

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

VOLUME 75

January 1, 1986 through December 31, 1986

BRONSON C. LA FOLLETTE
ATTORNEY GENERAL



MADISON, WISCONSIN
1986

1947

1948

1949

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1951

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1961

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 Jan. 5, 1987

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MICHAEL L. ZALESKI ¹	Assistant Attorney General

¹Resigned, 1986

²Appointed, 1986

³Retired, 1986

1. The first part of the document
describes the general situation
of the country and the
economic conditions. It
mentions the fact that the
country is a developing
one and that the economy
is still in a state of
transition. It also
mentions the fact that the
country is a member of the
Organization of American
States and the Inter-
American Commission on
Human Rights.

2. The second part of the document
describes the human rights
situation in the country.
It mentions the fact that
there have been reports
of human rights violations
in the past and that
there are still reports
of such violations today.
It also mentions the fact
that the government has
taken steps to improve
the human rights situation
and that it is committed
to the principles of the
American Declaration of
the Rights and Duties of
Man and the American
Declaration of the Rights
and Duties of Man.

OPINIONS
OF THE
ATTORNEY GENERAL

Volume 75

Clerk of Courts; Circuit Court; Discussion of circumstances under which additional filing fees for support or maintenance petition under section 814.61(13), Stats., are to be paid. OAG 1-86

January 24, 1986

J. DENIS MORAN

Director of State Courts

On behalf of the clerks of circuit court throughout Wisconsin, you have requested an opinion on several questions regarding the application of section 814.61(13), Stats. Section 814.61 lists the fees which the clerk of court shall collect in civil actions. 1985 Wisconsin Act 29 created section 814.61(13) which authorizes the following fee:

For the cost to the county of administering s. 46.25, whenever a person not receiving aid under s. 49.19, 49.46 or 49.47 files a petition requesting child support, maintenance or family support payments, \$10 in addition to any other fee required under this section. This subsection does not apply to a petition filed by the state or its delegate.

Your first three questions are:

In an action to enforce the payment of child support, maintenance, or family support under section 767.305, statutes, does the motion or application of a party for such enforcement constitute the filing of a petition for support or maintenance as contemplated under section 814.61(13), and therefore require the payment of the \$10.00 fee?

In an action to revise a judgment for support or maintenance under section 767.32, statutes, does a petition for revision of judgment requesting a change in the amount of support or maintenance constitute a petition for support or maintenance as contemplated by section 814.61(13), statutes, and therefore require the payment of the \$10.00 fee?

When a party makes application to the family court commissioner or judge under section 767.33, statutes, for an annual adjustment in child support, does such application constitute a petition for support or maintenance as contemplated by section 814.61(13), statutes, and therefore require the payment of the \$10.00 fee?

For the reasons hereafter set forth, my answer to all three questions is no.

The newly created fee under section 814.61(13) is designed to defray the cost of administering the child and spousal support program established pursuant to section 46.25. The \$10 payment is collected in addition to any other fee required under that section but it clearly is to be collected only when a petition requests child or spousal support.

The specific reference to a "petition" limits the applicability of this fee to an initial request for such support. Section 767.085 makes it clear that actions affecting the family are commenced with the filing of a petition, the contents of which are to comply with that section. The court's determination concerning liability for this support may be enforced in a number of ways including the enforcement mechanisms provided under section 767.30. Sec. 767.08(2)(c), Stats.

The actions to which you refer in your first three questions are enforcement mechanisms or attempts at revising or adjusting the support obligation after the initial petition has been filed and juris-

diction assumed. Section 767.05(4) provides that a petition is the same as a "complaint" as the latter term is used elsewhere in the statutes. A petition differs from a motion in that a motion is not initiatory and may be made orally.

It does not seem logical that the Legislature would require the payment of an additional \$10 every time one of the parties sought an adjustment or some other action on the obligation. If the Legislature had so intended to act, it could have done so in clear and unambiguous terms. It is my opinion, therefore, that this additional fee applies only to a petition which originally requests child support, maintenance or family support payments.

You next ask the following two questions:

Does a response which requests support or maintenance as relief filed by a respondent in an action affecting the family constitute a petition for support or maintenance as contemplated under section 814.61(13), statutes, and therefore require the payment of the \$10.00 fee by the respondent?

If the answer . . . is yes, is the respondent required to pay the \$10.00 fee even when the petitioner in the action has paid the \$10.00 fee?

If a response requests support or maintenance, it acts as a form of counterclaim. A counterclaim is asserted as a written pleading which initiates a claim for affirmative relief. *See* secs. 802.01 and 802.02, Stats. If this constitutes the initial request for child or spousal support, it is my opinion that the \$10 fee is applicable.

It is my further opinion that the respondent is not required to pay the \$10 fee when the petitioner already has paid a \$10 fee. Although this question is not free from doubt and a contrary conclusion easily can be supported, I find it less logical to assume that the Legislature intended that more than \$10 was necessary for the administration costs of any case dealing with such child support, maintenance or family support. Therefore, my answer to this question is consistent with my answer to the first three questions. Again it would have been easy for the Legislature to specifically provide for the payment of fees by both parties in clear and unambiguous terms.

Your next concern and the two questions resulting therefrom are:

In light of the limitations on disclosure of information regarding applicants and recipients of general relief under section 49.53, statutes, it is difficult for a clerk of circuit court to determine whether a petitioner filing a petition for support or maintenance is receiving aid under section 49.19, 49.46, or 49.47, statutes.

Does a clerk of circuit court have the authority to require oral or written confirmation of receipt of aid by a petitioner from the agency administering aid for waiver of the \$10.00 fee?

Does the clerk of circuit court have the authority to require an affidavit from the petitioner regarding the receipt of aid for waiver of the \$10.00 fee?

It is my opinion that the clerk has the authority to require oral or written confirmation of the receipt of aid by petitioner from the agency administering aid for waiver of the \$10 fee. Clearly child support or paternity proceedings are "directly connected with the administration" of the public assistance programs to which reference is made. *State ex rel. Dombrowski v. Moser*, 113 Wis. 2d 296, 301-03, 334 N.W.2d 878 (1983). This does not mean, however, that any state agency or officer is authorized to receive information concerning public assistance payments. *See* 69 Op. Att'y Gen. 96 (1980).

The clerk does not have the authority to require an affidavit from the petitioner regarding the receipt of aid in the absence of a clear statutory mandate that such an affidavit be provided. However, in most or all instances, the petitioner probably will voluntarily submit an affidavit pursuant to section 814.29 seeking approval from the court to file all papers without payment of any fee based upon indigency.

Your last question is:

Can the clerk of circuit court refuse to accept the filing of an original petition requesting support or maintenance until the \$10.00 fee is paid or satisfactory proof of receipt of aid (as defined by the answers to questions 5a and 5b above) is presented by the petitioner?

The clerk may refuse to accept any paper for filing or recording until the fee prescribed in subchapter II of chapter 814 or any other applicable statute is paid. Sec. 59.42(1), Stats. The requirement under section 814.61(13) that the clerk collect the \$10 "in addition

to any other fee required under this section” is a clear indication that this separate fee normally would be covered under section 59.42(1). However, the clerk cannot refuse to accept the filing of an original petition because of the limited exception in section 767.08(2)(d) which applies to those persons specifically authorized to commence support actions under section 767.08:

In any such support action there shall be no filing fee or other costs taxable to the person’s spouse, the minor child, the person with legal custody or the nonlegally responsible relative, but after the action has been commenced and filed the court may direct that any part of or all fees and costs incurred shall be paid by either party.

Based upon this exception, therefore, the clerk can determine the amount of the fees and costs normally payable but cannot collect these amounts until the court directs payment.

BCL:DPJ

Vocational, Technical and Adult Education; The levy limit imposed on Vocational, Technical and Adult Education districts by section 38.16(1), Stats., does not include amounts charged under section 74.73(2), for recovery of unlawful taxes or overassessments. OAG 2-86

January 30, 1986

ROBERT P. SORENSON, *State Director*
Wisconsin Board of Vocational, Technical
and Adult Education

You have requested my opinion on two questions:

1. Does the levy limit imposed on Vocational, Technical and Adult Education districts by section 38.16(1), Stats., include amounts charged under section 74.73(2), for recovery of unlawful taxes or overassessments?
2. Should the word "town" as used in section 74.73(2), be given the meaning set forth in section 990.01(42)?

My answer to the first question is no, and my answer to the second question is yes.

A Vocational, Technical and Adult Education district includes one or more counties, school districts or municipalities in contiguous combination. Sec. 38.06(1), Stats. Among other methods of securing operating funds, each Vocational, Technical and Adult Education district is given statutory authority to levy a tax. That authority and the procedure for collecting the tax are both provided for in section 38.16(1):

Annually . . . the district board may levy a tax, not exceeding 1.5 mills on the full value of the taxable property of the district, for the purpose of making capital improvements, acquiring equipment and operating and maintaining the schools of the district, except that the mill limitation is not applicable to taxes levied for the purpose of paying principal and interest on valid bonds or notes now or hereinafter outstanding as provided in s. 67.035. The district board secretary shall file with the clerk of each city, village and town, any part of which is located in the district, a certified statement showing the amount of the levy and the proportionate amount of the tax to be spread upon the tax roles for collection in each city, village and town. Such proportion shall be ascertained on the basis of the ratio of full value of the

taxable property of that part of the city, village or town located in the district to the full value of all taxable property in the district, as certified to the district board secretary by the department of revenue. Upon receipt of the certified statement from the district board secretary, the clerk of each city, village and town shall spread the amounts thereof upon the tax roles for collection. When the taxes are collected, such amounts shall be paid by the treasurer of each city, village and town to the district board treasurer.

Thus, although each city, village and town is responsible for collecting the section 38.16(1) tax, the tax is actually levied by the Vocational, Technical and Adult Education district board. The local board is the only entity authorized to determine this levy within the limit set by the Legislature.

Elsewhere in the statutes, the Legislature has established a procedure under which individuals can recover unlawful taxes and overassessments which they have paid to cities, villages and towns. Sec. 74.73, Stats. The same statute also establishes a procedure under which cities, villages and towns can then in turn recover the proportionate share of the unlawful tax which they collected and paid over to underlying municipalities, including Vocational, Technical and Adult Education districts. With respect to the latter, section 74.73(2) provides in pertinent part:

If any part of such unlawful tax was paid over to any school district or vocational, technical and adult education district before the payment of such claim or judgment, the town shall charge the same to such district with the proportionate share of the taxable costs, interest and expenses of suit, and the town clerk shall add the same to the taxes of such district in the next annual tax.

In these situations, therefore, the towns charge back the Vocational, Technical and Adult Education district for its proportionate share of the unlawful tax through an addition to the district's next annual tax.

Your first question arises not because of ambiguity on the face of either section 74.73(2) or section 38.16(1), but rather because of apparent ambiguity in whether the add-on provision in section 74.73(2) should be interpreted to affect the levy limit imposed in section 38.16(1). Given this ambiguity, the rules of statutory con-

struction must be applied to determine the intent of the Legislature. See *Kimberly-Clark Corp. v. Public Service Comm.*, 110 Wis. 2d 455, 462, 329 N.W.2d 143 (1983).

The first rule provides that the primary source of construction is the language of the statutes. *Kimberly-Clark*, 110 Wis. 2d at 462. As was noted above, the add-on provision in section 74.73(2) concerns itself with taxes levied by a town. In contrast, the limit imposed by section 38.16(1) clearly refers to taxes levied by a Vocational, Technical and Adult Education board. The plain meaning of the two statutes reveals that they deal with entirely different entities. Accordingly, the provisions of section 74.73(2) have no effect on the provisions of section 38.16(1).

A second rule of statutory construction mandates the same result. It states that "where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed." *Kimberly-Clark*, 110 Wis. 2d at 463, quoting *State v. Welkos*, 14 Wis. 2d 186, 192, 109 N.W.2d 889 (1961). Sections 74.73(2) and 38.16(1) obviously concern related subjects. However, although section 74.73(2) requires that the charge-back assessment by a town be added on to the next Vocational, Technical and Adult Education district annual tax, there is no correlative provision in section 38.16(1) to indicate that this add-on should apply to the district's levy limit. It is therefore appropriate to presume that the Legislature intended that the provisions of one do not affect the provisions of the other.

Additional guidance can be drawn from a closely analogous situation involving counties. Section 70.62 imposes a one per centum annual limitation on taxes which counties are permitted to levy. Under section 66.09, when a judgment is entered against a county, the amount of that judgment is added to the next tax levy. Just as in this situation, section 66.09 makes no reference to section 70.62.

The same question you raise today with respect to the relationship between sections 74.73(2) and 38.16(1) was raised with respect to the relationship between sections 66.09 and 70.62 in *Oconto County v. Townsend*, 210 Wis. 85, 244 N.W. 761 (1933). In that case, the court held that a judgment placed upon the county tax roll for collection pursuant to section 66.09 is *not* within the one per

centum levy limitation of section 70.62. *See also* 27 Op. Att'y Gen. 835, 839 (1938).

In so holding, the court stated that levy limitations are imposed by the Legislature in order to ensure that local governmental units balance their budgets and arrange their expenditures within the legislatively set limit. *Oconto County*, 210 Wis. at 90. In my opinion, the *Oconto County* decision applies as well to situations involving Vocational, Technical and Adult Education districts, and the add-on provided in section 74.73(2) would not further the policy or purpose behind levy limitations as enunciated by the court in that decision. Judgment amounts added to the district's annual tax are accordingly excludable from the district's levy limit. It should be noted, however, that neither your question, *Oconto County* nor this opinion address a situation in which the judgment debt was generated in the first place because a district exceeded its maximum taxation.

In answer to your second question, the word "town" as used in section 74.73(2) is not defined in that statute. It must therefore be construed according to section 990.01(42).

BCL:BB

Highways; Property; Snowmobiles; The rights of property owners abutting a highway are subject to reasonable regulations imposed by highway maintenance authorities and are subordinate to the public's interest over the use of the land within the boundaries of a highway right of way. OAG 3-86

January 30, 1986

LOWELL B. JACKSON, *Secretary*
Department of Transportation

You have requested an opinion relating to controls over the use of lands abutting highways. Your request was occasioned by correspondence I had with District Attorney Duket of Marinette County and particularly my letter to him of December 21, 1984.

I advised the district attorney that if the public body has an easement over land abutting the highway, the abutting owner retains the remaining benefits of ownership except those specifically limited for the public benefit. I further advised that the abutting owner retains the right to harvest plants and to prohibit the operation of snowmobiles.

Your first question is whether the abutting owner may use the land to the exclusion of the state's interest in highway maintenance and the removal of encroachments in the right of way. The answer is no.

The owner's fee title, even when it extends to the center of the travelled highway, is subject to the public's interest in its easement acquired for travel purposes. See *Miller v. City of Wauwatosa*, 87 Wis. 2d 676, 680, 275 N.W.2d 876 (1978); *Walker v. Green Lake County*, 269 Wis. 103, 111, 69 N.W.2d 252 (1955). The precise rights of the landowner will vary with the circumstances, including the date of the public's acquisition, any rights previously vested and the terms of the conveyances. But generally speaking, the public authorities have extensive powers over the use of the land in a right of way.

For example, section 86.03(3), Stats., provides that the owner may plant alongside the highway with "the approval of the public authority maintaining the highway." Section 86.03(2) subordinates the owner's use of trees to the rights of the public, as contained in the acquisition of the right of way, and to the public right to "make or repair the highways" (with certain qualifications for trees re-

served for shade or ornament if not included within the public acquisition). Section 80.01(3) provides that, as to lands acquired for highway purposes after June 23, 1931, the right to cut or trim vegetation in the highway as laid out is subject to consent of the public authority (absent a contrary reservation of rights), but the public authority is charged with the duty to remove vegetation in order to provide highway safety. Finally, as you note, there is specific authority in section 86.04 for the removal of encroachments on the highway right of way. *Also see* sec. 86.022, Stats. (unlawful obstruction of highway with embankments or ditches), and *see generally Heise v. Village of Pewaukee*, 92 Wis. 2d 333, 285 N.W.2d 859 (1979), *cert. denied*, 449 U.S. 992 (1980), and *Dept. of Transp. v. Black Angus Steak House, Inc.*, 111 Wis. 2d 342, 330 N.W.2d 240 (Ct. App. 1983).

Second, you inquire whether the public can acquire highway rights by use. The answer is yes under certain circumstances. *See* sec. 80.07(1), Stats. (the public may use land for highway purposes without providing compensation if public monies have been spent on the land and if the general public in fact has used the land for at least five years).

You observe that my letter to Mr. Duket stated that the public can acquire no highway rights by use except over the roadway, citing *In re Vacating Plat of Chiwaukee*, 254 Wis. 273, 36 N.W.2d 61 (1948). *Chiwaukee* erroneously was cited for that proposition. A closer reading of the case shows that the court made its comments only on the basis of the particular record before it. 254 Wis. at 276.

Your third question is whether the abutting owner's right to harvest is dependent on the consent of the public authority and, if so, whether the plants and trees have value for which compensation must be paid if the public authority refuses consent or cuts the crops itself. With qualifications to be noted, the answer to the first half of your question is yes and the answer to the second half is no.

I already have described conditions under which the public authority may control the decision whether to plant or cut vegetation. There is "no requirement of compensation if the restrictions may be justified under the exercise of the police power." *Howell Plaza, Inc. v. State Highway Comm.*, 66 Wis. 2d 720, 726, 226 N.W.2d 185 (1975). Compensation is required only if property is "taken" by eminent domain. *Public Service Corp. v. Marathon County*, 75 Wis.

2d 442, 449, 249 N.W.2d 543 (1977). The remedy for a police power regulation "that goes so far that it has the same effect as a taking by eminent domain . . . is not 'just compensation,' but invalidation of the regulation . . ." *Williamson Co. Regional Planning v. Hamilton Bank*, 105 S. Ct. 3108, 3122 (1985).

The question becomes whether control of the right to plant and harvest is a taking or a reasonable exercise of the police powers. Case law indicates that the abutting owner may not use his land to interfere with the public's right to protect its easement interest: the owner may enter the easement area for a use that is reasonable and temporary; the use may be forbidden altogether if it interferes with the exercise of the public easement; permission to use the easement area is subject to revocation; and in all events the use is subject to reasonable regulation in the interest of public safety and convenience. 3 *Nichols on Eminent Domain* sec. 10.211 and (2) at 351-58 (1985). A police power enactment that bars a particular use is not itself a taking of property that requires just compensation. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593 (1962). To be distinguished is the duty to pay compensation for the removal of trees outside the right of way. See *Wiggins v. Alabama Power Co.*, 214 Ala. 160, 107 So. 85 (1926). I conclude, therefore, that requiring the abutting owner to obtain the public authority's consent to plant or cut vegetation in the right of way is a valid police power enactment and not a taking that requires payment of compensation.

This leads to the correlative question: Must the state compensate the abutting owner for the value of the trees and other harvests in the right of way when the state actually occupies the right of way for the purpose of cutting the crop or constructing a highway? In my opinion, the answer is no.

The rights of the public turn on the manner and terms of the acquisition. Where the public already has acquired an easement for highway purposes over the land of another, absent a special reservation in the conveyances or other unusual circumstances, the public already has paid for the right to build the highway. Additional payment is not required when the right is exercised if payment was made when the right was acquired. 3 *Nichols on Eminent Domain* sec. 9.221(1) at 9-43 and 44 (1985). This rule applies even when the initial acquisition results in a limitation on the abutting owner's right of use. *Id.* at sec. 9.221(1) at 9-46. In other words, whatever would have been a proper public use of the right of way at the time

of its acquisition requires no additional compensation when the right of way is put to such use. *See 2A Nichols on Eminent Domain* sec. 6.35(3) at 6-248 (1985). Where the abutting owner retains an interest in timber or other growth in the way the state has the right to use, the state's right of use enables it to remove the timber without payment of compensation although the abutting owner may have the right to take possession of the timber after it is felled. Thus, the pivotal fact issue in each case is the scope of the public's right at the time it acquired its interest.

Your fourth question is whether a snowmobile may be operated on the highway right of way adjacent to privately owned land. The answer is yes.

Section 350.02(2)(b) describes the circumstances for operating snowmobiles "adjacent to a roadway." For example, they may be operated along state and county highways at a distance of ten or more feet from the roadway. Sec. 350.02(2)(b)1., Stats. The "roadway" as defined in section 340.01(54) invariably is within the right of way. Thus, under section 350.02(2)(b) all roadways may be used for snowmobiles except where specifically prohibited in the conveyance. Otherwise, the owner's right to prohibit snowmobiles is limited to his own private property unencumbered by the public's easement in travel. *See* sec. 350.10(6), Stats.

Your final two questions both relate to the extent of state regulatory authority over lands abutting highways, especially where the state's interest was acquired by easement. Insofar as the question asks for a description of existing statutory and police power authority, I believe the foregoing discussion has addressed these issues. In summary, except in unusual cases such as where the terms of the conveyance provide otherwise, the state may constitutionally act to protect its interests in the right of way for the protection of the travelling public, and valid regulations enacted to carry out this objective will not, in the ordinary situation, result in a taking that compels the payment of compensation.

BCL:DWS:CDH

Health and Social Services, Department of; Medicaid; Nursing Homes; Discussion of federal and state law regarding the practice of requiring a prospective nursing home resident to forego medical assistance benefits for a stated period of time as a condition of admission. OAG 4-86

March 7, 1986

GEORGE F. POTARACKE, *Executive Director*
Board on Aging and Long Term Care

You have asked for my opinion as to the legality of certain contract provisions utilized by some Wisconsin nursing homes that require prospective residents to enter and remain on "private pay status" for a given period of time before applying for medical assistance benefits. You pose the question of "legality" in general terms, but specifically refer to section 1909(d)(2) of the Social Security Act (42 U.S.C. §1396h(d)(2) (1977)). Section 1909(d)(2) criminalizes the solicitation of money from residents or their families above and beyond the rate paid by medical assistance as a precondition of admittance or as a requirement for continued stay.

In essence, the contract provisions in question require that the prospective resident waive the right to apply to the Wisconsin Medical Assistance Program (hereinafter Medicaid) for a period of time as a precondition to admittance. For the purposes of this discussion, it is understood that the duration of the contract provision is typically twelve to eighteen months, and that nursing homes charge a higher rate to residents not supported by Medicaid, known as private pay patients, than is collected from Medicaid for program beneficiaries. It is further assumed that the prospective residents forced to agree to such provisions are typically on private pay status at the time of signing, but would generally qualify for Medicaid benefits before expiration of the contract provision. Virtually all nursing homes require some type of contract or admissions agreement to be executed before admission, but only provisions that would force a waiver of the right to apply for Medicaid are challenged here.

I.

Since your request does not specify all of the relevant facts for any specific case, I cannot predict with certainty the result should a court be faced with the question presented. However, there is a

strong probability that these contract provisions are unlawful if they in any respect deter the prospective resident from applying for Medicaid benefits.

A. Federal Developments

The tracing of developments at the federal level makes clear that such contract provisions offend public policy as enunciated by Congress, the federal courts and federal administrative agencies. When the Medicaid program was first established, many states were unable to bear the entire cost of providing medical care to the needy, notwithstanding the states' receipt of federal funds. The charges imposed by the nursing homes were, therefore, met by a combination of government funds and forced payments from Medicaid residents, relatives or friends, called supplementation. Starting in 1965, the secretary of Health, Education and Welfare (hereinafter HEW) approved state Medicaid plans including supplementation, so long as the state could show that it had existing supplemental arrangements with nursing homes and that, in the absence of such arrangements, it would be unable to attract a sufficient number of nursing homes to the program. *See Resident v. Noot*, 305 N.W.2d 311, 313 (Minn. 1981); *Johnson's Professional Nursing Home v. Weinberger*, 490 F.2d 841 (5th Cir. 1974).

A few years later Congress noted that it would be better for all concerned if the practice would be abolished and all states set reimbursement rates adequate to meet providers' costs. Congress did not impose the statutory prohibition at that time, but relied on HEW's assurance that the practice would be phased out after 1971. S. Rep. No. 744, 90th Cong., 1st Sess. 187-88, reprinted in 1967 U.S. Code Cong. and Ad. News 2834, 3026.

In 1969, HEW promulgated the first version of the anti-supplementation regulation, which included the phase out of supplementation in the nursing home field. 45 C.F.R. §250.30(a)(6) (1972). The provision presently appears at 42 C.F.R. §447.15 (1978) and specifies that, "A State plan must provide that the Medicaid agency must limit participation in the Medicaid Program to providers who accept, as payment in full, the amount paid by the agency." In *Lawrie v. Department of Public Aid*, 72 Ill. 2nd 335, 381, N.E.2d 266 (1978), the court upheld the state's authority to require a payment in full agreement with the provider based upon 42 C.F.R. §447.15, as required by the federal regulation in order to avoid jeopardizing

federal funding. The court also emphasized that the regulation's central concern was the prevention of charges to recipients and their families.

In 1977, the government accounting office recommended new federal legislation enabling criminal prosecution for the practice of supplementation. *Report of the Comptroller General of the United States*, No. HRD-77-90, May 26, 1977. The Medicare-Medicaid Anti-Fraud and Abuse Amendments of 1977, Pub. L. 95-142 §4(b), 91 Stat. 1181, codified at 42 U.S.C. §1396h(d), state in part:

(d) Whoever knowingly and wilfully —

(1) charges, for any service provided to a patient under a State plan approved under this subchapter, money or other consideration at a rate in excess of the rates established by the State, or

(2) charges, solicits, accepts, or receives, in addition to any amount otherwise required to be paid under a State plan approved under this subchapter, any gift, money, donation, or other consideration (other than a charitable, religious, or philanthropic contribution from an organization or from a person unrelated to the patient)—

(A) as a precondition of admitting a patient to a hospital, skilled nursing facility, or intermediate care facility,

(B) as a requirement for the patient's continued stay in such a facility,

when the cost of services provided therein to the patient is paid for (in whole or in part) under the State plan, shall be guilty of a felony and upon conviction thereof shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

The Department of Health, Education and Welfare has consistently interpreted section 1396h(d) as a legislative statement of public policy condemning supplementation under whatever guise it appears. For example, the Health Care Financing Administration Regional Office Manual, Part 6, Medicaid Guidelines, Transmittal No. 16 (May 21, 1979), provides in part as follows:

Section 5350-A. Acceptance of State Payment as Payment in Full: Nursing Home Prepayments and Deposits.

