *Barnes v. United States*, 412 U.S. 837, 843 (1973); *Leary v. United States*, 395 U.S. 6, 44-45 (1969); *Tot v. United States*, 319 U.S. 463, 467 (1943). The Wisconsin Supreme Court has labeled forfeiture provisions "penal." *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 670, 239 N.W.2d 313 (1976). And, while the court has held that forfeiture actions are essentially civil in nature, due process requires that the state carry at least a burden of persuasion by the "clear and convincing" standard. *City of Neenah v. Alsteen*, 30 Wis. 2d 596, 142 N.W.2d 232 (1966); sec. 345.45, Stats. (1977).

Thus, the Legislature is not free to allocate the burden of persuasion to the defendant as it could in a purely civil action. *Lavine v. Milne*, 424 U.S. 577, 585 (1976). Where the state does bear the burden of demonstrating guilt, statutory presumptions aimed at assisting in that burden must satisfy certain standards of reliability. *Id.* 424 U.S. at 585 n. 10. In my opinion, the "more likely than not" test for presumptions is consistent with the state's burden of proving guilt of the offense by clear, satisfactory and convincing evidence.

Two presumptions are set up by sec. 347.483, Stats.: first, that the existence of an automobile upon the highway is proof of its operation on the highway; second, that the presence of a radar detector in or on the vehicle is prima facie evidence that the vehicle was equipped with a radar detector.

Under the "more likely than not" test, the first presumption is not very troublesome. The existence of a vehicle on a highway is consistent with the conclusion that the vehicle was operated on the highway.

It is also my opinion that the presumption that the presence of a radar detector in or on the vehicle is prima facie evidence that the vehicle is equipped with the device is constitutionally sound. The presumption has the effect of requiring a defendant to produce evidence showing that it is more probable than not that defendant's vehicle was

not equipped with a detector, after the state produces evidence showing that a detector was present in the vehicle. The presumption is not rendered unconstitutional because in a particular case the presence of a radar detector in or upon a vehicle does not establish "more likely than not" that a vehicle is equipped with such a device. The standard established in *Leary* and *Tot* is one of probability based on all situations where a radar detector is present in or upon a motor vehicle. Thus, in judging whether the presumption in the proposed statute is constitutional, one must ask whether the presumed fact—that the vehicle is equipped with a radar detector—flows "more likely than not" from the proven fact of presence of a radar detector. I find no difficulty applying this test in relation to the proposed statute. The presumed fact, that the vehicle is equipped with a radar detecting device, flows more likely than not from the proved fact: the presence of the device in the vehicle.

The Virginia Supreme Court, in *Crenshaw v. Commonwealth*, 219 Va. 44, 245 S.E.2d 243 (1978), was confronted with language in a Virginia statute almost identical to the language in the proposed statute that creates the presumption that a vehicle is equipped with a radar device upon proof of the presence of such a device. In *Crenshaw*, the court held the following statutory presumption invalid as a denial of due process:

"The presence of any such prohibited device or mechanism in or upon a motor vehicle upon the highways of this State shall constitute prima facie evidence of the violation of this section. The Commonwealth need not prove that the device in question was in an operative condition or being operated."

245 S.E.2d at 245 n. 1. The court's holding was based on its belief that the effect of the second sentence, when read with the paragraph as a whole, was to exclude from the trier of fact's consideration any evidence concerning "operative condition," thereby rendering the presumption conclusive. Had the second sentence of the presumption been excised, the court in *Crenshaw* clearly would have upheld its validity. 245 S.E.2d at 246.

The presumption in the proposed statute is rebuttable. Where the operator of a motor vehicle believes the presumption inappropriate, he or she can show that the vehicle was not "equipped" because the radar detector was inaccessible to the driver, suffered from a

mechanical defect which rendered it inoperable, etc. In cases where the vehicle is not "equipped" with a detector, the vehicle's occupant is obviously in the best position to produce evidence to that effect, and the presumption operates to compel such evidence. I conclude that the presumption in question meets due process requirements and is constitutionally sound.

Second, you ask whether the law would violate the interstate commerce clause alone or coupled with the federal supremacy clause of the United States Constitution. The answer is no.

I find no federal law enacted under the commerce clause relative to radar detectors. Thus there is no problem of the state's law conflicting with federal law under both the commerce clause, art. 1, sec. 8, para. 3 and the supremacy clause, U.S. Const. art. VI, para 2.

The commerce clause, even in the absence of federal legislation in this area, consistently has been construed to prevent the states from erecting barriers to the free flow of interstate commerce. *Great Atlantic and Pac. Tea Co., Inc. v. Cottrell*, 424 U.S. 366, 370-71 (1976); *Cooley v. Board of Wardens*, 53 U.S. 299 (12 How. 299) (1852). Nonetheless, the states are empowered to enact legislation serving legitimate state interests if it does not cause an impermissible burden on interstate commerce. *Gibbons v. Ogden*, 22 U.S. 1 (9 Wheat. 1) (1824). The considerations relevant to reaching a balance between the overlapping federal and state interests were summarized most recently by the United States Supreme Court in *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978). Citing earlier cases with approval, the Court stated that, "in no field has the deference to state regulation been greater than that of highway safety regulation," and a statute will be overturned only where "the total effect of the law as a safety measure ... is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it." 434 U.S. at 443. My conclusion, based on *Raymond* and the cases cited therein, is that the legislation in its present form would not violate the commerce clause. The state has a legitimate interest in safety. If there is evidence that the law contributes to highway safety, it would be entitled to a strong presumption of validity. The law would have to interfere seriously with the free flow of commerce before it would be considered an impermissible burden. *Raymond*, 434 U.S. at 444-45. That

the law would require those interstate travelers who use radar detectors to render their vehicles "unequipped" appears not to present a burden of any constitutional magnitude. Furthermore, the Legislature has minimized the burden by removing from the scope of the law the transportation of detectors for lawful use or sale if the device is stored in an enclosed storage compartment of the vehicle. I must add one proviso, however. Legal conclusions in this area, which depend on the balance between the legitimacy of state legislation and the burden on commerce, are drawn on empirical information. Since I lack this information, my answer is necessarily somewhat speculative.

Your third question is whether federal law, specifically the Federal Communications Act of 1934, 47 U.S.C.A. sec. 151, *et seq.*, has preempted all regulation of radio transmissions. The answer is no.

I find nothing in this Act evincing a congressional intent to prevent the states from regulating the receipt of police radar. The scope of the Act is limited to interstate communication by radio. 47 U.S.C.A. sec. 152(a). Intrastate regulation of radio is explicitly removed from the Federal Communications Commission's jurisdiction. 47 U.S.C.A. sec. 152(b)(1). I see no conflict between the proposed law and the purposes of the federal act. 47 U.S.C.A. sec. 151. Highway safety measures are enacted under the historic police powers of the states, which are not to be superseded by federal act unless that was the clear and manifest purpose of Congress. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218, 230 (1947).

Fourth, you ask whether the law would interfere with the lawful operation of radio receivers receiving lawfully licensed frequencies, such that it would be unconstitutionally vague or overbroad. I have difficulty understanding the question, particularly since subsec. (4)(a) of the proposed statute specifically provides that the law does not apply to "any receiver of radio waves of any frequency licensed by any federal agency or agency of this state."

I imagine that your concern is whether the definition of "radar detecting device" includes only those devices intended to be prohibited by the legislation. I am unable to respond to this question as an answer requires technical information not available to me.

BCL:WHW:scj

County Board; Public Welfare; Powers of county board and county board of public welfare as to establishment of and appointment to positions in the public welfare department, concerned with administration of aid to dependent children, discussed. OAG 84-79

September 12, 1979.

THOMAS SAZAMA, *District Attorney*
Chippewa County

Your predecessor inquired:

1. Is county board approval required, in a county having a public welfare department organized under sec. 46.22, Stats., before the county board of public welfare can appoint employes to administer the functions of the department?
2. Is county board approval required to authorize the county clerk to pay such employes?

The request does not expressly differentiate between approval necessary for (1) the establishment of positions and (2) appointment to positions. Therefore, the questions are not subject to a simple yes or no answer.

The Chippewa County Welfare Department is organized under sec. 46.22, Stats. Section 46.22, Stats., embodies the concept that welfare is a matter of statewide concern subject to state standards but is administered by the counties.

65 Op. Att'y Gen. 163 (1976) states that a county board is without power to hire or fire employes of a county welfare department but that such power belongs to the county board of public welfare to be exercised in compliance with merit system rules promulgated by the Department of Health and Social Services. That opinion, however, failed to recognize the change in sec. 49.50(2), Stats., effected by ch. 307, Laws of 1975. Under the amended statute, claim can be made that the state department merit system rules are limited to employes concerned with the administration of aid to families with dependent children. However, in view of sec. 46.22(6), Stats., it is my opinion that the merit system rules may be made applicable to all personnel

within the county department of public welfare. That section provides: "Section 49.50(2) to (5) shall be applicable to the county department of public welfare created by this section."

Insofar as employes concerned with administration of aid to families with dependent children are concerned, sec. 46.22, Stats., is a matter of statewide concern; and compliance with merit system requirements promulgated under sec. 49.50(2), Stats., would, by express language, be mandatory, unless the county had been delegated the Department's authority as to maintenance of a merit system as permitted by sec. 49.50(5), Stats., and a county board could not utilize power under sec. 59.025(2), (3), and (4), Stats., to exercise complete control in the area.

Section 46.22(3), Stats., provides that the county board shall have power to "review and approve, reject or revise by majority vote the annual budget of the county department of public welfare." It, however, is for the director to recommend and the county board of public welfare to determine how many positions required by the Department of Health and Social Services, or higher number, if any, authorized by the county board, shall be utilized *and to make appointment to such positions*. The county board fixes the salaries of such employes. Under sec. 59.15(2)(c), Stats., *the county board can establish the number of positions* in the county department of public welfare and can fix the salaries for such positions, *but such action cannot be in derogation* of rules and regulations of the Department of Health and Social Services established pursuant to sec. 49.50(2)-(5), Stats. The opinion request does not state whether the merit system rules established by the Department of Health and Social Services establishes the number of various positions which are required for a county of the size of Chippewa.

Where the county board has approved the annual budget for a county department of public welfare, no further action of the whole board is necessary to authorize the county clerk to pay employes appointed by the county board of public welfare to authorized positions. Modification of the annual budget for the county welfare department requires a two-thirds vote of the entire membership of the county board. Sec. 65.90(5), Stats. Pay vouchers certified by the director are entitled to approval by the county board preaudit committee if within the budget authorized; and to approval by the county clerk and county board chairman, under sec. 59.17(3), Stats., if

within the budget authorized and funds are available; and to payment by the county treasurer pursuant to sec. 59.20(2), Stats., if proper order is presented.

I trust that the above will be of aid in resolving the problem you are currently concerned with.

BCL:RJV

Natural Resources, Department Of; Words And Phrases; Without more explicit direction from the Legislature, current statutory or case authority does not authorize the Department of Natural Resources to establish a wetlands activity permit program, although many marshes or wetlands can and should be brought within existing water regulatory statutes. OAG 85-79

September 17, 1979.

ANTHONY S. EARL, *Secretary*
Department of Natural Resources

You have asked questions concerning the authority of the Department of Natural Resources under current law to regulate public and private activity on "wetlands." Your questions can be rephrased into three basic questions:

1) Does the Department have authority to adopt rules which establish a wetlands activity permit program under the broad authority granted the Department in light of rejection in previous legislative sessions of amendments to the statutes governing the Department's powers which would have created a wetlands activity program requiring permits for some or all of the following:

a) Draining, flooding, dredging, excavation, removal of soil, mud, sand, gravel or other aggregate from any marsh.

b) Dumping, filling or depositing of any soil, stones, sand, gravel, mud, rubbish, or fill of any kind either directly or indirectly.

c) Erecting any structures other than duck blinds.

- d) Constructing roads or driving pilings.
- e) Discharging pollutants into a marsh.
- f) Any other activity which impairs the natural functions of marshes.

2) Does the Department have authority to adopt a wetlands activity, acquisition, and preservation program not involving permits *per se* and how does such a program relate to other departmental programs?

3) Does the Department have the authority, by rule, to define the word "marsh" which occurs in sec. 144.01(1), Stats., by adopting a definition such as "Marsh—a marsh is an area where groundwater is at or near the surface much of the year or where any segment of plant cover is defined as 'aquatic' according to N.C. Fassett's *Manual of Aquatic Plants*," or defining "marsh" using the definition of "wetlands" contained in sec. NR 1.95(3), Wis. Adm. Code?

As background, of an estimated 10 million acres of wetlands in Wisconsin's presettlement days, about 2.5 million acres remain. Approximately 1.6 million acres of these wetlands are privately owned.¹ Your staff informs me that more than 80% and perhaps as much as 90% of these wetlands are dissociated from navigable waters in the sense that there is no direct surface water connection at any time during the year.

You note that your Department has been presented with a petition for the adoption of wetlands management rules and that your Department has already adopted Wis. Adm. Code section NR 1.95, entitled "Wetland preservation, restoration and management." This section defines wetlands as "those land areas characterized by surface water or saturated soils during at least part of the growing season such that moist soil vegetation or shallow water plants can thrive." Section NR 1.95(4) directs DNR to emphasize wetlands in its land acquisition program, preserve "by every lawful means" wetlands already under departmental control, and support legislative and cooperative efforts

¹ "Wetland Use in Wisconsin: Present Policies and Regulations," Wisconsin Department of Natural Resources (1976), p. 5.

to maintain Wisconsin's other wetlands. Section 1.95(5) further directs DNR to "fully exercise all of its authority under the law to ... [p]rotect wetlands from all environmentally incompatible uses, activities and substances," and to "[r]estore wetlands which were unlawfully altered."

Two observations must precede a discussion of DNR's wetlands management authority. First, power to regulate publicly owned lands must be distinguished from power to regulate privately owned lands. Section 23.11(1), Stats., empowers DNR to:

[T]ake the general care, protection and supervision of all ... lands owned by the state or in which it has any interests, except lands the care and supervision of which are vested in some other officer, body or board; and said department is granted such further powers as may be necessary or convenient to enable it to exercise the functions and perform the duties required of it by this chapter and by other provisions of law.

Presumably, sec. 23.11(1), Stats., vests DNR with power to prevent harm to and restore state-owned wetlands in the exercise of its discretion. Your concern, then, relates to DNR authority over privately owned lands and not public lands which DNR may now own or acquire in the future.

Second, we are dealing with what has traditionally been characterized as *land*, even though some of this land may be periodically covered with water.

I. PERMIT PROGRAM

Your first question, as rephrased, asks whether the Department has authority to adopt rules which establish a wetlands activity permit program. If your Department has the authority to adopt such a program, that authority must derive from either the statutes or the constitution.

A. The Statutes

An administrative agency has no power except those "powers which are expressly conferred or which are fairly implied from the four corners of the statute under which it operates." *State (Dept. of Administration) v. ILHR Dept.*, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977). This maxim is stated another way in sec.

227.014(2)(a), Stats., authorizing agency rules “necessary to effectuate the purpose of the statutes, but such rules are not valid if they exceed the bounds of correct interpretation.” *See also: American Brass Co. v. State Board of Health*, 245 Wis. 440, 451, 15 N.W.2d 27 (1944); *Josam Manufacturing Co. v. State Board of Health*, 26 Wis. 2d 587, 601, 133 N.W.2d 301 (1965); *Mid-Plains Telephone, Inc. v. Public Service Commission*, 56 Wis. 2d 780, 786, 202 N.W.2d 907 (1973); *Wisconsin’s Environmental Decade, Inc. v. Public Service Comm.*, 69 Wis. 2d 1, 16, 230 N.W.2d 243 (1975).

The Legislature has obviously given the Department broad control over the “waters of the state.” Sec. 144.025(2)(a), Stats. The Legislature has defined “waters of the state” to include “marshes ... and other surface or ground water, natural or artificial, public or private.” Sec. 144.01(1), Stats. In sec. 144.025(1) the Legislature has stated that the purpose of the chapter is “to grant necessary powers and to organize a comprehensive program ... for the enhancement of the quality management of all waters of the state, ground and surface, public and private.” The Legislature, in the same section, also directs that rules and orders promulgated by your Department are to be “liberally construed in favor of the policy objectives of [the] act.”

In the operative sections of ch. 144 no express mention is made of a wetlands activity permit program *per se*. There is, however, a mosaic of sections from which it might be argued that authority for such a program may be inferred. Under sec. 144.025(2)(b), for example, the Department is authorized to adopt rules establishing water quality standards for waters of the state. Section 144.025(2)(c) empowers the Department to issue general orders and adopt rules relating to systems, methods and means for avoiding pollution of the waters of the state. Finally, the Department has authority under sec. 144.025(2)(d) to issue special orders requiring particular owners to achieve specified results toward controlling pollution of the waters of the state. Waters of the state include “marshes.” Sec. 144.01(1), Stats.

“Pollution” is defined in sec. 144.01(11) to include “contaminating or rendering unclean or impure the waters of the state [including ‘marshes’] or making the same injurious to public health, harmful for commercial or recreational use, or deleterious to fish, bird, animal or plant life.”

Moreover, other sections of the statutes explicitly grant DNR extensive authority in water management matters, some of which authority is not presently exercised to the fullest extent: the navigable waters protection law, sec. 144.26, Stats.; flood control, ch. 87, Stats.; DNR approval procedure for drainage district activities affecting navigable waters, sec. 88.31, Stats.; the extensive enumeration of water pollution control measures in ch. 144, Stats., and Wisconsin's Pollutant Discharge Elimination System, ch. 147, Stats., to name a few. In addition, the definition of "navigability" undoubtedly encompasses areas which may appropriately be defined as "marsh" to bring them within the reach of chs. 30 and 31, Stats.

None of these statutes, however, can be construed as an explicit directive to the Department to establish an overall wetlands activity permit program. In the absence of an express grant of authority, the question of what powers may be "fairly implied" by an enabling statute must be addressed in light of the maxim that such statutes are to be "strictly construed to preclude the exercise of power which is not expressly granted," *Browne v. Milwaukee Board of School Directors*, 83 Wis. 2d 316, 333, 265 N.W.2d 559 (1978); *Racine Fire and Police Commission v. Stanfield*, 70 Wis. 2d 395, 399, 234 N.W.2d 307 (1975). And, if doubts remain, "any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority." *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 358, 190 N.W.2d 529 (1971).

Keeping these basic principles of statutory construction in mind, *State (DOA) v. ILHR Dept.*, *supra*, is particularly instructive in determining what powers may fairly be implied from sec. 144.025, Stats. The issue in that case was whether the director of the State Bureau of Personnel had exceeded his delegated authority by promulgating administrative rules which authorized absolute preferences for hiring women and minorities in state civil service. The rules were promulgated pursuant to sec. 16.08(7), Stats., which permitted the director to provide by rule for "exceptional methods" to employ the disadvantaged. Finding no express statutory grant of authority for the challenged rule, the supreme court then examined sources of implied power to use absolute hiring preferences. The court found no such implication arising from sec. 16.08(7), Stats., or any other statute, and declared the rules void *ab initio*, stating:

We conclude a grant of power to implement absolute preferences based upon sex or race is not implied by the language of sec. 16.08(7) or because the appellants claim such preferences are the only feasible method to accomplish the legislative purpose. Furthermore, other statutes contain statements which are clearly not consistent with the grant of such a power, and therefore there is at minimum a reasonable doubt of the existence of implied power to implement the drastic procedures of absolute preferences. Where such a reasonable doubt exists, that doubt must be resolved against the implied grant.

State (Dept. of Administration) v. ILHR Dept., 77 Wis. 2d at 140.

In my opinion at least four sources of reasonable doubt contravene any implied DNR power to establish by rule the proposed wetlands activity permit program. First, other statutes establishing permit programs enacted to protect the state's water quality suggest that where the Legislature has intended to bestow regulatory authority upon DNR, it has expressly done so. Foremost among these regulatory mechanisms is ch. 147, Stats., Wisconsin Pollutant Discharge Elimination System. Chapter 274, Laws of 1977, did grant the Department authority to *map* wetlands, but this delegation of power falls short of the permit program contemplated in your request.

Second, the enumeration of powers granted to DNR in sec. 144.025(2)(a) through (t), Stats., emphasizes by exclusion that if the Legislature had intended to vest DNR with power to require permits for alterations to wetlands, it would have done so. In *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974), this principle was stated as follows:

Where there is evidence of such enumeration [of agency powers], it is in accordance with accepted principles of statutory construction to apply the maxim, *expressio unius est exclusio alterius*; in short, if the legislature did not specifically confer a power, it is evidence of legislative intent not to permit the exercise of the power.

Third, and most persuasive, the Legislature's previous rejection of wetlands activity permit legislation negates the existence of an *implied* legislative delegation of such authority to DNR. The Legislature rejected proposed wetlands protection programs in 1973 and 1975. Only the wetlands mapping bill survived the 1977 legislative

session. The Legislature's repeated rejection of wetlands activity permit legislation in 1973, 1975 and 1977 speaks for itself.

In 1968, your predecessor requested my opinion on the statutory authority of the conservation commission to limit by rule the number of hunters in any given area. Noting that successive legislative sessions from 1949 to 1967 had rejected bills authorizing the commission to adopt controlled hunting regulations, I stated:

The fact that the legislature has seen fit to specifically authorize controlled hunting in several instances (i.e., sec. 29.107, 29.174(2)(b), 29.571, Stats.) is inconsistent with the view that secs. 23.09 and 29.174, Stats., repose this power in the commission. The legislature is, after all, presumed to have full knowledge of the existing condition of the law when it acts. *Town of Madison v. City of Madison*, (1955) 269 Wis. 609, 70 N.W.2d 249.

57 Op. Att'y Gen. 31, 35, 36 (1968).

We must presume that when the Legislature refuses to delegate wetlands management authority, it is well aware of the extent of DNR's powers in this area and simply intends *not* to grant additional authority. *Ford v. Wisconsin Real Estate Examining Board*, 48 Wis. 2d 91, 109, 179 N.W.2d 786 (1970); *Cook v. Industrial Commission*, 31 Wis. 2d 232, 243, 142 N.W.2d 827 (1966). *Wisconsin's Environmental Decade v. Public Service Commission*, 81 Wis. 2d 344, 351, 260 N.W.2d 712 (1978), adds this caveat:

Public agencies are granted a great deal of latitude in regulatory matters, because of the expertise of the agencies. However, actions of the agency will not be allowed to prevail when they conflict with the legislative history or intent. Moreover, decisions of an agency like the present one, which deal with the scope of the agency's own power, are not binding on this court.

Finally, the best argument against the adoption by rule of a wetlands activity permit program is that you have not done so though the arguable power to do so has existed and your practical construction of the statute, in this case by inaction, would likely, along with the other factors mentioned above, be given great weight in any court test of your powers. I believe you had a fighting chance of sustaining your power to adopt such a program if you had acted on my informal

advice that I would defend the Board and the Department if you did so. In the absence of action on your part, I am constrained to answer the theoretical question concerning your statutory power in the negative.

B. The Constitution and the Public Trust Doctrine

Because the statutes do not authorize a wetlands activity permit program, we must determine whether the public trust doctrine provides an independent basis for the adoption of such a program.

The public trust concept is rooted in Wis. Const. art. IX, sec. 1, which reads exactly as the provision in the Northwest Ordinance of 1787 regarding navigable waters:

JURISDICTION ON RIVERS AND LAKES; NAVIGABLE WATERS.
SECTION 1. The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

The significance of the Northwest Ordinance is that northwest territory lands, including Wisconsin, were ceded to the union only on condition that the navigable waters within them remain "common highways and forever free." The state's obligation to protect its waterways, then, began at statehood and continues as a constitutional limitation on public and private use of navigable waters within Wisconsin. See *Muench v. Public Service Commission*, 261 Wis. 492, 53 N.W.2d 514, 55 N.W.2d 40 (1952).

Earliest Wisconsin cases characterize the state's ownership in navigable waters as a public trust to be administered for the benefit of the people of Wisconsin. *Walker v. Shepardson*, 4 Wis. 495 (1856); *Olson v. Merrill*, 42 Wis. 203 (1877); *McLennan v. Prentice*, 85 Wis. 427, 55 N.W. 764 (1893); *Priewe v. Wis. State Land and Improvement Co.*, 93 Wis. 534, 67 N.W. 918 (1896); *Village of Pewaukee v. Savoy*, 103 Wis. 271, 79 N.W. 436 (1899); *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 84 N.W. 855 (1901); *Diana Shooting Club v. Husting*,

156 Wis. 261, 145 N.W. 816 (1914); *Muench v. Public Service Commission, supra*; and *Wisconsin's Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 271 N.W.2d 69 (1978).

Although the early cases stressed the state's responsibility to protect navigable waters for commerce, the Wisconsin Supreme Court over the years has expanded the *range* of public rights in navigable waters beyond commercial navigation to include recreational uses. *Nekoosa-Edwards Paper Co. v. Railroad Comm.*, 201 Wis. 40, 46, 228 N.W. 144, 229 N.W. 631 (1930); *Muench v. Public Service Comm., supra*. The definition of "navigable" has similarly broadened so that a stream is navigable in fact if capable of floating a craft of the shallowest draft for recreational purposes; moreover, the stream need not even be navigable year round, since "the test is whether the stream has periods of navigable capacity which ordinarily recur from year to year, e.g., spring freshets, or has continued navigable long enough to make it useful as a highway for recreation or commerce." *DeGayner & Co. v. DNR*, 70 Wis. 2d 936, 945, 946, 236 N.W.2d 217 (1975).

What has not changed, however, is the principle that the Legislature, not state agencies, administers the trust. *Milwaukee v. State*, 193 Wis. 423, 449, 214 N.W. 820 (1927).

The Legislature may delegate some of its trust duties to administrative agencies and governmental units, and has done so. *See, for example*, chs. 30 and 31, Stats., concerning structures, alterations and activities upon navigable waters; ch. 33, Stats., public inland lake protection and rehabilitation; ch. 88, Stats., drainage districts; and ch. 92, Stats., soil and water conservation districts. Because the Legislature is the trustee, however, any delegation of trust responsibilities must come from the Legislature. Those trust responsibilities cannot be created or assumed by an administrative agency, no matter how meritorious the purpose. It is precisely that lack of legislative direction that prohibits DNR's exercise of trust powers to regulate privately owned wetlands, as has been discussed above.

Historically, the trust doctrine has been a basis along with the police power for state regulation of waters. *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). However, it has never been used to create a power in any agency not already clearly residing in that agency. This is not to suggest that should the Legislature grant

express power for a wetlands activity program to DNR that the trust doctrine would be irrelevant; indeed, I believe that the public trust doctrine would provide strong support for such a program once enacted.

II. NON-PERMIT PROGRAMS

You have also asked me about non-permit programs and other powers. I have already pointed to some of these powers above. While I have concluded that no wetlands permit program authority exists *per se* there appears to be broad non-permit authority in the Department to acquire, preserve, and protect wetlands. In addition, permit programs which are not specifically directed at wetlands but which affect such wetlands directly and indirectly could be administered so as to grant substantial amounts of protection to this portion of the "waters of the state."

For example, Wis. Adm. Code section NR 151.12(4)(f) prohibits the location of solid waste sites in wetlands. Similarly, sec. 88.31, Stats., regulating drainage district activities affecting navigable waters, and chs. 30 and 31, regulating structures and activities in navigable waters could be administered to prevent or at least minimize damage to wetlands by prohibiting or regulating drainage, fills and drawdowns detrimentally affecting wetlands. Although the Department has not so administered the statutes I am also convinced that filling wetlands falls in many instances within the definition of pollution of "waters of the state," and rules and special orders under sec. 144.025(2)(c) and (d) and ch. 147, Stats., could be used to regulate at least some of such activity. Finally, there are wetlands which directly affect water quality in connected or *adjacent* navigable waters where water quality standards set for the navigable body could be used to regulate activity in the related wetlands. NR 1.95 is, in itself, a step in this direction.

III. DEFINITIONS

Finally, you ask about the authority to define "marsh." The short answer is that an administrative agency always has the power to define terms to give substance to the powers delegated to it by the Legislature as long as the definition does not "exceed the bounds of correct interpretation," sec. 227.014(2)(a), Stats.; *State v. Grayson*, 5 Wis. 2d 203, 210-211, 92 N.W.2d 272 (1958). I would consider that either of the definitions proposed would be within your discretion

and that you could go further, depending on the purpose of the program, to define "marsh" or "wetland" to exclude areas of less than a certain size from such definition.

BCL:DJH:MS

Automobiles And Motor Vehicles; Criminal Law; Proof that a driver knew or should have known that he collided with an unattended vehicle is not necessary for a conviction for violation of sec. 346.68, Stats., requiring that the driver of the colliding vehicle stop and locate the owner of the unattended vehicle or leave a note on the unattended vehicle containing the name and address of the colliding driver. OAG 86-79

September 17, 1979.

MARY LIEDTKE, *District Attorney*

Price County

Your predecessor asked:

Is it necessary that the Court make a finding that the defendant must know, or in the exercise of ordinary care should have known, that he collided with an unattended vehicle in order to get a conviction under Section 346.68?

That section reads:

DUTY UPON STRIKING UNATTENDED VEHICLE. The operator of any vehicle which collides with any vehicle which is unattended shall immediately stop and shall then and there either locate and notify the operator or owner of such vehicle of the name and address of the operator and owner of the vehicle striking the unattended vehicle or shall leave in a conspicuous place in the vehicle struck, a written notice giving the name and address of the operator and of the owner of the vehicle doing the striking and a statement of the circumstances thereof.

In accordance with the following authorities, the answer is no. In order to obtain a conviction under sec. 346.68, Stats., proof of the

driver's knowledge that he or she collided with an unattended vehicle is not required.

On November 9, 1978, I issued 67 Op. Att'y Gen. 265 (1978). The opinion reads in part:

Although "the element of scienter is the rule rather than the exception in our criminal jurisprudence," *State v. Alfonsi*, 33 Wis.2d 469, 476, 147 N.W.2d 550 (1967), "[a] legislature may create a crime which requires no specific intent," *State v. Gould*, 56 Wis.2d 808, 810, 202 N.W.2d 903 (1973). In fact, the Wisconsin Supreme Court "has long recognized the existence of and, as a general matter, the propriety of legislative definitions of crime that omit any element respecting mental state beyond the requirement that the accused intended to do the act which is made a crime." *State v. Collova*, 79 Wis.2d 473, 480, 255 N.W.2d 581 (1977). "Wisconsin has abolished all common-law crimes, and the element of intent of the statutory crimes is only necessary when specified by statute." *Flowers v. State*, 43 Wis.2d 352, 360, 168 N.W.2d 843 (1969).

In *State v. Dried Milk Products Co-op.*, 16 Wis.2d 357, 114 N.W.2d 413 (1962), the supreme court upheld the constitutionality of sec. 348.15(2)(c), Stats., which imposed a \$400 fine on the corporate owner of a truck which had been loaded in excess of axle weight limitations, in spite of the absence of any actual knowledge of the violation on the owner's part. The court described the purpose of such enactments as being the enforcement of a high standard of care:

"This section is part of a welfare statute which generally creates a crime *malum prohibitum* for the doing of an act without requirement of intent.

....

"These statutes are examples of situations where a person must at his peril see to it that the regulations are not violated by his acts or by the acts of another acting in his behalf." *Id.*, 16 Wis. 2d at 359, 362-363.

See also, West Allis v. Megna, 26 Wis.2d 545, 548, 133 N.W.2d 252 (1965), where the court held proof of knowledge on the part of a tavern keeper that a patron is actually under age

is not required in order to obtain a conviction under sec. 176.32(1), Stats. That statute imposes "strict liability on tavernkeepers for permitting minors to be on the premises," and subjects violators to fine or imprisonment. *Id.*, 26 Wis.2d at 548.

67 Op. Att'y Gen. at 271.

The opinion relied largely on *State v. Collova*, 79 Wis. 2d 473:

The problem is determining where the legislature intended to draw the line between offenses which do and do not require scienter. Liability without fault has been applied in Wisconsin, as the above cited cases demonstrate, in "regulatory criminal statutes." The complex industrial state of the 20th century has generated increased social regulation and has adapted the criminal law, originally designed to punish the culpable individual, to enforce obedience to regulatory statutes. These regulatory statutes are concerned primarily with the protection of social and public interests, with the prevention of direct and widespread social injury. They are more concerned with the injurious conduct than with the question of individual guilt or moral culpability. The penalties imposed are generally light. The usual rationale for strict liability statutes is that the public interest is so great as to warrant the imposition of an absolute standard of care—the defendant can have no excuse for disobeying the law. Because of the multitude of cases arising under these regulatory statutes, there is a need for quick, simple trials unhindered by examinations of the subjective intent of each defendant.

79 Wis. 2d at 482.

It is further stated in *Collova, supra*, 79 Wis. 2d at 485: "[W] here the statute is not explicit, one of the principle indexes courts consider on the question whether some element of knowledge is required is the severity of the penalty involved."

The penalties involved in violation of sec. 346.68, Stats., are forfeitures of only \$20 to \$40 for a first offense. Sec. 346.74, Stats.

Under sec. 346.68, Stats., the elements of the offense are striking an unattended vehicle and leaving the scene of the collision without an attempt to locate the owner or operator and without leaving a message containing pertinent information. To require proof of knowledge would defeat the purpose of the statute which is to impose an

absolute standard of care in the interest of the driving public. The administration of the court system is also served by such a determination since the type of offense here is particularly subject to assertions of lack of knowledge which cannot be tested by the state, *e.g.*, "I didn't feel anything," "I didn't hear anything—my radio must have been on," etc. A requirement of knowledge would effectively emasculate the statute.

Thus, I conclude that knowledge need not be proved as an element in the violation of sec. 346.68, Stats.

BCL:BL

Banks And Banking; Stock; Trusts; Words And Phrases; Buying and selling stock options by trust company banks and state chartered banks with trust powers does not constitute a crime under sec. 112.05, Stats., but the writing of most "puts" and all uncovered "calls" is prohibited. OAG 87-79

September 21, 1979.

ERICH MILDENBERG, *Commissioner*
Office of the Banking Commissioner

You have asked whether sec. 112.05, Stats., makes it a criminal offense for a trust company bank or state chartered bank with trust powers to purchase or sell stock options for a securities portfolio for which it acts as trustee. For the reasons set forth below, it is my opinion that such specific activity does not constitute a crime.

Trust company banks chartered under ch. 223, Stats., and state chartered banks with trust powers obtained pursuant to sec. 221.04(6), Stats., hold sizeable securities portfolios in various fiduciary capacities. Generally, such banks have authority to sell existing securities and reinvest in other assets, including different stocks.

Options to purchase and sell stocks in the broad sense include: "rights," which provide stockholders with a short term option to purchase additional stock from the issuing corporation at prices generally lower than the existing market; "warrants," which are often issued by corporations as a financing "sweetener" and which permit

purchasing of stock at a set price for a longer period of time; "calls," which are contracts giving their owner an option to buy a specified number of shares of stock at a set price at a specified time; and "puts," which are similar contracts giving their owner an option to sell a certain quantity of shares for a set price at a specified time. It is the last two options, "puts" and "calls," that are primarily the basis for your inquiry and that are today commonly referred to as "stock options."

"Puts" and "calls," until several years ago, had very limited marketability. A holder of such options could easily complete the transactions by selling or purchasing the underlying stock at the specified time. But such "put" and "call" owners were at a distinct bargaining disadvantage in attempts to sell the options themselves to put and call dealers prior to the specified exercise date. Several years ago, however, exchanges began listing and trading "puts" and "calls." "Calls" on a large number of stocks are now widely traded; fewer stocks are subject to "puts" trading. The Chicago Board Options Exchange lists several hundred "calls" and about twenty "puts." As a consequence, "puts" and "calls" have become very marketable.

