

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

VOLUME 72

January 1, 1983 through December 31, 1983

BRONSON C. LA FOLLETTE
ATTORNEY GENERAL



MADISON, WISCONSIN
1983

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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, Madison from Nov. 25, 1974, to

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LEGAL SERVICES DIVISION

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| MICHAEL L. ZALESKI | Assistant Attorney General |

¹Resigned, 1983

²Appointed, 1983

OPINIONS
OF THE
ATTORNEY GENERAL

Volume 72

Special Prosecutor; Circuit courts of this state may *sua sponte* appoint a special prosecutor in contempt actions pursuant to ch. 785, Stats., without the need to resort to the provisions of sec. 59.44, Stats. OAG 1-83

January 11, 1983

ROBERT D. ZAPF, *District Attorney*
Kenosha County

You have requested my opinion regarding the power of a circuit court in this state to appoint a special prosecutor within the provisions of sec. 785.03(1)(b), Stats., for the purpose of prosecuting an action for punitive sanction for contempt without utilizing the application and order procedure provided for in sec. 59.44, Stats. Your specific question is: Does a circuit court of this state possess the power and authority to appoint a special prosecutor in contempt actions brought pursuant to provisions of ch. 785, Stats., in addition to, or independent of, the power of a circuit court to appoint a district attorney *pro tempore* or a special assistant district attorney pur-

suant to the provisions and procedures contained in sec. 59.44, Stats.?

It is my opinion that circuit courts of this state do possess the power to make such *sua sponte* appointments of special prosecutors within the provisions of ch. 785, Stats., and that sec. 59.44, Stats., is not the exclusive means or procedure by which circuit courts can appoint special prosecutors.

You ask this question because of the recent appointment by a circuit judge of your county of a special prosecutor for the purposes of pursuing punitive sanctions for contempt against a member of the bar who is alleged to have engaged in misconduct within the provisions of secs. 785.01(1)(a) and 785.03(1)(b), Stats. The circuit judge involved made the appointment of a private practitioner to act as special prosecutor *sua sponte* and specifically within the provisions contained in sec. 785.03(1)(b), Stats., with no utilization of the procedures involving the district attorney's office within the provisions of sec. 59.44, Stats.

The statute pursuant to which the circuit judge appointed a special prosecutor to prosecute the contempt action involved in your situation, sec. 785.03(1)(b), Stats., states in pertinent part as follows:

Punitive sanction. The district attorney of a county, the attorney general or a special prosecutor appointed by the court may seek the imposition of a punitive sanction by [utilizing stated procedures] The district attorney, attorney general or special prosecutor may issue the complaint on his or her own initiative or on the request of a party to an action or proceeding in a court or of the judge presiding in an action or proceeding.

The other statute applicable to your request which provides for the appointment of an acting district attorney or district attorney *pro tempore* and of special assistants to the district attorney is sec. 59.44, Stats. This statute provides for the appointment of acting district attorneys and special assistant district attorneys under several sets of circumstances. First, if there is no district attorney in the particular county, or if the district attorney is absent, or if the district attorney is unable to attend to his duties regarding a case or investigation, or if the district attorney should be disqualified because of various conflicts of interest or if the district attorney is charged with a crime, any judge of a court of record may appoint a district attorney *pro*

tempore; second, the district attorney may apply to any judge of a court of record for appointment of special assistants to assist the district attorney in criminal prosecutions and investigations; and, third, the circuit court may appoint special assistant district attorneys upon application by the county board to assist the district attorney if there is an unusual amount of civil litigation involving the county. It is important for purposes of this discussion, as will be seen shortly, to note that nowhere in the provisions of sec. 59.44, Stats., is any mention made of a district attorney's desire to terminate or dismiss a pending prosecution being one of the grounds upon which the judge of a court of record may appoint a district attorney *pro tempore*.

Nowhere in the provisions of these two statutes is there to be found any indication that the special prosecutor referred to in sec. 785.03(1)(b), Stats., is to be appointed by utilization of the provisions contained in sec. 59.44, Stats., and there is no indication in the latter section that the Legislature considered those provisions to be the exclusive means by which a special prosecutor is to be appointed. To the contrary, our court of appeals has specifically decided that the provisions of sec. 59.44, Stats., are not exclusive.

In *State v. Lloyd*, 104 Wis. 2d 49, 310 N.W.2d 617 (Ct. App. 1981), the court of appeals was presented the issue of whether it was error for the circuit court to *sua sponte* appoint a special prosecutor when it refused to approve the district attorney's stipulation entered into with defense counsel for the dismissal of a criminal charge with prejudice. In determining that such *sua sponte* appointment was not error the court of appeals stated the following: "Defendant contends that because the district attorney did not request appointment of a special prosecutor pursuant to sec. 59.44(2), Stats., the trial court was without appointive authority. Sec. 59.44(2) is not the exclusive means by which a court can appoint a special prosecutor." *Lloyd*, 104 Wis. 2d at 56. The court of appeals went on to state that a trial court may appoint counsel to prosecute a case when the district attorney refuses to continue the action. Therefore, it would appear that there is clear authority in this state for a court to appoint a special prosecutor in situations other than those specifically mentioned in sec. 59.44, Stats.

In addition, there appears to be a clear legislative delegation of authority to the circuit court to appoint a special prosecutor within

the provisions of ch. 785, Stats., without the necessity of resorting to the procedures provided for in sec. 59.44, Stats. If the Legislature had intended to require such resort, it could have easily inserted that requirement within the provisions regarding the appointment of a special prosecutor in sec. 785.03(1)(b), Stats. It chose not to do so.

Further support for this conclusion is furnished by the Judicial Council Committee comment (1979) to sec. 785.03, Stats., which states as follows: "the council's intent is to have the Wisconsin statute be in accord with the federal rule." The federal rule referred to is Rule 42 of the Federal Rules of Criminal Procedure which states in pertinent part, in language similar to that of sec. 785.03, Stats., that a criminal contempt in the federal court is to be prosecuted by "the United States Attorney or ... an attorney appointed by the court for that purpose."

At least one circuit has recently held that that language does not require the federal court to select counsel from the staff of the United States Attorney's Office to prosecute criminal contempt but may appoint appropriate counsel as it sees fit. *See Musidor v. Great American Screen*, 658 F.2d 60, 65 (2d Cir. 1981).

Indeed, since we are speaking of the contempt powers of a court, involving as they do the power to do that which is necessary to the very existence, dignity and continued functioning of the courts, it would be absurd to engraft by unsupported implication or inference a condition upon those powers that the district attorney must first act and request a special prosecutor in order for the court to direct that a contempt complaint be filed when the statute specifically provides for the appointment of a special prosecutor by the court.

BCL:JCM

Counties; District Attorney; A multi-county prosecutorial system could be established, consistent with article VI, section 4, of the Wisconsin Constitution, by reorganizing certain counties and joining them solely for prosecutorial purposes, while allowing them to remain separate for the purpose of exercising all other functions of county government. The electors of each county sharing the services of a particular district attorney, however, would have to participate in the selection of their joint prosecutor. OAG 2-83

January 19, 1983

MICHAEL J. MULROY, *District Attorney*
La Crosse County

As a member of the Legislative Council's Special Committee on the Prosecutorial System, you have asked whether article VI, section 4, of the Wisconsin Constitution, which provides in part that "district attorneys, and all other county officers ... shall be chosen by the electors of the respective counties," prevents the Legislature from establishing either:

1. A multi-county regional district system under which a district attorney is elected by the voters of more than one county and is responsible for the delivery of prosecutorial services throughout the multi-county district; or
2. A prosecutorial system which allows a district attorney who is elected by the voters of one county to provide prosecutorial services on a regular basis to citizens of one or more counties in a designated area of the state.

I have concluded that a multi-county prosecutorial system could be constitutionally established by reorganizing certain counties and joining them solely for prosecutorial purposes, while allowing them to remain separate for the purpose of exercising all other functions of county government. The electors of each county sharing the services of a particular district attorney, however, would have to participate in the selection of their joint prosecutor.

The Wisconsin Constitution, of course, is not a grant of power to the Legislature, but a limitation on the Legislature's plenary power. *E.g.*, *State ex rel. McCormack v. Foley*, 18 Wis. 2d 274, 277, 279, 118 N.W.2d 211 (1962); *Beardsley v. City of Darlington*, 14 Wis. 2d 369, 372, 111 N.W.2d 184 (1961). The Legislature may exercise all power appropriate to its branch of government which the constitution does not expressly or by necessary implication forbid it to exercise. *Id.* In determining whether the Legislature may take some action the question is not whether any affirmative constitutional provision authorizes the action, but whether any provision prohibits the elected representatives of the people from enacting as law a proposal which they deem wise and for the public welfare. *Northwestern National*

Bank of Superior v. City of Superior, 103 Wis. 43, 46, 79 N.W. 54 (1899). See *Beardsley*, 14 Wis. 2d at 372.

The provision of the Wisconsin Constitution with which you are concerned appears on its face to prohibit the Legislature from establishing multi-county prosecutorial units. The critical word in the provision is "respective." This word means, essentially, relating to each, each to each or singly considered. *Webster's Third New International Dictionary* 1934 (1976); 37A *Words and Phrases* 19-21 (perm. ed. 1950). Because the provision requires that the electors of each county, singly considered, choose the various county officers, it seems to demand that a district attorney and other county officers be chosen in each county by the electors of that county.

Historically, however, each politically organized county in Wisconsin has not always had its own prosecutor. In the early days of statehood it was common for the Legislature to create what were in effect multi-county prosecutorial units by joining otherwise separate counties for "judicial purposes." *Cathcart v. Comstock*, 56 Wis. 590, 604, 14 N.W. 833 (1883). One of these shared-prosecutor units continues to exist in Shawano and Menominee Counties. Sec. 59.475, Stats. (1979-80).

The constitutionality of this arrangement was questioned in *Cathcart*. It was contended in that case that the legislative act which organized Lincoln County as a separate political entity was void because it did not provide for the election of a separate district attorney to serve Lincoln County exclusively. *Id.* 56 Wis. at 604. Instead the legislation provided that the territory being organized should "constitute a separate county, except that the same shall be and remain attached to the county of Marathon for all judicial purposes under the laws of this state." *Id.* This meant that although Lincoln and Marathon Counties each separately elected most of their own county officers, a single district attorney was elected to serve both counties, which were considered to be but a single county for judicial purposes. *Id.*

The supreme court approved the Legislature's method of establishing a prosecutorial system which did not provide for the election of separate district attorneys in Lincoln and Marathon Counties, respectively, saying: "We apprehend there is no constitutional objection to the two counties remaining united for judicial purposes,

notwithstanding the organization of the new county for other purposes. Such acts have often been passed, and we are not aware that they have ever been questioned." *Id.*

The court ruled in essence that although the constitution required the election of a district attorney in each county, this meant each county organized for judicial purposes. Two counties organized separately for political purposes which were joined for judicial purposes were but one county for the purpose of electing a district attorney. Thus the election of a single district attorney in what amounted to the single judicial county of Lincoln/Marathon fully complied with the requirement that a district attorney be elected in each county.

Cathcart is a century old, but remains good law. It has never been overruled or limited in any way by subsequent judicial decisions.

Both the legal principles enunciated in *Cathcart* and the decision itself were recently reaffirmed by the supreme court in *Pamanet v. State*, 49 Wis. 2d 501, 182 N.W.2d 459 (1971). *Pamanet* did not raise the precise issue which had been decided in *Cathcart*. The questions raised, however, were closely analogous.

The first question was whether the Legislature could constitutionally establish a single county court to jointly serve both Shawano and Menominee Counties. *Pamanet*, 49 Wis. 2d at 504-05. The supreme court answered this question in the affirmative. *Id.* Citing *Cathcart*, the court reaffirmed that "a county may be organized for county purposes, and be attached to some other county for judicial purposes." *Id.* at 505. It ruled further that whether to establish a judicial county including two or more political counties is solely a matter of legislative policy, not of constitutional concern. *Id.*

The public defender argued that "the statute providing that 'the district attorney of Shawano county shall serve as district attorney for Menominee county' conflicts with the constitutional requirement that district attorneys be chosen by the electors of a county once in every two years." *Id.* at 506. It is important to realize that counsel was not simply resurrecting the same argument made in *Cathcart*. His contention was not that it was unconstitutional to join Shawano and Menominee Counties for judicial purposes, and to have one district attorney elected to jointly serve the judicially united counties. See Brief for Plaintiff In Error 12 (State No. 4, August Term 1970). His complaint, rather, was that the statute under attack had been

interpreted in Memominee County to mean that only the electors of Shawano County could vote for the Shawano/Menominee County District Attorney. *Id.* at 9-15. He argued that the electors of Menominee County were deprived of their constitutional right to vote for the joint prosecutor. *Id.*; *Pamanet*, 49 Wis. 2d at 506.

The supreme court did not reach this issue, probably because the answer to the question presented, which you also raise as your second question, is fairly apparent. The constitution, in requiring that district attorneys be chosen by the electors of the “respective” counties, demands that the electors of each county have a voice in choosing their prosecutor. Two or more counties may be joined for the purpose of electing a district attorney, but electors in all parts of the joined judicial county, *i.e.*, each of the political counties comprising the judicial county, must be allowed to vote for the officers of that county.

The court ruled instead that *Pamanet*, as the defendant in a criminal case, had no standing to challenge the right of the district attorney to prosecute him, as long as the existence of the office of district attorney was not questioned. *Id.* at 507. Quoting *Cathcart* at length with obvious approval, the court reiterated that, consistent with the state constitution, counties could be organized separately for other purposes, but united as one for judicial purposes. *Id.* at 506. The court then stated that since Shawano and Menominee Counties were legislatively joined for judicial purposes, “there could be no claim that there was not a lawfully established office of district attorney” in the united Shawano/Menominee County judicial unit. *Id.* at 507.

In holding that a county may be attached to some other county for judicial purposes, *Pamanet* relied in part on *State ex rel. Brown v. Stewart*, 60 Wis. 587, 597-98, 19 N.W. 429 (1884), which had found constitutional support for the proposition because article VII, section 11, in speaking of “‘each county of this state organized for judicial purposes’ ” implied that the practice was permissible. *Pamanet*, 49 Wis. 2d at 505 n. 5. That provision of the constitution was repealed by the process of court reorganization in 1977. *See* 1975 J. R. 13; 1977 J. R. 7. The validity of *Pamanet*, however, was not affected by the repeal.

As noted earlier, the power of the Legislature is absolute, and does not depend on any specific grant of authority in the constitu-

tion. If the constitution were completely silent on the subject, thus not prohibiting the Legislature from joining counties for judicial purposes, the Legislature would have power to join them. See 20 C.J.S. *Counties* § 39 at 793. Even if this were not so, though, the validity of *Pamanet* would not be affected because another provision of the state constitution, article VII, section 12, which remains part of the document, still speaks of counties "organized for judicial purposes." The constitution continues to imply, therefore, that this system of organization is permissible.

Neither do the recent amendments to article VI, section 4, affect the continuing vitality of *Cathcart* or *Pamanet*. The amendment which allows counties, at their option, to abolish the elective office of coroner and substitute an appointed medical examiner is inapposite since joining counties for the purpose of electing a prosecutor does not abolish the elective office of district attorney in either county. It merely modifies the boundaries of the county, organized for judicial purposes, from which the district attorney is elected.

The amendment which allows two or more counties to institute a joint medical examiner system does not suggest, under the principle of express inclusion, implied exclusion, that the Legislature has been stripped of its inherent authority to join the state's subdivisions for special purposes. Counties are merely creatures of the Legislature, and have no power except that ceded to them by the state. *Dane County v. DH&SS*, 79 Wis. 2d 323, 329-30, 255 N.W.2d 539 (1977). See *State ex rel. Sonneborn v. Sylvester*, 26 Wis. 2d 43, 56, 132 N.W.2d 249 (1965). Counties have no power to band together, therefore, unless granted that power by the sovereign. If the Legislature also lacked any power except that expressly bestowed by the constitution, perhaps some significance could be attached to a constitutional grant of authority to the counties, but not to the Legislature. Since counties must be expressly granted power, while the Legislature has all power which is not expressly taken away, a constitutional grant of power to counties means no more than that counties have been given a share of the authority the Legislature inherently enjoys.

Both *Cathcart* and *Pamanet* were concerned with the joinder of newly created counties to existing counties. All the counties of this state, except Menominee, are now fully organized, however, and there is some question whether fully organized, existing counties can

be attached to other existing counties for governmental purposes. See *Palms v. Shawano County*, 61 Wis. 211, 216, 21 N.W. 77 (1884) (raising question, but upholding joinder of what is now Langlade County to Shawano County because Langlade was not an organized county at the time of joinder). See also 20 C.J.S. *Counties* § 39.

As a practical matter this question need not be answered, as it apparently has not been in the century since it was posed, because the Legislature, at its pleasure, may repeal the act organizing a county and destroy it as a legal entity. *State v. Mutter*, 23 Wis. 2d 407, 413, 127 N.W.2d 15, *app. dismissed*, 379 U.S. 201 (1964); 56 Am. Jur. 2d *Municipal Corporations* § 28 at 92, § 8 at 143-44. Once a county has ceased to exist, the territory which formerly comprised it may be reorganized as a new county. 2 R. Eickhoff and M. Meier, *McQuillin, Municipal Corporations*, § 8.17 at 595 (3rd ed., 1979 rev. vol.). See also 56 Am. Jur. 2d, § 54 at 111. And the newly organized county, of course, may be attached to an existing county for judicial purposes in complete accord with prior appellate decisions. See generally 20 C.J.S. *Counties* § 39 at 793 n. 66.

As long as an affected county does not lose territory during reorganization, the Legislature may reorganize the political subdivision it has created without submitting the question to a vote of the area's inhabitants. See *Mutter*, 23 Wis. 2d at 413. See generally Wis. Const. art. XIII, § 7. The changes may be made unilaterally by the Legislature when it is not practical to carry on county government in a particular class of counties in the same manner as it is carried on in other counties, provided there is some reasonable basis for diversity. See *State ex rel. Milwaukee County v. Boos*, 8 Wis. 2d 215, 222, 990 N.W.2d 139 (1959).

Both *Cathcart* and *Pamanet* also were concerned with counties which were joined for all judicial purposes. The attached counties shared not only a district attorney, but all other county officials involved in the administration of justice. This does not mean, however, that other counties cannot be joined solely for prosecutorial purposes.

Those cases were concerned with joinder for all judicial purposes simply because, as a matter of fact, the counties whose joinder was challenged had been joined for all judicial purposes. Nothing in the rationale of either decision deals with the propriety of the particular

purposes for which counties may be joined. Both were concerned only with the general question of the permissibility of legislative joinder for any special purpose.

But, to recall and reemphasize the primary principle again, the power of the Legislature is unrestricted absent some express or necessarily implied restriction in the constitution. The important consideration is that no provision of the constitution restricts the Legislature from joining counties for only prosecutorial purposes. Absent such a restriction, "[t]he legislature's power to create municipal corporations implies the power to create them with such limitations as the legislature may see fit to impose." 1 J. Dray, *McQuillin, Municipal Corporations*, § 3.02c at 208 (3d ed., 1971 rev. vol.). Cf. *State ex rel. Hicks v. Stevens*, 112 Wis. 170, 179-80, 88 N.W. 48 (1901) (supreme court approved joinder of counties for sole purpose of electing representative in assembly).

Counties joined solely for prosecutorial purposes need not be amalgamated in such a way that the boundaries of the special county conform precisely to those of a circuit court judicial district created pursuant to article VII, section 6. Counties and districts are discrete subdivisions of the state. *Stewart*, 60 Wis. at 596. Usually they are created for different purposes. And absent some constitutional prohibition, it is competent for the Legislature to fix the boundaries of counties differently from the boundaries of districts. *See id.* *See also* 20 C.J.S. *Counties* § 39 at 793.

The recent amendment to article VII, section 6, which requires that judicial districts be bounded by county lines, established some limitation on the authority of the Legislature to fix county boundaries independently of the boundaries of judicial districts. Both must run along common lines. But this provision does not require that counties and judicial districts be geographically identical. It at least allows the boundaries of a judicial district to follow the lines of more than one county, and in three cases the Legislature has created circuits which circumscribe more than one political county. Secs. 753.06(7)(a), (9)(c) and (9)(h), Stats. (1979-80).

Although it is less clear, it reasonably appears that this constitutional provision does not obversely preclude the Legislature from joining counties for prosecutorial purposes in such a way as to circumscribe more than one judicial circuit. There is no reason to

believe that the provision, in referring to county lines, meant to refer to anything other than the geographical lines of the political counties specifically drawn in section 2.01, Stats. (1979-80). There is no reason to think that the constitution contemplated the legal lines of counties joined for special purposes as well. Thus as long as the boundaries of a judicial circuit follow the geographical lines of the political counties comprising a special county organized for prosecutorial purposes, there appears to be no constitutional prohibition against legislative creation of a special county which includes more than one circuit court district.

BCL:TJB

Confidential Reports; Inebriates And Drug Addicts; Subpoena;
Prior to releasing patient records in response to a warrant or subpoena, a federally funded or federally assisted drug treatment facility must first ascertain that the issuing court has made a finding of "good cause" within the meaning of 21 U.S.C. § 1175(b)(2)(C) in order to avoid the possibility of a fine under 21 U.S.C. § 1175(f). If there is no evidence that a finding of good cause has been made, no state criminal law is violated by refusing to release drug treatment records. OAG 3-83

January 20, 1983

LINDA REIVITZ, *Secretary*
Department of Health and Social Services

Your predecessor inquired as to the responsibility of a federally funded or federally assisted drug treatment facility to maintain the confidentiality of drug treatment records when a state law enforcement officer enters the premises of the facility with a search warrant, an arrest warrant or a subpoena for documents.

It is my opinion that, prior to releasing patient records, the facility must first ascertain that the court has made a finding of "good cause" within the meaning of 21 U.S.C. § 1175(b)(2)(C) in order to avoid the possibility of a fine under 21 U.S.C. § 1175(f).

21 U.S.C. § 1175 provides, in part, that:

(a) Records¹ of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall ... be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

(b)

(2) Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives his written consent, the content of such record may be disclosed as follows:

. . . .

(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

. . . .

(f) Any person who violates any provision of this section or any regulation issued pursuant to this section shall be fined not more than \$500 in the case of a first offense, and not more than \$5,000 in the case of each subsequent offense.

In Wisconsin, arrest warrants, search warrants and subpoenas are issued by a judge of a court of competent jurisdiction upon a finding of probable cause. Secs. 968.04, 968.12 and 968.135, Stats. A probable cause finding may be made where there is legitimate reason to

¹ In the absence of a controlling court decision construing the term "records," I rely upon the definition contained in the interpretive regulation, 42 C.F.R. § 2.11(o) (1981). I do not believe, however, that a statement that a person is present or absent from the premises constitutes the disclosure of a "record." See *State v. White*, 169 Conn. 223, 363 A.2d 143, 150, cert. denied, 423 U.S. 1025 (1975).

believe that the person or object sought is linked with the commission of a crime. See *Bast v. State*, 87 Wis. 2d 689, 692-93, 275 N.W.2d 682 (1979).

The term "good cause" in 21 U.S.C. § 1175 must be strictly construed so as to avoid the unnecessary disclosure of patient records or patient identity:

The conferees wish to stress their conviction that the strictest adherence to the provisions of this section is absolutely essential to the success of all drug abuse prevention programs. Every patient and former patient must be assured that his right to privacy will be protected. Without that assurance, fear of public disclosure of drug abuse or of records that will attach for life will discourage thousands from seeking the treatment they must have if this tragic national problem is to be overcome.

Every person having control over or access to patients' records must understand that disclosure is permitted only under the circumstances and conditions set forth in this section. Records are not to be made available to investigators for the purpose of law enforcement or for any other private or public purpose or in any manner not specified in this section.

[1972] U.S. Code Cong. & Ad. News 2072. Under a strict construction of 21 U.S.C. § 1175(b)(2)(C), a finding of "good cause" is a finding that "the public interest and the need for disclosure" outweighs "the injury to the patient, to the physician-patient relationship and to the treatment services." See *United States v. Hopper*, 440 F. Supp. 1208, 1210 (N.D. Ill. 1977).² "Probable cause" under state law is therefore not synonymous with "good cause" under federal law.

Since records may not be released unless a court has made a determination of good cause, any employe requested to reveal information should ask the arresting officer whether such a finding has been made. If the finding does not appear on the face of the court order and the law enforcement officer has no knowledge of whether the finding has been made, the judge or the prosecutor who secured the

² See also *United States v. Graham*, 548 F.2d 1302, 1314 (8th Cir. 1977); *Bell v. State*, 385 So.2d 78, 80-81 (Ala. Crim. App. 1980); *People v. Newman*, 32 N.Y.2d 379, 298 N.E.2d 651 (1973), cert. denied, 414 U.S. 1163 (1974).

warrant or subpoena should be contacted to determine whether a good cause determination was made.³ If no evidence is presented that a finding of good cause was made, the law enforcement officer should be informed that federal law precludes the release of the information sought.

It has been suggested that the refusal to release such information under these circumstances would constitute a criminal offense under section 946.40 or 946.41, Stats. The pertinent portions of those statutory provisions are as follows:

946.40 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.*

946.41 Resisting or obstructing officer. (1) Whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity *and with lawful authority*, is guilty of a Class A misdemeanor.

“Statutes which appear to be repugnant or allegedly inconsistent are to be accorded a concurrent effect if by a fair interpretation a reasonable field of operation for both can be found without destroying or perverting their evident meaning and intent” *White*, 363 A.2d at 149. Moreover, penal statutes are to be strictly construed. *Donaldson v. State*, 93 Wis. 2d 306, 286 N.W.2d 817 (1980).

I construe the italicized portions of sections 946.40 and 946.41 as precluding successful prosecution in situations where a warrant or subpoena has been obtained without complying with applicable federal law. In the situation which you pose, there is no violation of section 946.40 or 946.41 unless a finding of good cause was made prior to the issuance of the warrant or subpoena and the drug treatment facility receives evidence that such a finding has been made. Such a construction gives both the state and federal statutes a reasonable field of operation and avoids the need to determine whether

³ Where a subpoena is issued under section 968.135, Stats., and evidence of good cause is lacking, potential liability can be avoided by filing a motion to quash pursuant to that statute. See 42 C.F.R. § 2.65(e) (1981).

the supremacy clause of the United States Constitution precludes the state from enacting criminal statutes which are arguably in conflict with 21 U.S.C. § 1175.

In making the foregoing analysis, I have purposely avoided any strong reliance upon the federal regulations promulgated pursuant to 21 U.S.C. § 1175. Although 42 C.F.R. § 2.14 (1981) provides for fines against “[a]ny person who violates any provision of the authorizing legislation or any provision of this part,” that regulation is “included ... for convenience and completeness.” 42 C.F.R. § 2.14-1(a) (1981). I construe 21 U.S.C. § 1175(f) and 42 C.F.R. § 2.14(a) (1981) as applying only to violations of substantive regulations issued pursuant to 21 U.S.C. § 1175.

The essential difference between substantive and interpretive regulations was described in *State v. Amoco Oil Co.*, 97 Wis. 2d 226, 241, 293 N.W.2d 487 (1980): “Substantive rules implement the statutes and have the force and effect of law, but interpretive rules apprise the public of the agency’s construction of the statute. Davis, *Administrative Law* 126 (3d ed. 1972).” In general, a rule is interpretive “if it is not made under statutory authority to make rules having the force of law or if the agency intends the rule to be no more than an expression of its construction of a statute or rule.” *Chamber of Commerce of United States v. O.S.H.A.*, 636 F.2d 464, 469 (D.C. Cir. 1980). An interpretive rule may have some persuasive weight, but does not have binding effect. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976); *Swanson v. Health & Social Services Dept.*, 105 Wis. 2d 78, 88, 312 N.W.2d 833 (Ct. App. 1981).

42 C.F.R. Part 2, appears to be a revision of and an expansion upon previous regulations issued by the Special Action Office for Drug Abuse Prevention. See 37 Fed. Reg. 24636 (1972). The new regulations expressly recognize that the former regulations were “interpretive.” 42 C.F.R. §§ 2.3, 2.11(q) (1981). There is no suggestion that any of the new regulations are substantive:

Each section setting forth rules on any given topic of this part is followed by a section setting forth their basis and purpose. In many cases, the basis and purpose section *is itself an interpretative rule* regarding the legal authority of the rulemakers. In other instances, it summarizes historical or evidentiary material rele-

vant to the validity and interpretation of the section which precedes it.

42 C.F.R. § 2.5(a) (1981). This passage suggests that all the regulations, including those containing a statement of basis and purpose, are interpretive in nature. *Also see* 42 C.F.R. § 2.61-1(a) (1981).

The regulations concerning court orders are contained in 42 C.F.R. Part 2, Subpart E. These regulations indicate that notice should be given to the patient and the drug treatment facility when an application for a court order is made. 42 C.F.R. §§ 2.64(b), 2.65(b) (1981). Such notice would alleviate any disclosure problems which might be faced by a drug treatment facility. Since I do not construe these regulations as substantive, however, I merely conclude that the facility must ascertain that a finding of good cause has been made in order to avoid the possibility of a fine. If there is no evidence of such a finding, no state criminal law is violated by refusing to release drug treatment records.

BCL:FTC

Taxation; Words And Phrases; Section 646.51(7), Stats., is applicable to franchise taxes, income taxes and fire department dues. Only Wisconsin's assessments are used for offsets against Wisconsin taxes. The retaliatory tax provision of section 76.66, Stats., applies. If assessments are reimbursed, a tax credit should be recaptured.
OAG 5-83

February 1, 1983

ANN HANEY, *Commissioner*
Office of the Commissioner of Insurance

Your predecessor asked a series of questions concerning the tax offset provision of section 646.51(7), Stats., and the retaliatory/reciprocal provisions of sections 76.66 and 76.67, Stats. These questions were prompted by the liquidation of Reliable Life and Casualty Company, Inc. (herein Reliable), a domestic insurance corporation.

The Commissioner of Insurance of the State of Wisconsin was appointed liquidator of Reliable on October 7, 1981. She was directed "forthwith to take possession of the assets of the insurer and

to administer them under the orders of the court.” Sec. 645.42(1), Stats. The liquidator has extensive powers and responsibilities as detailed in section 645.46; specifically, under section 645.46(8), she must “[c]ooperate with the fund created under ch. 646 in using assets of the estate to transfer policy obligations to a solid assuming insurer, if the transfer can be arranged without prejudice to applicable priorities under s. 645.68.”

The fund referred to in section 645.46(8) is the Insurance Security Fund (herein the Fund). Generally, the Fund provides a source of funds for the payment of claims during liquidation under section 646.31 and the continuation of policies under section 646.35.

In your predecessor’s report to the Governor for 1981, she noted that 125,000 policyholders of Reliable are currently provided continued insurance coverage by the Fund. Administration is provided under a contract with Mutual of Omaha. 1981 Wisconsin Insurance Report at 5, 59.

In December, 1981, the Fund levied seven million dollars of assessments for twenty-two states against 384 domestic and nondomestic insurers writing accident and health insurance in Wisconsin. Each assessed company may be entitled to a tax credit in each of the five years following the year of payment “[i]f the premium rates on a class of business are fixed, so that it is not possible for the insurer to recoup its assessments by increasing premium rates on the class of business” Sec. 646.51(7), Stats. Recoupment through premium increases is preferred. Since the Legislature recognized the possibility that the Fund could “operate all or a portion of the outstanding business of a defunct insurer until it runs off the books,” committee comment, chapter 109, paragraph 4, Laws of 1979, the assessments and tax credits could extend over years, even decades.

The first question asks:

Does Section 646.51 (7), Wisconsin Statutes ... apply to taxes levied on affected domestic and/or non-domestic insurers under Subchapter III, Chapter 76; s. 71.01 ... or s. 601.93, Wisconsin Statutes?

Section 646.51(7) provides in part:

If the premium rates on a class of business are fixed, so that it is not possible for the insurer to recoup its assessments by increasing premium rates on the class of business, the insurer may offset 20% of the amount of the assessment against its tax liabilities to this state, other than real property taxes, in each of the 5 calendar years following the year in which the assessment was paid.

The word "liability" generally means "debt." "Taxes," however, invites a more precise definition.

The supreme court adopted a definition from *Cooley on Taxation* (3rd ed.) in *Fitch v. Wisconsin Tax Comm.*, 201 Wis. 383, 387, 230 N.W. 37 (1930): "In the very opening sentence of *Cooley on Taxation* (3d ed.) we find it stated that 'Taxes are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs.' "

This definition was restated in *DePere v. Public Service Comm.*, 266 Wis. 319, 63 N.W.2d 764 (1954), and more recently in *State ex rel. Bldg. Owners v. Adamany*, 64 Wis. 2d 280, 219 N.W.2d 274 (1974).

Not all funds collected by the state are taxes; the state also collects fees. Our supreme court explained the distinction in *State v. Jackman*, 60 Wis. 2d 700, 707, 211 N.W.2d 480 (1973): "A tax is one whose primary purpose is to obtain revenue, while a license fee is one made primarily for regulation and whatever fee is provided is to cover the cost and the expense of supervision or regulation." An insurer pays both taxes and fees to the state. Only those liabilities which represent taxes, as defined, are subject to an offset or tax credit under section 646.51(7).

I conclude that a domestic insurer is taxed only under the provisions of section 71.01(2) (franchise tax on corporations) and section 601.93 (fire department dues).¹ A non-domestic (or foreign) insurer is taxed only under the provisions of subchapter III of chapter 76 (taxation of insurers) and section 601.93. All other payments made by any insurer are not taxes and are therefore not subject to an offset

¹ Or a domestic life insurance company under section 76.65(1).

or credit. Included in this latter category are the fees payable under sections 601.31, 601.32, 601.45 and 601.47, which fund the Insurance Commissioner's supervision of the insurance industry.

The second question asks:

[W]hat is the meaning of the phrase "premium rates on a class of business [that] are *fixed*" in s. 646.51(7), Wisconsin Statutes ...? More specifically, the two key terms are "fixed" and "class of business." If a contract permits increased rates does that, de facto, mean that the rates are *not* fixed or are there other factors that should be used to define the term "fixed." With regard to "class of business," does this section mean that the entire "class of business" on which the assessment is based must have fixed premium rates or merely that some portion of that "class of business" must have fixed premium rates?

There are two key terms in the phrase in question, "fixed" and "class of business." "All words and phrases shall be construed according to common and approved usage" Sec. 990.01(1), Stats. "Common and approved usage of words in a statute may be established by definitions contained in a recognized dictionary." *Kollasch v. Adamany*, 104 Wis. 2d 552, 563, 313 N.W.2d 47 (1981); *In re Estate of Haese*, 80 Wis. 2d 285, 259 N.W.2d 54 (1977).

"Fixed" is defined in *Webster's Third New International Dictionary* 861 (1976) as "c (1) : not subject to change or fluctuation : ABSOLUTE, SETTLED, DEFINITE." Therefore, the statute refers to those premiums which are not subject to change. Since insurance is founded on a contract between insurer and insured or may be subject to rate legislation, it follows that the fixed character of a premium is due to the contract of insurance or legislation and not to other factors. Section 646.51(7) adopts this definition by declaring that a fixed premium rate is one that is not possible to raise.

The word "fixed" also appears in section 646.51(5). The use of one definition for this subsection and a second definition for section 646.51(7) would produce an unreasonable result.

"Class" is defined in *Websters Third New International Dictionary* 416 (1976) as "3 : a group, set, or kind marked by common attributes or a common attribute" Therefore, a class of business

would be those items of business sharing a common attribute. Chapter 646 applies to “[a]ll kinds and lines of direct insurance, except variable annuities and variable value life insurance contracts.” Sec. 646.01(1)(a)1., Stats. “Business” must be equated with direct insurance and “class of business” therefore corresponds to “kinds of insurance.”

The Legislature defined four groups of insurance in section 646.11(2) — life insurance, disability insurance, annuities and all other insurance subject to chapter 646. Implicit in section 646.51(7) is legislative recognition of two broader classes — insurance whose premium rates can or cannot be raised. Therefore, there are at a minimum eight classes of insurance. I conclude there are four main classes of business (as listed in section 646.11(2)), each of which is divided into two sub-classes — fixed rate or non-fixed rate. It is possible that a main class would have only one subclass, in which case the class and the subclass are coequal.

The third question asks:

Is the amount of the assessment that may be applied against tax liabilities in Wisconsin by an insurer ... derived from its total assessment or only from that portion of the assessment that relates to business in Wisconsin ...? Is the amount that may be applied derived only from that portion of the assessment ... attributable to classes of business with fixed rates?

An insurer’s Wisconsin assessment is based on business done (*i.e.*, premiums earned) in Wisconsin, not on its total business. Therefore, the assessment due to Wisconsin business is the assessment that will be used in calculating the tax offset.

If the assessment is needed for the payment of insurance claims under section 646.31(2) for continuation costs under section 646.35(3) or for the payment of expenses of administration of the fund in connection with a liquidation, the method of calculation is straightforward: multiply the amount of “premiums written in this state in the classes protected by the account, as reported in the most recent annual statement of each insurer,” section 646.51(3)(a), by a percentage which, pursuant to section 646.51(4), cannot exceed two percent. It is clear that only Wisconsin premiums are used.

If the assessment was for the payment of expenses incurred in providing continuation of coverage under section 646.35(2), the method of calculation becomes more complex. First, the Board of Directors of the Fund determined that Reliable was authorized to transact business in twenty-two states. Then the Board of Directors divided the premium amounts received by Reliable on business in each of those twenty-two states by the aggregate premiums Reliable received in all twenty-two states to determine the percentage of the total assessment attributable to each state. This results in a separate assessment for each of the twenty-two states. Each separate state assessment is then pro-rated among those assessed insurers doing business in such state on the basis of premiums earned by each company divided by the total premiums earned by all assessable insurers in such state.

Insurers subject to chapter 646 are taxed on the basis of how much business is done within Wisconsin. See sec. 71.02, Stats., and subch. III of ch. 76, Stats. The assessments are calculated on a state-by-state basis. It is clear to me, therefore, that the Legislature intended that any tax credit granted by Wisconsin extend only to Wisconsin tax liabilities. The intent is manifested by the use of the singular and plural form of the word "assessment" in section 646.51(7).

If the premium rates on a class of business are fixed, so that it is not possible for the insurer to recoup its *assessments* by increasing premium rates on the class of business, the insurer may offset 20% of the amount of the *assessment* against its tax liabilities to this state.

If the Legislature had intended all assessments to be offsets, the second "assessment" would be plural. To hold otherwise would be to allow the people of Wisconsin to subsidize expenses incurred outside of Wisconsin without furnishing any benefits for the citizens of Wisconsin.

Since the Legislature clearly intended that each class of business be subdivided in two subclasses according to the nature of the premiums, it follows that the assessment attributable to each assessed insurer in each state must be similarly subdivided. In fact, this subdivision occurs prior to the first step in the arithmetic involved under section 646.51(3). Since offsets exist only when the policy premiums

cannot be raised to provide recoupment, it follows that the offsets under section 646.51(7) are based on fixed-rate policies. Therefore, the amount of assessment to be applied as an offset is attributable to fixed rate business only.

The fourth question asks:

[Whether the] provisions of s. 76.66 and 76.67, Wisconsin Statutes [the retaliatory/reciprocal taxation clauses are] applicable to the assessment offset provisions of other states?

Presently, all fifty states and the District of Columbia have guarantee funds for property and casualty companies. However, only fifteen allow assessments to be offset against premium taxes. Thirty states have guarantee funds for life and health companies. Twenty states and the District of Columbia do not. Of those thirty states, twenty-two allow an offset for assessments against taxes. No state other than Wisconsin requires that premiums must be fixed before an offset is allowed. The other states that allow offsets do so unconditionally.

The consequences of section 76.66 (the retaliatory taxing provision) were explained in *Kansas City Life Ins. Co. v. State*, 265 Wis. 414, 415, 61 N.W.2d 816 (1953):

Sec. 76.35 [renumbered 76.66 by ch. 102, sec. 26, Laws of 1979] of the Wisconsin statutes is a retaliatory statute, providing that whenever the laws of any other state impose greater taxes, fines, penalties, license fees, or other payments upon life insurance companies organized in Wisconsin for a license to do business there than are imposed by the laws of Wisconsin upon foreign life insurance companies doing business in this state, then the same taxes, fines, penalties, license fees, and other payments imposed by the other state upon Wisconsin corporations shall be imposed by Wisconsin upon corporations of such other state doing business here.

Conversely, section 76.67, the reciprocal statute, allows lower taxes, fines, penalties, license fees or other payments if another state imposes lower payments than Wisconsin imposes on insurers from said state.

Both sections 76.66 and 76.67 specifically refer to taxes. Clearly, both sections would apply to taxes levied under section 71.02

(franchise tax on domestic insurers) and subchapter III of chapter 76 (premium taxes). Since section 646.51(7) impacts on tax liabilities, it therefore follows that the provisions of sections 76.66 and 76.67 must extend to section 646.51(7). Specifically, it is the action of the retaliatory statute, section 76.66, that compels this answer.

The retaliatory tax provision is not designed as a revenue measure; rather, it is founded on principles of comity, designed to create substantially equal burdens on domestic and nondomestic insurers. These clauses seem to be most frequently litigated in California. A typical holding contains the following statement of purpose quoted by the United States Supreme Court in *Western & Southern L. I. Co. v. Bd. of Equalization*, 451 U.S. 648, 673 (1981):

“The common purpose of [retaliatory tax] legislation in the several states has been to discourage any state from imposing discriminatory taxes or other burdens upon out-of-state companies. The effort seems to have been very largely successful; in any event taxes on insurance premiums have stayed close to 2 percent in most states, for both domestic and out-of-state insurers.” *Atlantic Ins. Co. v. State Board of Equalization*, 225 Cal. App. 2d, at 4, 62 Cal.Rptr., 786.

Since section 646.51(7) directly affects “tax liabilities,” it must be considered when applying section 76.66 to determine the taxes a nondomestic insurer will pay. Likewise, a similar provision in the law of another state must be considered in the application of sections 76.66 and 76.67.

The fifth question asks whether Wisconsin is required to:

[G]rant an offset of premium taxes and/or fire dues to companies domiciled in states which ... grant an offset to Wisconsin domiciled companies ...? If so, must the “terms and conditions” of that offset be the same as those of the “offset-granting” state?

My answer to both questions is yes, provided both states must have made an assessment or have the potential to make assessments.

Presently, twenty states and the District of Columbia do not have guarantee fund provisions. In those states, an insurer in liquidation would not trigger assessments or tax offsets.

Thirty states now have guarantee funds for life and health insurance companies. Of those thirty states, twenty-two have tax-offset provisions. Therefore, a straightforward application of section 76.66 would provide the answer for comparisons between any two of the twenty-two states allowing offsets. The remaining situation would involve one of the twenty-two states having tax offset provisions and one of the eight states without such provisions.

A case substantially similar to this last situation is *Franklin Life Ins. Co. v. State Board of Equalization*, 45 Cal. Rptr. 869, 404 P.2d 477 (1965).