....

Question 1. Can a nursing home require a prepayment or deposit to be made by or on behalf of an individual already certified as Medicaid eligible?

Answer: No. . . .

Question 2: Would the same answer to question #1 apply if the beneficiary had not yet been authorized for nursing care or certified as to level of care?

Answer: As a condition of participation, a state can legally require providers of nursing home care to refrain from requiring deposits for covered services from a potentially Medicaid-eligible person; however, in those cases where the facility has required a deposit, Section 1902(a)(34) mandates retroactive coverage of recipients and would therefore require that such deposits be returned to the individual after his eligibility under the state plan is established.

On October 1, 1984, a hearing on "Discrimination Against the Poor and Disabled in Nursing Homes" was held before the Special Committee on Aging of the United States Senate. The hearing focused on attempts by nursing homes to force prospective residents, not yet Medicaid eligible, to retain their private pay status for a given period of time and pay a given sum of money regardless of when they actually could become Medicaid eligible. 98th Congress, Second Session S. HRG. 98-1091, p. 6, 8. Senator John Heinz, of Pennsylvania, Chairman of the Special Committee, stated:

The intent of the Congress in assuring medicaid beneficiaries equal access to care is clear. Back in 1977, we enacted legislation to make it a felony to solicit or receive funds from a medicaid patient as a condition of entering or remaining in a nursing home. . . .

But the committee's investigation into nursing home practices documents that nursing homes do demand cash payments before they will accept a medicaid patient. The family of the patient may be asked to sign a private pay contract, pledging to pay out-of-pocket for care already paid for by taxes and promised under Federal law. . . .

A . . . reason for nursing home discrimination is avarice, greed. . . . [W]e . . . know that investment analysts are recom-

mending nursing home stocks because they promise as much as a 20-to 48-percent return on equity per year.

S. HRG. 98-1091, at p. 1-2. These contracts were typically signed by the resident's children or family members on the assumption that after spending down to the point of reaching Medicaid qualifications the resident would have no money to pay the contractual obligation. Thus the contracts were euphemistically called "sponsors' agreements." S. HRG. 98-1091, p. 11. Certain testimony indicated that such contract provisions impacted most on racial minorities and were, therefore, a form of *de facto* racial discrimination. S. HRG. 98-1091, p. 202-6. The commission found that discrimination against Medicaid recipients as well as potential recipients was a major problem in twenty-one states, including Wisconsin. S. HRG. 98-1091, p. 67. Chairman Heinz concluded that the practice was a felony under the 1977 amendments. S. HRG. 98-1091, p. 63.

The foregoing authorities obviously do not constitute binding precedent or specifically hold that such contract provisions are per se "illegal" in a situation devoid of Medicaid implications. However, they do establish beyond any doubt that the provisions are contrary to public policy as enunciated at the federal level insofar as they are a guise for supplementation.

B. State Developments

The states of Maryland, New York, Virginia and Washington have condemned similar contract provisions. Virginia has prohibited nursing homes from requiring prior status as a private paying patient as a precondition for admission.¹ Washington has determined that requiring even prospective Medicaid recipients to pay private patient rates for a specified time period may be in violation of section 1396h(d)(2), and that the contract becomes void at the time Medicaid eligibility is achieved.²

The attorney general of the State of Maryland determined that such contract provisions are violative of various federal and state

¹ "MEDICAID MEMO" to All Hospital and Nursing Homes Participating in the Virginia Medical Assistance Program, dated April 21, 1980, from Robert Treibley, Acting Director of the Virginia Medicaid Assistance Program, p. 1.

² Letter dated August 19, 1983, from Conrad Thompson, Director of the Bureau of Nursing Home Affairs, state Department of Health and Social Services, to State of Washington nursing home providers, p. 1-2.

statutes, including the nursing home resident's "bill of rights".³ The attorney general opined that contracts requiring prospective Medicaid recipients to remain as private pay patients for at least one year before applying for medical assistance benefits violated 42 U.S.C. §1396h(d)(2)(A) and became void upon conversion to Medicaid.

The only test to date of the attorney general's opinion of which I am aware has been in the state's administrative law forum. In *Summit Nursing Home, et al. v. Medical Care Programs, Department of Health & Mental Hygiene*, Final Decision and Order, Case No. 82-MAP-7 *et seq.*, at 14, the Maryland Department of Health and Mental Hygiene determined that a nursing home may contract with a person not certified for Medicaid benefits to pay the private rate if the agreement does not restrict the individual in any way from applying for Medicaid, that the right to apply for Medicaid cannot be waived, that attempts to enforce such agreements by Medicaid certified nursing homes are illegal, and that an agreement purporting to waive the right to apply for Medicaid for a specified period of time is void *ab initio*.

While this administrative law decision is obviously not controlling here, the reasoning therein is persuasive. The secretary held that 42 U.S.C. §1396h(d) came into operation and made criminal any attempts to pursue the agreement once the person was certified as a Medicaid recipient. *Summit Nursing Home* at 7-8. The secretary also determined that express and implied threats to discharge a person who converted to Medicaid before the lapse of time specified in the contracts and defaulted on the payments were illegal and unenforceable. *Summit Nursing Home* at 9. Medicaid nursing home providers are required to meet certain standards listed in 42 C.F.R. §442.202. This section incorporates the Patient's Bill of Rights contained in 42 C.F.R. §405.1121(k). The Patient's Bill of Rights provides that a patient may be transferred or discharged only for medical reasons, for his welfare or that of other patients, or for nonpayment. The opinion specifically stated:

[R]eliance by an individual on Medical Assistance reimbursement as his/her source of payment for nursing home care cannot be considered as nonpayment. . . .

³ Advice of Counsel letter to the state Director of the Medical Assistance Compliance Administration, Office of Medical Care Programs, dated July 7, 1982, p. 1-11.

The provisions of the "Patients' Bill of Rights" are not waivable by individual patients. They are absolute legal obligations owed to the State and Federal Governments as conditions for the facilities continued *participation in the Medicaid Program*.

Summit Nursing Home at 10 (citations omitted, emphasis supplied in original).

The secretary further determined that under these circumstances the continued use of such clauses in any contract was deceptive and misleading, and in violation of the state's Consumer Protection Act, prohibiting any "misleading oral or written statement . . . which has the capacity, tendency, or effect of deceiving or misleading consumers . . . [or a] failure to state a material fact if the failure deceives or tends to deceive." *Summit Nursing Home* at 11 (citation omitted). The secretary noted that the only purpose for including such an unenforceable clause in a contract was to induce the patients to believe that they were prevented from enjoying their rights to medical assistance. *Summit Nursing Home* at 11.

The opinion goes on to state that such agreements further violate the Patient's Bill of Rights because it requires that each patient be "fully informed before or at the time of admission, of his rights and responsibilities and of all rules governing resident conduct . . ." 42 C.F.R. §442.311. The secretary concluded that "because they are unenforceable and therefore misleading they are also void as against public policy." *Summit Nursing Home* at 11-12 (footnote and citation omitted). One pivotal fact in this portion of the holding was that patients entering nursing homes and their families are rarely in a position to bargain with the home about such clauses and are unlikely to know that they are unenforceable. *Summit Nursing Home* at 12.

Glangariff Corp. v. Snook, et al., Medicare and Medicaid Guide (CCH), para. 33,605 at 9905 (N.Y. S. Ct., Nassau County, 1984), is the only known court case directly on point. The court concluded that an admission contract forcing a prospective nursing home resident to forego the right to apply for medical assistance for eighteen months was void as against public policy. In discussing 42 C.F.R. §447.15, which provides that providers must accept Medicaid payments as payment in full, the court stated:

The fact that there is a statute or regulation in conflict with the terms of a contract does not necessarily render the contract void

automatically, for a party may waive a rule of law or a statute or even a constitutional provision enacted for his or her benefit or protection, so long as only a private right is involved. . . . The same rule does not apply when the right or benefit waived is based upon public policy considerations which negatively affect the public interest. Such rights may not be waived.

Medicare and Medicaid Guide at 9907 (citations omitted).

In determining public policy, the Court may look to subsequently enacted legislation Therefore, Public Health Law §2805-f(4) discussed supra, . . . is relevant in that respect. Both that statute and its federal counterpart predecessor [42 U.S.C. §1396h] make it a criminal act to charge more than is received from Medicaid. . . . This reflects the legislative conclusion that the act is a hienous one, and both the federal and state legislation manifest that public policy is involved.

Medicare and Medicaid Guide at 9908. The court noted that its conclusion was supported by federal legislative history, and added:

There is also the concern that if the clause in the contract be deemed an effective waiver, such “waivers” will rapidly find their way into all nursing home contracts, thereby rendering the public’s protection of Medicaid recipients and their families totally ineffective. . . .

Plaintiff’s apparent intent of denying a poor person the right to make application for assistance which the state and federal government have seen fit to provide cannot be condoned legally or morally.

Medicare and Medicaid Guide at 9908 (citation omitted).

The holding of the New York trial court has been implemented on a statewide basis, as evidenced by a State of New York Department of Health Memorandum, Series 84-54, dated June 13, 1984:

Clauses in admissions agreements which constitute “waivers” . . . of the right of a patient to apply for Medicaid are void since they are contrary to the public policy of this State. The rights of patients . . . are absolute legal obligations owed to the patient and to the State as a condition of facility licensure and participation in the *Medicaid* program. Such rights may not be waived.

Memorandum at 2.

Therefore, [such] clauses . . . are void at the time the admissions agreement is signed since they do not correctly inform the patient of his/her rights (e.g. the right of a patient to apply for Medicaid when funds are exhausted and that a facility with a Medicaid provider agreement has agreed to accept Medicaid payment as "payment in full").

The clauses mislead patients into believing that . . . despite eligibility, the patient is prevented from applying for Medicaid.

Memorandum at 3-4.

C. Wisconsin Law

Various provisions of Wisconsin law that evince a public policy determination similar to that of the authorities discussed above suggest that Wisconsin courts might adopt the position espoused in *Summit Nursing Home* and *Glengariff Corp.* if presented with the question. Section 49.49(4), Stats., is virtually identical to 42 U.S.C. §1396h(d) (1977) and was modeled after the latter. Section 49.45 provides in part:

(14) Charges imposed forbidden, exceptions. No provider may impose upon a recipient charges in addition to payments received for services under this section or impose direct charges upon a recipient in lieu of obtaining payment under this section

. . . .

(b) If an applicant is determined to be eligible retroactively under s. 49.46(1)(b) and a provider bills the applicant directly for services and benefits rendered during the retroactive period, the provider shall, upon notification of the applicant's retroactive eligibility, submit claims for reimbursement under this section for covered services or benefits rendered during the retroactive period. Upon receipt of payment, the provider shall reimburse the applicant or other person who has made prior payment to the provider. . . .

Section HSS 106.04(2)(b) of the Wisconsin Administrative Code, entitled "Payment on claims for reimbursement," has similar provisions.

Wisconsin nursing homes must honor residents' rights guaranteed by section HSS 132.31 of the Wisconsin Administrative Code in order to participate in Medicaid. Ss. HSS 105.10(2)(k) and

105.115(11), Wis. Adm. Code. These standards must be enforced by the state as a condition of federal funding. *Resident v. Noot*, 305 N.W.2d 311 (Minn. 1981). The rights apply to all residents in a Medicaid certified nursing home, be they program recipients or private pay, simply as a condition for participation in the program. This enumeration of rights states that a resident can be involuntarily discharged or transferred essentially only for medical reasons, his or her welfare or that of other patients, or for non-payment. Ss. HSS 132.31(1)(j) and HSS 132.53(2)(b), Wis. Adm. Code. Conversion of status from private pay to Medicaid and the corresponding loss of revenue to the nursing home cannot be considered non-payment. Sec. 49.45(14), Stats.; s. HSS 106.04, Wis. Adm. Code. Therefore, contract provisions prohibiting a person from applying for Medicaid, under the guise of requiring a certain length of stay as a private pay resident, cannot be enforced by threats of discharge.

My conclusion is fortified by the fact that the Department of Health and Social Services has recently put all Wisconsin nursing home providers on notice that violations of private pay duration of stay agreements cannot be grounds for discharge.⁴ The memo requires that all present and prospective residents be so notified. BQC-85-019 at 2-3.

It should also be pointed out that providers who continue to utilize such contract provisions may be subject to injunctive sanctions. An open and continuous violation of state law may be deemed a public nuisance and prosecuted as such. *See e.g., State v. J.C. Penney*, 48 Wis. 2d 125, 151-55 (1970).

II.

The second issue suggested by your question is whether the use of such contract provisions could subject a nursing home to termination from participation in Medicaid. I conclude that under certain conditions a provider could be excluded from the program for such conduct.

Section 42 U.S.C. §1395cc, entitled "Agreements with providers of service," provides in part as follows:

⁴ BQC-85-019, Memo to All Wisconsin Nursing Homes from the Director of the Bureau of Quality Compliance, dated July 26, 1985.

(a)(1) Any provider of services . . . shall be qualified to participate under this subchapter . . . if it files with the Secretary an agreement —

(A) not to charge, except as provided in paragraph (2), any individual or any other person for items or services for which such individual is entitled to have payment made under this subchapter (or for which he would be so entitled if such provider of services had complied with the procedural and other requirements under or pursuant to the subchapter or for which such provider is paid pursuant to the provisions of sec. 1395f(e) of this title), and

. . . .

(b) An agreement with the Secretary under the section may be terminated . . .

. . . .

(2) by the Secretary . . . after the Secretary has determined (A) that such provider of services is not complying substantially with the provisions of such agreement, or with the provisions of this subchapter and regulations thereunder

Section HSS 106.06 of the Wisconsin Administrative Code, entitled “Involuntary termination, suspension or denial of eligibility for program participation,” provides in part:

The department may suspend or terminate the certification of any . . . provider . . . if . . . the department finds:

. . . .

(17) The provider has in addition to claiming reimbursement for services provided a recipient, imposed a charge on the recipient for such services or has attempted to procure payment from the recipient in lieu of claiming reimbursement through the program contrary to provisions of HSS 106.04(2).

Therefore, it is my opinion that attempts to enforce such contract provisions when Medicaid eligibility is reached could lead to expulsion from the program.

III.

The final question presented by your inquiry is whether the use of the disputed contract provisions constitutes a violation of criminal law. I conclude that in certain circumstances their continued use

could subject the nursing home or its agents to criminal prosecution.

There can be little doubt that the solicitation of such provisions in an admission agreement with a certified Medicaid recipient, or an attempt to enforce the agreement, constitutes a violation of the criminal statutes in question. The section you cite, 42 U.S.C. §1396h(d), obviously proscribes exactly this type of conduct. The corresponding state statute, section 49.49(4), was modeled after section 1396h(d) and is nearly identical:

(4) Prohibited charges. No person, in connection with the medical assistance program when the cost of the services provided to the patient is paid for in whole or in part by the state, may:

(a) Knowingly and wilfully charge, for any service provided to a patient under a medical assistance program, money or other consideration at a rate in excess of the rates established by the state.

(b) Knowingly and wilfully charge, solicit, accept or receive, in addition to any amount otherwise required to be paid under a medical assistance program, any gift, money, donation or other consideration, other than a charitable, religious or philanthropic contribution from an organization or from a person unrelated to the patient, as a precondition of admitting a patient to a hospital, skilled nursing facility, or intermediate care facility, or as a requirement for the patient's continued stay in such a facility.

(c) Violators of this subsection may be fined not more than \$25,000 or imprisoned for not more than 5 years or both.

Section 49.49(4) and 42 U.S.C. §1396h(d) (1977) have not been construed in any reported appellate decisions. However, their relevance here is obvious. Under section 1396h(d)(2), the instigator of the disputed contract provisions would be a person who "knowingly and wilfully . . . solicits . . . in addition to any amount otherwise required to be paid under a State plan . . . money . . . as a precondition of admitting a patient . . . when the cost of the services . . . is paid for (in whole or in part) under the State plan . . ." And, similarly, there would be culpability under section 49.49(4) for a person who "when the cost . . . is paid for in whole or in part by the state . . . knowingly and wilfully . . . solicit[s] . . . money . . . as a precondition of admitting a patient"

A much more difficult question is presented when the prospective resident enters into the agreement and is on private pay status, or when the resident would qualify for medical assistance if application were made, but refrains from so doing under the cloud of the contract. Although whether the courts would so hold is too close a question for me to venture a conclusive opinion, providers put on notice by the July 26, 1985, Department of Health and Social Services memo, and this opinion, run a high risk of jeopardy by the continued use of such contract provisions. An argument can be made that the phrase in the state statute (and its counterpart in the federal statute) that "when the cost of services provided to the patient is paid for in whole or in part by the state" can be interpreted as including services that could have been paid for by Medicaid if application had been made.

"Although we recognize the general rule . . . that penal statutes are to be strictly construed in favor of the accused, it is equally true that this rule of construction does not mean that only the narrowest possible construction must be adopted in disregard of the purpose of the statute." *State v. Tronka*, 84 Wis. 2d 68, 80, 267 N.W.2d 216 (1978) (citations omitted). "[T]he rule of strict construction is not violated by taking the common-sense view of the statute as a whole and giving effect to the object of the legislature, if a reasonable construction of the words permits it." *Zarnott v. Timken-Detroit Axle Co.*, 244 Wis. 2d 596, 600, 13 N.W.2d 53 (1944). The meaning of a statutory phrase must be considered in light of the entire statute. *State v. Fouse*, 120 Wis. 2d 471, 355 N.W.2d 366 (Ct. App. 1984). In *Boyce Motorlines v. United States*, 342 U.S. 337 (1952), the Supreme Court stated that it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." 342 U.S. at 340 (citations omitted).

Our supreme court and court of appeals have had occasion to construe both penal and remedial statutes more broadly than a literal interpretation would allow. In *Wisconsin Granite Co. v. Industrial Comm.*, 208 Wis. 270, 242 N.W.2d 191 (1932), one section of the Worker's Compensation Act that significantly restricted the scope of another was disregarded in order to effectuate legislative intent. In *McLeod v. State*, 85 Wis. 2d 787, 271 N.W.2d 157 (Ct. App. 1978), one of two contradictory provisions of the battery-to-a-witness statute was disregarded in order to expand its protection

to persons who had not yet testified as witnesses. In *State v. S&S Meats, Inc.*, 92 Wis. 2d 64, 284 N.W.2d 712 (Ct. App. 1979), section 161.55, entitled "Forfeitures," was construed to avoid a literal reading that would have severely curtailed the statute's applicability.

It is my opinion, therefore, that continued use of these contract provisions, after having been put on notice by this office and the Department of Health and Social Services of their suspect nature, could well be the impetus for the courts to interpret the criminal statute in a manner designed to effect its purpose and find a knowing and willful violation of law.

BCL:MJL

Compatibility; County Medical Examiner; Appointment of assistants to the medical examiner who are not able to be qualified as expert witnesses in the field of pathology is not permissible under Dunn County local ordinance.

Appointment of law enforcement officers as assistant medical examiners creates an impermissible conflict between the offices.
OAG 5-86

March 11, 1986

WILLIAM THEDINGA, *Corporation Counsel*
Dunn County

You have requested an opinion as to whether your county medical examiner may appoint local law enforcement officers as assistant medical examiners despite their lack of medical training. You have also requested an opinion as to whether appointing such law enforcement officers as assistant medical examiners creates an impermissible conflict of interest.

It is my opinion that the appointment of assistants without medical training under your Dunn County ordinance would conflict with my previous opinion in 69 Op. Att'y Gen. 45 (1980). In addition, the appointment of law enforcement officers would create an impermissible incompatibility of office.

I.

EXPERTISE OF ASSISTANT MEDICAL EXAMINERS

You indicate that medical resources are rather limited in your county. The medical examiner appointed in Dunn County is a licensed internist without specific training in pathology or forensic medicine. From your point of view, it would be beneficial to have appointed assistant medical examiners who have training in law enforcement and homicide investigation, even though they are not licensed in medicine.

The express language of section 59.34(1), Stats., does not directly require that the position of medical examiner be held by a person licensed in medicine or pathology. Instead, the statute sets forth the following requirements:

Whenever requested by the court or district attorney, the medical examiner shall testify to facts and conclusions disclosed by autopsies performed by him or her, at his or her direction or in

his or her presence; shall make physical examinations and tests incident to any matter of a criminal nature up for consideration before either the court or district attorney upon request; shall testify as an expert for either the court or the state in all matters where the examinations or tests have been made; and shall perform such other duties of a pathological or medicolegal nature as may be required:

Sec. 59.34(1), Stats.

As I noted in a previous opinion, this statutory language reflects the legislative intent that the office of medical examiner be held by one who is "able to be qualified as an expert witness in the field of pathology." 69 Op. Att'y Gen. 45, 47 (1980).

There is no statutory provision setting forth the qualifications for assistants to medical examiners. Assistants may simply be appointed by each medical examiner as each county board authorizes. Sec. 59.34(1), Stats. According to the information you have provided, Dunn County has, by ordinance, authorized the medical examiner to appoint "such number of assistants as he determines from time to time." Section II(B).

I note, however, that your county ordinance uses language which renders identical the powers of the medical examiner and those of the assistants:

Section IV: *Duties and Powers of the Medical Examiner*

B. The medical examiner *and his assistants* shall have all the powers of a constable or sheriff to serve subpoenas requiring the attendance of witnesses at any inquest to be held by such medical examiner or other orders or writs and *shall have such other powers conferred by Wisconsin law on medical examiners.*

(Emphasis added.)¹

Because your ordinance grants the same powers for medical examiner assistants as those that are granted to the medical examiner, the same considerations would apply to the assistants as apply to medical examiner positions themselves in light of my previous

¹ Note that the language of your ordinance, regarding "any inquest to be held by such medical examiner," is obsolete in light of 1983 Wisconsin Act 279. It is now a circuit judge or court commissioner who is empowered to conduct inquests on the order of the district attorney. Sec. 979.04, Stats.

opinion at 69 Op. Att'y Gen. 45 (1980). Accordingly, it is my opinion that your ordinance requires that assistant medical examiners possess the training and experience necessary for them to be qualified as expert witnesses in the field of pathology.

II.

INCOMPATIBILITY OF OFFICE

The Wisconsin Supreme Court established the standard for determining whether two offices are incompatible in *State v. Jones*, 130 Wis. 572, 110 N.W. 431 (1907). The court held that if one office were superior in some respect to another, so that the duties exercised under each might conflict to the public detriment, the offices were incompatible. *Id.* at 575-76. In a later case, the supreme court highlighted the public policy considerations by stating that public offices would be incompatible "where the nature and duties of two offices were such as to render it improper from considerations of public policy for one person to discharge the duties of both" *Martin v. Smith*, 239 Wis. 314, 326, 1 N.W.2d 163 (1941).

This doctrine of incompatibility of office applies to positions of public employment as well as to public offices. *Otradovec v. City of Green Bay*, 118 Wis. 2d 393, 396, 347 N.W.2d 614 (Ct. App. 1984); *Haskins v. State ex rel. Harrington*, 516 P.2d 1171, 1174-78 (Wyo. 1973); 63 Am. Jur. 2d *Public Officers and Employees* sec. 65 (1984).

Earlier opinions of this office have addressed the issues regarding the compatibility of the office of the coroner with that of justice of the peace, 14 Op. Att'y Gen. 374 (1925), and that of a police officer, 33 Op. Att'y Gen. 227 (1944). These opinions rested upon an analysis of the duties involved in the various offices, along with a determination in both opinions that those duties rendered the offices incompatible.

Historically, it has been the coroner who, as a public official, acted in a quasi-judicial capacity in deciding whether grounds existed for conducting an autopsy. *Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 685, 292 N.W.2d 816 (1980); *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 381-83, 166 N.W.2d 255 (1969). Coroners were also responsible for deciding whether to have an inquest conducted. Sec. 979.01, Stats. (1981).

The respective duties of coroners/medical examiners, along with those of law enforcement officers and the district attorney, have

been modified somewhat by the 1983 amendments to chapter 979. Under the current statutory scheme, it is only the district attorney who may order an inquest if appropriate grounds exist. Sec. 979.04(1), Stats.

Despite these changes, the Legislature did preserve the division of the powers of the medical examiner from law enforcement officers in the statutory framework governing preliminary death investigations. The district attorney may request the coroner/medical examiner to conduct a preliminary investigation prior to a decision to order an inquest. Sec. 979.04(3), Stats. It is the district attorney who may determine the scope of the investigation. *Id.* By the terms of the statute, any other investigation conducted by any law enforcement agency is not to be limited or prevented by the coroner/medical examiner's investigation. *Id.* By making this division of investigative authority, the Legislature demonstrated its intent to protect the integrity of the separate investigations.

On a practical level, any law enforcement officer serving as assistant medical examiner could be confronted with a conflict of office. The conduct of a death investigation could result in the law enforcement officer, who is also acting as assistant medical examiner, being placed in a position of trying to serve two masters. Conceivably, a district attorney's request for a limited investigation could conflict with the law enforcement agency's plans for investigation. An individual employed both as a law enforcement officer and as an assistant medical examiner would then be required to fill the two conflicting orders. From the standpoint of public policy, such an overlapping of duties would frustrate the legislative plan.

The conflict is particularly manifest in the office of county sheriff. Sheriffs, under the Wisconsin Constitution article VI, section 3, are not to hold any other office. Deputy sheriffs, in carrying out the sheriffs' duties, similarly encounter problems of conflict between their duties and those of the medical examiners' offices.

Under section 59.34(2), the coroner must perform the duties of sheriff when there is no sheriff or undersheriff. The coroner, under section 59.34(3), must also serve and execute process and "perform all other duties of the sheriff" when the sheriff is a party or when the clerk of court requests the coroner to do so upon a party's petition under section 59.395(6).