The basis for your inquiry is sec. 112.05, Stats., which states:

Trust funds; person holding prohibited from dealing in margins. Any person engaged in the business of receiving deposits of money for safekeeping, any officer or employe of any bank, banking company, or trust company, any executor, administrator, guardian, trustee, or receiver, or any other person holding property or money in any manner in a trust capacity, *who shall buy, sell, deal, or traffic in any goods, stocks, grains, or other property or article of commercial barter by making or requiring any deposit, payment, or pledge of any margin or of any money or property to cover future fluctuation in the price of such goods, stocks, grains, or other property so bought, sold, dealt, or trafficked in*, shall be punished by imprisonment in the Wisconsin state prisons not more than 10 years, nor less than one year. Nothing in this section prohibits any person who acts in a fiduciary capacity from using personal funds for any purpose whatever.

The central question is whether this statute not only prohibits fiduciaries from buying stocks on margin but also from buying and selling

stock options, specifically, "puts" and "calls." The only supreme court decision examining this statute is *Shinners v. State ex rel. Laacke*, 219 Wis. 23, 261 N.W. 880 (1935). At the time of the decision, the last sentence of the statute was not in existence.

In *Shinners*, Richard T. Laacke was a director (only) of the Milwaukee Commercial Bank. Simultaneous to Laacke's prosecution pursuant to sec. 112.05, Stats., then numbered sec. 348.179, Stats. (1931), the Milwaukee Commercial Bank was in the process of liquidation by the Commissioner of Banking. The complaint alleged that Laacke purchased a large number of stocks from a Milwaukee investment house on margin "to cover future fluctuation" of price. The supreme court, however, determined that a bank director was not one of the persons prohibited under the statute (bank officers and employes) if the director was not also an officer or employe. In addition, the court, at page 26, discussed the statutory phrase "to cover future fluctuation in the price" and noted that there was no evidence that the brokerage house ever made any demand upon Laacke to increase his margin equity to protect the brokerage house against fluctuations in stock values.

A ten percent margin was standard during that period; currently a fifty percent margin is required on stocks. In *Shinners*, the supreme court implied that Laacke was purchasing stocks on a cash basis, even though the brokerage firm frequently advanced the purchase price to Laacke and charged him interest on such advancements. The court could have found that Laacke had a less than ten percent margin basis or a loose cash purchase basis. It chose the latter. Because Laacke was found not to be an employe or officer or otherwise come within the statute, the cash or margin distinction was academic.

The supreme court in *Shinners* applied the rule of strict construction to this criminal statute when it stated at pages 27 and 28:

This prosecution is under a statute highly penal. It is a fundamental rule of criminal law that no case is to be brought within a statute charging an offense unless completely within its words; and no person is to be made subject to the provisions of a criminal statute by implication. Bishop, *Statutory Crimes* (2d ed.), secs. 194 and 220. This author says, sec. 194:

"Such statutes are to reach no further in meaning than their words; no person is to be made subject to them by implication,

and all doubts concerning their interpretation are to preponderate in favor of the accused. *Only those transactions are covered by them which are within both their spirit and their letter.*"

A statutory offense, therefore, has precisely the proportions which the statute gives to it, and can have no other or greater.

(Emphasis supplied.)

In *Perkins v. State*, 61 Wis. 2d 341, 348, 212 N.W.2d 141 (1973), the court stated: "[W]hile criminal statutes are to be strictly construed, that is a rule of construction only, and the construction of a statute only becomes relevant when the meaning of the statute is obscured." Obviously, the meaning of "deposit, payment, or pledge of any ... money ... to cover future fluctuation in the price" in sec. 112.05, Stats., is obscured. While it clearly prohibits purchasing stocks on margin, it is not clear as to purchasing and selling options. Options are currently purchased on a cash basis; an investor cannot buy options on margin.

Specifically, sec. 112.05, Stats., makes it a crime for those fiduciaries:

[W]ho shall buy, sell, deal, or traffic in any goods, stocks, grains, or other property or article of commercial barter by making or requiring any deposit, payment, or pledge of any margin or of any money or property to cover future fluctuation in the price of such goods, stocks, grains, or other property so bought, sold, dealt, or trafficked in

While buying and selling stock options is not buying and selling the underlying stock I am of the opinion that a stock option as a widely recognized marketable set of rights constitutes "other property or [an] article of commercial barter." Stock options, however, cannot be purchased on margin. Therefore, I conclude that the purchase of the usual stock option is not prohibited by sec. 112.05, Stats.

Section 112.05, Stats., does cover the purchase of stock on margin wherein the margin and any call for increased margin by the dealer constitutes cover for future fluctuations in price for the dealer. Similarly, the language "to cover future fluctuation in the price of *such* goods, stocks, grain, or other property" clearly illustrates that the

prohibited margin or property would have to cover future fluctuations of the goods, stocks, grain or other property originally dealt in, bought or sold.

“Puts” and “calls” undoubtedly do not qualify as “stocks” in the above-quoted statutory language. They do, however, fall within the phrase “other property or article of commercial barter.” “Puts” and “calls” are particular types of options created when someone “writes” an option, promising to purchase or sell, respectively, a certain number of shares of stock at a set price on a set date. In writing a “call,” the creator or seller may own the underlying stock and the created or written option is therefore termed a “covered” option. The person writing the “call” is required to deposit the shares with a broker. Because this deposit of the shares does not “cover future fluctuation in the price of such ... property” (the written “call”), nor does it cover future fluctuations in price of underlying stock dealt in, such activity is not prohibited by sec. 112.05, Stats.

The person writing the “call,” however, may not own the underlying stock; this situation is termed an “uncovered” or “naked” option. That writer is required to *maintain* a margin account of at least thirty percent with a broker to insure the ability to acquire the underlying stock if the “call” is exercised on the set date. Because this margin account must be maintained at a minimum of thirty percent by the writer, using cash, warrants or convertible bonds and preferreds, it would constitute the covering of future fluctuations in the price of the underlying stock potentially sold by the writer, and thus would be prohibited by sec. 112.05, Stats. This distinction of falling within the prohibited language follows because the creators or writers of “puts” and “calls” do not control the ability to exercise the written options; only the purchasers of the options can control the transaction. Thus, the writer of the “call” is obligated at the time of writing the uncovered option to potentially sell the underlying stock not owned by such writer. Clearly, this transaction falls directly within the prohibited “selling” of “stocks” by making a payment of “margin.”

Creating or writing “puts” (the writer will purchase a certain number of shares at a set price on a set date) similarly falls within the proscribed activity of sec. 112.05, Stats. The writer is also required to establish and maintain a margin account of at least thirty percent with a broker as collateral. But if the writer of the “put” were to put

down cash for the full set price, such activity would not be prohibited. This situation, of course, would be unusual.

Because of the uncertainty and obscurity in the language of sec. 112.05, Stats., the statute must be strictly construed. So construed, it is my opinion that a successful criminal prosecution could not be maintained against a fiduciary who buys or sells (as distinguished from "writes") stock options. As analyzed above, the writing of "covered" calls is not prohibited by sec. 112.05, Stats., as to trust company banks and state chartered banks with trust powers, but the writing of most "puts" and all uncovered "calls" is prohibited.

Whether such activities by fiduciaries violates the prudent man rule was not requested nor considered in this opinion.

BCL:LEN

Automobiles And Motor Vehicles; Licenses And Permits; The requirement of sec. 343.05(2)(d), Stats., that holders of international driving permits speak and read the English language is pre-empted by international treaties governing driving permits and therefore is invalid under the supremacy clause, U.S. Const. art. VI, cl. 2. OAG 88-79

October 3, 1979.

LOWELL JACKSON, *Secretary*
Department of Transportation

Your predecessor asked whether the state can require a person to be able to speak and read the English language as a condition for use of an international driving permit. In my opinion, the state cannot impose such a requirement because it would restrict rights granted by international treaties and thereby violate the supremacy clause of the United States Constitution. Art. VI, cl. 2.

Section 343.05(2)(d), Stats., makes the ability to speak and read the English language a condition for use of the international driving permit. The requirement in sec. 343.05(1), Stats., that all motor

vehicle operators be licensed by the Wisconsin Department of Transportation is made inapplicable by sec. 343.05(2)(d), Stats., to the following:

Any person who speaks and reads the English language who holds an international license validated for use in the United States under either the 1943 regulation of inter-American automotive traffic or the 1949 Geneva convention on road traffic.

The regulations promulgated by the Convention on the Regulation of Inter-American Automotive Traffic were ratified by the United States Senate in 1946. Article XIII of that agreement, 61 Stat. 1129, 3 T.I.A.S. 865, 869, provides:

A special international driving license may be required for each operator admitted to circulation in any individual State party to this Convention, if the State so elects. Such a special license shall be required for each operator who does not possess a domestic driving license as required in Article VI. Provision for the issuance of such international driving license shall be made by each Contracting State, and such document shall be issued by the State, or by any authorized political subdivision thereof, or by an association duly empowered by such authorities, or by an authorized representative of either the Contracting State or one of its political subdivisions having legal authority to issue driving licenses. The validity of such special international driving license shall be recognized by all officials having regulatory powers over automotive traffic. The license shall be in the form, of the size, and contain the information [none of which relates to English language fluency] prescribed in Annex B to this Convention, and shall be valid for one year from date of issuance.

The 1949 Geneva Convention on Road Traffic replaced the inter-American automotive traffic regulations for nations who were signatories to both conventions; it was ratified by the United States Senate in 1950. Article 24 of the Convention on Road Traffic, 3 U.S.T. 3008, 3016-17, T.I.A.S. 2487, provides in part:

1. Each Contracting State shall allow any driver admitted to its territory who fulfils the conditions which are set out in annex 8 [pertaining to minimum driving age] and who holds a valid

driving permit issued to him, after he has given proof of his competence, by the competent authority of another Contracting State or subdivision thereof, or by an association duly empowered by such authority, to drive on its roads without further examination motor vehicles of the category or categories defined in annexes 9 and 10 for which the permit has been issued.

2. A Contracting State may however require that any driver admitted to its territory shall carry an international driving permit conforming to the model contained in annex 10, especially in the case of a driver coming from a country where a domestic driving permit is not required or where the domestic permit issued to him does not conform to the model contained in annex 9.

3. The international driving permit shall, after the driver has given proof of his competence, be delivered by the competent authority of a Contracting State or subdivision thereof, or by a duly authorized association, and sealed or stamped by such authority or association. The holder shall be entitled to drive in all Contracting States without further examination motor vehicles coming within the categories for which the permit has been issued.

The United States Supreme Court has long acknowledged the existence of Congress' exclusive power under the Constitution to regulate, by act or treaty, matters involving foreign nations. *See, e.g., Fong Yue Ting v. United States*, 149 U.S. 698 (1893). *See also, e.g., U.S. Const. art. I, sec. 8, cls. 1, 10; id., sec. 10, cls. 1, 3.* In fact, subject to limitations on extreme congressional actions, not involved in your inquiry, "it is not perceived that there is any limit to the questions which can be adjusted [by treaty] touching any matter which is properly the subject of negotiation with a foreign country." *DeGeofroy v. Riggs*, 133 U.S. 258, 267 (1890). The United States entered into the treaties governing driving permits primarily in order to "make it easier for American motorists to take their cars into foreign countries by providing for the reciprocal recognition of ... [*inter alia*] drivers permits," Senate Foreign Relations Committee Executive Rep. No. 10, 81st Cong., 2d Sess. 30 (1950). Travel conditions for Americans abroad certainly seem proper subjects for treaty negotiations, as required under *DeGeofroy*.

The Supreme Court has also frequently held that under the supremacy clause, treaties, along with the Constitution and federal legislation, are “the supreme Law of the Land ..., any Thing in the ... Laws of any State to the Contrary notwithstanding,” U.S. Const. art. VI, cl. 2. *See, e.g., Missouri v. Holland*, 252 U.S. 416 (1920); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

States, of course, have authority over most of their internal affairs, and occasionally a state has argued that the federal government may not, through treaties, tamper with the powers reserved to a state by the tenth amendment. The Supreme Court has clearly rejected this argument, however. *See, e.g., Missouri; Hauenstein v. Lynham*, 100 U.S. 628 (1880). Faced with a tenth amendment argument in *Hauenstein*, the Court held that the provisions of a treaty between the United States and Switzerland preempted conflicting Virginia state inheritance law: “It must always be borne in mind that the ... treaties of the United States are as much a part of the law of every State as its own local laws and Constitution.” 100 U.S. at 631.

Since Congress by exercising a granted power may preempt, via the supremacy clause, conflicting state regulation, the issue raised by your inquiry is whether sec. 343.05(2)(d), Stats., is preempted by the inter-American traffic regulations and the Geneva Convention road traffic provisions. Section 343.05(2)(d), Stats., as noted earlier, makes an ability to speak and read the English language a prerequisite to using a license validated under international treaty. By contrast, neither treaty imposes such a language requirement.

Although the inter-American regulations are actually totally silent on English fluency, they state that “[e]vidence of compliance with the conditions [none of which deals with language ability] of this Convention shall entitle motor vehicles and motor vehicle operators to circulate on the highways of any of the Contracting States,” art. VII of 61 Stat. 1129, 3 T.I.A.S. 865. Moreover, unlike inter-American arts. X and XI, which deal with vehicle regulation, art. XIII, which pertains to licensing of drivers, does not indicate that it applies only where the laws and regulations of the respective nations or their political subdivisions do not provide otherwise.

The Geneva Convention provisions are also silent on English language fluency, but at art. I(1) they state that “each Contracting State agrees to the use of its roads for international traffic under the

conditions set out in this Convention.” The only conditions pertaining to drivers deal with driving age. *See* art. 24 and Annex 8 of 3 U.S.T. 3008, T.I.A.S. 2487. Additionally, although the Convention calls for vehicles to be registered “by a Contracting State or subdivision thereof in the manner prescribed by its legislation,” art. 18(1), there is no similar provision in art. 24 in terms of the granting of a driving permit.

Thus, although neither treaty expressly mentions fluency in English as being or not being required, it seems clear on the basis of the just-discussed treaty provisions that the signatory nations did not intend an English requirement to be imposed.

Moreover, any argument that the supremacy clause is inapplicable here because there can be no state-federal conflict where there is no express treaty language on the print at issue, must be rejected. Under well-recognized canons of treaty construction, it is clear that “[w]here a treaty admits of two constructions, one restrictive to the rights that may be claimed under it, and the other liberal, the latter is to be preferred,” *Hauenstein*, 100 U.S. at 629. *See also, e.g., Kolovrat v. Oregon*, 366 U.S. 187 (1961); *Todok v. Union State Bank*, 281 U.S. 449 (1930) (treaties should receive liberal construction to give effect to their apparent purpose). “The [Convention on Regulation of Inter-American Automobile Traffic] is designed to facilitate and encourage the movement of motor-vehicle traffic between the American republics by simplifying formalities and establishing *uniform* regulations for international automotive traffic in relation to such matters as ... driving licenses.” 15 Dep’t State Bull. 1021 (press release published Dec. 1, 1946) (emphasis added). Similarly, the prefatory remarks to the Geneva Convention on Road Traffic indicate that “[t]he Contracting States [are] desirous of ... establishing ... uniform rules.” To increase benefits conferred to aliens, *Hauenstein*, and to give effect, *Todok*, to the stated purposes of simplifying and unifying regulations on an international level, any perceived silence in the treaties in regard to language requirements must be construed as not freeing American states to alter the treaty provisions in the manner attempted by sec. 343.05(2)(d), Stats.

In conclusion, it is my opinion that the English language requirement of sec. 343.05(2)(d), Stats., is invalid under the supremacy

clause. It is preempted by the inter-American automotive traffic regulations and the provisions of the 1949 Geneva Convention on Road Traffic.

BCL:BL:jw

Private Schools; Religion; Schools And School Districts; State Aid; 1979 Assembly Bill 227, which if enacted into law would require school boards to purchase textbooks and loan them without charge to pupils of public and private schools within the district, does not violate the United States or Wisconsin Constitution. OAG 89-79

October 5, 1979.

ED JACKAMONIS, *Chairman*
Assembly Committee on Organization

On behalf of the Assembly Committee on Organization you have requested my opinion on the constitutionality of 1979 Assembly Bill 227, which deals with the purchase and loan of textbooks to pupils attending public and private schools.

The Legislative Reference Bureau's analysis of 1979 AB 227 summarizes the current state of the law as permitting "each individual school board [to] purchase textbooks for the public schools in the district and sell them to the pupils at cost." The Bureau goes on to state the substance of 1979 AB 227 to be a requirement that "school boards ... loan textbooks to all requesting pupils attending a public or private school located within the school district." The bill states that "[e]ach school district shall be paid state aid for the purchase of textbooks at the rate of \$20 per school year per pupil for whom textbooks are purchased and to whom textbooks are actually loaned." See sec. 118.03(3)(b), Stats., as recreated by 1979 AB 227. By statutory definition, though, only schools at the elementary and high school levels are affected. See sec. 118.03(1)(a), Stats., as recreated by 1979 AB 227; secs. 121.51(3) and 115.01(1), Stats. The bill also contains several other qualifications: (1) a student is ineligible under the program if he attends a private school that does not comply with Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin under any program

that receives federal financial assistance; (2) loans are to be made only upon the request of the pupil or his parent or guardian; (3) a textbook may not be purchased or loaned unless it is accurate, nondefamatory of this nation's founders, and nonsectarian; and (4) all textbooks purchased and loaned must be used as principal study aids by the pupil's school for at least five years. In addition, the bill directs the state Superintendent to promulgate rules to administer the textbook purchase and loan program.

The fiscal estimate prepared by the Wisconsin Department of Public Instruction is printed as an appendix to 1979 AB 227, and it states in part:

Local school districts would develop plans to purchase 20% of their needed textbooks each year with the life span of textbooks expected to be five years.

The definition of text books [sic.] in this proposal includes workbooks which are expendable and would need to be purchased annually.

From a constitutional point of view, the significant change that this bill would make in the law is that school boards would be required to purchase textbooks and, upon the request of pupils or their parents or guardians, loan the textbooks, without charge, to all pupils attending public or private schools within the school district. See sec. 118.03(2)(b), Stats., as recreated by 1979 AB 227.

The constitutional question is whether a statute resulting from this bill would be unconstitutional under the establishment of religion clause of the First Amendment of the United States Constitution or under the similar but somewhat more restrictive provisions of Wis. Const. art. I, sec. 18.

I. *Analysis under the United States Constitution*

The leading recent case decided by the United States Supreme Court on this matter is *Wolman v. Walter*, 433 U.S. 229 (1977). That case involved a challenge, under the first amendment's establishment of religion clause, of an Ohio statute substantially similar in part to the provisions of 1979 AB 227. The Ohio statute authorized, *inter alia*, the expenditure of public funds to purchase secular textbooks approved by the Superintendent of Public Instruction for use in

the public schools and to loan such textbooks to public and nonpublic school pupils or their parents.¹ The Ohio statute also had other provisions that were challenged, provisions dealing with additional services and supplies to be furnished from public funds for nonpublic school students. A district court held that the statute was constitutional in all respects. *Wolman v. Essex*, 417 F. Supp. 1113 (S.D. Ohio, E.D. 1976). On direct appeal the United States Supreme Court in a partial affirmance upheld the textbook loan provisions by a vote of six to three. The fragmented Court took the following actions on the other types of aid provided in the Ohio scheme: (1) upheld, six to three, the expenditure of funds for distributing and scoring standardized educational tests; (2) upheld, eight to one, the provision of services performed at the school site by state personnel diagnosing certain health and educational problems; (3) upheld, seven to two, the rendering of services at nonschool sites by state personnel giving therapy for health and educational problems; (4) held invalid, seven to two, the loans to students of equipment and instructional materials, such as maps and projectors; and (5) held invalid, five to four, the expenditure of funds for commercial transportation or the use of school vehicles for field trips.

The textbook loan program involved in the *Wolman* case is similar in all significant respects to that envisioned for Wisconsin, and the language used in 1979 AB 227 bears a striking resemblance to the statutory language approved by the Court in *Wolman*. In the Ohio scheme, textbooks and book substitutes loaned under Ohio Rev. Code Ann. sec. 3317.06(A) were:

¹ Ohio Rev. Code Ann. sec. 3317.06, as quoted in *Wolman, id.* at 236-37, authorizes the expenditure of funds:

(A) To purchase such secular textbooks as have been approved by the superintendent of public instruction for use in public schools in the state and to loan such textbooks to pupils attending nonpublic schools within the district or to their parents. Such loans shall be based upon individual requests submitted by such nonpublic school pupils or parents. Such requests shall be submitted to the local public school district in which the nonpublic school is located. Such individual requests for the loan of textbooks shall, for administrative convenience, be submitted by the nonpublic school pupil or his parent to the nonpublic school which shall prepare and submit collective summaries of the individual requests to the local public school district. As used in this section, "textbook" means any book or book substitute which a pupil uses as a text or text substitute in a particular class or program in the school he regularly attends.

[L]imited to books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group.

Wolman, 433 U.S. at 237. Similarly, section 4 of 1979 AB 227 repeals and recreates sec. 118.03, Stats., so that sec. 118.03(1)(c), Stats., will provide that “[t]extbook’ means a book, workbook or manual, intended as a principal source of study material for a semester or more in a particular class.” Also, section 4 of the bill, in recreating sec. 118.03(2), Stats., adds a prohibition that “[n]o textbook may be designated for use or be used in any public school [if the textbook] ... is devoted to, prejudiced in favor of, or promotes the interests of, any religious denomination.” This parallels the qualification in Ohio Rev. Code Ann. sec. 3317.06(A) that fund expenditures be only for the purchase of “secular textbooks as have been approved by the superintendent of public instruction for use in public schools.”

The Ohio textbook loan program, to which 1979 AB 227 appears so similar, bore, the Supreme Court commented in *Wolman*, a striking resemblance to the systems upheld in *Board of Education v. Allen*, 392 U.S. 236 (1968) and *MEEK v. Pittenger*, 421 U.S. 349 (1975). The Court noted at 238 that the only distinction between the Ohio statute and those in *Allen* and *MEEK* offered by the *Wolman* appellants was that the Ohio statute defined “textbook” as “any book or book substitute.” Because the Ohio statute, unlike those in *Allen* or *MEEK* and unlike the bill in the instant matter referred to “book substitute[s],” the *Wolman* appellants had argued that auxiliary equipment and materials might be loaned under this language, resulting in an unconstitutional loan. Although the Court agreed that loans of auxiliary equipment and materials were unconstitutional, it rejected this constitutional challenge to textbook loans. It found the appellants’ argument “untenable in light of the [Ohio] statute’s separate treatment of instructional materials and equipment in its subsections (B) and (C), [which were distinct from the subsection dealing with textbooks], and in light of the stipulation defining textbooks as ‘limited to books, reusable workbooks, or manuals.’” 433 U.S. at 238. The *Wolman* definition is nearly identical to the definition of “textbook” in 1979 AB 227. After also rejecting the *Wolman* appellants’ claim that the “textbook substitute” language was so vague as

to be open to sectarian abuse of the loan program, the Court concluded that the Ohio textbook loan program, like those in *Allen* and *Meek* was constitutional. The Court declined to overrule those two cases.

In fact, despite the division among the Justices in the area of school aid under the establishment clause, the constitutionality of textbook loan programs is one issue to which the Supreme Court's answer has remained constant. At the time that textbook loans were upheld in *Allen*, a majority of the Court refused to assume that parochial schools were permeated with religion to the point that even secular subjects could not be taught without a religious bias. Taken in conjunction with the local school board's assurance that only secular books would be used, this lack of judicial suspicion of parochial school bias was a major basis for the *Allen* Court's holding of constitutionality. *Allen*, 392 U.S. at 245-48. In *Allen*, the Court noted its view that many informed persons, among them legislators, believed that private schools, including parochial schools, adequately provided secular education to their students. The Court in *Allen*, 392 U.S. at 248, stated that:

This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education. ... [W]e cannot agree ... that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion.

The Supreme Court no longer holds this view of the operation of parochial schools. In deciding *Wolman*, for example, the Court expressed its belief that secular education in parochial schools could not be separated from the inculcation of religious beliefs because this inculcation was the purpose of such schools. *Wolman*, 433 U.S. at 249-50, quoting *Meek*, 421 U.S. at 366. The *Wolman* Court added that "[i]n more recent cases, [than *Allen*] [the Justices] have declined to extend that presumption of neutrality to other items in the lower school setting." *Wolman*, 433 U.S. at 252 n. 18. See also, *State ex rel. Wis. Health Fac. Auth. v. Lindner*, 91 Wis. 2d 145, 156-59, 280 N.W.2d 773 (1979). When urged to extend the *Allen* presumption to all materials similar to textbooks, the Court has refused, opting instead for "continued adherence to the principles announced in [its] subsequent cases." *Id.* Nonetheless—and of importance to the

instant matter involving 1979 AB 227—in the narrow area of textbook loans, “*Board of Education v. Allen* has remained law, and [the Supreme Court] now follow [s] as a matter of stare decisis the principle that restriction of textbooks to those provided the public schools is sufficient to ensure that the books will not be used for religious purposes.” *Id.*

In reaching its conclusion in *Wolman*, that statutory safeguards there sufficiently counteracted the parochial schools’ religious permeation, the Court used the three-part test that had emerged from its earlier decisions, such as *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This test, which has also been applied on numerous occasions by the Wisconsin Supreme Court and to which I referred in a recent opinion, 67 Op. Att’y Gen. 283 (1978), can be stated as follows: (1) the state program must have a purpose that is secular in nature; (2) the program may not have a principal or primary effect of advancing or inhibiting religion or religious practices; and (3) the state program must not foster excessive entanglement between church and state. Regarding the third prong of the test, the Court in *Lemon* pointed out that three factors should be examined in testing for entanglement: (1) the recipient institution’s character and purpose; (2) the nature of the aid; and (3) the relationship between government and religious authorities in which the program resulted.

As already indicated, the textbook loan program challenged in *Wolman* was upheld under the purpose—effect—entanglement test. The first prong was easily met on the ground that the statute, which at Ohio Rev. Code Ann. sec. 3317.06 explicitly prohibited provision of “services, materials, or equipment for use in religious courses, devotional exercises, religious training, or any other religious activity,” merely “reflect [ed] Ohio’s legitimate interest in protecting the health of its youth and in providing a fertile educational environment for all the schoolchildren of the State.” *Wolman*, 433 U.S. at 236. The Court’s reliance on the precedential value of *Allen* and *Meek* took the place of an extended analysis of the effect and entanglement elements.

On the basis of the case law, it now seems clear, especially after *Wolman*, that textbook loan programs such as envisioned in 1979 AB 227 do not violate the establishment clause. Textbook programs continue to be treated more favorably than programs involving other types of aid. For example, as mentioned earlier in this opinion, the

Court in *Wolman* struck down as an advancement of religion the part of a loan program involving allegedly nonideological study aids such as tape recorders, globes, maps, projectors, and so forth. In *Lemon* the Court concluded that impermissible entanglement was involved in programs by which salary supplements were made to teachers of secular subjects in private schools where per-pupil spending was lower than at public schools. The *Lemon* Court also found impermissible entanglement present in programs by which nonpublic schools were reimbursed for a portion of the cost of teacher salaries and study materials in secular subjects. Thus, as these cases illustrate, although the secular purpose element of the establishment clause test rarely, if ever, provides a constitutional stumbling block in the school aid cases, the religious effect and entanglement elements do frequently result in programs being struck down. Nonetheless, as stated earlier, textbook loan programs have consistently been upheld, on the basis of *Allen*. There is no evidence that the Supreme Court will not continue to uphold them.

II. Analysis under the Wisconsin Constitution

The Wisconsin Supreme Court has stated that the establishment clause of the First Amendment of the United States Constitution "lends itself to more flexibility of interpretation" than does Wis. Const. art. I, sec. 18.² *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 165, 115 N.W.2d 761, 770 (1962). This is so because "[t]he freedom of worship section of our state constitution ... includes language more specific than the terser establishment of religion and free exercise ... clauses in the first amendment of the federal constitution." *State ex rel. Holt v. Thompson*, 66 Wis. 2d 659, 676, 225 N.W.2d 678, 687 (1975).

² Wisconsin Constitution art. I, sec. 18, "[f]reedom of worship; liberty of conscience; state religion; public funds," reads as follows:

The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury [sic.] for the benefit of religious societies, or religious or theological seminaries.

The Wisconsin Supreme Court in *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 198 N.W.2d 650 (1972), discussed the proper judicial approach in ruling on a nonpublic school aid program already held constitutional under the first amendment. First it noted that “[w]hile the words used may differ, both the federal and state constitutional provisions relating to freedom of religion are intended and operate to serve the same dual purpose of prohibiting the ‘establishment’ of religion and protecting the ‘free exercise’ of religion.” *Id.* at 332, 198 N.W.2d at 658. The court then noted that appearing after the Wis. Const. art. I, sec. 18, language resembling a detailed version of the first amendment, is additional language specifically prohibiting the expenditure of any public funds “for the benefit of religious societies, or religious or theological seminaries.” The court concluded that this was the important language for it to examine in determining the constitutionality under Wis. Const. art. I, sec. 18, of a program that has already been found constitutional under the first amendment: it reasoned that the earlier language in Wis. Const. art I, sec. 18, need not be examined if the court has already found the statutory program to be constitutional under the first amendment, since the federal amendment and the free worship language that appears before the spending prohibition in the state constitutional passage serve the same purpose. *Id.* at 332-33, 198 N.W.2d at 658-59. In reviewing the statutory scheme for constitutionality under the Federal Constitution, the state court is to apply the United States Supreme Court’s purpose—effect—entanglement test: “We [in the state judiciary] are bound by the results and interpretations given the first amendment in these high court decisions. Ours [is] not to reason why; ours [is] but to review and apply.” *Id.* at 322, 198 N.W.2d at 653. Finally, with respect to examining a statutory scheme under the additional Wisconsin constitutional language prohibiting certain public expenditures, the court in *State ex rel. Warren v. Nusbaum* stated that the Wisconsin Supreme Court has read this spending passage as encompassing the effect element of the three-pronged test established by the United States Supreme Court for determining constitutionality under the first amendment.

Thus, given the just-outlined analytical approach employed by the Wisconsin Supreme Court and given the absence here of federal constitutional problems, the determinative question in the instant matter becomes whether a textbook purchase and loan statute resulting from 1979 AB 227 would violate that portion of the Wis. Const. art. I, sec.

18, that reads “nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”

As noted at the beginning of Part II of this opinion, the Wisconsin Supreme Court views the detailed language of Wis. Const. art. I, sec. 18, as amenable to less flexible interpretation than the first amendment. Nonetheless, the court has also indicated that the public spending prohibition in the state constitution is not totally prohibitive. *Id.* at 333, 198 N.W.2d at 659, *reaffirmed on this point in State ex rel. Warren v. Nusbaum*, 64 Wis. 2d 314, 219 N.W.2d 577 (1974). Consequently, various types of public aid to nonpublic schools have been held not to violate the spending prohibition of Wis. Const. art. I, sec. 18.

For example, in *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 198 N.W.2d 650 (1972), the Wisconsin Supreme Court stated in dicta that although a statute that directed the state to contract with a church-related university for the purchase of dental education for state residents violated the first amendment and also the free worship language of Wis. Const. art. I, sec. 18, it was valid under the latter's spending prohibition. In analyzing the language “nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries,” the court emphasized the words “for the benefit of.” It posed the issue under the state constitution as follows: “Do payments on the contract for state purchase of dental education from a church-related university constitute money drawn from the treasury ‘for the benefit of’ a religious society or religious or theological seminary”? The court then answered that question as follows:

A dental school or college, operating as a unit of a university, may be sufficiently separate in terms of finances, controls and secular nature of its educational programs as to permit state aid. “For the benefit of” is not to be read as requiring that some shadow of incidental benefit to a church-related institution brings a state grant or contract to purchase within the prohibition of the section. This court has held that “... we cannot read sec. 18 [of art. I, Wisconsin Constitution] as being so prohibitive as not to encompass the [United States Supreme Court's] primary-effect test....” The applicability of the primary-effect

test is to make “[t]he crucial question ... not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion.”

State ex rel. Warren v. Nusbaum, 55 Wis. 2d 316, 333, 198 N.W.2d 650, 659 (1972) (citations omitted). Applying this analysis in the case before it, the court in dictum concluded that “[p]ayments under a proper contract for providing dental education by a church-related university need not be payments ‘for the benefit of’ a religious society or such church-related institution but can be payments for the advancement of the dental health of the citizens of this state.” *Id.* at 333-34, 198 N.W.2d 659. *Accord*, *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 170 N.W.2d 790 (1969).

This judicial construction of “for the benefit of” as not barring statutory programs under which the primary effect of the legislation is not the advancement of religion, but a permissible effect such as the advancement of the health of Wisconsin residents, has also been employed to uphold against a challenge under the state constitution a statute that provided for the special educational needs of handicapped children in Wisconsin. *State ex rel. Warren v. Nusbaum*, 64 Wis. 2d 314, 219 N.W.2d 577 (1974). In examining the statute under Wis. Const. art. I, sec. 18, the court said the statutory health-oriented effect was secular and the benefit that the religious institution would enjoy as a result of the legislation was merely incidental, and therefore not unconstitutional.

Other forms of publicly funded school aid have also been permitted in Wisconsin. In *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 115 N.W.2d 761 (1962), the court held that a statute providing for transportation of parochial school children to the nearest public school they were entitled to attend violated that part of the Wisconsin Constitution that prohibits the expenditure of any public funds “for the benefit of religious societies, or religious or theological seminaries.” That constitutional passage was effectively amended, however, by the creation in April, 1967, of Wis. Const. art. I, sec. 23, which provides that: “Nothing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning.”

Other sections of the Wisconsin Constitution also make it clear that the spending prohibition contained in Wis. Const. art. I, sec. 18, is not absolute. Wisconsin Constitution art. I, sec. 24, created in April, 1972, states that nothing in the Wisconsin Constitution bars legislative authorization of "the use of public school buildings by civic, religious or charitable organizations during nonschool hours upon payment by the organization to the school district of reasonable compensation for such use." Wisconsin Constitution art. X, sec. 3, as amended in April, 1972, states that "the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours." Such constitutional amendments "render inappropriate the claim that what was specifically authorized by constitutional amendment offends the document to which the authorization was added," and a challenge to the authorized activity will not be aided by the prohibitions contained in Wis. Const. art. I, sec. 18. *State ex rel. Holt v. Thompson*, 66 Wis. 2d 659, 678, 225 N.W.2d 678, 688-89 (1975).

The type of school aid contained in 1979 AB 227 is not specifically addressed in the Wisconsin Constitution, however, or in the cases discussed above in Part II of this opinion. Therefore, further analysis is required to determine whether the bill about which you have inquired is valid under the state constitution.

Statutes are presumed to be constitutional and will be held unconstitutional only when they so appear beyond a reasonable doubt. *White House Milk Co. v. Reynolds*, 12 Wis. 2d 143, 106 N.W.2d 441 (1960). A statute will not be held unconstitutional unless the court can say that no state of facts can reasonably be conceived that would sustain it. *State v. Texaco*, 14 Wis. 2d 625, 111 N.W.2d 918 (1961). If any state of facts, known or assumed, justifies the law, the court's power to declare a statute unconstitutional is at an end. Questions as to wisdom, need, or appropriateness are for the Legislature. *State v. Kerndt*, 274 Wis. 113, 118, 79 N.W.2d 113, 115 (1956). Additionally, where a constitutional challenge is made to a statute on its face, it is inappropriate to address "the possible [problematic] situations that may arise, each to be 'properly evaluated if and when challenges arise.'" *State ex rel. Holt v. Thompson*, 66 Wis. 2d 659, 677, 225 N.W.2d 678, 688 (1975).