Franklin was an Illinois corporation doing business in California. California law required a tax of 2.35% of gross premiums less return premiums received in such year by an insurer upon business done in California. California allowed a deduction for property taxes from the premium tax. Illinois did not. As a result, the Illinois tax on a California insurer was higher than California's tax on equivalent business done by the Illinois insurer in California. As a result, Franklin paid the higher tax to California.

Applying the *Franklin* holding to the last situation, we find that Wisconsin would not allow a tax offset to a company domiciled in one of the eight states not allowing offsets but having a guarantee fund and assessments.

Must the "terms and conditions" of the offset granted by Wisconsin be the same as those offered by the other state? "Terms and conditions" are immaterial; the amount of the offset is material. Again, this answer presumes we are comparing two of the twenty-two states allowing both assessments and offsets. The tax is computed twice, once in the actual tax assessing state, and again hypothetically, assuming a reversal of position. Then, either section 76.66 or 76.67 controls, depending on which calculation produced the higher tax.

The sixth question assumes the application of section 76.66 and another state which does not grant offsets for assessments:

[I]s Wisconsin [then] prohibited from granting an offset to insurers domiciled in that 'non-offset-granting' state?

The answer is yes. This results from the application of the retaliatory provision, section 76.66. It also results from the holding in *Franklin*. However, please note that I assume both states can assess.

The seventh question asks:

Is the legal amount that an insurer, domestic and/or non-domestic, may offset in Wisconsin limited by any factors other than the 20% per year for five years limitation? For example, tax liability offset provisions of other states may result in a situation where an insurer has recouped some or all of its assessment in a year. In such a case, in the insurer's offset of tax liability in Wisconsin limited in any way by the amount of the assessment offset in other states?

One limitation imposed by chapter 646 is the twenty percent/five year limitation in section 646.51(7). Since the assessment is imposed on a state-by-state basis and since the offset is based only on the state assessment, in Wisconsin's case a company could not get an excess offset.² However, if other states allow offsets on assessments based on more than one state's assessment, it is possible that a Wisconsin domiciled insurer could recoup more than 100% of its assessment. There is no prohibition against this. If a limitation is desired or becomes necessary, then the matter is one properly before the Legislature. A second limitation limits the offset to actual tax liability by disallowing any carry-forward or refunds. Sec. 646.51(7), Stats.

The last question asks:

If legal action by the liquidator results in collection of damages in amounts sufficient to reimburse assessed insurers for some or all of the assessments paid, how will such reimbursements be treated for tax purposes if tax liability offsets have been claimed and granted?

Assessments are offset dollar for dollar against taxes, and therefore constitute a credit.

"Credit" is defined in Blacks Law Dictionary 331 (5th ed. 1979): "In taxation, an amount which may be subtracted from the computed tax itself in contrast to a deduction which is generally subtracted from gross income to arrive at adjusted gross income or taxable income."

² However, the effects of sections 76.66 and 76.67 should not be overlooked.

Therefore, reimbursement of an assessment used as an offset calls for an addition to the computed tax, *i.e.*, recapture of the credit.

BCL:DJS

Counties; Waste Management; Under section 59.07(135), Stats., a county may contract with another municipality or private company to pay the costs of operating a solid waste disposal site, including one owned by a private collector, as long as the necessary approvals have been secured under chapter 144, Stats. Costs of operation of such sites are to be borne by the users while capital costs are to be borne by the general county property tax. OAG 6-83

February 16, 1983

RICHARD E. GARROW, *Corporation Counsel*
Manitowoc County

You have asked for my opinion on the following questions:

- (1) Can Manitowoc County, Wisconsin, enter into contracts for the disposal of solid waste with the following entities:
 - (a) A private (non-municipal) owner and operator of a solid waste disposal landfill site; and
 - (b) Other municipalities?
- (2) Can Manitowoc County dollars be used to pay for part of the cost of disposing of solid waste generated in the various municipalities within the corporate limits of Manitowoc County, Wisconsin?

My answer to both questions is yes.

Section 59.01, Stats., provides as follows:

Each county in this state is a body corporate, empowered to sue and be sued, to acquire and hold, lease or rent real and personal estate for public uses or purposes, including lands sold for taxes, to sell, lease and convey the same, including the authority to enter into leases or contracts with the state for a period of years for the uses and purposes specified in s. 23.09(2)(d), to make such con-

tracts and to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it.

Section 59.07(135) grants the county authority to establish and operate a solid waste management system or "participate in such a system jointly with other counties, cities, villages or towns." Counties may contract with private collectors "to receive and dispose of wastes." Sec. 59.07(135)(i), Stats. It is therefore my opinion that Manitowoc County may enter into contracts for the disposal of solid waste with either another municipality or a private firm. It should be noted that solid waste disposal sites must have approvals from the Department of Natural Resources before use. Such approvals apply to both publicly and privately operated disposal facilities. Sec. 144.44, Stats., *et seq.* (ch. 374, Laws of 1981).

With respect to your second question, you state that a private collector charges \$16.50 per ton of waste collected. The Manitowoc County Board has determined that \$4.00 of the \$16.50 per ton disposal charge represents capital cost or 24 1/4% thereof; \$12.50 of the per ton costs represents costs of operations, including profit to the private owner-collector. You inquire how these costs should be allocated for taxing purposes.

Section 59.07(135)(l) provides that the county may:

Appropriate funds and levy taxes to provide funds for acquisition or lease of sites, easements, necessary facilities and equipment and for all other costs required for the solid waste management system except that no town, city or village which operates its own waste collection and disposal facility, or property therein, shall be subject to any tax levied hereunder to cover the cost of operation of these functions. Such appropriations may be treated as a revolving capital fund to be reimbursed from proceeds of the system.

Section 59.07(135)(l) means that any municipality which operates its own waste disposal facility shall not be subject to any tax levied by the county to cover the costs of operating the county facility. Municipal or any other users of the county facility, however, must pay charges "approximately commensurate with the costs of services rendered." Sec. 59.07(135)(n), Stats.

The county also may acquire lands and equipment and build structures to operate solid waste disposal facilities. Sec. 59.07(135)(e) and (g), Stats. These costs, of course, represent capital outlays.

Section 59.07(135)(l) was interpreted by 67 Op. Att'y Gen. 77, 80 (1978) as follows:

If the purpose of the Legislature was to promote a countywide solution to this problem then a broad construction of "cost of operation" in a large measure thwarts it. County boards must be able to look to the towns, cities and villages as partial sources of revenue if they are ever to receive sufficient funds to develop a countywide solid waste management system. Construing "cost of operation" to encompass capital as well as operating costs would mean that it would be in municipalities' best interest to drag their feet, allowing those who do participate at the outset to bear the burden of the initial capital investment.

. . . .

I must conclude then, that the most reasonable construction of the statute, one compatible with its language and purpose, is that municipalities with their own solid waste collection and disposal systems may be taxed for all costs for the system of a capital nature, but may not be taxed for day-to-day operating costs.

Thus, the general county property taxes should be used to pay capital costs regardless of whether or not cities, villages or towns of the county operate their own solid waste disposal sites. If a municipality owns and operates its own facility it should not pay any of the operating costs. If a municipality uses the county facility it must pay its determined share of the operating costs.

If waste disposal districts are set up in the county, however, all costs of operation of said districts may be paid either from the general property tax or by allocation of charges between the municipalities.

Section 59.07(135)(o) provides:

Districts may be created and different types of solid waste collection or disposal services provided within them and different regulations and cost allocations may be applied to each service district. Costs allocated to such service districts may be provided

by general tax upon the property of the respective districts or by allocation of charges to the cities, villages or towns whose territory is included within such districts.

Under section 59.07(135) a county may contract with another municipality or private company to pay the costs of operating a solid waste disposal site, including one owned by a private collector, as long as the necessary approvals have been secured under chapter 144. Costs of operation of such sites are to be borne by the users while capital costs are to be borne by the general county property tax.

BCL:JPA

Community Developmental Disabilities Services Board; Minor; 51.42 Board; A juvenile court may order a 51.42 or 51.437 Board to provide care or treatment to a minor found to be in need of protection or services subject to conditions of chapter 51, Stats. OAG 7-83

February 18, 1983

R. R. ROGGENSACK, *Corporation Counsel*
Grant County

You ask whether the Community Developmental Disabilities Services Board (herein "Board") established under section 51.437, Stats., is "an appropriate agency" within the meaning of section 48.34(6), Stats., so that the court can require such Board to provide care for a child who has been adjudged in need of protection or services under section 48.345, Stats. You have also raised funding implications relating to your request which will also be addressed herein.

If a child alleged to be in need of protection or services is before the court and it appears that the child is developmentally disabled, the court, as defined in chapter 51, may proceed to order placement of the child under either chapter 51 or 55. Sec. 48.135(1), Stats. Admissions, placements or commitments of any child made in or to an inpatient facility, as defined in section 51.01(10), are governed by chapter 51 or 55. Sec. 48.135(2), Stats.

In providing for disposition where a child is in need of protection or services, the judge may not make a placement unless the child has specifically been "found under chapters 46, 49, 51, 115 and 880 to be developmentally disabled, mentally ill or to have exceptional educational needs in facilities which exclusively treat those categories of children." Sec. 48.345(5), Stats. Under section 48.355(1) the judge must decide on a placement and treatment finding based on the evidence submitted, and the court order must contain the identity of the agency which is to be primarily responsible for the provision of the services mandated under subsection (2)(b)1.

It should be noted in passing that the county department of social services has the authority to accept legal custody of children transferred to it by the court under section 48.355 "and to provide special treatment and care if ordered by the court." Sec. 48.57(1)(b), Stats. It is my opinion that so providing special treatment and care is limited to those cases in which legal custody is transferred. This seemingly follows from the fact that subsection (1)(c) authorizes the county department of social services to provide appropriate protection and services for all children "in its care."

A question arises whether the 51.437 Board (or the 51.42 Board when designated to provide the same services under section 51.437(7)(b)) constitutes an "agency" within the meaning of sections 48.34(6) and 48.355(2)(a)1. It is my opinion that it does.

The word "agency" generally is defined to include public boards. *See* secs. 13.62(2), 35.93, 55.01(1), 227.01(1), 230.03(3) and 880.01(1), Stats. One exception arises under section 48.40, dealing with termination of parental rights, where "agency" refers only to the Department of Health and Social Services, a county department of social services or a licensed child welfare agency. In order to achieve the separate or combined goals of chapters 48 and 51, I see no reason for so limiting the scope of the term "agency" as it pertains to your questions.

Authorization for all care of any patient in a state, local or private facility is to be provided under a contractual agreement between the Board and the facility unless the Board governs the facility. It must be remembered that the need for inpatient care shall be determined by the clinical director of the program prior to the admission of a patient to the facility except in the case of emergency services. Secs.

51.42(9)(a) and 51.437(12)(a), Stats. Therefore, the juvenile court has no authority to order inpatient care at any particular facility but instead is limited to ordering that certain services be provided through the proper board.

As for funding, a Board established under chapter 51 and the county department of social services usually are funded separately to perform their respective statutory duties. Section 51.42(5) requires the Board to perform the duties set forth therein subject to the provisions of that section, the rules promulgated thereunder, and "within the limits of state and county appropriations and maximum available funding from other sources." Boards established under section 51.437 are funded pursuant to section 51.42(8). Plans and budgets must be submitted and approved under section 46.031. Sec. 51.437(11), Stats.

It is clear, therefore, that both the 51.42 and 51.437 Boards operate within certain funding limitations. On the other hand, the county boards of supervisors have the primary responsibility for the well-being, treatment and care of those developmentally disabled citizens residing within their respective counties. Secs. 51.42(1)(b) and 51.437(4), Stats. Thus, where the Legislature has imposed on the counties an absolute duty to carry out a program, the counties bear the responsibility for funding those programs and providing services, whether through one of these community boards or in some other way. It is well-established that the Legislature may properly impose duties involving financial obligations upon counties without providing any appropriation whatsoever on the theory that the county is a political subdivision or agency of the state. *Columbia County v. Wisconsin Retirement Fund*, 17 Wis. 2d 310, 116 N.W.2d 142 (1962).

You suggest that cases might arise in which the major component of the service required is custodial with the financial responsibility being assumed by the county department of social services. If the required service is primarily for treatment, you assert that the appropriate community board should be liable. Finally, you contend that if the service is part custodial and part treatment, the institution is required to identify the cost of each, and the court should require the respective agencies to pay for their share of the expense.

There are elements of both custodial care and treatment present in most placements embodied by your opinion request. It is my opinion that the primary purpose for the placement is controlling. For example, if a minor is found to be in need of any care or treatment available to him through one of the community boards, that board should be financially responsible.

Your concept of cost sharing for partially custodial and partially treatment service might be useful in isolated instances although I know of no case in which it has been applied. Hopefully the respective county agencies would agree to share the expense under these unusual circumstances without the necessity for testing your theory before a court. I again feel, however, that the primary purpose for the placement should be controlling in determining financial responsibility in every or nearly every case.

BCL:DPJ

County Board; Public Health; Section 140.09(5), (6), Stats., authorizes the county board of supervisors to determine compensation to be paid members of a city-county board of health and employes of a city-county health department. OAG 8-83

February 18, 1983

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

You advise that your county has had a city-county health department and city-county board of health for over thirty-five years pursuant to chapter 140, Stats., and that questions have been raised whether the county board of supervisors has power to establish compensation for such health department and board of health. You ask:

1. Does section 140.09(5), (6), Stats., authorize the county board of supervisors, in a county which participates in a city-county health department operated under the direction of a city-county board of health, to determine per diems or other compensation to be paid members of such board of health?

In my opinion the answer is yes.

2. Does said board of supervisors have authority to establish the salaries and other compensation for employes of such city-county health department?

In my opinion the answer is yes.

Section 140.09(1)(a), (b) provides:

(1) **DEFINITIONS.** As used in this section:

(a) "County health department" and "county board of health" refer to a single county health department or board of health, a multiple county health department or board of health, or a city-county health department or board of health.

(b) "County health officer" refers to the position of a health officer either in a county health department, multiple county health department or city-county health department.

Section 140.09(2) provides in part: "**POWER OF COUNTY BOARD.** Any county board may organize a single county department of health, or a city-county department of health or may join with one or more adjacent counties to organize a multiple county department of health."

Section 140.09(3)(c) empowers a county board and a city council for a city located in such county to organize a joint city-county department of health "managed by a board of health consisting of 8 members," four being appointed by the mayor and council and four by the county board chairman with approval of the county board.

Section 140.09(5) provides:

ORGANIZATION OF BOARD OF HEALTH. The board of health of each county, multiple county or city-county unit shall immediately after appointment meet and organize by the election of one of its members as president and one as secretary, to hold office for a term of one year. The county board may determine appropriate compensation or reimbursement for expenses of board of health members.

Prior to May 12, 1976, subsection (5) provided that "[m]embers shall serve without compensation but may be reimbursed for their actual and necessary expenses." In 63 Op. Att'y Gen. 196 (1974), it was stated that in view of this restriction a county board of supervisors could not authorize compensation for members of a county

board of health. Shortly thereafter the Legislature enacted chapter 234, Laws of 1975, which deleted the sentence quoted above and added: "The county board may determine appropriate compensation or reimbursement for expenses of board of health members." In my opinion the words "county board" refer to the county board of supervisors. The section expressly includes "[t]he board of health of each ... city-county unit"

Section 140.09(14) provides that the board of health of a city-county health department shall annually submit its budget to the county board and city mayor for appropriations by such separate units of government. Subsection (6), which defines the powers of a "county board of health" and, by reason of section 140.09(1)(a), includes a city-county board of health, does not delegate or reserve power over the compensation of health department employees to the county or city-county board of health. On the contrary, leaving no room for power by implication, it specifically provides: "The county board of supervisors shall determine compensation of health department employes."

Section 140.09 was originally created by chapter 511, Laws of 1947. In my opinion, the statute intended that a county health department be for most purposes a county agency, even though it was created by the county board of supervisors pursuant to section 140.09(2) in the form of a city-county health department through the cooperative efforts of the participating city council. Section 140.09(3)(c) does give the city some input with regards to the selection of members of the board which manages the health department in certain areas and section 140.09(14) reserves to the city council the amount to be appropriated to fund such department. However, by reason of subsections (7), (10) and (11), there is a county health officer rather than a city-county health officer, and jurisdiction within such city is in the county department of health. By implication, a city participating in a city-county health department cannot withdraw from a city-county health department unless it had a full-time health department prior to its decision to participate in the city-county health department. *See* sec. 140.09(17), Stats.

The county board of supervisors should consult and cooperate with the city council of the participating city and with the city-county board of health with respect to the exercise of such powers in view of the need for joint funding and the economic and other bene-

fits which may accrue from the utilization of one rather than two health departments and boards of health.

BCL:RJV

Public Records; The custodian of public records may not require that a requester for copies of records pay the cost of unrequested certification.

The custodian may furnish copies of records rather than allow the requester the use of the custodian's copying equipment.

Unless a fee for copies of records is established by state law, a custodian may not charge more than the actual and direct cost of reproduction. OAG 9-83

March 1, 1983

JERILYN KOLBA, *Register of Deeds*
Juneau County

You have asked several questions concerning the law of public records, chapter 335, Laws of 1981, which took effect on January 1, 1983.

The answer to most of your questions can be provided by referring to section 19.35(1)(b), Stats., which reads:

Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record which appears in written form. If a requester requests a copy of the record, the authority having custody of the record may, at its option, permit the requester to photocopy the record or provide the requester with a copy substantially as readable as the original.

Your first question reads:

1. Office policy has always been that if a person wants a copy of a document of record in this office, that we make them a certified copy charging the fee as prescribed in Sec. 59.57(4) and 409.407(2)(b). We have never made uncertified copies of a document of record. We have an old DA opinion which says we do not have to make uncertified copies. Can we now be forced to make an uncertified copy?

A requester for copies of public records is not required to pay for certified copies if certification is not requested because the law clearly allows inspection and obtaining copies without paying for certification. Thus, if a requester merely asks for copies of records in your possession, you are required, at your option, either to furnish copies or allow the requester to photocopy them.

By reason of section 19.35(3)(a),* where a copy is requested, the fees allowable under section 59.57(4) would be the referenced fees stated in section 59.57(1) without the separately stated certificate fee established in section 59.57(4).

The fee for supplying the certified statement of data from records of financing statements pursuant to section 409.407(2)(b) is "\$3 if the request for the certificate is in the standard form prescribed by the secretary of state and otherwise shall be \$4, plus \$1 for each financing statement and for each statement of assignment reported therein." The last sentence of section 409.407(2)(b) reads: "Upon request the filing officer shall furnish a certified copy of any filed financing statement or statement of assignment for a uniform fee of \$1 for each page of the copied statement plus 50 cents for the certificate." If the requester asks for certified copies, the plain language of the statute controls. If the requester merely asks for copies without certification, the filing officer must furnish the copies, if reproducing facilities are available, under the provisions of section 19.35(1)(b), quoted above. It is my opinion, however, that the Legislature has, by the language just quoted from section 409.407(2)(b), established the fee for such copy at "\$1 for each page of a copied statement"

Your second question reads:

2. For the safety and integrity of our record, no one is allowed to remove pages from a book, or take microfilm or commercial code documents from the file for the purpose of making their own copies. Can we keep them from using the record *themselves* for the purpose of making copies and avoiding the certified copy charge?

* Section 19.35(3)(a) provides: "An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law."

Under the statutory language quoted above, you, as custodian, may at your option “permit the requester to photocopy the record or provide the requester with a copy substantially as readable as the original.” Nevertheless, you may not prohibit a requester from copying records if the only reason therefor is to require the requester to pay the fee for certifying copies.

Your third question reads:

3. This office has a Xerox copier and Microfilm printer which is run exclusively by the personnel [sic] of this office. This has always been the practice and insures that the machines are always in working order for us. Can we refuse to let the public use these machines (Sec. 19.35(2))?

Section 19.35(2) provides:

The authority shall provide any person who is authorized to inspect or copy a record under sub. (1)(a), (b) or (f) with facilities comparable to those used by its employees to inspect, copy and abstract the record during established office hours. An authority is not required by this subsection to purchase or lease photocopying, duplicating, photographic or other equipment or to provide a separate room for the inspection, copying or abstracting of records.

Section 19.35(1)(b) gives the custodian the option to either permit the requester to photocopy records or to receive copies. If the custodian exercises the option to furnish copies rather than to allow the requester to copy, the custodian need not authorize the requester copying facilities as provided in section 19.35(2). Thus, you may refuse to allow the public to use your reproducing facilities if you opt to provide requested copies reproduced through other means. The custodian cannot refuse a requester the right to inspect the actual record. A requester must be permitted to use facilities and equipment comparable to those used by employees of the authority to inspect such records.

Your last question reads:

4. Our County Board has established a fee for copies (of other than documents of record) which are made on our copy machine which some may consider in excess of the actual, necessary and

direct cost of reproduction (Sec. 19.35(3)(a)). Can they insist upon getting the copies for less?

Section 19.35(3)(a) provides:

An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.

The answer to your final question is that, under the statutory provision just cited, fees for furnishing copies may not exceed the "actual, necessary and direct cost" of providing copies unless a fee is otherwise specifically established by law as, for example, in the discussion of your question numbered 1. Section 19.37(4) provides for a substantial forfeiture against any authority or legal custodian who arbitrarily and capriciously denies or delays response to a request or charges excessive fees.

The law relating to the right of the public to inspect and copy or receive copies of public records springs from the concept that public records belong to the public. Chapter 335, Laws of 1981, essentially codifies this right. The custodian's duty is to insure that public records are maintained and available for inspection. It is from this duty that the custodian's duty to protect the integrity of public records flows. Thus, the law provides that the authority may adopt such rules and procedures as will insure the integrity and safety of the records in his or her custody.

BCL:WHW

Court Commissioner; Non-lawyer court reporters cannot be delegated power to issue criminal warrants and conduct initial appearances pursuant to section 757.69(1)(b), Stats. OAG 11-83

March 9, 1983

LAVERNE MICHALAK, *District Attorney*
Trempealeau County

You request my opinion regarding the powers of a part-time court commissioner who is not a licensed attorney but is an official

court reporter. The individual was originally appointed as court commissioner on February 1, 1974, by the County Judge for Trempealeau County, Albert L. Twesme, with approval of Circuit Judge Merrill R. Farr. The individual was again appointed as court commissioner on August 1, 1978, by order of then Circuit Judge Twesme, who also approved the appointment as Chief Judge of the District 7 Judicial Administrative District. On January 19, 1981, Judge Twesme, acting in his capacity as both Circuit and Chief Judge, issued and approved an order delegating to the individual court commissioner the powers specified in section 757.69(1)(b), Stats.

You specifically inquire whether a part-time court commissioner who is not licensed as an attorney has power to issue arrest or search warrants and conduct initial appearances pursuant to authority delegated under section 767.69(1)(b).

It is my opinion that such a commissioner does not have these powers. Section 757.69(1)(b) provides, in material part:

(1) On authority delegated by a judge, which may be by a standard order, and with the approval of the chief judge of the judicial administrative district, a court commissioner appointed under s. 757.68 may:

....

(b) In criminal matters issue summonses, arrest warrants or search warrants and conduct initial appearances of persons arrested and set bail to the same extent as a judge.

In the instant case, the court commissioner was originally appointed in 1974 pursuant to section 252.14(1), Stats. (1973), to a term which, "unless removed by the judge, shall continue until the expiration of the term of the judge who appointed him and until the successor of such commissioner is appointed and qualified."

Under section 252.15, Stats. (1973), court commissioners, whether or not licensed attorneys, did not have power to issue warrants or preside over initial appearances in criminal cases. Chapter 252 was renumbered to chapter 753 of the statutes by section 92 of chapter 187, Laws of 1977. Section 753.14(1) was then amended and renumbered to section 757.68(2) by section 7 of chapter 323, Laws of 1977.

Section 757.68(2) in essentially its current form became effective May 16, 1978, and requires court commissioners appointed after that date to be attorneys, except court reporters who may perform only certain duties. Section 757.68(2) currently provides in material part:

All court commissioners appointed after May 16, 1978, other than official court reporters acting under s. 814.68 (1) (b) performing duties or exercising powers specified for court reporters, shall be attorneys licensed to practice in this state. The appointing judge may remove, at will and without cause, any court commissioner appointed by the judge or the judge's predecessor in office. Unless he or she is so removed, the term of each court commissioner shall continue until the expiration of the term of the appointing judge and until the successor of the commissioner is appointed and qualified.

The only change in section 757.68(2) since 1978 was in the cross reference, replacing "s. 757.71(2)(b)" with "814.68(1)(b)." See ch. 317, sec. 2202, Laws of 1981. Section 814.68(1)(b) which was recreated by chapter 317, Laws of 1981, establishes fees to be charged by a part-time court commissioner, and is similar in content to former section 757.71(2)(b), Stats. (1979), and provides:

(b) For the following duties performed by a part-time court commissioner held in the county courthouse or other court facilities provided by law, reasonable compensation as fixed by the court but not more than the hourly equivalent of the salary of a judge of the court:

1. Every attendance upon the hearing of any motion for an order which a court commissioner is authorized to grant and for attendance upon any motion or an official act to be done by the court commissioner.
2. Conducting a hearing and deciding on the issuance of a writ of habeas corpus, certiorari, ne exeat and alternate writs of mandamus.
3. Attendance upon the taking of testimony or examination of witnesses in any matter held outside the county courthouse or other court facilities provided by law, whether acting as a referee or otherwise.

In my opinion an official court reporter who is not licensed as an attorney can be appointed as part-time court commissioner after May 16, 1978, but is limited in the powers he or she may exercise to those set forth under section 814.68(1)(b) and those which other statutes provide are within the duties or powers specified for court reporters. Such powers and duties would not include the issuance of warrants and conducting initial appearances in criminal matters.*

In the instant case, the official court reporter was reappointed as court commissioner by judicial order on August 1, 1978. Because this appointment occurred after the effective date of section 757.68(2), such appointment is certainly governed by that statute.

It is my opinion that the term of the part-time court commissioner which began on February 1, 1974, terminated on August 1, 1978, when Circuit Judge Twesme, acting pursuant to section 757.68(2), in effect removed such person from office and appointed that person again for a new term. Since the new appointment is governed by section 757.68(2), and the court commissioner is an official court reporter but not a licensed attorney, the appointee's powers as court commissioner are limited to those set forth under section 814.68(1)(b) and those which other statutes provide are within the duties of powers specified for court reporters. Again, such powers and duties would not include the issuance of warrants and conducting initial appearances in criminal matters.

Even had the court commissioner's term not expired by reappointment, I do not believe a non-attorney can legally issue criminal warrants or conduct initial appearances. The authority of court commissioners is strictly defined and limited by statute. The provisions of section 757.68(2) appear to demonstrate the Legislature's clear intention that only attorneys can exercise the expanded duties of court commissioners under section 757.69(1). It would seem that a non-attorney who was appointed court commissioner before the duties were expanded does not have the powers now limited to attorney court commissioners merely because his term never expired.

* In so concluding, I express no opinion as to the validity of past warrants issued and initial appearances conducted by non-attorney court commissioners.

This would appear contrary to the language of the statute and the intent of the Legislature.

BCL:RJV:TH

Fish And Game; Applicability of animal regulatory statutes to game farm operators discussed. OAG 13-83

March 10, 1983

CARROLL D. BESADNY, *Secretary*
Department of Natural Resources

You have requested my opinion with respect to the relationship of general game regulatory statutes and certain so-called "game farm" statutes establishing game bird and animal farms, fur farms and deer farms. Secs. 29.574, 29.575 and 29.578, Stats. Your questions are as follows:

Do the regulatory provisions of the following statutes and Administrative Code provisions apply to licensees operating under sections 29.574, 29.575 or 29.578, Stats.:

- (a) Section 29.222, Stats., which requires the reporting of hunting accidents;
- (b) Section 29.224, Stats., which imposes certain safety precautions upon the use and transportation of firearms;
- (c) Section 29.245, Stats., which prohibits shining animals;
- (d) Section 29.41, Stats., which prohibits the possession of furs showing the same have been shot or speared;
- (e) Section NR 10.01(3)(e) Wis. Adm. Code, which establishes an open and closed season and other limitations on hunting deer;
- (f) Section NR 10.14 Wis. Adm. Code, which places limitations upon the methods that may be used in taking fur-bearing animals?

It is my opinion that the provisions of section 29.222, relating to the reporting of hunting accidents, fully apply to any licensee of a game farm. There is simply no basis to exclude game farms from the

application of the broad accident reporting requirements of section 29.222.

My answer is the same as to the application of section 29.224. That statute is clearly intended for the protection of the general public, including the person possessing the gun or bow and arrow, from the hazards resulting from carrying a loaded, uncased weapon in a motor driven boat, aircraft, vehicle or automobile. It is not insignificant that the same Legislature which made the changes in the game farm statutes also created section 29.224 (ch. 246, Laws of 1975). In each of the following sessions the Legislature amended this safety statute, yet no exemption was made for game farm premises. Certainly no public purpose could be usefully served by such an exemption.

My answer with respect to section 29.245 is that the statutory prohibition against shining of wild animals has no application to game farms. For all intents and purposes the animals specified in the game farm statutes are unprotected animals within the geographical limits of the game farm. As such, they would fall within the exceptions provided by section 29.245(4)(b)2. and (5)(b)3.

Section 29.41 has no application to furs obtained from any licensee of a fur farm operated pursuant to section 29.575. It is possible that practical enforcement of the laws protecting the animals listed in section 29.575(1) has been seriously undermined by the state's inability to regulate the taking of furs found in the possession of fur buyers. However, the legislative history of chapter 322, Laws of 1975, sketchy as it is, makes it abundantly clear that all tagging requirements for furs coming from fur farms have been eliminated and the prohibition against shooting or spearing fur bearing animals has been eliminated as to furs obtained under the authority of that law.

Clearly, section NR 10.01(3)(e) Wis. Adm. Code, which establishes open and closed seasons, methods of taking and other limitations by geographic area, has no applicability to the hunters authorized to take deer under the provisions of section 29.578. That statutory section provides that the licensee is the sole owner of all deer on the licensed lands and shall have the right to manage and control the deer thereon. *See* subsection (4). However, the licensee

must give notice to your Department before any deer may be killed and all deer killed must be tagged. See subsection (7).

Finally, it is my opinion that section NR 10.14 Wis. Adm. Code has no application to persons taking furs under the provisions of section 29.575. That fur farm statute is unequivocal in granting exclusive discretion to the licensee to take the animals specified in the license at any time or in any manner. Once licensed as a fur farm, the specified animals are totally unprotected as to the licensee under state law. However, in so concluding I express no opinion as to the applicability of the endangered species laws, state or federal.

BCL:RBM

Public Officials; Salaries And Wages; Proposal to amend section 20.923, Stats., insofar as it is applicable to state officials appointed for a fixed term, other than judicial officers, which would provide that the "salary rates during the term shall be set by the appointing officer at the time of appointment," but that any "scheduled pay increases" during the term "shall be subject to the pay range maximums in effect at the time the official's pay rates are scheduled to be adjusted" would, if adopted, be violative of article IV, section 26 of the Wisconsin Constitution.

Pay adjustments during a term must be clearly provided for in specific amount or be ascertainable by reference to a salary range schedule which was in effect on the date of appointment of such official, and which is not subject to discretionary change thereafter, to be valid. A schedule or plan must not be dependent upon the exercise of legislative or administrative discretion during the term for its implementation. OAG 15-83

April 15, 1983

HOWARD FULLER, *Secretary*
Department of Employment Relations

The introduction to section 20.923, Stats., provides in part:

[A]ll elected officials, appointed department and agency heads, unclassified positions and higher education administrative positions, unless specifically excepted by law, shall be assigned to the appropriate executive salary group among the 10 executive salary

groups and all such included positions shall be subject to the same basic salary establishment, implementation, modification, administrative control and application procedures.

Your Department has proposed to amend this introduction by inclusion of the underlined language as follows:

[E]xcept that for an official serving a fixed term in an appointive position, the salary rates during the term shall be set by the appointing authority at the time of appointment. Any scheduled pay increases for an official serving a fixed term in an appointive position shall be subject to the pay range maximums in effect at the time the official's pay rates are scheduled to be adjusted.

You inquire whether the underlined language, insofar as it is applicable to non-judicial state officials appointed for fixed terms, violates article IV, section 26 of the Wisconsin Constitution, which provides in material part:

The legislature shall never grant any extra compensation to any public officer ... after the services shall have been rendered or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office

In my opinion the language as proposed when considered as a whole would, if adopted, violate the constitutional provision.

The restraint of article IV, section 26, is applicable to state public officers serving a fixed term. The word compensation as used in the constitutional provision includes salary but is not concerned with actual and necessary expenses. In *State ex rel. Sachtjen v. Festge*, 25 Wis. 2d 128, 137, 130 N.W.2d 457 (1964), the court stated:

In considering the meaning of "public officer" in sec. 26, art. IV, Wis. Const., we also note that the section prohibits diminution as well as increase of compensation. It was doubtless intended to protect public officers from reprisals as well as to prevent improper rewards. Its purposes would be considered important with respect to judges as well as others. It is true that the rising price level has usually made sec. 26 a burden to public officers, and more so to justices and judges, but we think the construction must be made in the light of the intended purpose.

Insofar as the Legislature may have power to delegate the establishment of compensation to a committee or officer, such committee

or officer is likewise restricted in authorizing any increase or decrease during the term of the officer involved. In 63 Am. Jur. 2d *Public Offices and Employees* §§ 369, 370, 373, it is stated:

§ 369. Constitutional restrictions.

....

Where power to fix the compensation of public officers is delegated by the legislature to administrative boards and officers, it must be exercised by them in conformity to the requirements of the fundamental law. Any constitutional limitations on the right to increase or decrease the salary or emoluments of the office during the incumbent's term of office must be observed. Where, under the Constitution, the legislature has no power to increase the compensation of an officer during his incumbency, it cannot authorize boards or officers to do so.

§ 370.—Purpose of restrictions.

The purpose of constitutional provisions against changing the compensation of a public officer during his term or incumbency is to establish definiteness and certainty as to the salary pertaining to the office, and to take from public bodies therein mentioned the power to make gratuitous compensation to such officers in addition to that established by law. Limitations of this type are designed to establish the complete independence of the officers affected by them, and to protect them against legislative oppression which might flow from party rancor, personal spleen, enmity, or grudge.

§ 373.—Acts or measures violative of restrictions.

Changes in the compensation of a public official within the intendment of constitutional inhibitions against such change must relate to the particular kind of compensation against which the change is directed. A prohibited change may be effected in a variety of ways. Some may be direct, others indirect or even evasive. But the prohibition is inexorable. It cannot be evaded, either directly or indirectly, by the legislature or other body. There is no distinction between a law enacted during an officer's term which, by its express terms, proposes to increase or diminish his compensation during such term and one which furnishes a standard by which such result may be obtained. They equally violate the constitutional provision against changing the compen-

sation; and any act or measure which by its necessary operation and effect withholds or takes from a public officer a part of the compensation to which he is entitled by law for his services must be regarded as within the prohibition.

Although the Wisconsin Supreme Court has not expressed its opinion with respect to a clearly established step salary plan which would provide for different predetermined and readily ascertainable rates to apply during different years of a fixed term, I am of the opinion that such a plan could meet constitutional requirements. A permissible step salary plan would require that a pay adjustment schedule be in place prior to the date of appointment; that dates of adjustment be specific; and that amounts of adjustment be specific, whether stated in dollar amounts, percentages or other measure readily ascertainable by reference to a fixed schedule which was in place prior to the date of appointment and which is not subject to discretionary change thereafter. A schedule or plan must not be dependent upon the exercise of legislative or administrative discretion during the term for its implementation.

While not constitutionally suspect, I find the language of the first proposed phrase, "except that for an official serving a fixed term in an appointed position, the salary rates during the term shall be set by the appointing authority at the time of appointment," incomplete even when construed together with other language in section 20.923. It is apparently your intent to limit the appointing authority to setting the initial salary at some set amount or at some point within an established salary range schedule applicable to that particular office. The language is not clear in that regard. The language would also appear to let an appointing authority determine the time periods, duration of each salary rate (*i.e.*, for each year of a term or on a monthly or other basis) and dates of adjustment. The language "any scheduled pay increases for an official serving a fixed term in an appointive position shall be subject to the pay range maximums in effect at the time the official's pay rates are scheduled to be adjusted" is not wholly clear in that it does not tie the official to any executive salary group for which both salary range minimum and maximum are established pursuant to sections 20.923(1) and 230.12(3).

The constitutional problem with the proposed amendment is not that it would allow the appointing authority to act at the time of appointment to establish different salary rates for each year of the

term of an officer serving a fixed term, which is permissible even under present statutes, but rather that the amendment would purport to permit pay adjustments during the term subject to a salary range schedule which could be changed at the discretion of other officials subsequent to the commencement of the term. The purpose of the proposed amendatory language, when considered as a whole, is intended to allow scheduled changes in salary to be based on salary schedules and salary maximums which were not in effect at the time of appointment. The pay range maximums which may be in effect at the time the official's pay rates might be scheduled to be adjusted would be subject to the discretion of the Legislature, Joint Committee on Employment Relations or possibly the Secretary of the Department of Employment Relations.

Under the present constitutional provision any pay adjustments during a term must be clearly provided for in specific amount or be ascertainable by reference to a salary range schedule which was in effect on the date of appointment of such official and which is not subject to discretionary change thereafter. Neither the schedule or plan, or the implementation of the schedule or plan, can be dependent upon the exercise of legislative or administrative discretion during the term. The proposed amendatory language does not meet this test and in my opinion, if enacted, would be violative of article IV, section 26 of the Wisconsin Constitution.

BCL:RJV

Counties; Libraries; To qualify for exemption from county library tax under section 43.64(2), Stats., municipality or school district must have expended for its own "library fund" during the year in which the county tax levy is made a sum at least equal to the sum it would have to pay for the county tax levy made during that year to fund the county budget for the ensuing year. OAG 16-83

April 15, 1983

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

Section 43.64(1), Stats., authorizes a county board of a county expending money for public library service to levy a tax to provide funds for such service and to include the amount of such tax in taxes

determined to be levied under section 70.62(1), Stats. Your question relates to qualifying for the exemption included in section 43.64(2), which provides:

Any city, town, village or school district in a county levying a tax for a county library under sub. (1) shall, upon written application to the county board of the county, be exempted from the tax levy, *if the city, town, village or school district making the application expends for a library fund during the year for which the tax levy is made* a sum at least equal to the sum which *it would have to pay* toward the county tax levy.

You inquire whether the language “expends for a library fund during the year for which the tax levy is made ...” refers to actual expenditures the municipal or school governmental unit has made or is committed to make during the calendar year in which the county board meets to establish a levy, or whether it refers to proposed expenditures from local tax levy or other funds for the forthcoming year.

In my opinion it refers to amounts which have been raised by local tax levy or otherwise and which have been appropriated and expended by the municipality or school district as and for its “library fund” for the calendar year in which the county board meets to establish a levy. This office has stated* that a town, city or village which does not maintain a public library, as a municipality or jointly with another municipality under contract, but which makes contributions to a nearby public library, cannot be exempted from the county library tax levy under section 43.64(2). The opinion noted that the words “library fund” were not defined in the statutes and construed them to mean:

A “library fund” therefore consists of the proceeds of a tax levied and moneys appropriated by a municipality to be used exclusively to maintain “the public library” established, equipped and maintained by the municipality. Expenditures therefrom can only be made by a library board. If a city, town or village does not have a library within its boundaries or is not obligated under contract with one or more other municipalities to operate a

* 65 Op. Att’y Gen. 182, 184 (1976).

libraries located outside its boundaries, there is no need for the special library fund.

Section 43.64(2) uses the word "expends." There is substantial difference between the word "expends" and the word "appropriate." *Black's Law Dictionary* 131 (Rev. 4th ed. 1968) succinctly states the difference between these two terms in its definition of "appropriation":

An "expenditure" is the expending, a laying out of money, disbursement, and is not the same as an "appropriation," the setting apart or assignment to a particular person or use. *Grout v. Gates*, 97 Vt. 434, 124 A. 76, 80; *Suppiger v. Eniking*, 60 Idaho 292, 91 P.2d 362, 364, 365.

The distinction is an important one since a municipality or school district could evade the intent of the statute by "appropriating" a sum sufficient with very high cap to fund library activities in a given year, yet expend only a very small amount in a given year.

Section 43.64(2) uses the word "year" which is to be construed as calendar year by reason of section 990.01(49).

Support for my conclusion that measurement is based on expenditures during the current year rather than expenditures proposed for the ensuing year is found in the legislative history of the subsections involved.

Section 43.64(2) was renumbered from section 43.52(4), Stats. (1969), by chapter 152, Laws of 1971. Its somewhat unusual measuring element is related to the context of former section 43.25(3), Stats. (1969), which was substantially amended and renumbered to section 43.64(1) by chapter 152, Laws of 1971. Section 43.25(3), Stats. (1969), provided:

The county board of the county expending money for public library service to its inhabitants may provide in the following manner for the raising and collecting of the money necessary *to reimburse the county for the amount so expended*. The county clerk of any such county shall make a report to the county board at each annual November meeting, *covering the year ending October first preceding, showing in detail the amount and proportion of the money expended by the county for such library service in each town, village, and city*. The county board shall thereupon deter-

mine the proportionate amount to be raised and paid by each such town, village, and city *to reimburse the county for the money so advanced*, and thereupon within 10 days after such determination the county clerk shall certify to the clerk of and charge to each town, village, and city the amount so advanced. Each such town, city, and village shall levy a tax sufficient to *reimburse the county for such advances* which shall be collected as other taxes and paid into the county treasury.

The statutes required the county clerk to ascertain the amounts the county had expended to furnish library service in each respective town, village and city during the period from October 1 of the year preceding the November county board meeting to October 31 of the year in which such annual meeting was held. The county board would then determine the proportionate amount each such unit of government would have to raise by its own tax levy to reimburse the county for "advances" made. The levy by the town, village or city would take place during the year the services were furnished and to be exempt under section 43.52(4), Stats. (1969), such municipality would have to establish that it "expends for a library fund during the year for which the tax levy is made a sum at least equal to the sum which it would have to pay toward the county tax levy." I construe the "county levy" as used in such section as the amounts determined by the county board and certified by the county clerk as a "charge to each town, village, and city" or which otherwise would have been certified had the respective town, village or city not qualified for the exemption after written application pursuant to then section 43.52(4). By reason of then section 43.25(3), Stats. (1969), "during the year" referred to the period from the preceding October 1 to the October 31 preceding the annual November meeting of the county board.