Ordinarily these duties do not apply by statute to a medical examiner unless the local medical examiner is so authorized in his appointment by the county board. Sec. 59.34(5), Stats. However, your Dunn County ordinance does provide this same authority which exists under the statute for coroners to your medical examiner as follows:

Section IV: Duties and Powers of the Medical Examiner

- C. The medical examiner shall serve and execute process of every kind and perform all other duties of the sheriff when the sheriff is a party to the action and whenever the clerk of the circuit court addresses the original or other process in any action to him as provided in s. 59.395(6), execute the same in like manner as the sheriff might do in other cases, and exercise the same powers and proceed in the same manner as prescribed for sheriffs in the performance of similar duties.

If a deputy sheriff, who also served as an assistant medical examiner, were directed to serve such process because the sheriff was a party, that deputy would be violating the separation of duties as mandated by statute. Accordingly, I believe that the office of sheriff or deputy would be incompatible with that of medical examiner in your county for this additional reason.

The same considerations which apply to deputy sheriffs would also apply to law enforcement officers. In many counties the offices of sheriff and other law enforcement agencies overlap, as I have previously noted:

[I]t has been a well recognized practice for sheriffs in this state to deputize law enforcement officers of other local law enforcement agencies in their county on a cooperative basis. This has been done so as to obviate the jurisdictional problems that might arise because of the limited power such officers otherwise would have to act beyond their municipal boundaries.

68 Op. Att'y Gen. 334, 342 (1979); *see also*, 61 Op. Att'y Gen. 79, 85 (1972).

In those common situations where law enforcement officers are also deputized, the same conflicts which apply to sheriffs' departments would also apply to other law enforcement agencies. In this

way other law enforcement offices are also incompatible with the office of the medical examiner.

In conclusion, it is my opinion that the appointment of persons as assistant medical examiners, when those persons would not be qualified to testify as expert witnesses in pathology, is not authorized under your Dunn County ordinance. In addition, the appointment of acting members of local law enforcement agencies as assistants to the medical examiner would create an impermissible incompatibility of office.

BCL:BS

Fire Department; Police; Wisconsin Retirement Fund; Wisconsin Retirement System; Section 40.21(4), Stats., limits prospective mandatory Wisconsin Retirement System coverage to present and future police and firefighter employees of cities and villages that had police and firefighter employees included in the Wisconsin Retirement Fund prior to March 31, 1978. OAG 6-86

March 17, 1986

GARY I. GATES, *Secretary*

Department of Employee Trust Funds

You request my opinion as to whether the repeal of sections 61.65(6), (7) and 62.13(9), (9a), (10), Stats. (1975), by chapter 182, Laws of 1977, and the amendment of section 41.05, Stats. (1975), by chapter 182 and thereafter by chapter 96, Laws of 1981, deleted the requirement that villages that reach the specified populations and all cities of the second, third and fourth class be mandatorily included in the Wisconsin Retirement System for police and firefighter personnel.

Prior to 1948, cities of the second, third and fourth class and villages having a specified population (5,000 as to police and 5,500 as to firefighters) were required to establish and administer local pension funds for their police and firefighters. Secs. 61.65(6), (7), and 62.13(9), (9a), (10), Stats. (1975). On January 1, 1948, these local funds were closed to new members but continued for existing members. Police and firefighter personnel hired by these villages and cities after December 31, 1947, were required to be covered by the Wisconsin Retirement Fund (WRF), the predecessor to the present Wisconsin Retirement System (WRS).

WRF coverage of all employes was not mandatory for cities and villages. A city or village had the right to elect whether it wanted to include its employes in the WRF. Sec. 40.21(1), Stats. If the cities or villages elected to cover their employes under the WRF, police and firefighters were of course included. If, however, the cities and villages did not elect to cover all their employes, police and firefighter employes were still mandatorily covered by virtue of sections 61.65(6), (7) or 62.13(9), (9a), (10), Stats. (1975).

On April 1, 1978, chapter 182, Laws of 1977, terminated local administration of police and firefighter pension funds in these cities and villages and transferred their functions and operation to the

WRF Board. Chapter 182 also repealed sections 61.65 (6), (7) and 62.13(9), (9a), (10), Stats. (1975), which require mandatory WRF participation of police and firefighters, notwithstanding lack of an election by the municipality to include all of its employes. However, section 41.05(1), Stats. (1975), relating to required and elective participation in the WRF, maintained these repealed sections. The last sentence of section 41.05(1), Stats. (1975), was amended by chapter 182 to include a reference to the 1975 statutes as follows:

A city or village which has not elected to participate but some of whose employes will be included within and subject to this fund on or after January 1, 1948 shall be included within and subject to this fund effective January 1, 1948, as though such employer had elected to participate in the fund, but until such employer does actually so elect and such election becomes effective, its employes included within and subject to this fund shall be only those specified by ss. 61.65 (6) and (7), 62.13 (9) (e), (9a), (10) (f) and (g), 1975 stats.

The Retirement Systems Merger Bill, chapter 96, Laws of 1981, repealed section 41.05 and enacted the present section 40.21, which states in part:

(2) Any employer who elected or was required to participate in the Wisconsin retirement fund under s. 41.05, 1979 stats., shall be included in the Wisconsin retirement system on the same basis as the employer was included in the Wisconsin retirement fund.

....

(4) Every city or village subject to ss. 61.65 and 62.13, 1975 stats., except a city of the 1st class, which is not otherwise a participating employer, is a participating employer *but only with respect to present and future employes* of its police and fire departments specified by ss. 61.65(6) and (7) and 62.13(9)(e), (9a) and (10)(f) and (g), 1975 stats.

Based upon this history, you ask which police and firefighter employes are included within the WRS by virtue of the mandatory language of section 40.21(4).

It is my opinion that the mandatory inclusion of police and firefighters set forth in section 40.21(4) relates only to those cities and villages which were affected by such mandate up to March 31, 1978, the effective date of repeal of sections 61.65(6), (7) and

62.13(9), (9a), (10), Stats. (1975). Any police or firefighter personnel hired after March 31, 1978, by a municipality so affected are also mandated under the WRS by the present section 40.21(4). Municipalities not having sufficient population or city status on March 31, 1978, to be mandated under the WRS are not mandated thereunder if they reach that population or city status after March 31, 1978.

Chapter 182, Laws of 1977, which transferred the operation of the sections 61.65 and 62.13, local police and firefighter funds to the WRF, repealed those portions of sections 61.65 and 62.13, Stats. (1975), that mandated WRF coverage of police and firefighters employed after December 31, 1947. The amendment to section 41.05(1), Stats. (1977), by adding "1975 stats.," simply recognizes this termination while preserving and maintaining the status of those who were previously made participants in the WRF. Thus the amendment requires the city or village to continue under the fund those local police and firefighter personnel already under the fund on April 1, 1978. Had the reference to "1975 stats." not been added, the right to continue those police and firefighters already in the fund would be in question since the cross-referenced sections "61.65(6) and (7), 62.13(9)(e), (9a), (10)(f) and (g)" were repealed. This repeal (with the saving language of section 41.05(1), Stats. (1977)) cancelled all prospective coverage but maintained the obligation and authority in the cities and villages to continue coverage of policemen and firefighters already in place.

Section 41.05(1), Stats. (1977), was repealed by the Retirement Systems Merger Bill and the last sentence substantially recreated in section 40.21(4), with the addition of the language "but only with respect to present and future employes." Section 40.21(4) thus clearly limits the prospective mandatory coverage to present and future police and firefighter employes of cities and villages that had such employes included in the WRF prior to the repeal of sections 61.65(6) and (7) and 62.13(9)(e), (9a), (10)(f) and (g), Stats. (1975), effective March 31, 1978.

Without section 40.21(4), mandatory WRF (now WRS) coverage would be limited to police and firefighter personnel employed on March 31, 1978, by those cities and villages having satisfied the statutory population and classification standards on that date. The present section 40.21(4) provision, however, extends such mandatory WRS coverage to post March 31, 1978 police and firefighter

employees of cities and villages who were in the WRS by virtue of mandatory coverage on that date.

BCL:WMS

Licenses and Permits; Municipalities; Words and Phrases; Under section 66.036, Stats., additions to, and the remodeling of, structures require an on-site inspection of the existing private sewage system before a building permit may be issued. OAG 7-86

March 25, 1986

HOWARD I. BERNSTEIN, *General Counsel*

*Department of Industry, Labor
and Human Relations*

You have asked for my opinion concerning the duties imposed on local municipalities by sections 66.036 and 145.20(2)(h), Stats. Your letter indicates that the Department of Industry, Labor and Human Relations and several counties are in disagreement over the extent of these duties. You have requested my opinion to resolve this disagreement. The sections in question provide:

66.036 Building on unsewered property. (1) No county, city, town or village may issue a building permit for *construction of any structure requiring connection to a private domestic sewage treatment and disposal system unless a system satisfying all applicable regulations already exists to serve the proposed structure or all permits necessary to install such a system have been obtained.*

(2) *Before issuing a building permit for construction of any structure on property not served by a municipal sewage treatment plant, the county, city, town or village shall determine that the proposed construction does not interfere with a functioning private domestic sewage treatment and disposal system.* The county, city, town or village may require building permit applicants to submit a detailed plan of the owner's existing private domestic sewage treatment and disposal system.

145.20(2) GOVERNMENTAL UNIT RESPONSIBILITIES. The governmental unit responsible for the regulation of private sewage systems shall:

. . . .

(h) Inspect existing private sewage systems to determine compliance with s. 66.036 if a building or structure is being constructed which requires connection to an existing private sewage system. The county is not required to conduct an on-site inspec-

tion if a building or structure is being constructed which does not require connection to an existing private sewage system.

In your letter you advise that the department has consistently interpreted these sections to mean that an on-site inspection of an existing private sewage system must be made before a building permit may be issued for *any* type of construction requiring a connection to that system. For the reasons set forth in this opinion, I agree with this conclusion.

You also advise that some counties contend that additions to, or the remodeling of, existing structures do not require an on-site inspection. This contention is based on the counties' interpretation of section 66.036 to the effect that additions and remodeling do not constitute construction of a "structure" within the meaning of the statute. Because of the nature of the private sewage regulatory program conceived by the Legislature, I believe that the counties' contention is incorrect. A resolution of the disagreement involves a statutory construction of section 66.036.

The court in *Terry v. Mongin Ins. Agency*, 105 Wis. 2d 575, 583-84, 314 N.W.2d 349 (1982), summarized the basic rules for statutory construction as follows:

We have repeatedly stated that "[t]he aim of all statutory construction is to discern the intent of the legislature," *Green Bay Packaging, Inc. v. ILHR Dept.*, 72 Wis. 2d 26, 35, 240 N.W.2d 422 (1976), and that a "cardinal rule in interpreting statutes" is to favor a construction which will fulfill the purpose of the statute over a construction which defeats the manifest object of the act. *Student Asso., U. of Wis.-Milw. v. Baum*, 74 Wis. 2d 283, 294-95, 246 N.W.2d 622 (1976). Where one of several interpretations of a statute is possible, the court must ascertain the legislative intention from the language of the statute in relation to its context, subject matter, scope, history, and object intended to be accomplished. *State ex rel. First Nat. Bank & Trust Co. of Racine v. Skow*, 91 Wis. 2d 733, 779, 284 N.W.2d 74 (1979).

In connection with the scope of the private sewage system regulatory program in Wisconsin, your department has supplied my staff with relevant background information. There are well over 700,000 private sewage systems in Wisconsin. Failure of a septic system is not ordinarily due to the shortcomings of the system

itself, but rather to its misapplication and/or misuse. In its present state, the environment in Wisconsin is without a statewide comprehensive statutory land use authority. Therefore, locally adopted zoning ordinances and sanitary permits still represent the prime methods of land use control.

Except for Milwaukee County, the local governmental unit responsible for regulation of private sewage systems is the county (section 145.01(5)). Section 66.036 is an integral part of the private sewage regulatory program. It is obviously *in pari materia* with section 145.20 and should be construed with this section to fulfill the purpose of the act.

Section 66.036 was created by chapter 258, Laws of 1977. This chapter contains a prefatory note which provides in part:

At the present time, in some localities, a property owner may obtain a building permit and construct a building before obtaining a sanitary permit. When the individual seeks a sanitary permit to install a septic tank system after constructing the building, the sanitary permit may be denied because the site does not meet the requirements of the state plumbing code or a local sanitary ordinance.

New sub. (1) is intended to preclude the possibility of a person erecting a building which requires connection to a private domestic sewage treatment and disposal system and then later being unable to obtain a sanitary permit to install the system on the property. When a building permit application is received, the county, city, village or town must determine whether the proposed building will require connection to a private domestic sewage treatment and disposal system. If connection is required, the county, city, village or town may not issue the building permit unless the applicant already has a sewer system adequate to serve the new structure or unless the applicant obtains a sanitary permit or other permit necessary for installation of a private domestic sewage treatment and disposal system required by the state plumbing code or a municipal sanitary ordinance.

While a title and preamble may be used to construe a statute as to the objects to be accomplished, it cannot be used to alter the scope of the text of the statute. *Smith v. Brookfield*, 272 Wis. 1, 6, 74 N.W.2d 770 (1956); *State ex rel. Columbia Corp. v. Pacific Town Board*, 92 Wis. 2d 767, 773, 774, 286 N.W.2d 130 (1979). Signifi-

cantly, the statute refers to a "structure" rather than to a "building." Accordingly, it is necessary to determine whether the term "structure" has a broader meaning than the term "building." "Structure" is not defined for purposes of section 66.036. However, in *State v. Bleck*, 114 Wis. 2d 454, 463, 338 N.W.2d 492 (1983), it was said:

Sec. 990.01(1), relating to general rules of statutory construction, indicates that all words and phrases must be construed according to their common and approved usage. The common and approved meaning of a word can be ascertained by reference to a recognized dictionary. [Citation omitted.]

Webster's Third New International Dictionary 2267 (1961) defines "structure" as "something constructed or built . . . something made up of more or less interdependent elements or parts"

The term "building," on the other hand, is more narrowly defined as a "constructed edifice designed to stand more or less permanently, covering a space of land, usu. covered by a roof and more or less completely enclosed by walls." *Webster's Third New International Dictionary*, p. 292 (1961). Therefore, in my opinion, the term "structure" does include remodeling of an existing building or an addition to the building. These examples are not meant to be all inclusive.

It is my opinion that the language of section 66.036 applies to any "structure" as the term is ordinarily used and for which a building permit must issue, and that before such a building permit can be issued, the municipality must determine: (1) whether a connection to the private sewage system is required; (2) whether a private sewage system satisfying applicable regulations exists to serve the proposed structure; (3) if not, whether necessary permits have been obtained to install such a system; and (4) whether the municipality determined that the proposed construction does not interfere with a functioning private domestic sewage treatment and disposal system. (Section 66.036(2)).

To implement and maintain a private sewage regulatory program consistent with public health and safety, the Legislature has recognized that local units of government should share enforcement responsibility with state government. The Department of Industry, Labor and Human Relations, in conjunction with these local units

of government, is responsible for the administration and enforcement of chapter 145. Section 66.036 transfers some of that responsibility to the local governmental units by requiring that before a building permit be issued, the adequacy of the private sewage system serving the proposed structure be determined. If it is determined that a connection is required, then the local units of government should be notified so that they may discharge their duty under section 145.20(2)(h), which requires them to make an inspection to determine compliance with section 66.036.

BCL:JWC

Probation and Parole; Words and Phrases; Worker's Compensation; Probationers who provide child-care services under a state-run program as a condition of their probation are not agents of the state for purposes of indemnity, but they are county employes for purposes of worker's compensation. OAG 8-86

April 17, 1986

LINDA REIVITZ, *Secretary*

Department of Health and Social Services

You have requested my opinion as to (1) whether certain probationer clients are state agents or employes entitled to an indemnity for judgments rendered against them, and (2) whether they are county employes for purposes of worker's compensation.

My answer is no to the first question and yes to the second question.

You describe the nature of the probationers' work and relationship with the state and the county as follows:

DHSS' Bureau of Community Corrections has developed a project through which some of its clients on probation for welfare fraud will provide child care for the children of other similar clients, thereby freeing the latter clients to seek job training or employment. Each client involved in the program will be obligated to pay restitution as a condition of probation. Those providing the child care will earn credit against their restitution obligations, though no money will actually change hands. It is expected that those provided the child care will be enabled to earn wages to pay restitution.

The provider-clients will be trained and certified as child care workers by a recognized child care organization, through a purchase of services by DHSS. The provider-clients will be supervised by their probation agents, who will keep an accounting of the provider-client's time and make both scheduled and unscheduled home visits. DHSS will retain the right to terminate any provider-client from the program, regardless of the wishes of any client to whom the provider-client provides child care.

The program will be entirely state-run. County involvement will be limited to receiving restitution payments. Circuit courts, which are state offices, will be involved to the extent they will order the provider-clients to perform the day care services as

uncompensated community service work, which may be ordered as a condition of probation under s. 973.09(7m), Stats.

The state indemnifies its agents and employes for any judgments rendered against them for conduct “within the scope of their agency.” Sec. 895.46(1)(a), Stats. The term “scope of agency” is used in the *respondeat superior* context; it includes acts so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods of carrying out the objectives of the employment. *Cameron v. Milwaukee*, 102 Wis. 2d 448, 457, 307 N.W.2d 164 (1981).

Admittedly, these probationers resemble agents, as that is understood in the *respondeat superior* context. An agent is one who acts on behalf of and is subject to the control of the principal. *Paulson v. Madison Newspapers*, 274 Wis. 355, 361, 80 N.W.2d 421 (1957). Compensation is not an invariable element of agency, *Estfred Corp. v. Freeman*, 36 Wis. 2d 19, 27, 153 N.W.2d 13 (1967), although it ordinarily is a component. *Galvan v. Peters*, 22 Wis. 2d 598, 608, 126 N.W.2d 590 (1964). An independent contractor, however, is not an agent within the *respondeat superior* context. See *Paulson*. Whether a person is an agent or independent contractor pivots around such facts as the extent of control over the details of the work, whether the worker is engaged in a distinct occupation or business apart from that of the party desiring the services, the place of work, the time of employment, the method of payment, the right of summary discharge, the nature of the business, which party furnishes the tools and the intent of the parties. *Pavalon v. Fishman*, 30 Wis. 2d 228, 236, 140 N.W.2d 263 (1966). The single most important factor is the extent of control retained over the details of the work. *Kablitz v. Hoeft*, 25 Wis. 2d 518, 529, 131 N.W.2d 346 (1964).

Applying these criteria to the situation you describe, arguably an element of compensation is present in that the restitutionary obligation is discharged by the service. The probationer is not generally in the business of providing child-care services, but becomes so at the behest of the department and as a condition of probation. Although the probationer’s home is the place of work, the department retains control over the details of the work. The department determines the appropriate training and certification. It makes both scheduled and unscheduled home visits to monitor performance; it assumes responsibility for providing the tools, *i.e.*, toys, lesson

plans, equipment, games and food; and it establishes the standards of care relating to health and cleanliness, frequency of feeding, number of children who can be cared for, safety precautions both inside and outside the home, manner of control and punishment, exercise, play, social activities and rest periods.

Despite these similarities, it is my opinion that the nature of the relationship is better described as that of the governed to the governor, or the regulated to the regulator. The sovereign simply has ordered a subject to discharge a duty, namely, to care for the children of others. As such, the probationers are not agents or employes.

Close regulation does not itself create an agency relationship. Such regulation does not convert private action into state action under the fourteenth amendment. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Agency under section 895.46(1)(a) requires an even closer nexus to the state than does the state action doctrine. See *Cameron v. Milwaukee*, 102 Wis. 2d 448, 457, 307 N.W.2d 164 (1981). It follows, I believe, that the probationers are not state agents within section 895.46(1)(a) simply because the state has ordered them to undertake child-care services as a condition of probation.

Another consideration supports my conclusion that the probationers are not agents. These probationers and foster parents are alike. Both help execute state programs as surrogates for parents. Both are subject to state controls. But in the case of foster parents, the Legislature separately addressed liability issues. It authorized the department to purchase liability insurance. Sec. 48.627, Stats. See 1985 Wisconsin Acts 24 and 106. This legislation would have been unnecessary if foster parents were state agents under section 895.46(1)(a). Because of the similarity between this program and that involving foster care, I conclude the Legislature has not yet authorized the extension of state liability protection to probationers under section 895.46(1)(a) or elsewhere.

Turning to your second question of whether these individuals are county employes for worker's compensation purposes, at the time of your request section 102.07(14) defined an "employee" for worker's compensation purposes as follows: "An adult performing uncompensated community service work under s. 971.38 is an employe of the county in which the court ordering the community

service work is located.” The issue you posed arose because the probationers were required to perform this work, not under section 971.38, but as a condition of probation under section 973.09(7m). Subsequently, the Legislature resolved the issue by amending section 102.07(14) to include probationers under section 973.09(7m). 1985 Wisconsin Act 83, sec. 5. Accordingly, these probationers are county employes for purposes of worker’s compensation.

BCL:CDH

Lotteries; The dissemination of out-of-state lottery tickets by business establishments in Wisconsin, with or without a purchase, is a violation of chapter 945, Stats. OAG 9-86

April 22, 1986

ROBERT D. ZAPF, *District Attorney*
Kenosha County

You ask whether the dissemination of out-of-state lottery tickets in Wisconsin by local business establishments, *with or without* a purchase of other merchandise, is a violation of the criminal code under chapter 945, Stats.

Section 945.05(1)(a) provides that: "Whoever . . . transfers commercially or possesses with intent to transfer commercially . . . [a]nything which he knows evidences, purports to evidence or is designed to evidence participation in a lottery . . ." is engaged in a Class E felony.

The issue presented is whether a merchant who gives a lottery ticket without charge to a customer upon the condition of purchasing other merchandise or gives a customer a lottery ticket for merely visiting the merchant's place of business, without any purchase being necessary, "transfers commercially" the lottery ticket.

62 Op. Att'y Gen. 186, 188-89 (1973), sets forth the basic state policy concerning lotteries:

It is the public policy of this state as expressed by Art. IV, sec. 24, Wis. Const., and as expressed by the legislature, that lotteries are undesirable. While Art. IV, sec. 24 has been amended twice to allow for limited types of lotteries to be conducted in this state, the general anti-lottery prohibition remains as follows: "The legislature shall never authorize any lottery. . . ." Because of this strict constitutional anti-lottery stance, lotteries have traditionally been viewed restrictively by the courts, legislature and attorneys general. *Kayden Industries, Inc. v. Murphy* (1967), 34 Wis. 2d 718, at 724, 150 N.W.2d 447.

This 1973 opinion specifically answered the question whether out-of-state lottery tickets could be *sold* in Wisconsin. The answer was no. The opinion went on to say at page 188, "[t]he word 'commercially' should not be limited to monetary transfers. There may be non-monetary transfers which, according to the facts sur-

rounding such a transfer, amount to a 'commercial' benefit to the transferor."

It is my opinion that just such facts exist in the examples you present. A liquor store offering a "free" lottery ticket with each \$20 purchase certainly is receiving a commercial benefit from the transfer. A new car dealer offering a "free" lottery ticket if a person takes a test drive in a new car would also receive a commercial benefit from the transfer. Both such promotions would be in violation of section 945.05(1)(a).

It is my opinion that commercial benefit extends to the mere visit by a customer to pick up a lottery ticket at a merchant's place of business even though no further act, such as a test drive or purchase, is required of that customer. A long line of Wisconsin cases has held that a visit to a mercantile establishment or other place without being required to make a purchase or pay an admission fee constitutes consideration for lottery purposes. See *State ex rel. Regez v. Blumer*, 236 Wis. 129, 294 N.W. 491 (1940) and *State ex rel. Cowie v. La Crosse Theaters Co.*, 232 Wis. 153, 286 N.W. 707 (1939). The increased floor traffic and opportunity for the merchant to sell other merchandise amount to a commercial benefit to the transferor and therefore a violation of section 945.05(1)(a).

BCL:SJN

Attorneys; Words and Phrases; Entitlement to indemnity and immunity from suit of prosecuting counsel retained by the Board of Attorneys Professional Responsibility discussed. OAG 10-86

April 22, 1986

GERALD C. STERNBERG, *Administrator*
Board of Attorneys Professional Responsibility

You request a formal opinion on whether counsel appointed by the supreme court to prosecute lawyers for professional misconduct are agents of the state. If they are state agents within section 895.46(1)(a), Stats., they are entitled to state indemnification for judgments rendered against them for conduct within the scope of their agency as well as to legal representation provided by the state. In addition, you ask whether these attorneys have any immunity from suit.

These counsel are appointed by the supreme court on recommendation of the Board of Attorneys Professional Responsibility (board). They are supervised by the board's administrator. Their compensation is determined by contract. The board itself was created by order of the supreme court on November 5, 1976. Supreme Court Rules (SCR) chapter 21 contains a preamble which reads as follows:

The board of attorneys professional responsibility is established as an arm of the supreme court to assist in the discharge of the court's constitutional responsibility to supervise the practice of law and protect the public from professional misconduct by members of the bar.

The board carries out its investigative functions through the administrator and the professional responsibility committees. When the board determines that there is probable cause that there has been conduct constituting grounds for discipline within the meaning of SCR 21.05, disciplinary action is instituted by serving and filing a complaint with the clerk of the supreme court and the board is authorized to employ counsel to "serve, file and prosecute the complaint" in accordance with SCR 22.10(1). Supreme Court Rule 21.15 provides:

Official duties. Referees and members of the board, board staff, board counsel and members of district professional responsibility committees acting in the course of their official duties

under SCR chapters 21 and 22 are acting on behalf of the supreme court with respect to the statutes and supreme court rules and orders regulating the conduct of attorneys.

Section 895.46 covers “agents of any department of the state” in addition to officers and employees. The board is a department of the state within this statute. The preamble to SCR 21 states that the board is an arm of the supreme court and was created under the constitutional authority of the supreme court to supervise the practice of law and protect the public from professional misconduct by lawyers. Only the supreme court has authority to regulate the practice of law and to create public agencies and departments to carry out that authority and responsibility. *See Lathrop v. Donahue*, 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *aff'd*, 367 U.S. 820 (1961); *Integration of Bar Case*, 244 Wis. 8, 11 N.W.2d 604 (1943); and *In re Cannon*, 206 Wis. 374, 240 N.W. 441 (1932).

Board counsel do not automatically become “agents” within section 895.46(1)(a) simply because they help carry out the supreme court’s responsibility of regulating the conduct of attorneys. Many others similarly serve essential governmental functions, such as highway and building contractors, and they are readily discernible as independent contractors not entitled to an indemnity from the state.