The search thus must be for any reasonable means of sustaining the statute. Unfortunately, 1979 AB 227 does not contain a legislative declaration of policy. Although such declarations are not determinative, they are given great weight by the courts. *State ex rel. Warren v. Nusbaum*, 64 Wis. 2d 314, 219 N.W.2d 577 (1974). It is reasonable to assume that in introducing this bill the Legislature intended to act in the furtherance of the constitutional mandate of Wis. Const. art. X, sec. 3,³ dealing with the establishment of and uniformity of district schools, and directing that such schools shall be free and without charge and that no sectarian instruction shall be allowed. Whereas under the present law local school districts may and do loan textbooks to students attending public schools within the district, this bill would extend that power and in fact require, subject to rules promulgated by the state Superintendent, the loaning without charge of such textbooks to both public and private school pupils within the school district. This calls for the additional cost of this requirement to be at least partially borne by the state, in the form of state aid at the rate of twenty dollars per school year per pupil for whom textbooks are purchased and to whom textbooks are actually loaned. It should be assumed that such a program will be carried out with the same concern for the proper use and return of such loaned textbooks as now exists with respect to pupils in public schools. Under the bill, it is still the school board that designates all the textbooks to be used in the schools under its charge. The newly created sec. 118.03(2)(a), Stats., would guarantee that none of the textbooks so designated will be sectarian in nature. The provision of rules to be promulgated by the state Superintendent is a further protection required by the bill.

Therefore, applying the previously discussed United States Supreme Court's primary effect test, encompassed in Wis. Const. art. I, sec. 18—that is whether the bill would create a law whose primary

³ Wisconsin Constitution art. X, sec. 3, “[d]istrict schools; tuition; sectarian instruction; released time,” reads as follows:

The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.

effect advances religion—I must assume that the primary legislative purpose is, and the effect would be merely the loaning of certain textbooks to pupils. This result has been upheld elsewhere and described as simply a state's engaging in the legitimate function of "protecting the health of its youth and ... providing a fertile educational environment for all the school children of the State." *Wolman v. Walter*, 433 U.S. 229, 236. Although another effect of the loaning of such textbooks to pupils of private schools owned or controlled by a religious society could arguably be said to be the advancement of religion because the religious institution would be spared the expense of purchasing those same textbooks for its pupils, it is my conclusion that this would be considered by the Court as just a possible secondary effect, with any benefits that that may accrue to religious organizations being only incidental. See, e.g., *State ex rel. Warren v. Nusbaum*, 64 Wis. 2d 314, 219 N.W.2d 577 (1974); *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316 (1972) (dictum). In my opinion, 1979 AB 227 would thus encounter no barrier under Wis. Const. art. I, sec. 18.

III. Conclusion

It is my opinion that, for the reasons stated in Parts I and II of this opinion, 1979 AB 227, if enacted into law, would violate neither the First Amendment of the United States Constitution nor Wis. Const. art. I, sec. 18.

BCL:JEA:jw

Emergency Medical Technician; Paramedic; Words And Phrases: The Department of Health and Social Services by rule may authorize the ambulance attendants to perform emergency care services which the statutes specify also are performable by paramedics, but only to the extent the Department finds that the attendants can perform those services safely by reason of their training. Attendants can perform those services under proper supervision of a physician unless the Department provides otherwise by rule, but the physician's decision to delegate a service to an attendant is reviewable by the Medical Examining Board and the attendant's decision to accept the delegation is reviewable by the Department. OAG 90-79

October 5, 1979.

DONALD E. PERCY, *Secretary*
Department of Health and Social Services

You request my opinion as to whether an Emergency Medical Technician (ambulance attendant) is excluded from practicing the skills of an Advanced Emergency Technician (paramedic) specified in sec. 146.35(1), Stats. Second, you ask whether sec. 448.03(2)(e), Stats., authorizes a person licensed as an Emergency Medical Technician (ambulance attendant) to perform the advanced life support techniques specified in sec. 146.35(1), Stats., under the direction, supervision, and inspection of a licensed physician.

In answer to your first question, it is my opinion that the Department of Health and Social Services may empower the Emergency Medical Technician (ambulance attendant) to perform those advanced lifesaving techniques which it may designate as "emergency care services" and for which it institutes training standards.

Section 146.50(1)(c), Stats., defines an "ambulance attendant" as "a person who is responsible for the administration of emergency care procedures, proper handling and transporting of the sick, disabled or injured persons." Ambulance attendants are licensed by the Department of Health and Social Services after presenting evidence of their background and training and successfully completing an examination. Sec. 146.50(5) and (6), Stats.

An emergency medical technician-advanced (paramedic) is defined in sec. 146.35(1), Stats., as follows:

As used in this section, "emergency medical technician — advanced (paramedic)" means a person who is specially trained in emergency cardiac, trauma and other lifesaving or emergency procedures in a training program or course of instruction prescribed by the department and who is examined and licensed by the department as qualified to render the following services:

(a) Render rescue, emergency care and resuscitation services.

(b) While caring for patients in a hospital administer parenteral medications under the direct supervision of a licensed physician or registered nurse.

(c) Perform cardiopulmonary resuscitation and defibrillation on a pulseless, nonbreathing patient.

(d) Where voice contact with or without a telemetered electrocardiogram is monitored by a licensed physician and direct communication is maintained, upon order of such physician perform the following:

1. Administer intravenous solutions.
2. Perform gastric and endotracheal intubation.
3. Administer parenteral injections.

(e) Perform other emergency medical procedures prescribed by rule by the department.

I am aware that a strong argument can be made that ambulance attendants may not perform any of the services of paramedics specifically enumerated in sec. 146.35(1), Stats. Such argument would rest on the principle of statutory construction known as *expressio unius est exclusio alterius*. Under this argument, the express enumeration of services in the case of paramedics implies their exclusion in the case of ambulance attendants, especially since the paramedic services are in addition to the provision for "emergency care services," a phrase found both in sec. 146.50(1)(c) and sec. 146.35(1)(a), Stats.

The *exclusio* rule is not a "Procrustean standard to which all statutory language must be made to conform." *Columbia Hospital Asso. v. Milwaukee*, 35 Wis. 2d 660, 669, 151 N.W.2d 750 (1967). There should be some factual evidence that the Legislature intended the *exclusio* rule to be applied, *id.*, and absent such indication, or if there appears to be some special reason for mentioning one thing and none for mentioning another, *Johnson v. General Motors Corporation*, 199 Kan. 720, 433 P.2d 585, 589 (1967), and *C. & O. Ry. Co. v. Mich. Public Serv. Comm.*, 59 Mich. App. 88, 228 N.W.2d 843, 850 (1975), it may be inappropriate to apply this rule of construction.

Application of the *exclusio* rule is inappropriate in this case. First, it proves too much. For example, the conclusion that cardiopulmonary resuscitation is not within the meaning of "emergency care services" defies the obvious. Intensive public training programs across the nation have instructed masses of people to perform this service,

and both the Red Cross and the American Heart Association give a certificate of accomplishment in this area.

Second, other indicia of legislative intent show an overall concern to make emergency care services readily available, to establish training programs to equip ambulance attendants and others to provide these services, and to enable the Department to determine the suitability of attendants to perform various services. Chapter 321, sec. 4, Laws of 1973, created sec. 146.50, Stats. It also required the Department to report to the Legislature on the status of emergency medical service plans. *Id.*, sec. 5. The Department was empowered to prescribe a course of instruction and training for attendants, sec. 146.50(6), Stats; to arrange for courses of instruction sufficient to meet the necessary requirements, sec. 146.50(9)(a), Stats; the Secretary of the Department was empowered to “adopt rules necessary for administration of this section,” sec. 146.50(3), Stats; applicants must pass an examination “approved by the department,” sec. 146.50(6)(c), Stats; and the applicants must have “additional qualifications as may be required by the department,” sec. 146.50(6)(d), Stats. In addition, the Legislature in sec. 146.70, Stats., has established a statewide emergency services telephone number system in part to enhance the availability of emergency medical and ambulance services. Sec. 146.70(2)(b), Stats. Under sec. 140.83(3), Stats., the state has assumed the responsibility of providing technical assistance to area-wide comprehensive health planning services in the development of emergency medical service plans. In sum, the Department has been given broad authority to facilitate the delivery of emergency medical services by training ambulance attendants to acquire new skills and ascertaining the appropriate level of emergency medical services they can provide safely.

It seems more reasonable to believe, then, that in the express enumeration for paramedics, the Legislature merely recited those advanced emergency care services which paramedics by training and experience had come to master. By this express enumeration, the Legislature gave notice to all who would deal with the paramedics — physicians, nurses, and hospital administrators — that it was satisfied with the competence of paramedics to perform these services.

The Legislature, however, did not thereby foreclose the Department from training ambulance attendants to achieve the same level of competence as paramedics in certain emergency care services.

In 67 Op. Att'y Gen. 145 (1978), I stated that the Department's power to adopt rules necessary for the administration of sec. 146.50, Stats., and to institute additional training requirements allows the establishment of training standards above the minimum base skill level, for ambulance attendants. This determination implicitly empowers the recipient of additional training to perform the additional skills mastered. Accordingly, the Department may designate certain advanced lifesaving techniques as "emergency care services" which the ambulance attendant may perform. To ensure that emergency care service is provided by qualified persons, the Department should also institute training standards for those additional services which it determines the ambulance attendant may perform.

Your second question is whether an ambulance attendant may perform the advanced lifesaving techniques specified as appropriate for paramedics in sec. 146.35(1), Stats., when functioning under the direction, supervision, and inspection of a licensed physician, pursuant to sec. 448.03(2), Stats.

In my opinion the answer is yes with two qualifications. First, the Department by rule can circumscribe the services attendants can perform under the direction of a physician. Second, absent such a limiting rule, the extent to which a physician can direct an attendant to perform services is under the control of the Medical Examining Board, its rules and the statutes it administers. Similarly, the extent to which an attendant may accept such direction from a physician remains under the control of the Department.

In addition to the Department's control over the licensure of attendants under sec. 146.50, Stats., the relevant statutes in considering this question are sec. 448.03(1), (2)(a), (2)(e), and (2)(i), Stats., and sec. 448.01(11), Stats.

Section 448.03(1), Stats., provides:

(1) **License required to practice.** No person may practice medicine and surgery, podiatry or physical therapy, or attempt to do so or make a representation as authorized to do so, without a license granted by the [Medical Examining] board.

Section 448.03(2)(a), (e), and (i), Stats., provide:

(2) **Exceptions.** Nothing in this chapter shall be construed either to prohibit, or to require a license or certificate under this chapter for any of the following:

(a) Any person lawfully practicing within the scope of a license ... under any other statutory provision, or as otherwise provided by statute.

....

(e) Any person providing patient services as directed, supervised and inspected by a physician or podiatrist who has the power to direct, decide and oversee the implementation of the patient services rendered.

....

(i) Any person furnishing medical assistance or first aid at the scene of an emergency.

Section 448.01(11), Stats., defines “unprofessional conduct” as those acts or attempted acts defined as unprofessional conduct by the Medical Examining Board, and sec. 448.02, Stats., empowers the Board to take disciplinary action against physicians guilty of unprofessional conduct.

In addition to these statutes, your attention is drawn to Wis. Adm. Code section Med 10.02(1)(j) which classifies as unprofessional conduct the aiding or abetting of another in practicing or attempting to practice “under any license beyond the scope of that license.”

Given the scope of the Department’s powers over ambulance attendants, I am persuaded that the Department has authority to set the outer limits of services which the attendants may perform. In exercising that power, the Department must be guided by the overall legislative purposes to safely deliver emergency care services. It also must consider the relative training of paramedics and attendants and with due regard for the standards of the Medical Examining Board.

Nothing in ch. 448, Stats., or elsewhere empowers a physician or the Medical Examining Board to permit an attendant to do what the Department forbids. The provision in sec. 448.03(2)(i), Stats., that the furnishing of medical assistance or first aid at the scene of an

emergency does not constitute the practice of medicine, does not authorize an attendant to violate Department rules restricting what he or she can do at the scene of an emergency. Similarly, the provision in sec. 448.03(2)(e), Stats., that one is not guilty of practicing medicine without a license when acting under the direction of a physician, does not authorize an attendant to violate Department restrictions on what services he or she can perform under the direction of a physician. The Department regulates the attendants, not the Medical Examining Board. The Board could find it permissible for a physician to delegate a certain service to an attendant, but the Department would remain free to discipline the attendant for performing the service notwithstanding physician authorization. (As noted, the Medical Examining Board considers it unprofessional for a physician to assist another in acting beyond the scope of his or her license.) Conversely, the Department could conclude that a certain service may be performed by an attendant if done under the direction of a physician, but the Medical Examining Board is free to discipline a physician for delegating that service to the attendant.

It is clear, however, that sec. 448.03(2)(e), Stats., does not give the physician unlimited authority to delegate service to attendants. The contrary interpretation would lead to the absurd result that a physician may direct an attendant to perform open-heart surgery. Rather, the physician, in deciding what services may be performed by an attendant, must consider all the facts and circumstances, including the complexity of the service, the attendant's past training and experience, the standards of the Medical Examining Board, and the general norms of the medical profession in similar situations. Similarly, the attendant must exercise independent judgment. Although a physician's assurance that the attendant is capable of performing a service under supervision is a fact on which the attendant may place some reliance, the attendant is answerable to the Department and must take account of his or her own limitations. Unquestionably, the Department's exercise of its rule-making authority could illuminate this very ill-defined area. Until the Department fashions appropriate rules, resolution of this issue must be done on a case-by-case basis.

BCL:CDH

County Board; Discrimination; Cities, counties, and other local governmental entities, not being a part of the executive or legislative branches of state government are neither "contracting agencies" of the state within the meaning of sec. 16.765(1), Stats., which requires a nondiscrimination clause in contracts, nor are such entities "subdivisions" of the state within the meaning of sec. 16.755(1), Stats., which empowers the Council on Small and Minority Business to review the extent of small business participation in purchasing by the state and its subdivisions. OAG 91-79

October 8, 1979.

KENNETH LINDNER, *Secretary*
Department of Administration

You have asked for my opinion on the following questions:

1. Are cities, counties, county community mental health, mental retardation, alcoholism and drug abuse program boards (51.42 Boards) and other local governmental entities contracting agencies of the state under s. 16.765, Wis. Stats., and, therefore, required to include in their contract documents the provisions of s. 16.765(2)(a), i.e., the non-discrimination clause?
2. Does the Council on Small and Minority Business, pursuant to 16.755(1), Wis. Stats., have authority to review the extent of small business participation in purchasing by cities, counties and other local governmental entities?

In my opinion the answer to your first question is no. The phrase "contracting agencies of the state" refers to the Department of Administration and all other state agencies authorized to sign contracts pursuant to sec. 16.76, Stats.

Section 16.76, Stats., provides in part:

CONTRACTS, CONTENTS, ARBITRATION CLAUSE. (1) All contracts for materials, supplies, equipment and contractual services shall run to the state of Wisconsin, and shall be signed by the secretary or persons authorized by the department.

Section 16.765, Stats., provides in part:

NONDISCRIMINATORY CONTRACTS. (1) Contracting agencies of the state shall include in all contracts executed by them a provision obligating the contractor not to discriminate against any employe or applicant for employment because of age, race, religion, color, handicap, sex, physical condition, developmental disability as defined in s. 51.01 (5) or national origin, and obligating the contractor to take affirmative action to ensure equal employment opportunities.

....

(8) If further violations of this section are committed during the term of the contract, the contracting agency involved may permit the violating party to complete the contract, after complying with this section, but thereafter the contracting agency shall request the department to place the name of the party on the ineligible list for state contracts, or the contracting agency may terminate the contract without liability for the uncompleted portion or any materials or services purchased or paid for by the contracting party for use in completing the contract.

(9) The names of parties who have had contracts terminated under this section shall be placed on an ineligible list for state contracts, maintained by the department. No state contract may be approved and let to any party on such list of ineligible contractors.

Section 16.77, Stats., provides in part:

AUDIT OF BILLS; ILLEGAL CONTRACTS; ACTIONS TO RECOVER. No bill or statement for work or labor performed under purchase orders or contracts issued by the secretary or his designated agents, and no bill or statement for supplies, materials, equipment or contractual services purchased for and delivered to any office shall be paid until such bill or statement shall have been approved by the secretary or his designated agents.

In interpreting statutes, it is important to note their position relative to other statutes. *See State v. Consolidated Freightways Corp.*, 72 Wis. 2d 727, 737, 242 N.W.2d 192 (1976). The entire section is to be considered. *Omernik v. State*, 64 Wis. 2d 6, 12, 218 N.W.2d 734

(1974). A term must be read "in its context within the statutory section as a whole." *Falkner v. Northern States Power Co.*, 75 Wis. 2d 116, 124, 248 N.W.2d 885 (1977). And the meaning of a particular section must be derived from consideration of the act or statute as a whole. *State v. Wachsmuth*, 73 Wis. 2d 318, 323, 243 N.W.2d 410 (1976).

The Department of Administration is created by sec. 15.10, Stats., and pursuant to sec. 15.101, Stats., has the program responsibilities specified for it under ch. 16, Stats. Chapter 16, Stats., is entitled "Department of Administration" and is divided into eight subchapters which define the Department's responsibilities in several broad areas, e.g., finance, purchasing, engineering, and state planning and energy. Section 16.765, Stats., is part of subch. IV which is entitled "Purchasing" and which contains statute sections numbered 16.70 through 16.845. Section 16.71, Stats., states in part that "[t]he department shall purchase *and may delegate to special designated agents the authority to purchase* all necessary materials, supplies, equipment, all other permanent personal property and miscellaneous capital, and contractual services and all other expense of a consumable nature for all offices." Section 16.70(1), Stats., defines "office" to include "both houses of the legislature and any department, board, commission or body connected with the state government, including all educational, charitable, correctional, penal and other institutions." Section 16.76, Stats., states in part that "[a]ll contracts for materials, supplies, equipment and contractual services shall run to the state of Wisconsin, and shall be signed by the secretary or *persons authorized by the department.*" To assure that purchasing takes place at the proper level, the Department of Administration, through the State Bureau of Procurement, delegates the authority to sign purchasing contracts under sec. 16.76, Stats., to purchasing agents of the various state agencies which the Bureau has determined are ready to manage and operate under the established procurement guidelines. All such delegations are in writing and must be accepted by each state agency in writing. *Manual on Organization & Policies for the State Bureau of Procurement*, February 10, 1978. Moreover, subsecs. (8) and (9) of sec. 16.765, Stats., refer to eligibility for state contracts, and sec. 16.77, Stats., provides for auditing of contracts through the Department of Administration. Finally, ch. 16, Stats., is part of tit. III of the statutes which is titled "General Organization of

the State, Except the Judicial Department” and relates to the legislative and executive branches of state government.

It is evident, then, that the statute as a whole deals with state contracts, *i.e.*, contracts in which the state is one of the contracting parties. It follows that the entities you mention, not being part of the legislative or executive branches of state government, are not included as “contracting agencies of the state” within the meaning of sec. 16.765, Stats.

In my opinion the answer to your second question also is no.

Section 16.755, Stats., provides:

COUNCIL ON SMALL AND MINORITY BUSINESS OPPORTUNITIES.

The council on small and minority business opportunities shall:

(1) Review the extent of small business participation in purchasing by this state and its subdivisions.

(2) Advise the department’s purchasing agent with respect to methods of increasing such participation.

(3) Advise the department’s purchasing agent with respect to methods of simplifying or easing compliance with the forms and procedures used or to be used for obtaining contracts with the state for providing materials, supplies, equipment and contractual services.

(4) Advise the department concerning methods of improved compliance with any aspect of its duties under s. 16.75 (4) (a).

(5) Annually, submit in its report under s. 15.09 (7) any recommendations regarding the matters described in subs. (1) to (4) to the governor and the legislature.

Section 16.75(4)(a), Stats., provides:

The department shall encourage the participation of small businesses in the statewide purchasing program by ensuring that there are no undue impediments to such participation and by actively encouraging small businesses to play an active role in the solicitation of public purchasing business. To that end the department shall:

1. Maintain a comprehensive bidders list of small state businesses which have demonstrated the capacity of providing materials, supplies, equipment or contractual services to the state;
2. Develop ways of simplifying specifications and terms so that they will not impose unnecessary administrative burdens on small state businesses which submit bids to the state;
3. Assist small state businesses in complying with state bidding procedures;
4. Notify businesses on the list maintained under subd. 1 of office purchasing requests for which the businesses may wish to submit a bid; and
5. By May 1 of each year, submit a report to the council on small and minority business opportunities which evaluates the performance of small Wisconsin businesses submitting bids to the state and makes recommendations for increased involvement of such businesses in bidding under this section.

I am aware, of course, that the phrase "subdivisions" often is used to refer to political subdivisions such as cities and counties, and standing alone the same referent could have been intended in sec. 16.755(1), Stats. Considering this term in the context of the section, the chapter and the title of which it is a part, it is clear that "subdivisions" refers to those agencies of the state government which have been delegated power to contract for the state. Had the Legislature intended that the Council deal with local units of government on methods, it could have said so expressly. Instead, sec. 16.755(3), Stats., for example, requires the Council to advise "the department's purchasing agent" in respect to methods for obtaining contracts "with the state." Further, sec. 16.755(4), Stats., requires the Council to advise the Department on improving compliance with sec. 16.75(4)(a), Stats., which refers to the Department's responsibility toward small businesses which deal with the state. *See also*, ch. 419, sec. 1, Laws of 1977 ("to offer assistance to small and minority businesses in the competition for state purchasing contracts").

Accordingly, inasmuch as the entire focus of the statutory material as a whole is placed on the state's own program for contracting for services and materials, it is clear that "subdivisions" in sec.

16.755(1), Stats., refers to the Department of Administration and other state agencies and not to political subdivisions such as cities and counties.

BCL:CDH

Public Records; Register Of Deeds; The amount payable to a register of deeds for issuing certified copies of birth, death, and marriage records is \$4 if the register must search for the records but \$1 if no search is necessary. OAG 92-79

October 16, 1979.

DONALD E. PERCY, *Secretary*

Department of Health and Social Services

You ask whether the fees payable to county registers of deeds for certified copies of birth, death, and marriage records as established by sec. 59.57(7), Stats., are in conflict with the fees required by sec. 69.24(1)(a), Stats., for certified copies of the same types of records, and, if they do conflict, which one prevails. More specifically, you ask whether the register of deeds is to charge \$4 or \$1 for these records.

It is my opinion that these statutes do not conflict. Section 69.24(1)(a), Stats., calling for a \$4 charge, applies when a register of deeds must search for the records. Section 59.57(7), Stats., calling for a \$1 charge, applies where no search is necessary.

Section 59.57, Stats., in pertinent part provides:

Register of deeds; fees. Every register of deeds shall receive the following fees:

....

(7) For a certified copy of the full record of any marriage, birth or death, \$1; and for a short-form certificate, 25 cents, with the exceptions stated in ch. 69.

Section 69.24(1), Stats., in pertinent part provides:

The state registrar, register of deeds, and city health officer who are authorized to issue certified copies, as stated in this subchapter, shall collect the following fees for the search, filing and issuing of certified copies of birth, death, marriage and divorce records

(a) A fee of \$4 *for the search of the files*. If a record is located, no additional fee is required for issuance of the first certified copy. The department may set additional fees, not to exceed \$2 for each additional copy after the first copy.

....

(d) A fee of \$1 for a short form certificate, except that such certificate for a person under 18 years of age shall be issued free.

A construction which contains an implied statutory repeal is disfavored. *State ex rel. Sauk County D. A. v. Gollmar*, 32 Wis. 2d 406, 412, 145 N.W.2d 670 (1966). *Accord, State v. Dairyland Power Cooperative*, 52 Wis. 2d 45, 51, 187 N.W.2d 878 (1971); *State v. Consolidated Freightways Corp.*, 72 Wis. 2d 727, 738, 242 N.W.2d 192 (1976). The general rule of statutory construction is that where two provisions are susceptible of a construction which will give operation to both, without doing violence to either, it is incumbent to search for a reasonable theory under which to reconcile them so that both may be given full force and effect. *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 292, 125 N.W.2d 636 (1964). *Accord, Raisanen v. Milwaukee*, 35 Wis. 2d 504, 516, 151 N.W.2d 129 (1967); *Kramer v. Hayward*, 57 Wis. 2d 302, 311, 203 N.W.2d 871 (1973).

The key to harmonizing these statutes is the provision of sec. 69.24(1)(a), Stats., which reads "for the search of the files." The Legislature evidently intended that a county should be compensated for the time required for a register of deeds to search through county files for birth, death, marriage or divorce records. The larger fee of sec. 69.24(1)(a), Stats., must be paid whether or not the search produces the desired records. The fee in sec. 59.57(7), Stats., applies where there is no search.

In addition, the legislative history of sec. 69.24(1)(a), Stats., supports this harmonization. Chapter 43, sec. 162, Laws of 1967,

amended sec. 69.24(1)(a), Stats. (1965), in the following manner: "A fee of \$1 \$2 for the issuance of a certified copy of any record previously filed search of the files. If a record is located, no additional fee is required for issuance of a certified copy." (Emphasis and deletion in original.)

The substantive changes in the provisions of sec. 69.24(1)(a), Stats., clearly illustrate the Legislature's intent. The fee required by sec. 69.24(1)(a), Stats., is not for the issuance of certified copies of records. Rather, the fee is for the time and effort required to locate records in public files.

For purposes of clarification, it should also be noted that the language of sec. 59.57(7), Stats., which refers to "the exceptions stated in ch. 69," applies to the provision of sec. 69.24(1)(d), Stats., that "such certificate for a person under 18 years of age shall be issued free." The grammatical structure of sec. 59.57(7), Stats., which places the language of exception after the semicolon, indicates that the language does not apply to certified copies of full records, but to short form certificates.

BCL:CDH

Clerk Of Courts; Courts; Public Records; After a transcript of court proceedings is filed with the clerk of court, any person may, pursuant to secs. 19.21(2) and 59.14(1), Stats., examine or copy such transcript. OAG 94-79

October 19, 1979.

MATTHEW F. ANICH, *District Attorney*
Ashland County

You have asked for assistance in resolving the issue of whether transcripts of court proceedings which have been filed with the clerk of court may be photocopied by individuals at their expense or whether such individuals must request the court reporter to provide a copy at the statutorily prescribed fee. Apparently the clerk of court and the court reporter view secs. 19.21 and 59.14, Stats., in conflict with sec. 757.57(5), Stats.

It is my opinion that these statutes may be read together without conflict. Section 757.57(5), Stats., relates to an initial request from a party that the court reporter's notes be transcribed. Even though the notes are not the property of the reporter but rather are the property of the court, the statute provides for a specific amount of compensation to the court reporter for transcribing the notes. At any time a party requests that the court reporter make original or copy transcripts and certify their correctness, the court reporter is entitled to the stated fee.

Section 757.57(5), Stats., is limited to the plain meaning of the words of the statute. The subject matter is requests from a "party to an action or proceeding" for a "typewritten transcript ... and ... copies ... of the testimony and proceedings reported by him or her in the action or proceeding." There can be no doubt that this section concerns a party requesting the initial transcription of the court reporter notes. The statute provides for compensation in this situation, and it is only when the statute specifically or by some general provision allows compensation that a court reporter may claim it. 8 Op. Att'y Gen. 2 (1919).

Once the court reporter makes the transcript and files it with the clerk of court it falls within the provisions of secs. 19.21 and 59.14, Stats.

The court reporter does not retain a proprietary interest in either the original notes, 31 Op. Att'y Gen. 219 (1942), or the typewritten transcript the reporter has made. You state:

The Court Reporter takes the position that a person desiring a copy of a transcript is required to notify the Court Reporter for a copy since the Court Reporter has a proprietary interest in the typewritten transcript the reporter has made. Otherwise, the reporter argues, an individual could photocopy the original typewritten transcript the Court Reporter makes and thereafter sell copies of it for a profit bypassing the reporter that did the work.

If the reporter is attempting to establish some form of quasi-copyright protection, he is in error. A person who copies or takes down and transcribes dictation is not an author. Since the transcripts do not contain a distinctive individuality of the court reporter's mind, the

transcripts and the reporter enjoy no copyright protection. 18 Am. Jur. 2d *Copyrights and Literacy Property* sec. 37.

It is my opinion that the controlling statute is sec. 19.21, Stats., which states, in part:

CUSTODY AND DELIVERY OF OFFICIAL PROPERTY AND RECORDS. (1) Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof prescribes, examine or copy any of the property or things mentioned in sub. (1). Any person may, at his own expense and under such reasonable regulations as the custodian prescribes, copy or duplicate any materials, including but not limited to blueprints, slides, photographs and drawings. Duplication of university expansion materials may be performed away from the office of the custodian if necessary.

When this is read in conjunction with sec. 59.14(1), Stats., which states that the clerk of circuit court shall open to the examination of any person all books and papers required to be kept in his office and permit any person to make notes and copies, it is clear that the Legislature intended that such material be available for copying.

57 Op. Att'y Gen. 138 (1968) and 59 Op. Att'y Gen. 144 (1970) previously addressed the legislative mandate of sec. 19.21(2), Stats., and stated that any member of the public, regardless of motive, must be allowed access for examination and copying of typed material within sec. 19.21, Stats., at his own expense.

I do not think that one can argue that the intent of sec. 757.57(5), Stats., was to prevent the creation or existence of noncertified transcripts via photocopying the court's files. I say this because the original transcript is certified by the court reporter and any person may,

upon tendering the legal fee, require the clerk of court to furnish certified copies of the original transcript pursuant to sec. 889.18(3), Stats. 60 Op. Att'y Gen. 470 (1971). As my predecessor stated in that opinion, the legislative intent is heavily weighed in favor of permitting access; sec. 19.21(4), Stats., provides a penalty for unreasonable denial of such examination and copying; and sec. 889.18(3), Stats., provides an additional forfeiture for an unreasonable refusal to make copies.

This is a clear indication that, in Wisconsin, official records, including transcripts produced by court reporters, are open to public inspection and copying.

BCL:SDE

Chiropractors; Physicians And Surgeons; The Medical Practices Act, ch. 448, Stats., permits a physician, subject to certain limitations, to advise a patient whether or not continued chiropractic care is necessary, and the giving of such advice while it may technically fall within the definition of chiropractic practice does not constitute the unauthorized practice of chiropractic. OAG 95-79

October 22, 1979.

S. C. SYVERUD, D.C.

Chiropractic Examining Board

You ask whether a physician has authority under the Medical Practices Act to counsel a patient on whether or not continued chiropractic professional care is necessary. My answer is yes, subject to the qualifications set forth below.

It is generally recognized that, absent specific limits drawn by the Legislature,

A person holding a license or certificate to practice medicine and surgery, or to treat human diseases generally, has unlimited authority to prescribe for and treat the sick and afflicted, practice the profession in all its branches, and use any method or system of treatment or healing he may choose.

70 C.J.S. *Physicians and Surgeons* sec. 15(b). In Wisconsin, a physician's authority to practice medicine and surgery is broadly defined by the Legislature to include authority "[t]o examine into the fact, condition or cause of human health or disease, or to treat, operate, prescribe or advise for the same by any means or instrumentality." Sec. 448.01(9)(a), Stats. This grant of authority appears particularly broad in view of the fact that the Legislature has demonstrated its ability to impose specific limitations on other medical professions. See sec. 448.01(4), (8), Stats. As Justice Currie pointed out in *State v. Grayson*, 5 Wis. 2d 203, 206, 92 N.W.2d 272 (1958):

Sec. 147.14, Stats., prohibits any person from treating the sick who does not hold a license or certificate of registration from the state board of medical examiners, "except as otherwise specifically provided by statute." By sec. 147.23 the legislature has provided for the licensing of chiropractors. It thereby necessarily follows that chiropractors so licensed are authorized to treat the sick only to the extent authorized by their chiropractic license.

It is obvious, therefore, that physicians licensed by the Medical Examining Board have full authority to treat the sick, whereas, chiropractors licensed by the Chiropractic Board have only such authority to treat the sick as authorized by the Legislature.

I conclude, on the basis of the expansive grant of authority to physicians contained in the Medical Practices Act, that a physician may properly advise or counsel a patient on whether or not continued chiropractic professional care is necessary.

While as a general proposition the Medical Practices Act permits a physician to provide advice concerning the need for chiropractic care,

[I]t is a generally accepted principle that a physician has the duty to advise his patient to consult a specialist or one qualified in a method of treatment which the physician is not qualified to give, where he knows, or ought to that he does not have the requisite skill, knowledge, or facilities to treat the patient's ailment properly, or that the method by which he is treating the patient's ailment is not providing relief or effecting a cure.

Annot., 58 A.L.R.3d 590-91 (1929). This general principle is recognized in the administrative rules of the Medical Examining Board. In the rules prohibiting unprofessional conduct, such conduct is defined in Wis. Adm. Code section Med 10.02(2)(i), to include, “[p]racticing or attempting to practice under any license when unable to do so with reasonable skill and safety to patients.” Additionally, a physician is prohibited from engaging in “[a]ny practice or conduct which tends to constitute a danger to the health, welfare, or safety of patient or public.” Wis. Adm. Code section Med 10.02(2)(h). Thus, advice to a patient that chiropractic care is not needed may be prohibited in situations where a physician does not possess the skills or qualifications necessary to properly formulate such advice or where such advice may prove dangerous to the patient.

A review of the case law from throughout the country, however, reveals court decisions dealing with both the obligation of a physician to refer a patient to another physician and with the obligation of a limited medical professional to refer a patient to a physician. Courts have held that a general practitioner is required to advise a patient to consult a specialist. *Wilson v. Corbin*, 241 Iowa 593, 41 N.W.2d 702 (1950); *Morgan v. Engles*, 13 Mich. App. 656, 164 N.W.2d 702 (1968); *Benson v. Dean*, 232 N.Y. 52, 133 N.E. 125 (1921); and *Osborne v. Frazor*, 58 Tenn. App. 15, 425 S.W.2d 768 (1968). Chiropractors have been held liable for failure to advise a patient to consult a physician. *Salazar v. Ehmann*, 505 P.2d 387 (Colo. App. 1972); *Janssen v. Mulder*, 232 Mich. 183, 205 N.W. 159 (1925); *Ritter v. Sivils*, 206 Or. 410, 293 P.2d 211 (1956); and *Ison v. McFall*, 55 Tenn. App. 326, 400 S.W.2d 243 (1964). I have not found any cases holding a physician liable for failure to advise a patient to consult a chiropractor.

You also ask whether a physician’s advice to a patient concerning the need for continued chiropractic care would be considered the practice of chiropractic. The answer is no. Section 446.01(2), Stats., defines the practice of chiropractic as follows:

(a) To examine into the fact, condition, or cause of departure from complete health and proper condition of the human; to treat without the use of drugs as defined in s. 450.06 or surgery; to counsel; to advise for the same for the restoration and preservation of health or to undertake, offer, advertise,

announce or hold out in any manner to do any of the aforementioned acts, for compensation, direct or indirect or in expectation thereof; and

(b) To employ or apply chiropractic adjustments and the principles or techniques of chiropractic science in the diagnosis, treatment or prevention of any of the conditions described in s. 448.01(10).

A physician's advice concerning the need for continued chiropractic care obviously does not fall under the definition of chiropractic practice contained in sec. 446.01(2)(b), Stats. That section requires the employment or application of "chiropractic adjustments." This phrase is a term of art in the chiropractic field, *see, e.g.*, its use in Wis. Adm. Code section Chir 3.02(1). It is intended to specifically cover bodily manipulations performed by the chiropractic professional, *see* Wis. Adm. Code section Chir 3.02(1) ("chiropractic adjustments" are performed to correct disease-causing interferences with normal nerve transmission). But such advice may well meet that part of the definition of chiropractic set forth in sec. 446.01(2)(a), Stats. However, as discussed above, such physician's advice also falls clearly within the definition of the practice of medicine and surgery under sec. 448.01(9)(a), Stats.