The exemption was based on performance of both the county and each respective town, village or city during a past period and not on planned performance in the form of a library fund for an ensuing year. However, I conclude that by reason of the statutory revision, measurement of the exemption is on the basis of the performance of the respective town, village or city during the calendar year in which the county budget is adopted and county tax levy made as against the county's proposed expenditures for the ensuing calendar year. Section 43.64(1) was amended by chapter 152, Laws of 1971, to elim-

inate the necessity of the county clerk to report how much money was expended to provide library service in each town, village and city, to eliminate the charge back provisions and to authorize counties to levy a county tax to provide funds for such service. Section 43.64(2) as amended by the same law retains the phrase "expends for a library fund during the year for which the tax levy is made a sum at least equal to the sum which it would have to pay toward the county tax levy." I am aware that the exemption to the municipal unit may be of greater or lesser value if measured against the county's proposed expenditures for library service in the oncoming year than if measured against the county's actual or committed expenditures for the current year. However, it is unlikely that property within a municipal unit of government can be retroactively exempted from a levy made in a prior year after taxes have been collected. The county's expenditures during the current year were financed by a levy made in the preceding year.

Section 43.64(2) uses the word "expends," which is the present tense, but which can be construed to include has expended, is expending or will be expending. By reason of section 990.001(3), "[t]he present tense of a verb includes the future when applicable." *McLeod v. State*, 85 Wis. 2d 787, 271 N.W.2d 157 (1978). The language in subsection (2) continues: "during *the year for which* the tax levy is made ... *it would have to pay* toward the county tax levy."

Under section 70.62(1) the county board normally meets in November to "determine by resolution the amount of taxes to be levied in their county *for the year*." Your board met in November 1982, to establish the levy to be made for 1982 to raise the moneys to fund the budget for 1983. In my opinion the tax levy which was made in 1982, is *for 1982*. Under section 43.64(2), the measurement is as between the amount the municipal unit or school district has budgeted, appropriated, expended and is committed to expend for its "library fund in 1982, as against "the sum which it would have [had] to pay toward the county tax levy" for 1982, had it not made application for and qualified for the exemption. The amount the municipality "would have [had]" to pay toward the 1982 tax levy would be based on an equalized tax basis, a proportionate share against the total amount budgeted for county library service, since the amount of the county levy is no longer based on the "amount and proportion of the money expended by the county for such

library service in each town, village, and city” as was the case under section 43.25(3), Stats. (1969).

It is evident from this dissertation that section 43.64(2) needs legislative attention.

BCL:RJV

Indians; Natural Resources, Department Of: The state and tribal governments share jurisdiction to regulate prospecting and mining activity within reservation boundaries to the extent necessary to protect groundwater from contamination. OAG 17-83

May 6, 1983

CARROLL D. BESADNY, *Secretary*
Department of Natural Resources

You indicate that the Department of Natural Resources has been revising its prospecting and mining rules (chapters NR 131, 132 and 182 Wis. Adm. Code) in order to ensure that this activity will be regulated in the most environmentally sound manner. You and the American Indian Study Committee express concern about the enforceability of these administrative rules, in particular the groundwater provisions, within the boundaries of Wisconsin’s Indian reservations. You ask my opinion regarding the state’s regulatory authority over a prospecting or mining operation that may adversely affect groundwater given three different factual settings.

The jurisdictional relationship between the state and the Indian tribes and the federal government over environmental matters within the exterior boundaries of Indian reservations is not easily defined. The following analysis will show that in some situations and under varying circumstances both state and tribal governments may have jurisdiction over certain such matters. Your questions will be considered seriatim based upon the assumed facts stated.

1. Prospecting or mining activity conducted off the reservation which may adversely affect groundwater under the reservation. Assume that the reservation boundary is within 1,200 feet of the waste site such that the reservation property line is the compliance boundary. The opinion should focus on our

ability to monitor groundwater flow within the reservation and to commence enforcement actions if a violation is detected.

The state's ability to enforce its prospecting and mining rules to prevent or correct groundwater contamination, where violations occur outside reservation boundaries, whether involving Indians or non-Indians, is not open to question. *See, e.g., Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). This is true regardless of how the groundwater contamination is detected or where that detection occurs.

There is no absolute barrier to the exercise of state jurisdiction within reservation boundaries even though such jurisdiction may be qualified in some situations. The Supreme Court recently summarized the analytical framework utilized to determine under what circumstances a state's regulatory authority may lawfully be extended within reservation boundaries. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Court noted that it long ago departed from the early view that state laws can have no force within reservation boundaries. Rather, the question whether a particular state law may be applied within an Indian reservation or to tribe members requires a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

The Court concluded:

Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. I, § 8, cl. 3. [Citation omitted.] This congressional authority and the "semi-independent position" of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. [Citations omitted.] Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them." [Citations omitted.] The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members. They are related, however, in two important ways. The

right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important “backdrop,” [citation omitted] against which vague or ambiguous federal enactments must always be measured.

448 U.S. at 142-43.

The application of these principles in resolving jurisdictional questions is materially affected by the status of the land tenure where enforcement is sought and the identity of the person or entity being regulated. For example, when on-reservation conduct involving only Indians is at issue, state law is generally inapplicable because the state’s regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. See *Bracker*; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973); *Montana v. United States*, 450 U.S. 544 (1981). In this situation, state laws generally are not applicable to tribe members or Indian activities on a reservation except where Congress has expressly provided that they shall apply. *McClanahan*, 411 U.S. at 170-71.

Where, however, the conduct involves only non-Indians, state law usually is applicable because of the state’s legitimate interests in regulating the affairs of non-Indians. See, e.g., *People of State of N.Y. ex rel. Ray v. Martin*, 326 U.S. 496 (1946); *Draper v. United States*, 164 U.S. 240 (1896); *Utah & Northern Railway v. Fisher*, 116 U.S. 28 (1885). See generally *Williams v. Lee*, 358 U.S. 217 (1959); *McClanahan*. Therefore, each of these controlling principles—infringement and preemption—may effect a different result depending on the nature of the land tenure and the identity of the person or activity being regulated.

In this opinion, land tenure within the outer boundary of a reservation will be referred to either as “Indian land” or “fee land.” Indian land includes land held in trust by the federal government, either for the Tribe or for individual Tribe members, together with land owned in fee by the Tribe and by Tribe members. Fee land refers to all land other than Indian land.

Each of your questions must be considered within this framework. The principal concern in your first question appears to be the state's ability to monitor groundwater flow within a reservation.

In my opinion the state has unqualified authority to monitor groundwater flow on fee land within reservation boundaries. Enforcement of the groundwater regulations at issue unquestionably is a proper exercise of the state's police power to protect, among other things, the health, safety or general welfare of all state citizens. Since groundwater is a shared resource, *State v. Michels Pipeline Construction, Inc.*, 63 Wis. 2d 278, 217 N.W.2d 339, 219 N.W.2d 308 (1974), that moves into and beyond tribal lands, a legitimate and important state interest would be impaired if the state was precluded from monitoring groundwater flow underneath fee lands. Monitoring groundwater under fee lands would not, in my opinion, unlawfully infringe upon any tribal interest or interfere with internal tribal relations. Nor would such activity interfere with any federal interest. There is no comprehensive federal regulatory scheme for monitoring groundwater within reservations and the federal environmental statutes (see below) are essentially silent with regard to the question of state authority over environmental matters within reservation boundaries.

State authority to monitor or to exercise other forms of jurisdiction over groundwater under Indian land is less clear. There are no federal statutes or regulations that are specifically concerned with groundwater protection on Indian lands (or other lands) within reservation boundaries. The federal government through the Department of Interior, Bureau of Indian Affairs, has adopted regulations regarding mining activities on Indian lands within reservation boundaries. See 25 C.F.R. subch. I (1982). These regulations, however, do not address the concerns for groundwater management and protection that are an integral part of the state's prospecting and mining administrative rules.

The Indian Health Service, an agency within the Department of Health and Human Services, is primarily responsible for determining water quality and for providing water and sewerage systems for Indians on Indian reservations. In carrying out its responsibilities in this regard, the Indian Health Service utilizes the Environmental Protection Agency's drinking water standards. It does not, however,

enforce any rules or regulations that are designed to prevent ground-water contamination.

Federal environmental legislation does not for the most part evince an intent to preempt state authority over groundwater protection on Indian land within reservation boundaries. Until recent amendments in 1977, the legislative history of the various federal environmental acts was completely devoid of mention of Indian tribes. The first major environmental statute enacted—the Clean Air Act Amendments of 1970 (42 U.S.C. §§ 1857-58a (1970))—contains no mention of Indians. The Solid Waste Disposal Act, *as amended* in 1970 (42 U.S.C. §§ 3251-59 (1970)), now recodified *as amended* by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §§ 6901-87 (1977)), did include Indian tribes within the definition of the term “municipality” but contained no other mention of Indians or Indian tribes. The Federal Water Pollution Control Act, *as amended* in 1972 (33 U.S.C. §§ 1251-1376 (Supp. 1975)), contained the same mention of Indians only in the definition of the term “municipality.” The Noise Control Act of 1972 (42 U.S.C. §§ 4901-18 (Supp. 1975)) and the Federal Insecticide, Fungicide and Rodenticide Act, *as amended* in 1975 (7 U.S.C. §§ 136-136y (Supp. 1975)), made no mention of Indians. The Safe Drinking Water Act of 1975 (42 U.S.C. § 300f(10) (Supp. 1975)), returned to the inclusion of Indians in the “municipality” definition. The Toxic Substances Control Act of 1976 (15 U.S.C. §§ 2601-29 (Supp. 1978)), made no mention of Indians. It was not until amendments to the Clean Air Act, the Federal Water Pollution Control Act and the Safe Drinking Water Act in 1977, that Congress ventured beyond the definitional sections to mention Indians in any substantive provisions, and then only cautiously.

For example, in the amendments to the Safe Drinking Water Act, Congress made clear its intentions concerning application of the Safe Drinking Water Act to federal facilities, clarified the issue of state jurisdiction over Indian lands and completely exempted the Bureau of Indian Affairs from the provisions of the Act. The amendments provided in part:

(c)(1) Nothing in the Safe Drinking Water Amendments of 1977 shall be construed to alter or affect the status of American Indian lands or water rights nor to waive any sovereignty over Indian lands guaranteed by treaty or statute.

(2) For the purposes of this chapter the term "Federal agency" shall not be construed to refer to or include any American Indian tribe, nor to the Secretary of the Interior in his capacity as trustee of Indian lands.

Safe Drinking Water Act Amendments of 1977, 42 U.S.C. § 300j-6(c) (Supp. 1977).

Although this legislation, as indicated, is not directly concerned with the protection of groundwater, it does suggest that environmental concerns within reservation boundaries that affect Indians are the primary concern and responsibility of federal agencies such as the Bureau of Indian Affairs, the Indian Health Service and the Environmental Protection Agency, and the tribes themselves.

Unquestionably, an Indian tribe has an interest in monitoring any activity within its territorial jurisdiction, especially on Indian land, that "threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. Monitoring groundwater for the purpose of protecting the resource would undoubtedly meet this test. I do not know if any tribe in Wisconsin has established its own groundwater monitoring program. Since the Indian Health Service has responsibility for ensuring that drinking water from wells on Indian lands is safe, it is likely a more comprehensive tribal monitoring program has not been needed.

Although state monitoring of groundwater on Indian lands is not, in my opinion, clearly preempted or a clear infringement on tribal self-government, the state's interest in conducting this activity does not appear to be sufficient to overcome the general rule that prohibits the exercise of state jurisdiction on Indian lands without specific congressional authorization. I have not been apprised of any reason why it is essential for the state (as opposed to the Tribe or the federal government) to monitor groundwater under Indian lands. (See discussion regarding question no. 3.) Accordingly, it is my opinion that under the assumed facts and absent permission of the tribe or individual Indian landowner, the state is without authority to go upon Indian lands to monitor groundwater.

Because the tribes and the state share similar interests with regard to the protection of groundwater resources traveling beneath all reservation lands, the state should endeavor to enter into cooperative

intergovernmental agreements with the various tribal governments and appropriate federal agencies to ensure protection of the resource. Effective monitoring of groundwater under all land within a reservation will ensure enforcement of state, federal or tribal regulations that will protect the resource.

2. Prospecting and mining activity conducted on non-Indian lands within the reservation which may adversely affect groundwater within and outside of the reservation.

Since the federal government has not undertaken comprehensive regulation of mining activities, in general, or groundwater, in particular, within reservation boundaries, federal preemption presents no barrier to the enforcement of Wisconsin's prospecting and mining rules as they relate to groundwater. Controlling, therefore, is whether enforcement of the administrative rules in question unlawfully infringes on the right of reservation Indians to make their own laws and be ruled by them.

In *Montana* the Court suggested that tribal government retains inherent power to exercise regulatory authority over the conduct of non-Indians on fee lands within reservation boundaries "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566.

Undoubtedly, prospecting and mining activity that is conducted anywhere within reservation boundaries would meet this test. Arguably a tribal government, therefore, would have authority to enact regulations to govern such activity including provisions to protect its interest in the groundwater resources beneath Indian land. It does not necessarily follow, however, that enforcement of the state's prospecting and mining rules constitutes an unlawful infringement upon tribal self-government.

I am not aware of any tribe in Wisconsin that has enacted tribal ordinances or regulations to govern prospecting and mining activities within reservation boundaries. Until that occurs, it is not possible to determine whether the state's rules conflict in any way with the exercise of tribal self-government.

In my opinion the interests of the state and the tribes in protecting groundwater resources are similar if not identical. It therefore is my

opinion that enforcement of the state's prospecting and mining rules as they relate to groundwater on activity conducted on fee land within reservation boundaries is permissible.

3. Prospecting and mining activity conducted within the reservation on Indian-owned lands which may adversely affect groundwater within and outside of the reservation.

I am not aware of any recent Supreme Court case upholding the exercise of state regulatory authority over Indians or Indian activity on Indian land within reservation boundaries absent specific congressional authorization. Undoubtedly any prospecting or mining on Indian owned lands would not occur without some tribal involvement even though non-Indians also may be involved. Because of this tribal involvement, it is likely that the exercise of state regulatory authority over such activity would infringe to some extent upon tribal self-government.

In *Bracker* the Court intimates that in an exceptional case a state's regulatory interest may be so compelling that a state could act even without specific congressional authorization. Unregulated prospecting or mining activity that will contaminate groundwater could present such an exceptional case. It is not possible to predict with certainty whether the exercise of state jurisdiction in such a case would be upheld. Although not settled, it is my opinion that where it can be conclusively shown that without state regulation prospecting or mining activity would contaminate groundwater moving beyond Indian lands thereby posing an immediate danger to public health, safety or the general welfare, such regulation is permissible.

BCL:JDN

Public Defenders; The state public defender has the authority to represent indigent material witnesses who are subject to the section 969.01(3), Stats., bail provisions so long as this does not create a conflict of interest with another client, but does not have the authority to represent an indigent in a civil forfeiture action unless that action is reasonably related to one for which the indigent is entitled to counsel. OAG 18-83

May 19, 1983

ROBERT D. ZAPF, *District Attorney*
Kenosha County

You have requested my opinion concerning certain practices of the state public defender in your county. I will respond to the following issues raised in your letters:

Does the state public defender have the authority to represent indigent material witnesses for the state who are required to post bail pursuant to section 969.01(3), Stats.? If so, what is the scope of that representation?

Assuming the authority to represent witnesses required to post bail under section 969.01(3), Stats., does this create a conflict of interest when the public defender office representing the state's material witness is also representing the defendant in the same case?

Does the public defender have the authority to represent indigents in civil forfeiture actions, including traffic matters, on the theory that since these are indigent people, they are unable to satisfy the forfeiture judgments and consequently face incarceration for contempt of court?

Any analysis of these questions must begin with chapter 977, Stats., which governs the state public defender. The applicable provisions are section 977.05(4)(h) and (i). Those subsections, as amended by chapter 20, Laws of 1981, delineate the duties of the public defender.

Section 967.06, to which section 977.05(4)(h) refers, states:

As soon as practicable after a person has been detained or arrested in connection with any offense which is punishable by incarceration, or in connection with any civil commitment proceeding, or in any other situation in which a person is entitled to counsel regardless of ability to pay under the constitution or laws of the United States or this state, the person shall be informed of his or her right to counsel. Persons who indicate at any time that they wish to be represented by a lawyer, and who claim that they are not able to pay in full for a lawyer's services, shall immediately

be permitted to contact the authority for indigency determinations specified under s. 977.07(1).

It is my opinion that the public defender has the authority to represent indigents whom the state seeks to hold as material witnesses under section 969.01(3). That section provides:

If it appears by affidavit that the testimony of a person is material in any felony criminal proceeding and that it may become impracticable to secure his presence by subpoena, the judge may require such person to give bail for his appearance as a witness. If the witness is not in court, a warrant for his arrest may be issued and upon return thereof the court may require him to give bail as provided in s. 969.03 for his appearance as a witness. If he fails to give bail, he may be committed to the custody of the sheriff for a period not to exceed 15 days within which time his deposition shall be taken as provided in s. 967.04.

A section 969.01(3) bail hearing is a unique proceeding. The person involved is not a criminal defendant nor is he or she subject to any sort of "penalty." The provision is undoubtedly non-punitive in nature even when incarceration results. Its sole purpose is to guarantee the appearance of the witness in court. *See* sec. 969.01(4), Stats. However, incarceration is a very real option, unless bail is set very low.

Wisconsin courts have recognized an entitlement to appointed counsel when the state brings a civil contempt action against an indigent since incarceration is an option for contempt. *Brotzman v. Brotzman*, 91 Wis. 2d 335, 283 N.W.2d 600 (Ct. App. 1979); *Ferris v. State ex rel. Maass*, 75 Wis. 2d 542, 546, 249 N.W.2d 789 (1977). As the court reasoned in *Brotzman*: "In this matter, the state is exercising its police powers to threaten an individual's liberty. That the imprisonment here would be coercive rather than punitive is immaterial." 91 Wis. 2d at 339 (footnote omitted). In such a case, the court must advise the alleged contemnor of his or her right to counsel and, if indigent, that counsel will be appointed at public expense.

The same rationale appears to apply at section 969.01(3) hearings. Because the liberty of the witness is threatened in an action brought directly by the state, it appears that the witness is entitled to appointed counsel under section 967.06. *See People ex rel. Fusco v. Ryan*, 124 N.Y.S.2d 690, 696 (1953); *People ex rel. Van Der Beek v.*

McCloskey, 18 A.D.2d 205, 238 N.Y.S.2d 676 (1963). Assuming indigency is established, the public defender is duty-bound by section 977.05(4)(h) to represent that person at the section 969.01(3) hearing.

The next issue relates to the scope of that representation. Certainly, counsel may appear on behalf of the material witness to challenge the state's determination that the witness is "material," to challenge the need for bail or the amount of bail, to challenge the existence of an ongoing "felony criminal proceeding" for which this person is to be a witness, or to present a claim that the detention is too long or is merely a ruse to interrogate a person as a prospective defendant in the criminal action. See *Van Der Beek*, 238 N.Y.S.2d at 681; *Fusco*, 124 N.Y.S.2d at 697-98. However, it appears that section 977.05(4)(h) does give the public defender some discretion to provide representation beyond, but reasonably related to, the section 969.01(3) proceedings. See 71 Op. Att'y Gen. 16 (1982) (January 14, 1982).

This brings us to the conflict of interest question. As a threshold matter, it should be noted that the law is unsettled on the question whether the public defender's office is to be treated as a single entity for purposes of resolving a conflict of interest question. The cases are split on this point. See *Annot.*, 18 A.L.R.4th 360, 394 (1982), "Criminal Counsel - Conflict of Interests." However, the public defender's own rule appears to treat the office as a single entity for conflict of interest purposes. Rule SPD 2.05 Wis. Adm. Code.

Representation of a material witness will in many cases create an actual conflict of interest with a criminal defendant in that same case who is also being represented by the public defender. If nothing else, the potential for conflict and the appearance of impropriety should be obvious. The public defender's own rule would prohibit representation of clients who have such conflicting interests in the same case.

Rule SPD 2.05 of the Wisconsin Administrative Code provides:

The state public defender shall not represent more than one person at trial charged in the same case or any client whose interests conflict with any other client. Such cases shall be assigned to

private local counsel and compensated as part of the private bar percentage as determined by s. 977.02(6).

(Emphasis added.)

If, however, the material witness and the defendant insist on maintaining public defender representation, and if the public defender chooses to continue the dual representation despite Rule SPD 2.05 and the Code of Professional Responsibility, Rule SCR 20.23(3) (1982), the court should inquire of counsel and the clients before the section 969.01(3) hearing as to the possibility of actual conflicts and their understanding of the serious risks involved. *State v. Kaye*, 106 Wis. 2d 1, 14, 315 N.W.2d 337 (1982). The determination as to whether an actual conflict exists, and whether representation of multiple clients in the same case ought to continue, must be done on a case-by-case basis. However, because of the potential for an actual conflict of interest in this situation, dual representation of a criminal defendant and a material witness against such defendant should be avoided.

In fact, there may be certain circumstances where it is impossible for a material witness and/or a criminal defendant in the same case to make a *knowing* waiver of their right to conflict-free counsel. Since the court in *Kaye* required that any such waiver be “knowing,” 106 Wis. 2d at 14, 16, there may be cases in which the trial court should not permit the public defender to represent both even if it is contrary to their express desire to waive any conflict. *See, e.g., In re Grand Jury Investigation*, 436 F. Supp. 818, 821-22 (W.D. Pa. 1977).

There is hope that some of these issues will be clarified soon. In *Kaye*, the Wisconsin Supreme Court expressly disagreed with the result in *United States v. Flanagan*, 527 F. Supp. 902 (E.D. Pa. 1981), where the district court refused to permit defendants to be represented by the same law firm because of the *potential* conflict of interest. The district court so ruled even though the defendants chose the same firm and wished to waive any claim of conflict. 106 Wis. 2d at 16. The Third Circuit Court of Appeals affirmed the district court’s order in *Flanagan*, 679 F.2d 1072 (3d Cir. 1982). The United States Supreme Court has agreed to review the third circuit’s decision. The Supreme Court’s decision should shed some light on these complicated conflict of interest questions.

The issue you raise regarding representation by the state public defender in civil forfeiture matters is quickly disposed of, with one exception.

In the recent decision of *State v. Novak*, 107 Wis. 2d 31, 318 N.W.2d 364 (1982), the Wisconsin Supreme Court clearly stated that an indigent person is not entitled to counsel in a civil forfeiture action. 107 Wis. 2d at 41. *But see Schindler v. Clerk of Circuit Court*, Case No. 82-C-696 (W.D. Wis. Nov. 30, 1982). Incarceration will not actually result, nor is it an option, in a civil forfeiture action. *See State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 556, 249 N.W.2d 791 (1977); *see State v. Albright*, 98 Wis. 2d 663, 673, 298 N.W.2d 196 (Ct. App. 1980). It is only when the state brings a separate contempt action for failure of the person to satisfy the civil forfeiture that representation by the public defender will be available. *See Brotzman*.

This is analogous to the situation in *Novak*. There, a criminal conviction for second offense drunk driving was affirmed even though that criminal conviction was grounded on an uncounseled civil forfeiture first offense drunk driving. The court concluded that the possibility of incarceration only came into existence after the defendant was actually charged with the second offense drunk driving. Only at that point was he entitled to counsel. 107 Wis. 2d at 41. Therefore, if the state seeks to hold an individual who claims to be indigent in contempt for failure to satisfy a civil forfeiture judgment, the defendant is entitled to appointed counsel at that contempt proceeding. Secs. 967.06 and 977.05(4)(h), Stats.

While it is clear that an indigent is not entitled to counsel at a civil forfeiture hearing, *Novak*, and that an indigent is entitled to counsel in a contempt action, *Brotzman* and *Ferris*, a difficult right to counsel issue arises when a civil forfeiture judgment is not satisfied and the person is automatically incarcerated pursuant to a commitment order. *See* sec. 66.12(1)(c), Stats.; sec. 345.47(1)(a), Stats. *Also see West Allis v. State ex rel. Tochalauski*, 67 Wis. 2d 26, 30, 226 N.W.2d 424 (1975). It is clear that a person may not be incarcerated for his or her financial inability to pay a forfeiture. *Tochalauski*; *State ex rel. Pedersen v. Blessinger*, 56 Wis. 2d 286, 201 N.W.2d 778 (1972); *Tate v. Short*, 401 U.S. 395 (1971); *see City of Madison v. Two Crow*, 88 Wis. 2d 156, 164-65, 276 N.W.2d 359 (Ct. App. 1979). It is also clear that, upon request, a person who claims to be indigent and financially unable to pay the forfeiture is entitled to a hearing at

which he or she bears the burden of proving his financial inability to pay. The hearing, in essence a "resentencing" hearing, may be requested at any time after the entry of the judgment, including after detention on the commitment order. *Tochalauski*, 67 Wis. 2d at 32; *Pedersen*, 56 Wis. 2d at 296. However, it is not clear whether the indigent person has a right to appointed counsel at such a "financial inability to pay" hearing. See *Pedersen*, 56 Wis. 2d at 288 n.1. This problem could be avoided in some cases by raising and fully considering the question of ability to pay at the forfeiture hearing itself before the court enters a judgment. See *Tochalauski*, 67 Wis. 2d at 30-31.

However, this is getting beyond the scope of your original request which referred only to the right to counsel at a civil forfeiture hearing. As stated above, that question has been squarely answered by *Novak*. Resolution of the question whether a person who claims to be financially unable to satisfy a judgment has a right to appointed counsel at some time before being incarcerated on a commitment order will have to await a court decision where that issue is squarely presented.

If the public defender is already representing an indigent in a proceeding for which that person is entitled by law to counsel, the public defender may also represent that indigent in a closely related civil forfeiture action if, in the exercise of his or her discretion, the public defender deems that additional representation to be "appropriate." Sec. 977.05(4)(h), Stats.; see 71 Op. Att'y Gen. 16 (1982) (January 14, 1982).

However, there is no authority whatsoever for the public defender to represent an indigent person in a civil forfeiture action alone. *Novak*, 107 Wis. 2d at 41. The discretion authorized under section 977.05(4)(h) is limited by the language which precedes it. That section requires the public defender to accept requests for legal services from indigent persons legally entitled to counsel. It goes on to state that "such persons" may be provided with additional legal services when, in the discretion of the public defender, such services are "appropriate." I read the phrase "such persons" to mean only those who are already receiving public defender representation because they are entitled to it by law in a related proceeding. The public defender may not expand the discretion of section 977.05(4)(h) to

include representation in a civil forfeiture action of any indigent person who is not otherwise entitled to representation.

Although it is not entirely clear, your letter also appears to raise the issue whether the public defender has the authority to represent an indigent who is a witness for the state in a criminal prosecution when that witness is not, and has not been, the subject of a material witness warrant and is not otherwise entitled to counsel by law. Stated another way, does the public defender have the authority to appoint counsel for an indigent simply because of that person's status as a witness for the state in a pending criminal prosecution?

It should be self-evident, based upon the discussion so far, that the public defender has no authority to represent such a witness. There is no independent statutory or constitutional basis for representing the witness; consequently, there exists no basis for discretionary representation of this witness by the public defender under section 977.05(4)(h), Stats.

BCL:DJO

Public Records: A demand for a written statement of the reasons denying a request for records may be made orally. A mandamus action may be commenced only after a written request for disclosure is made. A written denial of even an oral request must inform the requester that if the request was in writing the denial is subject to review. A copying fee but not a location fee may be imposed on a requester for the cost of a computer run. Whether materials which result from staff participation in activities of a review or evaluation organization are public records discussed. OAG 19-83

June 2, 1983

LINDA REIVITZ, *Secretary*
Department of Health and Social Services

Your predecessor requested my opinion on a number of questions relating to the open records law, chapter 335, Laws of 1981:

1. According to s. 19.35(4), if an oral request for a record is denied the reasons for the denial can be given orally unless the requester, within 5 business days after the denial, requests a written statement of the reasons. Under these circumstances, can the

request for a written statement be presented orally, or can we insist that the request for written reasons be presented in writing?

Section 19.35(4)(b) provides as follows:

If a request is made orally, the authority may deny the request orally unless a demand for a written statement of the reasons denying the request is made by the requester within 5 business days of the oral denial. If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request. Every written denial of a request by an authority shall inform the requester that if the request for the record was made in writing, then the determination is subject to review upon petition for a writ of mandamus under s. 19.37(1) or upon application to the attorney general or a district attorney.

In my opinion, the demand for a written statement of the reasons denying the request may be made orally. The law does not authorize an authority to insist that the demand be in writing.

2. If timely oral requests for written denial reasons must be honored under s. 19.35(4), does the requester have a right to enforcement pursuant to s. 19.37? If not, must the requester still be notified that, if the original request was in writing, enforcement rights would be available? (Section 19.37 seems to say that only requests originally presented in writing are enforceable, yet s. 19.35(4) states that every written statement of denial reasons must include certain language concerning enforcement.)

Section 19.37(1) states in part that “[i]f an authority withholds a record or a part of a record or delays granting access to a record or part of a record after a written request for disclosure is made, the requester may pursue either, or both, of the alternatives under pars. (a) and (b).”

The remedies provided by section 19.37 are available only after a *written* request for disclosure is made. However, under section 19.35(4)(b) a *written denial* of an oral request must inform the requester that if the request for the record was made in writing, then the determination is subject to review pursuant to section 19.37(1).

3. The Department of Health and Social Services often has computer data without having a presently existing printout of the

data. Section 19.35(1)(e) requires us to produce printouts for examination by requesters. I am informed that the cost of a computer run to produce a printout can frequently be quite expensive. If the requester wishes to obtain his or her own copy of the printout, can the cost of the computer run be charged to the requester as a copying fee? If the requester merely wishes to examine the printout, rather than to obtain a copy, could the computer run cost be charged as a record location fee (if at least \$50) or as some other type of fee?

Section 19.35(1)(e) provides that “[e]xcept as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is not in a readily comprehensible form a copy of the information contained in the record assembled and reduced to written form on paper.”

Section 19.35(3)(a) and (c) states as follows:

(a) An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.

. . . .

(c) Except as otherwise provided by law or as authorized to be prescribed by law, an authority may impose a fee upon a requester for locating a record, not exceeding the actual, necessary and direct cost of location, if the cost is \$50 or more.

Section 19.35(1)(e) gives any requester the right to receive from an authority a copy of the information contained in the record “assembled and reduced” to written form on paper. Section 19.35(3)(a) authorizes the authority to impose a fee upon the requester for the actual, necessary and direct cost of “reproduction and transcription” of the record. In my opinion, the reproduction and transcription of a record includes the assembly and reduction of the record to written form on paper. Therefore, you may impose the cost of the computer run on the requester as a copying fee. However, I do not believe you may impose the cost of the computer run on the requester as a location fee under section 19.35(3)(c) since you do not have to locate the record. All that needs to be done is to reduce the information contained in the record to a readily comprehensible

form on paper. I am not aware of any other statutes that would justify imposing the cost of the computer run on the requester.

4. In an unpublished opinion of April 30, 1979 (OAG 50-79), you concluded that s. 146.38, Stats., does not apply to records of this Department's activities. The opinion responded to questions concerning official health regulatory activities of this Department as an agency. This Department's staff, however, occasionally serve on private health care services review organizations, doing so with DHSS sponsorship or encouragement. Such staff may have records of their activities on behalf of the private organization at the premises of their DHSS offices. I presume these records must be treated as records of the Department of Health and Social Services. Under such circumstances, do the confidentiality restrictions of s. 146.38 apply to the records our staff hold of their private organization activities?

The question may be restated: When a member of the staff of the Department is a member of and has in his or her possession records of a review or evaluation organization within the purview of section 146.38, do such records which otherwise would be nonpublic records become public records by virtue of their being in the custody of a member of the staff of the Department?

The answer depends on whether the record has been created or is being kept by the Department, or you as its secretary and acting in such capacity. Section 19.32(2) defines record as any material on which is recorded or preserved information "which has been created or is being kept by an authority." For purposes of this question, authority is defined in section 19.32(1) as a state office or agency.

If the records of a review or evaluation organization were not prepared for the benefit or use of the Department, or you as its secretary, and are not in the possession of a member of the staff *in his or her capacity as such*, they would not be public records within the definition of that term found in section 19.32(2). They would be private records and their mere possession by a public officer or employe does not, absent the aspects embraced in section 19.32(2), convert them into public records. The fact that the person having custody of such records is a staff member is an incidental and non-material fact.

If, however, the records were prepared for the Department or for you as its secretary, to serve a Department aim, function or need then the staff member would possess the records as a staff member and such status would no longer be an incidental and nonmaterial fact.

I would consider material to the issue a consideration of whether participation in the activities of the review or evaluation organization by a member of the staff of the Department involves the use of state time or money, whether such participation is required by the staff member's prescribed duties or necessary for the proper fulfillment of the Department's statutory duties and whether such participation is pursuant to relationship between the Department and the review or evaluation organization for the mutual advantage of each. If any of these questions must be answered in the affirmative, the presumption would be that such participation is a proper function of the Department and that the materials resulting from such participation are public records.

BCL:JGG

Public Welfare; County child support agencies can initiate actions to compel support under section 767.08(2), Stats., without the payment of a filing fee. OAG 20-83

June 9, 1983

WILLIAM D. BUSSEY, *District Attorney*
Bayfield County

You have asked whether a county child support agency must pay a filing fee when initiating an action to compel support under section 767.08(2), Stats. My answer is no.

Section 767.08(1) authorizes actions by one spouse against the other to compel the payment of maintenance and support. It expressly provides that the plaintiff spouse is not required to pay a filing fee or other costs.

Section 767.08(2) provides that where the state or a subdivision of the state has furnished "public aid" to a spouse or dependent children, and the spouse fails or refuses to file an action under section

767.08(1), the state Department of Health and Social Services, a county child support agency or a person in charge of county welfare activities "shall have the same right as the individual spouse to initiate an action under this section, for the purpose of securing reimbursement for support and maintenance furnished and of obtaining continued support and maintenance."

Section 767.08(2) does not contain the waiver-of-fee language contained in section 767.08(1). Until recently, it was unnecessary to decide if section 767.08(2) nevertheless should be read to exempt county child support agencies from having to pay a filing fee because counties were not required to pay fees in any civil action. Sec. 59.42(2), Stats. (1979-80). Effective July 1, 1982, this section and several others were amended as part of a comprehensive revision of the statutes relating to court costs and fees. Section 59.42 was repealed and recreated by section 30gw of chapter 317. Instead of setting the amounts of different fees and naming the parties required to pay them, as it previously had, the statute now simply requires the clerk to collect and invest the fees prescribed in subchapter II of chapter 814 (entitled "Court Fees"), created by section 85vy of chapter 317. Newly-created section 814.61 provides in part:

In a civil action, the clerk of court shall collect the following fees:

(1) COMMENCEMENT OF ACTIONS. (a) At the commencement of all civil actions and special proceedings not specified in ss. 814.62 to 814.66, \$40. This includes actions and proceedings commenced by a government unit as defined in s. 108.02(28).

Sections 814.62 to 814.64, which are referenced in section 814.61(1)(a), prescribe the fees for commencing certain specifically-named actions. Actions to compel support pursuant to section 767.08 are not mentioned. The term "government unit" includes counties and "any agency" thereof. Sec. 108.02(28)(b), Stats. In my opinion, county child support agencies are government units within the meaning of this section. Thus, section 814.61(1)(a), viewed alone, requires the payment of a \$40 filing fee at the commencement of a section 767.08(2) action. I have found no statute other than section 767.08 which could be read to provide otherwise. The question then becomes whether or not section 767.08(2) itself excepts

county child support agencies (and other governmental plaintiffs) from the filing fee requirement.* In my opinion, it does.

Section 767.08(1) provides that a spouse can commence an action for support without the payment of a filing fee. Section 767.08(2) was not altered by chapter 317, Laws of 1981, and provides that the “county child support agency or the state department of health and social services shall have *the same right* as the individual spouse to initiate an action *under* this section”

In my opinion the filing fee waiver provisions of section 767.08(1) are applicable to a county or state agency which brings an action for support pursuant to section 767.08(2) “on behalf of” and in place of the spouse since that is “the same right as the individual spouse has to initiate an action” This conclusion is consistent with the underlying purposes of the statute. To subrogate government plaintiffs to the rights of dependent spouses without extending the filing fee waiver provisions to such plaintiffs would only serve to undermine the statutory objective of encouraging government enforcement against delinquent spouses. Accordingly, if section 767.08(2) is to fully accomplish its objectives, it should be read to allow governmental plaintiffs to initiate support actions without paying a filing fee.

BCL:RJV

Indians; Taxation; The state has express authority under the General Allotment Act of 1887, *as amended*, 25 U.S.C. § 331 *et seq.*, particularly 25 U.S.C. § 349, to impose *ad valorem* property taxes on Indian fee patented lands located within the Lac du Flambeau Reservation which were originally allotted under the Act after February 8, 1887. Indian fee patented lands allotted prior to that date directly under the Treaty of September 30, 1854, are not taxable by the state under 25 U.S.C. § 349. OAG 22-83

* There is no question that this would be consistent with section 814.61(1)(a). That section does not exclude the possibility of exceptions to the filing fee requirement. Section 767.08(1), of course, clearly creates an exception for actions commenced by a spouse.

June 17, 1983

JAMES B. MOHR, *District Attorney*
Vilas County

You have requested my opinion on the question of whether the state has authority to impose *ad valorem* property taxes on land owned in fee by Indians and located within the exterior boundaries of the Lac du Flambeau Indian Reservation.

For the reasons which follow, I believe the state and its local subdivisions have express authority pursuant to the General Allotment Act of 1887, as amended, 25 U.S.C. §§ 331, *et seq.*, particularly 25 U.S.C. § 349, to impose property taxes on fee patented Indian lands located within the exterior boundaries of the reservation which were first allotted pursuant to the Act after February 8, 1887. The Allotment Act does not apply, however, to Indian fee patented lands allotted prior to that date directly under the Treaty with the Chippewas of September 30, 1854 and, accordingly, such lands are not taxable by the state under 25 U.S.C. § 349.

The Lac du Flambeau Reservation was created pursuant to provisions of the Treaty with the Chippewas of September 30, 1854, 10 Stat. 1109, reprinted in *United States v. Bouchard*, 464 F. Supp. 1316, 1370-76 (W.D. Wis. 1978). For purposes of this opinion, three provisions of the treaty are particularly relevant. Pursuant to Article 2 (3), the United States agreed to set apart and withhold from sale, for the use of certain bands of the Lake Superior Chippewas "a tract of land lying about Lac De [sic] Flambeau, and another tract on Lac Court Orielles, [sic] each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President." Article 2 (7) authorized selection of eighty-acre allotments of land by mixed blooded persons to "be secured to them by patent in the usual form." Article 3 of the treaty requires the survey and fixing of boundaries for the various reserved tracts and authorizes the President, at his discretion, to permit the assignment of eighty-acre allotments to each head of a family or single person over twenty-one years old, and to issue patents therefor "as fast as the occupants become capable of transacting their own affairs ... with such restrictions of the power of alienation as he may see fit to impose."

For purposes of this opinion, I will refer to the following three major categories of land tenure which probably include the great majority, if not all, of the lands within the exterior boundaries of the current reservation:

1. "Trust or tribal lands": Lands held in trust by the United States, either for the Lac du Flambeau Band (Band) itself or for individual members of the Band;

2. "Indian fee patented lands": These include both (a) lands allotted to individual Indians directly under provisions of the 1854 Treaty ("Treaty allotted lands") prior to February 8, 1887; and (b) lands allotted to individual Indians after February 8, 1887, the effective date of the General Allotment Act. In both instances, title to such lands is now held by Indians in fee simple under patents issued to the original allottees or their Indian successors;

3. "Non-Indian lands": Lands alienated by the original Indian allottees or their successors, fee simple title to which is now held by non-Indians.

Cf. State of Wis. v. Baker, 524 F. Supp. 726, 729 (W.D. Wis. 1981) (describing land in the current Lac Courte Oreilles Reservation created by the same treaty provisions).

Your inquiry is limited to the question of whether the state and its local units of government have authority to impose property taxes on Indian fee patented lands, including both treaty-allotted lands and lands allotted after the Allotment Act became effective.¹ I understand that no one has currently challenged the state's authority to tax non-Indian lands within the reservation, nor am I aware of any substantial basis to assert such a challenge. See generally *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-53 (1980); F. Cohen, *Handbook of Federal Indian Law*, 394 n.39 *et seq.* (1982 ed.) (hereafter *Cohen*).

Furthermore, the state has not attempted to tax reservation trust or tribal lands, either those held in the name of the Band or those held in the name of individual Indian members of the Band. Asser-

¹ To the extent the Band itself, rather than individual Indians, may have acquired fee title to certain reservation lands, the question of the state's authority to tax such tribal fee land is outside the scope of this opinion.

tion of such authority is, of course, precluded both as to tribal lands and as to individual trust lands. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866); *United States v. Rickert*, 188 U.S. 432 (1903); *Squire v. Capoeman*, 351 U.S. 1 (1956); see generally the General Allotment Act, 25 U.S.C. §§ 348-49; Indian Reorganization Act, 25 U.S.C. § 465.

In contrast to certain other areas of Indian law, the principles governing your question as to whether the state has authority to tax Indian fee patented lands are relatively well settled: "Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress." *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 171 (1973), quoting United States Department of Interior, *Federal Indian Law* 845 (1958); *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373, 376 n.2 (1976).

Bryan also describes the standards for construing statutes granting states taxing authority over reservation Indians. Congress must have manifested a "clear purpose" to authorize the tax, with doubts and ambiguities to be resolved in favor of the Indians. *Id.* at 392. See also *Cohen* at 407.

The General Allotment Act is the only relevant federal statute which would appear to authorize state property taxation of Indian fee lands within the Lac du Flambeau Reservation. The initial question is whether the Allotment Act applies to any of the Indian fee patented lands on that reservation. In this regard, the distinction between those reservation lands allotted directly under the treaty and those allotted subsequent to the February 8, 1887, effective date of the Allotment Act appears to be critical. [As noted above, the Treaty of 1854 authorized allotments of lands to individual Indians and half-blooded persons. At least some reservation lands were allotted prior to passage of the Allotment Act. E. Danziger, Jr. *The Chippewas of Lake Superior* 97-104 (Norman, 1978). I have no information regarding the extent to which such lands remain in individual Indian fee ownership today.]

Our research leads to the conclusion that the Allotment Act does not apply to treaty allotted lands, but does apply to all Lac du Flambeau allotments made since the February 8, 1887, effective date of the Act. The general rule, of course, is that statutes are construed

to operate prospectively only unless there is clear legislative intent to the contrary. 82 C.J.S. *Statutes* § 414. Here, the language of the Act itself strongly suggests that the statute was intended to have prospective effect only. For example, various sections of the 1887 Act expressly and repeatedly refer to “allotments set apart” or “provided for” under “this Act.” At the same time, the Act specifically recognized treaties and special allotment acts authorizing allotment by providing that such allotment provisions would generally control as to size of the allotment. Act of February 8, 1887, ch. 119, secs. 1, 2, 3 and 5; 24 Stat. 388; now codified as amended in 25 U.S.C. §§ 331-33, 348.

Consistent with the view that the Act applied prospectively only, the United States Attorney General issued a formal opinion within two years of its passage concluding that the Act was applicable only to those lands held in common at the time of its passage:

This act provides a general system for the partition of lands which, at the time of its passage, were held *in common* by the Indian tribes. Its general provisions have no relation to lands that were held in severalty before its passage.

. . . .