Two subissues emerge: (1) Does section 895.46(1)(a) use the term “agent” so broadly as to include independent contractors? and, if not, (2) Are board counsel independent contractors?

The consistent administration of section 895.46(1)(a) since its inception has excluded independent contractors from the definition of “agent.” Thus, legal representation has been denied to court-appointed guardians-*ad-litem* and private attorneys appointed by the public defender board to represent the indigent in criminal prosecutions, even though a staff attorney performing the same service is protected as an employee. Indeed, the practical administration of this statute has been to construe the word “agent” most narrowly. Hence, even district attorneys have been denied representation despite their obviously critical role in the prosecution of crime as the attorneys for the state.

The supreme court itself has construed section 895.46(1)(a) in a way that tends to exclude independent contractors from the meaning of “agent.” In *Cameron v. Milwaukee*, 102 Wis. 2d 448, 456, 307

N.W.2d 164 (1981), the court indicated the scope of the conduct covered by this statute is to be interpreted in light of the law of master-servant and *respondeat superior*. As you appreciate, those concepts historically have excluded independent contractors. See *Paulson v. Madison Newspapers*, 274 Wis. 355, 361, 80 N.W.2d 421 (1957).

The court's reference to the doctrine of *respondeat superior* cannot be interpreted literally and must be understood as an analogy only. For under that doctrine the master is liable for the torts of the servant committed while carrying out the master's business. But the doctrine of sovereign immunity prevents suit against the state for the torts of its servants. See *Fiala v. Voight*, 93 Wis. 2d 337, 348, 286 N.W.2d 824 (1980). The indemnity provided by section 895.46(1)(a) is not a waiver of the immunity from suit. *Id.* Rather, by the indemnity statute the state has chosen "gratuitously to shield" its officers, employes, and agents from losses. *Cords v. Ehly*, 62 Wis. 2d 31, 37, 214 N.W.2d 432 (1974). Moreover, the theory behind the doctrine of *respondeat superior* rests in part on a profit motive.

The doctrine rests . . . upon the idea that where an enterprise is carried on for the financial benefit of a master it is considered just that he should answer for the tort of his servant in conducting it because he is deemed to profit financially by its being carried on.

Apfelbacher v. State, 160 Wis. 565, 575, 152 N.W. 144 (1915).

Despite these limitations on the court's use of the *respondeat superior* doctrine in construing the reach of the indemnity statute, it at the least marks the starting point for analysis. Accordingly, I conclude that the indemnity statute excludes independent contractors from the meaning of "agent" because they are excluded under the *respondeat superior* rule and have been so excluded under the long-standing and uninterrupted administrative application of the indemnity statute.

It remains to determine whether board counsel are independent contractors or agents in the master-servant sense used in this statute. Generally speaking, whether a person is an agent or independent contractor turns on such facts as the extent of control over the details of the work, whether the worker is engaged in a distinct occupation or business apart from that of the party desiring the

services, the place of work, the time of employment, the method of payment, the right of summary discharge, the nature of the business, which party furnishes the tools, and the intent of the parties. *Pavalon v. Fishman*, 30 Wis. 2d 228, 236, 140 N.W.2d 263 (1966). The single most important factor is the extent of control retained over the details of the work. *Kablitz v. Hoeft*, 25 Wis. 2d 518, 521, 131 N.W.2d 346 (1964).

Although you do not expressly so state, I assume that the board counsel referred to are private sector attorneys whose practices include the representation of numerous different clients in a variety of matters. From that perspective, the board is simply another client. Further, although you state that the board administrator "supervises" their performance, I assume you refer to the same control any client retains over the policy factors of a case, not that board counsel have less control than attorneys generally over the details of how to provide a lawyer-like service. On these assumptions, board counsel are independent contractors under the traditional criteria.

The courts, however, have not consistently applied agency law to the attorney-client relationship. Some courts have held that the attorney is an independent contractor, not an agent within the *respondeat superior* doctrine. See, e.g., *Williams v. Burns*, 463 F. Supp. 1278, 1284-85 (D. Colo. 1979). Our court, however, has held that the attorney-client relationship is one of agency. *Clear View Estates, Inc. v. Veitch*, 67 Wis. 2d 372, 380, 227 N.W.2d 84 (1975). On the other hand, our court has not invariably taken such agency status to a *respondeat superior* conclusion to hold the client fully accountable for the attorney's conduct. Rather than place a premium on the independence of counsel in controlling the details of the legal work, the court has placed a higher value on securing "substantial justice between the parties under all the circumstances." *Paschong v. Hollenbeck*, 13 Wis. 2d 415, 424, 108 N.W.2d 668 (1961). The court has even departed from the disclosed agency rule of master-servant law to hold the attorney, not the client, accountable for paying the fees of an expert retained for the client, recognizing that the attorney's dominance in the litigation process means the court and the parties " 'may safely regard themselves as dealing with the attorney, instead of with the client.' " *Theuerkauf v. Sutton*, 102 Wis. 2d 176, 195, 306 N.W.2d 651 (1981). A review of the cases in other jurisdictions similarly reveals that the *respondeat*

superior rule has been subordinated to other policy considerations unique to the attorney-client context. See 7A C.J.S. *Attorney & Client* §§180-81, 190 (1980).

The dominant relationship test militates in favor of treating board counsel as agents in the master-servant sense of the indemnity statute and not as independent contractors. Ordinarily, board counsel will be targeted for suit only for starting action against a lawyer for professional misconduct. In instituting such suit, board counsel act only at the behest of the board and the supreme court. Focusing on this essence of the relationships, it is the mission and directive of the supreme court and the board that dominate, not board counsel. Stated in other terms, in the typical suit board counsel are merely nominal parties sued only for implementing the directives of the board and the supreme court; the board and the supreme court are the real, substantial parties in interest. Cf. *Ford Motor Co. v. Treasury Department*, 323 U.S. 459, 464 (1945) (the state was the real, substantial party in interest in a suit against a state official to obtain a tax refund); *Appel v. Halverson*, 50 Wis. 2d 230, 234-35, 184 N.W.2d 99 (1971) (action to compel a state officer to pay money from the state treasury is against the state and is barred by the doctrine of sovereign immunity).

Therefore, so long as the board counsel act to carry out the function of the board and the court to regulate the practice of law, they will be regarded as agents of the state within the meaning of section 895.46(1)(a). In that capacity they will be entitled to indemnification for any judgment rendered against them for conduct within the scope of their agency and they will be entitled to legal representation provided by the state.

It is necessary to note that even where board counsel are agents within the meaning of section 895.46(1)(a), entitlement to representation and indemnity do not automatically follow. That statute provides for indemnity for judgments "in excess of any insurance applicable." In other words, the state is an excess indemnitor, not a primary insurer. Further, whether represented by the attorney general or insurance counsel, the notice of injury requirements of section 893.82 must be strictly complied with. *Tierney v. Lacenski*, 114 Wis. 3d 298, 338 N.W.2d 522 (Ct. App. 1983).

It is equally necessary to stress the limitations of this opinion. Board counsel will be treated as agents entitled to indemnity from

the state only where the dominant feature of the relationships is the directive of the board and the supreme court to proceed against lawyer misconduct. Insofar as the dominant feature is the attorney's own conduct, agency status is doubtful. Past experience with these cases indicates the directives and missions of the board and the supreme court usually dominate. However, determining what feature dominates depends on the facts and circumstances of a particular case. See *Theuerkauf v. Sutton*, 102 Wis. 2d 176, 195, 306 N.W.2d 651 (1981).

Finally, you inquire whether board counsel enjoy any immunities from suit. Insofar as the counsel act as agents of the state, Wisconsin common law holds that no liability attaches for the exercise of discretionary judgments even if the conduct constitutes an intentional tort. See *Ibrahim v. Samore*, 118 Wis. 2d 720, 348 N.W.2d 554 (1984). More generally, absolute immunity attaches to the exercise of the prosecutorial function. "[P]rosecuting attorneys, when acting within the scope of their prosecutorial functions, are absolutely immune from damages, the theory being that in so acting they are performing a quasi-judicial function." *Riedy v. Sperry*, 83 Wis. 2d 158, 168, 265 N.W.2d 475 (1978). This immunity does not turn on whether the prosecutor is a state employe or an independent contractor, for it is the function being discharged that is protected. See *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983). Immunity is not confined to the decision to commence an action: it includes the attorney function of arranging and presenting evidence. See *Butz v. Economou*, 438 U.S. 478, 517-18 (1978). Immunity is not lost even if the prosecution was conspiratorially arranged, *Dennis v. Sparks*, 449 U.S. 24, 27 (1980); it is not lost by presentment of perjured testimony, *Blevins v. Ford*, 572 F.2d 1336, 1339 (9th Cir. 1978); and it is not lost by withholding exculpatory information. *Imbler v. Pachtman*, 424 U.S. 409, 431 n.34 (1976). A prosecutor ordinarily is not immune, however, for nonprosecutorial decisions, such as mere administrative matters. An act is prosecutorial if it is "intimately associated" with the adjudicative process. See *Ross v. Meagan*, 638 F.2d 646, 648 (3rd Cir. 1981); *C.M. Clark Insurance Agency, Inc. v. Reed*, 390 F. Supp. 1056, 1061-62 (S.D. Tex. 1975).

To summarize, subject to the qualifications and limitations noted and as a generalization only, board counsel who prosecute attorneys for professional misconduct are agents of the state within the

meaning of section 895.46(1)(a) only to the extent the board's control of the particular conduct is dominant, and in discharging the prosecutorial function the attorney is immune from liability for damages.

BCL:CDH

County Board; Forests; Where large sums had accumulated from sale of leases of county forest land and were credited to the Forestry and Parks Department, county board resolution which would authorize transfer of funds for specific use of construction of a waterslide on county forest park lands failed passage where it did not receive two-thirds vote of the entire membership. Sec. 65.90(5), Stats. OAG 11-86

April 22, 1986

DARWIN L. ZWIEG, *District Attorney*
Clark County

You request my opinion with respect to the respective powers of the county board of supervisors and one of its committees to which it has delegated power to establish, protect, develop and manage county forests. In November 1958, the county board adopted a county forestry ordinance which purported to delegate certain county powers and duties described in chapters 26, 28, 29, 59 and 77, Stats., to a committee of the board entitled the Forestry and Parks Committee. The ordinance has been amended over the years to grant additional powers. Among the powers are:

Section IV

Powers and Duties of the Committee

.....

5. Purchase, acquire, sell, trade or dispose of instruments, tools, equipment and supplies required for the operation of the forest and parks. Items costing more than one thousand dollars (\$1000) shall be purchased by competitive bid according to Section 59.08 of the Wisconsin Statutes. The County Board has authorized the Committee to purchase up to ten thousand dollars (\$10,000) without County Board approval.
14. Sell timber stumpage in accordance with a county forest management plan in cooperation with the Department of Natural Resources.

.....

15. Establish, construct and maintain wherever desirable within the forest, picnic grounds, waysides, camps and campsites, public access roads and boat landings, scenic areas, nature

trails and designate, mark and preserve places of natural or historic interest and significance.

....

- 18. Do special forest or recreation development work on other public lands not included in the county forests, including such lands as school forests, community forests, county parks, watersheds, reduction of hazards, public highways and similar projects under the County Forestry Fund as set up in Section VI thereof.

Section V

Forest Crop Law Administration

After the Forest Crop Law applications for entry have been prepared and approved by the Committee, the County Clerk shall, after verifying county ownership of the listed lands, execute the applications and forward them to the Department of Natural Resources within the date limits prescribed by the Department of Natural Resources for each year's applications. Withdrawal of lands entered under the County Forest Law shall be in the manner prescribed by Section 28.11(11) of the Wisconsin Statutes. No deed to any description of Forest Crop Land shall be issued prior to recording of an order of withdrawal with the Register of Deeds.

Section VI

Forest Finances

- 1. All allotments from the State of Wisconsin, Department of Natural Resources, to Clark County under Section 28.14 of the Wisconsin Statutes, for the purchase, development, preservation and maintenance of the county forest, shall be deposited in the State Aid Forestry Fund. Income from the sale of lands or equipment purchased with state aid funds shall be restored to this fund. All unexpended funds shall be non-lapsing.
- 2. All monies received from the sale of timber stumpage, cut forest products, fees and use permits, sale of building materials, sale of surplus materials, and equipment, or other revenue received by the Committee, except income specified in Paragraph 1 of this Section, shall be deposited in the County Forestry Fund and expended for the purposes covered by this Ordinance and designated by the Committee.

3. All monies appropriated for purposes under section V, paragraph 17, shall be deposited in the County Forest or Parks Fund.

SECTION VII

County Forest Use Regulations

A. Recreational Use

1. The Committee may designate suitable areas for forest parks, campsites and picnic grounds, and boat access and is authorized to provide needed conveniences, including wells, and sanitary facilities. Such areas shall be for public use as prescribed by the Committee.
2. No miscellaneous lot leases will be issued nor transferred and those now present will be terminated at the death of the owner. (County Board proceedings, March 4, 1965.)
3. Any cabin permit may be revoked at any time without reimbursement of fees when the permittee or any member of his family or guest shall have been convicted of violation of the state game laws or forest fire laws or of the regulations herein provided and rules of good conduct. All permits issued for the use of cabins shall contain clauses that the permittee shall remove any buildings erected by him by April 15 of the year following revocation or failure to renew any permit, and that whenever any buildings not so removed by April 15 shall become the property of the county and the Committee may dispose of such buildings.

The committee apparently previously had power to lease county owned lands. You state that over the years about \$300,000 had been accumulated in the Forestry and Parks account which you describe as an undesignated balance account. The moneys had largely resulted from the sale of county owned lot leases. Another Ordinance No. 2.08.200 in effect in August 1985 reaffirmed the broad powers set forth in the forestry ordinance and amendments and provided that the committee could lease forest and park lands.

A. This committee shall have all of the power set forth in the forestry ordinance and amendments thereto and shall have charge and supervision of all county forests, parks, dams and recreational areas. This committee shall have the power to lease and let county forest and parks land, lay out, improve, maintain

and govern all such parks and recreational areas including the right to establish roadways, camping sites, beaches, parking areas, and any other improvements deemed in the public interest; and to make rules for the regulation of the use and enjoyment thereof by the public subject to the Wisconsin Statutes or county board resolutions. This committee shall have charge of all accounts and accounting under the forestry ordinance and park regulations, and shall audit all claims under these departments. *This committee shall prepare and present to the finance committee before the fall session of the county board a budget covering the estimated expenses for the operation and maintenance of the forests and parks and upon approval of such budget by the county board shall have the power to expend such funds.*

B. This committee shall prepare and *present to the board plans for such projects as are requested of them by the county board or are in the judgment of the committee to the best interest of the county. After any plans are adopted by the county board on any projects, the plans shall be carried out by the committee as directed by the board.* This committee shall have charge of all lands now owned or later acquired by Clark County outside the zoned area and are not under the jurisdiction of any other committee and shall classify such lands as to agricultural, grazing and forestry. In making such classification the county clerk, county treasurer, county agricultural agent and chairperson of the municipality or his/her designee in which the lands are located shall be consulted. As to agricultural and grazing lands or other property this committee shall recommend to the county board the price at which such lands or other property is to be sold.

(Emphasis added.)

The committee offered a resolution to transfer the sum of \$300,000 from the Forestry and Parks account to the Parks Outlay account. Some amount, estimated at from \$125,000 to \$175,000 would "be applied to the purchase and construction of waterslide facilities at a site to be approved at a regular session of the Clark County Board." Resolution No. 21-8-85. The vote was 17 Yes and 12 No and the measure was announced as having failed. You had advised and the chair ruled that a two-thirds vote of the entire membership was necessary.

Your first question is whether the county can maintain a large account such as the "Forestry and Parks undesignated balance account."

It probably can. It does not appear to be wholly undesignated. This opinion assumes that the fund is deposited with the county treasurer. On the basis of *Immega v. Elkhorn*, 253 Wis. 282, 34 N.W.2d 101 (1948), it was stated in 46 Op. Att'y Gen. 230 (1957) that county boards do not have authority to tax for the purpose of accumulating surpluses and that a surplus remaining in the treasury at the end of the year should be applied toward the following year's budget. In 62 Op. Att'y Gen. 312, 315 (1973), it was stated that the "unnecessary accumulation of money in the public treasury is unjust to the people" One matter a court would be urged to consider in a proper case is whether the accumulation was necessary. However, in *Appleton v. Outagamie County*, 197 Wis. 4, 220 N.W. 393 (1928), it was stated that the amount to be appropriated for a given purpose and the amount to be levied are matters within the province of the county board. The court said that any remedy is political and not judicial and courts will not attempt to ascertain what sum is in fact needed and limit the levy to that amount. In *Blue Top Motel, Inc. v. City of Stevens Pt.*, 107 Wis. 2d 393, 399, 320 N.W.2d 172 (1982), it was stated: "Taken together, *Immega* and *Fiore* establish generally that a city may retain funds to meet its needs, but may not simply carry a large surplus which has not been designated for any particular use." See also *Barth v. Monroe Board of Education*, 108 Wis. 2d 511, 322 N.W.2d 694 (1982). I do not view the County Forestry Ordinance enacted in 1958 and thereafter amended to be a sufficient vehicle to reappropriate moneys received from sale of leases to the Forestry and Parks Department for all years since 1958. The ordinance does provide, "shall be deposited in the County Forestry Fund and expended for the purposes covered by this Ordinance and designated by the Committee" (Section VI, Par. 2). In my view some language of appropriation would have to be included in the county budget for each year. You may wish to examine the budgets adopted for those years. It is possible that the accumulation in your county is distinguishable from the situation discussed in 47 Op. Att'y Gen. 69 (1958). Here, the funds were accumulated from the sale of leases of forestry lands. It would be proper for a county board to reappropriate such funds for general operations of the Forestry and Parks Department or for special

projects related thereto. It appears that the county may have designated the fund for purposes of forestry and park development.

Your second question is whether the resolution to utilize the money to purchase and construct a water slide facility required a two-thirds vote of the entire membership. If the funds had been appropriated to the department in an annual budget I am of the opinion that a two-thirds vote was required under section 65.90(5)(a) which provides in part:

Except as provided in par. (b) and except for alterations made pursuant to a hearing under sub. (4), the amount of tax to be levied or certified, *the amounts* of the various appropriations *and the purposes for such appropriations stated in a budget* required under sub. (1) may not be changed unless authorized by a vote of two-thirds of the entire membership of the governing body of the municipality.

Your last question is whether the Forestry and Parks Department could enter into a lease agreement at something under \$10,000 per year for ten years with the option to purchase at the end of the lease period.

The answer is no. The county board has not delegated such power to the committee. The project would fall within the provisions in paragraph B of Ordinance 2.08.200. The project is of a major nature and falls within language "This committee shall prepare and present to the board plans for such projects as are . . . in the judgment of the committee to the best interest of the county. After any plans are adopted by the county board on any projects, the plans shall be carried out by the committee as directed by the board." The plans for the waterslide were not adopted by the county board. The resolution which would have authorized the committee to proceed with the waterslide project was part and parcel of the resolution which would have changed the purpose of the appropriation. Although section 59.02(2) provides that "Ordinances and resolutions may be adopted by a majority vote of a quorum or *by such larger vote as may be required by law,*" section 65.90(5)(a) required a two-thirds vote of the entire membership in this case.

BCL:RJV

Law Enforcement; Police; In a criminal case in which a police officer testifies as a witness for the prosecution, a district attorney may have a duty under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose to the defendant information that another police officer in the same police department had claimed that the officer-witness did not tell the truth under oath in court in another, unrelated case. OAG 12-86

April 28, 1986

JAMES J. ROBB, *District Attorney*
Richland County

I am writing in response to your request for advice regarding the scope of a prosecutor's obligation to disclose exculpatory evidence under the following set of facts:

Officer A arrested a defendant for operating while under the influence of an intoxicant. At a refusal hearing, Officer A's testimony included driving evidence which led him to pursue the defendant. Two years later, Officer B (the breathalyzer operator in the above-described arrest) stated that, on the night of defendant's arrest, Officer A told Officer B that he did not have any driving evidence.

Officer A maintains that he only told Officer B he did not "have much" driving evidence and that he testified truthfully at trial. Officer A's commanding officer investigated the incident and did not press either criminal charges or disciplinary action.

You have asked me to answer four questions:

1. Is Officer B's assertion exculpatory evidence that must be turned over in every case in which Officer A testifies?
2. Assuming the information qualifies as exculpatory evidence, does the fact that this information is contained in Officer A's personnel file, apparently an open record, alleviate the prosecutor's responsibility to disclose?
3. Again assuming the information qualifies as exculpatory evidence, does exculpatory evidence of this sort need to be disclosed in non-criminal ordinance prosecutions?
4. If the above information is disclosed in every case Officer A is a witness for the State, does Officer A have a cause of action for slander or defamation of character?

DISCUSSION

Brady v. Maryland, 373 U.S. 83 (1963), held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* at 104. Impeachment evidence — *i.e.*, evidence tending to cast doubt on a witness’ credibility — is material subject to disclosure under *Brady*. See, *e.g.*, *United States v. Bagley*, 105 S. Ct. 3375, 3380 (1985); *Giglio v. United States*, 405 U.S. 150 (1972); *Hudson v. Blackburn*, 601 F.2d 785, 789 (5th Cir. 1979), *cert. denied*, 444 U.S. 1086 (1980); *United States v. Esposito*, 523 F.2d 242 (7th Cir. 1975), *cert. denied*, 425 U.S. 916 (1976); *Tucker v. State*, 84 Wis. 2d 630, 641, 267 N.W.2d 630 (1978); *Loveday v. State*, 74 Wis. 2d 503, 516, 247 N.W.2d 116 (1976); *Nelson v. State*, 59 Wis. 2d 474, 481, 208 N.W.2d 410 (1973). See also *Napue v. Illinois*, 360 U.S. 264 (1959). Whether the prosecutor believes the impeachment evidence is inaccurate is irrelevant to the obligation to turn it over. *United States v. Enright*, 579 F.2d 980, 989 (6th Cir. 1978). Thus, Officer B’s claim that Officer A lied about the existence of probable cause constitutes exculpatory evidence under *Brady* even if you, as the prosecutor, believe Officer B’s claim is incorrect. Cf. *People v. Walker*, 666 P.2d 113 121-22 (Colo. 1983) (in determining extent of required disclosure of complaints about police officer’s alleged use of excessive force, no distinction between sustained and unsustained complaints).

Although *Brady* requires disclosure of potentially exculpatory evidence, failure to disclose *Brady* material will not necessarily result in prejudicial error. Even if a prosecutor willfully fails to turn over arguably exculpatory evidence, a defendant still bears the burden of proving a *Brady* violation. To establish a *Brady* violation, a defendant must prove that “(1) the prosecution suppressed or withheld evidence (2) which is favorable and (3) material to the defense.” *United States v. Phillips*, 664 F.2d 971, 1025 (5th Cir. 1981), *cert. denied sub nom. Meinster v. United States*, 457 U.S. 1136 (1982). See also *Moore v. Illinois*, 408 U.S. 786, 794-95 (1972). The United States Supreme Court recently defined materiality for *Brady* purposes:

The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A “reasonable proba-

bility” is a probability sufficient to undermine confidence in the outcome.

Bagley, 105 S. Ct. at 3384. *Cf. State v. Ruiz*, 118 Wis. 2d 177, 192, 347 N.W.2d 352 (1984) (standard by which Wisconsin courts “determine the existence or not of a duty voluntarily to disclose the evidence is whether, viewing the record as a whole, the undisclosed evidence raises a reasonable doubt that did not otherwise exist”). Where a prosecutor fails to disclose *Brady* evidence, the trial court determines as matters of law the issues of materiality and (apparently) the exculpatory or inculpatory character of the evidence. *Bagley*, 105 S. Ct. at 3385.

In response to your first question, I conclude that the obligation to disclose the information impeaching Officer A’s credibility would not arise in every case in which Officer A testifies. Rather, the duty to disclose will depend on the materiality of the information to the defense. Materiality will depend on the specific circumstances surrounding the officer’s testimony, including how much the state’s case relies on the officer’s evidence. If the state’s case depends exclusively or almost exclusively on Officer A’s credibility, a duty to disclose would almost certainly exist. *Cf. Denver Policemen’s Protective Association v. Lichtenstein*, 660 F.2d 432, 436 (10th Cir. 1981) (where case “involves a ‘swearing match’ between the accused and police officers, ascertainment of the truth is of particular importance. . . . [W]hen the only prosecution witnesses are the police officers involved, anything that goes to their credibility may be exculpatory”). On the other hand, if the state’s case rests principally on other (preferably unimpeached) evidence, or if the officer’s testimony merely cumulates or is well-corroborated by other evidence, I doubt the officer’s testimony would satisfy the *Bagley* materiality standard for disclosure of impeaching evidence.

Even assuming such evidence qualifies for disclosure under *Brady* and later cases, a question remains as to its proper use at trial. Because Wisconsin Rules of Evidence preclude the use of extrinsic evidence of specific instances of a witness’s conduct to attack or support a witness’s credibility, *see* sec. 906.08(2), Stats., *see also McClelland v. State*, 84 Wis. 2d 145, 158-61, 267 N.W.2d 843 (1978), a defendant could not expect to use this evidence directly to impeach the officer. On the other hand, section 906.08(1) Stats., entitles a defendant to attack the officer’s credibility either with evidence of the officer’s reputation for untruthfulness or with

opinion evidence regarding the officer's untruthfulness. Thus, a defendant could reasonably expect to use this evidence in accordance with section 906.08(1), but not under section 906.08(2). Because a defendant could use this evidence at trial to attack a witness's credibility (even if in an indirect rather than direct attack), a potential *Brady* obligation still exists.

Nonetheless, because of the collateral character of the credibility attack, the relevance and materiality of the evidence to a defendant would be more attenuated than if the alleged conduct were not collateral to a specific case. Thus, a prosecutor seeking to comply with *Brady's* disclosure requirements faces a closer call in these circumstances than when the alleged impeaching conduct actually occurs in the context of the specific case being litigated. The dilemma increases in light of the view, expressed by both the United States Supreme Court and the Wisconsin Supreme Court, that when serious doubt exists as to the materiality of evidence for impeachment purposes, a prudent prosecutor should incline to resolve doubtful questions in favor of disclosure. *United States v. Agurs*, 427 U.S. 97, 108 (1976); *Ruiz*, 118 Wis. 2d at 190.