At the heart of the issue you raise is the fact that there is clearly an overlap between the substantial statutory authority granted to physicians and the more limited authority given chiropractors to advise patients. *Compare* sec. 446.01(2)(a), Stats., with sec. 448.01(9)(a), Stats.; *see* sec. 446.01(2)(b), Stats., which authorizes chiropractors to diagnose, treat, or prevent any conditions described in sec. 448.01(10), Stats., which defines sicknesses treated by physicians and surgeons.

Though there are not any court decisions concerning the chiropractor/physician situation, courts have had occasion to deal with the issue of overlapping professional services in other areas. The most litigated dispute seems to be between architects and engineers. In these cases, the courts have generally held that:

[W] here either a licensed architect or a licensed engineer performed services which could properly be regarded as within the reach of the statute licensing his profession and also within the

statute licensing the other profession, he performed such services under the statute under which he was licensed and was not affected by the fact that they came incidentally within the purview of the other licensing statute.

5 Am. Jur. 2d *Architects* sec. 3.

It is my opinion that a similar line of reasoning must be applied to chiropractors and physicians. In giving advice to patients, there is an overlap between what may properly be done by a chiropractor and a physician under their respective grants of statutory authority. In my view, a physician is given the latitude to perform services within his or her authority, whether those services overlap with professional services properly performed by a chiropractor, or other health care professional.

To find otherwise would be to place unreasonable restraints on the practice of medicine. As summarized by the court in *Smith v. American Packing & Provision Co.*, 102 Utah 351, 130 P.2d 951, 955 (1942), "the mere fact that a licensed profession extends in some degree into the field of some other licensed occupation, does not require the licensee to have a license in each of the fields into which his profession may overlap, unless the statutes impose such requirement." Our statutes impose no such requirement. It is therefore my opinion that physicians may advise their patients whether or not continued chiropractic care is necessary. By so doing, physicians are not engaging in the unauthorized practice of chiropractic.

BCL:DDS

Bonds; Trust Funds; The state is not required to pay claims on bonds and coupons evidencing public debt issued pursuant to subch. 1 of ch. 18, Stats., once those obligations are six years overdue. Funds which cannot be paid out because of the extinguishment of the debt by reason of the passage of time remain in the building trust fund for the use of the long-range building program. OAG 96-79

November 1, 1979.

KENNETH LINDNER, *Secretary*
Department of Administration

Your predecessor asked my opinion on two questions:

- (1) Is the State required to pay on bonds and coupons presented for payment after the six year limit?
- (2) What State account should receive the unclaimed funds?

In my opinion, the answer to your first question is no. This answer is limited to bonds evidencing public debt issued pursuant to subch. 1 of ch. 18, Stats.

Section 18.10(10), Stats., provides:

Extinguishment of debt. Interest shall cease to accrue on public debt on the date that such debt becomes due for payment if said payment is made or duly provided for, but such debt and the accrued interest thereon shall continue to be public debt until 6 years overdue for payment or, in the case of public debt owing to the United States, until 20 years overdue for payment. At that time, unless demand for their payment has been made, they shall be extinguished and shall be deemed no longer outstanding.

The above-quoted statute clearly is applicable to the public debt evidenced by bonds and interest coupons. If a bond issued by the state, or a coupon related to such bond, is not presented for payment within six years from the time such payment is due, the debt is extinguished.

This conclusion is fortified by Wis. Const. art. VIII, sec. 2, which in material part provides that “[n]o appropriation shall be made for the payment of any claim against the state ... unless filed within six years after the claim accrued.” This constitutional provision is designed to limit the neglectful creditor. As stated in *Will of Heine-mann*, 201 Wis. 484, 489, 230 N.W. 698 (1930),

This provision of the constitution was no doubt intended as a limitation upon those who possessed legal claims against the State, but who permitted them to slumber without taking any action to enforce collection. It was a penalty visited upon the

slothful creditor. The vigilance of one whose claim rests upon moral considerations alone can avail him nothing.

The effect, then, both of this constitutional provision and sec. 18.10(10), Stats., is to extinguish the legal claim once mature obligations are six years overdue. Inasmuch as the obligation is extinguished six years after accrual, the date of the appropriation for payment is irrelevant to the issue whether the obligation is extant.

Accordingly, it is my opinion that the state is not legally required to pay on such bonds or coupons after expiration of the six-year limit.

In response to the second question posed, it is my opinion that unclaimed funds must remain in the building trust fund even after a legal claim can be made against them.

Section 18.09(1), Stats., provides that for each bond issue there shall be established in the state treasury a separate and distinct sinking fund. Subsections (2) and (3) thereof provide:

(2) Each sinking fund shall be expended, and all moneys from time to time on hand therein are irrevocably appropriated, in sums sufficient, only for the payment of principal and interest on the bonds giving rise to it and premium, if any, due upon refunding of any such bonds.

(3) One year after interest has ceased to accrue on all of the bonds giving rise to a sinking fund, all moneys on hand in such sinking fund shall be paid over and transferred to the state building trust fund and the sinking fund shall be closed. An amount equal to the aggregate face value of all outstanding bonds and the accrued interest thereon for which no sinking fund exists shall be maintained in the state building trust fund applicable exclusively to the payment of such bonds and interest.

Thus, the unused monies in the state treasury sinking funds must, one year after interest has ceased to accrue, be transferred to the state building trust fund and the sinking fund is closed. In my view, the monies on hand which cannot be paid because of extinguishment under sec. 18.10(10), Stats., are appropriated by operation of sec. 20.710(2)(x), Stats., to the long-range building program under sec. 13.48, Stats.

Section 20.710, Stats., provides:

BUILDING COMMISSION. There is appropriated to the building commission for the following programs:

....

(2) **Building Trust Fund....**

....

(x) *Building trust fund.* As a continuing appropriation, all moneys not otherwise appropriated from the state building trust fund for purposes of carrying out the long-range building program under s. 13.48. The state building trust fund shall consist of all appropriations or transfers made thereto by the legislature, together with all donations, gifts, bequests or contributions of money or other property, all restored advances and all investment income.

Section 20.710(2)(x), Stats., evinces a legislative intent that all monies not otherwise appropriated from the building trust fund shall, as a “continuing appropriation,” become part of the long-range building program under sec. 13.48, Stats. The building trust fund itself is funded from a wide variety of sources, one of which is the money from the sinking funds pursuant to sec. 18.09(3), Stats. That subsection also provides that the money from the sinking funds shall be used “exclusively ... [for] the payment of such bonds and interest.” By definition of the problem and the terms of sec. 18.10(10), Stats., however, that obligation has become extinguished and the original purpose no longer can be carried out. Accordingly, sec. 20.710(2)(x), Stats., works to appropriate the money to the long-range building program under sec. 13.48, Stats., inasmuch as sec. 18.10(10), Stats., precludes any payment out of that fund for the original purposes of sec. 18.09(3), Stats.

BCL:CDH

Personnel Commission: A single member of the Personnel Commission is empowered to act as the Commission where two of the three Commission positions are vacant. OAG 97-79

November 1, 1979.

CHARLOTTE M. HIGBEE, *Commissioner*
Personnel Commission

You advise that two of the three members of the Personnel Commission have resigned, leaving you as the only member. You ask whether you are authorized, during the period of these vacancies, to finally decide contested cases that are before the Commission pursuant to sec. 230.45, Stats., including matters in which you have conducted hearings as a hearing examiner but in which the Commission had not entered an order pursuant to sec. 227.09(3)(a), Stats., directing that the hearing examiner's decision be the final decision of the agency.

In my opinion, the answer is yes.

Section 15.06(6), Stats., provides: "**Quorum.** A majority of the membership of a commission constitutes a quorum to do business, except that vacancies shall not prevent a commission from doing business."

Section 230.45, Stats., sets forth the powers and duties of the Personnel Commission. They include adjudicating contested cases involving such matters as employe discipline, alleged discrimination on the basis of race and sex, and arbitration of certain grievances. Section 227.09(3)(a), Stats., empowers agencies to direct that a hearing examiner's decision be the final decision of the agency.

The legislative intent under sec. 15.06(6), Stats., is clear. Commission business is to continue despite vacancies. Since two of the three members of the Commission have resigned, thereby creating two vacancies, you alone constitute a quorum and are empowered to act as the Commission until a new member of the Commission takes office.

The power to act as the Commission includes all subjects on which the Commission is empowered to act, including cases before the Commission in which you sat as a hearing examiner. In this situation you would be exercising the same powers ordinarily exercised by a fully constituted Commission, and your decisions similarly are subject to the same provisions for judicial review.

In arriving at this conclusion, I have considered the argument that there is no vacancy caused by the resignations of two members of the Commission until their successors are chosen and qualify for office. Section 17.01(13), Stats., provides:

Resignations shall be made in writing, shall be addressed and delivered to the officer or body prescribed in this section and shall take effect, in the case of an officer who is not a school district officer and whose term of office continues by law until a successor is chosen and qualifies, upon the qualification of the successor; and in the case of other officers ... at the time indicated in the written resignation, or if no time is therein indicated, then upon delivery of the written resignation.

Members of the Commission hold office until their successors qualify. *See, State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 283, 125 N.W.2d 636 (1964).

For a number of reasons I cannot accept the argument that there are no vacancies on the Commission despite the resignations of two members, even absent the qualification of any successors. First, the "shall" in sec. 17.01(13), Stats., probably is directory rather than mandatory. A contrary interpretation would lead to the absurd result that a governor could not nominate and the senate could not confirm a successor to an office holder who refused to put his/her resignation in writing but who nevertheless orally resigned and ceased to perform all duties. Second, this subsection must be construed as at most defining the content of the desired written resignation as including a willingness to remain in office until a successor qualifies. In addition to evidencing legislative intent to avoid vacancies where possible, this construction probably is constitutionally compelled. The contrary position would compel a person to work against his/her will. Third, the construction suggested in the previous two points harmonizes sec. 17.01(13), Stats., with the overall purpose of sec. 15.06(6), Stats., to see that government business continue notwithstanding resignations from service.

My opinion in 66 Op. Att'y Gen. 192 (1977) is not applicable here. In that opinion, I concluded that a resignation from a seven person board nevertheless required a quorum of four, the implication being that a resignation or vacancy does not reduce the number of votes needed to do business. However, that conclusion in part rested

on sec. 15.07(4), Stats., which then provided: “**Quorum.** A majority of the membership of a board constitutes a quorum to do business and, unless a more restrictive provision is adopted by the board, a majority of a quorum may act in any matter within the jurisdiction of the board.”

The difference between sec. 15.07(4), Stats., as construed in that opinion, and sec. 15.06(6), Stats., which is applicable here, is that the latter subsection contains terms added by ch. 276, sec. 65, Laws of 1969, viz: “except that vacancies shall not prevent a commission from doing business.” This difference in statutory language makes inapplicable the reasoning in 66 Op. Att’y Gen. 192 (1977).

Similarly, this additional language makes inapposite 26 Op. Att’y Gen. 41 (1937), which concluded that the powers of the Public Service Commission could not devolve on a single commissioner. The applicable statute, however, provided that “a vacancy shall not impair the right of the remaining commissioners to exercise all the powers of the commission.” 26 Op. Att’y Gen. at 42 (emphasis added). By contrast, sec. 15.06(6), Stats., does not refer to “commissioners” in the plural. Instead, it provides that “vacancies” shall not prevent a “commission” from doing business. Thus, the Legislature was keenly aware that in the case of a three-person commission, as is the case here, “vacancies” in the plural would result in the conduct of commission business by a single commissioner.

BCL:CDH

Conservation Wardens; Natural Resources; The power of arrest of DNR wardens is limited by statute; they do not have general law enforcement authority except on state-owned lands, and property under DNR’s supervision, management and control including the power to arrest violators of state law on all bodies of water which lie exclusively within such area, as determined by facility boundaries. OAG 98-79

November 6, 1979.

ANTHONY S. EARL, *Secretary*
Department of Natural Resources

You ask whether sec. 23.11(4), Stats., gives the Department of Natural Resources (DNR) law enforcement personnel the power of a peace officer on streams, natural lakes, flowages, artificially raised lakes and bodies of water exclusively within the boundaries of state parks and forests. More specifically, you inquire as to the applicability of sec. 23.11(4), Stats., to situations where DNR law enforcement personnel observe violations of state law, such as possession of marijuana, occurring on navigable waters of the state.

Initially, it should be noted that the Legislature is cautious in granting the authority to arrest. When construing a statute to determine whether it grants a person or a class of persons the authority to arrest, the arresting authority should not be construed as having been vested by inference. 6A C.J.S. *Arrest* sec. 11.

Before addressing the direct applicability of sec. 23.11(4), Stats., to the situation posed in your question, I would like to point out that a related statute, sec. 29.05(1), Stats., grants DNR law enforcement personnel authority to arrest violators of certain state laws specifically enumerated in that section. Section 29.05(1), Stats., provides in pertinent part:

The department [of natural resources] and its wardens ... may arrest, with or without a warrant, any person detected in the actual violation, or whom such officer has probable cause to believe guilty of a violation of any of the laws cited in this subsection ... and ... any such officer may stop and board any boat ... if the officer reasonably suspects there is a violation of such sections.

I am of the opinion that duly appointed DNR law enforcement personnel may arrest a violator of any of the state laws enumerated in sec. 29.05(1), Stats., anywhere in the State of Wisconsin, including on any of the state's navigable waters. This conclusion is supported by the provision in sec. 29.05(1), Stats., that the arresting DNR officer "may stop and board *any* boat."

However, it must be emphasized that the arrest authority granted to DNR wardens *by sec. 29.05 (1)* is limited to the power to arrest violators of the laws expressly enumerated in that section and is not a general grant of authority to arrest violators of any and all of the state's laws. Your question specifically includes an inquiry as to whether DNR wardens can arrest persons in possession of marijuana on navigable waters of the state. The sections of the statutes relating to marijuana possession, secs. 161.41(2r) and 161.14(4)(k), Stats., are not enumerated under sec. 29.05(1), Stats. Thus, DNR law enforcement personnel are not authorized by sec. 29.05(1), Stats., to arrest persons who possess marijuana on a navigable waterway.

Therefore, we reach the question as to whether sec. 23.11(4), Stats., grants the powers of a peace officer to DNR law enforcement personnel to arrest, on navigable waters, violators of sections of the statutes *not* enumerated in sec. 29.05(1), Stats. In answering this question, it must be noted that an administrative agency may only act within the scope of powers granted to it by the Legislature. *Clintonville Transfer Line v. Public Service Commission*, 248 Wis. 59, 21 N.W.2d 5 (1945). I am of the opinion that sec. 23.11(4), Stats., does *not* constitute a general grant of peace officer arrest authority to DNR wardens on streams, natural lakes, flowages and artificially raised lakes. I am of the further opinion that sec. 23.11(4), Stats., does grant peace officer arrest authority to DNR law enforcement personnel on those portions of streams, natural lakes, flowages and artificially raised lakes which lie within the facility boundaries of various state owned lands and properties which are under DNR's supervision, management and control. Section 23.11(4), Stats., expressly grants DNR "police supervision over all state-owned lands and property under its supervision, management and control" and specifically provides that DNR's "duly appointed agents or representatives may arrest ... any person *within such area*" who commits "an offense against the laws of this state or in violation of any rule of the department [of natural resources] in force *in such area*." As made evident above, I construe the statutory phrase "within such area" as encompassing those portions of streams, natural lakes, flowages and artificially raised lakes which lie within the facility boundaries of various state owned lands and property under DNR's supervision, management and control, such as state parks, state forests, state owned fish and game management lands, and state owned public hunting and fishing grounds.

Section 23.11(1), Stats., places the following state owned lands and properties under DNR's supervision, management and control:

GENERAL POWERS. In addition to the powers and duties heretofore conferred and imposed upon said department by this chapter it shall have and take the general care, protection and supervision of all state parks, of all state fish hatcheries and lands used therewith, of all state forests, and of all lands owned by the state or in which it has any interests, except lands the care and supervision of which are vested in some other officer, body or board

More specifically, sec. 27.01(8), Stats., expressly grants DNR law enforcement personnel the general arrest authority of a peace officer within state park areas:

Police supervision. The department shall have police supervision over all state parks, and its duly appointed wardens or representatives in charge of any state park may arrest, with or without warrant, any person within such park area, committing an offense against the laws of the state or in violation of any rule or regulation of the department in force in such state park

It is not too difficult to visualize situations in which only a portion of a navigable body of water would lie within the area of state owned lands and property under DNR's supervision, management and control. For example, if a portion of a river runs through a state forest, violators of state law would be subject to arrest by duly appointed DNR personnel on that portion of the river. Or, if a state park boundaries jut out into a lake meeting at a point on a survey map, DNR wardens may arrest violators of state law on that portion of the lake which lies on the state park side of such line.

I am also of the opinion that conservation wardens and other duly appointed DNR law enforcement personnel are given the authority by sec. 23.11(4), Stats., to arrest violators of state law on all bodies of water which lie exclusively within the area, as determined by facility boundaries, of state parks, state forests and all other state owned lands and property under DNR's supervision, management and control.

Finally, I believe that the Department should bring this problem to the attention of the Legislature. The Legislature could extend the

arrest power of DNR wardens to all navigable waters. This would avoid confusion over jurisdiction and compliance problems. *See Mendota Club v. Anderson, et al.*, 101 Wis. 479, 493, 78 N.W. 185 (1899), when the court said boaters should not have to carry chart, compass and measuring line to determine whether they were trespassing. Likewise, wardens would certainly be inconvenienced and enforcement enhanced if their jurisdiction were extended by statute.

The authority of a DNR warden to make a citizen's arrest in these circumstances is not considered.

BCL:TLP

County Clerk; Prisons And Prisoners; Sheriffs; As custodian of the jail and its prisoners, the sheriff has the exclusive right to determine where duplicate sets of jail keys will be kept; the county clerk is not authorized to retain a duplicate set of jail keys if the sheriff does not agree to such possession. OAG 99-79

November 7, 1979.

MORGAN R. BUTLER, III, *Corporation Counsel*

Ozaukee County

You have asked me to resolve what you perceive to be a conflict between secs. 59.23(1) and 59.07(1)(d)1., Stats., regarding the county clerk's authority to retain a set of jail keys. The circumstances prompting this question are as follows:

For the past twenty-five years, the county clerk has kept a duplicate set of all keys to county buildings, including keys to the jail. Until recently, the clerk kept his jail keys in a locked drawer in his office. Currently, however, the keys are kept in a secured location known only to the sheriff, the clerk, and the clerk's deputy. The sheriff has demanded the return of this duplicate set of keys, claiming sec. 59.23(1), Stats., vests him with exclusive control over the jail keys. The clerk has refused to return the keys, claiming secs. 59.07(1)(d)1. and 59.67(1), Stats., authorize him to retain a duplicate set. For the following reasons, it is my opinion the county clerk

has no right to have a set of jail keys unless the sheriff agrees to such possession.

The relevant statutes provide as follows:

59.07 GENERAL POWERS OF BOARD. The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language:

(1) **Property.**

....

(d) *Construction, maintenance and financing of county-owned buildings and public works projects:* 1. Construct, purchase, acquire, lease, develop, improve, extend, equip, operate and maintain all county buildings, structures and facilities ... including ... jails ... and including all property, real and personal, pertinent or necessary for such purposes.

59.23 SHERIFF; DUTIES. The sheriff shall:

(1) Take the charge and custody of the jail maintained by his county and the persons therein, and keep them himself or by his deputy or jailer.

59.67 COUNTY PROPERTY. (1) **How held.** County property shall be held by the clerk in the name of the county.

In an earlier opinion of this office, the apparent conflict between secs. 59.07(1)(d)¹ and 59.23(1), Stats., was noted in relation to the county board's right to use unoccupied jail space. That opinion concluded the county board could use such space only if it would not interfere with jail operations or security and that, between the sheriff and the county board, the sheriff was to be arbiter of that decision. 52 Op. Att'y Gen. 377, 379-80 (1963).

Under the instant set of facts, the conflict between the two statutes is more imagined than real. While the sheriff obviously needs keys to the jail and its cells in order to fulfill his duty as custodian of the jail

¹ Section 59.07(1)(d), Stats., has since been amended and subdivided into secs. 59.07(1)(d)1. and 59.07(1)(d)2., Stats.

and the prisoners therein, the same cannot be said of the county clerk in respect to his duty, as the representative of the county, to operate and maintain the jail. Because the jail is open twenty-four hours a day, 365 days of the year, maintenance can continue as long as the sheriff and his deputies are willing to permit janitors, repairmen, etc., reasonable access to the jail. Because of this accessibility, the county clerk's failure to have a set of jail keys will not interfere with his maintenance and operation of the jail. In fact, there is no indication of a problem in this regard in your county, and the clerk has admitted he has never needed to use a single key to gain access to the jail during his fifteen years in office. Thus, there is not necessarily a conflict between the two statutes regarding possession of jail keys.

Insofar as secs. 59.07(1)(d)1. and 59.23(1), Stats., may be viewed as conflicting, however, the sheriff's rights to control of the jail are superior to those of the county clerk as representative of the county. Section 59.23(1), Stats., which designates the sheriff as custodian of the jail and its prisoners, embodies one of the powers of the sheriff as they existed at common law and at the time of adoption of the state constitution. *State ex rel. Kennedy v. Brunst*, 26 Wis. 412, 414 (1870), cited with approval in *Schultz v. Milwaukee County*, 245 Wis. 111, 114-115, 13 N.W.2d 580 (1945). Because such a power is an important attribute of the constitutional office of sheriff, the county board cannot constitutionally effect a change in the substance of that power by transferring custody of the jail to the county clerk or by requiring the sheriff and the clerk to share custody of the jail. I say this not to imply that the county board has done so in this instance, but merely to emphasize the great deference traditionally accorded the sheriff in the operation of the jail.

The sheriff's independence from other county officials in the performance of his duties, clearly recognized in *Andreski v. Industrial Comm.*, 261 Wis. 234, 240, 52 N.W.2d 135 (1952), also supports the conclusion that his right to control the jail keys is absolute.

Within the field of his responsibility for the maintenance of law and order the sheriff today retains his ancient character and is accountable only to the sovereign, the voters of his county, though he may be removed by the governor for cause. No other county official supervises his work or can require a report or an accounting from him concerning his performance of his duty. *He chooses his own ways and means of performing it.*

(Emphasis added.)

The immense responsibilities which attach to the office of sheriff also require that he be given absolute control over the handling of jail keys. The sheriff has been singled out by the state constitution as the only county officer for whose actions the county may not be held responsible. Wis. Const. art. VI, sec. 4; *Bablitch & Bablitch v. Lincoln County*, 82 Wis. 2d 574, 263 N.W.2d 218 (1978). Furthermore, it is common knowledge that the sheriff, rather than the county clerk, will be the party blamed for failures in jail security. This is further reason for giving the sheriff exclusive right to determine where duplicate sets of jail keys will be kept.²

Insofar as the county clerk is relying on sec. 59.67(1), Stats., for authority to retain a set of jail keys, I do not believe this statute authorizes such possession. Although sec. 59.67(1), Stats., mandates that the county clerk shall "hold" county property (which would include the county jail), I believe this statute refers to the title to county property and not to actual physical possession of county-owned buildings. Because conflicts between different statutes will not be held to exist if they may otherwise be reasonably construed, *Raisanen v. City of Milwaukee*, 35 Wis. 2d 504, 516, 151 N.W.2d 129 (1967), I believe a reasonable construction of sec. 59.67(1), Stats., is that it refers to the clerk holding legal title to county property. In the alternative, if secs. 59.67(1) and 59.23(1), Stats., are read as conflicting, the latter statute, which designates the sheriff as custodian of the jail and the prisoners therein, would control over the former because when a general statute and a specific statute relate to the same subject matter (here, county property), the specific statute controls. *Raisanen*, 35 Wis. 2d at 516. Because sec. 59.23(1), Stats., specifically relates to the county jail, while sec. 59.67(1), Stats.,

² Although it is my opinion that the sheriff has the right to determine where the various sets of keys to the jail shall be kept, he is required by the Wisconsin Administrative Code to keep one set of keys outside the jail. Specifically, Wis. Adm. Code section PW-C 50.03(2), provides as follows:

(2) There must be at least 3 complete sets of jail and fire escape keys, one set each in use and one set, stored in a safe place accessible only to jail personnel for use in an emergency and one set stored in a secure place outside the jail. There must be an accurate record of the location of the keys. All jail personnel must be given instructions concerning the use and storage of the keys and held strictly accountable for keys assigned to them.

relates generally to county property, the former statute would control the latter if they were deemed to conflict.

Although it is my opinion that the county clerk does not have the right to demand a duplicate set of jail keys, this is not to say that the sheriff could not authorize the clerk to possess such keys. Under the circumstances existing in your county, however, it is clear the county clerk does not have the sheriff's consent to retain a set of jail keys.

BCL:MM

Civil Service; Sheriffs; Words And Phrases; The county board may require the appointment of regularly employed deputies to be in accordance with the pertinent civil service ordinance. The county board may fix the number and the compensation, if any, of all deputy sheriffs, whether regularly employed or honorary deputies. Notwithstanding the number fixed by ordinance, the sheriff retains the power to call a *posse comitatus* pursuant to sec. 59.24(1), Stats. OAG 100-79

November 8, 1979.

WILLIAM G. THIEL, *Corporation Counsel*
Eau Claire County

You request my opinion whether, assuming the adoption of appropriate ordinances under the provisions of sec. 59.21(8)(a), Stats., the county board may require the appointment of all deputy sheriffs to be under civil service and, further, may restrict the maximum number of all deputy sheriffs to be appointed, with the only exceptions in both contexts being appointments of "honorary deputies" and "posse comitatus/section 59.24" deputies.

I am of the opinion that the county board may require the appointment of regularly employed deputies to be in accordance with the pertinent civil service ordinance and the county board may fix the number and, the compensation, if any, of all deputy sheriffs, whether regularly employed or, honorary deputies. I am also of the opinion that notwithstanding the number fixed by ordinance, the sheriff

retains the power to call a *posse comitatus* pursuant to sec. 59.24(1), Stats.

Section 59.21, Stats., provides in pertinent part:

SHERIFF; UNDERSHERIFF; DEPUTIES. (1) Within 10 days after entering upon the duties of his office the sheriff shall appoint some proper person, resident of his county, undersheriff, provided that in selecting such undersheriff, in counties where the sheriff's department is under civil service the sheriff, in conformity with county ordinance, may grant a leave of absence to a deputy sheriff, and appoint him undersheriff, or to any other position in the sheriff's department, on request of such appointee, and upon acceptance of such new appointment and duties, and after completion thereof, such appointee shall immediately be returned to his deputy sheriff position and continue therein without loss of any rights under the civil service law; the sheriff, however, may not grant such leave of absence to a deputy sheriff until he first secures the consent of the county board by resolution duly adopted by the county board, provided that in counties with a population of 500,000 or more the appointment of an undersheriff shall be optional; and within such time the sheriff shall appoint deputy sheriffs for his county as follows:

(a) One for each city and village therein having one thousand or more inhabitants.

(b) One for each assembly district therein, except the district in which the undersheriff resides, which contains an incorporated village having less than one thousand inhabitants and does not contain a city or incorporated village having more than one thousand inhabitants.

(c) Each deputy shall reside in the city or village for which he is appointed, or if appointed for an assembly district, shall reside in the village in such district.

(2) He may appoint as many other deputies as he may deem proper.

(3) He may fill vacancies in the office of any such appointee, and may appoint a person to take the place of any undersheriff or deputy who becomes incapable of executing the duties of his office.

(4) A person appointed undersheriff or deputy for a regular term or to fill a vacancy or otherwise shall hold office during the pleasure of the sheriff.

(5) The sheriff or his undersheriff may also depute in writing other persons to do particular acts.

(6) Every appointment of an undersheriff or deputy, except deputations to do a particular act, and every revocation of such appointment shall be in writing and be filed and recorded in the office of the clerk of the circuit court.

(7) In case of a vacancy in the office of sheriff the undersheriff shall in all things and with like liabilities and penalties execute the duties of such office until the vacancy is filled as provided by law.

(8)(a) In counties having a population of less than 500,000, the county board may by ordinance fix the number of deputy sheriffs to be appointed in said county which number shall not be less than that required by sub. (1) (a) and (b), and fix the salary of such deputies

....

(d) Adoption of the ordinances provided for by this subsection shall not preclude the county board from thereafter amending or repealing such ordinances, but such amendment or repeal shall not be effective unless voted by the affirmative vote of three-fourths of the members-elect of such board. The civil service provisions of this section shall apply only to such deputies or traffic patrolmen who are regularly employed by the county or sheriff and shall not apply to honorary deputies. Notwithstanding the provisions of this subsection the county board may enact a civil service ordinance for county employes under s. 59.07 (20) which civil service ordinance may include deputy sheriffs or traffic patrolmen, or both.

Your inquiry primarily concerns the interrelationship between subssecs. (2) and (8)(a) and (d) above. Subsection (2) has been law in substantially its present form since the inception of statehood. Revised Statutes (1849), ch. 10, sec. 81. Subsection (8) was enacted by ch. 349, Laws of 1935, and since amendment in pertinent part, by ch. 253, Laws of 1937, has not materially changed.

County boards have only such legislative powers as are conferred upon them by statute, expressly or by clear implication. *Maier v. Racine County*, 1 Wis. 2d 384, 385, 84 N.W.2d 76 (1957). By the express language of paragraphs (a) and (d) of subsec. (8), above, the Legislature has clearly and unambiguously imbued the county boards with those powers relevant to your inquiry. The county boards have been given express authority to, by ordinance, "fix the number of deputy sheriffs to be appointed," subject to the minimum numbers established pursuant to sec. 59.21(1)(a) and (b), Stats., and "fix the salary of such deputies." So also, the boards have been authorized to adopt, by ordinance, a civil service type selection procedure under which the sheriff must make his appointments of deputies.

Within the provisions of sec. 59.21, Stats., there exists only the exception: "The civil service provisions of this section shall apply only to such deputies ... who are regularly employed by the county or sheriff and shall not apply to honorary deputies." Sec. 59.21(8)(d), Stats.

To fully appreciate the impact of that express exception, it is necessary to determine what is meant by the terms "regularly employed" and "honorary deputies." The exception in sec. 59.21(8)(d), Stats., was enacted by ch. 253, Laws of 1937. There is no pertinent legislative history on this law and the drafting files are no longer in existence. The words here in question should be given their common and ordinary meaning. *Telemark Co. v. Dept. of Taxation*, 28 Wis. 2d 637, 641, 137 N.W.2d 407 (1965). *Black's Law Dictionary*, 617 (Rev. 4th ed. 1968), defines "employee" as "a person working for salary or wages." Similarly, *Webster's Seventh New Collegiate Dictionary*, 271 (1970), offers the following single definition: "one employed by another usually for wages or salary and in a position below the executive level." In defining "regular," *Black's*, at 1450, states: "steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation." It is the antonym of "casual" or "occasional." *Webster's*, at 722, offers as synonyms, "normal," "typical" and "natural," while stating: "Regular stresses conformity to a rule, standard, or pattern."

Based upon these above definitions, it is my opinion that the term "regularly employed" as used in sec. 59.21(8)(d), Stats., refers to *compensated* deputies who are typically hired in the normal pattern of employment for a sheriff's department as distinguished from

uncompensated deputies or persons deputized for a particular act or for emergencies. This definition is consistent with the action of the Legislature extending the opportunity for civil service selection and protection to deputy sheriffs. Applying the common and ordinary meaning of employe exempts from the application of the civil service provisions of sec. 59.21(8), Stats., both uncompensated deputies and casual or occasional limited appointments. This is logical and avoids the possibility of unwarranted impediments in the appointment process. Consistent with this philosophy, our supreme court has stated: "The primary purpose of civil service laws is to improve the *efficiency* of the public service." *State ex rel. Esser v. McBride*, 215 Wis. 574, 578, 254 N.W.2d 657 (1934) (emphasis supplied).

Are there individuals who are not "regularly employed" who are more than "honorary deputies?" The term "honorary deputy" was given a very narrow definition in a 1948 opinion of this office, 37 Op. Att'y Gen. 381 (1948). In the context of the specific fact situation presented in that opinion, it was stated that the term "honorary deputies" referred only "to persons to whom the title is given merely as a mark of compliment or respect." *Id.* at 383. That opinion utilized such narrow definition to arrive at a sensible result under the facts presented. It was, however, unnecessary to the resolution of the question to specifically apply that narrow definition to the term "honorary deputies" as set forth in sec. 59.21(8)(d), Stats., even though the author of that opinion applied the narrow definition to sec. 59.21(8)(d). The language in that opinion does not, in my view, determine the issue you raise. The definition of "honorary deputy" set forth in the earlier opinion should be narrowly confined to the fact situation there presented. 37 Op. Att'y Gen. 381 (1948) did clearly recognize the existence of two generally accepted definitions of an honorary officer. In addition to the narrow definition mentioned above, the opinion discussed, but rejected, a broader definition which would encompass uncompensated deputies with powers of the office. *Id.* at 382.

A broader definition of the term "honorary deputy" in sec. 59.21(8)(d), Stats., can be harmonized with the definition of "regularly employed." Both accepted definitions of "honorary" have one element in common, *i.e.*, the office or position is not compensated. (See discussion of the two accepted definitions in 37 Op. Att'y Gen. at 382.) Honorary deputies are, therefore, by either definition, not

“employed” as that term is ordinarily understood. There is no evidence that the Legislature meant to restrict the term “honorary deputy” as used in sec. 59.21(8)(d), Stats. On the contrary, one may assume that the Legislature, when enacting that language, took into consideration the existence of both definitions, *i.e.*, uncompensated deputies with official powers and uncompensated deputies without any official powers.

We are dealing here with an exception which expressly applies only to the county civil service provisions. In this context “honorary deputy” should be given a broader definition in order to avoid a gap in the statute between the common and ordinary meaning of “regularly employed” and “honorary deputies.” Adopting a broader definition of “honorary deputy” does not restrict the county board with respect to fixing the number of deputy sheriffs or fixing the salary of such deputies by ordinance.

The argument might be advanced that the granting of such powers by the Legislature to the county board is an unconstitutional usurpation of the powers of the office of sheriff and that such provisions are, therefore, void. *State ex rel. Kennedy v. Brunst*, 26 Wis. 412 (1870). That question has been directly addressed by our supreme court in the context of a similar civil service statute involving Milwaukee County, ch. 259, Laws of 1917. In *State ex rel. Milwaukee County v. Buech*, 171 Wis. 474, 177 N.W. 781 (1920), the supreme court refused to apply the rationale of the *Kennedy* case to the power of the sheriff to appoint deputies.

With no disposition to question the doctrine of that case, we do not think it should be extended to the extent here urged. We think it should be confined to those immemorial principal and important duties that characterized and distinguished the office. While at common law the sheriff possessed the power to appoint deputies, it was not a power or authority that gave character and distinction to the office. Many other officers as well as sheriffs possessed the power. It was more in the nature of a general power possessed by all officers to a more or less extent and was not peculiar to the office of sheriff. It should not be held, in our judgment, that the constitution prohibits any legislative change in the powers, duties, functions, and liabilities of a sheriff as they existed at common law. If that were true, a constitutional amendment would be necessary in order to change the

duties of sheriffs in the slightest degree and, in this respect, "the state would be stretched on a bed of Procrustes."

Id. at 482.

To the extent that the provision of sec. 59.21(2), Stats., conflicts with the express provisions of the more recently enacted sec. 59.21(8), Stats., "the new provisions should prevail as the latest declaration of the legislative will." 1A Sands, *Sutherland Statutory Construction* sec. 22.34, p. 196 (4th ed. 1973). (Obviously, if no conflicting ordinance has been enacted, the provision in subsec. (2) remains effective.) There is additional authority for this construction in the specific context of sec. 59.21, Stats. The supreme court held in *Buech*, 171 Wis. at 483-84, that the residency requirements of sec. 59.21(1)(c), Stats., were effectively superseded, for Milwaukee County, by the more recently enacted provisions of ch. 259, Laws of 1917. Similarly, in an opinion of this office, 24 Op. Att'y Gen. 747, 749 (1935), sec. 59.21(4), Stats., relating to the tenure of deputy sheriffs, was found to have been superseded, where a proper ordinance was in effect, by the more recently enacted express provisions of sec. 59.21(8)(c), Stats. *See also*, 38 Op. Att'y Gen. 245, 247 (1949).