The whole tenor of the act shows that so far as allotments had been made under any prior laws or treaties such allotments were not intended to be disturbed nor the rights of the allottees to such lands in any way modified or impaired.

19 U.S. Op. Att’y Gen. 255, 257-58 (1889) (emphasis in original).

Accordingly, it is my opinion that the Allotment Act has no application to allotments on the Lac du Flambeau Reservation made directly pursuant to the Treaty of September 30, 1854, prior to February 8, 1887. *Id.*

I believe it is equally clear, however, that the provisions of the Act do apply to all Lac du Flambeau allotments made after that date. In so concluding, I am aware of an apparently contrary opinion issued September 23, 1889, by the Secretary of Interior to the effect that allotments on the reservation made after the passage of the Act were, nonetheless, to be made pursuant to the 1854 Treaty rather than the 1887 Act. 9 Interior Department 392, September 23, 1889. For a variety of reasons which follow, the Secretary’s opinion appears to

be both incorrect in harmonizing the Treaty and the Act, and unreliable as precedent.

First, the express language of the Act is unequivocal and all-inclusive. The Act shall apply “[i]n all cases” to the allotment of reservation lands, except for a small number of tribes specifically excluded. The Chippewas were not excluded. 25 U.S.C. §§ 331, 339. Furthermore, as noted above, the Act expressly refers to treaty provisions for allotment, requiring that the treaties control only as to the size of the allotment. 25 U.S.C. § 331. This proviso would be superfluous if the Act itself did not generally govern the subsequent allotment of reservation lands such as the Lac du Flambeau, where treaties already authorized allotment and allotments had, in fact, been made.

Second, contrary to the 1889 Secretary of Interior opinion, there is nothing inherently inconsistent between the general allotment provisions of the 1854 Treaty and the specific requirements of the Allotment Act. In any event, even if there were, it is well settled that treaties and statutes should be harmonized and construed *in pari materia*, with the later enactment controlling in case of conflict. *United States v. Payne*, 264 U.S. 446, 448 (1924); *United States v. Jackson*, 280 U.S. 183, 196 (1930); *United States v. Nez Perce County, Idaho*, 95 F.2d 232, 233-36 (9th Cir. 1938). In *Payne*, for example, the Supreme Court harmonized provisions of the Allotment Act with allotment provisions of an earlier treaty, specifically noting that the later statute would prevail in the case of a direct conflict. 264 U.S. at 448.

Third, it is doubtful that the interpretation espoused in the cited Interior Secretary’s opinion was either consistent or of long duration. The opinion itself suggests that previous interpretations of the Act were inconsistent with regard to the application of the Act to reservations on which treaty-authorized allotment had already occurred. 9 Interior Department at 394-95. Moreover, the reasoning of the formal United States Attorney General’s opinion of March 14, 1889, cited above, appears to be in conflict with the views espoused by the Interior Secretary later that same year. The United States Attorney General’s opinion clearly suggests that the Act applied prospectively to all lands held in common at the time of its passage, without suggesting any exception for reservations where some allotments pursuant to treaty had already occurred.

Fourth, Congress, in a joint resolution approved June 19, 1902, expressly memorialized its view that “[i]nsofar as not otherwise specially provided, all allotments” should be made in conformity with the Act as amended, and “shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act” Jt. Res. 31, June 19, 1902, 32 Stat. 744. It is in this context that a special allotment act approved by Congress in 1924 relating to the Lac du Flambeau Reservation must be interpreted. Act of May 19, 1924, ch. 158, 43 Stat. 132. This Act directed that certain names be added to the list of enrolled members of the Lac du Flambeau Band, required that additional allotments be made to persons thereby added to the roll and directed that such allotments be made in conformity with the Allotment Act, as amended. In context, the primary purpose of the statute appears to have been the opening of additional Lac du Flambeau lands to allotment, and the requirement that trust patents be issued in conformity with the Act was merely declarative of existing law.

Finally, the view that the Allotment Act applied prospectively to all tribal reservation lands not previously allotted unless specifically excepted is supported by the leading treatise on Indian law. As the most recent edition of *Cohen* declares, “Congress has imposed the General Allotment Act on the trust or restricted lands of all Indians except for members of a few tribes exempted from the Act,” including “allotments under most treaties.” *Cohen* at 420 and n.141. See also *Cohen* (1941 Ed.) at 258-59. Accordingly, it is my opinion, based on the authorities cited and discussed above, that the General Allotment Act controls the question of whether the Indian fee patented lands on the Lac du Flambeau Reservation originally allotted after February 8, 1887, are now subject to state property taxes. Cf. *Stevens v. C.I.R.*, 452 F.2d 741 (9th Cir. 1971); *County of Thurston, State of Neb. v. Andrus*, 586 F.2d 1212, 1218 n.6 (8th Cir. 1978); *Kirkwood v. Arenas*, 243 F.2d 863 (9th Cir. 1957).

Under the Allotment Act, initial allotments, generally though misleadingly called “trust patents,” were inalienable for a specific term of years and protected against taxation as well. 25 U.S.C. §§. 348-49; *Squire*, 351 U.S. at 3-4. Indeed, the primary purpose of Congress in imposing the initial trust period on allotments was to prevent alienation of the lands and to ensure that the allottees would be immune from state taxation for a term of years. *United States v.*

Mitchell, 445 U.S. 535, 543-44, 547 (dis. op.) (1980).² After an initial period during which fee simple patents were issued routinely, the trust period for allotments under the Act was repeatedly extended by Executive Order and, in fact, has now been extended indefinitely by Congress. *Squire*, 351 U.S. at 3 n.4; *County of Thurston*, 586 F.2d at 1219; 25 U.S.C. § 462.

In the years prior to reversal of the national policy favoring the allotment of Indian lands, however, many Indians, including significant numbers of allottees on the Lac du Flambeau Reservation, were granted fee simple patents for their lands. *The Chippewas of Lake Superior*, at 110-11. Even though the policy favoring allotment has been reversed, the effects of the allotment process continue to be governed by the provisions of the Act. *Cf. Blake v. Arnett*, 663 F.2d 906, 911 (9th Cir. 1981).

The provisions of the Allotment Act regulating trust allotments and issuance of fee patents are contained principally in 25 U.S.C. §§ 348-49. Of particular relevance to the question of state taxation of Indian fee patented lands is the following proviso in section 349:

Provided, That the Secretary of the Interior may ... cause to be issued to such allottee a patent in fee simple, *and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed* and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent

(Emphasis supplied.)

Until recently 25 U.S.C. §§ 348-49, particularly the proviso language quoted above, has uniformly been construed as protecting allotments from taxation during the trust period, and as expressly authorizing taxation of allotted lands once a valid fee patent is issued. The following cases contain express recognition of the authority to tax Indian fee patented lands once the trust period has ended: *Squire*, 351 U.S. at 7-8; *Mahnomen County, Minn. v. United States*, 319 U.S. 474, 478 (1943); *Mitchell*, 445 U.S. at 543-44, 547; *County of Thurston*, 586 F.2d at 1221-22; *Kirkwood*, 243 F.2d at 868-

² Portions of the legislative history of the Allotment Act and of subsequent amendments to it are discussed in *Mitchell*; see also *Montana v. United States*, 450 U.S. 544, 559 n.9 (1981); *County of Thurston*; *Nez Perce County, Idaho*; *Cohen* at 127-43; *Federal Indian Law* at 855-61.

69; *Board of Com'rs v. United States*, 100 F.2d 929, 933 (10th Cir. 1938); *United States v. Nez Perce County, Idaho*, 16 F. Supp. 267, 272 (D. Idaho, 1936), *rev'd on other grounds*, 95 F.2d 232 (9th Cir. 1938); *United States v. Spaeth*, 24 F. Supp. 465, 469 (D. Minn. 1938); *Shepard v. United States*, 162 F. Supp. 313, 315-16 (E.D. Wis. 1958); *Nash v. Wiseman*, 227 F. Supp. 552, 554 (W.D. Okla. 1963); *Chatterton v. Lukin*, 116 Mont. 419, 154 P.2d 798, 799 (1944); *Milne v. Leiphart*, 119 Mont. 263, 174 P.2d 805, 807-08 (1946); *Heacock v. Tripp County*, 60 S.D. 518, 244 N.W. 887, 888-89 (1932); *McGeehan v. Ashland County*, 192 Wis. 177, 179, 212 N.W. 283 (1927). *See also Goudy v. Meath*, 203 U.S. 146 (1906); *Federal Indian Law* at 859; *Cohen* at 425.

Perhaps the clearest statement of this principle is contained in the Supreme Court's description of the amendment creating the proviso quoted above:

The Government argues that this amendment was directed solely at permitting state and local taxation after a transfer in fee, but *there is no indication in the legislative history of the amendment that it was to be so limited. ... The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee.* This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted.

Squire, 351 U.S. at 7-8 (emphasis added).

The previously settled interpretation of section 349 as authorizing taxation of Indian fee patented lands has, however, been questioned in the wake of *McClanahan*, 411 U.S. at 164 and *Moe v. Confederated Salish & Kootenai Tribes etc.*, 425 U.S. 463 (1976). *See Estate of Johnson*, 125 Cal. App. 3d 1044, 178 Cal. Rptr. 823 (1982); *Battese v. Apache County*, 129 Ariz. 295, 630 P.2d 1027 (1981); *Baraga County Equalization Dept. v. Darcy, et al.*, Michigan Tax Tribunal no. 29713, decided Feb. 23, 1982 (unreported administrative decision concerning L'Anse Reservation created by Treaty of September 30, 1954); *Cohen* at 406-11.

The question of a state's authority to tax Indian fee patented lands has not been squarely addressed by the Supreme Court in the cases since *Moe* and *McClanahan*. Nonetheless, for the reasons

which follow, it is doubtful that those cases overruled, *sub silentio*, nearly eight decades of consistent judicial interpretation of 25 U.S.C. § 349 as expressly authorizing state property taxation of such lands.

McClanahan, of course, concerned state income taxes and did not discuss either the Allotment Act or the imposition of state property taxes on Indian lands. *McClanahan* does require that the state taxation of Indian reservation property be expressly authorized by Congress. The cases cited above have uniformly regarded 25 U.S.C. § 349 as providing such express authority. Moreover, the language of the proviso set forth above is clear and unambiguous, leaving no room for doubt as to the intent of Congress in enacting it. *Squire*, 351 U.S. at 7-8; *cf. Bryan*, 426 U.S. at 392.³

In *Moe*, the Supreme Court held, *inter alia*, that Montana lacked authority under 25 U.S.C. § 349 to impose its personal property tax on motor vehicles owned by reservation Indians. 425 U.S. at 477-79. *Moe* is not directly controlling for two closely related reasons. First, it dealt with a personal property tax on movable goods and not with a tax on realty. Secondly, the holding does not rely on, nor even discuss, the language of the section 349 proviso concerning removal of restrictions against taxation of the allotted land once a fee patent is issued. Instead, the court rejected the state's contention that the general reference in the first clause of section 349 to state civil and criminal laws authorized imposition of the particular state tax at issue. Aside from disagreeing with the state's interpretation of the literal language of the first part of section 349, the court essentially held that its general language was not a sufficiently express or unambiguous grant of taxing authority to the state to comply with the *McClanahan* standard. *Moe*, 425 U.S. at 479.

The *Moe* decision also rests, in part, on the Court's disapproval of the kind of "checkerboard" taxing jurisdiction which would necessarily be created if personalty located on fee lands were taxable while personalty located on trust lands were not. *Id.* To the extent the Court eschewed "checkerboard" taxing jurisdiction over personalty,

³ *Bryan* illuminates the principles governing a state's authority to tax Indian reservation property, as noted above, but the case neither cites nor discusses the Allotment Act itself. Instead *Bryan* addressed whether a state had express authority under Pub. L. No. 280, 67 Stat. 589, 28 U.S.C. § 1360, to impose a personal property tax on personalty (a mobile home) located on tribal trust lands.

its reasoning arguably applies to Indian realty as well. Nonetheless, the modern policy disfavoring “checkerboard” jurisdiction is only a policy, however meritorious, unless based on statutory authority. In fact, 25 U.S.C. § 349 has not been repealed or even substantially amended since 1906.

Policy considerations alone cannot authorize ignoring the clear wording of a statute or disregarding the express intent of Congress: “The Supreme Court has cautioned that the courts cannot remake history or expand treaties and legislation beyond their clear terms to remedy a perceived injustice suffered by the Indians.” *United States v. State of Minn.*, 466 F. Supp. 1382, 1385 (D. Minn. 1979); *aff’d*, *Red Lake Band of Chippewa v. State of Minnesota*, 614 F.2d 1161 (8th Cir. 1980). See also *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943). Policy alone cannot create an exemption from a tax which the statutes clearly authorize. Cf. *United States v. Anderson*, 625 F.2d 910 (9th Cir. 1980); *United States v. Board of Com’rs of Osage County*, 216 F. 883, 885 (8th Cir. 1914). Policy considerations, like canons of construction, do not confer “a license to disregard clear expressions of ... congressional intent.” *DeCoteau v. District County Court for Tenth Jud. Dist.*, 420 U.S. 425, 447 (1975).

In any event, “checkerboard” jurisdiction is not novel or unusual in Indian law, nor is it arbitrary or facially unconstitutional. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 499-502 (1979). Indeed, property taxation is inherently “checkerboarded” by its very nature, a fact which sharply distinguishes it from certain other areas of the law where checkerboard jurisdiction is mechanically unworkable.

Finally, I can find nothing in the cases decided since *Moe* which persuasively suggests, much less holds, that 25 U.S.C. § 349 does not authorize state property taxation of Indian fee patented lands. Indeed, the Supreme Court has expressly referred to the Allotment Act as contemplating state taxation of such lands once the trust period has ended in one recent case. *Mitchell*, 445 U.S. at 543-44, 547; see also *County of Thurston*, 586 F.2d at 1221.

In *Estate of Johnson*, a California intermediate appeals court decision, the court held that the Allotment Act does not authorize state inheritance taxes on the transfer of fee patented land from one

Indian to another, but expressly distinguished cases upholding state property taxation. *Id.* 178 Cal. Rptr. at 827 n.3. In *Battese*, the Arizona Supreme Court held that Indian-owned real estate located within the present Navaho Reservation was not subject to state property taxation. 630 P.2d at 1027. The facts suggest, however, that the General Allotment Act had never applied to the lands in question and neither the act nor cases decided under it are discussed in the decision. Finally, the *Baraga County* decision (a copy of which has been supplied to you) is primarily concerned with defining which lands were part of the original L'Anse Chippewa Reservation. The decision neither cites nor discusses the Allotment Act and appears simply to assume, without discussion, that Indian fee lands located within the original reservation are not taxable by the state.

I am not persuaded that either *Moe* or the three state cases just discussed control the answer to your question of whether Indian fee patented lands within the Lac du Flambeau Reservation are subject to state property taxes. For the reasons discussed, it is my opinion that the state has express authority, pursuant to 25 U.S.C. § 349, to impose *ad valorem* property taxes on Indian fee patented lands located within the exterior boundaries of the reservation which were first allotted after February 8, 1887. Indian fee patented lands allotted prior to that date directly under the Treaty of September 30, 1854, are not taxable by the state under 25 U.S.C. § 349.

BCL:MAM

Arrest; Counties; Drunk Driving; Counties can enter into reciprocal mutual assistance agreements whereby they can agree in advance to cooperate in the arrest of persons suspected of violating drunk driving laws who are involved in an accident in one county and transported to a hospital in another county. OAG 24-83

July 22, 1983

GARY J. SCHUSTER, *District Attorney*
Door County

You have requested my opinion as to whether counties can enter into reciprocal mutual assistance agreements whereby such counties would agree in advance to cooperate in the arrest of persons and in

the subsequent procurement of evidence from arrested persons suspected of violating drunk driving laws who are involved in an accident in one county and transported to a hospital in another county for emergency treatment. Your inquiry is prompted by the dilemma created by an accident occurring in Door County with an injured person (a potential offender of the drunk driving laws) being transported to a hospital in Brown County for necessary emergency treatment and the resultant question of which county's law enforcement personnel are the proper arresting authority. It should be recognized that the cooperation contemplated by your inquiry suggests two alternative procedures: (1) a Door County law enforcement officer (sheriff or county traffic officer) arresting the injured in Brown County; and (2) a Brown County law enforcement officer (sheriff or county traffic officer) arresting the injured in Brown County for the purpose of a prosecution in Door County. For the reasons that follow, I am of the opinion that counties can enter into reciprocal mutual assistance agreements pursuant to section 66.30(2), Stats., to resolve any dilemmas which may result from the situation posited in your inquiry.

Certain explanations and assumptions regarding my conclusion should be initially stated:

First, by concluding that mutual assistance agreements may be utilized for the purpose contemplated by your inquiry, I do not intend my conclusion to circumscribe the alternatives available to law enforcement agencies. To the contrary, it may well be that the same result may also be accomplished in the absence of such an agreement. Using your example, a Brown County law enforcement officer certainly can effectuate a warrantless arrest of an injured driver in Brown County if the arresting Brown County officer believes on reasonable grounds that the injured driver has committed a traffic crime, *i.e.*, second or subsequent OWI offense. Sec. 968.07(1)(d), Stats. Similarly, section 345.22 authorizes the Brown County law enforcement officer to effectuate a warrantless arrest when there are reasonable grounds to believe that the injured driver has violated a traffic regulation, *i.e.*, first OWI offense. *See also* 61 Op. Att'y Gen. 275 (1972). And, still using your example, while the express wording of section 66.305 would appear to suggest that a Door County law enforcement officer could only arrest the injured driver in Brown County upon the specific request of a Brown

County officer (Door County officer relating to Brown County officer that he wishes the latter to request his assistance), section 66.305 arguably does also confer authority on Door County officers to effectuate a warrantless arrest of the injured driver in Brown County in the absence of such a specific request. In order to be practical and effective, however, the latter approach could well raise an additional question — the propriety of a “continuing call” for assistance. See 62 Op. Att’y Gen. 250, 251 (1973). Therefore, while sections 968.07(1)(d), 345.22 and 66.305 suggest that the contemplated agreements may not always be required, I believe the contemplated agreements do not compromise those instances already covered and, in addition, provide authority for those arguably not covered as well.

Second, my conclusion assumes that the requirement of probable cause has been satisfied in all cases. The relevant provisions of the implied consent law, section 343.305(2)(b) and (c), contemplate that a lawful arrest be made prior to a request for submission to one of the enumerated intoxication tests. *State v. Neitzel*, 95 Wis. 2d 191, 200, 289 N.W. 828 (1980) (*but see, Neitzel*, 95 Wis. 2d at 205); *Scales v. State*, 64 Wis. 2d 485, 494, 219 N.W.2d 286 (1974); 67 Op. Att’y Gen. 314 (1978); 59 Op. Att’y Gen. 183 (1970). Therefore, the probable cause for making the arrest must precede any intoxication test. *Scales* 64 Wis. 2d at 494. In this regard, all of the alternative situations considered herein are no different than that which would occur if the accident had occurred and the hospital was located within the same county.

Third, my conclusion assumes that the necessary probable cause for arrest may be transmitted from one law enforcement officer with personal knowledge of the probable cause to another law enforcement officer making the arrest and requesting the intoxication test. See *Schaffer v. State*, 75 Wis. 2d 673, 677, 250 N.W.2d 326 (1977); *State v. Shears*, 68 Wis. 2d 217, 253, 229 N.W.2d 103 (1975); *State v. Mabra*, 61 Wis. 2d 613, 625, 213 N.W.2d 545 (1974); *State v. Taylor*, 60 Wis. 2d 506, 515-16, 210 N.W.2d 873 (1973).

Fourth, my conclusion only contemplates agreements between counties regarding the law enforcement personnel of their respective sheriff’s department or the county traffic patrol.

The preliminary explanations and assumptions necessary to render the opinion now stated, I turn to the analysis resulting in my conclusion.

As stated in a previous opinion of the attorney general, the decision of the Wisconsin Supreme Court in *State v. Barrett*, 96 Wis. 2d 174, 291 N.W.2d 498 (1980), “establishes that extraterritorial exercise of police powers by sheriffs and county traffic officers is primarily a matter for legislative clarification and sets forth some of the considerations in determining when county officers can make arrests outside of county boundaries.” 69 Op. Att’y Gen. 194 (1980).

Although *Barrett* appears to limit the extraterritorial exercise of police powers by county law enforcement personnel, nothing in the Wisconsin statutes prohibits a county board from entering into an agreement with another county to enable law enforcement personnel to cooperate in the manner contemplated by your inquiry.

The Wisconsin Constitution outlines the powers of county boards: “The legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe.” Wis. Const. art. IV, § 22.

Section 59.07 describes the many and varying general powers that each county board may exercise, “which shall be broadly and liberally construed and limited only by express language.” Subsection (11) of section 59.07 provides for the joint cooperation of the many county boards as provided by section 66.30. And, by that latter provision, the Wisconsin Legislature has specifically granted to the counties the power to enter into cooperative agreements:

In addition to the provisions of any other statutes specifically authorizing cooperation between (counties), unless such statutes specifically exclude action under this section, any (county) may contract with other (counties), for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law. ... This section shall be interpreted liberally in favor of the cooperative action between (counties).

Sec. 66.30(2), Stats. (The word county has been substituted for the word municipality as provided in section 66.30(1)(a).)

While the legislative history of section 66.30 appears to be silent regarding its specific application to cooperative law enforcement assistance, I am of the opinion that the section provides clear authority for counties to enter into a mutual assistance agreement as contemplated by your inquiry.

In *Village of McFarland v. Town of Dunn*, 82 Wis. 2d 469, 475, 263 N.W.2d 167 (1978), the Wisconsin Supreme Court held that section 66.30(2) provided for the municipalities defined in section 66.30(1) to contract with one another for "the receipt or furnishing of law enforcement services or for mutual law enforcement assistance" And, prior to the *McFarland* case, several opinions issued from this office suggested the use of intergovernmental cooperation agreements for the purpose of law enforcement assistance. 58 Op. Att'y Gen. 72 (1969); 62 Op. Att'y Gen. 250 (1973); 63 Op. Att'y Gen. 596 (1974). As stated in the earliest of those opinions:

By enactment of sec. 66.30, Stats., the legislature has left the policy determination as to whether there should be a cooperative arrangement, by contract, to the local legislative bodies concerned. The local units of government cannot, however, avoid their ultimate responsibilities of maintaining peace and order in their respective units by means of cooperative arrangements. Some of the duties and services may be shifted to the other unit of government, but the basic responsibility involved cannot.

58 Op. Att'y Gen. at 77.

Cooperative mutual assistance takes many forms and arises from necessity. For example, in a related area, this office was requested to give an opinion regarding the necessity, pursuant to section 343.305(1), of every law enforcement agency having its own equipment to administer two forms of intoxication tests, or at least having such equipment available within its own territorial jurisdiction. 63 Op. Att'y Gen. 119 (1974). This office concluded:

[T]he method by which law enforcement agencies comply with the requirement that they must be prepared to administer a second test is to make arrangements with others for obtaining the specimen and for its analysis. Nothing in the law requires that this must be done within the territorial jurisdiction of the particular agency.

Id. at 121.

The cooperation necessary to solve the dilemma of your example does not appear to contravene conditions affirmatively prescribed by any relevant statute. *See* secs. 59.23, 59.24(2), 66.305 and 66.315, Stats. Apart from any duties derived from the common law, the statutes require or permit action by county law enforcement personnel outside the appointing jurisdiction in several instances. With respect to sheriffs alone, *see* secs. 53.06, 59.25(1), 59.29 and 66.305. *See also* 45 Op. Att’y Gen. 267 (1956).

A final consideration in support of my conclusion relates to the application of the statute. By its own words, section 66.30(2) “shall be interpreted liberally in favor of cooperative action between the municipalities.” Here, the cooperative action involves an area of serious legislative concern, where the intent of the Legislature is clear. As the Wisconsin Supreme Court recently stated:

The purpose behind the implied consent law is to facilitate the gathering of evidence against drunk drivers. *Scales v. State*, 64 Wis. 2d 485, 219 N.W.2d 286 (1974). We stated in *Scales* that the implied consent law was to facilitate the taking of tests for intoxication and not to inhibit the ability of the state to remove drunken drivers from the highway. The proper and liberal construction of legislation designed for this very purpose militates against ... [impeding] the police in obtaining evidence against those drivers who are under the influence of intoxicants.

Neitzel, 95 Wis. 2d at 203-04 (bracketed material supplied).

I wish to make one additional comment regarding mutual assistance agreements themselves. I recommend that they be carefully drafted and approved by the county boards of the participating law enforcement agencies. *See* secs. 57.02(1) and 57.07(11), Stats. Funding arrangements and reimbursement should be fully considered and set forth in the agreements. *Cf.* sec. 66.315, Stats.

BCL:JSS

Discrimination; Sheriffs; Wisconsin Retirement Fund; County collective bargaining agreement providing for payment of employe contribution to Wisconsin Retirement System only for those deputy sheriffs under age fifty-five violates the federal Age Discrimination in Employment Act. OAG 25-83

July 22, 1983

MORGAN R. BUTLER, III, *Corporation Counsel*
Ozaukee County

You request my opinion on the following question:

Is it a violation of age discrimination prohibitions found at 29 USC §623 to require protective occupation participants in the Wisconsin Retirement Fund to pay their own employee contribution when they are 55 or older, when younger officers have their employee contribution paid by the County?

The basis for your question is a negotiated collective bargaining agreement (confirmed by county ordinance) wherein Ozaukee County agrees to pay the employe contributions to the Wisconsin Retirement Fund (WRS) for deputy sheriffs under age fifty-five but not for those over age fifty-five.

Section 40.05(1) and (2), Stats., requires contributions from both the employer and employes to fund WRS participation. The employe required contribution may, by virtue of section 40.05(1)(b), be paid in whole or in part by the employer on the employe's behalf. This section reads in part:

(b) In lieu of employe payment, the employer may pay all or part of the contributions required by par. (a), but all the payments shall be available for benefit purposes to the same extent as required contributions deducted from earnings of the participating employes. Action to assume employe contributions as provided under this paragraph shall be taken at the time and in the form determined by the governing body of the participating employer.

The county has, under a collective bargaining agreement with its deputy sheriffs, agreed to pay the required employe contributions only for those deputy sheriffs under age fifty-five. It is my opinion

that this is a violation of the age discrimination provisions of the Age Discrimination In Employment Act of 1967 (Act), 29 U.S.C. §§ 621-34. The fact that the discrimination was agreed to via collective bargaining does not ameliorate the violation since "the statute's prohibition of age discrimination in employment takes precedence over a collective bargaining agreement." *Levine v. Fairleigh Dickinson University*, 646 F.2d 825, 832 (3rd Cir. 1981).

The Act, at 29 U.S.C. § 623(a)(1), makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age" Section 623(f)(2) of the Act provides, however, that it is not unlawful for an employer:

[T]o observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual

The WRS, a bona fide retirement plan under the Act, does not distinguish between contributions required for those under age fifty-five and those over age fifty-five but requires employe contributions from or on behalf of all active participants. Employe contributions are required from or on behalf of all "participating employes" regardless of age. Sec. 40.05(1)(a), Stats. "Participating employe" is defined at section 40.02(46) as "an employe who is currently in the service of, or an employe who is on a leave of absence from, a participating employer under the Wisconsin retirement system" No distinction is made relating to the payment of employe required contributions based upon attaining a specific age. It cannot be said then that the county determination not to pay employe contributions on behalf of those employes over age fifty-five constitutes "observing the terms of ... a bona fide retirement ... plan."

The Department of Labor, in its interpretative rules at 29 C.F.R. § 860.120(c) (1967), states:

In order for a bona fide employee benefit plan which provides lower benefits to older employees on account of age to be within the section 4(f)(2) exception, the lower benefits must be provided in "observ[ance of] the terms of" the plan. As this statutory text

makes clear, the section 4(f)(2) exception is limited to otherwise discriminatory actions which are actually prescribed by the terms of a bona fide employee benefit plan. Where the employer, employment agency, or labor organization is not required by the express provisions of the plan to provide lesser benefits to older workers, section 4(f)(2) does not apply. Important purposes are served by this requirement. Where a discriminatory policy is an express term of a benefit plan, employees presumably have some opportunity to know of the policy and to plan (or protest) accordingly. Moreover, the requirement that the discrimination actually be prescribed by a plan assures that the particular plan provision will be equally applied to all employees of the same age. Where a discriminatory provision is an optional term of the plan, it permits individual, discretionary acts of discrimination, which do not fall within the section 4(f)(2) exception.

Section 860.120 has been adopted by the Equal Employment Opportunity Commission as part of its enforcement policy in line with the transfer of enforcement of the Act to it from the Department of Labor. *See* 44 Fed. Reg. 68860 (1979) and 29 C.F.R. § 1625.10. The county agreement, requiring only those over age fifty-five to pay contributions, is not a required term of the WRS and therefore does not fall within the section 4(f)(2) exception.

I therefore conclude that the collective bargaining agreement and the implementing county ordinance are in violation of the Act.

BCL:WMS

Child Abuse; Criminal Law; CHILD ABUSE; consensual sexual conduct involving sixteen- and seventeen-year-old children does not constitute child abuse under section 48.981(2), Stats. OAG 26-83

July 28, 1983

RUSSELL DEVITT, *Corporation Counsel*
Walworth County

You inquire whether consensual sexual conduct involving fifteen-, sixteen- and seventeen-year-old children must be reported as child abuse under section 48.981(2), Stats. That section requires various persons who deal with children in the course of their

professional duties to report to the county welfare agency, sheriff or police where they have reasonable cause to believe that a child has been abused or neglected. A child is any person less than eighteen years old. Sec. 48.981(1)(b), Stats. "Abuse" is defined as "any physical injury inflicted on a child by other than accidental means, or sexual intercourse or sexual contact under s. 940.225." Sec. 48.981(1)(a), Stats.

There is some ambiguity in the reference to section 940.225, the sexual assault statute. That statute contains the following definitions of sexual contact and sexual intercourse:

"Sexual contact" means any intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant's or defendant's intimate parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19(1).

"Sexual intercourse" includes [vulvar penetration] as well as cunnilingus, fellatio or anal intercourse between persons or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening either by the defendant or upon the defendant's instruction. The emission of semen is not required.

Sec. 940.225(5)(a) and (b), Stats.

The statute which mandates reporting of sexual abuse could be read as including in the definition of abuse any act of sexual contact or intercourse, as defined above, if a child is a participant. Under that interpretation, it would be irrelevant for purposes of section 48.981 whether the sexual conduct had all the elements of a sexual assault under section 940.225. Whenever there was reasonable cause to suspect that a fifteen-, sixteen-, or seventeen-year-old child had engaged in sexual contact or intercourse, a report would be required.

But consideration of the overall purpose of section 48.981 indicates that abuse should not be so broadly defined. See *Wisconsin's Environmental Decade, Inc. v. Public Service Commission*, 84 Wis. 2d 504, 518, 267 N.W.2d 609 (1978). The goal of the statute is to pre-

vent physical harm and the psychological or emotional harm which may accompany it. Sec. 48.981(1)(a) and (d), (3)(b) and (3)(c)9., Stats.; *see* Laws of 1977, ch. 355, sec. 1. Remedial steps are to be taken where harm has already occurred. Sec. 48.981(3)(b)2., Stats. Consensual sexual activity by those legally deemed capable of consent cannot be compared to the types of abuse and neglect which are mentioned in the statute and are required to be reported, such as lacerations, burns, internal injuries or the lack of food or medical care. Sec. 48.981(1)(a) and (d), Stats. Thus the definition in section 48.981(1)(a) of abuse as "sexual intercourse or sexual contact *under* s. 940.225" must be understood to mean sexual conduct which constitutes a sexual assault under section 940.225. It is consistent with the purpose of the statute to require the reporting of assaultive sexual behavior because it can have physical, psychological and emotional effects comparable to those of the other types of abuse and neglect which must be reported.

Sexual contact or intercourse constitutes abuse which must be reported if it is a sexual assault within the meaning of section 940.225. Since sexual contact or intercourse with any child under the age of sixteen years is a sexual assault, regardless of whether consent was given, section 940.225(1)(d), (2)(e) and (4), all sexual conduct involving children in that age group must be reported. Sexual contact or intercourse with a sixteen- or seventeen-year-old is not a sexual assault unless it is nonconsensual. Therefore, it should be reported as abuse only if there is reasonable cause to suspect that the sixteen- or seventeen-year-old did not consent.

Having consensual sexual intercourse with a sixteen- or seventeen-year-old constitutes fornication. Sec. 944.15(2), Stats. But such conduct is deemed criminal on moral grounds, *see* chapter 944, not because it jeopardizes bodily security as sexual assault does. No reference is made in section 48.981 to the fornication statute. That one could be criminally prosecuted or found delinquent for having sexual intercourse with a sixteen- or seventeen-year-old does not, therefore, mean that such conduct must be reported as abuse.

County Surveyor; Public Records; Counties that employ rather than elect a county surveyor pursuant to section 59.12, Stats., are required to maintain the survey record system described in section 59.60(2). Further, all counties are required to maintain the survey record system to enable registered land surveyors to comply with statutory filing requirements. OAG 27-83

August 3, 1983

WILLIAM DUSSO, *Administrator*
Department of Regulation and Licensing

On behalf of the Examining Board of Architects, Professional Engineers, Designers and Land Surveyors, you have requested my opinion on two issues concerning county survey record systems. First, you ask whether a county may determine the scope of functions to be performed by an employed county surveyor and elect not to maintain the survey record system described in section 59.60(2), Stats. In my opinion the answer is no.

The duties of a county surveyor are set forth in section 59.60. It is mandatory that the county surveyor maintain a survey record system:

The county surveyor *shall*:

. . . .

(2) Make by himself or a deputy a record in books or on drawings and plats kept therefor, of all corners set and the manner of fixing the same and of all bearings and the distances of all courses run, of each survey made by him, his deputies, or other land surveyors and so arrange or index the same as to be easy of reference and file and preserve in his office the original field notes and calculation thereof; and within 60 days after completing any survey, make a true and correct copy of the foregoing record, in record books or on reproducible papers to be furnished by the county and kept in file in the office of the county surveyor to be provided by the county.

Sec. 59.60, Stats. The purpose of requiring the county surveyor to maintain surveying records is to provide

a central depository for the records and files of the county surveyor and for all surveys made within the county, that such records and field notes be county property, and that said depository be at the office of the county surveyor in offices furnished by the county and open during usual business hours.

60 Op. Att'y Gen. 134, 137 (1971). *See also* 69 Op. Att'y Gen. 160, 162 (1980).

The statutes provide that a county need not maintain the office of county surveyor as an elective position; “[i]n lieu of electing a surveyor in any county, the county board may, by resolution designate that the duties under ss. 59.60 and 59.635 be performed by any registered land surveyor employed by the county.” Sec. 59.12, Stats. While a county may employ rather than elect a county surveyor, the statute requires that the duties of the county surveyor, including maintaining the survey record system described in section 59.60(2), be performed by an employed county surveyor. Therefore, in my opinion, a county is still required to maintain the survey record system if it employs rather than elects a county surveyor. In those counties that have abolished the office of an elected or full-time surveyor or surveyor’s office, the register of deeds must file and keep survey records and index them as required by section 59.60.

Second, in your inquiry you note that:

In those instances that a county neither maintains an office for a county surveyor nor designates that the duties in s. 59.60 and 59.635, *Stats.* be performed by a land surveyor employee, there is a serious question about how a land surveyor meets the filing requirement of s. 59.60(6), *Stats.*

In my opinion, the county is required to maintain the survey record system described in section 59.60(2) to enable land surveyors to meet various statutory filing requirements.

Counties are given broad discretion to organize county affairs and administer county functions. With certain limitations, a county board may consolidate or abolish a county office, section 59.025(3)(a), or transfer some or all of the functions, duties and responsibilities of a county office to another agency. Sec.

59.025(3)(c), Stats. The county's organizational discretion "shall be limited only by express language but shall be subject to the constitution and such enactments of the legislature of statewide concern as shall with uniformity affect every county." Sec. 59.025(2), Stats.

One exception to the broad grant of discretion to counties is where express language limits a county's ability to consolidate or abolish a county office or to transfer the functions of a particular county office. Section 59.60(2) states that survey records shall be copied "in record books or on reproducible papers *to be furnished by the county* and kept in file in the office of the county surveyor *to be provided by the county*." Thus there is an express statutory requirement that a county maintain the county surveyor's survey record system.

A second exception to the grant of organizational discretion is where legislative enactments of statewide concern uniformly affect every county. A number of statutes require that registered land surveyors file survey records in the county surveyor's office. A land surveyor may perform surveys for individuals or corporations "providing that within 60 days after completing any survey he files a true and correct copy of the survey in the office of the county surveyor." Sec. 59.60(6), Stats. When land surveyors are employed by the Department of Transportation or a county highway department to preserve and perpetuate landmarks, "a true and correct copy of the field notes and records shall be filed with the county surveyor." Sec. 59.635(7), Stats. The cost of the work of perpetuating the evidence of a landmark shall be borne by the county in which the landmark is located. Sec. 59.635(4), Stats.

I am of the opinion that the provisions of sections 59.60(6) and 59.635(7) are "enactments ... of statewide concern as shall with uniformity affect every county." Registered land surveyors are subject to statewide regulation. As I noted in 69 Op. Att'y Gen. 160, 161 (1980):

To practice land surveying in this state, a person must be authorized to practice by the engineering section of the Examining Board of Architects and Professional Engineers, sec. 443.02(1), Stats. He or she must also comply with rules of the Examining Board of Architects, Professional Engineers, Designers, and Land Surveyors.

Registered land surveyors who engage in misconduct in the practice of land surveying are subject to discipline, including revocation of the certificate of registration, section 443.12(1), which is required to practice land surveying in Wisconsin. Sec. 443.02(4)(a), Stats. Misconduct includes violation of a state statute relating to the practice of land surveying. Section A-E 4.001(3)(a) Wis. Adm. Code. Therefore, a land surveyor is subject to revocation of the certificate of registration for failure to file survey records with the county surveyor's office as required by sections 59.60 and 59.635.

Furthermore, as you note in your inquiry, "[t]he public policy implicit in the filing requirement is to avoid repetitious survey work and to permit the public access to available evidence and information on land boundaries." I am of the opinion that both this public policy and statutory regulatory provisions indicate that the statutory filing requirements of sections 59.60(6) and 59.635(7) are matters of statewide concern which with uniformity affect every county. Therefore, a county is required to maintain the survey record system described in section 59.60(2) to enable registered land surveyors to meet statutory requirements.

BCL:WHW:JN

Open Records; Public Records; Preliminary versions of a document prepared by an employe for his or her own or another's signature are not public records. Public records must have some relation to the functions of the agency. Separation costs must be borne by the agency. Actual damages are the liability of the agency. Punitive damages and forfeitures can be the liability of either the agency or the legal custodian or both. Section 895.46(1)(a) probably provides indemnification for punitive damages assessed against the custodian but not for forfeitures. OAG 28-83

August 4, 1983

LINDA R. REIVITZ, *Secretary*
Department of Health and Social Services

Your predecessor has requested my opinion on a number of questions under the new open records law, sections 19.31 through 19.39, Stats., which went into effect on January 1, 1983:

1. When an employe authors a document for his own or another's signature and the preliminary versions are reviewed by his supervisors, other employes or persons outside the Department for approval or comments, are the preliminary versions "records" under sec. 19.32(2).

Section 19.32(2) provides that "[r]ecord does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working."

The preliminary versions of the document would constitute "drafts" as that term is used in section 19.32(2). Section 990.01 provides:

Construction of laws; words and phrases. In the construction of Wisconsin laws the words and phrases which follow shall be construed as indicated unless such construction would produce a result inconsistent with the manifest intent of the legislature:

(1) GENERAL RULE. All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning.

The word "draft" is not a technical word, and its common and approved definition is "constituting a preliminary or tentative version." Webster's Seventh New Collegiate Dictionary 251 (1972).

Consequently, all preliminary versions of a document prepared by an employe for his or her own or another's signature do not constitute "records" under section 19.32(2). When statutory language is clear and unambiguous on its face, the intention of the Legislature is to be determined from the plain meaning of the statute itself. *State v. Engler*, 80 Wis. 2d 402, 406, 259 N.W.2d 97 (1977).

2. Are copies of documents received from other agencies purely for informational purposes and concerning matters not affecting the Department's functions subject to disclosure under the open records law?

Section 19.32(2) defines "record" to include any material "which has been created or is being kept by the authority." Section 16.61(2)(b) defines "record" to include any material "made, or

received by any agency of the state or its officers or employes in connection with the transaction of public business” Section 19.21(1) provides:

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.

These statutes should be construed together and read to include as public records materials that the officer is under a legal duty or obligation to preserve and that have some relation to the function of his or her office. This is clear from section 19.31, which declares as public policy the right of the electorate to be informed “regarding the affairs of government and the official acts of those officers and employes who represent them.” *See also* prior opinions of this office.*

In my opinion, the documents you describe would not have sufficient connection with the function of your office to qualify as public records and, therefore, would not have to be preserved or disclosed by you.

3. May the costs of separating confidential information from non-confidential information under sec. 19.36(6), as created by ch. 335, Laws of 1981, be charged to the person who requests access to the record?

Section 19.36(6) provides that “[i]f a record contains information that may be made public and information that may not be made public, the authority having custody of the record shall provide the information that may be made public and delete the information that may not be made public from the record before release.” Since there is no provision made therein or elsewhere in the law for charg-

* 63 Op. Att’y Gen. 400, 401 (1974) and 31 Op. Att’y Gen. 195, 196 (1942).

ing such separation costs to the person who requests access to the record, the agency must bear such costs.

4. Are the actual and punitive damages and the forfeitures provided for in subsecs. 19.37(2) through 19.37(4) the liability of the agency or of the legal custodian? If they are the liability of the custodian, does sec. 895.46, Stats., provide for indemnification?

The relevant subsections of section 19.37 provide as follows:

(2) **COSTS, FEES AND DAMAGES.** The court shall award reasonable attorney fees, damages of not less than \$100, and other actual costs to the requester if the requester prevails in whole or in substantial part in any action filed under sub. (1). Costs and fees shall be paid by the authority affected or the unit of government of which it is a part, or by the unit of government by which the legal custodian under s. 19.33 is employed and may not become a personal liability of any public official.

(3) **PUNITIVE DAMAGES.** If a court finds that an authority or legal custodian under s. 19.33 has arbitrarily and capriciously denied or delayed response to a request or charged excessive fees, the court may award punitive damages to the requester.

(4) **PENALTY.** Any authority which or legal custodian under s. 19.33 who arbitrarily and capriciously denies or delays response to a request or charges excessive fees may be required to forfeit not more than \$1,000. Forfeitures under this section shall be enforced by action on behalf of the state by the attorney general or by the district attorney of any county where a violation occurs. In actions brought by the attorney general, the court shall award any forfeiture recovered together with reasonable costs to the state; and in actions brought by the district attorney, the court shall award any forfeiture recovered together with reasonable costs to the county.

It is clear from subsection (2) that actual damages, together with costs and attorney fees, are the liability of the agency and not the legal custodian.