To minimize the likelihood of making an erroneous determination as to whether evidence of this sort should be disclosed pursuant to *Brady*, I suggest that prosecutors who have questions about the need to disclose allegedly exculpatory material follow the procedure for *in camera* inspection by the trial court as set forth in *State v. Denny*, 120 Wis. 2d 614, 626-27, 357 N.W.2d 12 (Ct. App.), *rev. denied*, 121 Wis. 2d 705, 362 N.W.2d 425 (1984). *See also Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980). This procedure allows the court to review the material without significant disruption of court proceedings.

With respect to your second question, I conclude that the availability of the information in a public record does not diminish the duty to disclose when such a duty arises. In *State v. Cole*, 50 Wis. 2d 449, 184 N.W.2d 75 (1971), the Wisconsin Supreme Court indicated that a prosecutor's duty to disclose arises only when the state has exclusive possession of the information. *Cole*, 50 Wis. 2d at 457. The *Cole* court relied on *Giles v. Maryland*, 386 U.S. 66 (1967), for this proposition, and Wisconsin courts have frequently reiterated the point. *See, e.g., State v. Sarinske*, 91 Wis. 2d 14, 36, 280 N.W.2d 725 (1979); *State v. Amundson*, 69 Wis. 2d 554, 573, 230 N.W.2d 775 (1975); *State v. Calhoun*, 67 Wis. 2d 204, 214, 226

N.W.2d 504 (1975); *State v. Rohl*, 104 Wis. 2d 77, 89, 310 N.W.2d 631 (Ct. App. 1981). Arguably, a file's status as a public record implies lack of exclusive control or possession by the state. *But cf. Tucker v. State*, 84 Wis. 2d at 642 (defense counsel's access pursuant to prosecutor's "open file" policy is not the controlling factor in resolving the *Brady* issue).

Neither the *Giles* plurality nor the *Brady* majority mentions the state's exclusive possession of exculpatory evidence as the controlling factor. Rather, both *Brady* and *Giles* characterize materiality as the criterion triggering the duty to disclose exculpatory evidence. Moreover, *Agurs*, 427 U.S. 97, emphasizes materiality as the benchmark for determining whether a prosecutor must disclose exculpatory evidence even if a defendant fails to request it, and *Bagley*, 105 S. Ct. 3375, further reiterates materiality as the proper *Brady* focus. Consequently, although *Cole* permits a court to consider exclusive possession as a factor in determining whether a prosecutor has complied with *Brady*, the court must evaluate that factor in the context of the fundamental *Brady* criterion of materiality. If the information is exculpatory, material and in the state's possession, the prosecutor has a duty under *Brady* to disclose it.

As to your third question, I conclude that the *Brady* obligation does not arise in municipal ordinance prosecutions. By its terms, *Brady* addresses a disclosure obligation in connection with criminal prosecutions. Section 939.12 of the Wisconsin statutes defines "crime" as "conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime." Section 66.115 of the Wisconsin statutes further provides that violation of a municipal ordinance may result in only a forfeiture (or imprisonment for failure to pay the forfeiture), and section 66.12 specifies that an action for violating a municipal ordinance is a civil action. By definition, therefore, an ordinance violation is not a criminal violation, and *Brady* does not apply. *Accord State ex rel. State Highway Commission v. Texaco, Inc.*, 502 S.W.2d 284, 289 (Mo. 1973).

Moreover, I conclude that even if due process were deemed to require a government agency or unit to disclose exculpatory evidence to a defendant in a municipal ordinance case, *Brady* would be largely superfluous. Except for the requirement under *Agurs* that a prosecutor disclose *Brady* material even when a defendant fails to make a *Brady* request, and except in traffic cases prosecuted under

chapter 345 (with respect to which the legislature specifically limited discovery rights, *see* sec. 345.421, Stats.) civil litigants already enjoy discovery rights under chapter 804 of the Wisconsin statutes that extend far beyond those available to a defendant under *Brady*. In a civil case such as an ordinance violation, *Brady* would not provide a defendant any due process rights of access to exculpatory evidence that do not already exist under the discovery provisions of the Wisconsin rules of civil procedure.

Finally, as to your fourth question, Officer A could not expect to prevail in a libel action against the county or county officials (such as a prosecutor) if the officer claimed that defamation flowed from the statements revealed pursuant to *Brady* requirements. “[S]tatements made during investigatory proceedings and judicial proceedings are absolutely privileged.” *Radue v. Dill*, 74 Wis. 2d 239, 241, 246 N.W.2d 507 (1976). *Cf. Novick v. Becker*, 4 Wis. 2d 432, 435, 90 N.W.2d 620 (1958) (“Parties to judicial proceedings are absolutely exempt from responsibility for libel on the ground of privilege for any defamatory matter published in the course of judicial proceedings, subject to the possible qualification that such defamatory matter is pertinent or relevant to the case”). Because I do not know the circumstances under which Officer B made the statements that arguably defamed Officer A, I offer no opinion as to Officer B’s potential liability to Officer A.

BCL:CGW

Pharmacy, State Board of; Section 450.02, Stats., providing for the lapse of the right of a pharmacist to practice for failure to renew his or her registration within sixty days of the pharmacy board's second notice of expiration, requires actual notice by the board. OAG 14-86

May 6, 1986

TOM LOFTUS, *Chairperson*

Assembly Committee on Organization

You have requested my opinion regarding the application of section 450.02, Stats., to the renewal of registrations for pharmacists. The applicable statutory language states: "Failure [of a registered pharmacist] to obtain renewal for 60 days after the department has given a 2nd notice of the expiration of registration shall terminate the right of any person to be a registered pharmacist within the meaning of this section" Sec. 450.02(3), Stats.

First, you have asked whether I concur with the opinions of my predecessors expressed in 2 Op. Att'y Gen. 586 (1913) and 26 Op. Att'y Gen. 48 (1937).

The first of these opinions interprets section 1409d(4), Stats. (1913), which states that if a registered pharmacist "fails to procure a certificate of renewal for sixty days after the secretary of the board shall have given him a second notice of the expiration of his registration, he shall cease to be such a pharmacist within the meaning of this chapter" Sec. 1409d(4), Stats. (1913). As you can see, the 1913 provision was essentially the same as today's section 450.02(3).

The 1913 attorney general opinion noted that the statute did not provide any method for service of the required notice. 2 Op. Att'y Gen. 586, 587 (1913). The opinion went on to state that "there can be no question but that the service must be an actual service on the party" *Id.* Although the 1913 opinion provided no authority for its assertion that actual notice was required, some justification may be found in the fact that the original statutory language provided for service by mail. Ch. 227, sec. 5, Laws of 1895. Because this requirement was repealed prior to the 1913 version of the law, apparent legislative intent supports the opinion that simply mailing a notice is insufficient and, therefore, actual notice is required.

In 1937, the attorney general confirmed this opinion, stating that where a registered mail expiration notice was returned marked “unclaimed,” the actual notice requirement was not fulfilled. 26 Op. Att’y Gen. 48, 49 (1937). The opinion attributed this result to the 1907 Wisconsin Supreme Court case, *Metcalf v. Mutual Fire Ins.*, 132 Wis. 67, 112 N.W. 22 (1907). The 1937 attorney general’s opinion stated that actual notice of expiration was required by the pharmacist licensing statute and adopted the definition of actual notice put forward by the court in *Metcalf*, 132 Wis. at 72: “[A]ctual notice ‘is information concerning the fact . . . directly and personally communicated to the party.’”

I must concur with the opinions of my predecessors on this question. Great weight is given an attorney general’s opinion when the Legislature amends a statute but makes no changes in the part of the statute interpreted by the attorney general. *Town of Vernon v. Waukesha County*, 99 Wis. 2d 472, 479, 299 N.W.2d 593 (1980), *aff’d*, 102 Wis. 2d 686, 307 N.W.2d 227 (1981).

The *Town of Vernon* court reasoned that the public was justified in relying on an interpretation of a statute where the statute had subsequently been re-enacted without change to the language construed by the attorney general. *Id.* As of this writing, section 450.02(3) has been amended no less than ten times since the 1913 opinion on this question. None of those amendments substantially changed the provision regarding notice of expiration. Therefore, I can only assume that the Legislature has approved of my predecessors’ interpretations of the statute. In light of this evidence of legislative intent, as well as public reliance on earlier attorney general opinions, I must concur that section 450.02(3) requires actual notice that the registered pharmacist’s registration has expired.

Your second question is whether section 450.02(3) requires both notices to be given after the expiration of the license or whether one may be given before the actual expiration. I have found no case law or previous attorney general opinions bearing on this question. However, the language of the statute requires “notice of the expiration of registration” Sec. 450.02(3), Stats. The plain meaning of this language suggests that “notice of the expiration” could not logically be given until the expiration has occurred.

For this reason, both notices must be given after the actual expiration of the pharmacist’s license.

Finally, you ask whether, if sixty days have elapsed since the date the second notice was given, the Pharmacy Examining Board may waive compliance with the provisions of the statute. Because an administrative agency derives its authority from statutory grant, it has no authority to act contrary to statutory provisions. *Racine Fire and Police Comm. v. Stanfield*, 70 Wis. 2d 395, 399, 234 N.W.2d 307 (1975).

Section 450.02(3) states that the right of any person to be a registered pharmacist “shall terminate” sixty days after the department has given a second expiration notice “and such right can only be acquired by compliance with the provisions concerning the original registration” Thus, the statutory language leaves no room for the board to waive the termination of registration.

Because your remaining question assumed a positive response to the above question, there is no need to address it.

I realize that the current procedures required by statute for renewal of pharmacists’ registration may seem antiquated in light of the increase in number and mobility of Wisconsin’s pharmacists. Wisconsin law, however, clearly requires the procedures I have enumerated above. Any change in this legislative scheme must come from the Legislature in the form of a revision to the existing statute.

BCL:WHW

Medical Examining Board; Physicians and Surgeons; A finding of negligence by a patients compensation panel against a physician who is not a named party in the proceedings should be reported to the Medical Examining Board for investigation. OAG 15-86

May 20, 1986

J. DENIS MORAN

Director of State Courts

You have asked for my advice concerning a situation arising out of a recent medical malpractice proceeding before a patient compensation panel under chapter 655, Stats., wherein the panel found a physician to have been negligent, but the physician was not named as a respondent in the submission of controversy and was not otherwise joined as a party. In essence, you ask how the panel's finding should be treated for the purposes of making reports to and proceedings before the Medical Examining Board.

The submission of controversy under section 655.04(1) claimed negligent treatment at a hospital emergency room. As party respondents, it named only the hospital and the patients compensation fund.

Following proceedings before a formal patients compensation panel, the panel found a particular emergency room physician to be negligent with respect to the care and treatment of the claimant and that the negligence was a substantial factor in causing the damages sustained. As a conclusion of law, the panel held that the negligence of the physician is imputed to the hospital under the circumstances of the case and that the hospital is liable for the award.

The submission of controversy did not name the physician as a respondent nor was he added as a named respondent pursuant to section 655.10. The physician was not represented by an attorney during the panel hearing. He appeared only as a witness. By panel order witnesses were not allowed to be present except during their own testimony. The physician was represented by his insurance company's attorney at the time of his deposition, but his attorney was considered to lack status to make objections. The panel's final order awards damages against the hospital and the fund and not against the physician.

You ask: Given a patient compensation panel's finding of negligence against a physician who is not a named respondent in the

proceedings, how should the finding be treated for purposes of making reports to the medical examining board?

The issue is complicated by a legislative hiatus created by 1985 Wisconsin Act 29. Prior to its enactment, section 655.08 required a panel to refer its findings and recommendations to the appropriate examining board if the panel finds that any health care provider, other than a hospital, has acted negligently. Under section 448.02(3)(intro.), Stats. (1983), a finding of negligence by a panel was to be taken as "an allegation of unprofessional conduct." It was left to the examining board to investigate the matter and pursue such disciplinary measures as it deemed appropriate.

1985 Wisconsin Act 29 made significant changes in the foregoing provisions. It continues to require panels to file their findings with the director of the system, section 655.065(5), and it requires the director to make quarterly reports to the appropriate examining board on cases filed and disposed of during the quarter, beginning with the first quarter of 1986. Most importantly, a finding of negligence by a panel is to be taken by the examining board as "conclusive evidence that the physician is guilty of negligence in treatment." Sec. 448.02(3)(b), Stats. However, by the terms of the statute, as emphasized below, the reports that go to the Medical Examining Board are to focus on physicians who are named respondents in the submission of controversy.

Section 655.045, as created by 1985 Wisconsin Act 29 provides:

Quarterly reports. (1) **MEDICAL EXAMINING BOARD.** For the quarter beginning on January 1, 1986, and thereafter, the director shall file with the medical examining board quarterly reports which include the following information:

(a) The name of each *health care provider licensed by the medical examining board who is named as a respondent in a submission of controversy* filed under s. 655.04(1) during the quarter. *For each respondent listed*, the report shall include the dates on which the medical treatment which gave rise to the claim was rendered, whether the claimant sought recovery in an amount greater or less than \$25,000, a brief description of the allegation of negligence on the part of the respondent and the case number assigned to the claim.

(b) The name of each *health care provider licensed by the medical examining board who is joined as a respondent* under s.

655.10 in a submission of controversy filed during the quarter. *For each respondent listed*, the report shall include the case number assigned to the claim and a brief description of the allegation of negligence on the part of the respondent.

(c) The name of each *health care provider licensed by the medical examining board of whom the director has received notice under s. 655.065*, or who has been dismissed from a claim as a result of any other settlement agreement, during the quarter. *For each respondent named*, the report shall indicate the case number assigned to the claim, whether the claim was disposed of by settlement, compromise, stipulation agreement or default, whether the disposition resulted in payment to a claimant and the dollar amount of payment, if any, to the extent the director has this information.

(d) A report of all panel and court findings, orders and judgments *relating to claims brought under this subchapter against any health care provider licensed by the medical examining board issued during the quarter*. *For each respondent named*, the report shall indicate the case number assigned to the claim by the director, the court docket number if the action was brought before a court under s. 655.19, whether the finding, order or judgment included an award to a claimant and the dollar amount of the award, if any, to the extent the director has this information.

The revisions enacted by 1985 Wisconsin Act 29 took effect on July 20, 1985, and thus would normally apply to the subject panel findings and order dated September 27, 1985. Therefore, in my opinion, the revised provisions of section 448.02(3)(b), making the panel finding conclusive on the issue of negligence, would ostensibly apply. However, technically there is no reporting requirement in force as of September 27, 1985. This is because the prior reporting requirement was repealed as of July 20, 1985. The new reporting requirement is not implemented until the end of the first quarter of 1986, and it pertains only to cases filed or disposed of during that first quarter.

In my opinion, there was no intention to create a hiatus of reporting between July 20, 1985, and the first quarter of 1986. Reports to examining boards were required under the old law and are required under the new law. There is no reason to suspend

reporting during the transition. Indeed, the absence of a reporting requirement would not preclude reporting on a voluntary basis. The underlying purpose of apprising the examining board of possible unprofessional conduct continues undiminished.

The move from the old law signals a strengthening of the relationship between the work of the patients compensation panel system and the examining board. It would be inconsistent to suggest that there should be no relationship in the interim. Therefore, during this period it is my suggestion that the director continue to apprise the appropriate examining boards of panel decisions. The exchange should be at least as substantive as under prior section 655.08, Stats. (1983).

The remaining issue that must be addressed is the effect to be given to panel findings of negligence issued after July 20, 1985, and before the first quarter of 1986.

As indicated earlier, the change in section 448.02(3) took effect on July 20, 1985. Thereafter, according to its new terms, a "finding by a panel established under sec. 655.02 or by a court that a physician has acted negligently is conclusive evidence that the *physician is guilty* of negligence in treatment." However, returning to the circumstances that prompted your request, it is my opinion this rule should not be applied by the examining board against physicians who are not named respondents in the medical malpractice proceedings. It is clear from the new reporting provisions in section 655.045, which accompanied the new rule of evidence in section 448.02(3), that the Legislature expects the reports and rule to apply only to named respondents having party status in the panel proceedings. I expect the Legislature correctly anticipated that there would otherwise be serious constitutional problems. In my opinion, the due process clause of the United States Constitution would not allow a conclusive presumption of negligence to attach to a proceeding and physician where the physician was not a named party in the underlying proceedings. See *Patterson v. University Board of Regents*, 119 Wis. 2d 570, 580-87, 350 N.W.2d 612 (1984).

Where a panel finds a physician negligent, but the physician was not a named party, this information should be conveyed to the Medical Examining Board for further investigation, but no evidentiary significance necessarily flows from the panel finding. In each case, it should be made clear to the examining board that the

physician was not a party to the panel proceedings. To avoid the situation where an unnamed physician is found negligent, parties and panel chairpersons should be reminded of the joinder provisions under section 655.10. Panel chairpersons in particular should be urged to exercise their authority to join necessary parties.

BCL:RWL

Regulation and Licensing, Department of; Placing the lowest standard of proof — preponderance of the evidence — upon the Department of Regulation and Licensing and the licensing boards attached to it, in proceedings that could result in a decision adversely affecting an occupational or professional license does not offend the fourteenth amendment due process requirement. OAG 16-86

May 29, 1986

TIM CULLEN

Senate Majority Leader

You ask whether 1985 Wisconsin Act 29, section 2238h,¹ changing the standard of proof used in disciplinary proceedings conducted by licensing boards and the Department of Regulation and Licensing from the more strict or higher standard, clear and convincing evidence, to the easier or lower standard, preponderance of the evidence, meets fourteenth amendment due process requirements.

It is my opinion that the new less strict standard of proof meets constitutional due process requirements under the balancing test articulated by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The balancing test applies three factors: (1) the nature of the private interests affected by the proceeding; (2) the countervailing governmental interest to be furthered by the proceeding; and (3) the risk of error in the ultimate determination created by the particular burden of proof employed.

The United States Supreme Court applied the *Mathews* balancing test in *Santosky v. Kramer*, 455 U.S. 745 (1982). In this case, the State of New York in a contested case terminated the parental rights of natural parents in a child after a finding that the child was permanently neglected. The finding was made under a preponderance of the evidence standard. The United States Supreme Court held that the fourteenth amendment due process clause required that the liberty interests of parents to the companionship, care and

¹ The burden of proof in disciplinary proceedings before the department or any examining board is clear and convincing evidence, for proceedings concerning violations occurring before January 1, 1986, and on or after July 1, 1989, and a preponderance of the evidence, for proceedings concerning violations occurring on or after January 1, 1986, and before July 1, 1989.

rearing of their child required the state to prove the parents' unfitness by the higher standard — clear and convincing evidence.

The court discussed the first factor, the nature of the private interests affected by the proceeding and observed that the natural parents' right to the companionship, care and rearing of their child or children is a fundamental and commanding interest and that the decision to terminate was a severe interference with this right. The court further noted that, unlike many other government initiated proceedings, decisions in termination of parental rights proceedings are generally irrevocable.

The court also observed that the disparity in the ability of the state to marshal a case against natural parents and the ability of the parents to defend against charges of parental unfitness militated in favor of imposing upon the state a higher burden of proof, considering the severity of the consequences of a decision against the natural parents.

While recognizing the interests of the state — a *parens patriae* interest in the welfare of the child and a fiscal and administrative interest in avoiding a great burden in such proceedings — the court reasoned that, given the commanding interests of the natural parents against the lesser interests of the state, the greater risk of an erroneous finding must be placed upon the state.

In my opinion, Wisconsin's preponderance of the evidence burden of proof standard in proceedings that could adversely affect professional or occupational licensure passes constitutional scrutiny under the reasoning of the Supreme Court of New Jersey in *In re Polk License Revocation*, 90 N.J. 550, 449 A.2d 7 (1982), where the court analyzed the issue in light of the *Mathews* balancing test and the *Santosky* discussion.

Polk, a New Jersey medical doctor, appealed a decision of the State Board of Medical Examiners revoking his license to practice medicine, contending that the board's decision to revoke should have been obtained under a higher burden of proof, clear and convincing evidence, rather than the lesser preponderance of the evidence standard.

In analyzing the first two *Mathews* factors, the private interests affected and the government's interest in the proceeding, the New Jersey Supreme Court recognized the property interest involved, the right to practice medicine, but recounted a number of New

Jersey cases holding that an occupational license is in the nature of a property right “always subject to reasonable regulation in the public interest,” and that the state has a countervailing interest to protect society from practitioners “found to be unfit.” *Polk*, 449 A.2d at 13.

The New Jersey Supreme Court reasoned that the right to practice medicine could not be equated with the “fundamental liberty interest” of natural parents in the care, custody and management of their child and held that government “has a paramount obligation to protect the general health of the public. The right of physicians to practice their profession is necessarily subordinate to this governmental interest.” *Polk*, 449 A.2d at 14.

Wisconsin also has long recognized the interest of the state in regulating professional and occupational licensure. See *Stockheimer v. American Bar Ass’n*, 407 F. Supp. 451 (Wis. D.C. 1975) (states have a compelling interest in regulating the practice of professions); *State ex rel. Wis. R. Bd. of A. & P.E. v. T.V. Eng.*, 30 Wis. 2d 434, 141 N.W.2d 235 (1936) (regulation of professions is based upon the police power of the state to safeguard life, health and property of its citizens); *Modern S. Dentists v. State Board of D. Examiners*, 216 Wis. 190, 256 N.W. 922 (1934) (the legislative police power to regulate the practice of dentistry is supreme if exercised within constitutional limits).

The New Jersey Supreme Court in *Polk* next discussed the third *Mathews* factor, the risk of error created by the use of a preponderance of the evidence standard burden of proof.

The court first noted that disciplinary proceedings followed serious charges involving high substantive standards, including “insanity, physical or mental incapacity, professional incompetence, habitual use of intoxicants, committing crimes . . . of moral turpitude, gross malpractice or negligence in the practice of medicine and endangering the health or lives of persons.” The court stated: “While these standards are broad, they are capable of objective measurement and application. In light of heightened and strict substantive standards defining professional misconduct, the preponderance of the evidence burden of proof constitutes an appropriate level of certainty to establish guilt.” *Polk*, 449 A.2d at 15.

The court next observed that the administrative procedures in New Jersey afforded a licensee a realistic opportunity to prepare

and meet the challenges and that the framework of the administrative proceeding was designed to provide fairness, objectivity and impartiality in the decision-making process.

The administrative procedures law in Wisconsin likewise affords licensees in discipline matters due process safeguards.

Sections 227.01(2) and 227.064, Stats., guarantee the right to a contested case type hearing to any person whose professional or occupational license is in jeopardy because of agency action. Contested case hearings require notice of hearing to all parties involved (section 227.07(1)), including a statement of the legal authority under which the hearing is to be held, a reference to the statute and rules involved and a statement of the facts asserted (section 227.07(2)).

Contested case hearings afford all parties the right to present evidence and rebutting evidence (section 227.07(3)) and the right to cross-examine (section 227.08(6)). A record of the proceeding is required (sections 227.07(6) and (7) and 227.08(8)) and each party has a right to have an adverse decision judicially reviewed (section 227.15). The grounds for court reversal or modification of agency rulings in a contested case, set forth in section 227.20, provide judicial review to insure due process, including a review of the record to determine if substantial evidence supports the agency's decision.

In summary, a Wisconsin licensee whose occupational or professional license is in jeopardy because of agency action has a realistic opportunity to prepare and meet the charges giving rise to the disciplinary proceeding.

Next, the New Jersey Supreme Court in *Polk*, in considering the third *Mathews* balancing factor, stated that in disciplinary proceedings the issues, evidence and standards are understood by the parties involved and the factfinder, and the factfinder is by experience and training uniquely qualified to render decisions less likely to be in error. The court noted that the higher clear and convincing proof standard was normally employed to assist the factfinder in adjudicating cases involving issues that are unusual or difficult such as parental unfitness, *e.g.*, *Santosky*, or where evidence is more difficult or complex to develop. The New Jersey court held that in licensure matters the subject matter or issues are neither "intrinsic-

cally elusive or esoteric” nor is there an absence of reliable evidence or exclusive possession of the evidence by the state, and concluded:

In view of the subject matter of such proceedings, the nature of the evidence, the qualifications of witnesses, the special expertise of the tribunal, the relative advantages and resources of the parties, and the minimal risk of inaccurate or erroneous factfinding and final decisionmaking, confidence in a final adjudication would not be imperiled by employing the preponderance of the evidence standard. These proceedings do not demand an enhanced burden of proof.

Polk, 449 A.2d at 16.

The reasoning of the New Jersey Supreme Court applies equally in Wisconsin since licensing boards have membership requirements that, while providing for some nonprofessional public members, require that a majority of the members of the various licensing boards be comprised of the occupation or profession regulated by the boards. *See* sec. 15.405, Stats.

Finally, I would note that, unlike the finality of a decision involving parental unfitness that would permanently deprive parents of their interest in the care, custody and rearing of their natural child, disciplinary decisions involving licensure are generally not irrevocable. Any decision short of revocation, by its very nature, is not permanent. Even in a revocation the licensee can, and frequently does, apply for relicensure after a duration of approximately one year and, if the licensee is otherwise qualified and has removed the disqualification during the interim year, often can receive reinstatement.

In conclusion, it is my opinion that the lower preponderance of the evidence standard burden of proof in disciplinary matters involving licensure does not violate due process rights of the licensee involved.

BCL:WHW

Religion; University; University of Wisconsin athletes may not engage in voluntary prayer led by a coach prior to an athletic event, although silent meditation or prayer organized by athletes may be undertaken within certain guidelines. OAG 17-86

May 29, 1986

IRVING SHAIN, *Chancellor*
University of Wisconsin-Madison

It has apparently been a practice of the University of Wisconsin's head football coach to lead his team in religious prayer in the locker room prior to a game. You request my opinion on the lawfulness of the following situations related to that practice:

- 1) a voluntary pre-game prayer led by a member of the coaching staff;
- 2) a few moments of silent meditation in which the players and coaches participate; and
- 3) a pre-game prayer organized by the players without the involvement of the coaching staff.