It should be noted here that language in 35 Op. Att'y Gen. 474, 475 (1946), implying that a sheriff may appoint as many deputies as he deems proper, notwithstanding the enactment of an ordinance fixing the number of deputy sheriffs, is hereby repudiated. The reasoning of that opinion was based upon 18 Op. Att'y Gen. 335 (1929), which opinion had nothing to do with the conflict between sec. 59.21(8)(a), Stats., and sec. 59.21(2), Stats., since it was written six years before the enactment of subsec. (8).

Prior to 1973, the Legislature had provided the county boards with the express power, *inter alia*, to abolish certain county positions such as that of deputy sheriff. Sec. 59.15(2)(b), Stats. (For a discussion of the application of this section to the office of deputy sheriff, *see* 49 Op. Att'y Gen. 26 (1960).) Section 59.15(2)(a), Stats., expressly limited the application of that subsection to positions, "the salary or compensation for which is paid in whole or in part by the county." Chapter 118, Laws of 1973, in pertinent part, repealed sec. 59.15(2)(b), Stats., and created sec. 59.025, Stats. Section

59.025(3)(b), Stats., gave to the county boards the power to “abolish ... any county office, department, committee, board, commission, position or employment.” No longer was this power expressly limited to compensated positions. This additional statutory power of the county board reinforces my opinion that such boards have the power to fix the number of deputy sheriff positions, whether compensated or uncompensated.

The one exception to the ability of the county board to fix the number of deputy sheriffs at or above the minimum set forth in sec. 59.21(1)(a) and (b), Stats., results from the superior power and duty of the sheriff to call upon citizens to aid him in preserving the peace or making an arrest. This has often been referred to as the power to call up a *posse comitatus*. *Kagel v. Brugger*, 19 Wis. 2d 1, 5-6, 119 N.W.2d 394 (1963); *Schofield v. Industrial Comm.*, 204 Wis. 84, 88, 235 N.W. 396 (1931). This is a power which has been expressly recognized by the Legislature and included in the provisions of sec. 59.24(1), Stats., which reads as follows:

(1) Sheriffs and their undersheriffs and deputies shall keep and preserve the peace in their respective counties and quiet and suppress all affrays, routs, riots, unlawful assemblies and insurrections; for which purpose, and for the service of processes in civil or criminal cases and in the apprehending or securing any person for felony or breach of the peace they and every coroner and constable may call to their aid such persons or power of their county as they may deem necessary.

Moreover, I believe that this power is one of those historical powers reserved to the office of sheriff by the Wisconsin Constitution. *See*, in this regard, 61 Op. Att’y Gen. 79, 82-84 (1972), and the cases and authorities there cited. For a more detailed discussion of emergency circumstances under which calls under sec. 59.24, Stats., for a *posse comitatus* may be authorized, see my opinion at 56 Op. Att’y Gen. 96, 99-103 (1967).

I must assume that no county ordinance enacted pursuant to sec. 59.21(8)(a), Stats., would be drafted so clumsily as to raise the possibility that the county board may have intended to restrict a sheriff from appointing deputies in such emergency situations. However, to

the extent that any ambiguity might presently exist in such ordinances, it is my opinion that this historical power of the sheriff would not thereby be restricted.

I cannot overemphasize the importance that those who draft ordinances restricting the number of deputies a sheriff may appoint and those who enact them recognize the multitude of good and sufficient reasons for appointments, as the need arises, of all types of deputy sheriffs. Our Legislature has always recognized, for instance, the advisability of allowing a sheriff to deputize a person to do a particular act. Revised Statutes 1849, ch. 10, sec. 81; sec. 59.21(5), Stats. Most importantly, it has been a well recognized practice for sheriffs in this state to deputize law enforcement officers of other local law enforcement agencies in their county on a cooperative basis. This has been done so as to obviate the jurisdictional problems that might arise because of the limited power such officers otherwise would have to act beyond their municipal boundaries. 61 Op. Att'y Gen. 79, 85 (1972).

An understanding of the diverse nature and functions of deputies should lead to a better appreciation of the complex responsibilities of the office of sheriff. Such understanding and recognition is essential if a county board is to enact appropriately flexible ordinances in accordance with the powers given to it under sec. 59.21(8), Stats.

BCL:JDH

Confidential Reports; Minors; The duty to report suspected cases of child abuse or neglect under sec. 48.981(3)(a), Stats., prevails over any inconsistent terms in sec. 51.30, Stats. OAG 101-79

November 8, 1979.

WILLIAM A. HUPY, *District Attorney*
Marinette County

You have posed the following question:

In a situation where a child, as defined in Wis. Stats. Sec. 48.981 (1)(b), is brought to a hospital for drug treatment due to an overdose of drugs or alcohol, are the hospital personnel

required to report pursuant to 48.981 (2) or does Wis. Stats. Sec. 51.30 (4)(a), (c) prevail and thereby prohibit such disclosure.

In my opinion the hospital personnel are required to report the facts and circumstances contributing to a suspicion of child abuse or neglect notwithstanding any of the terms in sec. 51.30, Stats.

Section 48.981, Stats., in material part provides:

ABUSED OR NEGLECTED CHILDREN. (1) Definitions. In this section:

....

(b) "Child" means any person under 18 years of age.

....

(2) Persons required to report cases of suspected child abuse or neglect. A physician, coroner, medical examiner, nurse, dentist, chiropractor, optometrist, or any other medical or mental health professional, social or public assistance worker, school teacher, administrator or counselor, child care worker in any day care center or child caring institution or police or law enforcement officer having reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected shall report as provided in sub. (3). Any other person having reason to believe that a child has been abused or neglected may make such a report. No person making a report under this subsection may be discharged from employment for so doing.

(3) Procedures. (a) *Initial report.* Persons required to report under sub. (2) shall immediately contact, by telephone or personally, the county agency, sheriff or city police department and shall inform the agency or department [of Health and Social Services] of the facts and circumstances contributing to a suspicion of child abuse or neglect. ...

....

(10) Confidentiality. (a) 1. All reports and records made under this section and maintained by the department, county agencies, the central registry and other appropriate persons,

officials and institutions shall be confidential, except that confidentiality of and access to preliminary investigative reports maintained by the department shall be governed solely by sub. (7).

Section 51.30, Stats., in material part provides:

RECORDS. (1) Definitions. In this section:

(a) "Registration records" include all the records of the department, boards established under s. 51.42 or 51.437, treatment facilities, and other persons providing services to the department, boards or facilities which identify individuals who are receiving or who at any time have received services for mental illness, developmental disabilities, alcoholism or drug dependence.

(b) "Treatment records" include the registration and all other records concerning individuals who are receiving or who at any time have received services for mental illness, developmental disabilities, alcoholism, or drug dependence which are maintained by the department, by boards established under s. 51.42 or 51.437 and their staffs, and by treatment facilities. Such records do not include notes or records maintained for personal use by an individual providing treatment services for the department, a community board established under s. 51.42 or 51.437, or a treatment facility if such notes or records are not available to others.

....

(4) **Access to registration and treatment records.** (a) *Confidentiality of records.* Except as otherwise provided in this chapter and ss. 905.03 and 905.04, all treatment records shall remain confidential and are privileged to the subject individual. Such records may be released only to the persons designated in this chapter or s. 905.03 and 905.04, or to other designated persons with the informed written consent of the subject individual as provided in this section. This restriction applies to elected officials and to members of boards established under s. 51.42 or 51.437.

Section 51.30(4)(b), Stats., sets forth exceptions to the confidentiality restrictions. Information can be disclosed in narrow circumstances, for example, for purposes of audits, for billing and collection, for certain research, to staff members of the Department of Health and Social Services and others as necessary to determine progress of treatment, and to physicians. But the confidentiality restriction binds those persons and groups. Section 51.30(4)(c), Stats., allows the Department to impose additional restrictions as may be necessary to secure federal funds. Damages may be recovered and penalties imposed for violations. Sec. 51.30(9) and (10), Stats. Employees violating this section may be suspended or discharged. Sec. 51.30(11), Stats.

There is only a very narrow conflict between these two statutes. As an example, assume that a physician acting pursuant to sec. 48.981(3)(a), Stats., reports to police and the county agency the facts and circumstances supporting his or her suspicion of child abuse or neglect. Assume further that part of the information reported by the physician is derived from treatment records, defined in sec. 51.30(1)(b), Stats., as including "all other records concerning individuals who are receiving or who at any time have received services for ... alcoholism [or] drug dependence which are maintained by ... treatment facilities." Nothing in sec. 51.30, Stats., permits disclosure of those treatment records, orally or otherwise, to law enforcement agencies or to county agencies.

Despite this conflict, albeit narrow, I am persuaded that the overall legislative intent is to require reporting under sec. 48.981(3)(a), Stats., notwithstanding sec. 51.30, Stats. First, the reports under sec. 48.981, Stats., themselves are confidential. "All reports and records made under this section ... shall be confidential." Sec. 48.981(10)(a)1., Stats. The essential difference between the two sections concerns which public officials are entitled to the confidential information. Thus, the objective of sec. 51.30, Stats., to preserve the confidentiality of treatment records is hardly imperilled by disclosing certain aspects of those treatment records in child abuse or neglect situations to other appropriate public officials who themselves are under a duty to preserve the confidentiality.

Second, the overall purposes of these separate pieces of legislation can be achieved and harmonized only by requiring reporting under

sec. 48.981, Stats. Section 51.30, Stats., encourages persons with disabilities, such as alcoholism, to seek treatment without fear of public disclosure. Children present a unique circumstance in that their disabilities might result from abuse or neglect, and the public officials needed to serve their needs must be notified if the underlying causes are to be remedied. In each case the goal is to cure the particular physical or medical problem in material part by imposing confidentiality restrictions on those persons necessary to the cure and by preventing disclosure to all others (with narrowly drawn exceptions).

This harmonization of the statutes jeopardizes no interest sought by sec. 51.30, Stats., and fully implements sec. 48.981, Stats. A contrary interpretation, on the other hand, would defeat the purpose of sec. 48.981, Stats., to report child abuse or neglect in critical situations without serving any interest essential to sec. 51.30, Stats.

Other legislative evidence supports this interpretation. The statutes in their current form were contemporaneously passed by the 1977 Legislature. Chs. 355 and 428, Laws of 1977. In respect to child abuse and neglect, the Legislature declared its liberal purpose as follows:

It is the purpose of this act to protect the health and welfare of children by encouraging the reporting of suspected child abuse and child neglect in a manner which assures that appropriate protective services will be provided to abused and neglected children and that appropriate services will be offered to families of abused and neglected children in order to protect such children from further harm and to promote the well-being of the child in his or her home setting, whenever possible.

Ch. 355, sec. 1, Laws of 1977.

As further evidence that this reporting requirement must prevail, the Legislature exonerated those making good faith reports from "any liability, civil or criminal." Sec. 48.981(4), Stats. This immunity from liability would include immunity from the damage and penalty provisions of sec. 51.30(9) and (10), Stats.

As a final piece of evidence of overall intent, the Legislature expressly made the confidentiality provisions of sec. 51.30(4)(a), Stats., subordinate to sec. 905.04, Stats. That section creates a physician-patient testimonial privilege, but expressly exempts "situations

where the examination of an abused or injured child creates a reasonable ground for an opinion of the physician that the condition was other than accidentally caused or inflicted by another." Sec. 905.04(4)(e), Stats.

Accordingly, it is my opinion that the Legislature intended to protect children by requiring physicians and others to report cases of suspected child abuse or neglect and that the confidentiality provisions of sec. 51.30, Stats., do not constitute an exception to this duty to report.

BCL:CDH

Arrest; Automobiles And Motor Vehicles; Criminal Law; An anonymous telephone tip to the police that a specified vehicle is being driven by an unlicensed person does not create an articulable and reasonable suspicion of illegality justifying an investigatory stop of the auto and driver. Under certain very limited circumstances, however, information from an anonymous informant may authorize a stop-and-frisk or an investigatory vehicle stop. OAG 102-79

November 8, 1979.

DENIS R. VOGEL, *District Attorney*
Manitowoc County

You ask whether a police officer may stop a motorist to check for a valid driver's license if the stop is made solely on the basis of a telephone message from an anonymous caller, who informs the police department that the motorist will be driving a vehicle with a specified license plate and that the motorist does not have a valid driver's license. If these are the only facts known to the police officer, it is my opinion that an officer may not lawfully stop the motorist to check for a valid driver's license.

The police officer described in your facts was engaged in an investigatory auto stop, the halting of a motor vehicle and the brief detaining of its driver for the limited purpose of determining whether a violation of the law had or was occurring. Though such police activity may typically involve only a temporary detention and a relatively

minor intrusion upon the individual's privacy and security, it nonetheless constitutes a "seizure" within the meaning of the fourth amendment to the United States Constitution and Wis. Const. art. I, sec. 11.

The constitutional dimensions of an investigatory detention of an individual were first articulated in *Terry v. Ohio*, 392 U.S. 1, 16 (1968), in the case of a police officer's "stop and frisk" of a pedestrian:

It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

In subsequent cases the Supreme Court has extended this holding to auto stops. In the most recent decision, *Delaware v. Prouse*, 99 S. Ct. 1391 (1979), the Court stated: "The Fourth and Fourteenth Amendments are implicated ... because stopping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of those Amendments, even though the purpose of the stop is limited and the resulting detention quite brief." *Id.* at 1396 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)). The Wisconsin Supreme Court had reached the same conclusion in a number of earlier decisions. *See, e.g., Wendricks v. State*, 72 Wis. 2d 717, 242 N.W.2d 187 (1976); *Jones (Hollis) v. State*, 70 Wis. 2d 62, 233 N.W.2d 441 (1975); *State v. Williamson*, 58 Wis. 2d 514, 206 N.W.2d 613 (1973).

Accordingly, an investigatory auto stop must meet the "reasonableness" standard of the search and seizure provisions of both the federal and state constitutions. This standard requires, "at a minimum, that the facts upon which an intrusion is based be capable of measurement against 'an objective standard,' whether this be probable cause or a less stringent test." *Delaware v. Prouse*, 99 S. Ct. at 1396 (citations omitted). An investigatory stop clearly need not meet the test of probable cause required for a lawful arrest. The stop and the consequent temporary detention are "an intrusion into the affairs of a person that does not amount to an arrest and thus does not

demand that the instigating officer possess 'probable cause.'" *Wendricks*, 72 Wis. 2d at 722. Instead, it is now well-settled that a less stringent, but equally objective, standard is applicable. The Wisconsin Supreme Court has stated the test for an investigatory traffic stop in the following manner: "to justify a forcible stop through the exercise of authority, the officer must present the court with '*specific and articulable facts* which, taken together with rational inferences from those facts, *reasonably warrant that intrusion.*'" *Id.* at 723 (quoting from *Terry v. Ohio*, 392 U.S. at 20-22) (emphasis added). While recently outlawing random stops of motorists in *Delaware v. Prouse*, the United States Supreme Court described a more cogent standard for investigatory auto stops:

[W]e hold that except in those situations in which there is at least *articulable and reasonable suspicion* that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver in order to check his driver's license and the registration of the automobile are unreasonable under the Fourth Amendment.

99 S. Ct. at 1401 (emphasis added).¹

It is now clear that before an officer can conduct an investigatory auto stop the officer must at least have an "articulable and reasonable suspicion" that the motorist is unlicensed or that the driver or the auto has in some other respect violated the law. The more specific and critical issue raised by your opinion request is whether an anonymous tip of the type you have described would give rise to the required "articulable and reasonable suspicion." I believe it would not, for the basic reason that your anonymous tipster's information, by itself, could not be accepted as reliable and was therefore incapable of creating a "reasonable" suspicion of criminal activity by the motorist involved.

¹ An important exception to this rule, not at issue in your opinion request, was also articulated in *Prouse*: the Court noted that its holding does not prohibit a roadblock-type traffic stop where all drivers are subject to questioning and license examination. 99 S. Ct. at 1401.

It is beyond dispute that in effecting a "seizure" of an individual—either an arrest or a temporary investigatory detention—an officer can rely on information supplied by others and is not limited to facts personally observed. Where an officer seeks to act on information from others, however, evidence of the reliability of the information is required. The required showing of reliability will vary with the nature of the police action taken, greater informational reliability being required to justify an arrest or the issuance of a search warrant, *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964), than a mere stop and frisk, *Adams v. Williams*, 407 U.S. 143 (1972).

Adams provides an excellent illustration of the difference between the degrees of informational reliability required for an arrest and a temporary stop. In *Adams*, a patrolman was approached by an informant known to the officer and told that an individual in a nearby car was carrying narcotics and a concealed weapon. The officer then approached the suspect, frisked him and found the reported gun, and placed him under arrest. The Supreme Court held that the stop and frisk was lawful. Concededly, the informant's tip did not provide probable cause for an arrest. 407 U.S. at 145. But because the informant was personally known to the officer and had given him information in the past, the Court ruled that "the information carried enough indicia of reliability to justify the officer's forcible stop." *Id.* at 146-47.

The tipster's information in your facts fails to satisfy even the relatively low reliability showing required for a stop and frisk or investigatory auto stop. The caller apparently offered no explanation of the source of the information provided; *i.e.*, whether it was based upon the caller's personal knowledge, a report from another person, idle speculation or spiteful imagination. More important, the caller was anonymous and thus the information was naturally suspect.

As the Supreme Court noted in *Adams*, information from an informant known personally to an officer "is a stronger case than obtains in the case of an anonymous telephone tip." 407 U.S. at 146. On the strength of this language, most courts considering the question have held that information from an anonymous informant cannot reasonably justify an investigatory stop. *See, e.g., United States v. Pearce*, 356 F. Supp. 756 (E.D. Pa. 1973); *Jackson v. State*, 157 Ind. App. 662, 301 N.E.2d 370 (1973); *People v. De Bour*, 40 N.Y.2d

210, 386 N.Y.S.2d 375, 352 N.E.2d 562 (1976); *Commonwealth v. Cruse*, 236 Pa. Super. 85, 344 A.2d 532 (1975); *State v. Lesnick*, 84 Wash. 2d 490, 530 P.2d 243 (1975). Moreover, the Wisconsin Supreme Court has held that information from an anonymous telephone informant is "not possessed of even minimal 'indicia of reliability.'" *Bies v. State*, 76 Wis. 2d 457, 470, 251 N.W.2d 461 (1977).

Because the informant in your facts was anonymous, the police could only speculate whether the information was true or false, and whether the informant was a public-spirited citizen or a malicious prankster. Accordingly, the anonymous call provided no reliable basis for a "reasonable suspicion" that the identified motorist was driving without a license. The subsequent investigatory stop of the motorist, based solely on the telephone call, was unreasonable and improper.

Please note that my opinion is limited simply to the facts you have described, and should not be read as a blanket assertion that a stop and frisk or investigatory auto stop can never be premised on an anonymous tip. As the Supreme Court cautioned in *Adams*, 407 U.S. at 147: "Informants' tips, like all other clues and evidence coming to a policeman on the scene, may vary greatly in their value and reliability. One simple rule will not cover every situation." There may well be circumstances in which the need for immediate law enforcement action is so great that even serious doubts about the reliability of an informant and his information should not be allowed to deter prompt police action. The supreme court of Washington made this point very well in a decision invalidating a stop of a suspect in response to an anonymous telephone message that the suspect was in possession of gambling devices:

Terry [v. *Ohio*] and *Adams* [v. *Williams*] emphasize that no single rule can be fashioned to meet every conceivable confrontation between the police and citizen. Evaluating the reasonableness of the police action and the extent of the intrusion, each case must be considered in the light of the particular circumstances facing the law enforcement officer. In this case, the suspected crime was a gross misdemeanor. It posed no threat of physical violence or harm to society or the officers.... This is quite a different matter from ... tips involving murder or threatened school bombings....

State v. Lesnick, 530 P.2d at 246. See also, *People v. Taggart*, 20 N.Y.2d 335, 283 N.Y.S.2d 1, 229 N.E.2d 581 (1967); *In the Interest of H.B.*, 75 N.J. 243, 381 A.2d 759 (1977). On the basis of this reasoning, I believe it would be reasonable—and indeed commendable—for the police to conduct a forcible stop of a suspect upon anonymous information when the information regards a threatened loss of life, serious injury, or significant property damage. The same police response would be inappropriate, however, when the information relates merely to a minor offense.

I trust you will also not read my opinion to suggest that the police in your facts should have made no response to the anonymous message. On the contrary, I believe the call gave the police sufficient reason to look into the matter further, by means short of a forcible intrusion upon the fourth amendment rights of the possible violator. As the Supreme Court noted in *Adams*, 407 U.S. at 147: “Some tips, completely lacking in indicia of reliability, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized.” In your case, an identification of the name of the motorist involved (if it was not reported by the anonymous caller) and an advance records check with the Division of Motor Vehicles would likely have revealed that the motorist’s license was invalid. That information, obviously reliable, would unquestionably have created a reasonable suspicion justifying a later forcible stop, if not probable cause for an outright arrest.

DJH:WLG

Firearms; Police Powers, Public Health And Safety; Prisons And Prisoners; Correctional staff have the authority, and possess the power of a peace office in pursuing and capturing escaped inmates. OAG 103-79

November 8, 1979.

ELMER O. CADY, *Administrator*
Division of Corrections
Department of Health and Social Services

You have requested an opinion on the authority of non-deputized correctional system staff members to pursue escapees. Actually, you have asked six related questions, the answers to which evolve from the general duties of the warden and the idea of deputization.

Section 53.07, Stats., states:

53.07 The warden or superintendent shall maintain order, enforce obedience, suppress riots and prevent escapes. For such purposes he may command the aid of the officers of the institution and of persons outside of the prison; and any person who fails to obey such command shall be punished by imprisonment in the county jail not more than one year or by a fine not exceeding \$500. The warden or superintendent may adopt proper means to capture escaped inmates.

46 Op. Att'y Gen. 280 (1957) previously interpreted this section as specifically granting police power to the warden within the institution and on institutional grounds. The question of the extent of the warden's police power in capturing escaped inmates is unanswered on the face of the statute, court cases, or opinions of this office.

A statute is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses. *Aero Auto Parts, Inc. v. Dept. of Transp.*, 78 Wis. 2d 235, 253 N.W.2d 896 (1977). Section 53.07, Stats., may be understood to limit the warden's police power to the institution and adjoining grounds, or it may be understood to grant a broader police power encompassing the pursuit and recapture of escaped inmates. Assuming *arguendo* that the statute could be considered ambiguous, resort may be made to extrinsic matters, such as legislative history and statutes relating to the same subject matter, in an effort to determine the legislative intent or purpose underlying the statute. *In re Estate of Haese*, 80 Wis. 2d 285, 259 N.W.2d 54 (1977); *Czaike v. Czaike*, 73 Wis. 2d 9, 242 N.W.2d 214 (1976). A cardinal rule in interpreting statutes is that the purpose of the whole act is to be sought and is favored over a construction which would defeat the manifest object of

the act. Each part of the statute should be construed with all other parts to produce a harmonious whole, *Milwaukee County v. ILHR Dept.*, 80 Wis. 2d 445, 259 N.W.2d 118 (1977), and unreasonable construction should be rejected where a reasonable construction is possible. *Wis. Environmental Decade v. Public Service Comm.*, 84 Wis. 2d 504, 267 N.W.2d 609 (1978). The primary goal of statutory construction is to give effect to the will of the Legislature.

Section 53.07, Stats., is the result of combining, and restating, two earlier statutes. Ch. 519, sec. 1, Laws of 1947. The ancestors of sec. 53.07, Stats., were created by ch. 193, secs. 42 and 55, Laws of 1873, which created secs. 4922 and 4930, Stats. (1878), later renumbered secs. 53.07 and 53.13, Stats., by ch. 348, secs. 9, and 15, Laws of 1919, *viz.*:

Order how maintained. Section 4922. All necessary means shall be used, under the direction of the warden, to maintain order in the prison, enforce obedience, suppress insurrections and effectually prevent escapes, even at the hazard of life; for which purpose he may at all times command the aid of the officers of the institution and of the citizens outside of the precincts of the prison; and any citizen refusing to obey such command shall be held liable to such fines, penalties and forfeitures as apply to persons refusing to obey a sheriff or other officer calling upon the aid of the county to assist in serving a process or for quelling insurrection. [1873 c. 193 s. 42; R. S. 1878 s. 4922; Ann. Stats. 1889 s. 4922; Stats. 1898 s. 4922]

....

Escaped prisoners, now captured. Section 4930. The warden may adopt such measures as he may deem proper to aid in detecting and capturing escaped convicts. [1873 c. 193 s. 55; R. S. 1878 s. 4930; Ann. Stats. 1889 s. 4930; Stats. 1898 s. 4930]

Section 53.13, Stats. (sec. 4930, Stats. (1898)) was interpreted in 22 Op. Att'y Gen. 103 (1933), as allowing the warden to follow and recapture escaped prisoners without the need for a new arrest warrant, and allowing the warden to break into a house to capture the escaped prisoner if the warden has reasonable grounds to believe the prisoner is inside. Both the warden and his deputies were treated as peace officers in that opinion.

These statutes were combined into present sec. 53.07 in 1947. At that time, the following comment of the Interim Committee was made:

Comment of Interim Committee, 1947: 53.07 is restated. The penalty is in effect the same. The penalty for failure to aid a sheriff in suppressing a riot is up to one year in jail or \$500 fine; sec. 347.05. New 53.07 is so worded as to expressly cover Taycheedah and Green Bay prisons. The last sentence is from old 53.13. (Bill 35-A)

Thus, the history of sec. 53.07, Stats., although scant, indicates that the warden has traditionally held police powers very analogous to the sheriff or other peace officers. He held the powers to prevent escape, "even at the hazard of life," to pursue and forceably enter houses to recapture escapees, and to command the aid of officers of the institution and of persons outside the prison to aid him in his duties. Additionally, the penalty for refusal to obey the warden's commands was the same or similar to the criminal penalty of refusing to aid a peace officer. The wording of the original sec. 4922, Stats. (1898), held persons liable to the same extent as they would be for refusing to obey a sheriff's call for the aid of the county or *posse comitatus*.

This history leads me to conclude that the warden's powers, contained in sec. 53.07, Stats., insofar as they relate to pursuing and capturing escaped inmates, are comparable to a peace officer's powers.

My opinion is further based upon an analysis of statutes relating to the same subject matter as sec. 53.07, Stats.

Section 53.07, Stats., should be read in conjunction with secs. 939.22(22) and 946.40, Stats.:

939.22(22) "Peace officer" means any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes.

946.40 (1) Whoever, without reasonable excuse, refuses or fails, upon command, to aid any person known by the person to be a peace officer is guilty of a Class C misdemeanor.

(2) This section does not apply if under the circumstances the officer was not authorized to command such assistance.

In my opinion, these statutes are *in pari materia* and must be construed in such a manner as to harmonize with each other, if possible, and to avoid unreasonable or absurd results. *In Matter of Estate of Walker*, 75 Wis. 2d 93, 248 N.W.2d 410 (1977).

A decision of the Wisconsin Supreme Court, which is instructive, is *Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 243 N.W.2d 422 (1976). That case turned on the construction of a statute and the definition of the word "person" in sec. 133.01, Stats. Respondents urged that "person" included the City of Madison and County of Dane, while appellants (Hyland, Hall & Co.) contended that neither the City of Madison nor Dane County had standing since they were not a person within the statute or within sec. 133.04, Stats., which defines "person," as used in sec. 133.01, Stats., and does not include "bodies politic or corporate."

The Wisconsin Supreme Court looked to sec. 990.01(26), Stats., which defined "person" as including all partnerships, associations and bodies politic and corporate. Stating that statutes relating to the same subject matter should be harmonized if possible, the court held that both respondents were bodies politic and corporate and, therefore, persons within the meaning of sec. 990.01(26), Stats. Furthermore, "[r]eading these two sections together, we conclude that cities and counties are 'corporations' within the meaning of sec. 133.04 and 'bodies politic and corporate' within the meaning of sec. 990.01(26). Thus, the city of Madison and Dane county are 'persons' within the meaning of sec. 133.01." *Madison*, 73 Wis. 2d at 371.

It is not unreasonable nor absurd to construe the warden as a peace officer for the purpose of maintaining order, enforcing obedience, suppressing riots, preventing escape and capturing escaped inmates. The analogy between these duties and the duties imposed upon a peace officer, by sec. 939.22(22), Stats., is striking.

Further reenforcement is found in the comparison of the duty imposed upon citizens to respond to the command of the warden under sec. 53.07, Stats., of the sheriff, undersheriff and deputies under sec. 59.24(1), Stats., and of peace officers under sec. 946.40, Stats. Section 46.05(2), Stats., specifically delegates police powers to the warden and grants arrest powers, and further provides that employes named by the warden "shall possess the powers of constables."

The manifest object of sec. 53.07, Stats., is to give the warden the duty to maintain order, to prevent escapes and to capture escaped inmates. It is a well-established principle that an administrative agency possesses every power which is necessarily or reasonably implied in an express grant of power and which is indispensable to the exercise of the power expressly granted. 63 Op. Att'y Gen. 176 (1974). Therefore, it is my opinion that the warden is a peace officer when pursuing and capturing escaped inmates.

Under both common law and statutory law, a peace officer enjoys the right to command the assistance of citizens to varying degrees in carrying out his duties. For example, the kind of assistance which traditionally can be required by an officer, under the *posse comitatus*, is physical help in finding, stopping, arresting, and conveying a suspect to a place of detention. 62 Op. Att'y Gen. 174 (1973). A private citizen summoned to assist a peace officer in the performance of his duties has all the authority of a formally deputized officer of the law for the purpose at hand and may do any act necessary to promote or accomplish the assigned mission that he might lawfully do if he were the officer himself. Fisher, *Laws Of Arrest*, Traffic Institute, Northwestern University, 1967 (Donigan, ed.); *Shawano County v. Industrial Comm.*, 219 Wis. 513, 263 N.W. 590 (1935); *Vilas County v. Industrial Comm.*, 200 Wis. 451, 228 N.W. 591 (1930); *Krueger v. State*, 171 Wis. 566, 177 N.W. 917 (1920). Our supreme court has held that a citizen has a duty to aid law enforcement officers in arresting fugitives or suppressing disturbances of the peace, and that such a duty clothes the citizen with the immunities and rights of a deputy. *Kagel v. Brugger*, 19 Wis. 2d 1, 119 N.W.2d 394 (1963); *West Salem v. Industrial Commission*, 162 Wis. 57, 155 N.W. 929 (1916). In addition, sec. 968.07(2), Stats., provides that a law enforcement officer, making a lawful arrest, may command the aid of any person and such person shall have the same power as that of the law enforcement officer.

46 Op. Att'y Gen. 280 (1957) discussed police powers of correctional staff members, stating that the department has the power to enact reasonable police regulations for the government of the institutions and adjacent open areas operated by it, and that institutional officers and employes have jurisdiction to enforce the law and make arrests for its violation within such areas.

It is my opinion that correctional staff, acting under direction of the warden, are peace officers within the institution and on institutional grounds by virtue of both secs. 53.07 and 46.05(2), Stats. When correctional staff are commanded by the warden or his representative to enforce his duty to prevent escape and recapture escapees, they have peace officer status while pursuing such escapees. Correctional staff also enjoy the immunities and rights of a deputy under the doctrine of *posse comitatus*, or secs. 53.07 and 968.07(2), Stats., so long as the warden retains his current statutory status as a peace officer.

The warden and correctional staff are state employes and their jurisdiction is statewide when carrying out their mandate to capture escaped inmates. They may pursue inmates throughout the state and may arrest, after hot pursuit and otherwise, in any county of the state. This does not in any way affect or limit local peace officers' responsibility to pursue and arrest escaped inmates.

The answers to your specific questions are premised on the conclusion that the warden is a peace officer for the purposes described above and those acting at his command enjoy the immunities and rights of a deputized peace officer. Your detailed questions and my answers follow:

1. What is the authority of non-deputized staff members to pursue escapees off-grounds of correctional institutions?

Section 53.07, Stats. The warden or superintendent may adopt proper means to capture escaped inmates. Based upon the above discussion, it is immaterial whether the warden or superintendent has been deputized by the sheriff or are acting with the inherent powers of their position.

2. [M]ay [such staff] carry concealed weapons or unconcealed weapons?

Since they carry the same status as deputized peace officers, they may act in the same manner as a peace officer. They may carry unconcealed weapons and are not prohibited by law from carrying concealed weapons. For example, sec. 941.23(1), Stats., prohibits any person, except a peace officer, from going armed with a concealed weapon. This answer is not meant to imply that the carrying and use of either concealed or unconcealed weapons should not be

strictly regulated by administrative rule to fit the particular circumstances which may arise. A peace officer or other person duly empowered is not liable for injuries inflicted by him in the use of reasonably necessary force to preserve the peace and maintain order. Only if the force used is more than reasonably necessary, under the circumstances, does it constitute an assault and battery. In the exercise of unreasonable force, both a peace officer and a private citizen, acting as a peace officer, may be liable, both civilly and criminally. *Wirsing v. Krzeminski*, 61 Wis. 2d 513, 213 N.W.2d 37 (1973); 6A C.J.S. *Assault and Battery* sec. 27 (1975); Fisher, *Laws Of Arrest, supra*, sec. 138. In addition, the use of firearms should be rigorously controlled due to their potential for harm. "Some acts such as shooting are so imminently dangerous as to anyone who may come within reach of the missile, however unexpectedly, as to impose a duty of prevision not far from that of an insurer." *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99, 100 (1928).

3. Do non-deputized staff have the authority to use state vehicles in high-speed chases of escapees?

Yes. However, as a general rule, a peace officer is personally liable for negligent or wrongful acts in the operation of a motor vehicle which cause personal injury or death. *Annot.*, 60 A.L.R.2d 873 (1958), *Police-Liability for Injury; Matczak v. Mathews*, 265 Wis. 1, 60 N.W.2d 352 (1953); 70 Am. Jur. 2d *Sheriff, Police, and Constables* sec. 50; 63 Am. Jur. 2d *Public Officers and Employees* sec. 293; *Kagel v. Brugger*, 19 Wis. 2d 1, 119 N.W.2d 394 (1963); hot pursuit—61 Op. Att'y Gen. 419, 421 (1972); *Carson v. Pape*, 15 Wis. 2d 300, 112 N.W.2d 693 (1961).

4. Can deputized or non-deputized staff use their own cars to pursue escapees, whether state owned cars are available or not?

Yes. Care must be taken in the operation of the vehicle due to the personal liability issue addressed above. Just as a private citizen, who voluntarily assists peace officers, will be held liable for his negligent acts, so will a staff member who voluntarily uses his private vehicle. The issue, simply stated, is the exercise of due care under the circumstances in the operation of the vehicle.

You also ask whether my opinion would change if the non-deputized staff were acting under the supervision of either the sheriff's department of the county or a deputized correctional staff member.

Since it is my opinion that the staff are already deputized, or hold equivalent status, my answer would not change.

Two additional statute sections should be considered in response to this question. Section 59.24(1), Stats., states, in part: "Sheriffs and ... deputies shall keep and preserve the peace in their respective counties and ... in the apprehending or securing any person for felony or breach of the peace they ... may call to their aid such persons or power of their county as they may deem necessary." Section 59.21(2), (5), Stats., states: "(2) He [the sheriff] may appoint as many other deputies as he may deem proper"; "(5) The sheriff or his undersheriff may also depute in writing other persons to do particular acts." Thus, if correctional staff members are deputized for the particular purpose of pursuing and capturing escapees, much of the above discussion becomes academic.