Punitive damages and forfeitures, on the other hand, can be the liability of either the agency or the legal custodian or both. This conclusion is derived not only from the language of subsections (3)

and (4) but also from the legislative history of section 19.37. 1979 Senate Bill 482, which preceded 1981 SB 250, and which was ultimately enacted as sections 19.31 through 19.39, provided that all punitive damages and forfeitures shall be assessed against the "authority." The Legislative Reference Bureau's analysis of engrossed 1979 SB 482 concluded that punitive damages and forfeitures may be assessed against "the affected unit of government." 1981 SB 250 provided that punitive damages and forfeitures shall be assessed against the "authority or custodian." The Legislative Reference Bureau's analysis of engrossed 1981 SB 250 concluded that punitive damages and forfeitures may be assessed against "the officer or agency."

If punitive damages are assessed against the legal custodian, I believe indemnification by the authority would be provided under section 895.46(1)(a). Although it could be argued that this is not so because section 19.37 makes the affected unit of government liable for actual damages and is silent with respect to its liability for punitive damages and forfeitures assessed against the legal custodian, the long-standing administration of section 895.46(1)(a) by this office has been to provide indemnification for punitive damages.

If a forfeiture is assessed against the legal custodian, however, I believe indemnification would not be provided by section 895.46(1)(a). This is so because the general rule is that a unit of government is not liable for forfeitures assessed against its officials. See *Bablitch & Bablitch v. Lincoln County*, 82 Wis. 2d 574, 581, 263 N.W.2d 218 (1978).

In my opinion, section 19.37 was not intended to change the established law with respect to governmental responsibility under section 895.46(1)(a) for punitive damages and forfeitures assessed against governmental officials.

Health And Social Services, Department Of; Probation And Parole; The Department of Health and Social Services has exclusive authority to detain and release a child who has violated the conditions of probation imposed by a court of criminal jurisdiction. The child need not be brought before a juvenile court intake worker if he or she is not also detained as a delinquent. The child can be held in the adult section of the county jail. OAG 29-83

August 9, 1983

LINDA REIVITZ, *Secretary*
Department of Health and Social Services

You have asked several questions presented by the situation in which a child who has been placed on probation by a court of criminal jurisdiction, following waiver of juvenile jurisdiction, commits an act which violates the conditions of probation.

1. You have asked, first of all, whether the Department of Health and Social Services (Department) has exclusive authority to take the child into custody for the violation of probation or other reasons. I have concluded that the Department does have exclusive authority to take the child into custody for the probation violation, but that, when unlawful conduct which violates the conditions of probation constitutes a delinquent act as well, the child may also be taken into custody by a law enforcement officer and held by a juvenile court intake worker under the authority delegated by the Children's Code. The Department has exclusive authority, however, to release the child from the probation hold.

Once the juvenile court properly waives its jurisdiction in a particular case, the criminal court has exclusive jurisdiction over all further proceedings in that case. Sec. 48.18(6), Stats. The juvenile court no longer has any authority to act in the matter. *See id.*

When the criminal court imposes probation as a disposition, the child is placed in the custody of the Department, under the Department's control. Sec. 973.10(1), Stats. The Department then has exclusive statutory authority to take the child into custody for a violation of probation. Sec. 973.10(3), Stats. *See also State ex rel. Cox v. DH&SS*, 105 Wis. 2d 378, 381, 314 N.W.2d 148 (Ct. App. 1981)

(approving Department's issuance of administrative warrant to apprehend probation violator).

But just as a subsequent unlawful act committed by an adult may be both a violation of probation and a crime, *State ex rel. Lyons v. DH&SS*, 105 Wis. 2d 146, 150-51, 312 N.W.2d 868 (Ct. App. 1981), a subsequent unlawful act committed by a child may be both a violation of probation and a delinquent act. Compare *id.* with sec. 48.02(3m), Stats. Since a waiver of juvenile jurisdiction is limited to a particular offense, *Gibson v. State*, 47 Wis. 2d 810, 817, 177 N.W.2d 912 (1970), the juvenile court has jurisdiction over the child with respect to the new delinquent act. Sec. 48.12, Stats. A law enforcement officer has authority to take the child into custody, therefore, and a juvenile court intake worker has authority to hold the child in custody as a delinquent. Ch. 48, subch. IV, Stats.

The person taking the child into custody and the intake worker have authority to release a child from the detention initiated because he committed a delinquent act. Sec. 48.20(2) and (7)(c), Stats. These persons do not have authority, however, to release a child from the detention initiated because he violated the conditions of his probation, even though the same conduct constitutes both the delinquent act and the probation violation.

When an adult commits a criminal act which also constitutes a violation of probation, the criminal court has authority to set bail on the criminal charge, but no authority to release the person from a probation hold placed by the Department. *State ex rel. Foshey v. DH&SS*, 102 Wis. 2d 505, 512, 307 N.W.2d 315 (Ct. App. 1981); *State ex rel. DH&SS v. Circuit Court*, 84 Wis. 2d 707, 267 N.W.2d 373 (1978); *State ex rel. Shock v. DH&SS*, 77 Wis. 2d 362, 366-67, 253 N.W.2d 55 (1977). Since the probationer has lost any presumption of innocence with respect to the criminal conviction for which probation has been imposed, provisions for discretionary release pending proceedings to revoke probation are purely a legislative matter. *Foshey* at 512. Although habeas corpus is available to test the lawfulness of a detention, sec. 782.01, Stats., no legislation presently gives criminal courts discretion to release a detained probationer. *Foshey* at 512. Even when a court orders an offender's release on the criminal charge, therefore, the offender will remain in custody unless the Department also releases the probation hold. *State ex rel. DH&SS v. Circuit Court*.

The same rationale applies with increased vigor to juvenile courts, whose jurisdiction is defined and limited by the statutes. *See generally Matter of D.V.*, 100 Wis. 2d 363, 366, 302 N.W.2d 64 (Ct. App. 1981). Nothing in the Children's Code or other statutes presently authorizes the juvenile court or its attendants or employees to release a child from detention initiated by the Department for a violation of probation. Read reasonably, the Children's Code provides for release from custody only in those situations in which the child is taken into custody in accord with the authority granted by the Children's Code. *See sec. 48.20(1)*, Stats. And the Children's Code grants no authority to take a child into custody because he has violated the conditions of probation imposed by a court of criminal jurisdiction. *See sec. 48.19(1)*, Stats. To the contrary, as noted earlier, the Children's Code divests the juvenile court of jurisdiction over all future proceedings relating to a particular case once it has determined that jurisdiction should be waived. *Sec. 48.18(6)*, Stats.

Even when juvenile authorities order a child's release in connection with delinquency proceedings, therefore, the child will remain in custody unless the Department also releases the probation hold.

2. Your second question is whether a child who is taken into custody for violating the conditions of probation must be brought before a juvenile court intake worker. I have concluded that such an appearance is not necessary if the child is not also detained as a delinquent.

The Children's Code requires an intake worker to interview "any child who is taken into physical custody and not released" so that a determination can be made whether to release the child or hold him in secure detention. *Sec. 48.067(2)*, Stats. Because a juvenile court intake worker has no authority either to detain a child for a violation of probation or to release a child from a probation hold, this requirement does not apply when the child is held solely on a probation hold. It applies only when the child is held concurrently as a delinquent, and then only in connection with that reason for detention.

3. You have asked, finally, whether a child who is taken into custody for violating the conditions of probation can be held in the adult section of the county jail. I have concluded that he can be held in those quarters when he is detained on a probation hold.

As soon as juvenile jurisdiction is waived, a child who is held in custody must be transferred to an adult facility. Sec. 48.18(8), Stats. It follows from this requirement that any future confinement resulting from the offense on which jurisdiction has been waived must be in an adult facility.

This requirement overrides the provisions of the Children's Code which prohibit a child from being held in the adult section of the jail. Secs. 48.209(1)(b) and (3), Stats. The purpose of these provisions obviously is to prevent children who are merely delinquent from mixing with criminals. But where juvenile jurisdiction has been waived, the child is treated as a criminal. Thus, there is no basis to prevent the child from being transferred to an adult facility.

BCL:TJB

Hospitals; Law Enforcement; In certain circumstances a peace officer may command a physician, or other medical staff at a hospital or clinic, to gather evidence from a sexual assault victim. OAG 30-83

August 9, 1983

DAVID A. SHUDLICK, *District Attorney*
Monroe County

Your letter states that there is a fully staffed hospital and clinic in Sparta, Wisconsin, which is the county seat in Monroe County. This hospital and clinic is located across the street from the Monroe County Sheriff's Department. The Monroe County Sheriff's Department wishes to refer sexual assault victims to this hospital for initial treatment and for the initial gathering of evidence from the person of the victim. Your letter states that in the past both adult and child sexual assault victims had to be transported outside of your county to La Crosse, Wisconsin, a distance of approximately thirty miles, in order to receive initial treatment and to submit to evidence-gathering process. The Monroe County sheriff has advised you that he met with the administrator of the hospital in Sparta to discuss this matter and that the hospital administrator stated that the hospital would not assist in gathering evidence in any of these cases under any circumstances.

You have asked for my opinion as to whether a peace officer has authority to request or command that the qualified medical personnel at your local hospital assist in gathering evidence from a sexual assault victim, and whether the refusal of such qualified hospital staff to so act constitutes a violation of section 946.40, Stats. Your letter does not provide sufficient factual information for me to give you an unqualified opinion on either question. My reasons for not giving unequivocal answers to your questions follow.

The Wisconsin Supreme Court addressed a similar question in *Waukesha Memorial Hospital v. Baird*, 45 Wis. 2d 629, 173 N.W.2d 700 (1970). The *Baird* case was a declaratory judgment action brought by the Waukesha Memorial Hospital against various law enforcement officers. The plaintiffs alleged that the doctors and the hospital might be held liable in tort if they drew blood from nonconsenting allegedly drunk drivers or, conversely, subjected to criminal liability if they refused to do so upon command from various law enforcement officers. The hospital sought a determination of the defendant's authority to order the taking of blood specimens and the legal protections afforded the plaintiffs in obeying such orders. The court discussed at some length the factual circumstances that were relevant to the issues before it and that must be known by the court in order for the court to issue a sound decision. The court dismissed the action, stating:

We recognize that, under some circumstances which this court could imagine, the plaintiffs herein could run the risk of prosecution. Whether such prosecution could be successfully maintained both as to the applicability of a statute and as to whether the facts properly triggered the activation of the statute must abide a case in which the necessary factual underpinnings make possible a judicial determination.

Baird at 643.

Like the complaint in *Baird*, your letter provides a general description of a problem. The *Baird* case makes it clear that the authority of a law enforcement officer to command medical personnel to assist in the gathering of evidence, if such authority exists, depends on the specific circumstances involved. I am, therefore, of the opinion that local law enforcement officers do not have the authority to command medical personnel of your local clinic to

gather evidence from sexual assault victims as a matter of routine. However, it is also my opinion that a law enforcement officer may command such assistance when certain circumstances exist.

Section 946.40 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 does not enumerate the circumstances under which an officer is authorized to command assistance. The circumstances under which an officer is authorized to command assistance must be ascertained by reference to other authority.

In 68 Op. Att'y Gen. 209 (1979), I answered the same questions you have addressed in relation to a peace officer's command that hospital staff members administer chemical tests, including blood tests, pursuant to section 343.305(1). It was my opinion that the hospital staff must comply with the peace officer's request to administer a specific chemical test unless the person who was to be the subject of the test was conscious and refused to submit to the test. My opinion relied on both section 343.305(1), which mandated that such tests "shall be administered upon the request of a law enforcement officer" and on a law enforcement officer's right to command assistance from citizens, which is frequently referred to as the officer's right to summon a posse comitatus. There is no statutory counterpart to section 343.305(1) with respect to the gathering of evidence from a sexual assault victim. Therefore, a peace officer's authority to command such assistance depends entirely on the officer's authority to command citizens to aid them in the discharge of their duties.

At common law, a peace officer had authority to summon citizens to aid in the discharge of the officer's duties. The common law right of a peace officer to summon citizens to aid in the discharge of his or

her duties is codified in section 59.24, which provides in pertinent part:

PEACE MAINTENANCE; POWERS AND DUTIES OF PEACE OFFICERS, CO-OPERATION. (1) Sheriffs and their undersheriffs and deputies shall keep and preserve the peace in their respective counties ... for which purpose ... 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.

The duty to secure evidence is not specifically described in section 59.24. This is not surprising in light of the fact that section 59.24 is a codification of a common law power of ancient origin. The modern day role of scientific analysis of evidence in the apprehension of criminal felons was unknown at common law. However, in modern times, the gathering of evidence for scientific analysis is frequently a critical stage in the apprehension of a criminal felon. In fact, in certain cases the successful apprehension of a sexual assault felon may be more seriously threatened by the loss of crucial identifying evidence than by the possibility that the offender might outrun the police. Since this activity appears to be within the intent of section 59.24, section 59.24 may be construed to authorize a law enforcement officer to command the assistance of a citizen in the gathering of evidence. As Mr. Justice Cardoza opined in regard to the modern day citizen's 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 parlay about the ownership of a vehicle in the possession of another where there is need of hot pursuit.

Babington v. Yellow Taxi Corporation, 250 N.Y. 14, 164 N.E. 726 (1928).

The authority of a law enforcement officer to command assistance from citizens is not unlimited. This office previously said of section 59.24, "[t]he statute contemplates *necessity* as the occasion for summoning assistance." 47 Op. Att'y Gen. 209, 214 (1958). It has also been held that a peace officer's request for assistance must

be reasonable. See *Williams v. State*, 253 Ark. 973, 490 S.W.2d 117, 122-23 (1973). In addition, in the circumstances you describe a law enforcement officer may not interfere with the consensual nature of a physician-patient relationship. Therefore, a law enforcement officer may command assistance in the gathering of evidence only when the assistance is ancillary to an established physician-patient relationship. Finally, the victim-patient must consent.

In summary, a law enforcement officer is authorized to command medical personnel to gather evidence from a sexual assault victim when the command occurs in the context of an existing physician-patient relationship, the patient consents to the evidence gathering, the assistance is necessary to preserve the evidence and reasonable in light of the particular circumstances that exist at the time. When each of these stated conditions exist, an officer may command medical personnel to assist in gathering evidence from a sexual assault victim and a refusal to do so constitutes a violation of section 946.40.

It is unlikely that each of these conditions can be met in all sexual assault cases. For example, although your letter refers to the importance of timing in gathering evidence from a sexual assault victim, it does not specify the time period during which such evidence may effectively be gathered. The time period during which evidence may effectively be gathered from a sexual assault victim undoubtedly varies from case to case depending on the amount of time that has passed before a law enforcement officer learns of the sexual assault. Obviously, the necessity for assistance depends on the likelihood that the evidence will be destroyed by the delay as well as the effort entailed in transporting the victim to a hospital outside of the county.

Similarly, the reasonableness of a law enforcement officer's request for assistance in these cases depends on the totality of the circumstances. The capabilities of the hospital and clinic, the victim's medical needs and other patients' medical needs are among the factors that must be considered in assessing the reasonableness of the officer's request.

In determining whether or not the local law enforcement officer's request is reasonable, it is logical to consider the capabilities of the hospital or clinic from which assistance is requested. Section 146.301 bears on this situation in that it clarifies the responsibility of

hospitals providing emergency services to accept emergency cases when such are within its capabilities. Section 146.301 provides:

REFUSAL OR DELAY OF EMERGENCY SERVICE. (1)

In this section "hospital providing emergency services" means a hospital which the department has identified as providing some category of emergency service.

(2) No hospital providing emergency services may refuse emergency treatment to any sick or injured person.

....

(4) No hospital may be expected to provide emergency services beyond its capabilities as identified by the department.

(5) Each hospital providing emergency services shall create a plan for referrals of emergency patients when the hospital cannot provide treatment for such patients.

(6) The department shall identify the emergency services capabilities of all hospitals in this state and shall prepare a list of such services. The list shall be updated annually.

(7) A hospital which violates this section may be fined not more than \$1,000 for each offense.

Your local hospital has been designated by the Department of Health and Social Services as a hospital providing "emergency services." Certainly any hospital that is defined as providing emergency services should, absent peculiar medical complications, be capable of gathering evidence from a victim in the course of its treatment of the victim. Therefore, it would normally be reasonable for a local law enforcement officer to request the staff of your local clinic to gather evidence from a sexual assault victim where the other conditions have been met.

Your letter does not state whether the local hospital's refusal to become involved in sexual assault cases extends beyond a refusal to gather evidence from sexual assault victims to a refusal to provide emergency services to sexual assault victims. If the hospital is refusing to provide emergency medical services to sexual assault victims, recourse may be had to section 146.301.

Finally, your letter also does not state whether the request for assistance occurs in the context of the provision of medical treatment

to the sexual assault victim or whether the victim consents to the evidence gathering desired by the police officer. Each of these factors bear on a law enforcement officer's authority to command assistance in the gathering of evidence from a sexual assault victim.

It is my opinion that a law enforcement officer does have authority to command medical personnel to assist in the gathering of evidence from a sexual assault victim. However, until the Legislature enacts a statute empowering a law enforcement officer to command assistance in the gathering of evidence from a sexual assault victim in all cases, the officer's authority to so command is limited to the circumstances I have described.

You may wish to seek assistance from the Department of Health and Social Services in obtaining the cooperation of your local hospital in evidence-gathering services. In addition, you may wish to address the concerns stated in your letter to your local legislator and request legislation that expressly mandates the assistance you are seeking from qualified medical personnel in all cases. Such legislation would certainly be consistent with the Legislature's recent expression of concern over the treatment of victims of crimes of violence.

BCL:DMN

Corporation Counsel; County Board; Although a county board in a county with a population of under 500,000 has no permanent or continuing authority to retain special counsel, it may obtain special counsel with the approval of the circuit court under section 59.44 on a case-by-case basis in those situations where the district attorney or corporation counsel is unable to continue to perform his or her duties without potentially violating the rules of professional conduct established by the Wisconsin Supreme Court. Unless otherwise provided by statute, in those situations where legal services are required in civil matters and the provisions of section 59.44 cannot be utilized, the district attorney or corporation counsel has the exclusive authority to perform or supervise the provision of those services. OAG 31-83

August 11, 1983

FRANK VOLTPIRESTA, *Corporation Counsel*
Kenosha County

You inquire as to the circumstances which would permit the county board to retain special counsel not responsible to the corporation counsel. Your inquiry arises from a situation where a dispute existed between the county executive and the county board concerning the appointment of members of the welfare board. You have also expanded your inquiry to encompass situations involving labor negotiations, labor litigation and litigation where counsel is retained by the county's insurance carriers.

It is my opinion that the county board has no permanent or continuing authority to retain special counsel, but may, subject to the approval of the circuit court under section 59.44, Stats., retain special counsel on a case-by-case basis where the district attorney or corporation counsel is unable to continue to perform his or her duties without potentially violating the rules of professional conduct established by the Wisconsin Supreme Court. In situations where legal services are required in civil matters and the provisions of section 59.44 or another specific statute cannot be utilized, the district attorney or corporation counsel has the exclusive authority to perform or supervise the provision of those legal services.

In a county with a population of under 500,000, the corporation counsel's authority is derived from sections 59.07 and 59.47. Section 59.07 provides, in part:

The board of each county may

.....

(44) ... In counties not having a population of 500,000 or more, employ a corporation counsel, and fix his salary. The corporation counsel may, when authorized by a majority of the county board, appoint one or more assistant corporation counsels to aid him in the performance of his duties. The assistants so appointed shall have authority to perform all the duties of the corporation counsel. His employment may be terminated at any time by a majority vote of all the members of the board. The duties of the corporation counsel shall be limited to civil matters and may include giving legal opinions to the board and its com-

mittees and interpreting the powers and duties of the board and county officers. Whenever any of the powers and duties conferred upon the corporation counsel are concurrent with similar powers or duties conferred by law upon the district attorney, the district attorney's powers or duties shall cease to the extent that they are so conferred upon the corporation counsel and the district attorney shall be relieved of the responsibility for performing such powers or duties.

The powers of the district attorney which may be transferred to the corporation counsel are enumerated in section 59.47. In addition to the many specific powers listed throughout sections 59.47(5)-(6) and (8)-(14), the district attorney in a county which has not established the office of corporation counsel also possesses the general authority under section 59.47 to:

(1) Prosecute or defend all [civil] actions, applications or motions ... in the courts of his county in which the state or county is interested or a party; and when the place of trial is changed in any such action or proceeding to another county, prosecute or defend the same in such other county.

. . . .

(3) Give advice to the county board and other officers of his county, when requested, in all [civil] matters in which the county or state is interested or relating to the discharge of the official duties of such board or officers

Ordinarily, when a county board creates the office of corporation counsel, it transfers all of these general functions from the district attorney to the corporation counsel. The ensuing discussion assumes that in those counties which have established the office of corporation counsel, a complete transfer of such general statutory authority has occurred.

Regardless of whether the district attorney or corporation counsel provides legal services in civil matters pursuant to section 59.47(1) and (3), his or her client is the county. Since the client is a quasi-municipal corporation, the provision of legal services to the county board and to all county officers has been mandated by statute.

I have previously indicated that, unless otherwise specifically provided by statute, the duty to provide or supervise the provision of legal services in civil matters is vested exclusively in the district attorney or corporation counsel. *See, e.g.*, 70 Op. Att'y Gen. 136 (1981); 65 Op. Att'y Gen. 138 (1976). You note an apparent conflict between my recent opinions and some earlier opinions of my predecessors which were issued before counties were first authorized to establish the office of corporation counsel pursuant to chapter 186, Laws of 1949. *See, e.g.*, 28 Op. Att'y Gen. 162 (1939); 27 Op. Att'y Gen. 162 (1938). These earlier opinions conclude that the district attorney is under no obligation to perform legal services in those civil matters not specifically enumerated in section 59.47, but indicate that the county board may employ special counsel to perform those services. These earlier opinions go so far as to hold that the district attorney need not handle many kinds of routine civil matters, including proceedings before state administrative agencies. *See* 27 Op. Att'y Gen. 162 (1938).

When these earlier opinions were issued, it was not apparent that the Legislature intended that the district attorney handle all civil matters in which the county had an interest. Once chapter 186, Laws of 1949, was enacted, however, a broad and liberal construction of the powers of the corporation counsel or district attorney, as required by section 59.07(intro.), required the conclusion that the district attorney or corporation counsel perform or supervise the provision of all civil legal services for the county, unless other specific statutory provisions applied. That continues to be my opinion.

In *Frederick v. Douglas County*, 96 Wis. 411, 71 N.W. 798 (1897), the Wisconsin Supreme Court held that a county board, acting of its own volition and without the approval of the circuit court, lacked statutory authority to appoint an attorney to assist the district attorney in defending tax cases, even though the county was engaged in an unusual amount of civil litigation. In apparent reaction to this decision, the Legislature attempted to aid district attorneys by enacting what is now section 59.44(3), which provides that:

When there is an unusual amount of civil litigation to which the county is a party or in which it is interested, the circuit court may, on the application of the county board, by order filed with the clerk of said county, appoint an attorney or attorneys to assist the district attorney, and fix his or their compensation.

Although the retention of a labor negotiator, of counsel to engage in labor litigation, and of insurance company counsel must be consistent with this statute, other statutory provisions may also apply.

A labor negotiator need not necessarily be an attorney. As long as no legal services within the meaning of section 59.47 (1) and (3) are performed, the employment of such a person falls within the general authority of the board to manage its business and concerns under section 59.07(5). There is no special statute authorizing a county board to retain independent counsel to engage in labor litigation. Unless a conflict of interest situation has arisen, counsel who performs labor litigation must therefore be an assistant district attorney or an assistant corporation counsel, or be supervised by the district attorney or corporation counsel under section 59.44(3). The purchase of insurance is authorized under section 59.07(2). It is the insurance company, not the board, who retains counsel when insurance is purchased. The primary allegiance of such counsel is therefore to the insurance company, rather than the county. The district attorney or corporation counsel has a duty to monitor those situations where insurance company counsel is utilized. If the interests of the insurance company and the county should diverge, the district attorney or corporation counsel must provide representation to the county. The county board may be permitted to retain special counsel not responsible to the district attorney or corporation counsel in certain kinds of civil matters, but specific statutory authorization to do so must be found.

In general, the district attorney or corporation counsel assumes office *cum onere* and is required to provide all needed legal services. 70 Op. Att'y Gen. 136, 138 (1981). Section 59.44(3) is therefore of limited use in a conflict of interest situation because the need to engage in an unusual amount of civil litigation often cannot be demonstrated. Even though a single complex suit may involve an unusual amount of civil litigation, if an unusual amount of civil litigation is neither pending nor likely to be commenced, the provisions of section 59.44(3) may not be used. See 70 Op. Att'y Gen. 234, 236 (1981); 34 Op. Att'y Gen. 188 (1945). Moreover, since employment under section 59.44(3) involves providing "assist[ance] to the district attorney [or corporation counsel]," his or her supervisory authority remains paramount under that statute.

In *Frederick*, the court had no occasion to consider whether the county board could have availed itself of the provisions of what is now section 59.44(1), which provides:

When there is no district attorney for the county, or he is absent from the county, or has acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged and for which he is to be tried, or is near of kin to the party to be tried on a criminal charge, or is unable to attend to his duties, or is serving in the armed forces of the United States, or if the district attorney stands charged with a crime and the governor has not acted under s. 17.11, any judge of a court of record, by an order entered in the record stating the cause therefor may appoint some suitable person to perform for the time being, or for the trial of such accused person, the duties of such district attorney, and the person so appointed shall have all the powers of the district attorney while so acting.

Where the district attorney or corporation counsel is under some disability, the provisions of section 59.44(1) may be utilized. The disability need not necessarily be physical. *Cf.* 30 Op. Att’y Gen. 51, 56 (1941). Moreover, the disability need not be general in nature; it may be limited to isolated cases or situations. *See Zeidler v. State*, 189 Wis. 44, 206 N.W. 872 (1926); 9 Op. Att’y Gen. 266 (1920).

I am of the opinion that a district attorney or corporation counsel is “unable to attend to his [or her] duties” within the meaning of section 59.44(1) when the continued performance of those duties would potentially violate the rules of professional conduct established by the Wisconsin Supreme Court. SCR 20.28 provides as follows:

Refusing to accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer. (1) A lawyer shall decline proffered employment if the exercise of the lawyer’s independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under sub. (3).

(2) A lawyer may not continue multiple employment if the exercise of the lawyer’s independent professional judgment in behalf of a client will be or is likely to be adversely affected by the

lawyer's representation of another client, except to the extent permitted under sub. (3).

(3) In the situations covered by subs. (1) and (2), a lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each.

(4) If a lawyer is required to decline employment or to withdraw from employment under this rule, no partner or associate of the lawyer or his or her firm may accept or continue that employment.

In addition, SCR 20.24(1) provides that: "Except with the consent of the client after full disclosure, a lawyer may not accept employment if the exercise of his or her professional judgment on behalf of the client will be or reasonably may be affected by his or her own financial, business, property or personal interests."

There is no inherent conflict between providing representation to the county board and providing such representation to the county executive or other county officers. Conceptually, the situation is similar to acting as corporate counsel for a private corporation with a board of directors, a chief executive officer and a number of department heads. As a practical matter, however, providing representation to the county is more complicated because many county officers are elected and because the division of authority between county officials is not always clearly defined. As I indicated in 68 Op. Att'y Gen. 92, 96 (1979), legal complications may very well arise if a county establishes the office of 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 dis-

putes 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.

The likelihood that legal complications may occur increases in a county which has both a county executive and a corporation counsel. Section 59.032(2) grants the county executive administrative and managerial authority over almost all aspects of county government, including those under the auspices of the corporation counsel. Under section 59.07(44), however, it is the county board which possesses the authority to terminate the corporation counsel's employment. The corporation counsel is therefore responsible in some degree to both the county board and the county executive. The corporation counsel is also required to provide legal assistance to all other county officers pursuant to section 59.47(1) and (3).

Although the true client of the district attorney or corporation counsel is the county, there may be situations where potential conflicts of interest arise in attempting to serve that client. While it is impossible to predict all situations in which conflicts may occur, a district attorney or corporation counsel may well face a potential conflict if there is litigation between the county board and the county executive.

Section 59.07(1)(b) empowers the county board to commence actions to protect the interests of the county. If the district attorney or corporation counsel has made full disclosure of an apparent conflict between serving the legal interests of the county board and the county executive or some other county officer and has been unable to resolve that conflict, application for one or more special counsel may be made by the county board, district attorney or corporation counsel to the circuit court under section 59.44(1). If the circuit court is satisfied that a potential conflict exists and that the situation is of sufficient gravity to warrant the expenditure of public funds pursuant to section 59.44(4), it should appoint special counsel to represent the county board and/or those county officers entitled to receive legal services under section 59.47(1) or (3).

Section 59.44 may also be utilized in fact situations other than those which you have described. Unless section 59.44 or some other specific statute authorizes the county board to employ special counsel, the district attorney or corporation counsel has the exclusive

authority to perform or supervise the provision of legal services in civil matters.

BCL:FTC

Licenses And Permits; Pharmacy; Out-of-state pharmacist not registered in Wisconsin is in violation of sections 450.04(2) and 450.07(3), Stats., where he or she on a regular and continuing basis solicits orders for the retail sale of prescription drugs, where preparation is out-of-state and delivery is by mail to patients located in Wisconsin. OAG 33-83

August 23, 1983

BARBARA NICHOLS, *Secretary*
Department of Regulation and Licensing

The Pharmacy Examining Board has requested my opinion on several questions regarding the application of chapter 450, Stats., which regulates the practice of pharmacy in Wisconsin, to out-of-state pharmacies that regularly and continually solicit mail orders for the retail sale of prescription drugs to Wisconsin residents. The issues presented in your request have been restated below:

1. Does chapter 450 authorize the Pharmacy Examining Board to extend its licensing and registration requirements to out-of-state pharmacies which solicit mail-order sales from Wisconsin residents?
2. Does the regulation of an out-of-state pharmacy by the Wisconsin Pharmacy Examining Board, whether pursuant to a specific statute or based on an implied legislative mandate, establish an unconstitutional burden on interstate commerce?
3. If it is assumed that out-of-state pharmacies may dispense prescriptions by mail to Wisconsin residents without being licensed, must the pharmacies nevertheless comply with the other provisions of chapter 450 regarding the dispensing of prescription drugs?

I have concluded that chapter 450 may be applied to regulate out-of-state pharmacies when they regularly and continually solicit mail-

order sales of prescription drugs from Wisconsin residents. Although chapter 450 does not explicitly require out-of-state pharmacists to become licensed or registered in Wisconsin, an implied power to regulate them when they solicit orders from Wisconsin residents may be inferred from the statute. With regard to the second issue, it is my opinion that application of chapter 450 to out-of-state pharmacists does not create an unconstitutional burden on interstate commerce. An opinion on the third issue is not necessary, since I have concluded that out-of-state pharmacies may not dispense prescriptions to Wisconsin residents without being licensed by the state. Therefore, they are compelled to comply with all the other provisions of chapter 450.

Section 450.04(2) provides in part: "No person may sell, give away, barter, compound or dispense drugs, medicines or poisons ... unless he or she is a registered pharmacist"

Section 450.07(3) provides: "No person, except a registered pharmacist or a practitioner, shall prepare, compound, dispense or prepare for delivery for a patient any prescription drug."

An analysis of the applicable case law underscores the strong policy considerations in favor of a statutory interpretation which would permit the Pharmacy Examining Board to regulate out-of-state pharmacies when they solicit mail-order sales from Wisconsin residents. As a general proposition, the courts have uniformly held that a state may enact safety regulations under the police power in the interest of the public health and welfare. *State v. Wetzel*, 208 Wis. 603, 243 N.W. 768 (1932); *Bisenius v. Karns*, 42 Wis. 2d 42, 165 N.W.2d 377 (1969); see also 16A Am. Jur. 2d *Con Law* § 417. In more specific terms, the regulation of pharmacies has been recognized as a legitimate exercise of the state's police power to act for the protection of the public health and general welfare. *Milligan v. Board of Registration in Pharmacy*, 348 Mass. 491, 204 N.E.2d 504 (1965); *Harvey v. Peters*, 237 Ark. 687, 375 S.W.2d 654 (1964); see also 25 Am. Jur. 2d *Drugs, Narcotics and Poisons*, §§ 7, 8.

Thus, the Wisconsin Supreme Court has held that the state may, through the exercise of its police power for the protection of the public health, regulate the sale of drugs. *The State v. Heinemann*, 80 Wis. 253, 49 N.W. 818 (1891); see also *State v. Wakeen*, 263 Wis. 401, 57 N.W.2d 364 (1953) and *Butala v. State*, 71 Wis. 2d 569, 239 N.W.2d

32 (1976). These cases refer only to intrastate sales of prescription drugs. Nevertheless, they provide compelling authority for the proposition that Wisconsin's pharmacy laws are designed to "protect the health and lives of citizens throughout the state from improper, dangerous, and destructive compounds, put up by incompetent or inefficient persons." *Heinemann*, 80 Wis. at 256.

Generally, statutes should be broadly construed in order to effect their legislative purpose. *State ex rel., McGrael v. Phelps*, 144 Wis. 1, 9, 128 N.W. 1041 (1910). In attempting to discern the legislative purpose behind the pharmacy laws, the Wisconsin Supreme Court has commented that beginning with the first act regulating the practice of pharmacy in 1882, "through the subsequent amendments of 1895 and 1897, which completely prohibited sale by anyone except a registered pharmacist, the legislature placed increasingly greater restrictions and limitations upon the dispensing and compounding of prescriptions and the sale of drugs." *State v. Maas*, 246 Wis. 159, 163, 16 N.W.2d 406 (1944). Taking into account the historical trend in favor of greater restrictions on the sale of drugs and the obligation to consider the underlying purpose of former statute section 151.04(2) (since renumbered section 450.04(2)), the court in *Maas* found a violation of the statute when a registered pharmacist allowed an unregistered clerk to dispense drugs. *Id.* at 159. These same considerations are also important in determining whether sections 450.04(2) and 450.07(3) apply to out-of-state pharmacists.

In *Meyers v. Matthews*, 270 Wis. 453, 71 N.W.2d 368 (1955), a regulatory statute was held applicable to out-of-state collection agencies which solicited in Wisconsin by mail. The relevant statute in that case was section 218.04(2), which provides that "[n]o person shall operate as a collection agency or as a collector or solicitor in this state without first having obtained a license as required by this section." The court concluded that since the collection agency was doing business with Wisconsin residents through its agents, it was subject to the provisions of section 218.04. Thus, in the case of a statute which did not explicitly refer to "foreign collection agencies," and was just as broad as sections 450.04(2) and 450.07(3), it was held that the statute should nevertheless apply. This suggests that a similar holding would be reached in a situation involving an out-of-state pharmacist.

Having concluded that chapter 450 authorizes the Pharmacy Examining Board to regulate out-of-state pharmacies that transact business with Wisconsin residents, the question remains whether this licensing requirement establishes an unconstitutional burden on interstate commerce.

A threshold inquiry is whether personal jurisdiction over the out-of-state operation has been established. The general standard is that personal jurisdiction is established if the foreign corporation has "minimum contacts" with the forum state. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). However, in the case of regulation, "the connection between a state and the regulated person must be of a more substantial character than the 'minimum contacts' needed to support judicial process running against a person." *Aldens v. La Follette*, 552 F. 2d 745, 751 (7th Cir. 1977). The governing standard in the case of regulatory statutes was enunciated in *National Liberty Life Ins. Co. v State*, 62 Wis. 2d 347, 215 N.W.2d 26 (1974): "[c]ontacts that would justify regulatory provisions as to one type of business might not as to another because of the greater interest of the state in the former than in the latter. Thus, a State can properly regulate an insurance business based upon contacts which would not support regulation of a greeting card business, for example." *Id.* at 354 (emphasis in original). Since the state interest in regulating the practice of pharmacy has already been demonstrated as very great, the contacts required to justify regulation of out-of-state pharmacies are necessarily quite minimal.

As stated earlier, state regulations concerning the sale of prescription drugs have been upheld as a valid exercise of the police power to act for the protection of the public health and general welfare. Such regulations are not rendered unconstitutional even though they may indirectly affect interstate commerce since Congress has not expressed an intent to preclude states from entering this area. *Pharmaceutical Soc. of New York v. Lefkowitz*, 454 F. Supp. 1175 (S.D. N.Y. 1978). I conclude, therefore, that in balancing the strong interest of Wisconsin in regulating the sale of prescription drugs from out-of-state pharmacies to state residents against the incidental effect of the regulation on interstate commerce, there exists no undue burden on such commerce.

It should also be noted that the application of chapter 450 does not discriminate against nonresidents or grant special privileges and

immunities to residents. *State v. Evans*, 130 Wis. 381, 110 N.W. 241 (1907). Since chapter 450 evenly regulates resident as well as nonresident pharmacists, it could not be construed as a discriminatory burden on interstate commerce.

You have also inquired whether out-of-state pharmacists would have to comply with other "dispensing laws" of this state. An opinion on this issue is not necessary since it has already been decided that out-of-state pharmacies must comply with all the requirements of chapter 450. Nevertheless, your inquiry suggests that there may be some venue problems in enforcing the statute. These are briefly discussed below in order to help facilitate enforcement efforts by your Department.

Violation of sections 450.04(2) and 450.07(3) is punishable by fine or imprisonment under sections 450.05(1) and 450.07(12). In a criminal prosecution, venue may be established under section 939.03(1)(a), (b) or (c). In a civil proceeding, personal jurisdiction over a pharmacist located in another state who delivers prescriptions in Wisconsin can be established under section 801.05(4). However, it should be noted that significant practical problems are often presented in enforcing state laws against out-of-state firms. These practical problems should be carefully considered before the Department undertakes enforcement action against an out-of-state pharmacist.

It should also be noted that the out-of-state pharmacist who solicits, prepares, dispenses and delivers would not be the only person in violation of Wisconsin law. A Wisconsin resident who procured such prescription drugs and had them in his or her possession would be in violation of section 450.07(7), which provides: "It is unlawful for any person to have any prescription drug in his or her possession unless such drug was obtained in compliance with this section."

Business; Marketing And Trade Practices; Words And Phrases; Under section 100.30(2)(n), Stats., a retailer may not deduct a manufacturer's conditional promotional allowance as a trade discount for purposes of determining "cost to retailer" and lowest legal retail selling price, even though the amount of the allowance exceeds the retailer's cost of performance in meeting the terms and conditions of the allowance. OAG 34-83

August 24, 1983

LA VERNE AUSMAN, *Secretary*

Department of Agriculture, Trade and Consumer Protection

You have requested my opinion regarding interpretation of section 100.30(2)(n), Stats., as it relates to the practice of retail grocers deducting manufacturers' conditional promotional allowances as "trade discounts" for purposes of determining the "cost to retailer" and lowest legal retail selling price under section 100.30(2)(b).

You state that there are manufacturers' allowances currently prevalent in the marketplace where the cost needed to be expended by the retailer to satisfy the terms and conditions of the allowance does not bear any relationship to the amount of the allowance. In fact, the amount of the allowance usually exceeds the cost of performance. You cite four examples:

1. A manufacturer offers an allowance per product unit which is conditioned on the retailer's advertising the product. There are no qualifications as to the size of the advertisement and the manufacturer permits the retailer to use handout flyers and other on-premises advertising to fulfill the condition of the promotion. As a result, the amount of the allowance is in no way related to the cost of the advertising and can exceed that cost, depending strictly on how the retailer chooses to advertise the product.
2. A manufacturer offers an allowance per product unit which is conditioned on the retailer displaying the product in the store in a way other than the way the product is normally exhibited for sale. The cost to the retailer consists solely of the allocated cost of the floor space made available for the special

display and frequently, but not always, the labor expended in setting up the display. The amount of the allowance does not relate to the retailer's actual cost of the display and almost invariably exceeds that cost.

3. A manufacturer offers an allowance per product unit conditioned on the retailer's reducing the regular selling price of the product. The amount of the price reduction required is not specified. The only "cost" to the retailer to comply with this condition is the cost of temporarily reducing the price of the item. Therefore, the amount of the allowance usually far exceeds the cost to the retailer to reduce the price.
4. A manufacturer offers an allowance conditioned on performance by the retailer of one of several conditions, giving the retailer the choice of what to do to qualify for the allowance. The usual choices of type of performance are either: advertising or display; or advertising, display or price reduction. The conditions for each type of performance are the same as outlined in the previous three examples, and the amount of the allowance relates to the "cost" of performance in accordance with which type of performance the retailer chooses as explained in the previous examples.

Your question is whether any of the four allowances listed above can be deducted as a trade discount from the invoice cost in determining the cost to retailer under section 100.30. Section 100.30(2)(b) and (2)(n) provides:

(2)(b) "Cost to retailer" means the invoice cost of the merchandise to the retailer within 30 days prior to the date of sale, or replacement cost of the merchandise to the retailer, whichever is lower, *less all trade discounts* except customary discounts for cash, plus any excise taxes imposed on such merchandise or the sale thereof other than excise taxes collected by the retailer, and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, to which shall be added a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be 6% of the cost to the retailer as herein set forth.

(2)(n) The term “trade discount” shall not include advertising, display or promotional allowances in the absence of a statement in writing from the grantor that receipt of such allowance is not conditioned on the performance of any service or expenditure of any money for promotion, advertising or any other purpose.

Section 100.30(2)(n) broadly excludes conditional promotional allowances from the term “trade discount.” There is no indication from the wording of subsection (2)(n) that it is intended to apply to a conditional allowance only to the extent that the allowance compensates the retailer for the actual cost of advertising, display or other form of promotional service or expense. The fact that a manufacturer’s conditional allowance exceeds the retailer’s cost of fulfilling the requirements for its receipt also does not make it any less of a conditional promotional allowance. Nor does the fact that the retailer elects to “pass through” the allowance “excess” to customers make it any less conditional in nature.

Trade discounts relate to prices charged by a manufacturer or wholesaler. See *State v. Eau Claire Oil Co.*, 35 Wis. 2d 724, 740, 151 N.W.2d 634 (1967). They customarily allow for differences in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which merchandise is sold or delivered to retailer customers. This differs from payments and allowances to retailers made in consideration for services, facilities or other things of value furnished by retailers. Such a difference is reflected in the well-established distinction made by sections 2(a) and 2(e) of the federal Robinson-Patman Act, 15 U.S.C. § 13. In my opinion the term “trade discount” under section 100.30 means a deduction from a manufacturer’s (or other supplier’s) list price which ostensibly relates solely to the terms and conditions of sale to the retailer, unless some other form of deduction is explicitly included or excluded by the statute itself. The conditional allowances which you describe are, by their very terms, not intended and offered by the manufacturer purely as a reduction of the list price of goods sold. Rather, they are allowed because of some condition of performance relating to product advertising or promotion which the retailer must meet, however minimal.