In my opinion, the situations described in questions 2 and 3 may be lawful if conducted in accordance with certain guidelines, and the situation described in question 1 is not.

I am aware of no Wisconsin statute pertinent to the situations you describe. The practices are therefore lawful unless they violate a provision of either the state or federal constitution. Those provisions applicable to your inquiry are as follows:

United States Constitution, first amendment [made applicable to the States by the fourteenth amendment]:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof

Wisconsin Constitution article I, section 18:

The right of every man to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be

drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

The Wisconsin Supreme Court has remarked that the language of article I, section 18 of the Wisconsin Constitution, while “more specific than the terser” clauses of the first amendment, carries the same import: Both provisions “‘are intended and operate to serve the same dual purpose of prohibiting the “establishment” of religion and protecting the “free exercise” of religion. . . .’” *State ex rel. Holt v. Thompson*, 66 Wis. 2d 659, 676, 225 N.W.2d 678 (1975), quoting *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 332, 198 N.W.2d 650 (1972). Because the questions you raise do not concern the expenditure of public funds “for the benefit of religious societies, or religious or theological seminaries,” analysis under the first amendment is the same as analysis under article I, section 18. See generally 68 Op. Att’y Gen. 287, 294 (1979).

The first amendment requires the state to be neutral in its relations with groups of religious believers and non-believers alike. *School District of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 216 (1963). Thus, the government is proscribed not only from favoring specific denominations, but also from promoting all religion:

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual’s freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.

Wallace v. Jaffree, 105 S. Ct. 2479, 2488 (1985).

The constitutionality of a practice challenged under the establishment clause must be analyzed by use of a three-part test. To survive constitutional scrutiny, the practice must have a secular purpose; its principal effect must be one that neither advances nor

inhibits religion; and the practice must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). If the practice under challenge violates any one of these three principles, it must be struck down under the establishment clause. *Stone v. Graham*, 449 U.S. 39, 40-41 (1980).

A review of pertinent establishment clause cases in the federal courts reveals that they have arisen in a context somewhat different from that presented in your request. In particular, most controversies have involved prayer or meditation in a classroom setting, and most have further involved pre-college rather than college-age students. These distinctions, however, are not pertinent as a threshold consideration. Instead, they are considered where appropriate under the *Lemon* test. See, e.g., *Doe v. Aldine Independent School Dist.*, 563 F. Supp. 883 (S.D. Tex. 1982); *Widmar v. Vincent*, 454 U.S. 263 (1981).

I.

CONSTITUTIONALITY OF A VOLUNTARY PRE-GAME PRAYER LED BY A MEMBER OF THE COACHING STAFF

It is by now well established that any type of prayer sessions endorsed or even permitted by policy or practice in public elementary and secondary schools violates the establishment clause. This point of law has been rigorously applied by the courts, as is illustrated by the following cases. A public school may not require that a prayer composed by the Board of Regents be recited aloud in class, even if the prayer is non-denominational and individual students may remain silent or leave the room. *Engel v. Vitale*, 370 U.S. 421 (1962). A public school also may not provide for voluntary Bible reading and recitation of the Lord's Prayer. *Abington*, 374 U.S. at 205. A public school may not schedule a voluntary session before school begins for students to read "remarks" of the chaplain from the Congressional Record, followed by comments and meditation. *State Bd of Education v. Board of Ed. of Netcong*, 108 N.J. Super. 564, 262 A.2d 21, *aff'd per curiam*, 57 N.J. 172, 270 A.2d 412 (1970), *cert. denied*, 401 U.S. 1013 (1971). In addition, a school may not permit students to pray at the opening of assembly programs, even if the programs are run by the student council and attendance is not mandatory. *Collins v. Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981). Finally and most recently, a public school may not set aside a daily

period of silence “for meditation or voluntary prayer.” *Wallace*, 105 S. Ct. 2479.

In each of these cases, the court concluded that the challenged activity failed under at least one of the three parts of the *Lemon* test and, therefore, constituted an establishment clause violation. I reach the same conclusion with regard to the activity described in your first question.

The “purpose” part of the establishment clause test unquestionably forbids practices which have a “pre-eminent purpose” that is religious in nature. See *Stone*, 449 U.S. at 41. Although your inquiry does not discuss the purpose of the staff-led prayer described in your first question, the circumstances under which it is undertaken strongly suggest that the prayer is offered for traditional religious reasons. Prayer most commonly refers to the inherently religious exercise of invoking the deity for purposes of praise, thankfulness or assistance. See *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), *aff’d*, 455 U.S. 913 (1982); *Kent v. Commissioner of Ed.*, 380 Mass. 235, 402 N.E.2d 1340 (1980). If this is a pre-eminent reason for offering the prayer, the activity you describe clearly has an impermissible religious purpose.

Even assuming for the moment that the claimed purpose of the pre-game prayer is instilling in the players a sense of team spirit or unity, my conclusion remains the same. This is consistent with the outcome in a recent case involving similar circumstances, entitled *Doe v. Aldine Independent School Dist.*, 563 F. Supp. 883. In that case, an establishment clause challenge was brought against a local high school practice of reciting and singing a school prayer at pep rallies and athletic events. The prayer, often sung by students to music played by the school band, consisted of the following words: “Dear God, please bless our school and all it stands for. Help keep us free from sin, honest and true, courage and faith [sic] to make our school the victor. In Jesus’ name we pray, Amen.” The athletic events took place at the football stadium, and the singing was frequently initiated by the high school principal or other school employes, although student attendance and participation was voluntary.

Applying the three-part *Lemon* test, the Court addressed the claim made by the school that the prayer had the secular purpose of instilling in the students “a sense of school spirit or pride . . .

[which] has a beneficial effect on the student body and contributes to an increase in morale, and concomitantly lessens disciplinary problems.’” *Aldine*, 563 F. Supp. at 886. The claim was rejected:

This argument misconstrues the law on this point. A school district or other governmental body cannot seek to advance nonreligious goals and values, no matter how laudatory, through religious means. *Abington School District v. Schempp*, 374 U.S. 203 Additionally, when a nonreligious purpose may be promoted through nonreligious means, a state may not employ religious ones. *Abington School District v. Schempp*, 374 U.S. at 278, 83 S.Ct. at 1601 (Brennan, J., concurring); *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d at 1045.

Aldine, 563 F. Supp. at 886. Presumably, the goals and values of team spirit or unity can likewise be encouraged through nonreligious means.

Constitutional conflict is not prevented by the fact that participation in the pre-game prayer is voluntary, by the fact that the activity takes place in the locker room rather than the classroom, or by the fact that the players are college rather than pre-college students. Voluntariness is not relevant to an inquiry under the establishment clause. *Engel*, 370 U.S. at 430. Further, the prayer is conducted at a university facility, is conducted during a university-sponsored event and, most importantly, is conducted at the initiation of university staff members. As long as the activity takes place on university property and is undertaken with obvious university endorsement, the particular geographic location is of no legal significance. Finally, the distinction between pre-college and college students is pertinent only in considering the second and third parts of the establishment clause test. *See, e.g., Widmar*, 454 U.S. 263 (invalidating university regulation prohibiting use of school buildings for religious exercises) and *Brandon v. Board of Ed. of Guilderland Cent. Sch.*, 635 F.2d 971 (2d Cir.), 1980 *cert. denied*, 454 U.S. 1123 (1981) (upholding high school’s refusal to allow group of students to assemble for prayer). Under the first part of the test, the inquiry is directed at the motivation of those who initiate the practice rather than at those who participate in or witness the practice.

Having concluded that the situation presented in your first question fails under the first part of the *Lemon* test and thus constitutes

an establishment clause violation, I am further of the opinion that cessation of this activity would not be an improper interference with the right of players and coaching staff to the free exercise of religion. The free exercise right of players and staff is not infringed by enforcement of the establishment clause, just as enforcement of their right under the free exercise clause would not violate the establishment clause. The two clauses are not mutually antagonistic. See *Aldine*, 563 F. Supp. at 888.

II.

CONSTITUTIONALITY OF A FEW MOMENTS OF SILENT MEDITATION IN WHICH THE PLAYERS AND COACHES PARTICIPATE

The constitutionality of a "silent meditation" measure which makes no reference to prayer has not been conclusively established, although it has been the subject of considerable debate. The relatively few federal courts which have considered the issue have divided on the constitutionality of the practice. The majority, however, have held silent meditation to be unconstitutional. Compare *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (upholding moment of silence statute) with *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985) (striking down statute); *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013 (D. N.M. 1983) (same); and *Beck v. McElrath*, 548 F. Supp. 1161 (M.D. Tenn. 1982) (same). See also *Walter v. West Virginia Bd. of Educ.*, 610 F. Supp. 1169 (S.D. W. Va. 1985) (striking down state constitutional amendment).

Although the full Supreme Court has not yet considered the issue, dictum in two decisions — one very recent — suggests that the "moment of silence" practice, if properly implemented, may be upheld. See *Abington*, 374 U.S. at 281 (Stevens, J.), and *Wallace*, 105 S. Ct. at 2491 (Stevens, J.), 2493 (Powell, J., concurring) and 2497-2501 (O'Connor, J., concurring). In the latter case, the Court considered an establishment clause challenge to an Alabama statute authorizing a period of silence in public schools "for meditation or voluntary prayer." After examining the legislative history, the Court determined that the state's purpose in passing the statute was to endorse religion, and the statute was therefore struck down under the first part of the *Lemon* test. See *Wallace*, 105 S. Ct. at 2490.

However, the majority opinion suggests in passing that a simple moment for "silent meditation" may be constitutional if the state does not endorse prayer as the preferred activity for that time. See *Wallace*, 105 S. Ct. at 2491-92 (Stevens, J.) and 2493 (Powell, J., concurring). The two concurring opinions indicate even more directly that a straightforward "moment of silence" measure may be upheld. See *Wallace*, 105 S. Ct. at 2493 (Powell, J., concurring) and 2496, 2497-2501 (O'Connor, J., concurring).

A state sponsored moment of silence in the public schools is different from state sponsored vocal prayer or Bible reading. First, a moment of silence is not inherently religious. Silence, unlike prayer or Bible reading, need not be associated with a religious exercise. Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts, and is not compelled to listen to the prayers or thoughts of others. For these simple reasons, a moment of silence statute does not stand or fall under the Establishment Clause according to how the Court regards vocal prayer or Bible reading. Scholars and at least one member of this Court have recognized the distinction and suggested that a moment of silence in public schools would be constitutional.

Wallace, 105 S. Ct. at 2498-99 (O'Connor, J., concurring).

The *Wallace* dictum provides no guarantee of the outcome of any future cases concerning pure "silent meditation" measures. In my opinion, however, the practice described in your second question is more likely to survive a constitutional challenge than the practice described in your first question, *provided that* the measure is carefully implemented so as to carry no religious purpose or preference.

III.

CONSTITUTIONALITY OF A PRE-GAME PRAYER ORGANIZED BY THE PLAYERS WITHOUT THE INVOLVEMENT OF THE COACHING STAFF

Your third question implies absolutely no involvement by the university or university personnel beyond simply allowing a practice to occur on university property. It is my opinion that this situation would not constitute an establishment clause violation, *provided that* the university and staff maintain absolute neutrality

with regard to the content of the prayer or whether the prayer occurs at all.

Clearly, the same opportunity would have to be provided to players who choose to engage in non-Christian as well as Christian prayer, meditation, reflection or religious exercise, as well as to players who choose to engage in nonreligious speech during the same period of time. Once the activity is allowed, the only permissible university involvement is that of establishing reasonable regulations of time, place and manner. *See Widmar*, 454 U.S. at 276.

The obvious danger inherent in the activity you describe is that, although ostensibly organized by players, it may in practice be conducted with some degree of participation, supervision or encouragement on the part of the staff. As was discussed in response to your first question, any degree of staff involvement, no matter how slight, could easily be perceived as an endorsement of prayer or even of a particular type of prayer and thus render the practice unconstitutional. *See Aldine*, 563 F. Supp. at 886.

BCL:BLB

Namekagon Portage Trail; Words and Phrases: The "Namekagon Portage Trail" is not impressed with a public trust under article IX, section 1 of the Wisconsin Constitution. OAG 18-86

June 16, 1986

THOMAS E. VAN ROY, *District Attorney*
Sawyer County

You ask whether Sawyer County may sell an eighty acre parcel of county-owned land which contains an ancient trail called the "Namekagon Portage Trail." The trail historically was used by Indians, missionaries and traders as a link between the Chippewa and St. Croix River systems. The trail is about two and one-half miles long, and lies between Lake Windigo and the Namekagon River, just south of Hayward, Wisconsin.

You state that although the trail crosses the above-described property, most of the trail's length crosses property now in private ownership. You state further that the State Highway Commission maintains an historic marker reciting the trail's significance on State Highway 27, south of Hayward, but that the trail has received no other state or federal designation as an historic site. Finally, you state that the trail's path, at least in places, still is visible and is used occasionally by the public.

The precise legal question you ask is whether article IX, section 1 of the Wisconsin Constitution applies to the sale of the described parcel, and, if so, whether the county must reserve to the public perpetual access to the "Namekagon Portage Trail." It is my opinion, for the reasons which follow, that the constitutional section cited does not apply and that the county may sell the parcel without any restriction.

Section 59.07(1)(c), Stats., permits a county to sell real property "on such terms as the board approves." *See*, 60 Op. Att'y Gen. 425 (1971); 38 Op. Att'y Gen. 386 (1949); 27 Op. Att'y Gen. 467 (1938); 23 Op. Att'y Gen. 650 (1934). Therefore, the county has authority to sell the described parcel in fee without reserving any rights therein. By the same token, the county has authority to sell the property reserving to the public the right to use the historic trail. Further, article IX, section 1 of the Wisconsin Constitution does

not prevent the county from selling said property on any terms the board approves.

Article IX, section 1 of the Wisconsin Constitution provides:

Jurisdiction on rivers and lakes; navigable waters. SECTION 1. The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

Article IX, section 1 of the Wisconsin Constitution was required as a condition of statehood by the Northwest Ordinance of 1787, Art. IV, Act of Congress, July 13, 1787, U.S. Rev. Stats., 2d Ed. 1878, p. 13. The requirement was clearly restated in the Act enabling the territory of Wisconsin to form a constitution and be admitted to the Union. Enabling Act, Act of Congress, Aug. 6, 1846, sec. 3, 9 U.S. Stat. ch. LXXXIV, pp. 56-58.

In *Lundberg v. University of Notre Dame*, 231 Wis. 187, 195, 282 N.W. 70 (1939), the court noted the importance of navigable waters and the portages between them in the northwest territory as follows:

At that time water transportation by river and lake was not merely an extremely important factor in interstate and foreign commerce but was essential to the maintenance of the great trade in furs and other products of the then nearly unsettled northwest territory. Well-established trade routes existed, and among the most important were those which linked the Mississippi with the Great Lakes and the St. Lawrence. If these routes were obstructed either physically or politically by the imposition of tolls and tariffs, the end of that profitable trade was inevitable. In order to accomplish the legislative purpose, it was necessary not merely to make provisions for the navigable waters themselves, but for such land as would by the processes of hauling render the routes continuous and practicable for commerce, for it is plain enough that the chain of commerce could be as disastrously broken at one point as at another.

Article IX, section 1 of the Wisconsin Constitution imposes a public trust on “navigable waters” and “carrying places” between them. The trust is administered by the state, primarily by the Department of Natural Resources. The state’s power is plenary thereunder. *Flambeau River L. Co. v. Railroad Comm.*, 204 Wis. 524, 540, 236 N.W. 671 (1931).

The trust doctrine applicable to “navigable waters” was thoroughly discussed in *Muench v. Public Service Comm.*, 261 Wis. 492, 53 N.W.2d 514 (1952). Stated in its most simple form, the doctrine provides that ownership of beds of navigable lakes lies in the state and ownership of beds of navigable rivers lies with each riparian owner to the river’s centerline, but said river is impressed with a trust for public use as long as the river exists as navigable.

A lake or river is navigable if it is able to float a sawlog, skiff or canoe for even short periods during the year. *Muench*, 261 Wis. at 500-01. Public use includes commercial and recreational use. *Muench*, 261 Wis. at 499-508. The trust applies up to the ordinary high water mark, a point which is established in each case by field procedures requiring objective examination of geologic and biologic indicators on shorelines to establish a numeric elevation. *State v. McFarren*, 62 Wis. 2d 492, 498, 215 N.W.2d 459 (1974); *Mayer v. Grueber*, 29 Wis. 2d 168, 173-74, 138 N.W.2d 197 (1965); *Diana Shooting Club v. Hustings*, 156 Wis. 261, 272, 145 N.W. 816 (1914).

The trust imposed by article IX, section 1 of the Wisconsin Constitution applies also to “carrying places” or portages, but certain distinctions must be maintained which lead to different conclusions than those cases concerned exclusively with “navigable waters.” *Lundberg v. University of Notre Dame*, 231 Wis. at 197-98, discusses the “carrying place” aspect of article IX, section 1 of the Wisconsin Constitution most thoroughly.

The term “carrying place,” discussed in *Lundberg* “refers to portages and trails in the same watershed as well as those between watersheds.” *Lundberg*, 231 Wis. at 195. *Lundberg* then states the legal distinctions between the terms “carrying place” and “navigable waters” under the trust doctrine (231 Wis. at 197-98):

There is a material distinction between a carrying place and navigable waters. It is fairly to be inferred that a carrying place exists only in connection with the use of navigable waters as a commercial route. Until there is such use of the navigable wa-

ters, there is no occasion to portage and no established place over which the process of hauling is done. A navigable river or lake exists regardless of Ordinances, and so does its capabilities for navigation. Not so the carrying place, which comes into being only when commercial necessity arises and is located only by use or planning in connection with commercial navigation. *Hence, it appears to us that the only carrying places which the act may be claimed specifically to refer to and preserve are those which had been located and were in use as such at the time of the enactment of the Ordinance.* It cannot have been intended to deal with specifically and to preserve unlocated portages for the obvious reason that the act would have nothing to operate upon. Whether the Ordinance imposed its burdens upon particular lands then in use as carrying places we do not undertake to decide. It is intimated in *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629, that carrying places may be abandoned, and in *Huse v. Glover*, 119 U. S. 543, 7 Sup. Ct. 313, 30 L. Ed. 487, that the state may in the improvement of navigation, so long as congress does not occupy the field by a law regulating the subject, substitute canals, bridges, or other structures for carrying places. Presumably, either congress or the state may change the location by any lawful means. *The legislative purpose was to protect carrying places to insure continuity of commerce along waters, and not to fix permanently the location of any particular carrying place. So long, however, as an established carrying place has not been abandoned, it is within the protection of the Ordinance. To that extent only is a burden incidentally put upon particular land.* What has heretofore been said does not mean that a new water route may not be established with its necessary portages. It is intimated in the *Economy Case, supra*, that should improvements in methods of water transportation or increased cost in other methods of transportation restore the usefulness of old water routes or establish the usefulness of new routes, congress might make the improvements necessary to their use. Where, however, it cannot be shown that a particular chain of rivers and lakes was in use as a commercial route at the time of the enactment of the Ordinance, *the existence of a carrying place may not be established by merely identifying some old trail which connects these waters and which might be a convenient portage if a commercial route were established. In such cases, when the chain of waters becomes useful as a route for commercial*

purposes if supplemented by portages, it is necessary to acquire by gift, purchase, or condemnation the land necessary to the portages. Once purchased or otherwise acquired, such land doubtless becomes a carrying place, and until abandoned either by the federal government or the state in the exercise of their powers to improve navigation, it is protected by the provisions of the Ordinance from obstruction or political interference. It is our conclusion, therefore, that assuming the Ordinance to have imposed some sort of servitude upon property then used for carrying places, it did not and could not do this with respect to land lying between waters which did not then constitute a part of some established commercial route. If carrying places are to come into existence in connection with such waters, they must be acquired by the process of purchase, condemnation, or other such means.

(Emphasis added.)

I can identify no ancient portage which still is used for commercial purposes in connection with navigable waterways. All such portages have been replaced by locks, dams, bridges, tressels, roads or other forms of transport such as truck, railroad or air services. Even the great commercial "carrying places" in Wisconsin history such as those between the Bois Brule and the St. Croix rivers at Solon Springs, and between the Fox and Wisconsin Rivers at Portage, have been abandoned. Under the law, then, such portages have lost the protection of the trust doctrine of article IX, section 1 of the Wisconsin Constitution. *Lundberg*, 231 Wis. at 197-98.

It is, therefore, my opinion that the "Namekagon Portage Trail" is not impressed with a public trust under article IX, section 1 of the Wisconsin Constitution. Its commercial use probably was abandoned well over 100 years ago, and most of its path now is privately owned.

BCL:JPA

Assessments; Condominium; Plats and Platting; Surveys; The legal description of condominium units must conform to the requirements of chapter 703, Stats., the condominium law. The requirements of chapter 236, dealing with platting and subdividing, may not be used to legally describe condominium units. OAG 19-86

June 16, 1986

KENNETH J. BUKOWSKI, *Corporation Counsel*
Brown County

You have requested my opinion on several practical problems that arise from perceived statutory ambiguity in the interrelation of chapter 236, Stats., governing subdivision creation, and chapter 703, governing condominium creation. Before addressing your specific questions, I think it is necessary to comment on the factors leading to the confusion engendered by Wisconsin's separate statutory provisions for the creation of subdivisions and condominiums.

WISCONSIN LAW GOVERNING SUBDIVISION PLATTING

The purpose of chapter 236, governing the platting and recording of lands in Wisconsin, is:

[T]o promote public health, safety and general welfare; to further the orderly layout and use of land; to prevent the overcrowding of land; to lessen congestion in the streets and highways; to provide for adequate light and air; to facilitate adequate provision for water, sewerage and other public requirements; to provide for proper ingress and egress; and to promote proper monumenting of land subdivided and conveyancing by accurate legal description.

Sec. 236.01, Stats.

Chapter 236 requires strict compliance by subdividers through a detailed statutory scheme aimed at ensuring accomplishment of the above purposes. These purposes are implemented by requiring local governing bodies as well as state agencies to approve a proposed subdivision before it can be recorded. Through this process, the subdivider is assured of complying with local ordinances and development plans.

In addition, the certification by various state agencies guarantees that proposed lot size and elevation will allow adequate septic systems where sewer service is not available; that proposed access

to public roads will comport with safety requirements; and that shoreland developments will maintain water quality. Sec. 236.13(1)(b), (c), (d) and (2m), Stats. Moreover, as a further condition of approval, the local governing body may require the subdivider to make necessary public improvements, may impose municipal standards on the construction of private streets, alleys or other public ways or may provide easements for the unobstructed flow of solar energy across adjacent lots in the subdivision. Sec. 236.13(2)(a), (b), (c) and (d), Stats.

Chapter 236 also has detailed surveying, mapping and layout requirements that provide for accurate monumenting of subdivision boundaries and lot lines; minimum lot width and area standards; minimum street width; public access to navigable waters; and inclusion of unplattable land within the subdivision as a part of lots, out lots or publicly dedicated areas. Secs. 236.15 and 236.16, Stats.

Thus, Wisconsin's Legislature intended, by enacting this comprehensive system of subdivision and platting regulation to prevent subdivision practices contrary to the public health, safety and general welfare, including disorderly layout, overcrowding, traffic congestion, inadequate light and air, inadequate sewerage disposal facilities and improper monumenting leading to inaccurate legal descriptions of parcels. Sec. 236.01, Stats.

WISCONSIN LAW GOVERNING CONDOMINIUM CREATION

Chapter 703 is similar to chapter 236, in that it is also a comprehensive statutory scheme complete in itself. 64 Op. Att'y Gen. 175, 178 (1975). However, chapter 703 differs from chapter 236 in the degree to which it regulates the creation and legal description of the condominium. For example, rather than setting out strict surveying requirements for the creation of a condominium plat, section 703.11 requires only a survey that complies with the "minimum standards for property surveys adopted by the examining board [of architects, professional engineers, designers and land surveyors] as defined in s. 443.01(5)" Historically, such relaxed standards may have reflected difficulty in accurately surveying and describing apartment units converted to condominiums. Indeed, legal definitions have reflected the notion that a condominium is "an estate in real property typically consisting of ownership . . . of a part of a

residential apartment-type building combined with an undivided interest-in-common of other portions of the property, including the land upon which the building stands.” 64 Op. Att’y Gen. at 176. In other words, the traditional concept of condominium envisioned ownership of a unit in a multi-unit building with common ownership of the land on which the building stood.

CREATION OF “LAND CONDOMINIUMS”

As a result of a series of amendments to Wisconsin’s original condominium law (Unit Ownership Act, chapter 78, Laws of 1963), it has become possible to create condominiums under chapter 703 that resemble subdivisions of land in all practical respects except for the necessity of complying with the requirements governing land subdivisions of chapter 236.

Creation of a so-called “land condominium” under chapter 703 can be accomplished through declaring an area of land a condominium under section 703.07, delineating sections of land resembling subdivision lots as “limited common elements” under section 703.02(10) and describing condominium units as “cubicles of air” above the limited common elements under section 703.02(15). In so doing, a condominium developer can create a “land condominium” resembling a subdivision without satisfying the requirements of chapter 236.

In a 1975 opinion, I addressed the possible creation of land condominiums under chapter 703. 64 Op. Att’y Gen. at 178. I concluded that because what was then section 703.13 established minimal requirements concerning the filing of a “plat of survey of the land” that was subject to local and state government approval, it would be unnecessary to apply chapter 236 to condominium developments. 64 Op. Att’y Gen. at 178. I went on to observe that:

There is an apparent need to relate the requirements of ch. 236, Stats., at least to those condominium developments which can only be distinguished from land subdivisions on the basis of the manner in which legal title in development property is held. Such developments affect many of the same public interests and may have the same impact on surrounding areas as the more traditional subdivision. However, until such time as the legislature specifically addresses the question of the extent to which such condominium projects should be subjected to the platting and subdivision approval requirements of ch. 236, Stats., it will

be possible for such projects to avoid such statutory requirements unless they actually involve divisions of land which constitute a subdivision under the provisions of sec. 236.02(8), Stats.