5. Would there be any difference in your opinions as they are applied to the pursuit of juveniles in escape status?

One of the factors to be considered equally, in both adult sentences to imprisonment and juvenile commitments to a secured correctional facility, is the fact that both committees have been found to be a danger to the public. Section 48.34(4m), Stats., provides that the judge may transfer legal custody, to the department administering corrections, of a juvenile adjudged delinquent for committing an act which would be a crime if committed by an adult, if the juvenile is found to be a danger to the public and in need of restrictive custodial treatment.

Although the analogy between criminal court proceedings and juvenile court proceedings has been rejected, *In re Arley*, 174 Wis. 85, 182 N.W. 728 (1921), and the juvenile law is not to be administered as a criminal statute, *Winburn v. State*, 32 Wis. 2d 152, 145 N.W.2d 178 (1966), the fact still remains that a juvenile may be taken into custody when the child is committing, or has committed, an act which, if committed by an adult, would be a crime, sec. 48.19(1)(d)3., Stats., or if the child has run away from his or her legal custodian, sec. 48.19(1)(d)4., Stats. Clearly, a juvenile may be apprehended, just as an adult may be arrested, for an escape from a secure correctional facility.

Therefore, my answers remain the same where the escapee is a juvenile.

DJH:SDE

Taxation; Semiannual tax payments varying by one cent are too trivial to justify assessing interest by county treasurer under sec. 74.03(4), Stats. OAG 104-79

November 14, 1979.

WILLIAM G. THIEL, *Corporation Counsel*
Eau Claire County

You state:

A rather perplexing situation has developed, of late, with respect to the collection of the second installments of property taxes by the Eau Claire County Treasurer. Apparently, in certain instances the City of Eau Claire sent out tax statements with respect to tax amounts some of which were not equally divisible to two decimal places, reflecting an initial payment of one-half penny or one penny less than what would constitute an equivalent payment to that of the second installment. My County Treasurer is, accordingly, assessing interest.

You also state that you have been asked questions concerning the validity of the imposition of interest in these instances; and as a result you have issued an opinion to the county treasurer, and you have enclosed a copy of that opinion. Section 74.03(2) and (4), Stats., provides for semiannual payment of property taxes and for imposition of interest on delinquent taxes.¹

¹ 74.03(2) SEMI-ANNUAL PAYMENTS. Each and every person or corporation charged with real estate taxes on a tax roll in the hands of the town, city or village treasurer shall pay to such treasurer the full amount thereof on or before the last day of February next following the receipt of such tax roll by such treasurer, or he may pay the same in 2 equal instalments as follows:

(a) The first instalment shall be paid to the town, city or village treasurer on or before January 31. The governing body of any town, village or city may by resolution

That opinion indicates that you have done considerable research on this question. You have concluded that it is appropriate for the county treasurer to hold that under-payment, upon first installment, of one-half cent should not be considered to subject a landowner to interest or penalties. I agree with your conclusion. You have relied principally upon the case of *Randall v. Dailey*, 66 Wis. 285, 288, 28 N.W. 352 (1886), which involved an administrative error of twenty-five cents in taxes and where the court said "this is too trifling and small a sum to be regarded in deciding upon the legality of the payment in full of the taxes for which the land was afterwards sold."

I concur with this reasoning. I commend you for the considerable research you have obviously done on this question. Semiannual tax payments in amounts varying by one cent are "equal installments" within the meaning of sec. 74.03(2), Stats. Such a trivial variation does not justify the assessing of interest by a county treasurer under sec. 74.03(4), Stats.

BCL:JEA

adopted by two-thirds of its membership not later than December 15 of the preceding year, fix a later date for the payment of the first instalment, which may be at a date not later than the last day of February. The resolution shall remain in effect for each subsequent year until repealed by the governing body by resolution adopted by a majority of its membership. A repealing resolution shall not take effect until 75 days after its adoption.

(b) The second instalment shall be paid to the county treasurer, except as provided in subs. (6) and (10), without interest on or before July 31 next succeeding.

(c) Such first instalment shall not be less than \$20 if the total tax exceeds \$20, nor less than the total amount of the tax if the same does not exceed \$20. In towns this paragraph shall apply to the total tax levied against any one person and not to individual parcels or descriptions.

....

(4) **Delinquent first instalment; interest.** If the first instalment of the real estate taxes or special assessments so charged is not paid on or before January 31, the whole amount of such real estate taxes or special assessments shall become due and payable and shall be collected, together with unpaid personal property taxes, on or before the last day of February by the town, city or village treasurer. All such taxes and assessments remaining unpaid on March 1 are delinquent and shall be returned to the county treasurer as provided in s. 74.17. Such taxes shall be collected by the county treasurer with interest at the rate of one percent per month or fraction thereof from January 1 next preceding.

Rule-Making: Administrative agencies are subject to the rule-making procedures in making discretionary choices even if those choices are based on opinions of the Attorney General. Conversely, the rule-making procedure does not apply where the opinion describes what the law mandates. OAG 105-79

November 20, 1979.

KENNETH A. LINDNER, *Secretary*
Department of Administration

You have asked for my opinion on the duty of administrative agencies to employ the rule-making procedures in ch. 227, Stats., before acting in reliance on opinions of the Attorney General.

One facet of this issue already has been ruled on by the supreme court and can easily be disposed of. In *Schoolway Transp. Co. v. Div. of Motor Vehicles*, 72 Wis. 2d 223, 240 N.W.2d 403 (1976), the Department of Transportation issued dual licenses to certain bus companies. The Attorney General advised the Department that its interpretation and application of the statute were in error. Relying on that advice, the Department changed its interpretation and denied dual licensure. The court held that this changed interpretation was not subject to the rule-making procedures of ch. 227, Stats. It reasoned that the applicable statute's plain meaning imposed on the Department a duty to cease its erroneous interpretation, as the Attorney General had advised.

Schoolway holds, then, that an administrative agency is not subject to the rule-making procedures of ch. 227, Stats., when it adopts an interpretation of a statute which is unambiguous even though it may be changing the interpretation of that statute. The fact of the agency's reliance on the Attorney General's opinion did not make the agency's changed interpretation subject to the rule-making procedure.

Agencies must, however, utilize rule-making procedure when making choices of how to apply a statute where the agency has discretion because the law compels no particular choice. *Schoolway* also

provides an illustration of this second situation. There, the Department interpreted a statute as denying carriers reduced licensed rates if they also acted as common carriers. The Department arrived at its conclusion by a process of construction and harmonization with related legislation. Its conclusion was not compelled as a matter of law, and the court held this process subject to the rule-making procedures.

Another case illustrating this second situation is *Wisconsin Telephone Co. v. ILHR Dept.*, 68 Wis. 2d 345, 228 N.W.2d 649 (1975). There, the agency had issued guidelines construing the statutory ban on sex discrimination in employment. The court held that the guidelines were invalid because they had not been filed as rules. The court pointed out that the agency's authority to adopt the conclusions stated in its guidelines was not foreclosed by an apparently contrary decision of the United States Supreme Court. Because this conclusion was not mandated by law but rather allowed by law, it had to be adopted as a rule.

The lesson to be drawn from these cases is that if the Attorney General's opinion reports that controlling principles of law compel particular agency action, the rule-making procedure is inapplicable. On the other hand, if the opinion reveals that under the law an agency has discretion whether to take certain action, the agency, if it proceeds to take the action, is subject to the rule-making procedure of ch. 227, Stats., unless its action comes within some other exception. *See, e.g., sec. 227.01(11), Stats.*

Agencies may not use opinions of the Attorney General to avoid the rule-making requirements of ch. 227, Stats. These opinions frequently set forth only the legal parameters in which the agency can act. "The attorney general has no authority to decide questions of fact. He advises upon questions of law.... Nor can his judgment be substituted for the discretion which the legislature has vested in another state officer." 40 Op. Att'y Gen. 3, 4 (1950). The opinions do not preempt ch. 227, Stats., and the rule-making procedures apply when an agency exercises its discretion within the limits of those opinions. To cite a recent example, I have advised the Superintendent of Public Instruction that she has authority to license vocational teachers to teach high school students if certain minimum statutory prerequisites are met. 68 Op. Att'y Gen. 248 (1979). The prerequisites are not subject to the rule-making procedure, of course, because

they already are required by law. But any additional criteria established in exercise of the licensing power are subject to the rule-making procedures of ch. 227, Stats.

I am persuaded that the distinction between discretionary agency action and that mandated by law is essential to preserve the constitutionality of much of the rule-making procedure. For example, a literal construction of sec. 227.01(10), Stats., would displace the supreme court as the final authority on the law. That subsection provides that "every interpretation of a statute" adopted by an agency must undergo the rule-making procedure. Since that procedure entails hearings on "arguments relative to the proposal," sec. 227.022(1), Stats., a literal construction would mean that whether an agency should comply with and implement an interpretation required by the supreme court would be subject to hearings, argument, and debate. Obeying the supreme court, however, is not subject to debate. It is emphatically the province of the judiciary to say what the law is. *United States v. Nixon*, 418 U.S. 683, 703 (1974). It matters not that in determining what the agency must do the supreme court undertakes a sophisticated statutory construction and analysis. Similarly, it is irrelevant whether the Attorney General's opinion engages in statutory construction, for the opinion essentially reports what the supreme court will require under established principles of law if the agency is sued to perform its duty. One need not presume the infallibility of an Attorney General's opinion to discern that an agency's reliance thereon is not a discretionary interpretation of legislation.

It is equally clear that the Legislature did not intend sec. 227.01(10), Stats., to include even the holdings of the supreme court. For example, the hearing requirement is made inapplicable where a proposed rule is designed solely to bring the language of an existing rule into conformity with a statutory change or a controlling judicial decision. Sec. 227.02(1)(b), Stats. Further, the rules, statements of policy, and interpretation of legislation which are subject to the rule-making procedure are the same items which are subject to debate and argument at the public hearings. The fact of debate shows that alternative discretionary choices are contemplated. Thus, the rule-making procedure, by its own terms, relates only to discretionary agency action and not to action mandated by law.

BCL:CDH

Garnishment; Salaries And Wages; A wage garnishment of a public employe under sec. 812.23, Stats., results in a continuing withholding of wages, less allowances specified in sec. 812.18(2), Stats., until the amount demanded in the garnishee complaint, together with disbursements, has been paid. OAG 106-79

November 20, 1979.

JOSEPH NOLL, *Secretary*

Department of Industry, Labor and Human Relations

You have requested my opinion on the proper interpretation of sec. 812.23, Stats., and have asked whether the wages of public employes are subject to a continuing garnishment under this section. This statute applies to the state and local units of government.

Although the answer is not entirely free from doubt, it is my opinion that the wages of public employes are subject to continuing garnishment until the amount demanded in the garnishee complaint, together with disbursements, has been paid.

Section 812.23(4), (5) and (6) reads:

(4) Within 20 days after service upon him, the department or the secretary or clerk of the garnishee shall answer the complaint by delivering or mailing to the court his certificate of the amount owed by the garnishee to the judgment debtor for earnings at the time of service; and his answer as to the amount owing is conclusive in the garnishment action.

(5)(a) The judgment debtor shall receive the subsistence allowance specified in s. 812.18 (2) on the date his check or voucher is normally paid. The balance of the earnings due shall be delivered to the court until the amount demanded in the garnishee complaint, together with disbursements, has been paid into court, unless sooner terminated by order of the court.

(b) The clerk shall hold the earnings paid into the court and disburse them as the court orders.

(c) The earnings remaining in the custody of the court after the judgment is satisfied, shall be paid to the judgment debtor.

(d) Other judgment creditors of the judgment debtor may intervene in the garnishment action.

(6) A judgment under this section shall have precedence over an assignment by the debtor filed with the garnishee subsequent to the service of the garnishee summons.

Section 812.23(4), Stats., provides that the garnishee's answer is required to specify the amount owed by the garnishee to the debtor at the time of service. On its face, this would appear to support the interpretation that the statute does not contemplate a continuing garnishment of the earnings of public employes, but merely contemplates the garnishment of those earnings owing at the time of service of the garnishee summons and complaint.

On the other hand, the language of sec. 812.23(5), (6), Stats., appears to contemplate that the garnishment will continue in effect until the judgment has been paid in full.

Chapter 507, Laws of 1965, dealt with this subject. Section 267.22, Stats. (1945), was renumbered as sec. 267.23, Stats. (1965), and provided in relevant part as follows:

(2)(a) The garnishee summons and complaint shall be served upon the garnishee by delivering a copy thereof to the department of administration if the state is garnishee; otherwise to its secretary or clerk.

....

(4) Within 20 days after such service upon him, said department or the secretary or clerk of the garnishee shall answer the complaint by delivering or mailing to the court his certificate of the amount owed by the garnishee to the judgment debtor for wages and salary at the time of such service; and his answer as to the amount owing shall be conclusive in the garnishment action.

(5)(a) The regular checks or vouchers for the salary or wages of the judgment debtor shall issue and continue to issue in due course as though no garnishment action were pending, but they shall be delivered to the court until the amount demanded in the garnishee complaint, together with costs, has been paid into court, unless sooner terminated by order of the court.

(b) The court may order such pay checks and vouchers cashed by its clerk and the proceeds held by him and disbursed as the court orders. The nonexempt portion of such proceeds shall be applied on the creditor's judgment.

(c) The court may in a summary manner, upon the application of the judgment debtor and with reasonable notice to the creditor, determine the exemptions to which the debtor is entitled and the amount thereof shall be paid to him and credited to the garnishee.

(d) Any proceeds of such checks and vouchers remaining in the custody of the court after the demands of such creditor as determined by the courts are satisfied shall be ordered paid to the judgment debtor.

(e) Other judgment creditors of the judgment debtor may intervene in the garnishment action.

(6) A judgment under this section shall have precedence over an assignment by the debtor filed with the garnishee subsequent to the service of the garnishee summons.

Chapter 127, Laws of 1969, repealed sec. 267.23(5), Stats. (1967), and recreated it to read in its present form. This amendment deleted the language that the "regular checks or vouchers for the salary or wages of the judgment debtor shall issue and continue to issue in due course as though no garnishment action were pending."

In 1970 my predecessor issued an unpublished informal opinion concluding that the deletion of such language evinced a legislative intent to remove the continuing garnishment effect of the statute. The 1970 informal opinion concluded that sec. 267.23, Stats. (1969), garnisheed only the wages owing at the time of the service of the garnishee summons and complaint. I disagree with this unpublished opinion.

It is appropriate to look to the legislative history of the provisions of sec. 812.23, Stats., to attempt to resolve the apparent ambiguity in the current law.

Historically, for almost fifty-five years prior to the enactment of ch. 127, Laws of 1969 (which repealed sec. 267.23(5), Stats. (1967), and recreated it to read as it does in present sec. 812.23(5),

Stats.), the statutes provided for continuous garnishment of public officers or employes until the amounts claimed on the basis of the original judgment were paid. Chapter 360, Laws of 1915, initially created sec. 3716a, Stats. (1915), to provide, in part, that after exemptions authorized by law were determined, the proper governmental officials of the state, etc., would:

[P]ay to the owner of such judgment such sum as at the time of filing such certified copy is due, or may thereafter become due from the state ... not to exceed the amount of such judgment, and to deduct the sum so paid from the amount due to such officer or employe as salary or wages

The purpose of the law was to furnish creditors of the public employe with a practical equivalent to garnishment and the law was interpreted as requiring that judgment creditors filing with the proper state and municipal officers, "be paid in the order of the filing of the certified copies of their judgments all moneys then due or thereafter to become due." *Prielipp v. Sauk County*, 215 Wis. 16, 18, 254 N.W. 369 (1934) and *Chadek v. Forest County*, 206 Wis. 85, 87, 238 N.W. 850 (1931).

It is of some importance to note that the provisions of sec. 267.23, Stats. (1965), quoted above, are essentially the same as those which had been created as part of sec. 267.22, Stats. (1945), by ch. 543, Laws of 1945. This 1945 enactment introduced at least one significant change in the garnishment of public employes, by changing the garnishment procedure so that the entire check for wages of the judgment debtor was forwarded to the court. Chapter 507, Laws of 1965, continued this change by providing that the wages "shall be delivered to the court until the amount demanded in the garnishee complaint, together with costs, has been paid into court, unless sooner terminated by order of the court." Sec. 267.23(5)(a), Stats. (1965). The legislative purposes for such procedure was described in a note by the Joint Committee on Revisions, Repeals, and Uniform Laws, which introduced S. 403 (1945), the bill which ultimately resulted in the enactment of sec. 267.22, Stats. (1945):

NOTE: This bill was prepared and is sponsored by the Advisory Committee on Rules of Pleading, Practice and Procedure. It is an attempt to provide a comprehensive method of reaching moneys due from the public to private debtors, and was

designed, among other things, to correct the unsatisfactory practice of quasi garnishment now embodied in section 304.21, which provides no judicial procedure for determining vexatious questions of law. Such questions involving exemptions, effect of bankruptcy and the like, must now be determined by the clerk of the municipality garnished, at his peril. The bill places the determination of these legal questions in the courts where they belong and relieves the municipality of all responsibility except certifying the amount due and paying the same into court when so ordered.

While the Laws of 1945 and 1965 thus placed the entire matter of the disposition of the employe's check in the hands of the court, it will be noted that the law continued to provide that the checks were to be forwarded until the entire amount demanded in the complaint, together with costs was paid. Likewise, while the law authorized other judgment creditors to intervene, there is no suggestion that such intervention would alter the long-standing legislative directive that judgments be taken "in turn." Therefore, the net effect of the 1945 and 1965 amendments was to shift responsibilities from the employing units to the courts for handling such garnishments, but the basic concepts remained unaltered.

Upon the repeal and recreation of sec. 267.23(5), Stats., by ch. 127, Laws of 1969, the new statute provided that after determination of subsistence allowance specified by law, the balance of the earnings shall be "delivered to the court until the amount demanded in the garnishee complaint, together with disbursements, has been paid into court, unless sooner terminated by order of the court." It is evident that this statutory language remained virtually identical to the language which existed prior to the 1969 amendment. Actually, the only essential changes effected by the repeal and recreation of sec. 267.23(5), Stats., by ch. 127, Laws of 1969, were to (1) terminate the need for delivering the entire salary or wages of the judgment debtor to the court and (2) to terminate the responsibility of the court to disburse both the exempt and nonexempt portions of each pay check to the debtor and creditor after it had determined the exemptions, and to shift that responsibility back to the employer.

I do not believe the deletion previously noted shows the legislative intent stated in the 1970 informal opinion. There was a very practical reason for that deletion which had nothing to do with limiting the

garnishment to the funds due the public employe at the time of the garnishment. Prior to the repeal and recreation of sec. 267.23(5), Stats. (1967), such language was necessary to insure that the employer would continue to issue "[t]he regular checks or vouchers for the salary or wages of the judgment debtor ... in due course *as though no garnishment action were pending,*" *i.e.*, the regular checks would continue to be issued in their full amount despite the fact that part of the proceeds would ultimately be disbursed to the judgment debtor. Once sec. 267.23(5), Stats., was recreated by ch. 127, Laws of 1969, the employer could no longer issue the employe's "regular checks ... as though no garnishment action were pending," since the employer was now required to first ascertain and apply the appropriate exemptions, then pay the judgment debtor an amount which represented his subsistence allowance, and finally pay only the balance to the court. Clearly it was the new mechanics introduced by the statute which made the old language inappropriate and necessitated its deletion, rather than any legislative determination to alter the policy of continuous garnishment of public officials which the Legislature had favored uninterruptedly since 1915.

The evident purpose in a special law dealing with the garnishment of public officials such as sec. 812.23, Stats., and its predecessors is to make it easier for the creditor to get his judgment satisfied without repeated garnishments and to provide some administrative convenience in the handling of such garnishments. Thus, ch. 543, Laws of 1945, was referred to as an act "to simplify procedure and promote the speedy administration of justice." It is highly unlikely that the 1969 Legislature would have reversed such a procedure with so little hint of any intention of doing so, particularly when it retained the critical language which previously had been interpreted as supporting continuous garnishment of the public employe.

The Department of Administration has consistently interpreted former sec. 267.23 and now sec. 812.23, Stats., as providing for a continuing garnishment of a public employe's wages until the judgment giving rise to garnishment action was satisfied. The long-standing interpretation given to a statute by an agency charged with administering it without a change being made by the Legislature will be given great weight by the courts in construing a law. *Dunphy Boat Corp. v. Wisconsin E. R. Board*, 267 Wis. 316, 64 N.W.2d 866 (1954).

I am aware of the argument that since a long-standing opinion of the Attorney General with legislative acquiescence will be accorded weight in construing a statute that, therefore the 1970 informal opinion should be the proper interpretation of sec. 812.23, Stats. But the 1970 opinion was not a published opinion and it is quite probable that neither the Legislature nor many governmental units or agencies were aware of it. Thus, the argument is not particularly persuasive in this case.

BCL:JCM:WHW

Banks And Banking; Trust Companies; Buying and selling federal agency obligations by trust company banks and state chartered banks with trust powers does not constitute a crime under sec. 112.05, Stats. OAG 108-79

November 27, 1979.

ERICH MILDENBERG, *Commissioner*
Office of the Commissioner of Banking

You have asked whether sec. 112.05, Stats., makes it a criminal offense for trust company banks and state chartered banks, with trust powers, to purchase or sell United States Treasury bills, or other federal agency obligations fully guaranteed by the full faith and credit of the United States government, on a deferred delivery-deferred payment basis. For the reasons set forth below, it is my opinion that such activity does not constitute a crime.

The proposed activity would have a bank secure a contract for deferred delivery of a federal agency obligation such as a treasury bill with payment on a deferred basis on a specific future settlement date. The brokerage house, under your stated situation, would commit in writing to deliver these obligations or bills on the established settlement dates. It appears that the bank would not pledge any assets nor make any guarantee as collateral for its obligation to pay the brokerage house on the future settlement date, nor would it borrow any funds for that purpose.

Apparently, the purpose of such a transaction is to obtain a commitment to purchase such obligations at rates which may not be available at the settlement date. No margin account is established at the time of commitment nor would the bank provide any assurances at any time to protect against fluctuations in the interest rates of such obligations or bills. You further state that the commitment by the brokerage house to deliver the obligations at the stated rate on the settlement date is, itself, a marketable contract right.

The basis of your inquiry is sec. 112.05, Stats., which states:

TRUST FUNDS; PERSON HOLDING PROHIBITED FROM DEALING IN MARGINS. Any person engaged in the business of receiving deposits of money for safekeeping, any officer or employe of any bank, banking company, or trust company, any executor, administrator, guardian, trustee, or receiver, or any other person holding property or money in any manner in a trust capacity, *who shall buy, sell, deal, or traffic in any goods, stocks, grains, or other property or article of commercial barter by making or requiring any deposit, payment, or pledge of any margin or of any money or property to cover future fluctuation in the price of such goods, stocks, grains, or other property so bought, sold, dealt, or trafficked in*, shall be punished by imprisonment in the Wisconsin state prisons not more than 10 years, nor less than one year. Nothing in this section prohibits any person who acts in a fiduciary capacity from using personal funds for any purpose whatever.

This statute has recently been discussed at length in 68 Op. Att'y Gen. 277 (1979), dated September 21, 1979. The analysis of that opinion is applicable here.

It is clear that the subject banks would not buy or sell such government obligations "by making or requiring any deposit, payment, or pledge of any margin or of any money or property to cover future fluctuations in the price of such ... property." The price on the settlement date is fixed and the bank does not pledge or pay any margin. Therefore, the proposed activity does not violate sec. 112.05, Stats. Of course, as indicated in the recent opinion, 68 Op. Att'y Gen. 277 (1979), dated September 21, 1979, whether such activities by

fiduciary banks violate the prudent man rule is not considered in this opinion.

BCL:LEN

Natural Resources; Waste Management Fund; The Department of Natural Resources has the authority to reduce or waive the Waste Management Fund fee for solid waste resulting from mining upon a determination that the specific portions of a mine reclamation plan or related statutory undertakings will be sufficient to accomplish the purposes of sec. 144.441(3)(d), Stats., with respect to a type of waste or portion thereof. OAG 109-79

November 27, 1979.

ANTHONY S. EARL, *Secretary*
Department of Natural Resources

You have requested my opinion regarding the portion of sec. 144.441(3), Stats., which reads: "The department shall reduce or waive [the Waste Management Fund] fees for solid waste resulting from mining if it determines that the reclamation bonding and other requirements of ss. 144.81 to 144.94 are sufficient to accomplish the purposes of this subsection." Your particular concern is whether there can ever be circumstances in which the Department of Natural Resources will actually have the authority to reduce or waive the fee inasmuch as the Waste Management Fund and the reclamation bonding and other requirements of secs. 144.81 through 144.94, Stats., appear to fulfill entirely separate purposes.

I am of the opinion that the purposes of the Waste Management Fund ("WMF") and the reclamation bonding and other requirements of secs. 144.81 through 144.94, Stats., Metallic Mining Reclamation Act, hereinafter "MMRA," are not so exclusive of each other that there may not be circumstances in which the Department of Natural Resources (the "Department"), upon a proper showing, could reduce or waive the WMF fees for solid waste resulting from mining. I am of the further opinion that authority to reduce or waive the WMF fees for mine waste does not require a determination that the general purposes of the WMF and the MMRA, in their entirety,

are the same but only that the specific portions of a mine reclamation plan or related statutory undertakings will be sufficient to accomplish the purposes of sec. 144.441(3)(d), Stats., with respect to a type of waste or portion thereof. The reasons for my opinion are set forth below.

As you have correctly pointed out in your letter, the WMF is limited by statute to certain fixed purposes. Stated generally, the purposes are to fund the costs of long-term care of a site accruing after the twenty- or thirty-year responsibility of the owner has terminated or to fund the cost of repairing the site or the environmental damage caused by the site, when such repairs are occasioned by events not anticipated in the plan of operation if the events pose a substantial hazard to public health or welfare.

By contrast, the legislative purpose behind the reclamation bonding requirement does seem to parallel more closely the purposes of the closure and long-term care bond required by sec. 144.44(3)(c), Stats., namely, assurance that the site closure obligations and the owner's long-term care requirements will be met.

Nonetheless, the time-honored maxim of statutory construction is to give meaning to every portion of a statute. *Unified S.D. No. 1 of Racine County v. WERC*, 81 Wis. 2d 89, 259 N.W.2d 724 (1977). Hence, such a direct and unambiguous grant of authority would be expected to have an appropriate mode of exercise.

In addition the Legislature has given evidence in sec. 144.43(1m), Stats., that with respect to solid waste disposal, metallic mining represents a special case. In pertinent part that section reads:

The rules [for the identification and regulation of metallic mining wastes] shall take into consideration the special requirements of metallic mining operations in the location, design, construction and operation and maintenance of sites and facilities for the disposal of metallic mining wastes as well as any special environmental concerns that will arise as a result of the disposal of metallic mining wastes. In adopting the rules, consideration shall also be given to research, studies, data and recommendations of the U.S. environmental protection agency on the subject of metallic mining wastes arising from the agency's efforts to implement the resource conservation and recovery act of 1976, P.L. 94-580.

Besides this clear expression by the Legislature that metallic mining waste presents unique problems, other practical aspects of the law of solid waste tend to show that the kind of particularized treatment of mining waste envisioned by a reduction or waiver of the WMF was clearly within the contemplation of the Legislature. For example, the language which established the WMF leaves no doubt that the Legislature intended that contributions to the fund come from the full spectrum of solid waste types:

Each owner or operator of a licensed site for the land disposal of solid waste or the disposal of hazardous waste shall periodically pay to the department a fee for each ton, or equivalent volume as determined by rule of the department, of solid waste received and disposed of at the site during the preceding reporting period.

Sec. 144.441(3), Stats. But if the Department could not make a reduction or waiver for mining solid waste, the burden of building up the WMF to its limit of \$15,000,000 would fall almost entirely on the metallic mining industry because of the broad definition of solid waste and the enormous quantities of waste produced in a metallic mining operation as compared to that produced by domestic or non-mining industrial sources. The result of that occurrence would be to render the general language of sec. 144.441(3), Stats., an assessment on a very particularized industry rather than the full spectrum of solid waste sources. If that had been the intention of the Legislature, it would certainly have expressed itself in more direct and explicit terms, such as that found in sec. 144.441(3)(c), Stats. Therefore, while the purposes of the WMF and the reclamation bonding or other requirements of the MMRA are generally dissimilar, it would appear that the Legislature envisioned circumstances where the two overlapped sufficiently that it required, in those circumstances, that the WMF fee be reduced or waived.

Other than the question of the authority of the Department to reduce or waive the WMF, your letter also suggests the companion question: When would it be appropriate for the Department to reduce or waive the WMF? Some guidance on this point may be obtained by looking at the sentence which precedes the authorization in question. That sentence reads as follows: "Solid waste materials approved by

the department for lining or capping a dike, berm or road construction within a site for land disposal of solid waste shall not be subject to the fee imposed under this [section].” Sec. 144.441(3), Stats.

This provision seems to focus on two things, types of materials and certain uses of materials. The lining materials, for example, are presumably exempt from the fee because by their nature they impose no significant detrimental effect on the environment and because they can be used for some purpose which ameliorates the environmental hazards of the solid waste itself. Other materials which may be used in haulageways or other on-site road construction are presumably of a type which do not significantly jeopardize the protection of the environment although they have no ameliorative effect as such. Thus, while granting the Department authority to reduce or waive the WMF fee in mining waste disposal sites, the Legislature has also affirmatively, albeit implicitly, recognized differences in fill materials or methods of disposal which are part of the mining operation.

The key to the decision of which materials or methods qualify for a reduction or waiver is whether there are long-term nonowner related responsibility or nonanticipated environmental impacts affecting public health or welfare. The Legislature has delegated to the informed judgment and expertise of the Department the authority to decide precisely what differences in type of material or method are sufficient to reasonably assure that the nonowner or nonanticipated impacts are so minimal as to support a finding that a reduction or waiver of the WMF fee is appropriate.

The determination by the Department that there are no nonanticipated environmental impacts which would pose a substantial hazard to the public health or welfare will be difficult. The case for a waiver is, therefore, the most difficult. Despite the difficulty, the Department can draw upon its own experience and that of others to achieve a reasonable level of assurance that the reclamation plan, and the supporting bond, will prevent the kind of long-term environmental problems and public funding obligations which are addressed in sec. 144.441(3)(d), Stats., and otherwise provided for by sec. 144.83(4)(f), Stats.

Although the questions which have to be answered by the Department prior to reduction or waiver of the WMF fee are outside the

expertise of this office, it would appear that there are, at least arguably, certain types of mine refuse or methods of disposal which experience *might* reliably show to be appropriate for consideration for a reduction or waiver. I will proffer several examples merely to amplify the arguable possibility and not to suggest the need or requirement for reduction or waiver.

Since a significant fraction of mine refuse is overburden and since a sizeable fraction of that overburden may be soils or gravel which experience has shown can be reliably stabilized and reclaimed, such materials may be appropriate for WMF fee reduction or even waiver. Another example might be generally inert waste rock which is used as roadbed for haulageways. Precedent for this can be found in the Legislature's view of road construction within other solid waste disposal sites. Sec. 144.441(3), Stats. A third, but by no means final circumstance, may be indicated in the Legislature's concern about surface mining. Secs. 144.84(1) and 144.85(1), (5)(c), Stats. The Department may find that reduction of WMF fees for certain types of backfill material used in an underground mining operation is appropriate to reflect the legislative purpose of sec. 144.84, Stats.

Finally, it should be noted that the MMRA, sec. 144.85(4)(b), Stats., provides for phased reclamation. Such phased reclamation *may be* precisely the kind of reasonably reliable experience needed to support findings about the accuracy of the Department's assessment for future WMF fee schedules.

BCL:RMR

Confidential Reports; Investment Board, Wisconsin; Section 19.43(3), Stats., requires that the Ethics Board forward copies of Investment Board nominees' statement of economic interests to members of the senate committee to which the nomination is referred.

The extent of confidentiality of such statements rests in the sound discretion of the senate committee. OAG 110-79

November 28, 1979.

R. ROTH JUDD, *Executive Director*

Ethics Board

You request my opinion on six questions which relate to the degree of confidentiality which attaches to a statement of economic interests which is filed with the Ethics Board by a nominee for appointment to the Investment Board, pursuant to sec. 15.76(2), Stats. On August 9, 1979, Governor Dreyfus nominated Elmer Homburg for appointment to the Investment Board. Homburg has now been confirmed, but two other provisional appointments to vacant positions have been made by Governor Dreyfus and these appointees are awaiting Senate confirmation.

Six members of the Investment Board are "nominated by the governor, and with the advice and consent of the senate" are appointed for fixed terms. Secs. 15.07(1)(a) and 15.72, Stats. Section 15.76, Stats., provides that the Investment Board shall consist of seven members. One member is the secretary of the Department of Administration or his designee, and one is a member of the state teachers retirement system. Such members are nominated by the Governor from a panel. Four members are appointed pursuant to sec. 15.76(2), Stats., which provides:

Four members appointed for staggered 6-year terms, who shall have had at least 10 years' experience in making investments, but any person having a financial interest in or whose employer is primarily a dealer or broker in securities or mortgage or real estate investments is not eligible for appointment, and any member who acquires such an interest or accepts such appointment shall thereupon vacate his membership.

Sections 19.41-19.58, Stats., comprise the Code of Ethics for state public officials. Appointive members of the Investment Board are "official [s] required to file ... statement [s] of *economic interests*" by reason of secs. 19.42(10)(c), 19.43(1) and (2), Stats., and "quarterly report [s] of *economic transactions*" with the Ethics Board by reason of sec. 19.43(5), Stats. A nominee is required to file a statement of economic interests. Section 19.42(9), Stats., states that "[n]ominee' means any person who is nominated by the governor for

appointment to a state public office and whose nomination requires the advice and consent of the senate.”

1. Must the Ethics Board forward copies of the nominee’s Statement of Economic Interests to members of the committee of the senate to which the nomination is referred?

The answer is yes. Specific language in sec. 19.43, Stats., requires transmittal of the entire statement within a reasonable time after it is filed with the Ethics Board. Section 19.43(3), Stats., provides:

A nominee shall file a statement of economic interests with the board as per the date he or she was nominated within 21 days of being nominated unless the nominee has previously filed a statement of economic interests with the board during that year. *Following the receipt of a nominee’s statement of economic interests, the board shall forward copies of such statement to the members of the committee of the senate to which the nomination is referred.*

2. Is the nominee’s Statement of Economic Interests in the Ethics Board’s possession open to public inspection?

Section 19.55(1) and (2)(c), Stats., provides:

(1) Except as provided in sub. (2), all records in the possession of the board are open to public inspection at all reasonable times. ...

(2) Notwithstanding s. 19.21, the following records in the board’s possession are not open for public inspection:

....

(c) Statements of economic interests and reports of economic transactions *which are filed* with the ethics board *by members or employes of the investment board*, except that the ethics board shall refer statements and reports filed by such persons to the legislative audit bureau for its review, and except that a statement of economic interests filed by a member or employe of the investment board who is also an official required to file shall be open to public inspection.

The Legislature clearly has provided that the statements of members are not open to public inspection. Under sec. 17.20(2), Stats., “a

provisional appointee may exercise all of the powers and duties of the office to which such person is appointed during the time in which the appointee qualifies." It is my opinion that a provisional appointee is a "member of the investment board" as that term is used in sec. 19.55(2)(c), Stats., and that his/her statement of economic interests is therefore not open to public inspection. It also follows, in my opinion, that the member's statement is not open to public inspection even if he is a nominee.