I further conclude that the fact that a retailer chooses to directly or indirectly pass on to its customers that portion of a manufacturer’s conditional promotional allowance which amounts to “sav-

ings” is immaterial to whether the allowance qualifies as a trade discount for purposes of section 100.30(2)(n). In *Eau Claire Oil Co.*, 35 Wis. 2d at 740, the court stated that it was “abundantly clear that a trade discount is given by a wholesaler or manufacturer to the retailer, not by the retailer to a customer or patron, as defendant would have this court hold.”

At first blush it may appear that by not being permitted to apply the “savings” portion of a conditional allowance against invoice cost, a retailer will be forced to use a “cost” that isn’t actually a cost for purposes of complying with section 100.30(2)(b) or (2)(k). However, both subsections (2)(b) and (2)(c) provide a mechanism for consideration of any bona fide reduction in the cost of doing business by permitting the retailer to make “proof of a lesser cost” than the prescribed minimum markup. The matter of proving a lesser cost of doing business under section 100.30 is discussed in 53 Op. Att’y Gen. 1 (1964).

Finally, it should be noted that under section 100.30(2)(n) the Legislature has permitted retailers to maximally use manufacturers’ promotional allowances to reduce “invoice cost” for purposes of computing lowest legal selling price by allowing full deduction of such an allowance when it is not conditional on retailer performance of service or expenditure.

BCL:DAM

Indians; Municipality must pay five dollar nonrefundable fee provided for in section 814.63(2) where a forfeiture action has been disposed of in circuit court after transfer from municipal court upon demand for jury. OAG 35-83

August 24, 1983

GEORGE E. RICE, *Acting Corporation Counsel*
Milwaukee County

You request my opinion as to whether a municipality must pay the five dollar nonrefundable fee provided for in section 814.63(2), Stats., where a forfeiture action has been disposed of in circuit court after transfer from the municipal court of such municipality upon demand for jury.

I am of the opinion that a municipality must pay the fee in such a situation. Section 814.63(1), (2) and (4) provides:

Fees in forfeiture actions. (1) In all forfeiture actions in circuit court, the clerk of court shall collect a fee of \$10 to be paid by the defendant when judgment is entered against the defendant.

(2) Upon the disposition of a forfeiture action in circuit court for violation of a municipal ordinance, the municipality shall pay a nonrefundable fee of \$5 to the clerk of circuit court.

. . . .

(4) In forfeiture actions in which a municipality prevails, costs and disbursements shall be allowed to the municipality subject only to such limitation as the court may direct.

This section was created by chapter 317, Laws of 1981, which included a number of provisions for increased fees to be collected in circuit courts for division between the county and state to cover part of the costs of operation of such courts. The costs of operating a circuit court with respect to handling forfeiture actions where a jury trial is demanded are substantially the same whether the action is started in circuit court or transferred from a municipal court upon demand for jury. Section 814.63 contains no language which exempts a municipality from payment of the nonrefundable fee of five dollars where the defendant exercises the right of transfer from municipal court to circuit court nor does it contain any language which exempts a municipality from payment of clerk's fees unless and until the defendant pays costs in the action.

The five dollar "nonrefundable fee" must be paid by the plaintiff municipality whose ordinance is involved. The fee is not to get into court but rather to voluntarily or involuntarily use the circuit court and, casually speaking, must be paid to get out of court. As the statute plainly states, the fee is not paid on filing, but rather "[u]pon the *disposition* of a forfeiture action in circuit court" Sec. 814.63(2), Stats. Where the municipality prevails it can recover the fee from the defendant under section 814.63(4). However, the fee must be paid to the clerk of circuit court "upon the disposition" of the action, which would include dismissal upon stipulation or for lack of prosecution and nonsuit. *Webster's Third New International Dictionary* 654 (4th ed. 1976) defines "disposition" as "the act or the

power of disposing or disposing of or the state of being disposed or disposed of”

Fee increases and sharing provisions in chapter 814 which resulted from enactment of chapter 317, Laws of 1981, became effective July 1, 1981. That chapter also amended sections 66.12(3)(a) and 778.195, Stats. (1979), which had provided that “the clerk’s fee shall not exceed \$5, except that a municipality need not advance clerk’s fees, but shall be exempt from payment of the fees until the defendant pays costs under this section.” The amendment of these sections, according to 1981 Senate Bill 767, was in part connected with the insertion in section 814.63(2) of the language “nonrefundable fee of \$5” payable by the municipality “[u]pon the disposition of a forfeiture action in circuit court” Section 66.12(3)(a) now provides: “Fees in forfeiture actions in circuit court for violations of ordinances are prescribed in s. 814.63(1) and (2).” Section 778.195 similarly provides: “Fees in forfeiture actions under this chapter are prescribed in s. 814.63.”

You indicate that some municipalities agree that the fee applies where a municipality files the action in circuit court. They contend that it should not, however, apply where a municipality has gone to the expense of creating its own municipal court which it utilizes for forfeiture actions involving its ordinances and the defendant demands a jury trial which necessitates transfer to circuit court. In such a situation, section 800.04(1)(d) provides:

If the defendant pleads not guilty and within 10 days after entry of the plea requests a jury trial and pays the required fees, the municipal judge shall promptly transmit all papers and fees in the cause to the clerk of the circuit court of the county where the violation occurred for a jury trial under s. 345.43. ... The required fee for a jury is prescribed in s. 814.61(4).

The jury fee prescribed in section 814.61(4) is “\$2 per juror demanded.” This statute, in association with section 814.63(2), therefore requires transfer upon demand for jury trial and the appropriate payment of fees. Moreover, the plain language of section 814.63(2) makes it applicable to every disposition of a forfeiture action in a circuit court involving violation of a municipal ordinance other than appeals, reviews or new trials to or in circuit court which

are subject to higher specific fees by reason of sections 814.61(8) and 814.65(5).

BCL:RJV:CKM

Indians; Section 144.07(4)(a), Stats., does not authorize joint sewerage commissions to include tribal governments as member governmental units. OAG 36-83

August 24, 1983

CARROLL D. BESADNY, *Secretary*
Department of Natural Resources

You ask whether the Oneida Indian Tribe is a “governmental unit” within the meaning of section 144.07(4)(a), Stats., and whether it may be included in a joint sewerage commission. In my opinion, a tribal government is not a “governmental unit” within the meaning of the statute. Consequently, for this reason alone and without deciding whether a tribe voluntarily could subject itself to the jurisdiction of a joint sewerage commission, it is my opinion that the Oneida Indian Tribe may not be included as a member of such a commission.

Although persuasive policy arguments could be made for including tribal governments within the definition of a “governmental unit,” the Legislature probably did not have Indian Tribes in mind when it adopted that language in chapter 144. Subchapter II of chapter 144, entitled Water and Sewage, makes no reference to tribal government. Rather, this subchapter appears only to be concerned with governmental units such as towns, cities and villages that are created and organized under state statutes. Clearly, tribal governments are distinguishable. See *Worcester v. The State of Georgia*, 31 U.S. (6 Pet.) 515 (1832); *United States v. Mazurie*, 419 U.S. 544 (1975). The frequent references to the duties and responsibilities of each member governmental unit clearly indicate that chapter 144 includes only those governmental units that are subject to state legislative authority.

Oneida participation in a joint sewerage system seems to be a logical and effective method for the tribal government to cooperate with local units of government in the development and operation of an

effective regional sewage treatment program. Although tribal government status is conceptually analogous in many ways to the status of units of local government as that phrase is used under state law relating to joint commissions, it is sufficiently different in my opinion to require excluding tribal governments from the present definition of governmental unit under section 144.07.

As indicated in 68 Op. Att'y Gen. 83 (1979), state law empowers a number of different 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 governmental unit, 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 general powers of a joint commission are set forth in section 144.07 and, by reference, in section 62.11(5). A joint commission that operates and maintains sewage treatment facilities has the power to act through regulation and to seek appropriate civil remedies.

In 68 Op. Att'y Gen. at 88-89, it is stated:

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."

Considered together, the various sections in chapter 144 concerned with joint commissions provide for the transfer of some powers from local government to the joint commission. To operate effectively a joint commission must have sufficient authority over its member governmental units to enable it to carry out its various responsibilities set forth in chapter 144. Because of the special governmental status of Indian Tribes and the unique jurisdictional relationship they have with the state, it is unlikely the commission would

have sufficient authority over a tribal government member to carry out commission activities as anticipated by chapter 144.

State jurisdiction over Indians and Indian Tribes within reservation boundaries is extremely limited. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). As I have indicated in several opinions, Indian Tribes such as the Oneida Tribe are recognized as separate and unique governmental entities. *See, e.g.*, 66 Op. Att’y Gen. 115 (1977); 66 Op. Att’y Gen. 290 (1977); 64 Op. Att’y Gen. 184 (1975). In 65 Op. Att’y Gen. 276, 278 (1976), it is stated: “The Oneida Tribe ... has the same rights of self-government as do other federally recognized tribes.” The Supreme Court has emphasized that “our cases recognize that the Indian tribes have not given up their full sovereignty.” *United States v. Wheeler*, 435 U.S. 313, 323 (1978). The Court in *Wheeler* clearly recognized that the inherent sovereignty of a Tribe is an alternate source of tribal authority, distinct from any powers delegated to the Tribe by the federal government. *Id.* at 322.

As a result, Indian Tribes such as the Oneida Tribe “are a good deal more than ‘private, voluntary organizations’ ...” *Mazurie*, 419 U.S. at 557. They possess a certain degree of independent authority “with the power of regulating their internal and social relations.” *Wheeler*, 435 U.S. at 322 (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)). *See also Mazurie*, 419 U.S. at 557; *White Mountain Apache Tribe*. It is not clear whether an Indian Tribe could voluntarily subject itself to the jurisdiction of a joint commission. Because of the uncertainty regarding the jurisdictional relationship between Indian Tribes and the state over environmental matters generally, *see* 72 Op. Att’y Gen. 54 (1983) and OAG 51-78 (unpublished, July 31, 1978), it is my opinion that the Legislature simply did not have tribal governments in mind when it authorized governmental units to form joint sewerage commissions. Where the Legislature has recognized tribal government as of the same status as local units of government, it has done so explicitly. *See, e.g.*, sec. 20.002(13), Stats.

The Oneida Tribe undoubtedly has a significant governmental interest in controlling any conduct or activity such as the discharge of sewage within its territorial jurisdiction that “threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe.” *Montana v. United States*, 450

U.S. 544, 566 (1981). Section 144.07, however, does not presently represent a viable way to carry out that interest.

BCL:JDN

Loans; Students; Wisconsin Higher Education Corporation; Wisconsin Higher Educational Aids Board; Guaranteed Student Loan Program; Higher Education Aids Board; the legal relationship between the Higher Education Aids Board and the Wisconsin Higher Education Corporation, as affected by various revenue bond agreements, discussed. OAG 37-83

August 29, 1983

JAMES A. JUNG, *Executive Secretary*
Wisconsin Higher Educational Aids Board

On behalf of the Higher Educational Aids Board (Board), you ask a number of questions concerning the legal relationship between the Board and the Wisconsin Higher Education Corporation (the Corporation) with respect to the administration of the Wisconsin guaranteed student loan program.

Before addressing your specific questions, it is useful to review the general background of the program. Chapter 39, Stats., provides for a federally guaranteed student loan program in Wisconsin including the state as a lender. The student loans are financed both by private lenders and by state revenue obligation bonds issued by the Wisconsin State Building Commission. The state bonds are exclusively secured by guaranteed student loan revenues. No state credit is pledged.

In order for the program to provide sufficient safety and security to induce private lenders and revenue bond investors, it is necessary to guarantee the student loans. The basic guarantee is furnished by the Corporation whose guarantee obligation is in turn reinsured by the United States Department of Education pursuant to the Higher Education Act, 20 U.S.C. § 1071, *et seq.* The federal reinsurance agreement provides a conditional federal guarantee ranging from eighty to one hundred percent depending on the annual claims rate. The balance of the guarantee to lenders comes from an insurance reserve fund maintained by the guarantor corporation.

Each state participating in the federal program must designate a guarantee agency to administer the various collection and insurance obligations mandated by federal law. The guarantee agency may be a state government agency or a private nonprofit corporation organized for that purpose. Wisconsin elected the latter option to avoid constitutional problems attendant to public assumption of private debt obligations. Accordingly, under section 39.33(1), the Board is authorized to organize and maintain a non-stock corporation under chapter 181 to provide for a guaranteed student loan program. The Wisconsin Higher Education Corporation was organized under that statute. At the present time the Corporation has no employees. Some, but not all, of its corporate directors are also members of the Board. Administrative services required by the Corporation are furnished by Board employees pursuant to a contract entered into under section 39.33(2) on February 4, 1977. The Corporation reimburses the Board in full for such services and facilities. The functions of the Corporation, among others, are granting underwriting approval to student loans, collecting delinquent loans and maintaining the corporation reserve fund.

The Corporation's duties are defined further in a complex set of agreements made between the Board, the Building Commission, the Corporation and the revenue obligation bond trustee. In particular, the corporation reserve agreement entered into by the Building Commission, the Board and the Corporation on July 13, 1978, which generally relates to the maintenance of a reserve fund for the guarantee of outstanding student loans financed under the revenue obligation bonds, also provides that:

The state agrees that in accordance with section 39.33 of the statutes at all times when bonds shall be outstanding the board shall provide administrative services to the corporation and the corporation agrees to pay the state therefor.

The reserve agreement is intended to cover all student loans insured by the Corporation whether financed through revenue bonds or other private sources. Thus, the services furnished to the Corporation by the Board extend to servicing all such loans. Specifically, the agreement recognizes that:

The ability of the corporation to fulfill its obligations to the state on the contract of student loan insurance depends directly

upon the maintenance of adequate amounts in the corporation's guarantee fund, which is available not only to fulfill insurance or guarantee obligations to the state under the contract of student loan insurance but also similar obligations to other lenders upon student loans

It is my understanding that at the present time the Corporation insures approximately \$700,000,000 worth of student loans, of which about \$566,000,000 are loans made by private lending institutions.

In addition, the state has covenanted with the bondholders that so long as the bonds are outstanding and unpaid, the state will maintain the corporation reserve agreement in full force. Failure to maintain the reserve agreement could result in a declaration of default under the revenue bond agreement. Other pertinent facts will be referred to in the answers to your specific questions.

1. Can the state control and/or direct the scope and level of administrative services of the Corporation?
2. Can the state control the number and level of employes available to collect corporate debts or to provide other administrative services associated with the guaranteed student loan program?

The brief answer to your first question is "no." The answer to your second question is a qualified "yes" in that the state may control the number and level of Board employes but only to the extent that such control does not cause a default of the revenue obligation bond agreement or impairment of existing contractual obligations.

Section 39.33(2) provides:

The board may provide administrative services for the non-stock corporation with which the board has entered into a contractual agreement for purposes of providing for a guaranteed student loan program in the State. *Services provided under this section shall be in accordance with the decision of the board as to the type and scope of services requested and the civil service range of any employe assigned to them.*

It should be understood that the Corporation is a private corporation having a legal existence independent from the state or any of its agencies. See OAG 36-82 (Unpublished Opinion, May 7, 1982). Since the Corporation is duly established as a private corporation under chapter 181, it is unlike an authority that is created as a body politic whose internal operations the Legislature may closely regulate. See, e.g., *State ex rel. Nusbaum v. Warren*, 59 Wis. 2d 391, 208 N.W.2d 780 (1973) (dealing with the Wisconsin Housing Finance Authority under chapter 234). Instead of creating an authority, the Legislature chose to empower the Board to organize a private corporation. In making this choice, future operations of the Corporation became subject to the provision of our constitution forbidding special or private laws respecting "corporate powers or privileges." Wis. Const. art. IV, § 31. In the case of corporations, the Legislature must enact "general laws for the transaction of any business ... and all such laws shall be uniform in their operation throughout the state." Wis. Const. art. IV, § 32. The purposes of these constitutional provisions were to foreclose enactments which " "meddled in purely private matters" " and to " "substitute general for special enactments." " " *State ex rel. La Follette v. Reuter*, 36 Wis. 2d 96, 112, 113, 153 N.W.2d 49 (1967). Consequently, the Legislature could not single out the Corporation for special enactments concerning its internal affairs, as though it were an authority, but of course the Corporation is subject to general laws that are uniform throughout the state.

As an independent and private corporation, therefore, the Corporation has the authority and duty to determine what services are needed to carry out its contractual obligations to the United States Department of Education and to the various lenders which it serves. The statute contemplates that the Board may contract with the Corporation to furnish the necessary personnel and facilities to the Corporation at the Corporation's expense. Thus, the Board has the authority to decide how many employees will be needed and from which of the established civil service classifications they will be drawn. However, as a state agency, the Board is subject to the statutes and rules governing the state civil service. The Board cannot independently create new civil service classifications nor can it exceed the number of positions authorized and allocated to it in the legislative budget process.

Ordinarily this contractual arrangement ought not present any problems. The Corporation will determine what needs to be done and call upon the Board to do it. As long as the services and facilities are adequate to the task, the Corporation should have no particular interest in the Board's personnel and budget policies and practices. However, if the Board should be restricted in its ability to furnish the necessary facilities and services, whether by legislative act or by the decision of other administrative agencies, and if such restrictions materially impair the capability of the Corporation to fulfill its obligations, then the state might very well face the specter of defaulting on its revenue obligation bond agreement.

Viewed another way, the state's inherent power to create, alter, abolish or control its administrative agencies has been affected substantially by its covenants with revenue bondholders. As noted above, the state through the Building Commission has promised that it will maintain the corporate reserve agreement for as long as the revenue bonds are outstanding. This covenant is directly related to the security afforded the bondholders. The Corporation's ability to carry out its overall insurance obligations in an efficient and effective manner is crucial not only to the maintenance of bondholder security, but also to the marketability of the revenue bonds themselves. The bond trustee has, on behalf of the bondholders, the right to enforce those provisions of the corporation reserve agreement requiring the continued maintenance of the purchase of service agreement between the Corporation and the Board. Any legislative action that either abolishes that contractual relationship or materially inhibits the Board's ability to provide the Corporation with the services it requires may constitute an impairment of a contractual obligation in violation of the Contract Clause of the United States Constitution. U.S. Const. art. I, § 10, cl. 1. This is not to say that the Legislature is prohibited from making any laws affecting the Higher Educational Aids Board. However, the point at which any legislative act materially impairs a contract depends upon the particular facts involved.

A review of recent Contract Clause cases is instructive but not altogether dispositive on this point. In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the United States Supreme Court considered the question of how to balance a state legislature's inherent powers against the restrictions placed on the legislative power

under the Contract Clause. In that case, the States of New York and New Jersey joined in an interstate compact to create a port authority to operate a number of public transportation facilities. The states had enacted laws that limited the port authority's ability to subsidize rail passenger services from revenues and reserves generated from other port authority operations. That restriction was incorporated into covenants in resolutions covering bonds issued by the port authority to finance its activities. Those bonds were secured by a pledge of the general reserve fund.

In 1974, the two states repealed the restrictions on the use of money in the general reserve fund for subsidizing of rail passenger services. The bond trustee brought an action against the states on behalf of the bondholders. The trustee was concerned that rail passenger subsidies might draw down the reserve fund securing the bonds, thereby imperiling bondholder security and the marketability of the bonds.

The Supreme Court held that the states' repeal of the restrictions violated the Contract Clause. The Court noted that more than a technical impairment is required before it becomes necessary to resolve the police power-contract clause question. Thus, impairment is ultimately an issue of fact. The Court also recognized that its previous decisions had affirmed the power of the respective states to use their police power to regulate for the benefit of the public health and welfare even when the exercise of that power affected existing contractual obligations. The Court observed: "In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *Id.* at 23.

Nevertheless, in ruling for the bondholders, the Court said:

In deciding whether a State's contract was invalid *ab initio* under the reserved-powers doctrine, earlier decisions relied on distinctions among the various powers of the State. Thus, the police power and the power of eminent domain were among those that could not be "contracted away," but the State could bind itself in the future exercise of the taxing and spending powers. Such formalistic distinctions perhaps cannot be dispositive, but they contain an important element of truth. Whatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts can-

not be questioned. Any financial obligation could be regarded in theory as a relinquishment of the State's spending power, since the money spent to repay debts is not available for other purposes. Similarly, the taxing power may have to be exercised if debts are to be repaid. Notwithstanding these effects, the Court has regularly held that the States are bound by their debt contracts.

The instant case involves a financial obligation and thus as a threshold matter may not be said automatically to fall within the reserved powers that cannot be contracted away.

Id. at 23-24 (footnotes omitted).

Of course, there are some factual differences in the covenants involved in *United States Trust Co.* and those in the Wisconsin revenue obligation bonds. While in both instances the covenants are related to security of bondholders, the *United States Trust Co.* covenants were solely financial in nature. The Supreme Court commented on that distinction:

Not every security provision, however, is necessarily financial. For example, a revenue bond might be secured by the State's promise to continue operating the facility in question; yet such a promise surely could not validly be construed to bind the State never to close the facility for health or safety reasons. The security provision at issue here, however, is different: The States promised that revenues and reserves securing the bonds would not be depleted by the Port Authority's operation of deficit-producing passenger railroads beyond the levels of "permitted deficits." *Such a promise is purely financial and thus not necessarily a compromise of the State's reserved powers.*

Id. at 25 (emphasis added).

In this instance the state has not agreed to pay the bonded indebtedness. The agreement that provides services to the Corporation is not purely financial in nature. Therefore, the extent to which the Legislature may control the Board's activities under that service agreement is a much closer one than presented in the *United States Trust Co.* decision. The line is difficult to draw and I cannot predict with any assurance when the line is crossed. It suffices to say at this point that the most prudent course is to recognize the independence

of the Corporation and to take whatever steps are reasonably necessary to equip the Board with sufficient personnel and facilities to enable it to provide the Corporation with the services it requires.

3. Can the state assume the Corporation's duty to manage and collect debt?

The Corporation is contractually obligated to collect delinquent student loans. This function is clearly within the powers conferred upon the Corporation under chapter 181. Thus, any attempt to abrogate those powers or otherwise transfer the Corporation's obligations to the state would more than likely be a violation of the Contract Clause. It must be remembered that the Corporation has agreed to insure and manage hundreds of millions of dollars of private debt. The private lenders have certain contractual rights that are enforceable against the Corporation alone. The state may not impair those existing contractual obligations.

In addition, the state is prohibited from giving its own credit in aid of any private individual, association or corporation. Wis. Const. art. VIII, § 3. Thus, to the extent that any state assumption of the loan collection function would obligate the state to insure the private student loans, that constitutional restriction would be violated.

Lastly, as noted in the answer to your first question, a legislative act directed toward controlling the powers and duties of an individual corporation, the Wisconsin Higher Education Corporation in this instance, may run afoul of the constitutional prohibition against the enactment of special or private bills granting corporate powers or privileges. Wis. Const. art IV, § 31, cl. 7. However, the Legislature retains the power of enacting general laws governing corporations providing those laws operate uniformly throughout the state. Wis. Const. art. IV, § 32.

Therefore, it is my opinion that the state may not assume the Corporation's duty to manage and collect debts incurred under the state guaranteed loan program.

4. Does the contract [between the Board and the Corporation] empower the Corporation to determine the scope and level of administrative services purchased from the State?

As stated in my answer to your first two questions, the Corporation has the authority and duty to determine what needs to be done in order to carry out its contractual obligations. For example, it may decide that it needs the capability of servicing its delinquent loan accounts within a specified time period. Under the Corporation-Board service agreement, the Corporation makes its needs known to the Board. The Board, in turn, must decide what personnel and facilities are required to perform that service. Of course, the Corporation is not precluded from making its recommendations on how the job might be best performed. But in the final analysis, the decision rests with the Board. For example, the Corporation may recommend but cannot require the purchase or rental of some particular data processing facility or the hiring of personnel. The key is actual performance; if the Board gets the job done satisfactorily and on time, the Corporation has no need to be concerned about how the Board does it.

In this regard, I note that the Corporation-Board service agreement appears to be inconsistent with the language of the statute as construed in this opinion. The agreement states:

In consideration for the agreement of the corporation to pay for the provision of administrative services, the board hereby agrees to furnish to the corporation all administrative services reasonably required for the operation of the guaranteed student loan program. *The type and scope of such services shall be determined from time to time by the corporation.*

(Emphasis added.)

The italicized language gives to the Corporation precisely what section 39.33(2) confers on the Board, namely, the authority to determine the type and scope of services to be furnished under the agreement. However, in my opinion, this apparent conflict can be resolved by construing the contract to mean that the Corporation retains the power to decide what services it needs and the Board may, in accordance with the statute, determine how it will provide those services. Consequently, to the extent that the agreement is capable of such construction, it is not in violation of the statute. It is my understanding that when this agreement was made the Board membership and the Corporation directorship were virtually identical. Therefore, the apparent conflict between the agreement and the

statute as a practical matter may be viewed as a distinction without a difference. However, in light of the changes in the composition of the Corporation's directorship, and the increasing recognition of the independence of the Corporation, the interpretation of the agreement in this opinion should be followed scrupulously by both parties. In addition, it might be advisable to amend the agreement to eliminate any ambiguity on this point.

5. What recourse does the Corporation have if the state fails to provide requested services?

As I emphasized in my answer to the previous questions, the Corporation is an independent legal entity having substantial obligations to the United States government and various lending institutions. If in the Corporation's judgment the Board fails to provide the services needed to fulfill its corporate obligations, the Corporation is in a position to decide whether it should obtain those services by other means, either through the hiring of its own staff or by contracting with another party.

This alternative is not without its difficulties, however. It is my understanding that the revenue bondholder trustee's approval of such an arrangement is probably necessary in order to avoid default. Moreover, the total abnegation of the service agreement would constitute an impairment of the corporate reserve agreement covenant requiring the Board to furnish services to the Corporation as long as any revenue bonds are outstanding.

In my opinion, it might be possible to avoid those problems to some extent by recognizing that neither the statute nor the corporate reserve agreement nor the Corporation-Board service agreement provides that the Corporation must acquire its services exclusively from the Board. The statute is permissive in that it authorizes but does not require the Board to contract with the Corporation. Also, the covenants merely contemplate the maintenance of a contractual relationship in which the Board will remain ready and willing to furnish the services within the limits of its capability. It would seem unreasonable that the Legislature and the bondholder trustee would have decided that a particular agency would always have the ability to accomplish any task the Corporation might require. Thus, a corporate decision to supplement the Board's service by other means

could, under some circumstances, be altogether consistent with the statute and the relevant agreements.

In conclusion, the tenor of your questions reflect the growing concern shared by the public, the Legislature and the financial community about the continued vitality of the state's guaranteed student loan program. Some of this concern may be the result of misapprehension of the legal and factual relationship between the Wisconsin Higher Education Corporation and the state. While both parties are engaged in a program of substantial public importance and share many common goals, the Corporation's independent authority and obligations cannot be overlooked.

Ideally, the surest way to avoid potential default on the revenue bond obligations is to recognize the independence and the distinctiveness of each of the parties to the program while at the same time making every reasonable effort to keep the existing relationships in place. It seems to me that the public is best served if the Corporation pursues its objective vigorously and the state makes a conscientious effort to equip the Board with sufficient facilities and personnel to fill the Corporation's needs.

As noted above, other arrangements may be possible. The state might lawfully exert more control over the Board's administrative judgments. The Corporation may even be able to look elsewhere for services. But all of these alternatives present difficulties. Where the line drawn by the respective covenants is crossed depends upon the facts of the particular case. I am unable to provide specific guidance in this regard given the information before me. However, the key is performance. If the Corporation performs its insurance obligations as it has promised, security of the student loan lenders and the bondholders will be assured and the public's interest in the continued maintenance of a viable student loan program will be served.

BCL:DSF

District Attorney; Juvenile Court; The juvenile court cannot require the district attorney to serve the summons or notice required by chapter 48, Stats. However, the district attorney, as an officer of the court, may voluntarily do so to aid the court in the administration of justice. OAG 38-83

September 13, 1983

STEPHEN M. NEEDHAM, *District Attorney*
Rock County

You have requested my opinion on two questions: First, who may serve the notice of a juvenile hearing required under chapter 48, Stats., and, second, may the juvenile court require the district attorney to serve the notice.

Section 48.273(2) provides: "*Service of summons or notice required by this chapter may be made by any suitable person under the direction of the court.*"

An examination of chapter 48 reveals that there are a number of persons who would qualify as a "suitable person under the direction of the court" for the purpose of serving a summons or notice pursuant to section 48.273(2). They include a clerk of court for juvenile matters (section 48.04(1)), juvenile court commissioners (section 48.065(2)(h)) and intake workers (section 48.067(9)).

In my opinion, the district attorney cannot be required by the juvenile court to serve the summons or notice required by chapter 48. Nowhere in chapter 48 is the district attorney put "under the direction of the court" for the purpose of serving the summons or notice required by that chapter nor is such service enumerated in the statutes as one of the duties of the district attorney. Section 59.47(11) requires the district attorney to "[p]erform any duties in connection with court proceedings in a court assigned to exercise jurisdiction under ch. 48 as the judge may request." That section, however, does not include the performance of ministerial or clerical functions, such as service of the summons or notice required by chapter 48. See 62 Op. Att'y Gen. 273 (1973).

The fact that this opinion was issued prior to the major changes brought about by the adoption of the 1977 Children's Code does not reduce its applicability under the current juvenile court system. Rather, it enhances it. For prior to those changes the district attorney was not required to perform the function of filing juvenile court petitions. It is only because of those changes that the district attorney is required to perform this ministerial or clerical function. Thus, absent a statute requiring the district attorney to perform the ministerial or clerical function of serving the notice required by chapter

48, the district attorney, for the reasons stated in 62 Op. Att'y Gen. 273 (1973), cannot be required to perform this function.

It should also be noted, however, that if the district attorney is otherwise involved in the juvenile proceeding, he or she, as an officer of the court, may have an obligation to assist the court in carrying out its duties under chapter 48, including serving any required summons or notice. Whether this would be true in a particular situation would depend on the circumstances involved in that case. Since, as noted above, chapter 48 directs a number of people to assist the juvenile court in carrying out its functions, the aid of the district attorney for serving a summons or notice should seldom be needed by the court, and for the court to order the district attorney to provide such aid when others specifically directed by statute to provide such assistance to the court are available could amount to a discretionary order of questionable validity.

Finally, it should be noted that there is nothing wrong with a district attorney voluntarily serving a summons or notice required by chapter 48. In fact, a number of district attorneys do perform this function and such practice appears to work well in many counties. In assisting the court in this fashion, the district attorney acts as an officer of the court and aids the court in the administration of justice. As such, this practice is to be encouraged.

BCL:JJG

Licenses And Permits; Medical Examining Board; The direction in section 448.02(3), Stats., that the Medical Examining Board render its decision within ninety days following the completion of the hearing is mandatory rather than directory. OAG 39-83

September 16, 1983

WALTER L. WASHBURN, M.D., *Secretary*
Medical Examining Board

The Medical Examining Board asks whether the emphasized language* in the following portion of section 448.02(3), Stats., is mandatory or merely directory:

The [Medical Examining] board shall investigate allegations of unprofessional conduct by persons holding a license or certificate granted by the board. A finding by a panel established under s. 665.02 or by a court that a physician has acted negligently is an allegation of unprofessional conduct. After the investigation, if the board finds that there is probable cause to believe that the person is guilty of unprofessional conduct, the board shall hold a hearing on such conduct. *The board shall render a decision within 90 days following completion of the hearing.*

First, you suggest that the ninety-day direction is mandatory. Second, you state that delays inherent in the proceedings involving a hearing examiner often make it impossible for the Board to meet the ninety-day direction.

First, it is my opinion that the ninety-day direction for a decision is mandatory.

This issue is governed by the decision in *Karow v. Milwaukee County Civil Serv. Comm.*, 82 Wis. 2d 565, 263 N.W.2d 214 (1978), and the cases therein cited. In that case a county civil service commission failed to hold a hearing within the statutory three-week period following the date charges were filed against a county employe. The controlling statute, section 63.10(2), provided: "The commission shall appoint a time and place for the hearing of said charges, the time to be within 3 weeks after the filing of the same"

The supreme court reasoned that the statutory procedure in section 63.10 protected the public interest from the burden of inefficient or otherwise undesirable employes. Section 63.10(1) allowed suspension of an employe without pay between the time when charges were filed and the hearing. At the same time, however, section

* Added by chapter 135, Laws of 1981.

63.10(2) protected the possibly innocent employe by providing a prompt hearing date. This protection could only be provided by holding the three-week limitation to be mandatory rather than directory.

The court relied on the rule in *Scanlon v. Menasha*, 16 Wis. 2d 437, 443, 114 N.W.2d 791 (1962), and *Wauwatosa v. Milwaukee County*, 22 Wis. 2d 184, 191, 125 N.W.2d 386 (1963), that the word "shall" is presumed mandatory when it appears in a statute unless the legislative intent clearly indicates otherwise. Further, the court relied on the holding in *State v. Rosen*, 72 Wis. 2d 200, 240 N.W.2d 168 (1976), that a statutory limit is mandatory where failure to act within the limit works an injury or wrong and the mandatory limit does not defeat the public interest protected by the statute.

The supreme court's reasoning in the *Karow* decision and cases therein cited is applicable here.

Section 448.02(4) allows suspension of a practitioner's license or certificate between the time when a hearing commences and the Board renders a decision. At the same time, however, section 448.02(3) protects the suspended practitioner's livelihood and reputation by mandating a prompt decision following completion of the hearing. Public and private interests are therefore best served by holding the ninety-day limitation to be mandatory rather than directory.

You suggest that the ninety-day period in section 448.02(3) might run from the Board's receipt of the hearing examiner's proposed decision under the procedure permissible under section 227.09. However, since section 448.02(3) requires that the "board shall render a decision within 90 days following completion of *the hearing*," we cannot arrive at your suggested interpretation. Nevertheless, our discussion cannot end here since we must still resolve the issue of when the hearing is completed. A hearing is not completed until the parties have submitted all of the evidence and arguments. Thus, while a hearing examiner may close the testimony, if there are yet proofs or briefs to be submitted, the matter is not fully before the hearing examiner and the hearing should not be considered to be concluded. In *State ex rel. Arnold v. Common Council*, 157 Wis. 505, 511, 147 N.W. 50 (1914), the supreme court held that a hearing included the "right to be heard by counsel upon the probative force

of evidence ..." and that this included oral argument. In accord, see *Wisconsin Telephone Co. v. Public Service Comm.*, 232 Wis. 274, 287 N.W. 122, 287 N.W. 593 (1939). While these cases speak of oral argument, they apply equally to arguments submitted by written briefs.

Thus, if at the close of the testimony portion of a hearing there are no further proofs to be submitted or arguments made, the hearing examiner should state that the hearing is concluded. If, however, the schedule calls for the further submission of evidence or briefs, the hearing examiner should establish a schedule for such submittals and establish a hearing closing date. In the alternative, the hearing examiner can notify the parties when all submittals have been received so that a hearing conclusion time can be established.

BCL:WHW:CM

Fees; Public Records: Under the public records law, the fee for copying public records may include a component for labor expenses actually, necessarily and directly incurred in connection with reproduction of public records; search fees cannot be charged as reproduction fees; local units of government cannot by ordinance establish public record copy fees that deviate from actual, necessary and direct costs of reproduction; and the municipal law provision authorizing the same fee for the same service has little if any practical impact vis-a-vis the requirement that fees for public records be limited to actual, necessary and direct costs. OAG 40-83

September 16, 1983

ROBERT G. MAWDSLEY, *Corporation Counsel*
Waukesha County

You ask four questions relating to fees chargeable under the public records law. Your questions and my answers follow:

1. According to § 19.35 (3) (a) "an authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record...". Does the phrase "actual, necessary and direct cost of reproduction" limit allowable charges to only those based on the costs of the copying equipment, e.g. chemicals,

machine maintenance and purchase, paper, sales tax and the like, or can a county agency include as a cost the labor expense incurred in making the copy?

It is my opinion that labor expenses that are actually, necessarily and directly incurred in connection with reproduction of public records may be incorporated in the fee charged for reproduction of the documents. Typically this will mean that a copy fee may include a charge for the time it takes for the secretary or clerk to reproduce the records on a copying machine.

2. Does § 19.35 (3) (c) regarding charges for record location searches of costs in excess of \$50.00 exclude the possibility of adding labor costs for searches of \$49.99 and less to the copying fee allowed under § 19.35 (3) (a)?

Yes. Section 19.35(3)(a) governs costs of reproduction. Section 19.35(3)(c) governs costs of locating records. The clear limitation on charging for search costs in section 19.35(3)(c) would be circumvented if search costs of less than \$50 were added to reproduction costs.

3. Can a county or other municipality establish its own copying fees by ordinance on a basis other than “actual, necessary or direct costs” by virtue of the clause in § 19.35 (3) (a) which reads: “...unless a fee is otherwise specifically established by law...”?

The full sentence provides that: “An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.”

It is my opinion that the term “law” as used in this provision refers to state statutory law. *Cf., Musback v. Schaefer*, 115 Wis. 357, 360, 91 N.W. 966 (1902). The Legislature clearly intended to minimize copying fees and to establish a general cost-based standard for all custodians except those for whom special provisions have been created. It would be inconsistent with these goals to interpret the statute to allow the multitude of local governments to adopt their own fee schedules without regard to actual costs.

An example of “a fee ... otherwise specifically established ... by law” is section 814.61(10) which requires the clerk of court to charge

a copying fee of \$1 per page. As to the latter portion of section 19.35(3)(a), I am not aware of any state statute that affirmatively authorizes counties or municipalities to establish their own fees for public records. Therefore, they do not have the authority to deviate from the requirements in section 19.35(3).

4. How does Wis. Stat. § 66.111, which authorizes an officer to charge the same statutory fee allowed to other officers if performing the same duties, affect § 19.35 (3) (a)? In other words, can an officer charge, for example, the statutory copying fee of \$1.00 per page set by statute for sheriffs on the basis of § 66.111, or is that officer bound by § 19.35(3)(a) to derive and charge the actual, necessary and direct cost?

Section 66.111 provides: "When a fee is allowed to one officer the same fee shall be allowed to other officers for the performance of the same services, when such officers are by law authorized to perform such services." This statute applies "where either of two officers may legally perform a particular act and a fee is specifically allowed to one and not to the other. Then the fee is made incident to the service, so it may be rightfully claimed by the officer performing the same." *Musback*, 115 Wis. at 360.

Therefore as to fees for copying records, section 66.111 would apply only if two distinct public officers are specifically authorized by the statutes to copy the very same public records, and the statutes specify a particular copying fee for one officer but not the other. For example, county court judges formerly were specifically authorized to make certified copies of papers filed in their courts, so a judge could charge the same statutory copying fee as that authorized by statute for the clerk of courts. 30 Op. Att'y Gen. 697 (1941).

As to your specific example regarding a \$1 per page copying charge by sheriffs, I assume you are referring to section 814.70(intro.) and (6), which reads:

Fees of sheriffs. The sheriff shall collect the following fees:

. . . .

(6) COPIES. Making a copy of any bond, undertaking, summons, writ, complaint or other paper served or taken, when required by law or demanded by a party, and if not furnished by a party to the action or attorney, \$1 per page.

This \$1 fee applies only to the particular documents and under the limited circumstances described in the statute. In most cases, the fee for copying public records on file in a sheriff's office will be governed by section 19.35(3)(a).

Section 66.111 would come into play vis-a-vis section 814.70(6) only if some officer outside the sheriff's office was specifically authorized to provide copies of the particular documents described and under the circumstances set forth in section 814.70(6), and no specific fee was otherwise set by the statutes. Under those circumstances, the outside officer could charge the fee specified in section 814.70(6). This would constitute "a fee [that] is otherwise specifically established ... by law" and would thus constitute an exception to section 19.35(3)(a).

I have found no statute that presently specifically authorizes one public officer to provide copies of particular records in the custody of another public officer. Therefore, I expect that, in reality, the provisions of section 66.111 will have limited or no impact on the mandate of section 19.35(3)(a) to limit copy fees to actual, necessary and direct costs.

BCL:RWL

County Board; Ordinances; Sheriffs; A county has power under section 59.07(64) to enact an ordinance, applicable countywide, prohibiting the giving of false alarms on security or fire alarm systems connected to the sheriff's department. Provisions amounting to a building code would not be applicable in cities, villages or towns having ordinances or codes covering the same subject. Authority of the sheriff to act as licensing authority or to collect license fees discussed. OAG 43-83

September 28, 1983

JOHN D. OSINGA, *District Attorney*
Portage County

You request my opinion whether the Portage County Board of Supervisors has statutory authority to enact an ordinance regulating the installation and operation of emergency security and fire alarm

systems which would be applicable within all territory within the boundaries of a county.

You indicate that the county sheriff has voiced concern regarding problems this department has experienced with false alarms which have often been triggered by the negligence of an employe where the alarm is located.

I am of the opinion that a county board does possess such power. Whether portions of a given ordinance would be applicable within the boundaries of villages and cities having home rule powers would in part depend upon the reasons for the county ordinance, the provisions therein, the statutory authority under which it is sought to be exercised and whether cities or villages had adopted ordinances or codes involving the same subject.

It should be noted that a criminal statute does prohibit the giving of false alarms. Section 941.13, Stats., provides: "Whoever intentionally gives a false alarm to any public officer or employe, whether by means of a fire alarm system or otherwise, is guilty of a Class A misdemeanor." In my opinion the prohibition extends to security system false alarms as well as to those associated with a fire alarm.

County boards have only such legislative powers as are conferred by statute, expressly or by clear implication. *Maier v. Racine County*, 1 Wis. 2d 384, 84 N.W.2d 76 (1957); *Town of Vernon v. Waukesha County*, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981). A county ordinance prohibiting the giving of false alarms to law enforcement officers, by intent or through gross negligence, and providing a penalty in the nature of a forfeiture, could be grounded upon section 59.07(64). The introduction to section 59.07 provides: "The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language." Paragraph (64) provides: "PEACE AND ORDER. Enact ordinances to preserve the public peace and good order within the county." In 69 Op. Att'y Gen. 92 (1980), it was stated that this section would authorize the enactment of a county ordinance prohibiting trespass to land that is consistent with section 913.13. In 56 Op. Att'y Gen. 126 (1967), it was stated that section 59.07(64) would authorize a county to enact a curfew ordinance but that such ordinance would not be applicable in cities or villages which had

home rule powers and express statutory authority to enact ordinances to prohibit loitering.

The proposed ordinance you enclose contains standards as to what systems constitute approved alarm systems and provisions as to the installation of emergency alarm systems on non-county property and which in some cases are not even connected by wire to the sheriff's office. The proposed ordinance would require that alarm systems connected directly to the sheriff's office be by separate lines and not utilize existing telephone numbers, that the sheriff's department be the licensing authority, that licenses could be revoked for repeatedly actuating false alarms and that each license holder pay a license fee of sixteen dollars a year to the sheriff's department. Penalty for false alarms would be provided for by verbal warning, written warning and monetary forfeiture.

It can be argued that some type of fee could be charged where there is independent connection of wires to the sheriff's office. See sec. 59.07(1)(b) and (d)2. and 3., Stats. Reasonable fees are also appropriate with respect to the administration of a building code. However, section 59.07(51), which permits counties to enact and enforce building codes, provides: "The codes, rules and regulations do not apply within cities, villages or towns which have adopted ordinances or codes concerning the same subject matter."