Id.

In 1978, chapter 703 was repealed and recreated. Ch. 407, Laws of 1977. The new chapter omitted the "plat of survey of the land" requirement that had allowed local government and state agency approval of a condominium plat. Moreover, the new law created section 703.37, stating: "For purposes of interpretation of this chapter, a condominium is not a subdivision as defined in ch. 236." Ch. 407, sec. 2, Laws of 1977.

The apparent legislative intent of these changes was to permit the development of land condominiums without requiring compliance with the subdivision provisions of chapter 236. As a result, the 1978 recreation of chapter 703, "has resulted in the creation of lots and developments which fail to comply with state minimum layout requirements, setback distances for buildings, private waste disposal requirements, and survey and mapping requirements." Testimony of the Department of Development before the Legislative Council Special Committee on Condominium Issues, August 1, 1984, page 2.

RESPONSE TO YOUR QUESTIONS

The legislative history I have outlined above relates to your questions in two ways. First, it explains the current legal status of condominiums that resemble land subdivisions and the fact that chapter 236 provisions may not be applied in such cases. Neither, of course, may chapter 236 be applied to more traditional condominiums. Second, this history may help explain similar problems that arise in the future regarding duties of registers of deeds with respect to condominium recording.

I will answer your questions in the order you asked them.

First, you ask whether section 236.28 governs the description of condominium units. The answer is no. Because chapter 703 is complete in itself and specifically prohibits application of chapter 236 to its interpretation, you must look to chapter 703 for condominium description requirements. Section 703.12 states: "A description in any deed or other instrument affecting title to any unit which makes reference to the letter or number or other appropriate designation

on the condominium plat together with a reference to the condominium instruments shall be a good and sufficient description for all purposes.”

The “condominium instruments” to which the legal description must refer are defined in section 703.02(5): “ ‘Condominium instruments’ mean the declaration, plats and plans of a condominium together with any attached exhibits or schedules.”

Thus, the proper legal description under section 703.12 must include the appropriate unit designation as well as reference to the condominium instruments. Your assumption that “the condominium plat name and unit number must be mentioned in all conveyances,” and that a unit, section, town, range and metes and bounds description would be inadequate is correct. In fact, describing a condominium unit with a metes and bounds description might prove impossible given the relaxed monumenting requirements of chapter 703.

Next, you ask whether a condominium plat recording supercedes a certified survey map description. The answer is yes. Because chapter 703 is complete in itself, the condominium plat described in section 703.11 is legally sufficient for recording purposes. No reference to chapter 236 is either necessary or proper.

Finally, you ask whether the recording of an amendment to a condominium declaration is required before a proposed building shown on the condominium plat can be constructed. This question was prompted by the near failure of an assessor to assess a completed condominium. Such a problem may arise with “land condominiums” as well as with expansion of more typical condominiums. The answer depends upon the facts. If new construction involves the adding of condominium units not shown in the original declaration under sections 703.09 and 703.11, then section 703.26 applies.

Under section 703.26(2)(c), a condominium declarant may reserve the right to expand a condominium if he or she outlines on the original condominium plat the “land, buildings, and common elements of new property that may be added to the condominium.” Under this section, the “proposed building” you mentioned as shown on the condominium plat served to reserve for the declarant the right to expand the condominium.

However, such a reservation is subject to section 703.26(3)(a), which states that “property may be added to a condominium *if* the

declarant records an amendment to the declaration” Because “property” as defined by section 703.02(14) includes improvements on land, it is clear that a declarant must amend the declaration as required by section 703.26(3)(a) before a proposed building may be constructed.

If, however, new construction involves the construction of the units stated in the original declaration, section 703.26 does not apply and the development can proceed in conformity with the declaration.

I do not believe, however, that the condominium law presents a unique problem to the assessor. The assessor’s task, whenever there is development in real estate, is to determine the fair market value of the real estate as of the assessment date. The assessor can draw upon several sources of information that will alert him or her that there may be or is development, such as recordings or filings with the register of deeds, as well as issuance of building permits and water and sewer hookups, where applicable. But the assessor is still required to make an actual assessment based upon, among other things, an inspection of the premises or the best practicably obtainable information. *See* sec. 70.32, Stats.

BCL:WHW:BLB

Counties; Venue; Section 48.185, Stats., does not authorize a change of venue, upon motion of a party or upon stipulation of the parties, after adjudication but before the first dispositional hearing, in a juvenile delinquency proceeding. OAG 20-86

June 20, 1986

WILLIAM J. GROGAN, *District Attorney*
Outagamie County

You have requested my opinion regarding change of venue in juvenile delinquency cases to effect cost sharing between two or more counties where, by statute, venue could properly lie in either county. Your specific questions are: (1) Is it lawful in a juvenile delinquency proceeding for a court to grant a motion for a change of venue after adjudication but before the *first* dispositional hearing provided that a basis exists for venue in either county; and (2) Is it lawful for parties by agreement to stipulate to a transfer of venue after adjudication but before the first dispositional hearing?

It is my opinion that section 48.185, Stats., the Juvenile Code provision on venue, does not authorize a change of venue after adjudication but before the first dispositional hearing, either upon motion of a party or upon stipulation by the parties.

You ask this question because you are concerned about the following scenario. A crime is committed in county A by a juvenile who resides in county B. Under section 48.185, venue can exist in either county A or county B. If county A initiates juvenile delinquency proceedings, and the juvenile is ultimately placed under a dispositional order, county A is liable for the costs of prosecution as well as the costs resulting from the dispositional order. You seek a method for ensuring that the county of residence of the juvenile will share some of the cost by shifting venue from county A to county B after adjudication and before the first dispositional hearing.

Section 46.26(4)(a) provides that the Department of Health and Social Services shall bill counties or deduct from statutory allocations to counties for the costs of care, services and supplies purchased or provided by the department for each person receiving services under section 48.34. Section 48.34 establishes all of the disposition alternatives for a child adjudged delinquent. Section 46.26(4)(b) provides that liability for such care, services and sup-

plies shall apply to the county public welfare or social service departments established by designated statutes "in the county of the court exercising jurisdiction under ch. 48 for each person receiving department services under ss. 48.34"

Section 48.185 currently provides as follows:

Venue. (1) Venue for any proceeding under ss. 48.12, 48.125, 48.13, 48.135, 48.14 and 48.18 may be in any of the following: the county where the child resides, the county where the child is present or, in the case of a violation of a state law or a county, town or municipal ordinance, the county where the violation occurred. Venue for proceedings brought under subch. VIII is as provided in this subsection except where the child has been placed and is living outside the home of the child's parent pursuant to a dispositional order, in which case venue is as provided in sub. (2).

(2) Venue for any proceeding under s. 48.363 or 48.365, or under subch. VIII when the child has been placed outside the home pursuant to a dispositional order under s. 48.345, shall be in the county where the dispositional order was issued, unless the child's county of residence has changed, or the parent of the child has resided in a different county of this state for 6 months. In either case, the court may, upon a motion and for good cause shown, transfer the case, along with all appropriate records, to the county of residence of the child or parent.

Under section 48.185(1), jurisdiction of a delinquency proceeding may be had in the county where the child is present or the county where the violation of law occurred. The statute does not state how the counties are to decide which of them shall assert jurisdiction when the county of residence, presence and violation are not the same.

Section 48.185 provides for a change of venue for subsequent dispositions, that is revisions or extensions of the original order. Under subsection (2), venue for any proceeding under sections 48.363 (revision) or 48.365 (extension) shall be in the county where the dispositional order was issued, but the court, upon a motion and for good cause shown, may transfer the case to the county of residence of the child or parent if the child's county of residence has changed or the parent has resided in a different county of the state for six months.

By its own terms, section 48.185 makes no provision for change of venue except in the limited circumstances described in section 48.185(2), *i.e.*, for a revision or extension of an existing order. In order to interpret the statute to authorize a change of venue from the county where the crime was committed to the county of the child's residence for the purpose of cost-sharing, I would have to find some indication that the Legislature intended to allow such a change of venue upon motion or by stipulation.

I am unable to discern such intent on the part of the Legislature. Reading sections 48.185 and 46.26 together, it is apparent that the county which accepts jurisdiction and prosecutes a delinquency action which culminates in a dispositional order under section 48.34 shall be liable to the department for all costs associated with such a dispositional order. There is nothing in the legislative history of sections 48.185 or 46.26 that suggests that distribution of costs between counties was of concern to the Legislature in the question of venue.

Prior to 1955, there was no specific venue provision in the predecessor to the Children's Code, The Chapter on Child Protection and Reformation. Venue apparently was in the county of the child's residence, with the county where the child was present, if different, having concurrent venue. Sec. 48.01(5), Stats. (1953). In 1955, section 48.16, the first section specifically dealing with venue, was created to read as follows:

VENUE. Venue for any proceeding under ss. 48.12 and 48.13 shall be in any of the following: the county where the child resides, the county where he is present or, in the case of a violation of a state law or a county, town or municipal ordinance, the county where the violation occurred.

Chapter 364, Laws of 1977, made the following change:

SECTION 28. 48.16 of the statutes is renumbered 48.185 and amended to read:

48.185 Venue. Venue for any proceeding under ss. 48.12 and, 48.125, 48.13 shall, 48.135, 48.14 and 48.18 may be in any of the following: the county where the child resides, the county where ~~he~~ *the child* is present or, in the case of a violation of a state law or a county, town or municipal ordinance, the county where the violation occurred. *Venue for any proceeding under s. 48.363 or 48.365 shall be in the county where the dispositional order was*

issued, unless the child's county of residence has changed, or the parent of the child has resided in a different county of this state for 6 months. In either case, the court may, upon a motion and for good cause shown, transfer the case, along with all appropriate records, to the county of residence of the child or parent.

Chapter 330, Laws of 1979, changed the statute to its current form:

48.185 Venue. (1) Venue for any proceeding under ss. 48.12, 48.125, 48.13, 48.135, 48.14 and 48.18 may be in any of the following: The county where the child resides, the county where the child is present or, in the case of a violation of a state law or a county, town or municipal ordinance, the county where the violation occurred. *Venue for proceedings brought under subch. VIII is as provided in this subsection except where the child has been placed and is living outside the home of the child's parent pursuant to a dispositional order, in which case venue is as provided in sub. (2).*

(2) Venue for any proceeding under s. 48.363 or 48.365, or under subch. VIII when the child has been placed outside the home pursuant to a dispositional order under s. 48.345, shall be in the county where the dispositional order was issued, unless the child's county of residence has changed, or the parent of the child has resided in a different county of this state for 6 months. In either case, the court may, upon a motion and for good cause shown, transfer the case, along with all appropriate records, to the county of residence of the child or parent.

The legislative history of section 48.185, which was amended in 1977 and 1979, sheds some light on the Legislature's intention. Before the 1977 amendment of section 48.185 (previously section 48.16), the statute did not contain any of what is now subsection (2) of section 48.185. Section 48.16, the old statute, is in many respects the same law as current section 48.185(1). The 1977 amendment added the section recognizing the change of the child's or parent's residence as cause for changing venue, but only in case of an alteration of an already established order pursuant to sections 48.363 and 48.365. Change of venue for good cause was added with these provisions and did not exist before 1977. The change of venue clause appears to only refer to the circumstances defined in section

48.185(2), not to a general switch of venue in any juvenile proceedings.

In 1979, the Legislature enacted Assembly Bill 656, which, for the most part, dealt with modifying laws governing termination of parental rights. Section 48.185 was also amended in Assembly Bill 656. The change of venue for "good cause" clause was placed in a separate subsection. Before 1979, this language was together with the language of section 48.185(1). Before the statute was split into two parts, there might be grounds to believe the change of venue applied to all the preceding text of section 48.185. By separating the clause beginning "in either case" in subsection (2) the Legislature purposely removed subsection (1) from the effect of this wording. The Legislature evidenced concern for protecting the child's and family's interests, not the state's convenience, by the changes of 1977 and 1979.

This concern can be seen in subsection (2) which allows only transfer to the parent's or child's resident county; it does not allow transfer, for example, to the county where the crime occurred, from the county of residency. This further demonstrates the Legislature's concern was for protection of the family not cost considerations of the counties.

In addition, several general principles of law gravitate against a finding that for the sake of cost-sharing, counties may change venue midstream. In the first place, your suggestion that change of venue should be allowed between two stages of the delinquency proceedings is unique. Change of venue is ordinarily afforded at the beginning of judicial proceedings. I find no place in the statutes where a change of venue is authorized midstream. Chapter 48, the Children's Code, clearly anticipates one continuous proceeding from the filing of the delinquency petition through the eventual termination of the dispositional order. One would certainly expect that if the Legislature had intended to allow a change of venue at the time you suggest, it would have made that intent clear and apparent.

There is nothing in the Children's Code or the general principles of venue which suggest venue is intended to help distribute costs or to effect cost-sharing. The basic function of venue statutes is to set a fair and convenient location for trial. *Voit v. Madison Newspapers, Inc.*, 116 Wis. 2d 217, 224, 341 N.W.2d 693 (1984). The right to a change of venue is purely statutory and the basis for a change must

be found in the statutes. *State ex rel. Klabacka v. Charles*, 36 Wis. 2d 122, 129, 152 N.W.2d 857 (1967). In addition, the focus of the entire Children's Code is on the best interest of the child, with a goal toward preserving the family wherever possible. See sec. 48.01, Stats.; *State ex rel. Herget v. Waukesha Co. Cir. Ct.*, 84 Wis. 2d 435, 267 N.W.2d 309 (1978). In light of these evident policies, it would be quite difficult to read your proposal into section 48.185.

For these reasons, I do not believe that section 48.185 authorizes switching venue once established in any potentially eligible county, either by stipulation or motion, except under section 48.363 or 48.365 and subchapter VIII proceedings where the child has been placed outside of his home.

If the statute does not allow changing venue after it has been established under section 48.185(1) in one of three counties, it clearly does not allow changing venue midstream. To allow change of venue prior to the first dispositional hearing could greatly inconvenience all of the parties to the fact finding hearing, while complicating the ultimate disposition. A new judge, who did not hear the delinquency issues, would decide disposition. This appears to be inconsistent with the overall policy of the Children's Code and the strong legal policy to have the same judge who heard the facts determine disposition.

By expressing my opinion on the meaning of section 48.185, I express no view on the legality of any cost-sharing arrangements between counties which are implemented by means other than a change of venue.

BCL:SLW

Automobiles and Motor Vehicles; Section 351.08, Stats., authorizes enhancements to the section 343.44 penalties; it does not create a separate substantive offense. OAG 21-86

June 20, 1986

MARK PERRINE, *District Attorney*
Ashland County

You have requested my opinion on whether convictions are possible both under section 343.44, Stats., and under section 351.08, for a single instance of operating a motor vehicle after one's driver's license has been revoked by a court order pursuant to section 351.06. Specifically you ask:

1. Is it proper to convict a criminal defendant for both of the following offenses arising out of a single instance of operating a motor vehicle, if the defendant's driving record and status supports such charges:
 - A. Operating a motor vehicle upon a highway in this state when the defendant's operating privileges are revoked—4th offense within five years, contrary to Section 343.44(1), Wisconsin Statutes;
 - B. Operating a motor vehicle upon a highway in this state while the order of the Court issued under Section 351.06, Wisconsin Statutes is in effect, contrary to Section 351.08, Wisconsin Statutes.
2. If the State must elect and proceed only on one charge, must that charge be the violation of Section 351.08, Wisconsin Statutes?
3. What is the mandatory minimum sentence which a Court must impose upon a conviction for violating Section 351.08, Wisconsin Statutes?

Section 351.08, Stats. (1983-84), was amended by 1985 Wisconsin Act 71, section 15, as follows:

Operation of motor vehicle by habitual traffic offender or repeat habitual traffic offender prohibited; penalty; enforcement. Any person who is adjudged a habitual traffic offender or repeat habitual traffic offender under s. 351.06 who is convicted of operating a motor vehicle in this state while the order of the court issued *revocation* under s. 351.06 *this chapter* is in effect

shall, *in addition to any penalty imposed under s. 343.44*, be fined not to exceed \$5,000 and ~~shall be imprisoned not to exceed 180 days~~. No portion of the sentence may be suspended, except in a case where operating was made necessary by a situation of emergency, as determined by the court. Any person imprisoned under this section, on his or her request, may be allowed Huber law work privileges under s. 56.08. For the purpose of enforcing this section, in any case in which the accused is charged with driving a motor vehicle while his or her license, permit or privilege to drive is suspended or revoked or is charged with driving without a license, the court before hearing the charge shall determine whether the person is a habitual traffic offender or repeat habitual traffic offender and therefor barred from operating a motor vehicle on the highways of this state. ~~If the court determines that there is an order in effect revoking the accused's operating privileges under s. 351.06, it shall certify the case to the district attorney.~~

In light of this amendment to section 351.08, I conclude that, while the section 351.08 penalties are to issue in addition to penalties issued for conviction pursuant to section 343.44(1), it is not proper to convict a defendant under both section 343.44(1) and section 351.08. Rather, the section 351.08 provisions are more appropriately viewed as penalty enhancers, and the correct approach is to seek conviction pursuant to section 343.44. Finally, I conclude that the mandatory minimum enhancement pursuant to section 351.08 is within the discretion of the sentencing court.

The 1985 amendment added language specifically stating that the penalties under section 351.08 were to be imposed “in addition to any penalty imposed under s. 343.44” While this language is unambiguous and therefore interpretation focuses solely on the plain meaning of the statutory terms, *State v. Derrne*, 102 Wis. 2d 38, 45, 306 N.W.2d 12 (1981), I would note that in its analysis to 1985 Assembly Bill 426, the Legislative Reference Bureau states: “The bill . . . clarifies that the penalty for operating a motor vehicle while a person's operating privilege has been revoked as an HTO or RHTO is in addition to other penalties for operating a vehicle after revocation under other provisions of law.”

There remains, however, the question of whether a defendant may be convicted under both section 343.44(1) and section 351.08 for a single instance of operating a motor vehicle. On the question

of whether section 351.08 authorizes a separate, independent conviction, the statutory language is ambiguous. As revised, section 351.08 refers to a person “who is *convicted* of operating a motor vehicle in this state while the revocation under [chapter 351] is in effect . . .” Sec. 351.08, Stats. (as amended). This language could be read to suggest that operating while under a chapter 351 revocation subjects one to a conviction pursuant to section 351.08.

Several factors, however, lead me to conclude that section 351.08 does not authorize a separate, independent conviction. First, if section 351.08 is read as creating a separate offense, the phrase, “in addition to any penalty imposed under sec. 343.44,” becomes superfluous at least insofar as it refers to the mandatory fine. With regard to the imprisonment, the phrase could simply indicate that the term must run consecutively, rather than concurrently, with any term imposed under section 343.44. *Cf. State v. Morris*, 108 Wis. 2d 282, 287, 322 N.W.2d 264 (1982) (If the statute in question is viewed as creating a separate crime, the phrase, “in addition to the maximum punishment fixed for such crime,” is rendered superfluous because of the criminal statute authorizing consecutive sentences.). With regard to the fine, however, reading section 351.08 as creating a separate, independent offense renders the “in addition to” provision superfluous. Given the mandatory nature of the section 351.08 penalties as discussed below, there is no need to refer to any other statutory provision, and there is no concept, like that of consecutive versus concurrent, that necessitates explanation.

Neither is the language of the predecessor statute helpful in determining legislative intent. Before the creation of administrative revocation by the 1985 Act, the statute read: “Any person who is *adjudged* a habitual traffic offender or repeat traffic offender under s. 351.06 *who is convicted* of operating a motor vehicle in this state while the order of the court issued under s. 351.06 is in effect shall be fined . . .” Sec. 351.08, Stats. (1983-84). While the reference to conviction in the predecessor statute was separate from the reference to section 351.06 adjudication, it was still possible to read the conviction to which the section 351.08 referred as existing solely under section 351.08.

Consistent with the institution of administrative revocation in 1985 Wisconsin Act 71, the reference to adjudication was dropped. However, while documents in the legislative drafting file to 1985 Wisconsin Act 71 contain references to the intended cumulative

nature of the section 351.08 penalties, they contain no statements with regard to conviction.

Neither the present language of the statute nor its legislative history necessarily leads to a conclusion on the question of whether the Legislature intended section 351.08 to create a separate, independent offense. However, under the canon of strict construction, penal statutes are to “be construed strictly against the party seeking to exact statutory penalties and in favor of the person on whom statutory penalties are sought to be imposed.” *Morris*, 108 Wis. 2d at 289. Accordingly, “in case of doubt concerning the severity of the penalty prescribed by the statute,” a milder penalty will be preferred over a harsher one. *Id.*

In light of these considerations, I conclude that section 351.08 was not intended as a separate substantive offense. Rather, the state should proceed under the appropriate provision of section 343.44.

Since, unlike section 343.44, section 351.08 provides no minimum, I conclude that the Legislature intended the court to have discretion to set, without minimum limitation, the section 351.08 enhancements. See *Kimberly-Clark Corp. v. Public Service Comm.*, 110 Wis. 2d 455, 463, 329 N.W.2d 143 (1983) (“where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed,”) (quoting *State v. Welkos*, 14 Wis. 2d 186, 192, 109 N.W.2d 889 (1961)). Given the statutory language to the effect that the offender “shall be fined . . . and imprisoned,” section 351.08, these enhancements are mandatory. Cf. *State v. Vick*, 104 Wis. 2d 678, 694, 312 N.W.2d 489 (1981) (contrasting use of “may” and “shall” in context of jury instructions); *State v. Camara*, 28 Wis. 2d 365, 371, 137 N.W.2d 1 (1965) (quoting civil case that stated: “Generally in construing statutes, “may” is construed as permissive and “shall” is construed as mandatory unless a different construction is demanded by the statute in order to carry out the clear intent of the legislature.”). Since the section 351.08 enhancements would be in addition to the statutory minimums set forth in the applicable provision of section 343.44(2), the violator in the specific case you describe, *i.e.*, a fourth conviction of section 343.44(1), which also involves violation of a court order contrary to section 351.08, must receive a fine greater than \$1,500 (the section 343.44(2)(d) minimum plus the mandatory section 351.08 fine) and must be imprisoned for a period greater

than sixty days (the section 343.44(2)(d) minimum plus the mandatory section 351.08 imprisonment).

BCL:SR

Attorneys; District Attorney; Section 196.675(1), Stats., would be violated where a partner of a district attorney compensated on a part-time basis was retained by a public utility, if the partner-district attorney were to financially benefit directly or indirectly. OAG 22-86

July 1, 1986

MARK PERRINE, *District Attorney*
Ashland County

Your predecessor requested my opinion whether section 196.675(1), Stats., would be violated if a non-municipal public utility employed and retained the law partner of a district attorney who is compensated on a part-time basis.

Section 196.675(1) and (2) provides:

(1) No common carrier operating within this state and no public utility, except a municipal public utility, may retain or employ a district attorney or assistant district attorney, city attorney or assistant city attorney or any person holding a judicial office.

(2) If any district attorney or assistant district attorney, city attorney or assistant city attorney or any person holding a judicial office violates this section, the attorney's or judge's office shall be deemed vacant.

I am of the opinion that there would be a violation if the partnership was employed and the district attorney was thereby financially interested in the contract of retainer. Whether the person serving as a district attorney would benefit financially in a specific case would be for determination by the trier of fact in a proper court action. In 4 Op. Att'y Gen. 762, 763 (1915), it was stated:

The purpose of this law was to prevent the district attorney or city attorney from accepting professional employment from the classes of quasi-public corporations therein enumerated because the interests of such corporations frequently conflict with the public interests and wise public policy requires that the district attorney or city attorney should be in a position at all times to serve the public unreservedly and without the embarrassment arising from conflicting duties.

....

It is my opinion that your partner may act as attorney for the corporation provided he does so distinctly in his individual capacity and in such a manner that you have no interest in the contract of employment. The penalty provided by the statute is the forfeiture of the office of the district attorney. By its terms it does not prevent the employment by the quasi-public corporations therein enumerated of the partner of the district attorney. The statute will be strictly construed because it is penal in its nature.

In my opinion, employment of the law firm by utilizing the services of a partner other than the district attorney is equivalent to employment of the person who serves as district attorney where the latter benefits on a pecuniary basis by reason of such employment.

In 1910 Op. Att'y Gen. 623, it was stated that if a district attorney were a partner in a legal firm, the partnership could not be retained by a common carrier or public utility but that would not preclude individual members of the firm from being so employed in their individual capacities so long as the firm and district attorney partner were not interested directly or indirectly.

It is highly improbable that a non-district attorney *partner* would serve a public utility in a distinctly individual capacity.

Your predecessor's question and the statute above are primarily concerned with the legal principles referred to as conflict of interest and qualification for office rather than incompatibility between two offices or an office and position. See 63A Am. Jur. 2d *Public Officers and Employees* §79 (1984).

In discussing conflict of interest, 63A Am. Jur. 2d *Public Officers and Employees* §320 (1984), it is stated:

It is the duty of public officers to refrain from outside activities which interfere with the proper discharge of their duties. Within reasonable limits, subject to the limitation that it may not abridge any man's constitutional rights, the legislature has power to ascertain and declare what activities are inconsistent with the proper performance of public duties. This power is sometimes conferred by constitutions. For example, it is normally within the power of the legislature to prohibit public officers from engaging in business for public utility corporations.

At 63A Am. Jur. 2d *Public Officers and Employees* §321 (1984), it is stated:

A public officer owes an undivided duty to the public whom he serves, and is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interests of the public. In other words, a public official may not use his official power to further his own interest.

In *Boone v. State*, 54 So. 109 (Ala. 1911), the court upheld a statute which made it a misdemeanor for a municipal officer to act as an attorney for a public utility corporation.

Your predecessor inquired who would have standing to enforce this law and seek declaration of the vacancy provided in subsection (2) of section 196.675.

By reason of section 784.04(1), the attorney general could bring an action in the nature of *quo warranto* on his own information or upon the complaint of any private party. However, since the office involved is a county office, section 784.04(2) would permit the action to be brought in the name of the state by a private person on personal complaint.