It cannot be argued that member-nominees' statements are open to public inspection by reason of the provision in sec. 19.55(2)(c), Stats., that statements of "an official required to file shall be open to public inspection." Undoubtedly, Investment Board members are public officials, but within this subsection the word "official" relates only to those members who sit on the Investment Board because of their official status in another capacity. Otherwise, the general exception for Investment Board members would be repealed by construction.

It is unlikely that you will confront the situation of a nominee who is not a member. A provisional appointment is possible whenever there is a vacancy. Sec. 17.20(2), Stats. While the expiration of a term does not create a vacancy under sec. 17.03, Stats., the Governor's office has been following a practice of obtaining resignations from holdovers so a provisional appointment can be made under sec. 17.20(2), Stats. It is important to recognize that a nomination can be made at a time prior to the expiration of a term in order to secure Senate consideration and approval in a timely fashion. Such a nomination is not a provisional appointment and a nominee to the Investment Board would not be a "member." Under these circumstances the question arises whether such nonmember nominees' statement of economic interests is open to inspection. Because the law is confused on this point and because all current nominees are also provisional appointees and it is likely that future nominees will be appointed to provisional appointments, I decline to answer this question at this time.

I urge the Legislature to consider this question. Current law is in conflict. On the one hand, the statements of nominees to office are open to public inspection. On the other hand, the statements of members of the Investment Board are not open to public inspection. The Legislature has not specifically addressed the apparent paradox. If an

Investment Board nominee's statement is open to public inspection, the subsequent confidentiality once the nominee becomes a member is of no avail. The Legislature may have thought that the nominees' financial status was of particular interest to the public, or it may have simply overlooked the conflict. In any event the question deserves legislative review.

3. If the nominee's Statement of Economic Interests in the Ethics Board's possession is open to public inspection, does it remain open to public inspection following the nominee's qualification and appointment to office?

This question need not be answered because of my answer to the previous question.

4. If the nominee's Statement of Economic Interests in the Ethics Board's possession is not open to public inspection but the Ethics Board must refer copies of the Statement to members of the senate committee to which the nomination is referred, what degree of confidentiality, if any, attaches to copies of Statements referred to senators under sec. 19.43(3), Stats.?

In my opinion a measure of confidentiality attaches to the statement of economic interests of an Investment Board member-nominee when the statement is in the possession of the senate committee, but the extent of that confidentiality rests in the sound discretion of the senate committee.

It is clear that no statute imposes a confidentiality requirement on the statement when it is in the possession of the senate committee. Moreover, any mandated confidentiality would require specific legislation to that effect inasmuch as the important work of senate committees in determining whether to consent to a nomination often requires far-reaching discussion and deliberation by the senators.

Nevertheless, in my opinion there is a sufficiently stated legislative intent that the senate committee should exercise sound discretion before making such statements public. The Legislature already has determined that statements of nominees who are members of the Investment Board are not open to public inspection, albeit while in the possession of the Ethics Board. Senate committees should look to this overall legislative policy determination in the case of Investment Board nominees and weigh it against the need for disclosure in the

responsible discharge of senate committee responsibility. *Cf.* OAG 74-78.

5. [I]n the event a member of the Investment Board is nominated for reappointment may the Ethics Board refer the Statement of Economic Interests most recently filed by the member-nominee to the senate committee to which the nomination is referred; and if so, what degree of confidentiality, if any, attaches to the Statements of Economic Interests when in the senators' possession?
6. Would your replies to any of the foregoing questions differ if, subsequent to the nomination but prior to the Statements being filed with the Ethics Board, the nominee is provisionally appointed to the office for which nominated under sec. 17.20(2), Stats., and qualifies?

I believe these questions are answered by the foregoing discussion. The Ethics Board is required to refer to the senate committee the statement of economic interests of all Investment Board nominees, including those who presently are members. The extent of confidentiality rests in the sound discretion of the senate committee.

BCL:CDH

Hospitals; The National Health Planning and Resources Development Act of 1974 does not preclude the Wisconsin Hospital Rate Review Committee from considering excess bed capacity in determining the reasonableness of a hospital's rate increase. OAG 112-79

November 28, 1979.

DONALD E. PERCY, *Secretary*
Department of Health and Social Services

You have asked whether the Wisconsin Hospital Rate Review Committee, operating under sec. 146.60, Stats., may consider a hospital's excess bed capacity in determining the reasonableness of the hospital's rate increase. More specifically, based on the background to which your letter refers, you inquire whether the National Health Planning and Resources Development Act of 1974, 42 U.S.C. sec.

300k, *et seq.*, hereafter "Act," precludes the Rate Review Committee from considering such excess bed capacity. This is the only question which you have asked and I confine my remarks to your question.

In my opinion the answer is no.

The Wisconsin Hospital Rate Review Program (WHRRP) was created in material part to contain hospital costs. *See* the WHRRP Manual, pp. 2 and 3. The Rate Review Committee is "a committee of the State of Wisconsin, the Wisconsin Hospital Association, and Blue Cross of Wisconsin, and is charged with reviewing rate requests and rendering decisions, subject to appeal, on the acceptance or rejection of these requests." WHRRP Manual, pp. 9-10. The current process includes "[u]sing comparative analysis techniques to perform two comparisons ... first, and most important, a comparison of a hospital's experience (budget vs. prior experience), then, comparison with hospitals by grouping." WHRRP Manual, p. 7. In addition to comparing in terms of percent of occupancy, *i.e.*, whether there is excess bed capacity, the Committee also compares such items as length of stay and employes per patient day. *Id.* at p. 9.

There is, of course, no express federal bar to the Committee's consideration of excess bed capacity in this context. In determining whether Congress impliedly foreclosed state action, the first inquiry is whether the local regulation "conflicts with federal law or would frustrate the federal scheme," and the second inquiry is whether it can be seen from "the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

With respect to the first level of inquiry, the Committee's consideration of excess bed capacity as a factor in determining the reasonableness of a hospital rate increase neither conflicts with nor frustrates the Act. In fact, it complements the federal purposes.

The overall purposes of the Act are to provide a uniform planning mechanism to assure equal access to quality health care at a reasonable cost, to control the distribution of health resources, to provide incentives for alternative levels of health care, and to augment state planning. *See*, 42 U.S.C. secs. 300k and 300k-2. The federal program was summarized in *Park East Corp. v. Califano*, 435 F. Supp. 46, 50 (S.D. N.Y. 1977).

The Act calls for the setting up of local Health System Agencies (HSAs), with mandated requirements for their legal structure, staff size, composition and the public nature of their meetings, sec. 3001-1(b). The primary function of an HSA is health planning, including "preventing unnecessary duplication of Health resources...." Sec. 3001-2(a)(4). The HSA is to develop a Health Systems Plan (HSP) including an Annual Implementation Plan (AIP), sec. 3001-2(b). The HSA is also to review at least every five years "all institutional health services offered in the health service area of the agency and ... make recommendations to the State health planning and development agency designated under section 300m ... respecting the appropriateness in the area of such services." Sec. 3001-2(g)(1).

The Act also calls for creation of State Health Planning and Development Agencies and Statewide Health Coordinating Councils, sec. 300m, which, *inter alia*, coordinate the HSPs and AIPs submitted by the various HSAs, and form State Health Plans. The Act finally calls for the promulgation of guidelines for and the general supervision of the entire system by the Secretary of HEW. *See, e.g.*, secs. 300k-1, 300k-2, 300n-1(a).

The federal program itself takes into account excess bed capacity. The Secretary of the Department of Health, Education and Welfare (HEW) has identified excess bed capacity as one of the leading causes of unreasonable health care costs. 42 C.F.R. sec. 121.202(2)(b).

It was contemplated that the WHRRP would work closely with the federal planning program. The WHRRP Manual provides at pp. 13-14 that:

[F] or any capital expenditure project reviewable under Section 1122 of the Social Security Act or state certificate of need law ... approval from the State Health Planning and Development Agency must be obtained. If this approval is not obtained, the Rate Review Committee will withhold depreciation, interest, and all financial requirements associated with that project.

....

When requested by the appropriate HSA or the State Health Planning and Development Agency, the Rate Review Program staff ... will provide information on the financial feasibility and advisability of all reviewable projects and information on hospital rates for each health service area....

As part of the rate review process, it is expected that the Rate Review Committee will encounter situations with individual hospitals which can be resolved through the health planning process. In these instances, the appropriate HSA may be requested to review a situation ... or comment on ways to resolve it. HSA comments in non-1122 or certificate of need decisions will not be binding on the Rate Review Committee. However, these comments will be carefully considered.

The WHRRP also interacts with the federal medicaid program. I am informed that Region 5 of HEW has approved the Rate Review Program for setting rates for medicaid reimbursement.

Although complementary to the planning program, the Rate Review Program is different from and independent of that program. Congress itself believed that planning and rate review are different programs. In fact, it made available two separate grants: one for state planning, 42 U.S.C. sec. 300m-4, and one for state rate review, 42 U.S.C. sec. 300m-5.

The planning function consists in controlling the distribution of health facilities to meet public needs. The rate review function consists in assessing the reasonableness of rates even if the planning function's purposes have been met. The Rate Review Committee could disallow a rate increase to a hospital near full capacity since the rate might be unreasonable even if the facility is clearly needed. Conversely, a hospital conceivably could have a ninety percent vacancy, but if its rates were reasonable the Committee could approve the rate even though the hospital was subject to decertification under the Act for excess capacity. Unused capacity is material to both programs.

The planning program under the Act aims to control cost through control of distribution of resources, but not through rate review directly. *See, e.g.*, 42 U.S.C. sec. 3001-2(a)(1)-(4), which provides:

Functions of health systems agencies—Health planning as primary responsibility

(a) For the purpose of—

(1) improving the health of residents of a health service area,

(2) increasing the accessibility (including overcoming geographic, architectural, and transportation barriers), acceptability, continuity, and quality of the health services provided them,

(3) restraining increases in the cost of providing them health services, and

(4) preventing unnecessary duplication of health resources, each health systems agency shall have as its primary responsibility the provision of effective health planning for its health service area and the promotion of the development within the area of health services, manpower, and facilities which meet identified needs, reduce documented inefficiencies, and implement the health plans of the agency. To meet its primary responsibility, a health systems agency shall carry out the functions described in subsections (b) through (h) of this section.

One of the primary purposes of the HSA is to restrain increases in the costs of providing residents with health services. Yet the HSA has no authority to set the rates for the hospitals it reviews. The federal goal of "achievement of equal access to quality health care at a reasonable cost," 42 U.S.C. sec. 300k(a)(1), could be frustrated if hospitals were free to pass unreasonable costs on to the public. The rate review function complements the federal planning scheme, and, given the fact that the Act provides for just such a program, 42 U.S.C. sec. 300m-5, it was contemplated by Congress that such programs could coexist.

Therefore, far from frustrating the purposes of Congress, the Rate Review Program, including its consideration of excess capacity, complements the federal scheme.

Turning from the first level of inquiry to the second, the question becomes whether it can be seen from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states.

I already have noted that planning and rate review are separate and distinct functions even though excess capacity is relevant to both undertakings. Further, I already have noted that Congress expressly

contemplated state involvement both in the planning area and in the rate review area. It hardly can be said that Congress intended to occupy the field to the exclusion of the states.

One court has held that the Act preempts the area of health planning. *Park East Corp. v. Califano*, 435 F. Supp. 46 (S.D. N.Y. 1977). An analysis of this case, however, shows that the word "pre-emption" was used in the sense that the state's planning function cannot conflict with the uniform scheme established by Congress. Here, the consideration of excess capacity is within the context of the rate review function, not the planning function.

In *Park East*, the court was asked to grant a preliminary injunction to restrain New York health officials from closing a small proprietary hospital for hospital and life safety code violations. The hospital claimed that the attempt to close it was motivated by a desire to eliminate excess hospital beds. The district judge held that, under the Act, the hospital could not be closed without a review by the state health systems agency according to the procedures mandated by the Act and, therefore, granted the injunction.

But, even if Congress completely occupied the field of planning, it does not follow that Congress has precluded all other regulation of subjects necessary to accomplish the planning function. If it were the case that states cannot deal with hospital growth or capacity because the National Planning Act does so, municipal zoning controls and fire codes would be rendered useless.

In *Park East*, the court held:

There is no claim that this Act in any way affects a state's inherent police power to regulate hospitals and insure their compliance with various state health and hospital codes. However, the complaint alleges that the State defendants' acts in attempting to close Park East are motivated by a desire to eliminate excess hospital beds in New York State in contravention of the Act.

435 F. Supp. at 50. In the case at hand, the purpose of looking to a hospital's alleged excess capacity is not to perform the planning function, but to examine the reasonableness of the rates charged.

It is illustrative to compare the case at hand with the preemption law as it has developed in other fields. Consider, for example, picket line misconduct in a labor dispute. A state may not enjoin peaceful

picketing directed against an employer engaged in interstate commerce because it would be entering the preempted domain of the National Labor Relations Act which protects the federal goal of worker free choice. However, the federal power does not take away from the state the power to prevent picket line violence. The state has a separate and independent interest to secure domestic peace which enables it to regulate this facet of picket line conduct. *See United Auto A. & A. I. W. v. Wisconsin Emp. Rel. Bd.*, 351 U.S. 266 (1956) and *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957).

Similarly, excess hospital capacity is the subject of a federal planning interest of determining whether or not the hospital is needed, and is equally the subject of a state interest of determining reasonable rates. This is not a *Park East* or a peaceful picketing type of case in which the state is interfering with the federal scheme. It is akin to a valid building code or a picket line violence case in which the state is regulating a subject matter that, for different reasons, is subject to a federal regulation.

Congress has shown no intent to occupy either the planning or the rate review areas to the exclusion of the states. Therefore, the Rate Review Committee is not precluded from considering excess capacity in making its rate determinations.

BCL:CDH

Schools And School Districts; Taxation; When school taxes are collected on property in school district A but are erroneously paid to school district B, school district A is entitled, under sec. 74.78, Stats., to recover the amount so paid, with interest at six percent. Action on a claim under sec. 74.78, Stats., is subject to the six-year statute of limitations.

To the extent that 14 Op. Att'y Gen. 443 (1925), 20 Op. Att'y Gen. 1177 (1931), and 24 Op. Att'y Gen. 170 (1935) are inconsistent with this opinion, they are repudiated. OAG 113-79

November 28, 1979.

DR. BARBARA THOMPSON, *State Superintendent*
Department of Public Instruction

You ask whether sec. 74.78, Stats., applies in the situation described below and, if so, whether there is an applicable statute of limitations.

A village, which then comprised the entire territory of a school district, in 1970 annexed parts of two towns, each part being in a separate school district. Neither of the annexed areas was transferred to the school district containing the village. However, the village collected school taxes for 1970-1977 from the property in the annexed areas and paid that tax to the "village" school district which provided schooling for the children residing in the annexed areas. The question is whether the two "town" school districts may now recover from the "village" school district the school taxes erroneously paid to the latter and, if so, is there any limit to the number of years for which recovery may be had.

At the outset it should be noted that annexation of territory from a town to a village does not by itself change school district boundaries. *Greenfield v. West Milwaukee*, 272 Wis. 215, 226, 75 N.W.2d 424 (1956). Thus, in your case, the children living in the annexed areas should have continued to attend the "town" school districts.

Until 1925 there was no specific statute allowing recovery in a situation such as you describe. Chapter 303, Laws of 1925, created sec. 40.22, Stats. (1925), which provided, so far as here material, that "[w]henver any tax owing by one school district is erroneously assessed against the property of and paid by another district, the latter district shall be reimbursed." The section went on to provide that upon proof of such an error the clerk of the debtor district should:

[O]n the next succeeding tax roll of his town extend against the property of the district which should have paid the former tax a sum sufficient to reimburse the other district for the amount so paid, with interest at six per cent from date of payment, and the same shall be collected and paid as other school district taxes are collected and paid. When such tax is paid to the town treasurer he shall draw his warrant therefor payable to the treasurer of the district which paid such tax.

A legislative committee created to revise the school laws submitted a bill which became ch. 425, Laws of 1927, and renumbered sec. 40.22 to 74.78, Stats., and revised it to its present form. A note to S. 13 (1927), which became ch. 425, Laws of 1927, states that in the revision of sec. 40.22, “[n]o change in substance is proposed.” Section 74.78, Stats., provides:

Recovery of taxes paid by wrong school district. Whenever any debt or tax owing by a school district is assessed against and paid by another district, such tax plus six per cent shall be entered in the next tax roll against the taxable property in the debtor district, and when collected shall be paid to the treasurer of the district, against which the tax was so erroneously assessed.

14 Op. Att’y Gen. 443 (1925), in discussing sec. 40.22, Stats. (1925), did not discuss the meaning of the words, “any tax owing by one school district,” stated in sec. 74.78, Stats. (1977), as “any debt or tax owing by a school district.” Nevertheless, I deem it reasonably clear that what is intended under either form is a property tax levied on land in school district A and paid to school district B which is not entitled to it. That was the situation involved in 14 Op. Att’y Gen. 443 (1925) and in 20 Op. Att’y Gen. 1177 (1931). Each of those opinions concluded that the statute was applicable and that there was no limit to the time for which recovery could be had. Certainly, a school district does not, in a literal sense of the words, *owe* a tax to anyone. School taxes are collected by towns, villages, and cities and are paid over *to* school districts. If the wording of sec. 74.78, Stats., in this regard be deemed ambiguous so that construction of the language is necessary, the two opinions of my predecessors, which the Legislature has acquiesced in for approximately half a century, are entitled to “great weight.” *State v. Smith*, 50 Wis. 2d 460, 472, 184 N.W.2d 889 (1971). Also, if it be suggested that the 1927 revision of the statute changed its meaning, it should be noted that a revision does not change the meaning of a statute unless the new language is so clear as to be subject to no other interpretation. *George Williams College v. Williams Bay*, 242 Wis. 311, 316, 7 N.W.2d 891 (1943). Here, of course, a note attached to the revision bill expressly states that no change in substance is proposed, and such a note is important in construing the legislative intent. *George Williams College*, 242 Wis. at 315.

It is my conclusion that sec. 74.78, Stats., is applicable to the situation you describe.

I also am of the opinion that the limitations in secs. 893.19(4) and 895.43(1), Stats., are applicable.

Sections 61.51(4) and 118.26, Stats., make sec. 895.43, Stats., applicable to villages and school districts. Section 895.43(1)(a), Stats., bars any action against a governmental subdivision unless a claim is served on the subdivision within 120 days after the event giving rise to the claim, with one exception. Failure to serve the notice, or to serve it timely, does not bar action on the claim if the subdivision had actual notice and the claimant satisfies the court "that the delay or failure to give the requisite notice has not been prejudicial to the ... subdivision." Although the provisions of sec. 895.43(1)(a) and (b), Stats., are far from clear, it is probable that one seeking to bring himself within the exception in para. (a) first should comply with the requirements of para. (b), including the six-month limit upon bringing action after the claim has been disallowed by the governmental subdivision. I express no opinion whether the exception provided by sec. 895.43(1)(a), Stats., would apply in the situation you have described.

Section 893.19(4), Stats., raises another question in the situation you describe where the tax error began in 1970. That statute creates a six-year limitation on actions upon liabilities created by statute "when a different limitation is not prescribed by law."

This office on three occasions said no statute of limitations applies to the predecessor of sec. 74.78, Stats.: 14 Op. Att'y Gen. 443 (1925), 20 Op. Att'y Gen. 1177 (1931), and 24 Op. Att'y Gen. 170 (1935). Collectively, these opinions rested on three grounds: (1) there is no limitation in sec. 40.22, Stats. (1925) (now sec. 74.78, Stats.), or in any other section of the statutes, 14 Op. Att'y Gen. at 444; (2) in any event a limitations statute is inapplicable to recovery under sec. 74.78, Stats., because the recovery is not based on an action at law, 20 Op. Att'y Gen. at 1178; and (3) a limitations statute is inapplicable to recovery under sec. 74.78, Stats., because the officers of the aggrieved school district and the clerk of the town erroneously assessing school taxes are under a continuing duty to correct the errors, 20 Op. Att'y Gen. at 1178-79.

I believe these opinions are in error and that the six-year limitation period of sec. 893.19(4), Stats., applies to recovery under sec. 74.78, Stats.

Section 893.19(4), Stats., provides for a six-year limitation on actions upon liabilities created by statute when a different limitation is not prescribed by law. Recovery under sec. 74.78, Stats., clearly stems from a liability created by statute. No limitation for such recovery is prescribed by law. Although the procedure under sec. 74.78, Stats., is not an action at law, a court action under sec. 895.43, Stats., predicated on the rights and duties established by sec. 74.78, Stats., would be an action at law.

Moreover, the contention that there can be no limitations to a continuing duty was rejected in *Milwaukee v. Firemen Relief Asso.*, 34 Wis. 2d 350, 149 N.W.2d 589 (1967). There, the limitation of sec. 893.19(4), Stats., was applied to a claim against a city based on an obligation continuing from 1891 to 1957.

In view of the foregoing, it is my conclusion that sec. 74.78, Stats., applies to the situation you describe and that the six-year statute of limitations is applicable.

BCL:EWV

Compatibility; Towns; 60 Op. Att'y Gen. 276 (1971) discussed. The conclusion in that opinion is questionable. Until the law is changed offices of town clerk and town treasurer are probably incompatible. OAG 114-79

November 28, 1979.

ED JACKAMONIS, *Chairperson*
Assembly Committee on Organization

The Committee on Assembly Organization requests that I review the opinion of this office reported in 60 Op. Att'y Gen. 276 (1971). That opinion states that the offices of town clerk and town treasurer are "probably incompatible" because the safeguards inherent in the statutory "check-order system" of disbursements by the town treasurer upon the order of the town clerk would "largely disappear

where the same individual wears two hats.” 60 Op. Att’y Gen. 276, 279 (1971). The guarded conclusion in that opinion evidenced a reluctance on the part of my predecessor that an opinion of this office be the vehicle for announcing such a result.

The check-order system, (sec. 66.042, Stats.) which requires the signature of the clerk to make sure that the board has authorized the expenditure, that it was budgeted, and the signature of the treasurer to insure that money is available and to authorize money out of the town treasury, has no practical value if the same person wearing two separate hats merely signs twice. An alternative system of drawing checks is provided for villages and cities of the second, third and fourth classes for approval of claims. Sec. 66.042(1), (7). Such procedure is not applicable to towns.

If I were writing on a clean slate I might very well reach a contrary conclusion to the one stated in 60 Op. Att’y Gen. 276 (1971). Statutorily authorized consolidation of similar offices in cities and villages, through the use of municipal home rule, suggests that such offices are not necessarily incompatible. *See* secs. 61.195, 62.09(3)(c), and 66.01, Stats. If such offices are not incompatible in cities and villages, it is difficult to conclude they would be incompatible in towns.

This conclusion is supported in part by the statutes relating to towns. As 60 Op. Att’y Gen. 276, 277 (1971) points out, sec. 60.19(1)(a), Stats., could be viewed as contemplating dual office holding “with respect to some offices.” This statement was made in obvious reference to the language of sec. 60.19(1)(a), Stats., which provides that “no person may hold the offices of treasurer and assessor at the same time.” That statutory language implies that two town offices (other than treasurer and assessor) can be held by the same person simultaneously, if not otherwise incompatible, though such offices probably may not be consolidated, except where specifically authorized under secs. 60.19(1)(a) and 60.60(3), Stats. Note that sec. 60.60(3), Stats., provides that under such circumstances the town officer would not be entitled to the compensation established for both such offices but only for one of the offices.

I would also point out that I am advised that the offices of town clerk and town treasurer are combined in a number of towns throughout the state.

60 Op. Att'y Gen. 276 (1971) is not obviously wrong and it has become part of the fabric of the law, acquiesced in by successive Legislatures. I am reluctant to withdraw or rescind the opinion and I will not do so. The reluctance with which my predecessor reached his conclusion continues to be warranted and I would urge that the Legislature take another look at this issue in light of the fact that these offices have been combined in municipalities other than towns with no discernible effect on the operations of those local governments.

BCL:DJH:JCM

Malt Beverages; The proposed sponsorship of the Miller High Life National Doubles Bowling Tournament does not violate sec. 66.054(4), Stats., or Wis. Adm. Code section Tax 7.23. OAG 115-79

November 28, 1979.

MARK MUSOLF, *Secretary*
Department of Revenue

You ask whether the Miller Brewing Company's proposed sponsorship of the Miller High Life National Doubles Bowling Tournament would violate sec. 66.054(4)(a), Stats., or the provisions of Wis. Adm. Code section Tax 7.23.

Section 66.054(4)(a), Stats., reads in relevant part:

No brewer, bottler, or wholesaler shall furnish, give, lend, lease or sell any ... thing of value, directly or indirectly ... to any Class "B" licensee, or to any person for the use, benefit or relief of any Class "B" licensee

Section 66.054(15)(a), Stats., makes violation of this provision a misdemeanor punishable by a fine of not more than \$500, by imprisonment in the county jail for a term not to exceed ninety days, or by both. Additionally, revocation of license is also possible.

In my opinion, sponsorship of the bowling tournament would not violate sec. 66.054(4)(a), Stats. We are dealing with the construction of a penal statute and must, therefore, strictly construe its provisions in favor of a defendant. *State v. Wilson*, 77 Wis. 2d 15, 252

N.W.2d 64 (1977). The language of the statute is ambiguous as to the meaning of "thing of value." The concern, for example, that underlies this request for my opinion presumably is that the brewer might be furnishing something of value to those bowling establishments that possess a Class "B" license and that participate in the tournament. The "thing of value" is, I suppose, a temporary increase in business or good will that might potentially be generated by the tournament. I do not think that this constitutes furnishing anything of value, directly or indirectly, within the meaning of sec. 66.054(4)(a), Stats. If sec. 66.054(4)(a), Stats., is given so broad an interpretation, it would proscribe any advertising activity on the part of a brewery. The advertising of a particular fermented beverage would directly benefit Class "B" retail establishments since that is where retail sales occur.

Proper interpretation of the language of sec. 66.054(4)(a), Stats., requires that legislative intent be ascertained. *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941). Section 66.054(4), Stats., has been construed by an earlier Attorney General Opinion. 67 Op. Att'y Gen. 337, 338 (1978). There it was said:

The object and intent of sec. ... 66.054(4) ... is to prevent manufacturers and wholesalers from acquiring complete or partial control of specific class B retailers, directly by owning them or *indirectly by creating financial or moral obligations*. The purpose is clearly to assure the freest competition in the industry by preventing monopolistic practice, and to divorce entirely the wholesaler from the class B retailer.

(Emphasis in the original.)

In my opinion, any flow of benefit from brewer to Class "B" retailer as a result of Miller's sponsorship of the bowling tournament is so remote to such sponsorship as not to fall within the language of sec. 66.054(4)(a), Stats. It is a well-settled principle of statutory construction that statutes enacted as a legitimate exercise of the police power ought not to be given a construction that is "unnecessary to the furtherance of the main purpose of the statute." 66 Op. Att'y Gen. 277, 279 (1977); *Enos v. Hanff*, 98 Neb. 245, 152 N.W. 397, 400 (1915). In the present case, we do not have an attempt by a brewer to buy or control a Class "B" retailer or to create a financial or moral obligation that would facilitate control by the brewer. The

real and direct benefit provided by the brewery is to tournament winners and the discernible indirect benefit accrues to the brewer itself through its promotional activities. There is no obligation on the part of any participating bowling establishment to participate in the tournament or to be in any way obligated to Miller Brewery. Participating bowling establishments are not required to serve Miller beer and can continue to sell any other brand of fermented malt beverages they desire. Additionally, it does not appear that the sponsoring brewer picks any particular Class "B" retailers for inclusion within its promotional scheme. All tournament arrangements are made by the Wisconsin Bowling Proprietor's Association.

On the basis of the facts before me the benefit, if any, enjoyed by Class "B" retailers that participate in the bowling tournament, would be entirely too speculative and remote to constitute a violation of sec. 66.054(4)(a), Stats.; the proposed promotion also lacks any of the evil that sec. 66.054(4)(a), Stats., was designed to control.

You also ask whether the proposed sponsorship violates provisions of Wis. Adm. Code section Tax 7.23 which reads in part: "No brewer, bottler or wholesaler of fermented malt beverages may sponsor any event conducted on premises operated under a retail Class 'B' fermented malt beverage license or promoted by a retail Class 'B' fermented malt beverage licensee." Wis. Adm. Code section 7.23(2)(a).

"Event" is defined to include bowling tournaments. Wis. Adm. Code section Tax 7.23(1)(a). "Sponsor" is defined in the following manner: "'Sponsor' means to underwrite in whole or in part the cost of an event by providing signs, advertising in score cards or on scoreboards and fences or by providing equipment, prizes, trophies, entertainment or other things of value." Wis. Adm. Code section 7.23(1)(d).

It is my understanding that the prize money awarded state winners is to be derived from participant's entry fees. This presents no violation of the administrative rules. I also understand that the Miller Brewing Company will contribute \$125,000 in prize money to state winners who will compete in Reno, Nevada, in a national championship. If this prize money is distributed only at the national championship and not given to an association of Class "B" licensees within this state, I cannot see that the rule proscribing the provision of prizes and

trophies is violated. I do not have sufficient information concerning the type of advertising that Miller Brewery plans for the proposed tournament and must, therefore, defer to the Department of Revenue's judgment as to whether its own administrative rules might be violated by Miller's actions. Clearly, Miller may not provide signs or advertise in score cards or on scoreboards and fences. It appears, however, that more general advertisements of the tournament that do not specify the Class "B" premises on which the competition will be held would not violate either sec. 66.054(4)(a), Stats., or any provisions of Wis. Adm. Code section Tax 7.23.

In summary, the benefits to be derived from Miller's sponsorship of this tournament accrue to Miller Brewery and the actual contestants. Any benefit derived by Class "B" licensees is entirely too speculative and remote to constitute a violation of either sec. 66.054(4), Stats., or Wis. Adm. Code section Tax 7.23. I would add in closing that while Wis. Adm. Code section Tax 7.23 appears to be a permissible extension and interpretation of sec. 66.054(4)(a), Stats., I could very well understand why a brewer or a Class "B" retailer threatened with prosecution under sec. 66.054(4)(a), Stats., would argue that Wis. Adm. Code section Tax 7.23 exceeds the bounds of correct interpretation and is an unwarranted extension of legislative intent.

BCL:JEA:SCJ

Loans; Sales; Savings And Loan Associations; Charges imposed on a seller of property as a condition of the granting of a loan to a buyer of the property are includable as part of the interest under sec. 138.05, Stats., to the extent that such charges are passed on by the seller to the buyer. OAG 116-79

November 30, 1979.

R. J. McMAHON, *Commissioner*

Office of the Commissioner of Savings and Loan

You have requested my opinion on whether seller's points constitute interest for purposes of sec. 138.05, Stats. You have described a plan proposed by at least one Wisconsin savings and loan association

to charge seller's points, a one-time charge to the seller of the property being purchased by a customer of the association. The charge would be calculated as a percentage of the amount borrowed and would be charged in addition to the contract interest rate and other charges that the association collects from the borrower. You have expressed concern that such seller's points may constitute interest for purposes of sec. 138.05, Stats.

Section 138.05(1), Stats., provides in part as follows:

Except as authorized by other statutes, no person shall, directly or indirectly, contract for, take or receive in money, goods or things in action, or in any other way, any greater sum or any greater value, for the loan or forbearance of money, goods or things in action, than:

(a) At the rate of \$12 upon \$100 for one year computed upon the declining principal balance of the loan or forbearance....

In a previous opinion to you I observed that the broad statutory language of sec. 138.05, Stats., indicates the Legislature's intention to limit all devices for exacting compensation for a loan regardless of the form of the transaction. 65 Op. Att'y Gen. 67, 69 (1976). That opinion discusses the types of charges which must be included in the computation of interest rates under sec. 138.05, Stats., but deals only with those charges paid by the borrower directly. Your present inquiry relates to the treatment of charges paid by the seller to the lender as a condition of the granting of a loan to the buyer. Since certain types of charges described in the prior opinion would not be includable as interest even if charged directly to the buyer, such charges would, of course, not be includable if charged to the seller in the transaction. The question then is whether charges which would be part of the interest rate if paid by the buyer are includable within the interest rate computations if paid by the seller.

McArthur v. Schenck, 31 Wis. 673 (1873), dealt with a fact situation in which the seller of a farm reduced the purchase price by \$30 to reimburse the buyer for a \$30 usurious charge imposed by the lender. The court attached substantial significance to the fact that the \$30 charge was not actually paid by the buyer, but was, in fact, paid by the seller, a stranger to the loan. The court stated at p. 676 as follows:

The theory upon which laws against usury have been enacted, and the principle which has governed in their interpretation, have always been, that the borrower was at the mercy of the lender and subject to his utmost exactions and avaricious demands, unless protected by laws. In theory the borrower has been put, by such laws, in the same category with persons under legal disability to contract, such as infants, *femes covertis*, and persons *non compos mentis*. He has been declared legally incompetent to make a bargain about money where more than the lawful rate of interest was demanded. The prohibition of all such laws, and of our law, has been and is against the lender's bargaining for, reserving or taking usury *from the borrower*. We say "from the borrower," not because the statute uses these exact words or in terms so enacts the prohibition, but because such is the evident intent and purpose of the statute. Acts of the kind have always been so interpreted and understood. It is to shield from the grasp of the lender, and save the borrower from the injurious consequences of his own weakness and inability, that such statutes have been passed. They are designed for the protection of the borrower, and the protection so given has been extended to those persons standing in his place or representing him and succeeding to his rights, such as heirs-at-law, executors, devisees, sureties, assignees and the like. They are designed for the borrower's protection and benefit, and the protection and benefit of those thus representing him, *when he or they has or have suffered loss or injury from the unlawful exactions of the lender, or may suffer such loss or injury from the performance of the usurious contract, and when likewise he or they see fit not to waive the sanction or penalty of the statute in his favor....*

A recurrence to these general principles, which are well understood and elementary, seems very clearly to indicate that the payment of usury, if it be properly so called, not by the borrower, but by a *stranger* to the contract, one not connected with the loan nor liable for it, who voluntarily or from any motive advances the sum exacted or sustains the loss where the borrower is unwilling or declines so to do, is not a circumstance of which the borrower can be permitted to take advantage for the purpose of having the contract declared inoperative and void for usury.

(Emphasis in the original.)

Zang v. Schumann, 262 Wis. 570, 55 N.W.2d 864 (1952), cited *McArthur* with approval and stated:

In the Wisconsin Annotations (1933), p. 353, to Restatement, 2 Contracts, sec. 531, prepared under the direction of the late Prof. William H. Page, appears the following statement:

“The Wisconsin cases are in accord with the Restatement in holding that a payment made by a third party in order to induce the making of the contract, although together with interest it exceeds the permitted rate, does not make the bargain usurious: *McArthur v. Schenck*, 31 Wis. 673, 11 Am. Rep. 643 (1873). From this case, however, it would seem that it is immaterial whether or not the borrower knows of or consents to the payment.”

Zang, 262 Wis. at 577.

The Wisconsin cases are clear that a payment by a seller made to a lender to induce the loan of money to a buyer is not included within the calculations to determine whether the loan is usurious so long as the payment falls on the seller. The situation would, however, be different if the seller were to pass such burden on to the buyer by directly or indirectly inflating the selling price.

Just as the court in *McArthur* looked beyond the form of the transaction to determine that the actual payment for the usurious charge was made by the seller, so must one look beyond the form of the transactions proposed by Wisconsin savings and loan associations to determine whether the points “paid” by the seller are, in fact, a burden on the buyer. Numerous Wisconsin cases clearly state that in cases of alleged usury, the court will look through the form of the agreement to the substance of the transaction. *State v. J. C. Penney Co.*, 48 Wis. 2d 125, 179 N.W.2d 641 (1970); *Randall v. Home Loan and Investment Co.*, 244 Wis. 623, 12 N.W.2d 915 (1944); *Friedman v. Wisconsin Acceptance Corp.*, 192 Wis. 58, 210 N.W. 831 (1927).