Powers conferred on a county officer by statute cannot be narrowed, taken away or enlarged by the county board except in cases where the Legislature has authorized it by statute. *Reichert v. Milwaukee County*, 159 Wis. 25, 150 N.W. 401 (1914); 63 Op. Att'y Gen. 196 (1974). Neither section 59.23 nor any other statute of which I am aware provides that the sheriff shall or may act as a licensing agent on behalf of the county in this area and I find no express statute which would authorize the county or such office to charge or collect a sixteen dollar yearly license fee from each "license holder of an alarm system" or a one-hundred dollar yearly fee from each "alarm system operator in the County." Such persons do not appear to be "truckers, hawkers, peddlers and transient merchants" which the county may license and regulate by reason of section 59.07(18m).

You have stated that the proposed ordinance is modeled after one utilized by the City of Stevens Point. I suggest that ordinances utilized by cities and villages are not the best starting point for formula-

tion of county ordinances, since the former have much broader statutory and home rule powers than do counties.

BCL:RJV

Milwaukee, City Of; Schools And School Districts; Common Council of City of Milwaukee is without power under home rule provision of the Wisconsin Constitution or under its special charter and section 62.11(5) to adopt an anti-truancy ordinance. State has provided special procedures in sections 118.15 and 118.16, and has designated the school district board as its agent to deal with matters of local concern in this area. OAG 44-83

September 30, 1983

TIMOTHY F. CULLEN, *Chairperson*
Senate Organization Committee

The Committee on Senate Organization has requested my opinion whether the Common Council for the City of Milwaukee has the power to enact an anti-truancy ordinance similar to the draft enclosed. The proposed anti-truancy ordinance would provide in part:

(1) APPLICATION

(a) Minors. It shall be unlawful for any minor between the ages of 7 and 18 years to be absent from his or her school during the full period and hours, religious holidays excepted, that the public or private school in which the child should be enrolled is in session until the end of the school term, quarter, or semester of the school year in which the child becomes 18 years of age except as provided under s. 118.15, Wis. Stats.

(b) Parents. It shall be unlawful for any person having under their control a child required to attend school under s. 118.15, Wis. Stats., to permit such child to be truant from school.

(2) PENALTY

(a) Minors. Any person violating sub. (1)(a) shall be referred to the proper authorities as provided in Ch. 48, Wis. Stats., and the court may impose a forfeiture not to exceed \$25. If a child fails to pay the forfeiture the court may suspend the child's opera-

tion privilege as defined in s. 340.01(40), Wis. Stats., for not less than 30 nor more than 90 days, as provided in s. 48.343(2), Wis. Stats.

(b) Parents. Any person violating sub. (1)(b), upon conviction thereof, shall be fined not less than \$5 nor more than \$50 and in default of payment thereof be confined in the county jail not more than 60 days.

Proposed (1)(a) is based on section 118.15(1)(a), the compulsory attendance law, which requires any person who has control of a child between six and eighteen years old to cause the child to attend school. In a case of noncompliance, after a school attendance officer has met with the parent or guardian, made counseling available and evaluated a child, the parent or guardian may be prosecuted for noncompliance with the statute and may be fined or imprisoned. Secs. 118.15(5) and 118.16(5), Stats. If, however, the parent or guardian proves that he cannot comply with the compulsory attendance statute because of the child's disobedience, the action against the parent or guardian is to be dismissed and the child is to be referred to juvenile court. Sec. 118.15(5), Stats. The juvenile court has

exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court, and:

. . . .

(6) Who is habitually truant from school, after evidence is provided by the school attendance officer that the activities under s. 118.16(5) have been completed.

Sec. 48.13(6), Stats. Truancy is defined in section 118.16(1)(b). Section 118.16 provides for appointment of a school attendance officer to be designated by the district school board who has the power to enforce the law as to all children between the ages of six and eighteen in the district and who is permitted access to records in private schools located in the district. The provisions of the compulsory attendance laws are applicable to schools in the City of Milwaukee. Sec. 119.04(1), Stats.

If the city had the power under home rule constitutional provisions to enact such an ordinance, I would nonetheless conclude that the proposed draft would be invalid if enacted. Paragraph (a) fails to define "private school" and paragraph (b) makes a reference to

“school under s. 118.15, Wis. Stats.” without further definition. In *State v. Popanz*, 112 Wis. 2d 166, 177, 332 N.W.2d 750 (1983), the supreme court stated: “We hold sec. 118.15(1)(a) is void for vagueness insofar as it fails to define ‘private school.’ ”

I conclude, however, that the City of Milwaukee is without power under the home rule provision of the Wisconsin Constitution or under general police powers to enact the proposed anti-truancy ordinance. Wisconsin Constitution article XI, section 3(1) provides:

Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.

Sections 118.15 and 118.16 are enactments of statewide concern that with uniformity affect every city and village. Wisconsin Constitution article X, section 3 requires that the Legislature shall provide by law for the establishment of district schools which shall be free and without charge for tuition to all children between the ages of four and twenty and article X, section 1 provides that “[t]he supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct” The power of the Legislature as to education, attendance and truancy of children eligible for but not attending public schools is extremely broad within state and federal constitutional limits to the extent it is not reserved to the state superintendent or some other agency or to the people by the Wisconsin Constitution. The power of the Legislature is plenary in nature and the constitution is not to be regarded as a grant of power but rather as a limitation upon the powers of the Legislature. *State ex rel. McCormack v. Foley*, 18 Wis. 2d 274, 118 N.W.2d 211 (1962). In *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976), it was held that equal opportunity for education is a fundamental right under the Wisconsin Constitution, that the establishment and operation of public schools is a governmental operation of the state and that the Legislature has delegated portions of that power to the school districts which act as agencies of the state. *Buse* holds that Legislature’s power over public education is extensive but not plenary, since there remains some local control in the school district through its electors and board. Under the present scheme of

education in Wisconsin, in both the public and private school area, there is very little room left for local control by city councils and village boards in matters of curriculum, textbooks or attendance. A municipal officer can be designated school attendance officer under section 118.16(1)(a) if such officer and his municipal governing body are agreeable.

The City of Milwaukee operates under special charter and the provisions of the general charter law, subchapter I of chapter 62, do not apply to such city unless adopted by the city. See sec. 62.03, Stats., and *State ex rel. Cortez v. Bd. of F. & P. Comm.*, 49 Wis. 2d 130, 181 N.W.2d 378 (1970). It can be argued that cities which are subject to section 62.11(5) and Milwaukee, which has adopted section 62.11(5), can enact an anti-truancy law under the general welfare provision which provides:

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.

The case of *City of Madison v. Schultz*, 98 Wis. 2d 188, 295 N.W.2d 798 (Ct. App. 1980), involved an ordinance regulating commercial sex activity. The court held that Madison could not rely on the home rule amendment as authority to enact the ordinance in question, but could rely on section 62.11(5). *Schultz* makes it clear that, unlike the home rule amendment, section 62.11(5) permits municipalities to legislate in matters primarily of statewide concern. 98 Wis. 2d at 198. The test of the validity of such an ordinance is set forth in *Schultz*, citing *Wisconsin's Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 271 N.W.2d 69 (1978). An ordinance may stand if the Legislature has not expressly withdrawn power from the municipality to legislate in that area, if the ordinance does not logically conflict with existing legislation and if the ordinance does not

defeat the purpose or go against the spirit of state legislation. 98 Wis. 2d at 199.

Milwaukee adopted section 62.11(5) by Charter Ordinance 203 on February 6, 1933. I conclude, however, that section 62.11(5) is not a sufficient justification upon which the City of Milwaukee can base an anti-truancy ordinance for a number of reasons. First, the Legislature has designated the school district board as its agent to deal with local aspects of most matters related to education of minors. Second, neither the constitution, special charter nor express statute grant the city such power. I have found no provision in the codified city charter which would give the common council specific power in the areas of truancy and compulsory school attendance. The Legislature has not provided that cities of the first class have power to enact anti-truancy ordinances. Third, the ordinance conflicts with existing legislation. The Legislature has expressly acted in the area and has established a scheme for handling nonattendance and truancy matters. It has provided that the juvenile court shall have exclusive control with respect to a child alleged to be a truant after the required activities in section 118.16(5) are completed. Procedures under the proposed ordinance would in some cases be instituted by a police officer or other city officer or employe by issuance of a citation or procedures related to arrest. Such procedures would be in conflict with those provided in section 118.16(5) and (6), where filing information on a child with a court assigned to exercise jurisdiction under chapter 48 must be preceded by a conference with parent or guardian, educational counseling and evaluation by the school attendance officer. Police and other city officials can presently act under state statute to bring information as to alleged truancy of a child or alleged failure of a person having custody to have such child attend school to the attention of the school attendance officer.

The proposed anti-truancy ordinance may attempt to incorporate the procedures of section 118.15(5) by providing that any child who violates the ordinance "shall be referred to the proper authorities as provided in chapter 48, Wis. Stats." Under section 48.13(6) the juvenile court has jurisdiction only if "the activities under s. 118.16(5) have been completed." But the proposed ordinance directly conflicts with chapter 48 in that the penalties to be imposed, forfeiture and suspension of the child's operating privilege, are expressly pro-

hibited for a child found in need of protection or services under section 48.13. Sec. 48.345(3) and (4), Stats. Thus, the proposed ordinance, as it applies to truant children themselves, is not authorized by section 62.11(5). Nor is it authorized as it applies to parents or guardians because it permits a penalty to be imposed without the activities specified in section 118.16(5) having been completed. The ordinance conflicts with section 118.15(5). I therefore conclude that the Common Council of the City of Milwaukee is without power to enact the proposed anti-truancy ordinance.

BCL:RJV

County Board; County Corporation Counsel; In a county with a population of under 500,000 which does not have a civil service ordinance, the corporation counsel is appointed by the county executive and confirmed by the county board. The county executive possesses administrative and managerial authority over the corporation counsel; supervisory authority of a legislative or policy-making nature may be exercised by the county board or one of its committees. The corporation counsel serves at the pleasure of the county board and may only be removed by a majority of the members of that body.
OAG 45-83

September 30, 1983

GARRETT N. KAVANAGH, *District Attorney*
Fond du Lac County

You have requested my opinion concerning a question posed by the former corporation counsel of Fond du Lac County. The question is whether the Fond du Lac County Board may make the corporation counsel "accountable" to the county executive "in accordance with the policies governing Fond du Lac County employees set forth in the Fond du Lac County Personnel Practices and Procedures Ordinance." I understand that this ordinance is not a civil service ordinance and that Fond du Lac County has no civil service ordinance.

Accountability has three aspects—the power to appoint, the power to supervise and the power to remove. Although I do not have a complete copy of the ordinance, I will assume that it provides

for the appointment, supervision and removal of the corporation counsel by the county executive, without the approval of the county board.

It is my opinion that in a county with a population of under 500,000 which does not have a civil service ordinance:

(1) The corporation counsel is appointed by the county executive and confirmed by the county board;

(2) The county executive possesses administrative and managerial authority over the corporation counsel, and supervisory authority of a legislative or policy-making nature may be exercised by the county board or one of its committees; and

(3) The corporation counsel serves at the pleasure of the county board and may only be removed by a majority of the members of that body.

I. The Power To Appoint.

Section 59.07(44) empowers the county board “[i]n counties not having a population of 500,000 or more [to] employ a corporation counsel, and fix his salary.”

Section 59.032, in turn, provides that:

(1) ... Counties having a population of less than 500,000 may by resolution of the county board or by petition and referendum create the office of county executive

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

. . . .

(b) Appoint the heads of all departments of the county except those elected by the people and except where the law provides that the appointment shall be made by a board or commission or by other elected officers; but he shall also appoint all department heads where the law provides that the appointment shall be made by the chairman of the county board or by the county board. Such appointments shall require the confirmation of the county board. The county executive may file, with the county board,

charges for the removal, discharge or suspension of any person so appointed.

I understand that the county board has not acted, pursuant to section 59.025, to designate the corporation counsel as a department head or to authorize the county executive to appoint the corporation counsel. Section 59.025(3) and (4) provides:

(3) CREATION OF OFFICES. *Except for the offices of supervisor, county executive and county assessor and those officers elected under section 4 of article VI of the constitution, the county board may:*

(a) Create any county office, department, committee, board, commission, position or employment it deems necessary to administer functions authorized by the legislature.

(b) Consolidate, abolish or reestablish any county office, department, committee, board, commission, position or employment.

(c) Transfer some or all functions, duties, responsibilities and privileges of any county office, department, committee, board, commission, position or employment to any other agency including a committee of the board.

(4) SELECTION PROCESS FOR OFFICES. The county board may determine the method of selection of any county offic[e] The method may be by election or by appointment and, *if by appointment, the county board shall determine the appointing authority, subject to ss. 59.031 and 59.032.*

At the time section 59.032 was passed, the Legislature could not have made reference to section 59.025 because that section had not yet been enacted. *See* 65 Op. Att'y Gen. 245, 246 (1976); 62 Op. Att'y Gen. 14 (1973). At the time section 59.032 was passed, the Legislature must nevertheless have intended to remove the county board's power to appoint "department heads" in those counties which chose to establish the office of county executive. The principal officers or employes which the county board had the power to employ at the time section 59.032 was passed were the veteran's service officer, the corporation counsel and the highway commissioner. *See* secs. 45.43(1), 59.07(44) and 83.01(1). This office has already indicated that the highway commissioner is a "department head"

within the meaning of section 59.032(2). *See* 61 Op. Att’y Gen. 116, 117 (1972). Because of the breadth of section 59.032, *see* 68 Op. Att’y Gen. 92 (1979), I am of the opinion that the term “department head” includes, at a minimum, the principal officers or employes whom the county board possessed the express statutory authority to appoint at the time section 59.032(2) was passed. Section 59.032(2)(b) therefore requires that the corporation counsel be appointed by the county executive.

It is immaterial that the county board has not acted to designate the corporation counsel as a department head under section 59.025. By virtue of the passage of section 59.032(2), the Legislature transferred the authority to appoint the corporation counsel from the county board to the county executive. Since the powers then vested by statute in the county executive have always been expressly excepted from the operation of section 59.025, that statute provides no authority for the county board, either by action or inaction, to transfer the power to appoint the corporation counsel from the county executive to another entity.

II. The Power To Supervise.

Section 59.032(2)(a) empowers the county executive to “[c]oordinate 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 term “board” does not refer to the county board. *See* 61 Op. Att’y Gen. 116 (1972). Since no other board, commission or elected officer possesses supervisory authority over the corporation counsel, the county executive exercises direct or indirect control over the administrative and management functions associated with the corporation counsel’s office. Generally speaking, administrative and management functions refer to those functions which are not policy-making and legislative. *See* 68 Op. Att’y Gen. 92, 94-95 (1979); 63 Op. Att’y Gen. 220, 227, 228 (1974). The latter functions are retained by the county board or its committees. *See* 68 Op. Att’y Gen. 92, 94 (1979). While it would be impossible to precisely define the line where administrative and management functions end and legislative or policy-making functions begin, the power to supervise personnel on a day-to-day basis would appear to be an administrative and management function. *See* 63 Op. Att’y Gen. 220, 227 (1974).

Unless permitted by statute, the county executive's administrative and managerial authority with respect to the corporation counsel may not be infringed upon or removed by the county board. *See* 65 Op. Att'y Gen. 245, 247 (1976). The county board could establish regulations of employment for the corporation counsel pursuant to section 59.15(2)(c) and could, for the purpose of clarity, enact an ordinance or resolution reiterating that the corporation counsel is subject to the administrative and managerial authority of the county executive. The county executive could also, by executive order, establish minimum work rule standards for the corporation counsel and issue oral or written reprimands if those standards were violated. For the reasons which follow, however, the establishment of any such system is largely superfluous with respect to the office of corporation counsel in a county which does not have a civil service ordinance.

III. Power To Remove.

Appointive county officers generally may be removed only for cause:

Appointive county officers may be removed as follows:

. . . .

(2) **APPOINTED BY COUNTY BOARD.** County officers appointed by the county board, by that body, for cause. All such removals may be made by an affirmative vote of two-thirds of the supervisors entitled to seats on such board.

. . . .

(7) **GENERAL EXCEPTION.** But no county officer appointed according to merit and fitness under and subject to a civil service law, or whose removal is governed by such a law, shall be removed otherwise than as therein provided.

Sec. 17.10, Stats.

Section 59.07(44) contains considerably different language, stating that the corporation counsel's "employment may be terminated *at any time* by a majority vote of all the members of the board." To the extent that the specific provisions of section 59.07(44) are in apparent conflict with the general provisions of section 17.10, the

provisions of the more specific statute are controlling. See *Luedtke v. Shedivy*, 51 Wis. 2d 110, 118, 186 N.W.2d 220 (1971).

Section 59.07(44) indicates that the corporation counsel may be removed by a simple majority of the entire county board; section 17.10(2) indicates that a two-thirds vote of the entire board is required to remove county officers. In addition, section 59.07(44) provides that the services of the corporation counsel may be terminated "at any time." In *Patterson v. Ramsey*, 413 F. Supp. 523, 531 (D. Md. 1976), *aff'd per curiam*, 552 F.2d 117 (4th Cir. 1977), the district court was called upon to construe a statute which provided, in relevant part, that, "[t]he Board shall have the power and authority to appoint and remove *at pleasure*" The holding was as follows:

The Court construes the words "at pleasure" to mean that the Board may remove the ... [employee] for any reason except an unconstitutional reason. *The statute plainly omits any requirement that the removal be for good cause or any specific reason.* This reading of the provision (mandated by the plain words) makes sense in light of the relationship between the Board and the ... [employee] and in light of the highly discretionary nature of the ... [employee's] job. The Board is composed of nine members ... whose function is to broadly oversee the workings of the system and to set ... policy in the system. The ... [employee] has the highly discretionary task of implementing the Board's general directions. In such a relationship, the pleasure of the superior is quite often the standard by which the employee is hired and fired.

413 F. Supp. at 531 (emphasis supplied). The lack of any requirement of removal for cause in section 59.07(44) indicates that the corporation counsel in a county which does not have a civil service ordinance serves at the pleasure of the county board.

Because the specific provisions for removal of the corporation counsel under section 59.07(44) cannot be harmonized with the general provisions for removal of appointive county officers under section 17.10, there is no need to determine whether the corporation counsel is an appointive county "officer." Compare *Sieb v. Racine*, 176 Wis. 617, 624, 187 N.W. 989 (1922); 1 Op. Att'y Gen. 521 (1913); and 1908 Op. Att'y Gen. 862 with 65 Op. Att'y Gen. 292 (1976); *Martin v. Smith*, 239 Wis. 314, 322, 1 N.W.2d 163 (1941); and

Thompson v. Whitefish Bay, 257 Wis. 151, 155-56, 42 N.W.2d 462 (1950).

Removal of the corporation counsel can occur only "by a majority vote of all the members of the board." Sec. 59.07(44), Stats. This power to remove carries with it the power to suspend. *Cf.* 16 Op. Att'y Gen. 638 (1927).

The county executive has no statutory authority to unilaterally remove a department head, but may "file, with the county board, charges for ... removal, discharge or suspension" Sec. 59.032(2)(b), Stats. Violations of work rules and the existence of oral or written reprimands might support such charges and might also be relevant to a determination of "cause" for the removal of appointive county officers under section 17.16(2). But documented work rule violations are not necessary to support removal of the corporation counsel in a county which does not have a civil service ordinance. The *Ramsey* case indicates that, pursuant to the specific provisions of section 59.07(44), the corporation counsel may be removed at any time for any reason which is not unlawful.

The former corporation counsel also asked me to address the question of whether the county board may lawfully transfer to the county executive the power to appoint, supervise and remove the corporation counsel. His principal concern was that the transfer of any such authority would constitute an impermissible delegation of legislative power. I indicated in 68 Op. Att'y Gen. 92, 95 (1979) that "[t]o 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." This statement did not contemplate a situation where the county board actually attempted to delegate legislative power. *Compare Westring v. James*, 71 Wis. 2d 462, 469, 238 N.W.2d 695 (1976). It bears repeating that:

[T]he legislature has authorized county boards of supervisors to exercise both legislative and administrative powers. ... [A]nd the County Board has authority to transfer duties and functions of an administrative nature to ... [the county executive] if they are not expressly reserved to some other elective officer, or are not immemorial and important duties of a constitutional officer which characterize such office.

63 Op. Att'y Gen. 220, 228 (1974).

Acting as an appointing authority, as a supervisor concerning personnel matters, and as a removing authority with respect to department heads are all administrative and managerial, rather than legislative or policy-making functions. *Cf.* 63 Op. Att'y Gen. 220, 227 (1974). This fact situation therefore does not involve a question of the impermissible delegation of legislative authority.

Nevertheless, a transfer of functions to the county executive under section 59.025 can only occur if permitted by some other specific statute. *See* 67 Op. Att'y Gen. 1, 3 (1978). Section 59.025 need not be used to transfer the power to appoint or supervise the corporation counsel. The power to appoint is transferred to the county executive by operation of section 59.032(2)(b). The day-to-day power to supervise the corporation counsel in personnel matters is similarly transferred to the county executive by operation of section 59.032(2)(a). The Legislature apparently did not intend to authorize the county executive to unilaterally remove department heads. *See* sec. 59.032(2)(b), Stats. In a county which does not have a civil service ordinance, there appears to be no statutory authority for the county board to transfer the power to remove the corporation counsel from the county board to the county executive.

Under the stated facts, the corporation counsel in your county is appointed by the county executive, supervised with respect to personnel matters on a day-to-day basis by the county executive and removable at pleasure by a majority of the members of the entire county board. No ordinance or resolution should contain provisions to the contrary.

Public Records; Schools And School Districts; A written notice and request for transfer of pupil records under section 118.125(4), Stats., is both a pupil record and public record which must be maintained for at least five years after the pupil ceases to be enrolled. "Pupil records" as defined in section 118.125(1) are "public records" within section 19.32(2) but are subject to special statutes which limit access and direct maximum and minimum periods of maintenance before destruction for various classes of pupil records. Secs. 19.21(6) and 118.125(3), Stats. OAG 46-83

October 4, 1983

MARY ANN WOODKE, *Executive Secretary*
Public Records and Forms Board

You request my opinion on the following questions:

1. Is a school district required to retain and maintain the original written notices and authorization forms for transfer of "all pupil records" to other schools or institutions submitted by adult students or on behalf of minor students pursuant to section 118.125(4), Stats.
2. If the answer to question one is yes, for what period must such records be retained.

The answer to your first question is yes. The answer to your second question is governed by any rules adopted by the school board pursuant to section 118.125(3) which relates to maintenance of pupil records. With respect to "pupil records" which are not "behaviorial records" within the meaning of section 118.125(1)(b), such rules must provide for a retention and maintenance period of at least five years "after the pupil ceases to be enrolled in the school." The written notice and authorization form is not a "behaviorial record." Section 118.125(3) provides:

MAINTENANCE OF RECORDS. Each school board shall adopt rules in writing specifying the content of pupil records and the time during which pupil records shall be maintained, except that no behavioral records may be maintained for more than one year after the date upon which the pupil graduated from or last

attended the school, unless the pupil specifies in writing that individual behavioral records may be maintained. Rules adopted under this subsection shall be published by the school board as a class 1 notice under ch. 985. Pupils records need not be maintained for a period of longer than 5 years after the pupil ceases to be enrolled in the school. School districts may maintain such records on microfilm or in such form as the board deems appropriate.

The written notice authorization form is a "pupil record" within the definition contained in section 118.125(1)(a), which provides:

"Pupil records" means all records relating to individual pupils maintained by an elementary or high school but does not include notes or records maintained for personal use by a teacher or other person who is required by the department under s. 115.28(7) to hold a certificate, license or permit if such records and notes are not available to others nor does it include records necessary for, and available only to persons involved in, the psychological treatment of a pupil.

Paragraphs (b), (c) and (d) refer to specific types of pupil records: "Behaviorial records," "Progress records" and "Directory data."

The attorney who prompted your request has incorrectly set forth the basic issue in stating: "The question ... is whether the authorization form is a 'pupil record' within the meaning of sec. 118.125, stats., or whether the authorization form is a 'public record' within the meaning of 19.32(2), stats."

In my opinion "pupil records" as defined in section 118.125(1)(a), (b), (c) and (d) are "public records" within the definition in section 19.32(2) of the public records law:

"Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), and computer printouts. "Record" does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared

by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

Access to "pupil records" is limited under section 19.35 by reason of section 19.36(1) and specifically by section 118.125(2), which provides in part: "All pupil records maintained by a public school shall be confidential, except as provided in pars. (a) to (j). The school board shall adopt regulations to maintain the confidentiality of such records."

The exception as to pupil records in section 19.21(6) does not mean that such records are not public records or that they must be maintained forever. That section provides:

Any school district, except a city school district or a school district in a 1st class city, may provide for the destruction of obsolete school records. Prior to any such destruction, at least 60 days' notice in writing of such destruction shall be given the historical society, which shall preserve any such records it determines to be of historical interest. The historical society may, upon application, waive the notice. The period of time a school district record shall be kept before destruction shall be not less than 7 years, unless a shorter period is fixed by the public records and forms board under s. 16.61(3)(e) and except as provided under sub. (7). This section shall not apply to pupil records under s. 118.125.

Maintenance and the period pupil records must be retained by the school district is governed by section 118.125(3) and rules adopted thereunder. By reason of that statute, a school district board has a duty to adopt rules providing for the maintenance and destruction of pupil records not transferred, subject to limitations as to the maximum and minimum time periods set forth in the subsection.

Legislature; Public Officials; Reapportionment; Redistricting;
The assembly districts altered as to boundaries and renumbered by 1983 Wisconsin Act 29, became effective July 20, 1983. An assemblyperson is a constitutional state public officer who must be a resident and elector of the district he or she is chosen to represent. An incumbent assemblyperson continues to represent the district from which he or she was chosen, as altered as to boundaries and as renumbered. Limitations on in-district travel and mass mailings to constituents discussed. OAG 47-83

October 4, 1983

THOMAS A. LOFTUS, *Chairperson*
Assembly Committee on Organization

Pursuant to section 165.015(1), Stats., the Assembly Committee on Organization requests my opinion as to the effect of 1983 Wisconsin Act 29 on individual legislators currently holding office. You are especially concerned with those legislative districts which have been renumbered or whose boundaries have been changed by Act 29. In *Wisconsin State AFL-CIO v. Elections Bd.*, 543 F. Supp. 630, 639 (D.C. 1982), the order of the court provided: "The appended judicial plan of reapportionment be effective for the 1982 legislative elections and thereafter until such time as a valid constitutional redistricting plan is enacted into law.

The judicial plan was printed in the 1981-82 Wisconsin statutes as chapter 4 beginning at section 4.004 together with chapter 4 as created by chapter 304, Laws of 1971, even though the latter was held unconstitutional in *AFL-CIO v. Elections Bd.* The legislative elections in the November 1982 general election were held in accordance with the judicially ordered plan. In 71 Op. Att'y Gen. 157 (1982), this office stated that the effective date of the new district lines for purposes of nominations and regular, recall and special elections was the date of the court order, June 17, 1982. This office also concluded that holdover senators in districts whose boundaries were altered were responsible to the inhabitants of the district to which their numbers corresponded under the new districting plan and not to the inhabitants of those portions of their former district which were not included within the altered district.

Wisconsin Constitution article IV, section 3 requires that “[a]t their first session after each enumeration made by the authority of the United States, the legislature shall *apportion and district anew the members* of the senate and assembly, according to the number of inhabitants” The Legislature responded to the federal court order issued in *Wisconsin State AFL-CIO* by enacting the reapportionment plan set forth in 1983 Wisconsin Act 29. A reapportionment plan is presumed constitutional and its unconstitutionality must be established beyond question. *State ex rel. Broughton v. Zimmerman*, 261 Wis. 398, 52 N.W.2d 903 (1952). This opinion presumes that the reapportionment plan meets the one-person one-vote requirements under the federal constitution and the “contiguous territory ... in as compact form as practicable” requirements of Wisconsin Constitution article IV, sections 4 and 5.

1983 Wisconsin Act 29 does not specifically set forth the relationship of the new districts to incumbent legislators and especially as to assemblypersons. The Act utilizes different numbers for assembly districts than those assigned by the federal court. The Act does not include a cross-reference by name, map, index or number as between each incumbent assemblyperson, the judicially numbered district and the number assigned the district under Act 29.

1983 Wisconsin Act 29 was published on July 19, 1983, and by reason of section 991.11 all of its provisions, with exceptions,* became effective July 20, 1983.

Section 14 of Act 29 provides that “[s]ections 8.15(9) and 8.20(10) of the statutes, as affected by this act, first apply to the regular 1984 September primary and November general elections for representative in congress, and for members of the senate and assembly.”

At first blush one might argue that since the Legislature provided that sections 8.15(9) and 8.20(10) should first apply to the 1984 September primary and November general elections, the newly legislative-created districts have no relationship to incumbents. I am of the opinion, however, that the Legislature did, within constitutional terms, “apportion and district anew *the members* of the senate and

* Section 66.021(16), relating to annexations; section 66.022(6), relating to detachments; and sections 8.15(9) and 8.20(10) relating to duty of elections board to give candidates a copy of a map showing the boundaries of the district which the candidate seeks to represent.

assembly,” and that it intended that incumbents elected from judicially ordered districts immediately serve the district from which they were elected as altered with respect to boundaries and as renumbered in the case of assembly districts. This conclusion is in part based on legislative intent set forth in section 4.001(4) concerning the urgency to fulfill the constitutional duty with respect to apportionment which includes a statement that the Legislature had improved upon the court plan. It is primarily based, however, on the fact that section 2 of Act 29 expressly repealed all of chapter 4 which set forth the judicially created districts and those created by chapter 304, Laws of 1971. As of July 20, 1983, the only viable districts were those created by 1983 Wisconsin Act 29. Further, the Act made it clear that the former districts were not to be utilized for any election. The Act revised section 4.004 to provide:

On or after the effective date of this act (1983), any special election to the legislature called to fill a vacancy for the balance of an unexpired term, any election to recall a member of the legislature, and any regular election to the legislature, shall be from the districts as described in ss. 4.009 and 4.01 to 4.99.

Section 14 of 1983 Wisconsin Act 29 refers only to the initial applicability of amended sections 8.15(9) and 8.20(10), not to the initial applicability of the entire Act. Section 14 indicates that the state election board is not required to provide candidates for state office with copies of maps showing the boundaries of the reapportioned districts until the 1984 primary and general elections. This does not mean that the new districts are not effective before 1984, only that the board need not supply maps until that time.

My conclusion that the plan became immediately effective is supported by federal cases. See *Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564, *app. dis'd*, 447 U.S. 916 (D.C. D.C. 1980), and *Mach v. East Baton Rouge Parish School Bd.*, 533 F. Supp. 556 (D.C. La. 1980). In addition, there are strong policy considerations in favor of precluding delays in implementing reapportionment plans. See *Petuskey v. Rampton*, 243 F. Supp. 365 (D.C. Utah 1975).

Finally section 991.11 provides that every act “which does not expressly prescribe the time when it takes effect shall take effect on

the day after its date of publication.” Therefore, the Act became effective on July 20, 1983.

No real importance can be given to the fact that the Assembly changed the numbers of assembly districts from those utilized under the court plan. It did not result from any legislative intent to reassign a *member* (an incumbent legislator) to a district other than that from which he or she was elected. It was a reassignment of a *number* only, to the district which had altered boundaries. The district remained the district from which he or she was elected as altered. The total number of assembly districts was neither increased nor decreased. I am advised that the change was made to return to the former formula and procedure of the Legislature under which the senate district number multiplied by three would equal the number of the largest numbered assembly district contained within the senate district.

Your specific questions and my answers follow:

1. Does a legislator continue to represent, during the remainder of his or her term, all those persons within the election district from which he or she was elected?
2. Does a legislator, who currently resides in a district affected by Act 29, represent those persons within the district who were newly-placed there by Act 29?

The answer to your first question is no and the answer to your second question is yes. However, senators and assemblypersons are public officers and state constitutional officers and, in a broad sense, are responsible to all inhabitants of Wisconsin. Wisconsin Constitution article IV, sections 4 and 5; *State v. Eaton*, 133 P.2d 588, 591, 592 (Mont. 1943). An assemblyperson is elected from a district by the qualified electors therein, must be a resident and qualified elector “in the district he may be chosen to represent” and has special responsibility to such district and all of the inhabitants therein. Wisconsin Constitution article IV, sections 4 and 6. *Also see State ex rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 564, 565, 126 N.W.2d 551 (1964). Section 4.004 as created by Act 29 makes the assemblyperson solely subject to the electors of the altered district as far as recall is concerned. In *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (D.C. Pa. 1980), it was stated: “A legislative representative suffers no cognizable injury, in a due process sense or otherwise, when

the boundaries of his [or her] district are adjusted by reapportionment.”

3. Do the numbers assigned to [assembly] legislative districts have any relevance in determining who is represented by a specific legislator?

For reasons stated above the answer is no. A legislator continues to represent the district from which he or she was elected, “chosen to represent,” as altered with respect to boundaries and as renumbered.

4. May legislators currently residing in a legislative district change their residency to another location within that district, as established by Act 29, during the remainder of the term to which elected? Must the location of the new residence remain within the district from which the legislator was last elected, or may it be located at any place within the district as revised by Act 29?

The answer to the first part of the question is yes. The answer to the second part of your question is that such legislator can move to any portion of the district as revised. It is the same district but has merely had its boundaries altered and a different number assigned. If the residence of the legislator were not included within boundaries of the new district, the statement in 71 Op. Att’y Gen. 157, 161 (1982) would apply:

One or more senators in odd numbered districts do not reside within the boundaries of the new district bearing the number similar to that of the district from which such senators were elected. No vacancy would result by reason of sec. 17.03(4), Stats., since the senator remains an inhabitant of the “district from which he or she is elected.” However, such a person would have to move into the new boundaries and qualify as an elector to be elected to represent the newly created district. Wis. Const. art. IV, § 6.

A legislator is not required to move into his or her revised district immediately, if the effect of the new district lines is to exclude such person from the revised district. A legislator is required to move into the revised district only if he or she decides to run for representative in that district in the next general election.

5. Are there any restrictions which legislators should observe regarding the use of public funds for mailings to constituents and reimbursable travel within their legislative districts?

The answer is yes. Section 11.33, as amended by 1983 Wisconsin Act 27, prohibits the use of public funds by elected state officials for mass mailings between the period beginning with the first day for the circulation of nomination papers until after the date of the election. The limitation does not apply "to answers to communications of constituents." A legislator cannot expend public funds for a purely private purpose. However, such officer can expend funds which have been appropriated for his or her use for mailings to constituents within his or her district and to persons located outside such district and for travel both within and without such district when such mailings or travel are connected with the officer's representation of the district and the inhabitants therein, subject to rules of the Assembly enacted under Wisconsin Constitution article IV, section 8, or applicable statute. See section 13.123 as to postage and clerical assistance allowance and reimbursement for travel expense.

You have furnished me with copies of "Assembly District Mileage Reimbursement Policy" for payment from funds appropriated under section 20.765(1)(a) adopted by the Committee on Assembly Organization on August 3, 1983, which purports to limit reimbursement for mileage costs to travel within "their respective districts or adjoining counties," which attempts to define which meetings constitute official legislative business, and which prohibits reimbursement for travel related to attending political party meetings, appearances in behalf of other candidates or for other "political purposes" as defined in section 11.01(16). You have also furnished me with a copy of the minutes of the Committee's August 3, 1983, meeting which indicates that the Committee has attempted, by resolution, to establish a limit of "one district-wide mailing per session (equal to 15,000 copies at current bulk rates) outside the Assembly office account." The Committee also enacted the following resolution: "For the purpose of the Assembly district mileage reimbursement policy and office account policy, Assembly districts as established by 1983 Wisconsin Act 29 shall be considered the 'district' effective July 20, 1983."

I find nothing in the 1983 Assembly Rules, adopted June 2, 1983, which would delegate to the Committee on Assembly Organization power to limit the number of pieces mailed or to limit mailings to the representative's district or to limit travel to the representative's district or adjoining counties. 1983 Assembly Rule 23 is only concerned

with power of such Committee to approve expenditures from the "contingent fund" as required by section 13.14(1). Section 13.14(1), as amended by section 2202 of 1983 Wisconsin Act 27, which changed the cross reference from section 20.765(1)(b) to 20.765(1)(c), provides that: "Expenditures from the legislative contingent fund, under s. 20.765(1)(c) shall be made only when authorized by majority vote of the ... organization committee in the respective house" Act 27 provides for only a two thousand dollar appropriation for contingent expenses in each of the two years. I do not view section 13.14(1) as a basis for the Committee on Assembly Organization having power over expenses set forth in section 13.14(3), which provides:

TRAVEL; LEGISLATIVE PERSONNEL. The actual and necessary expenses of legislative policy research personnel, assistants to legislators and research staff assigned to legislative committees and party caucuses incident to attending meetings outside the capital shall be reimbursed from the appropriation under s. 20.765(1)(a).

In addition, section 13.14(1) is not a sufficient basis for the Committee on Assembly Organization to assert control over expenditures from section 20.765(1)(a), as created by Act 27, which provides a sum sufficient fund for "General program operations-assembly" estimated at \$8,661,200 for 1983-84 and \$8,714,700 for 1984-85. The interim postage and clerical assistance allowance for each calendar month during which the Legislature is in actual session three days or less is limited to \$25 per month for each representative. Sec. 13.123(2), Stats. Subsection 2 does not confer power of prior approval on the Committee on Organization with respect to mailing within the representative's district or with respect to processing claims for payment. In my opinion the Committee probably did not have power to limit mailings of representatives as to number or as to territory.

The Committee on Assembly Organization does have power under section 13.123(3)(a) and (b) relative to approval of *attendance* of an assemblyperson at certain *out-of-state* meetings as a prerequisite to reimbursement for expenses from section 20.765(1)(a). The speaker, rather than the committee, has power to approve attendance of meetings "within the state outside the state capitol." Sec. 13.123(3)(a), Stats. It is my opinion that the limits on reimburse-

ment for travel in the "Assembly District Mileage Reimbursement Policy" adopted by the Committee on Assembly Organization, except as they apply to out-of-state meetings, are of questionable validity and are not within powers authorized the Committee under section 13.123(3), or any statute or duly enacted assembly rule of which I am aware.

BCL:RJV

Corporation Counsel; County Board; County board may not by resolution require either a full time district attorney or the corporation counsel to advise town officers on matters of strictly town business, and may not engage special counsel for such purpose. OAG 48-83

October 17, 1983

DARWIN ZWIEG, *District Attorney*
Clark County

You request my opinion on four questions:

1. May a county board by resolution expand the duties of a full time district attorney to require such officer to advise and counsel town officers concerning town business?
2. If the full time district attorney agreed to advise and counsel town officers concerning town business at the request of the county board, may the board legally expend funds to purchase errors and omissions insurance to cover the District Attorney's Office in this area?
3. May the county board expend funds to pay a full time or part time county corporation counsel to advise and counsel town officials concerning town business?
4. Assuming the county does not have a corporation counsel for county business, may the county board expend funds to pay a private attorney for the sole purpose of giving advice and counsel to town officials?

The answer to all four questions is no. It can be noted that the statutes do in at least one instance require a town chairperson to notify the district attorney of every forfeiture that has occurred in the town so that appropriate forfeiture action may be commenced. *See* sec. 778.12, Stats. There may be other statutes which require contact between the district attorney and town official such as those involving a town police officer who seeks prosecutions on state charges. District attorneys are of course not foreclosed from rendering advice in such areas even though they are to some degree concerned with town business. Advice and acts of a district attorney in such case are part of such officer's official duties and can be covered by a fidelity or liability insurance policy purchased at county expense. *See* secs. 19.01(2)(2m), 19.07 and 59.07(2)(a)(d), Stats. It is assumed, however, that your questions are not concerned with advice concerning such special statutes or contacts in which there is a direct and obvious state or county interest.

We must start with the proposition that a county and towns lying within its boundaries are separate corporate, and substantially independent, governmental bodies. Secs. 59.01 and 60.01, Stats. Both a county, which is a *quasi*-municipal corporation, and a town, which is a municipal corporation, have limited powers. County boards have only such legislative powers as are conferred by statute, expressly or by clear implication. *Maier v. Racine County*, 1 Wis. 2d 384, 84 N.W.2d 76 (1957); *Town of Vernon v. Waukesha County*, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981). The same rule applies to towns. *Pugnier v. Ramharter*, 275 Wis. 70, 81 N.W.2d 38 (1957). The interests of a county and a town lying within its borders are in some respects common but there are many areas of actual or potential conflict. The same can be said where the interests of the state and town are concerned. The district attorney represents the interests of the state as well as those of the county. *O'Neil v. State*, 189 Wis. 259, 207 N.W.2d 280 (1926). A district attorney is a constitutional officer whose powers are in large part statutory. *See* sec. 59.47 and the index to the statutes. Section 59.47(3) provides that the district attorney shall give advice to the "county board and other officers of his county." There is no reference therein or in any other statute of which I am aware that makes it the duty of a district attorney to give advice to town boards or town officials on matters strictly relating to town business. Town boards have express statutory power to retain

their own attorneys on an interim or regular basis. Section 60.29(3) empowers a town board:

To procure legal advice when needed in the conduct of town affairs and employ counsel for that purpose; also such stenographic, clerical and expert help as may from time to time be necessary in the conduct of the affairs of the town and the promotion of the financial welfare; to enter into the necessary contracts for the performance of such services; and to determine the qualifications, including the residence of the persons so employed.

Further, there is no provision within the many listed under section 59.07 or in all of chapter 59 which would empower the county board to require the district attorney to advise town officials with respect to town business. Even at a time when a town chairman, by reason of his or her office, served on the county board, this office opined that it was not the part of a district attorney's duties to advise a town chairman on town matters. 18 Op. Att'y Gen. 263 (1929). Indeed, section 59.485 recognizes the potential for conflict between the interest of a county and those of a town. It provides:

A district attorney who is not compensated by the county on a full-time basis may serve as town or village attorney, or as city attorney in any county having a population of less than 40,000. In cases where conflicts arise as the result of his being employed by a governmental unit other than the county, the district attorney shall withdraw from such other employment and shall represent only the interest of the county.

The inference to be drawn is that a district attorney compensated on a full-time basis cannot serve as a "town or village attorney, or as a city attorney in any county having a population of less than 40,000." Section 59.48 prohibits a district attorney in a county of over 40,000 from also holding office or serving as a city attorney.

It has long been held that powers conferred on a county officer by statute cannot be narrowed, taken away or enlarged by the county board except in cases where the Legislature has authorized it by statute. *Reichert v. Milwaukee County*, 159 Wis. 25, 150 N.W. 401 (1914); 63 Op. Att'y Gen. 196 (1974). I conclude that a county board cannot require a district attorney compensated on a full-time basis to advise and counsel town officers concerning town business.