The Federal Reserve Board, responsible for interpretations of the federal Truth-In-Lending Act, 15 U.S.C. secs. 1601 *et seq.*, has considered the appropriate treatment for disclosure purposes of seller’s

points in situations such as posed by your inquiry. Although disclosure requirements imposed by the federal government are not controlling as to the proper treatment of charges under state usury laws, they do provide some insight into the likelihood that such charges will ultimately be borne by the buyer. The Federal Reserve Board stated:

(b) Under the general rule in sec. 226.4(a), any such discount, to the extent it is passed on to the buyer through an increase in the selling price, must be included in the finance charge. However, as a practical matter, it may be difficult to determine whether or not a discount paid by the seller in connection with a real estate transaction has been, in fact, passed along to the customer as a part of the purchase price of the property....

(c) The Board has concluded that in any such transaction coming within its administrative enforcement authority, where seller's points or discounts were, in fact, passed along to the customer or buyer and the amount thereof was not disclosed as a finance charge, the Board will take such action as may be appropriate in the circumstances. However, it will not attempt to prescribe rules creating a presumption that all discounts or points are passed on to the customer or buyer and hence must be included in the finance charge in any particular class of transaction. On the other hand, the inclusion of seller's points or discounts in the finance charge will be acceptable to the Board as a correct disclosure under Regulation Z.

Board Interpretation, October 23, 1970, found in 1 CONS. CRED. GUIDE (CCH) para. 3518 at pp. 3625 to 3625-3.

If in a particular case the seller's points have been passed on to the buyer in the form of a higher price than would otherwise have been agreed to in the transaction, they fall clearly within the scope of sec. 138.05(1), Stats., which prohibits the lender from directly or indirectly, contracting for, taking or receiving more than twelve percent (12%) for a loan or forbearance. In those cases where the points have been borne by the seller and not passed on to the buyer in any way, the Wisconsin case law would lead to the conclusion that such charges would not be a part of the interest under sec. 138.05, Stats.

BCL:DJH:RAV

Discrimination; Personnel Commission; The Personnel Commission possesses the same powers and duties in processing discrimination complaints involving a state agency as employer as those exercised by the Department of Industry, Labor and Human Relations with respect to discrimination complaints involving an employer other than a state agency including the power to investigate complaints and to issue subpoenas. OAG 117-79

December 11, 1979.

CHARLOTTE M. HIGBEE, *Commissioner*
Personnel Commission

Your predecessor, Mr. Joseph W. Wiley, requested my opinion as to the extent of the Personnel Commission's authority under subch. II of ch. 111 and sec. 230.45(1)(b), Stats. His specific question was whether the powers and duties of the Commission in processing complaints of discrimination which involve a state agency as the employer, are equivalent to and include those powers and duties exercised by the Department of Industry, Labor and Human Relations (DILHR) in processing complaints of discrimination which involve an employer other than a state agency. Particularly, he inquired whether the Commission's power to "process" complaints under sec. 230.45(1)(b), Stats., included the power to investigate complaints and to issue investigative subpoenas.

The Wisconsin Fair Employment Practices Act, ch. 111, subch. II of the statutes, secs. 111.31 to 111.37, Stats., is procedurally intricate and reflects policy which has evolved over the years. *See, Ross v. Ebert*, 275 Wis. 523, 82 N.W.2d 315 (1957) and *Murphy v. Industrial Comm.*, 37 Wis. 2d 704, 155 N.W.2d 545, 157 N.W.2d 568 (1968).

State ex rel. Dept. of Pub. Instruction v. ILHR, 68 Wis. 2d 677, 229 N.W.2d 591 (1975), held that the Act did not apply to the state and state agencies. The court invited the Legislature to reconsider whether it wished to include state employers within the Act. *Id.* at 684. The Legislature within ten days passed ch. 31, Laws of 1975, making the state subject to all the provisions of ch. 111. This history

shows that the Legislature intended the terms of the Act to be the same for state employees as for other employees.

Prior to the enactment of ch. 196, Laws of 1977, subch. II of ch. 111, and especially sec. 111.36, Stats., vested broad power in the Department of Industry, Labor and Human Relations to receive, investigate, process, hold hearings on, conciliate, and decide complaints involving discrimination in employment on the basis of age, race, creed, color, handicap, sex, national origin, or ancestry including situations where the employer was a state agency.

The obvious intent of ch. 196, Laws of 1977, was to substitute the Personnel Commission for DILHR in the administration of the Act with respect to state employees. Section 111.33(1), Stats., provides that this "subchapter shall be administered" by DILHR, except as provided in sub. 2. Subsection (2) reads in part as follows: "This *subchapter* shall apply to each agency of the state except that complaints of discrimination against such agency as an employer shall be filed with and processed by the personnel commission under s. 230.45(1)(b)." Section 230.45(1)(b), Stats., provides that the Commission shall "[r]eceive and process complaints of discrimination under s. 111.33(2)."

Do the words "processed" or "process" contained in secs. 111.33(2) and 230.45(1), Stats., grant the Commission powers equivalent to those exercised by DILHR? It is fundamental law that administrative agencies possess only those powers which are expressly conferred or which are fairly implied from the statute under which it operates and that any reasonable doubt should be resolved against the grant of such power. *State ex rel Farrell v. Schubert*, 52 Wis. 2d 351, 357, 358, 190 N.W.2d 529 (1971). It is also basic law that statutes should be construed so as to avoid inconsistency and conflict and to avoid absurd results. *Wisconsin Valley Imp. Co. v. Public Serv. Comm.*, 9 Wis. 2d 606, 615, 101 N.W.2d 798 (1960).

In answering this question, it is helpful to consider other provisions contained in ch. 196, Laws of 1977. Section 127(2) of said chapter provides that:

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS. All records of the department of industry, labor and human relations related to equal rights complaints against state agencies completely *processed* as of the

effective date of this act *under subchapter II of chapter III of the statutes* are transferred to the personnel commission, as created by this act. All records of such *complaints processed* by the department after the effective date of this act shall be transferred to the personnel commission as completed.

It is apparent that the meaning of the word "processed" contained therein is synonymous with the words "processed" or "process" contained in secs. 111.33(2) and 230.45(1), Stats.

Likewise sec. 129(4) of the chapter provides:

All rules adopted and orders issued and all contracts entered into by the department of industry, labor and human relations which relate to administering state employe complaints under subchapter II of chapter 111, 1975 stats., shall remain in full force and effect until modified or rescinded by the personnel commission, as created by this act.

The rules referred to involve those adopted by the Department which are contained in Wis. Adm. Code chapter Ind 88. It should be noted that Wis. Adm. Code section Ind 88.03 provides for investigation of discrimination complaints and Wis. Adm. Code section Ind 88.09 provides for the issuance of subpoenas. Each of these points is strong evidence that the Legislature intended that the Commission has the same powers as those possessed by the Department.

Furthermore, to construe the Commission's power under sec. 230.45(1)(b), Stats., to "receive and process" discrimination complaints so narrowly as not to include all of the powers and responsibilities of DILHR in administering the law for nonstate employes would defeat the overall legislative intent, as evidenced by the history noted above, that the procedures and remedies for state employes be the same as for other employes. For example, under such a narrow construction, the Commission would have no authority to reinstate and order backpay in the case of an employe unlawfully discharged. Such a result would be contrary to the legislative purpose, and therefore such narrow construction must be rejected.

Accordingly, it is my opinion that the Commission possesses the same powers and duties with respect to the processing of discrimination complaints involving a state agency as an employer as does the Department with respect to discrimination complaints involving an

employer other than a state agency including the power to investigate complaints and to issue subpoenas.

BCL:GBS

Civil Actions; State may require proof beyond a reasonable doubt in civil commitments although a lesser burden would be sufficient under the United States Constitution. OAG 118-79

December 11, 1979.

FRED A. RISSER, *President*

Senate Committee on Organization

On behalf of the Senate Organization Committee you have asked whether the burden of proof standard for involuntary civil commitments under sec. 51.20(13)(e), Stats., can survive the decision of the United States Supreme Court in *Addington v. Texas*, 99 S. Ct. 1804 (1979).

In my opinion the answer is yes.

Section 51.20(13)(e), Stats., provides that “[t]he burden of proof shall be upon the petitioner to prove all required facts beyond a reasonable doubt, except that probability of physical harm, impairment or injury shall be proven to a reasonable certainty by evidence which is clear, satisfying and convincing.”

Addington dealt with the question of what standard of proof is required by the Fourteenth Amendment to the United States Constitution. 99 S. Ct. at 1806. The Court held that the burden must be greater than “a mere preponderance of the evidence,” *id.* at 1810, but that it need not equal the strict, criminal standard of beyond a reasonable doubt. *Id.* at 1811-12. Instead, the Court held that due process requires that the elements be established by a clear and convincing standard. *Id.* at 1813.

It is clear that sec. 51.20(13)(e), Stats., meets the clear and convincing standard in respect to proof of physical harm, impairment, or injury. As to the other elements for a commitment, however, it also is clear that this statute requires more than due process mandates.

The fact that the statute requires more than is required by due process does not invalidate the statute. As stated in *Oregon v. Hass*, 420 U.S. 714, 719 (1975): “[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards” (emphasis the Court’s). *Accord, Thompson v. State*, 83 Wis. 2d 134, 265 N.W.2d 467 (1978), and *State v. Doe*, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977).

BCL:CDH

Licenses And Permits; Nursing: The Board of Nursing has authority to accredit a new baccalaureate program even though the particular students who undertake that program are already certified as registered nurses. OAG 119-79

December 17, 1979.

MARJORIE LUNDQUIST, *Chairperson*

Board of Nursing

The Board of Nursing has requested my opinion on whether it has authority to establish minimum standards for college programs which offer the degree of Bachelor of Science in Nursing (BSN) to persons who already are registered nurses. The authority of the Board to establish minimum standards for BSN programs for unlicensed or uncertified persons is not at issue and is beyond question.

The facts as stated in the letter of request are:

The State of Wisconsin Board of Nursing was created in 1949 as the agent of State government authorized to interpret and to enforce the nurse practice act of this state. Since the time of its creation, the Board has interpreted its authority relative to “establishing minimum standards for schools for nurses and schools for trained practical nurses licensed under this chapter” to mean it holds legal authority over schools of nursing preparing persons for entry into the profession/vocation by licensure;

the distinction here is that of the Board's authority over preservice schools vs. schools and programs in nursing for persons already licensed.

....

The State of Wisconsin Board of Nursing consequently respectfully requests your opinion as to whether ... the Board's authority, extend(s) to [an academic program for persons *already* certified as registered nurses].

The question arises at this time because a new BSN program will be offered, which for its first several years of operation will admit only persons already certified or licensed. The BSN program described in your request is like that which exists at the University of Wisconsin-Madison and at other university system campuses in the state. In these programs a registered nurse entering the program after certification is graduated with a baccalaureate degree upon the satisfactory completion of nursing-related curriculum as set forth by the Board in Wis. Adm. Code section N 2.04. The BSN candidate is also required to complete nonnursing related course work which is specified by the appropriate academic authority. This same curriculum is available to baccalaureate candidates who have no previous licensure or certification.

I am advised that baccalaureate programs offered in the university system, as they pertain to the nursing-related curriculum, are now accredited and have been for many years. In other words the Board has in the past exercised its accreditation authority over baccalaureate programs whether candidates enter the program before or after certification or licensure. The specific question raised is novel only because the proposed BSN program will for a time be offered exclusively to candidates who are certified or licensed.

Section 441.01(3), Stats., provides:

The board may establish minimum standards for schools for nurses and schools for trained practical nurses licensed under this chapter, including all related clinical units and facilities, and make and provide periodic surveys and consultations to such schools. It may also establish rules to prevent unauthorized persons from practicing professional nursing. It shall approve

all rules for the administration of this chapter in accordance with ch. 227.

In the first sentence of the quoted material the statute premises the Board's authority on the kind of degree which a candidate is expected to receive upon successful completion of the related statewide examination. In the second sentence it is clear that the exercise of the authority is directed towards the school, and by extension its curriculum, not the licensure status of the incoming candidates. This latter factor is not, therefore, a required consideration under the statute. Thus, while it may be argued that a nurse who is certified and thereafter enters the BSN program in question has met the minimum standards in another curriculum that circumstance does not affect the Board's authority to examine the program itself.

To the extent that there is any ambiguity in sec. 441.01(3), Stats., regarding accreditation of baccalaureate programs, the Board's interpretation and past implementation is a factor of considerable importance in determining how the statute should be read. Where some ambiguity exists in a statute, the past practical construction over an extensive period by an officer or administrative agency charged with its administration is to be accorded great weight in determining the meaning of the statute. *State ex rel. Boulton v. Zimmerman*, 25 Wis. 2d 457, 130 N.W.2d 753 (1964). Thus, the Board's past accreditation practices for baccalaureate programs is due great deference in delineating its authority for accreditation of a new baccalaureate program. It should also be noted that the Board's past practice of exercising accreditation authority over any curriculum which is intended to culminate in a BSN also promotes uniformity, at least among all candidates in baccalaureate programs.

Therefore, since it appears that the Board's interpretation of sec. 441.01(3), Stats., with regard to baccalaureate programs is reasonable, rational and related to the purpose of that section, I am of the opinion that such a construction would be upheld by a reviewing court. *Schwartz v. ILHR Department*, 72 Wis. 2d 217, 221, 240 N.W.2d 173 (1976); *De Leeuw v. ILHR Department*, 71 Wis. 2d 446, 449, 238 N.W.2d 706 (1976).

Section 441.12, Stats., as recently amended by ch. 34, Laws of 1979, provides some further guidance:

(1) The board shall enforce this chapter and cause the prosecution of persons violating it.

(2) No person shall operate in this state a school for professional nurses or a school for practical nurses unless the same shall be accredited by the board.

Although the legislative history of ch. 441, Stats., sheds no light on the precise intent, it is my opinion that the language of the statute demonstrates that the Legislature authorized the accreditation process as a means to establish reasonably uniform standards for the education of registered nurses and trained practical nurses. In other words, the Legislature wanted to ensure that persons who seek employment as registered nurses or trained practical nurses fulfill basic requirements in certain areas of human knowledge that are relevant to the nursing profession. Section 441.01(3), Stats., explicitly uses the language “*minimum* standards for schools for nurses.” This statutory language is interpreted and amplified by Wis. Adm. Code section N 1.03(1)(b), promulgated by the Board of Nursing under the authority of ch. 441, Stats. This rule states specifically that the purpose of accreditation is: “1. To insure the safe practice of nursing by setting minimum standards which prepare the practitioner,” and “5. To insure graduates of accredited schools of their eligibility for admission to the state board examination and to facilitate their licensure without examination in other states.” Hence, the ultimate licensure or certification of the candidate is but one goal of accreditation.

An institution which grants a BSN degree and chooses to accept only candidates who are certified to practice nursing is still required to meet the goal of presenting a curriculum which promotes the safe practice of nursing. Therefore, because such an institution enrolls only those already certified or licensed, that self-imposed condition is irrelevant to the Board’s authority to accredit the program itself.

In conclusion, I am of the opinion that the Board has the authority to establish minimum standards for a new baccalaureate program which involves the further education of persons already certified or licensed to practice as nurses.

BCL:RMR

Attorneys; Public Officials; Discussion of possible conflict between the requirements of financial disclosure contained within the Code of Ethics for Public Officials with respect to the confidentiality requirements set forth in the Code of Professional Responsibility for lawyers and other laws related thereto. OAG 121-79

December 20, 1979.

R. ROTH JUDD, *Executive Director*
Ethics Board

You ask whether there is a conflict between the requirements of financial disclosure contained in the Code of Ethics for Public Officials and the confidentiality requirements contained in the Code of Professional Responsibility for lawyers. You also ask whether possible conflicts may be resolved by the waiver provisions found in sec. 19.48(8), Stats.

Your specific concern is whether state officials, nominees for appointment to state offices, and candidates for election to state office, who are lawyers, might violate any obligation or contravene any privilege created by law to preserve in confidence the identity of a lawyer's clients by complying with sec. 19.43, Stats. (which requires certain state officials, including nominees and candidates for state public office to file a statement of economic interest with the Ethics Board), and sec. 19.44, Stats. (which prescribes the form of the statement of economic interests). Section 19.55, Stats., requires that all records of the Board be open to public inspection subject to certain stated exceptions.

Among the information required by sec. 19.44, Stats., is the following:

(e) The identity of each payer from which the person who is required to file or a member of his or her immediate family received \$1,000 or more of his or her income for the preceding taxable year, except that if the person who is required to file identifies the general nature of the business in which the person or his or her immediate family is engaged, then no identification

need be made of any individual person, not acting as a representative of an organization, unless the individual is a lobbyist as defined in s. 13.62. In addition, no identification need be made of payers from which dividends or interest, compensation or reimbursement of expenses reported under s. 19.56, and political contributions reported under ch. 11 were received.

(f) If the person who is required to file or a member of his or her immediate family received \$1,000 or more of his or her income for the preceding taxable year from a partnership, corporation electing to be taxed as a partnership under subchapter S of the federal internal revenue code or service corporation under s. 180.99 in which such person or a member of his or her immediate family, severally or in the aggregate, has a 10% or greater interest, the identity of each payer from which the organization received \$1,000 or more of its income for its preceding taxable year, except that if the person who is required to file identifies the general nature of the business in which the person or his or her immediate family is engaged then no identification need be made of any individual, not acting as a representative of an organization, unless the individual is a lobbyist as defined in s. 13.62.

Thus, an attorney who is required to file has to identify only those individual payers who are acting as representatives of organizations or who are lobbyists. The attorney must, however, state that he or she is engaged in the practice of law.

Income is defined in Wis. Adm. Code section Eth 1.02(2)(a), to include:

1. Compensation for services (including salary, wages, fees and commissions);
2. Gross income derived from business;
3. Rents and royalties; and
4. Annuities and pensions.

Thus, under the provisions of sec. 19.44, Stats., and the broadness of the definition of "income" it is still possible that an attorney might be required to disclose the identity of some of his or her clients. The

question is whether such disclosure conflicts with the Code of Professional Responsibility for lawyers. The applicable provisions of the code are set forth in Disciplinary Rule 4-101, 43 Wis. 2d xxxviii (1969), and reads:

DISCIPLINARY RULES

DR 4-101 Preservation of Confidences and Secrets of a Client.

- (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
 - (1) Reveal a confidence or secret of his client.
 - (2) Use a confidence or secret of his client to the disadvantage of the client.
 - (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
- (C) A lawyer may reveal:
 - (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
 - (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
 - (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
 - (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.
- (D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or

secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

There is no question that an attorney occupies a fiduciary relationship toward his client. It is one of implicit confidence and trust. *In re Law Examination of 1926*, 191 Wis. 359, 362, 210 N.W. 710 (1926).

Several courts, however, have ruled that identification of a client is not a violation of a "confidence" as defined in the disciplinary rules. In *Falcon v. Alaska Public Offices Com'n*, 570 P.2d 469 (Alaska 1977), a physician, who was also a public official, was required to comply with Alaska's financial interests disclosure law and identify those patients from whom he received more than \$100.

The physician's practice consisted, in part, of psychiatric counseling and the treatment of venereal disease. He argued that a physician was exempted from compliance on the grounds: (1) that disclosure of a patient's identity violates the legal privilege between physician and patient or is barred by the ethical consideration of the physician-patient relationship, and (2) that the disclosure of names of individual patients unconstitutionally invades the patient's right to privacy. The court concluded at page 474 that there is no privilege which precludes compliance with the conflict of interest law. The court noted, however, that in situations involving psychiatry or venereal disease, the right of privacy with respect thereto outweighs the governmental interest in promoting fair and honest government. The court further noted that these situations present the exception rather than the general rule that ordinarily identification of a patient of a general practitioner does not infringe a significant private interest. 570 P.2d at 480.

Similarly, in *Chamberlin v. Missouri Elections Com'n*, 540 S.W.2d 876, 881 (Mo. 1976), two attorneys challenged the Missouri Campaign Finance and Disclosure Law on the ground, among others, that compliance by them with the law would violate the attorney-client privilege of confidentiality. The Missouri Supreme Court held: (1) whether or not the identity of a client is privileged must be assessed on a case to case basis; (2) that to uphold such a disclosure there must be a "substantial relationship" between the governmental interest and the information to be disclosed; and (3) the governmental interest must sufficiently outweigh the possibility of infringement

upon claimed rights. The court held that there was no showing that a serious barrier existed precluding compliance with the statutory requirement that the attorneys disclose the names and addresses of their clients who paid more than \$500 for their services, thus affirming the decision of the lower court.

McCormick on Evidence, *The Client's Privilege*, at pp. 185-87 points out:

The weight of authority denies the [attorney-client] privilege for the fact of consultation or employment, including the component facts of the identity of the client, such identifying facts about him as his address and occupation, the identity of the lawyer, and the scope or object of the employment.

....

Cases may arise, however, when protection of the client's identity is conceivably in the public interest.

(Footnotes omitted.)

There may be unusual situations where the disclosure of the identity of the client tends to prove a fact such as guilt or liability, and in those unusual situations identity and address are protected as confidences. *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960); *In re Kaplan*, 8 N.Y.2d 214, 168 N.E.2d 660 (1960). Conflicts of this sort seem to be adequately dealt with by the waiver provisions of sec. 19.43(8), Stats., which authorizes the Board to waive any filing requirement if it determines that a requirement works an unreasonable hardship or is in the public interest. Waiver may be on the Board's own motion or at the request of the person who is required to file a statement of economic interest. In cases where the Board refuses to waive a filing requirement, presumably an attorney may resort to any legal remedies available to reverse such a determination.

In summary, lawyers are not excused from the reporting requirements simply because they are lawyers. In those unusual cases where disclosure of a client's identity might prove an embarrassment to the client or would otherwise not be in the public interest, the Board may waive any filing requirement. As the Wisconsin Supreme Court pointed out *In re Hon. Charles E. Kading*, 70 Wis. 2d 508, 526, 235 N.W.2d 409, 238 N.W.2d 63, 239 N.W.2d 297 (1975):

While public officials, of course, do not waive their constitutional rights, they are nevertheless set apart from other members of society in terms of certain rights, as the law on libel makes clear. One who willingly puts himself forward in the public arena, and accepts publicly conferred benefits after election to public office, is legitimately much more subject to reasonable scrutiny and exposure than a purely private individual.

(Footnotes omitted.)

In my opinion, conflicts between the reporting requirements of sec. 19.44, Stats., and the Code of Professional Responsibilities for lawyers would arise only in unusual circumstances. In those cases, application for a waiver under sec. 19.43(8), Stats., would be appropriate.

BCL:GBS:scj

Fish And Game; Indians; Licenses And Permits; Indian fishers eligible to share in Tribal Treaty fishing rights are also eligible to apply for and hold a state commercial fishing license, but the state can exclude such individuals from sharing in non-Indian individual catch quotas applicable to a particular species of fish where a total harvest quota is necessary to prevent the substantial depletion of that species and where such quota must be apportioned between Indian and non-Indian fishers in order to safeguard the Indian's Treaty rights. OAG 123-79

December 26, 1979.

ANTHONY EARL, *Secretary*

Department of Natural Resources

You have asked two questions which involve the interpretation and application of sec. 29.33, Stats. (the Wisconsin Limited Entry Commercial Fishing Program on Lake Superior), and Wisconsin Administrative Code chapter NR 25, which implements that statutory program. You note that the administrative rules limit the number of commercial fishing licenses on Lake Superior and that at times some Native Americans who hold a Wisconsin Commercial Fishing

License claim additional fishing rights guaranteed by treaty. Separate lake trout quotas are established and authorized for the licensed commercial fishers and Native Americans in Wisconsin Administrative Code section NR 25.06. You also indicate that 1977 Amendments to sec. 29.33, Stats., establish fishing boards that will be establishing criteria for re-licensing under the commercial fishing program and that resolution of the issues raised in your questions is needed to provide guidance to this body.

You first ask:

May a fisher claim rights under both those preserved to Native Americans as well as to licensed commercial fishers, or must a party choose to operate under one of those authorities?

It is my opinion that a state licensed fisher may claim certain rights under the state license even though that fisher also may be entitled to share in rights guaranteed to Indian tribes by treaty.

The focus of your inquiry is the relationship between the state and the Red Cliff and Bad River Bands of Lake Superior Chippewa (hereinafter "The Bands") in regard to the fishery in the Apostle Islands area of Lake Superior. Your primary concern is the extent of the state's regulatory authority over the "harvest" of lake trout, including the allocation of harvestable lake trout between the "Indian" and "non-Indian" (*i.e.* state licensed) commercial fisheries in view of the Bands' treaty-protected fishing rights. ("Indian" or "Indian Fisher" will be used herein to mean Indian fishers fishing pursuant to treaty right.)

On January 6, 1972, the Wisconsin Supreme Court confirmed the Bands' fishing rights in the Lake Superior Fishery. *State v. Gurnoe*, 53 Wis. 2d 390, 192 N.W.2d 892 (1972). The court held that Band members have the right to fish in Lake Superior pursuant to the Chippewa Treaty of September 30, 1854 (10 Stat. 1109), but that such rights are in common with all citizens and that the state can regulate the exercise of those rights provided such regulations are "reasonable and necessary to prevent a substantial depletion of the fish supply."

The 1854 Treaty created a somewhat unique relationship between the state and the Bands with respect to the Lake Superior Fishery. To answer your questions, it is necessary to consider this relationship as

it has evolved since *Gurnoe* was decided. Although the Wisconsin courts have not considered the myriad of questions involved in defining this relationship, reference to decisions by other courts provides some guidance.

The United States Supreme Court has held that treaties with Indian tribes must be viewed as agreements between independent and sovereign nations that bargained (at least in theory) on the basis of formal equality. *Washington v. Washington State, Etc.*, 99 S. Ct. 3055 (1979). See also *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

In *McClanahan* the Court cautioned, however, that:

[A Treaty] is *not* to be read as *an ordinary contract* agreed upon by parties dealing at arms length with equal bargaining positions. ... “[d]oubtful expressions are to be resolved in favor of [the Indian people].”

(Emphasis added.) 411 U.S. at 174. See *State of Washington*, 99 S. Ct. at 3069.

Treaty fishing rights guaranteed as a result of such negotiations mean in effect that the Tribe is entitled to take a certain quantity of fish virtually free of state regulation and that such rights, whether exclusive or in common with non-Indians, are communal property rights belonging to the Tribe. *State of Washington*, 99 S. Ct. at 3071. See also, *Whitefoot v. United States*, 293 F.2d 658, 663, 155 Ct. Cl. 127 (1961), *cert. denied*, 369 U.S. 818 (1962). The fishing rights guaranteed by the 1854 Treaty in Lake Superior are off reservation communal rights of the Bands which an individual may be allowed to share by virtue of Band membership. The determination of who may share in these communal rights is an “internal affair” of the Band or Tribe involved subject to tribal regulation. *United States v. State of Washington*, 520 F.2d 676 (9th Cir. 1975); *Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974). See also, *Williams v. Lee*, 358 U.S. 217, 221-222 (1959).

It is well established that by virtue of its residual sovereignty a state, as the representative of its people and for the common benefit of all its citizens, may control the fish and game within its borders and may regulate or prohibit such fishing and hunting, *Manchester v. Massachusetts*, 139 U.S. 240 (1891); *Lawton v. Steele*, 152 U.S. 133

(1894); *Geer v. Connecticut*, 161 U.S. 519 (1896), subject, however, to the absence of conflicting federal legislation. *Skiriotes v. Florida*, 313 U.S. 69, 75 (1940). The state's regulatory authority extends to commercial fishing activity. *LeClair v. Swift*, 76 F. Supp. 729 (E.D. Wis. 1948). State regulatory authority, however, as defined in *State v. Gurnoe*, and similar cases, is extremely limited where the exercise of Indian treaty rights is involved. (See discussion *infra*.)

Under the Limited Entry Program, the Department of Natural Resources is authorized to limit the number of commercial licenses on Lake Superior, to designate areas where such licenses are operative, and to determine the qualification of commercial fishers. Sec. 29.33, Stats. Section 29.33(1), Stats., provides in part that: "the department may adopt rules defining the qualifications of licensees in the reasonable exercise of this authority, giving due consideration to residency, past record, fishing and navigation ability and quantity and quality of equipment possessed."

The rules adopted to implement the Limited Entry Program provide that not more than twenty-one licenses authorizing commercial fishing in Lake Superior shall be issued and effective for each yearly licensing period. Wisconsin Administrative Code chapter NR 25.03. Eligibility requirements on a yearly basis for a period of five years are also established. Other provisions in the Code regulate commercial fishing activities by establishing an open season, size limits, quotas for the commercial harvest of lake trout and a permit program for various commercial fishing activities. Permits are required for the harvest of lake trout and for the use of certain commercial fishing gear. The Administrative Code does not establish quotas for the commercial harvest of fish other than lake trout.

The Limited Entry Commercial Fishing Program appears to be a reasonable exercise of the state's police power authority to manage its fish and game resources. The Department has broad discretion to define the qualifications of Limited Entry Licensees. The exercise of that authority, however, must be reasonable and consistent with constitutional requirements.

It is my opinion that the state cannot force residents who possess treaty fishing rights to forego those rights in return for a state commercial fishing license. Any state regulation affecting treaty fishing rights must satisfy the reasonable and necessary standard and not

simply the broader standard applied to state police power regulations. See *Puyallup Tribe v. Washington Dept. of Game*, (Puyallup I), 391 U.S. 392, 402, fn. 14 (1968). As already suggested, a tribe's treaty fishing rights may not be qualified by the state even though the manner of fishing, the size of the take, the restriction on commercial fishing activity and the like may be regulated by the state in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against Indian fishers. *State v. Gurnoe; Puyallup I*, 391 U.S. at 398. The "appropriate standards" requirement means that the state must demonstrate that its regulations are reasonable and necessary conservation measures, *State v. Gurnoe; Dept. of Game of Washington v. Puyallup Tribe* (Puyallup II), 414 U.S. 44 (1973); *Tulee v. Washington*, 315 U.S. 681, 684 (1942), and that the application of such regulations to Indian fishers is necessary in the interest of conservation. *Antoine v. Washington*, 420 U.S. 194, 207 (1975). "Conservation" as used in this context means "insuring optimum spawning escapement for perpetuation of the run [species]." *United States v. State of Washington*, 520 F.2d at 686. To require an Indian fisher to forego treaty rights in order to secure or hold a state commercial fishing license would render the treaty guarantees nugatory and therefore would constitute an impermissible interference with such federally protected rights. Further, the state may not force treaty Indians to yield their own protected interests in order to promote the welfare of the state's other citizens. See *United States v. State of Washington*, 520 F.2d at 686; *Puyallup II*.

As a citizen of the United States and the state, an Indian person is entitled to the same rights, privileges and equal opportunities enjoyed by non-Indian persons. Additionally, Tribe members may be entitled to certain treaty-protected rights not available to non-Indians. Accordingly, an Indian fisher is entitled to apply for and hold a state commercial fishing license under the limited entry program notwithstanding that individual's eligibility to share in treaty-protected fishing rights.

In your second question you ask:

If a Native American may fish under both Native American fishing rights as well as under commercial fishing license rights, if he or she qualifies pursuant to section 29.33, Stats., does that individual have a right to fish under quotas established and

awarded under each separate classification or must the licensee choose to fish solely under one of those quota designations?

It is settled that the use of catch quotas for the harvest of fish and game resources is a reasonable exercise of the state's police power authority to manage its wildlife resources. *See e.g., Bittenhaus v. Johnston and another*, 92 Wis. 588, 66 N.W. 805 (1896); *State v. Nergaard*, 124 Wis. 414, 102 N.W. 899 (1905); *Krenz v. Nichols*, 197 Wis. 394, 222 N.W. 300 (1928). It is my opinion that a catch quota to prevent depletion of a particular species of fish can be applied to an Indian fishery under the state's limited authority to enforce conservation regulations against Indian fishers, provided such quota is necessary to prevent a substantial depletion of the fish supply. *State v. Gurnoe; Puyallup I and II; Puyallup Tribe v. Washington Dept. of Game* (Puyallup III), 433 U.S. 165 (1977); *Antoine v. Washington*, 420 U.S. 194 (1975).

Whether a catch quota is necessary to preserve a particular species such as the Lake Superior lake trout, and the size of such quota, are fact questions which may be in dispute. An Attorney General's opinion is not a proper vehicle to make a determination where there may be a dispute as to the facts. Any such dispute should be determined by a court, or by some other appropriate means such as an intergovernmental agreement between the state and the Bands. For purposes of this opinion, it is assumed that a total catch quota is necessary to preserve Lake Superior lake trout.

The Wisconsin Administrative Code provides for a total allowable annual commercial harvest of 100,000 pounds of lake trout. The Code per se does not establish quotas for the commercial harvest of any other species. As already noted, the establishment of a harvest quota is clearly a conservation measure. The Administrative Code, however, goes further and purports to divide the quota between Indian and non-Indian commercial fishers.

Pursuant to NR 25.06, each group is authorized to harvest forty percent of the total allowable annual harvest with the remaining twenty percent reserved for DNR use for special assessment purposes. I presume this allocation is based on the Department's interpretation of the 1854 Treaty and the decisions in *State v. Gurnoe*, and the *Puyallup* and other Washington cases which provide guidance where treaty fishing rights are involved.

Although our Supreme Court concluded in *State v. Gurnoe* that the Tribe's fishing rights were in common with all citizens, the Court did not decide what amount (*i.e.*, total number, pounds or percent) of the harvestable surplus of fish belonged to the state and the Bands under the 1854 Treaty. The allocation of rights in common, however, has been considered in the Washington litigation. In *Washington v. Washington State Etc.*, 99 S. Ct. 3055 at 3074-75, the Court concluded:

We also agree with the Government that an equitable measure of the common right should initially divide the harvestable portion of each run that passes through a "usual and accustomed" place into approximately equal treaty and nontreaty shares, and should then reduce the treaty share if tribal needs may be satisfied by a lesser amount.

....

It bears repeating, however, that the 50% figure imposes a maximum but not a minimum allocation. As in *Arizona v. California* [373 U.S. 564] and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but not more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living. Accordingly, while the maximum possible allocation to the Indians is fixed at 50%, the minimum is not; the latter will, upon proper submissions to the District Court, be modified in response to changing circumstances.

(Footnote omitted.) The Court's approval of the approximate 50-50 allocation of the rights in common under the treaty included all harvestable surplus and not just the commercial take. 99 S. Ct. at 3074-75.

There are many similarities between the treaty rights affecting the Lake Superior fishery and the treaty rights at issue in the Washington litigation. Accordingly, it may be judicious to follow the guidance offered by the Supreme Court respecting your apportionment efforts. Regardless of how determined, it may be in the best interest of the Bands to negotiate an equitable allocation or to acquiesce in the Department's determination. The state may secure the Bands' compliance with these quota allocations by gaining their acquiescence in

its goals or by judicial determination. Clearly some equitable apportionment of the available harvest between the state and the Bands must be effected in order to safeguard the Bands' federal Treaty rights.

Notwithstanding the problems inherent in effecting an apportionment, it is my opinion that the Department may establish individual catch quotas for all state licensed commercial fishers. The Department may exclude Indian fishers (who are eligible to share in the Bands' Treaty rights) from participation in the non-Indian share of the resource regardless of whether or not those individuals hold a state commercial fishing license. In other words, fish taken by Indian commercial fishers who hold a state license can be counted as part of the Bands' apportionment. *Cf. State of Washington*, 99 S. Ct. at 3075-76.

BCL:JN

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Circuit Judge; Elections; Under Wis. Const. art. VII, sec. 24(1), as amended April, 1977, a person must have been licensed to practice law in Wisconsin for five years immediately prior to the date of the election, rather than the date the term begins, to be eligible to the office of circuit judge. (Unpublished Opinion) OAG 1-79

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