Section 59.07(44) does authorize a county board to appoint a corporation counsel and provides that:

The duties of the corporation counsel shall be limited to civil matters and may include giving legal opinions to the board and its committees and interpreting the powers and duties of the board and county officers. Whenever any of the powers and duties conferred upon the corporation counsel are concurrent with similar powers or duties conferred by law upon the district attorney, the district attorney's powers or duties shall cease to the extent that they are so conferred upon the corporation counsel and the district attorney shall be relieved of the responsibility for performing such powers or duties.

Although sections 59.025(3) and 59.07(44) authorize the county board to create such office and assign duties of a civil nature to such officer in excess of those exercised by the district attorney pursuant to statutory authority applicable to such latter office, such duties must relate to a county on delegated state purpose. Advising town officials on town business matters is not a county purpose for which county funds may be expended. Having a county provide legal counsel to towns may also be contrary to the general rule that public monies must be spent at the level at which such monies are raised. *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976). No statute permits a county board to employ private counsel for such purpose or to purchase insurance to protect the county, district attorney or corporation counsel in connection with rendering advice which is not connected with the official duties of such offices. See section 59.44(1)(2)(3) with respect to appointment of special counsel to assist the district attorney or to act in his or her place in criminal matters or "(3) [w]hen there is an unusual amount of civil litigation to which the county is a party or in which it is interested"

BCL:RJV

Criminal Law; Gambling; Indians; The state's anti-gambling laws are enforceable against Indians on Indian reservations under the authority of Pub. L. No. 280. OAG 49-83

October 27, 1983

THOMAS E. VAN ROY, *District Attorney*
Sawyer County

You ask whether the State of Wisconsin has jurisdiction to enforce its gambling laws within the boundaries of the Lac Courte Oreilles Reservation. Specifically, you question whether the state may exercise jurisdiction over the operation of blackjack games and slot machines by the Lac Courte Oreilles Tribe or its members on tribally owned land. You note that the state does not exercise control of bingo games on an Indian reservation.

In my opinion, the state does have the authority to enforce its gambling laws with regard to such activities within the reservation without regard to the identity of the individual conducting those activities. In 69 Op. Att’y Gen. 22 (1980) (an opinion primarily concerned with the operation of bingo on Indian reservations), I concluded that the state’s criminal statutes relating to gambling are enforceable against Indians under the authority granted by Pub. L. No. 280 (67 Stat. 558, 28 U.S.C. § 1360, 18 U.S.C. § 1162). Under this statute, the state acquired limited civil and general criminal jurisdiction over Indians in “all Indian country within the state except the Menominee Reservation.”

I have reviewed the relevant case law and the state and federal statutes that prohibit gambling and related activities on Indian reservations located within Wisconsin. Since Congress has specifically authorized the state to enforce its *criminal* laws (including those concerning gambling) against tribe members within the Lac Courte Oreilles Reservation, there is nothing to cause me to qualify or change my earlier opinion.

Where the criminal jurisdiction of a state subject to Pub. L. No. 280 has been at issue, the courts have uniformly held that such authority is unqualified. See *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373, 380 (1976). I am not aware, however, of any reported case that has considered specifically whether Pub. L. No. 280 permits enforcement of state anti-gambling laws on reservations. A number of federal court cases have held that state bingo laws are not enforceable because they are civil-regulatory rather than criminal-prohibitory. In my opinion, these cases are distinguishable and only repre-

sent a limited exception to Wisconsin's otherwise unqualified authority to prosecute any Indian subject to Pub. L. No. 280 who violates state anti-gambling statutes.

In *Oneida Tribe of Indians of Wis. v. State of Wis.*, 518 F. Supp. 712 (W.D. Wis. 1981), the court concluded that before 1973 the conduct of bingo was generally considered unauthorized gambling if played for money prizes. The court noted that bingo was effectively decriminalized in 1973 by a constitutional amendment. As a result, the Bingo Control Act, chapter 163, Stats., was classified by the court as a civil-regulatory statute rather than a criminal statute, which means that the state is without authority under Pub. L. No. 280 to enforce provisions of the Bingo Control Act against the Oneida Tribe. The court, however, did not question the state's authority to enforce other gambling laws under its *criminal* jurisdictional authority over Indians on Indian reservations. Nor did the court consider whether a state's sovereign authority standing alone permits regulation of those Indian activities (including variations on bingo) that have a significant impact on state interests. *See generally Rice v. Rehner*, 103 S. Ct. 3291 (1983) (state regulatory authority over liquor sales by Indians on Indian reservations upheld).

The question of casino-type gambling by Indians on an Indian reservation was analyzed in detail in *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980). The court noted that in the State of Washington most forms of gambling are proscribed and are therefore against the state's public policy. Although the state's authority to enforce its gambling laws was not at issue, the court noted that the state probably lacked such authority because it had not assumed general criminal jurisdiction over Indians within reservation boundaries pursuant to Pub. L. No. 280. The court concluded that where a state lacks jurisdiction under Pub. L. No. 280 (like Wisconsin's lack of such jurisdiction on the Menominee Reservation), federal gambling laws incorporate by reference state laws that proscribe such activity and are therefore enforceable by the federal government. *See also United States v. Sosseur*, 181 F.2d 873 (7th Cir. 1950).

Nothing in the court's analysis in *Farris* suggests that the federal laws, which are clearly less comprehensive than state laws, were intended to preempt or otherwise qualify state jurisdiction over unauthorized gambling activities. In fact, the court specifically notes

that the federal laws are designed to aid the enforcement of state law, even though such statutes also further independent federal interests.

It therefore is my opinion that the state has unqualified authority to enforce its criminal statutes that proscribe gambling activities such as those you referred to should they occur on the Lac Courte Oreilles Indian Reservation.

BCL:JDN

Health And Social Services, Department Of; Water Pollution; The Department of Health and Social Services may not establish rules which regulate radioactive air emissions and water discharges from facilities regulated by the United States Nuclear Regulatory Commission but may regulate radioactive air emissions and water discharges from other facilities. OAG 50-83

November 28, 1983

LINDA REIVITZ, *Secretary*
Department of Health and Social Services

You have asked for my opinion concerning several questions involving the authority of the Department of Health and Social Services (DHSS) to establish radiation standards. Specifically, you ask whether DHSS may establish radiation standards for air emission and water discharges from sources licensed by the United States Nuclear Regulatory Commission (NRC) as well as other sources of radiation. These standards would be encompassed within chapter HSS 157 Wis. Adm. Code and would limit emissions and discharges in order to protect the public from unnecessary exposure to radiation.

It is my opinion that DHSS may not establish radiation water effluent standards applicable to NRC licensees; DHSS could regulate radioactive air emissions if the United States Environmental Protection Agency (EPA) delegated such authority under the Clean Air Act but EPA has not done so to date. DHSS may regulate radioactive air emissions and water effluent for any other non-NRC licensee.

The questions which you have raised require an analysis of existing state law with respect to the authority of DHSS and whether the federal government has preempted Wisconsin from setting radiation standards to any degree.

Beginning with what legal authority DHSS has as a matter of state law, chapter 140, Stats., is controlling. DHSS is granted very broad authority to protect the health and life of citizens in Wisconsin. Section 140.05(1) reads: "The department shall have general supervision throughout the state of the health and life of citizens." One of the specific areas delegated to DHSS by the Legislature is in the area of radiation protection. Sections 140.50 to 140.60 are known as the Radiation Protection Act and specify certain responsibilities that DHSS has in order to protect both the "health and life" of Wisconsin citizens and the "environment of the state" from the hazards of radiation emissions. Beginning with the stated public policy and purpose, it is clear that DHSS has very broad authority to set radiation standards.

140.51 Public Policy. Since ionizing radiations and their sources can be instrumental in the improvement of the health and welfare of the public if properly utilized, and may be destructive or detrimental to life or health if carelessly or excessively employed or may detrimentally affect the environment of the state if improperly utilized, it is hereby declared to be the public policy of this state to encourage the constructive uses of radiation and to prohibit and prevent exposure to ionizing radiation in amounts which are or may be detrimental to health. It is further the policy to advise, consult and cooperate with the department of industry, labor and human relations and other agencies of the state, the federal government, other states and interstate agencies and with affected groups, political subdivisions and industries; and, in general, to conform as nearly as possible to nationally accepted standards in the promulgation and enforcement of rules.

Your department's specific powers and duties are found at section 140.53. DHSS' duties are shared with the Department of Industry, Labor and Human Relations (DILHR) and include the following: Adoption and enforcement of rules that "may be necessary to prohibit and prevent unnecessary radiation"; and the development of "comprehensive policies and programs for the evaluation and determination of hazards associated with the use of radiation, and for

their amelioration.” The only limitation on these broad powers under state law is that the Radiation Protection Act does “not apply to on site activities of any nuclear reactor plant licensed or operated by the nuclear regulatory commission.” Sec. 140.595(2), Stats.

Given the stated public policy and purpose in section 140.51, the specific powers and duties outlined in section 140.53 and the mandatory language for promulgation of a radiation protection code in sections 140.53 and 140.56, there is little doubt that DHSS has the authority under state law to set radiation standards to protect the health and life of Wisconsin citizens for sources other than nuclear power plants operated or licensed by NRC.

That is not to say that other state agencies have no similar or corresponding responsibilities. For example, the Department of Natural Resources (DNR) also has broad authority to establish certain radioactive standards to prevent environmental harm. *See* chapter 147 wherein a radioactive substance is defined to be a “pollutant” within the meaning of Wisconsin’s pollution discharge elimination system. *See* sec. 147.015(7), Stats. *See also* section 144.025(3), which requires DNR to establish a program that will protect Wisconsin’s water resources. However, the fact that another agency has similar or overlapping legal authority, as may be the case here, does nothing to diminish the fact that DHSS has the responsibility and authority under state law to create air emission and water discharge radiation standards to protect human health. Had the Legislature wished to give either DHSS or DNR sole authority over air or water regulation, it could have easily stated so. The Legislature was well aware of the fact that DHSS exercises authority under the Radiation Protection Act because the Act existed at the time section 144.025 was created.*

The remaining question is whether the federal government has taken any action to preempt the DHSS from setting radiation standards to any degree? This requires an analysis of the relationship between Wisconsin and the federal government under the Atomic Energy Act, the Clean Water Act and the Clean Air Act.

* Section 140.50, *et seq.*, was created by chapter 325, Laws of 1963, whereas section 144.025 was created by chapter 614, Laws of 1965.

The Atomic Energy Act of 1954 (AEA) was enacted by Congress for the purpose of development of nuclear energy consistent with national defense and protection of public health and safety (*see* 42 U.S.C. §§ 2011, 2012 and 2013). In order to effectuate this purpose, Congress established a licensing program wherein the construction and operation of both “production” and “utilization” facilities, which use “source,” “by-product” or “special nuclear” materials, would be subject to standards established by the NRC (42 U.S.C. §§ 2131, *et seq.*). These facilities range in diversity from hospitals and research institutions using radioisotopes to nuclear reactors. Pursuant to its regulatory responsibilities, the NRC has adopted extensive standards for protection against radiation exposure. *See, e.g.*, 10 C.F.R. Parts 20 and 50—App. I. The AEA expressly retains for states the power to regulate the “generation, sale or transmission of electric power” produced by nuclear power plants (42 U.S.C. §§ 2018 and 2021(k)), but only for “purposes other than protection against radiation hazards” (42 U.S.C. 2021(k)).

The question of whether the AEA has preempted state involvement in the regulation of facilities regulated by the AEA for health and safety purposes has been the subject of much litigation. The United States Supreme Court has recently considered this issue in the context of a state-imposed moratorium on the construction of new nuclear-electric generating facilities. In *Pac. Gas & Elec. v. St. Energy Resources Conserv.*, 103 S. Ct. 1713 (1983), the Court specifically held that states are federally preempted from independently imposing any regulations relating to safety or radiation hazards for nuclear power plants. *Id.* at 1723, 1726.

Notwithstanding this broad preemption, the state has two potential mechanisms by which it can establish such regulations. First, the AEA authorizes the NRC to enter into agreements with any state to assume the NRC’s program for source, by-product or special nuclear materials. If a state and the NRC enter into such an agreement, the state then assumes the “authority to regulate the materials covered by the agreement for the protection of public health and safety from radiation hazards.” *Id.* 42 U.S.C. § 2021(b). Since Wisconsin has not chosen to become an “agreement state,” this avenue is presently unavailable.

A state may impose regulations on NRC licensees, however, if such authority can be found in another federal statute. Air emis-

sions and effluent discharges are each regulated by separate federal regulations: the Clean Air Act—42 U.S.C. §§ 7401, *et seq.*, and the Clean Water Act—33 U.S.C. §§ 1251, *et seq.*

Under the Clean Water Act, “pollutant” is defined to include radioactive material. However, the United States Supreme Court has specifically held that the Clean Water Act does not authorize the regulation of discharges from NRC licensees for source, by-product, and special nuclear materials. *Train v. Colo. Public Interest Research Group*, 426 U.S. 1 (1976). Therefore, a state may not adopt regulations governing water discharges from NRC licensed facilities. Still, as discussed above, states may adopt such regulations for non-NRC licensed facilities.

In the area of air emissions from NRC licensed facilities, there is a statute authorizing state action under certain circumstances. The Clean Air Act Amendment of 1977 (42 U.S.C. § 7422(a)) specifically authorizes the EPA to regulate radioactive air pollutants, including source, by-product and special nuclear material, in order to protect “public health.” The EPA and NRC must coordinate the regulation of source, by-product or special nuclear material from any facility under NRC jurisdiction (42 U.S.C. § 7422(c)(2)). However, NRC may waive any EPA standard at any facility under jurisdiction of NRC, if the standard would “endanger public health and safety” (42 U.S.C. § 7422(c)(3)).

The EPA may delegate to any state its regulatory powers if certain conditions are met. 42 U.S.C. § 7410. Although there is nothing in federal air law that requires responsibility of regulating air pollutants from NRC-licensed facilities to be in DNR and not DHSS, EPA has delegated the authority to regulate air pollutants to DNR through the regulatory scheme set out in chapter 144. Therefore, DNR may regulate radioactive air pollutants through its air pollution program in chapter 144.

In summary: for NRC-licensed facilities, DHSS may not regulate water effluents for radioactive pollutants; it could regulate air emissions if it were delegated authority by the EPA under the Clean Air Act, but to date delegation has not occurred. However, for any other air or water radioactive pollution source, DHSS has the

authority and responsibility to establish standards to protect the public health and lives of Wisconsin citizens.

BCL:KMF

Counties; Libraries; Taxation; A municipality, otherwise qualified, is entitled to an exemption under section 43.64(2), Stats., where the county has not acted to levy a tax specifically designated as a county library tax but does finance "money expended for public library services to its inhabitants" by a general tax levy. OAG 51-83

November 28, 1983

EUGENE R. DUMAS, *Corporation Counsel*

Sauk County

You request my opinion with respect to a number of questions which relate to section 43.64(1) and (2), Stats., which as amended by section 932 of 1983 Wisconsin Act 27, provides:

(1) The county board of a county expending money for public library service to its inhabitants may levy a tax to provide funds for such service and shall include any amount of tax under this subsection in the amount of taxes determined to be levied under s. 70.62(1).

(2) Any city, town, village or school district in a county levying a tax for a county library under sub. (1) shall, upon written application to the county board of the county, be exempted from the tax levy, if the city, town, village or school district making the application expends for a library fund during the year for which the tax levy is made a sum at least equal to the sum which it would have to pay toward the county tax levy. For the purposes of this subsection, "library fund" means the funds raised by the city, town, village or school district by tax levy or appropriation under s. 43.52(1)

Although these sections were extensively treated in 65 Op. Att'y Gen. 182 (1976) and 72 Op. Att'y Gen. 49 (1983), you are concerned with the scope of the exemption and what county taxes and supported expenditures are to be included in measuring as against municipal expenditures for a library fund. Your ultimate question is whether the interpretation of these sections made by the Department

of Public Instruction is correct. I am of the opinion that it is in substantial part.

A memorandum you include from the Department of Public Instruction dated July 19, 1982, indicates that counties treat taxation for county library services in a number of ways:

1. The county includes all costs for library services within its general budget and the general county levy under sec. 70.62, Stats., *et seq.* No separate tax for library purposes is levied by the county.
2. The county includes all monies to be raised by taxation for library purposes within a separate county levy denominated "county library tax" or similar phrase.
3. The county combines both methods above. Certain types of library services are funded from a separate county library levy and other library services are funded from appropriations from the general levy.

The department has concluded that "[t]he scope of the exemption hinges upon the scope of the county tax authorized by sec. 43.64(1), Stats. ..." and that

[b]y its express terms, this statute requires all money to be raised by taxation for county financed library services to be fixed at the time of setting the general levy under sec. 70.62(1), Stats. Since this provision relates to all library services funded by county level taxation and this is the tax from which exemption can be claimed under sec. 43.64(2), Stats., it necessarily follows that the exemption for eligible municipalities applies to any and all taxes levied by the county for library services. Thus, full exemption remains available regardless of which of the three methods outlined above is utilized by the county to raise funds for library services.

You state Sauk County raises funds by taxation to finance expenditures for library services but has included such tax in the general levy without a separate tax for library service. The budget includes items for the Sauk County Library Board, the South Central Library System, services purchased through the Baraboo

Municipal Library and contributions to other municipal libraries for serving non-municipal residents.

You inquire: Is a municipality entitled to an exemption under section 43.64(2) where the county has not acted to levy a tax specifically designated as a county library tax but does finance "money expended for public library services to its inhabitants" by a general tax levy?

In my opinion the answer is yes. Subsection (1) of 43.64 uses the words may and shall in the same section. The statute recognizes that not all money a county expends for public library services need be raised by tax levy. Many expenditures may be financed by receipts from gifts, donations, income from endowments, fines and service charges. However, subsection (1) expressly provides that where a county exercises its discretion to "levy a tax to provide funds for such service ..." the county board "*shall include any amount of tax under this subsection in the amount of taxes determined to be levied under s. 70.62(1).*" Neither section 43.64(1) nor 70.62(1) specifically require that the amount of the tax for library purposes, or items financed thereby, be listed separately. However, separate listing is beneficial as an aid to consideration of any claimed municipal exemption and is almost a matter of necessity. The exemption in section 43.64(2) is measured by the amount a municipality "expends for a library fund during the year for which the tax levy is made ..." as against the amount of "the sum [its proportional share of the tax to be raised] which it would have to pay toward the county tax levy" if it were not exempt. Where there is no separate listing of the expenditures financed by taxes, such figures must be ascertained and totaled to compute the municipality's proportional share of the taxes to be raised so that the exemption can be determined. Where exemption is claimed and there is entitlement, the "rate" of the tax for county library services may have to be adjusted. The statute does not permit, nor could the Legislature have intended, that a municipality which expends substantial amounts for its own library fund could lose its right to any exemption where the county board did raise substantial amounts for county library service purposes by tax levy through inclusion in its general budget and general tax levy rather than by means of designating the amount to be levied as a county library tax. If a county does not levy *any* tax to provide funds for public library service, municipalities would not be able to qualify for

an exemption from a county tax levy under subsection (1) since there would be no tax levy for public library services.

You also inquire whether the scope of the section 43.64(2) exemption encompasses taxes financing only expenditures "for a county library" which is the term used in subsection (2), or whether it extends to all taxes which finance expenditures for "public library service," which is the term used in subsection (1).

It is my opinion that the exemption is measured on taxes which finance expenditures for providing "public library service to its inhabitants," which would include expenditures for a county library should the county choose to operate one pursuant to section 43.52(1). The words "any municipality" as used in that section include a county. Sec. 43.001(4), Stats. My conclusion is based on the legislative history of section 43.64(1) and (2).

Sections 43.52(1) and (2) and 43.64(1) and (2) were renumbered from section 43.25(1), (2), (3) and (4) and amended by chapter 152, Laws of 1971. Former section 43.25(1) authorized cities, villages, towns and counties to establish, maintain and equip a "public library or reading room" and to "annually levy a tax or appropriate money to provide a library fund, to be used exclusively to maintain such library" Note that the words "public library or reading room" were used and there was no specific use of the term "county library." Former subsection (2) was concerned with free use of such library or reading rooms to the inhabitants of the municipality. Former subsection (3) provided that the county board of the county expending money for "public library service" could provide for recovering from each town, village or city for monies expended by the county for such library service in each town, village and city. Former subsection (4) provided that any city, town or village in any county "levying a tax for a county library under sub. (1) shall upon written application ... be exempted from [such] tax levy, [provided] the city, town or village making such application expends for a library fund during the year for which such tax levy is made a sum at least equal to the sum it would have to pay toward such county levy." The Legislative Counsel note to the change included:

(2) S. 43.64 is altered to eliminate a special statement on taxing procedure for library service, and to provide that the amounts to be levied for such services will be treated as part of the regular

county levy. As revised, it is the section which will be used, in most cases, for tax-levying purposes by counties participating in public library systems.

The note is not enlightening as to whether the exemption in section 43.64(2) extends to all taxes to pay for providing "public library service" or is limited only to that portion of taxes raised to finance a county library. Neither "county library" nor "public library service" are defined in chapter 43 and few counties have established and operate a county library governed by its own board pursuant to sections 43.52-43.56. However, the reference in former 43.25(4) was to a "county levying a tax for a county library under sub. (1)," which at that time referred to power of a county to establish a public library and levy a tax therefor. When subsection (4) was renumbered to 43.64(2), it continued to refer to a "county levying a tax for a county library under sub. (1)." However subsection (1) of section 43.64 was renumbered from 43.25(3) which authorized a "county expending money for public library service" to its inhabitants to levy and collect a tax for such advances. Present 43.64(1) also refers to "expending money for public library service." I therefore conclude that the Legislature intended to exempt a municipality, otherwise qualified, from a county tax levy to provide public library service to its inhabitants and not only to that portion of tax which finances a "public [county] library" organized pursuant to section 43.52(1).

The conclusion reached herein is consistent with that reached in 72 Op. Att'y Gen. 49 (1983). I conclude with the same last sentence: "It is evident from this dissertation that section 43.64(2) needs legislative attention."

BCL:RJV

Mental Health Act; The provisions of chapter 51, the Mental Health Act, and chapter 55, the protective service system, are compatible if each is used for its intended purpose and in the manner directed by the Legislature. OAG 52-83

December 20, 1983

ROBERT G. MAWDSLEY, *Corporation Counsel*
Waukesha County

You have asked a number of questions concerning the interpretation and implementation of chapter 55, Stats., and other sections pertaining to protective placements. Many of these questions have been generated by recent legislative revisions.

Section 55.06(18), which allowed persons to request a voluntary protective placement under chapter 55, has been repealed. Ch. 379, Laws of 1981. However, a person now may consent to enter certain facilities without protective placement under newly created section 55.05(5)(a). Your first set of questions relate to these changes and will be answered in narrative form without restating each question.

Section 55.05(5)(a) provides that a person who is "legally and actually capable of consenting" may consent to enter certain facilities without protective placement under section 55.06. The word "legally" limits such consent to those persons who have not been found incompetent under section 880.33. This conclusion logically flows from the parallel provision of section 55.05(5)(b) which provides that guardians of persons who have been found incompetent under section 880.33 may consent to admission to certain facilities without a protective placement under section 55.06. The term "actually capable" is a subjective standard to be applied initially by the staff of the facility where placement is sought. Although no criteria are set forth for making this determination, the ultimate question is whether the person is, in fact, voluntarily agreeing to this course of action with an informed understanding of what is to be done.

The elimination of what you referred to as "voluntary protective placement" under former section 55.06(18) is not inconsistent with the stated preference for voluntary protective services under section 55.05(3). An initial distinction must be made between placement and services.

Under section 55.06(1) "a protection placement under this section is a placement of a ward for the primary purpose of providing care and custody." This definition distinguishes it from "protective services" which are those services listed under section 55.04(1)(a). Pro-

tective services include placement with placement being a discrete aspect of the protective service system.

The words "legally and actually capable" appear only in section 55.05(5), pertaining to admissions without court involvement, and do not appear in section 55.05(2), relating to conditions required for protective services. Under section 55.05(2)(b), any interested person may request protective services on behalf of a person in need of services. Further, a guardian may request and consent to protective services on behalf of the guardian's ward, thereby eliminating any need for standards of consent by the ward.

Notwithstanding the "legally and actually capable" language of section 55.05(5)(a), the treatment director of a facility may temporarily admit an individual to an inpatient facility when there is reason to question the competency of such individual. Sec. 51.10(7), Stats. The treatment director must apply to the court for appointment of a guardian within forty-eight hours of the time of admission, and the individual may remain at the facility pending appointment of such guardian. There is no authority under section 51.10(7) for retaining the individual beyond the forty-eight hour time limitation stated therein and, therefore, further retention of the individual is possible only by complying with involuntary commitment provisions, emergency detention measures or voluntary admission standards elsewhere within chapter 51.

In this latter respect, it obviously is dangerous to discuss and attempt to apply interchangeably the provisions of chapter 51, the Mental Health Act, and those contained in chapter 55 except where specific cross-references appear or where the legislative intent is so clear as to admit of no doubt whatsoever. Further, it is virtually impossible to discuss all of those situations and means under which an individual who was temporarily admitted might later be the subject of a more permanent admission.

You next inquire concerning the powers and duty of guardians under section 55.05(5)(b)2., which provides:

Guardians of persons who have been found incompetent under s. 880.33 may consent to admission to a nursing home if the person is admitted directly from a hospital inpatient unit for recuperative care for a period not to exceed 3 months, unless the hospital admission was for psychiatric care. Prior to providing that con-

sent, the guardian shall review the ward's right to the least restrictive residential environment and consent only to admission to a nursing home that implements those rights. Following the 3-month period, a placement proceeding under s. 55.06 is required.

This provision prohibits guardians from consenting to any admission to a nursing home if the person was admitted to the hospital for psychiatric care. This prohibition relates only to the condition for which the patient was most recently admitted to the hospital and not to some previous admission for psychiatric care.

Recognizing that this discussion is limited to protective services and to admissions without court involvement, it is my opinion that section 55.05(5)(b)2., as quoted above, prohibits any guardian appointed under section 880.33 from consenting to admission to a nursing home unless the person is admitted directly from a hospital inpatient unit. *See also* sec. 880.38(1), Stats. Obviously, there are other situations when and reasons why a guardian might seek nursing home care for a ward other than the voluntary admission without court involvement of an adjudicated incompetent for the purpose of providing those protective services anticipated under chapter 55.

You next raise questions concerning temporary placement transfers of wards by their guardians to inpatient psychiatric facilities for purposes of diagnosis or treatment.

Section 55.06(9)(d) provides for temporary placement transfers "for the purpose of psychiatric diagnostic procedures for a period not to exceed 10 days." Moreover, "such period may not be extended for the purpose of providing psychiatric treatment except in the manner provided in par. (e)." Therefore, such transfer for performing diagnostic procedures cannot extend beyond ten days even if psychiatric treatment is necessary or desirable unless the additional procedures set forth under section 55.06(9)(e) are followed.

Section 55.06(9)(e) allows temporary transfers for emergency acute psychiatric inpatient treatment but "[s]uch treatment period may not exceed 15 days, including any transfer under par. (d)." You specifically ask whether diagnosis and treatment combined, therefore, can total twenty-five days or whether treatment is limited to five additional days if the diagnosis takes ten days.

Subsection (9)(e) permits a fifteen day placement for psychiatric inpatient treatment. I read that provision to clearly limit the period of confinement to fifteen days even if part of that time is used for psychiatric diagnosis rather than for treatment. Once the fifteen day period elapses, the provisions of chapter 51 must be used if continued in-patient treatment is sought. This is made clear in the last sentence of section 55.06(9)(e) which provides that “[a]ny application for continued psychiatric inpatient treatment requires proceedings under s. 51.20 or 51.45(13).” Moreover, section 55.06(9)(a) expressly provides that “[p]lacement under this section does not replace commitment of a person in need of acute psychiatric treatment under s. 51.20 or 51.45(13).”

It is my opinion that the court lacks discretion to extend these periods. If the Legislature wanted to give courts this discretion, it would have provided for temporary detention for a reasonable time rather than using specific ten day and fifteen day periods. In the alternative, the Legislature could have provided that diagnosis or treatment may not exceed fifteen days “unless otherwise ordered by the court” or “unless the court deems that a reasonably longer period of time is necessary to complete diagnosis or treatment.”

The above conclusion is consistent with the overall purpose of the protective services system which is “designed to encourage independent living and to avoid protective placement whenever possible.” Sec. 55.02, Stats. It is also consistent with the policy underlying chapter 55 which is “to place the least possible restriction on personal liberty and exercise of constitutional rights consistent with due process and protection from abuse, exploitation and neglect.” Sec. 55.001, Stats.

You next ask whether sections 55.05(5)(a) and 55.06(9)(d) and (e) can be reconciled with section 51.10(8) which provides that “an adult for whom a guardian of the person has been appointed under ch. 880 because of the subject’s incompetency may be voluntarily admitted to an inpatient treatment facility under this section only if the guardian and the ward consent to such admission.” These sections are compatible and may be employed under different circumstances.

Section 55.05(5)(a) provides for a form of protective service which is available without court involvement in contrast to protective placements. Section 55.06(9)(d) and (e) has as its primary purpose

the providing of appropriate care and custody for a ward following petition, notice and hearing in the appropriate court. Section 55.06(9) applies even when the protective placement in a psychiatric facility is involuntary and without the consent of the ward or where the ward is unable to consent.

On the other hand, section 51.10 is entitled "*voluntary* admission of adults." Section 51.10(8) provides that the ward may be voluntarily admitted "under this section." Thus, subsection (8) must be read in the context of the rest of section 51.10 and of the entire Mental Health Act. The ward who, along with his guardian, voluntarily consents to admission must satisfy the criteria for voluntary admissions set forth in section 51.10(4).

Under the Mental Health Act, it is the policy of the state to assure the provision of a full range of treatment and rehabilitation services for all mental disorders and developmental disabilities and for mental illness, alcoholism and other drug abuse. Sec. 51.001(1), Stats. In some respects, the provisions of chapter 51 are more specific than those in chapter 55 while in other respects they are more pervasive when one compares such things as the goals to be achieved, the persons eligible for various programs and the means of providing for those eligible persons.

In contrast to the sections discussed above under chapter 55, section 51.10(1) provides that an adult desiring admission to an approved inpatient treatment facility may be admitted upon application with the approval of the treatment director of the facility, the director of a center for the developmentally disabled and the director of the appropriate community board established under sections 51.42 and 51.437. The criteria for voluntary admission to any inpatient treatment facility must be based on an evaluation that the applicant is mentally ill or developmentally disabled or is an alcoholic or drug dependent and that the person has the potential to benefit from inpatient care, treatment or therapy. Sec. 51.10(4), Stats. The remaining portions of section 51.10 further demonstrate the differences between this voluntary admission program and the chapter 55 services and placements.

Section 51.10 provides a self-contained procedure for the voluntary admission of adults to inpatient treatment facilities. Subsection

(8) merely adds to what precedes it the requirement that both the guardian and the ward must consent to such voluntary admission.

Your last series of questions relate to section 55.06(11)(c) which provides that “upon a finding of probable cause under par. (b), the court may order temporary placement up to 30 days pending the hearing for a permanent placement, or the court may order such protective services as may be required.” The nature of this provision is such that the court is required to order a permanent placement or protective services within thirty days after the person was detained. As this period of detention is an involuntary restraint on the individual, the power to extend the thirty-day limitation cannot be inferred but must be found in clear and unambiguous statutory language. As none exists here, it is my opinion that the thirty-day limitation is absolute.

In conclusion, I direct your attention and that of other readers to the requirements to be observed by district attorneys and corporation counsel when requesting an opinion of the attorney general as set forth in 62 Op. Att’y Gen. Preface (1973).

BCL:DPJ

**STATUTES AND CONSTITUTIONAL PROVISIONS,
SESSION LAWS, LEGISLATIVE BILLS,
OPINIONS OF THE ATTORNEY GENERAL, AND
RESOLUTIONS REFERRED TO AND CONSTRUED**

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Public Records; A demand for a written statement of the reasons denying a request for records may be made orally. A mandamus action may be commenced only after a written request for disclosure is made. A written denial of even an oral request must inform the requester that if the request was in writing the denial is subject to review. A copying fee but not a location fee may be imposed on a requester for the cost of a computer run. Whether materials which result from staff participation in activities of a review or evaluation organization are public records discussed. OAG 19-83 68

Public Records; Schools And School Districts; A written notice and request for transfer of pupil records under section 118.125(4), Stats., is both a pupil record and public record which must be maintained for at least five years after the pupil ceases to be enrolled. "Pupil records" as defined in section 118.125(1) are "public records" within section 19.32(2) but are subject to special statutes which limit access and direct maximum and minimum periods of maintenance before destruction for various classes of pupil records. Secs. 19.21(6) and 118.125(3), Stats. OAG 46-83 169

Public Welfare

Public Welfare; County child support agencies can initiate actions to compel support under section 767.08(2), Stats., without the payment of a filing fee. OAG 20-83..... 72

Reapportionment

Legislature; Public Officials; Reapportionment; Redistricting; The assembly districts altered as to boundaries and renumbered by 1983 Wisconsin Act 29, became effective July 20, 1983. An assemblyperson is a constitutional state public officer who must be a resident and elector of the district he or she is chosen to represent. An incumbent assemblyperson continues to represent the district from which he or she was chosen, as altered as to boundaries and as renumbered. Limitations on in-district travel and mass mailings to constituents discussed. OAG 47-83..... 172

Redistricting

Legislature; Public Officials; Reapportionment; Redistricting; The assembly districts altered as to boundaries and renumbered by 1983 Wisconsin Act 29, became effective July 20, 1983. An assemblyperson is a constitutional state public officer who must be a resident and elector of the district he or she is chosen to represent. An incumbent assemblyperson continues to represent the district from which he or she was chosen, as altered as to

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| boundaries and as renumbered. Limitations on in-district travel and mass mailings to constituents discussed. OAG 47-83 | 172 |
| Retirement Systems | |
| <i>Retirement Systems; University; The University must bear the full cost of the early retirement payment required by chapter 388, Laws of 1981. (Unpublished Opinion) OAG 42-83</i> | |
| Salaries And Wages | |
| <i>Public Officials; Salaries And Wages; Proposal to amend section 20.923, Stats., insofar as it is applicable to state officials appointed for a fixed term, other than judicial officers, which would provide that the "salary rates during the term shall be set by the appointing officer at the time of appointment," but that any "scheduled pay increases" during the term "shall be subject to the pay range maximums in effect at the time the official's pay rates are scheduled to be adjusted" would, if adopted, be violative of article IV, section 26 of the Wisconsin Constitution.</i> | |
| <i>Pay adjustments during a term must be clearly provided for in specific amount or be ascertainable by reference to a salary range schedule which was in effect on the date of appointment of such official, and which is not subject to discretionary change thereafter, to be valid. A schedule or plan must not be dependent upon the exercise of legislative or administrative discretion during the term for its implementation. OAG 15-83</i> | 45 |
| Schools And School Districts | |
| <i>Milwaukee, City Of; Schools And School Districts; Common Council of City of Milwaukee is without power under home rule provision of the Wisconsin Constitution or under its special charter and section 62.11(5) to adopt an anti-truancy ordinance. State has provided special procedures in sections 118.15 and 118.16, and has designated the school district board as its agent to deal with matters of local concern in this area. OAG 44-83</i> | 156 |
| <i>Public Records; Schools And School Districts; A written notice and request for transfer of pupil records under section 118.125(4), Stats., is both a pupil record and public record which must be maintained for at least five years after the pupil ceases to be enrolled. "Pupil records" as defined in section 118.125(1) are "public records" within section 19.32(2) but are subject to special statutes which limit access and direct maximum and minimum periods of maintenance before destruction for various classes of pupil records. Secs. 19.21(6) and 118.125(3), Stats. OAG 46-83</i> | 169 |
| <i>Schools And School Districts; School boards may acquire school buses by tax-exempt lease financing. (Unpublished Opinion) OAG 10-83</i> | |
| Sheriffs | |
| <i>County Board; Ordinances; Sheriffs; A county has power under section 59.07(64) to enact an ordinance, applicable countywide, prohibiting the giving of false alarms on security or fire alarm systems connected to the sheriff's department. Provisions amounting to a building code would not be applicable in cities, villages or towns having ordinances or codes covering the same subject. Authority of the sheriff to act as licensing authority or to collect license fees discussed. OAG 43-83</i> | 153 |

Discrimination; Sheriffs; Wisconsin Retirement Fund; County collective bargaining agreement providing for payment of employe contribution to Wisconsin Retirement System only for those deputy sheriffs under age fifty-five violates the federal Age Discrimination in Employment Act. OAG 25-83 91

Special Prosecutor

Special Prosecutor; Circuit courts of this state may sua sponte appoint a special prosecutor in contempt actions pursuant to ch. 785, Stats., without the need to resort to the provisions of sec. 59.44, Stats. OAG 1-83 1

State Fair

Open Meeting; State Fair; The Board of Directors of the Central Wisconsin State Fair Association, which was organized as a county agricultural society under section 1460, Stats. (1898), is not a governmental body within section 19.82(1), Stats., and is not subject to the open meetings law. (Unpublished Opinion) OAG 41-83

Students

Loans; Students; Wisconsin Higher Education Corporation; Wisconsin Higher Educational Aids Board; Guaranteed Student Loan Program; Higher Education Aids Board; the legal relationship between the Higher Education Aids Board and the Wisconsin Higher Education Corporation, as affected by various revenue bond agreements, discussed. OAG 37-83... 135

Subpoena

Confidential Reports; Inebriates And Drug Addicts; Subpoena; Prior to releasing patient records in response to a warrant or subpoena, a federally funded or federally assisted drug treatment facility must first ascertain that the issuing court has made a finding of "good cause" within the meaning of 21 U.S.C. § 1175(b)(2)(C) in order to avoid the possibility of a fine under 21 U.S.C. § 1175(f). If there is no evidence that a finding of good cause has been made, no state criminal law is violated by refusing to release drug treatment records. OAG 3-83..... 12

Taxation

Cities; Taxation; Where city created tax incremental finance district by resolution adopted May 1, 1977, date of creation for purposes of calculating extended six year cut-off period within which expenditures must be made under section 66.46(6)(a)2., Stats., was January 1, 1977, and six year period expired on December 31, 1982. (Unpublished Opinion) OAG 23-83

Counties; Libraries; Taxation; A municipality, otherwise qualified, is entitled to an exemption under section 43.64(2), Stats., where the county has not acted to levy a tax specifically designated as a county library tax but does finance "money expended for public library services to its inhabitants" by a general tax levy. OAG 51-83 190

Indians; Taxation; The state has express authority under the General Allotment Act of 1887, as amended, 25 U.S.C. § 331 et seq., particularly 25 U.S.C. § 349, to impose ad valorem property taxes on Indian fee patented lands located within the Lac du Flambeau Reservation which were originally allotted under the Act after February 8, 1887. Indian fee patented

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| lands allotted prior to that date directly under the Treaty of September 30, 1854, are not taxable by the state under 25 U.S.C. § 349. OAG 22-83 .. | 74 |
| <i>Taxation; Words And Phrases; Section 646.51(7), Stats., is applicable to franchise taxes, income taxes and fire department dues. Only Wisconsin's assessments are used for offsets against Wisconsin taxes. The retaliatory tax provision of section 76.66, Stats., applies. If assessments are reimbursed, a tax credit should be recaptured. OAG 5-83</i> | 17 |
| University | |
| <i>Retirement Systems; University; The University must bear the full cost of the early retirement payment required by chapter 388, Laws of 1981. (Unpublished Opinion) OAG 42-83</i> | |
| Waste Management | |
| <i>Counties; Waste Management; Under section 59.07(135), Stats., a county may contract with another municipality or private company to pay the costs of operating a solid waste disposal site, including one owned by a private collector, as long as the necessary approvals have been secured under chapter 144, Stats. Costs of operation of such sites are to be borne by the users while capital costs are to be borne by the general county property tax. OAG 6-83</i> | 27 |
| Water Pollution | |
| <i>Health And Social Services, Department Of; Water Pollution; The Department of Health and Social Services may not establish rules which regulate radioactive air emissions and water discharges from facilities regulated by the United States Nuclear Regulatory Commission but may regulate radioactive air emissions and water discharges from other facilities. OAG 50-83</i> | 185 |
| Wisconsin Health Facilities Authority | |
| <i>Bonds; Wisconsin Health Facilities Authority; The Wisconsin Health Facilities Authority may consent to an amendment of a financing agreement relating to the issuance of bonds, to permit the lease of the facility financed to a for-profit corporation. (Unpublished Opinion) OAG 4-83</i> | |
| Wisconsin Higher Education Aids Board | |
| <i>Loans; Students; Wisconsin Higher Education Corporation; Wisconsin Higher Educational Aids Board; Guaranteed Student Loan Program; Higher Education Aids Board; the legal relationship between the Higher Education Aids Board and the Wisconsin Higher Education Corporation, as affected by various revenue bond agreements, discussed. OAG 37-83 ...</i> | 135 |
| Wisconsin Higher Education Corporation | |
| <i>Loans; Students; Wisconsin Higher Education Corporation; Wisconsin Higher Educational Aids Board; Guaranteed Student Loan Program; Higher Education Aids Board; the legal relationship between the Higher Education Aids Board and the Wisconsin Higher Education Corporation, as affected by various revenue bond agreements, discussed. OAG 37-83 ...</i> | 135 |

Wisconsin Retirement Fund

Discrimination; Sheriffs; Wisconsin Retirement Fund; County collective bargaining agreement providing for payment of employe contribution to Wisconsin Retirement System only for those deputy sheriffs under age fifty-five violates the federal Age Discrimination in Employment Act. OAG 25-83 91

Words And Phrases

Business; Marketing And Trade Practices; Words And Phrases; Under section 100.30(2)(n), Stats., a retailer may not deduct a manufacturer's conditional promotional allowance as a trade discount for purposes of determining "cost to retailer" and lowest legal retail selling price, even though the amount of the allowance exceeds the retailer's cost of performance in meeting the terms and conditions of the allowance. OAG 34-83 126

Taxation; Words And Phrases; Section 646.51(7), Stats., is applicable to franchise taxes, income taxes and fire department dues. Only Wisconsin's assessments are used for offsets against Wisconsin taxes. The retaliatory tax provision of section 76.66, Stats., applies. If assessments are reimbursed, a tax credit should be recaptured. OAG 5-83 17

Zoning

Zoning; Committee of the county board acting as county planning and zoning agency pursuant to sections 59.025(3)(c), 59.06 and 59.97(2)(a), Stats., rather than county executive, has power to appoint director for planning and zoning. (Unpublished Opinion) OAG 14-83

51.42 Board

Community Developmental Disabilities Services Board; Minor; 51.42 Board; A juvenile court may order a 51.42 or 51.437 Board to provide care or treatment to a minor found to be in need of protection or services subject to conditions of chapter 51, Stats. OAG 7-83 30

County Board; 51.42 Board; Although a county board of supervisors can require that a certain number of persons be supervisors at the time of their appointment to a 51.42, 51.437 or 115.86 board, members are entitled to serve the term for which they were appointed, unless removed, without reference to the termination of their office as county board supervisors. (Unpublished Opinion) OAG 12-83