Inquiry was also made whether an attorney's conduct in knowingly violating section 196.675(1) would constitute a violation of any of the supreme court rules which govern members of the State Bar. The code of ethics, rules promulgated by the Wisconsin Supreme Court, contain a number of provisions which require a lawyer to represent a client zealously and to avoid a conflict or the appearance of a conflict of interest. *See* SCR 20.34, 20.35, 20.48 and 20.49. Supreme Court Rule 20.28 provides that a lawyer shall not accept or continue employment if the interests of another client may impair the independent professional judgment of the lawyer. The principal clients of a district attorney are the county and the state. Supreme Court Rule 20.28(4) provides: "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." I decline to give my opinion whether the fact situation set forth constitutes a violation of any of the rules of ethics promulgated by the supreme court. You may inquire of the Board of Attorneys Professional Responsibility,

Room 410, 110 East Main Street, Madison, Wisconsin 53702, for further assistance.

BCL:RJV

Administrative Code; Constitutional Law; Religion; Transportation, Department of; The administrative rule of the Department of Transportation granting an exemption on religious grounds from the photograph-taking requirement of sections 343.17(2) and 343.14(3), Stats., is violative of the first amendment, United States Constitution, and of Wis. Const. art. I, §18. OAG 23-86

July 1, 1986

TOM LOFTUS, Chairperson
Committee on Assembly Organization

The Committee on Assembly Organization has requested my opinion as to whether section 343.17(2), Stats., and section Trans. 102.03(1)(b) of the Wisconsin Administrative Code impermissibly burden the free exercise of religion so as to violate the first and fourteenth amendments to the United States Constitution or article I, section 18, of the Wisconsin Constitution.

Section 343.17(2) requires a driver's license to "contain the licensee's photograph." Section 343.14(3) empowers the Department of Transportation (DOT) to make exceptions as it "deems . . . appropriate." DOT's rule, section 102.03, provides:

(1) As provided by s. 343.14(3), Stats., a license without photograph shall be issued when:

. . . .

(b) The person's religion does not allow a photograph to be taken. To qualify for the exemption, the following shall be furnished to the department.

1. A signed statement by a member of the clergy of his or her religion certifying the applicant is a member of the congregation and that photographing is prohibited by the religion, and

2. A copy of the certificate of tax exempt status from the internal revenue service for that congregation.

Unquestionably DOT's statutory authority to make whatever exceptions it "deems . . . appropriate" is broad enough to excuse religious objectors from the photo license requirement. The issue becomes whether DOT's rule meets constitutional standards.

It is equally certain that the administrative rule does not interfere with the free exercise of religion. To the contrary, by recognizing the validity of a religious objection the rule permits the free

exercise. The free exercise question would arise only if the statute or rule refused to recognize a religious objection. See *Quaring v. Peterson*, 728 F.2d 1121 (8th Cir. 1984), *aff'd by equally divided court without opinion*, 105 S. Ct. 3492 (1985) (holding that states must recognize a religious objection to photo requirement); ¹ *Bureau of Motor Vehicles v. Pentecostal House*, 269 Ind. 361, 380 N.E.2d 1225 (1978) (state must recognize religious objection); *Johnson v. Motor Vehicle Division, Etc.*, 593 P.2d 1363 (Colo. 1979) (state need not recognize religious objection); *Dennis v. Charnes*, 571 F. Supp. 462 (D. Colo. 1983) (state need not recognize religious objection).

But the analysis does not end here. Even if a law does not offend the free exercise clause, it must withstand examination under the establishment clause. In the words of the first amendment to the United States Constitution, the government "shall make no law respecting an establishment of religion." In the words of the Wisconsin Constitution, the Legislature may give no "preference . . . to any religious establishments." Wis. Const. art. I, §18.

I conclude that DOT's administrative rule violates the religious establishment clauses of both the federal and state constitutions. The rule honors the religious objection only of citizens (a) whose religious faith has clergy and a congregation, (b) whose faith has a tenet prohibiting such photographs, and (c) whose congregation enjoys tax exempt status. The fatal constitutional error consists in advancing such religions by giving them a preferred status over other, equally sincere religious objections.

The test for an establishment clause violation is virtually the same under both constitutions. See *American Motors Corp. v. ILHR Dept.*, 93 Wis. 2d 14, 29-30, 286 N.W.2d 847 (Ct. App. 1979). The guiding criteria were enunciated in *Committee For Public Education v. Nyquist*, 413 U.S. 756, 773 (1973).

Under this test (hereafter referred to as the *Nyquist* test) the law in question must: (1) reflect a clearly secular legislative purpose; (2) have a primary effect which neither advances nor inhibits religion; and (3) avoid excessive governmental entanglement with religion. The principle underlying all three of these prongs

¹ This affirmance does not constitute agreement by the United States Supreme Court with the court below inasmuch as affirmance was by an evenly divided vote. See *Neil v. Biggers*, 409 U.S. 188, 190-92 (1972).

is that the government should remain neutral in all matters concerning religion.

American Motors Corp. v. ILHR Dept., 93 Wis. 2d at 30.

The DOT rule plainly fails the second *Nyquist* test. The rule's primary effect advances religion by making the above-described religious establishments more attractive. Further, the rule inhibits religion by discouraging those not members of the preferred religious establishment, but believers nevertheless in the religious tenet, from adhering to or practicing the unfavored faith. The Constitution protects more than those who belong to tax exempt churches; it protects those religious beliefs that are sincere, meaningful and occupy the life of its possessor "parallel to that filled by the orthodox belief in God." *United States v. Seeger*, 380 U.S. 163, 165-66 (1965).

Case law supports my opinion. In *Kolbeck v. Kramer*, 84 N.J. Super. 569, 202 A.2d 889 (1964), a state university denied admission to a student who objected to vaccination on religious grounds. Admission was denied because the objector was not a member of the Christian Science faith. Declaring the denial unconstitutional, the court said: "Membership in a recognized religious group cannot be required as a condition of exemption from vaccination under statute and constitutional law." *Kolbeck*, 202 A.2d at 893. Another court, stressing the importance of governmental neutrality toward religion, struck an immunization law that excepted only those belonging to the Worldwide Church of God or the Church of Christ Scientist, saying:

The exemption in Maryland's immunization statute contravenes this principle of governmental neutrality regarding different religious beliefs. Section 7-402(b) permits only members or adherents of certain religions to apply for and obtain exemptions from the immunization requirement. By limiting the availability of the exemption, subsection (b) has the effect of respecting the personal religious beliefs and practices of those who happen to be members or adherents of the two faiths that have been recognized while overlooking the religious beliefs and practices of those such as the petitioner.

However broadly the phrase "recognized church or religious denomination" could reasonably be construed, the statutory language certainly fails to encompass personal religious beliefs like

Davis's which are not associated with any church or denomination. As far as the government is concerned, however, such beliefs are entitled to equal respect.

Davis v. State, 451 A.2d 107, 113-14 (Md. Ct. App. 1982).

The discriminatory nature of the administrative rule is even more pronounced by its denial of an exemption to the adherent of a faith meeting all DOT's criteria except tax exempt status. A particular religious congregation might choose to give up tax exempt status in order to influence legislation. See 26 U.S.C. §501(c)(3) and (h).

To be clear on the terms of this opinion, I have not concluded that DOT must honor religious objections. The courts are split on that question, and I have not formed an opinion. Rather, DOT's present rule unlawfully discriminates in favor of certain religious faiths at the expense of others, and it thereby violates the establishment clauses of the state and federal constitutions.

BCL:CDH

Counties; Law Enforcement; Municipalities; Under section 66.30, Stats., and subject to some limitation, a county may furnish certain supplemental law enforcement services to villages and towns within the county. The county sheriff's consent to provide such supplemental services and the sheriff's approval of such a contract is required. OAG 24-86

July 15, 1986

DAVID H. RAIHLE, *Corporation Counsel*
Chippewa County

You have requested an opinion on the authority of local governments to enter into cooperative agreements under section 66.30(2), Stats. Specifically, you ask: " 'May a town or village and the county enter into a contract, with the consent of the sheriff, wherein the local municipality would pay funds to the county in exchange for law enforcement services beyond that which the sheriff's department is presently providing?' "

In answering this question, it is assumed that the county-wide law enforcement services, "which the sheriff's department is presently providing" the towns and villages involved, are legally adequate. Under section 59.24(1), the sheriff is responsible for keeping and preserving the peace in the county. Those county law enforcement services are supported by county-wide taxes and additional town or village taxes may not be raised or expended for expanded county law enforcement services. Sec. 59.07(5), Stats. Simply stated, "[t]he purpose of the tax must be one which pertains to the public purpose of the district within which the tax is to be levied and raised," and town or village taxation is not an appropriate vehicle for insuring that the quantity or quality of county law enforcement services is improved. *See Sigma Tau Gamma Fraternity House v. Menomonie*, 93 Wis. 2d 392, 412-13, 288 N.W.2d 85 (1980).

According to your letter, two municipalities in Chippewa County wish to enter into law enforcement contracts with the county. One municipality is a village with a population of 2,000, and the other is a town with a population of 4,200. You further describe the nature of the agreements as follows:

The local municipal funding would not be payment for duties which the sheriff is required by law to perform. Rather, the municipalities would secure additional patrol, visibility, physical

presence and law enforcement not only of state law and county ordinance, but enforcement of town or village ordinances.

Officers patrolling in local municipalities would be deputy sheriffs serving solely under the control of the sheriff. The towns and villages would have no supervisory control over the officers or the sheriff. The sheriff, in his sole discretion, would schedule and direct the officers assigned to the local municipalities. Costs of added services are to be solely paid by local municipal funds without fiscal impact or additional expense to the county.

The sheriff has been consulted in this matter and, if lawful, he would consider such a contract. Because of constitutional and statutory limitations directed to the enlargement of sheriffs' duties, it may be necessary to consider a contract term only for the duration of the incumbent sheriff.

The subject of your inquiry has already been rather extensively reviewed and answered in several prior opinions of this office. 65 Op. Att'y Gen. 47 (1976); 60 Op. Att'y Gen. 85 (1971); 58 Op. Att'y Gen. 72 (1969). For the most part, those opinions are still applicable. They point out that, subject to certain limitations stated therein, there is latitude for the execution of agreements, such as you describe under the joint exercise of powers statute. Sec. 66.30, Stats.

Section 66.30(2) states, in part:

In addition to the provisions of any other statutes specifically authorizing cooperation between municipalities, unless such statutes specifically exclude action under this section, any municipality may contract with other municipalities, for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law.

This section allows each municipality to contract to the extent of "its lawful powers and duties." Sec. 66.30(2), Stats. Thus, "the service must be one that the receiving municipality is authorized to receive and the performing municipality is entitled to render." 56 Op. Att'y Gen. 69, 70 (1967). Our supreme court has pointed out that "[m]unicipalities, including towns and villages, may contract with one another for the receipt or furnishing of law enforcement services or for mutual law enforcement assistance under sec. 66.30(2), Stats." *Village of McFarland v. Town of Dunn*, 82 Wis. 2d

469, 475, 263 N.W.2d 167 (1978). The term "municipality" is defined by section 66.30(1)(a) to include "county."

Section 60.56(1), enacted by 1983 Wisconsin Act 532, authorizes a town board to provide for law enforcement by establishing a town police department, by creating a joint police department with another town, village or city, or by "[c]ontracting with any person."¹ "Person" is not defined in chapter 60. However, section 990.01 construes words which are not otherwise defined in the statutes. Section 990.01(26) defines person to include "all partnerships, associations and bodies politic or corporate." Section 59.01(1) specifically provides that "[e]ach county in this state is a body corporate . . ." Accordingly, it appears that section 60.56(1) specifically authorizes a town to contract with a county for law enforcement services.

Section 61.65(1) *requires* certain villages to provide police protection. Under this section, all villages with a population of more than 5,000 are required to provide police protection either by creating a police department, by creating a joint police department or by contracting with another municipality including the county. Other statutes provide specific authority for a village marshal, village constable and village peace or police officers. Secs. 61.28, 61.29 and 61.31, Stats.

The village you refer to has a population of only 2,000 and, therefore, it is not *required* to provide police protection *under section 61.65(1)*. However, as pointed out in 58 Op. Att'y Gen. at 76, "[i]t can be said, therefore, in general, that a village cannot drop 'police protection.'" Moreover, section 61.34(1) provides that the village board has the "power to act for the government and good order of the village . . . and for the health, safety, welfare and convenience of the public," which power "shall be in addition to all other grants . . . and shall be limited only by express language," and be liberally construed. Sec. 61.34(5), Stats. Based on the foregoing, and subject to limitations discussed in our previous opinions on the subject, it may reasonably be concluded that such smaller villages may also provide police protection for their inhabitants through cooperative agreements with their county.

¹ The legislative council special committee note describing this enactment indicates that previous detailed law is "replaced with broad authority of the town board to provide for law enforcement."

In 58 Op. Att’y Gen. 72 and 65 Op. Att’y Gen. 47, this office examined proposed law enforcement contracts similar to the ones proposed in your letter. Specifically, this office determined that “the county has an interest and duty to provide law enforcement in all of the villages and towns, and that the sheriff and his deputies can enforce village or town ordinances if necessary to maintain peace and order.” 58 Op. Att’y Gen. at 74. It is apparent, then, that the sheriff’s general county-wide law enforcement responsibilities give him the authority to enforce state statutes and county and municipal ordinances within the boundaries of villages and towns. The county may contract for the sheriff to act to the limits of this law enforcement authority to provide supplemental law enforcement to both the village and the town.

However, as indicated, the law enforcement contracts would be subject to certain limitations. One of these limitations is that the sheriff and deputy sheriffs may not serve as town or village officers as part of the contract. 65 Op. Att’y Gen. at 48 and 60 Op. Att’y Gen. at 86-88. In discussing the common law role of the sheriff in *Andreski v. Industrial Comm.*, 261 Wis. 234, 240-41, 52 N.W.2d 135 (1952), the Wisconsin Supreme Court stated: “No other county official supervises . . . [the sheriff’s] work or can require a report or an accounting from him concerning his performance of his duty. He chooses his own ways and means of performing it.” Another limitation is that the village and town may not use the contracts to abrogate their duties to provide for the safety and welfare of the public. 58 Op. Att’y Gen. at 76. Further, funding arrangements and reimbursement should be carefully considered and set forth in the agreement. *See sec. 66.315, Stats.*

Finally, as you appear to be aware, any contract between the county and a town or village should also be approved by the sheriff. Under *Professional Police Ass’n v. Dane County*, 106 Wis. 2d 303, 316 N.W.2d 656 (1982), a county may not limit a sheriff’s exercise of discretion concerning the performance of his or her traditional duties. Since the proposed contracts would affect the exercise of the sheriff’s traditional law enforcement duties, the sheriff’s approval is required.

BCL:JCM

Indians; Intoxicating Liquors; Licenses and Permits; State liquor laws, including licensing requirements, are applicable to liquor establishments owned or operated by either tribe members or non-Indians, and located on Indian reservations. Any license issued counts toward the local quota. OAG 25-86

July 23, 1986

KEVIN KELLEY, *District Attorney*
Forest County

You have asked a series of questions regarding the applicability of state liquor laws, chapter 125, Stats., to a privately-owned liquor establishment operating on the Sokaogon (Mole Lake) Chippewa Community Reservation. Specifically, you ask whether such a liquor establishment located on trust land is subject to state licensing requirements and, if so, who has authority to enforce state liquor laws on the reservation. Where the licensing laws do apply, a related question is whether liquor licenses issued to on-reservation businesses count toward the local quota. Since you do not specify whether the liquor establishment is owned and operated by a tribe member or by a non-Indian, this opinion will address both circumstances.¹

For the reasons explained below, it is my opinion that state liquor laws are applicable to an on-reservation liquor establishment owned or operated by either a tribe member or a non-Indian, regardless of where the business is located within reservation boundaries. These privately-owned businesses also require licenses pursuant to chapter 125, and those licenses count toward the issuing municipality's quota. As with any violation of state liquor laws, county law enforcement agencies and the state revenue department have concurrent enforcement authority.

The United States Supreme Court held recently that state liquor licensing laws are applicable to liquor establishments on Indian reservations. *Rice v. Rehner*, 463 U.S. 713 (1983). In reaching this conclusion, the Court engaged in a two-part analysis to determine whether California's liquor licensing laws were federally preempted. The Court first determined the "backdrop" of tribal sovereignty,

¹ This opinion is restricted, however, to private-owned businesses. The application of the state liquor licensing laws to Indian tribes or to tribally-owned business will be addressed separately in a forthcoming opinion

and then addressed the question of whether the federal government has preempted state regulation in the area.

The backdrop of tribal sovereignty, against which the preemption question is viewed, is comprised of two factors: the tradition of tribal self-government in the area and the balance of state, federal and tribal interests involved. The Court in *Rice* found that Indian tribes have no tradition of self-government in regard to regulating liquor transactions. 463 U.S. at 722-24. “[T]radition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians.” *Id.* at 722. In regard to the balance of state, federal and tribal interests, the Court stressed the fact that on-reservation distribution of alcoholic beverages has a significant impact beyond the reservation boundaries. *Id.* at 724. Because of these factors, the Court stated that it would accord “little if any weight” to the backdrop of tribal sovereignty in this area. *Id.* at 725.

The second part of the analysis is whether federal law has preempted state regulation. Federal law provides that liquor transactions in Indian country are lawful so long as they are “in conformity both with the laws of the state in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register.” 18 U.S.C. §1161. The Court in *Rice* held that in enacting this provision, “Congress authorized, rather than preempted, state regulation over Indian liquor transactions.” 463 U.S. at 726. The legislative history of section 1161, the Court stated, indicates congressional intent to have state laws govern on-reservation liquor transactions so long as the tribe has enacted an ordinance approving such transactions.² *Id.*

The decision in *Rice* concerned the applicability of California’s liquor licensing laws to a federally licensed Indian trader, and the Court did not, therefore, directly address the issue of a liquor establishment owned or operated by a tribe member. Nonetheless, there is little doubt that *Rice* governs all individual proprietors. Consequently, under the holding of *Rice v. Rehner*, both tribe

² The Sokaogon Tribe adopted a tribal ordinance on April 28, 1977, legalizing the introduction, sale and possession of liquor on the Sakaogon Reservation. 42 Fed. Reg. 38, 653 (1977).

members and non-Indians would be subject to the chapter 125 licensing laws.³

These proprietors are, moreover, required to obtain a license from the Sokaogon tribal council (42 Fed. Reg. 38,653 (1977)), and to abide by all tribal ordinances relating to the sale of liquor. See *United States v. Mazurie*, 419 U.S. 544 (1975). This dual licensing requirement may impose an increased financial burden on liquor establishments operating on Indian reservations. Several alternative solutions are possible, including reduced licensing fees, a joint state-tribal licensing board and coordination of licensing schemes to prevent the duplicate license requirement. McDonnell, *Federal and State Regulation of Gambling and Liquor Sales within Indian Country*, 8 Hamline L. Rev. 599, 604 (1985); Commission on State-Tribal Relations, *State-Tribal Agreements: A Comprehensive Study*, 84-85 (1981). These alternative mechanisms to alleviate the burdens on both Indian and non-Indian liquor establishment proprietors need to be explored jointly by the tribes and the state.

A related issue is whether state liquor licenses issued to on-reservation liquor establishments count toward the local quota. Section 125.51(4) imposes a quota on "class B" licenses for on-premises sale of intoxicating liquor. As a general rule, a municipality is restricted to no more than one such license for every 500 population. *Rice* clearly indicates that on-reservation liquor licenses are includable in any limits set on the total number of licenses. 463 U.S. at 721. It is my opinion, therefore, that state "class B" licenses for the sale of intoxicating liquor issued to liquor establishments located on Indian reservations do count toward the municipality's quota. It should be noted, however, that the dissent in *Rice*, 463 U.S. at 737-38, indicates that the application of state regulations so as to deny licenses to Indian retailers may violate federal laws vesting the Commissioner of Indian Affairs with "the sole power and authority to appoint traders to the Indian tribes." 25 U.S.C. §261; see also 25 U.S.C. §262. The resolution of this issue, however, is beyond the scope of this opinion.

³ Throughout its opinion in *Rice*, the Court emphasized the special nature and the "narrow context" of liquor regulation. 463 U.S. at 722-24. Its holding that state licensing laws are applicable on Indian reservations should not, therefore, be construed to extend beyond the area of liquor laws. The opinion of this office that the state has no jurisdiction to require an Indian cigarette distributor doing business exclusively on the reservation to obtain a permit, for example, remains unaffected. See 68 Op. Att'y Gen. 151, 155 (1979)

Finally, you ask who has authority to enforce state liquor laws against liquor establishments located on the reservation. As already noted, state liquor laws apply on Indian reservations to privately-owned establishments serving liquor to the public. *See Rice*, 463 U.S. at 726-35. General enforcement authority is found in section 125.14, which provides that “any peace officer may arrest without warrant any person committing in his or her presence a violation of this chapter . . .” Sec. 125.14(1), Stats. Peace officers include sheriffs, undersheriffs, deputy sheriffs, police officers, constables, marshalls, deputy marshalls, and any employes of the state revenue and justice departments authorized to act under chapter 125. Sec. 125.02(12), Stats. Consequently, local law enforcement agencies and the state revenue department share concurrent jurisdiction with regard to enforcement of state liquor laws on the reservation.

In addition, liquor licensing laws may be enforced against individual proprietors through suspension or revocation of the license by either the issuing municipality or the state revenue department. Sec. 125.12(1), Stats. Failure to have a state license where one is required is punishable under the general penalty provisions of chapter 125 by a \$500 fine or ninety days imprisonment or both. Sec. 125.11(1)(a), Stats. As with other state liquor laws, jurisdiction to enforce these licensing provisions rests concurrently with local law enforcement authorities and the state revenue department.

On the other hand, any violation of tribal or federal liquor laws is enforceable by the tribe or by the federal government respectively. In the absence of cross-deputization of county and tribal law enforcement officers, county officers have neither the authority nor the responsibility to enforce tribal liquor laws on the reservation.

In summary, it is my opinion that liquor establishments on the reservation owned and operated by either individual tribe members or non-Indians require state liquor licenses. Any “class B” intoxicating liquor license issued to a business located on an Indian reservation counts toward the municipality’s quota. Enforcement of state liquor laws within reservation boundaries is vested concurrently in county law enforcement agencies and the state revenue department.

BCL:JDN

Employe Trust Funds Board; An appointee to the Employe Trust Funds Board whose appointment is based upon membership in the Wisconsin Retirement Board or Teachers Retirement Board continues as a member of the Employe Trust Funds Board even if he or she is no longer a member of the appointing board. The appointing board may, however, remove and replace their appointees to the ETF Board "at pleasure." OAG 26-86

August 12, 1986

GARY I. GATES, *Secretary*

Department of Employe Trust Funds

You request my opinion on two questions relating to the appointment of Employe Trust Funds (ETF) Board members by the Wisconsin Retirement (WR) Board and Teachers Retirement (TR) Board.

The WR Board and TR Board each appoint four members of the ETF Board for four year terms. At the time of appointment, each appointee must be a member of the appointing board. Sec. 15.16(1)(a) and (b), Stats. The situation which gives rise to your questions occurs when the ETF Board member's term continues past the end of his or her term on the WR Board or TR Board. You note the problem as follows:

WR Board and TR Board members are appointed to serve staggered five year terms per s. 15.165(3), Stats. These Boards each appoint four members of the ETF Board pursuant to s. 40.03(8) and 15.16(1), Stats. Each ETF Board appointment is for a four-year term (s. 15.16(1)) and, at the time of appointment, each appointee must be a member of the appointing Board (s. 15.16(1)). It is therefore inevitable that frequently a member's term on the WR Board or the TR Board will end and a successor be appointed and seated prior to the expiration of that member's four-year term of office on the Employe Trust Funds Board.

Your first questions asks:

In the circumstance described, does the Wisconsin Retirement Board (or the Teachers Retirement Board in like circumstances) have the authority to appoint a replacement to the Employe Trust Funds Board prior to the expiration of the four-year term of office on the Employe Trust Funds Board of the former WR Board incumbent?

The answer to this question is yes since the WR and TR Boards have, under section 17.07(6), Stats., the authority to remove and replace their appointees to the ETF Board at any time. That removal power exists even though the official is appointed for a specific term.

Section 17.07 reads in part:

Removals; legislative and appointive state officers. Removals from office of legislative and appointive state officers may be made as follows:

. . . .

(6) Other state officers appointed by any officer or body without the concurrence of the governor, by the officer or body that appointed them, at pleasure.

WR and TR Boards have thus been granted the statutory authority to remove their appointments to the ETF Board "at pleasure." As the Wisconsin Supreme Court stated in *Moses v. Board of Veterans Affairs*, 80 Wis. 2d 411, 414-15, 259 N.W.2d 102 (1977):

In this state the right to remove legislative or appointive state officers is given by statute to the person or body that made the appointment of such officer. This is codified in a removal statute creating certain categories of officers. These categories relate the right to remove an officer with the person or body that made the appointment. One such category is "state officers appointed by the governor by and with the advice and consent of the senate, or appointed by any other officer or body, subject to the concurrence of the governor." State officers in this category can be removed from office only "by the governor at any time, for cause." Another category is "[o]ther state officers appointed by any officer or body without the concurrence of the governor." State officers in this category can be removed from office "by the officer or body that appointed them, at pleasure." If the petitioner is in the first category, he can be removed only by the governor for cause. But if the second applies, he is removable by the board, at its pleasure.

(Footnotes omitted.)

This authority to remove appointees to the ETF Board "at its pleasure" rather than solely "for cause" is not diminished by the statutory specification that the appointment is for a four year term.

I note that sections 17.20(1), dealing with “vacancies in appointive state offices,” and 17.28, dealing with “when officers may hold office,” both provide that appointees “shall hold office for the residue of the unexpired term.” One could argue that this general language precludes the WR and TR Boards from exercising the “at pleasure” right to replace ETF Board appointees since they are appointed for a fixed term. I reject such a restrictive reading of this as a previous attorney general did by stating at 62 Op. Att’y Gen. 97, 100 (1973):

It is my opinion therefore that despite the appointment of the board for a term of years, the legislature clearly intended to permit their removal at the pleasure of the appointing authority. Since the office is held absolutely at pleasure, a hearing is ordinarily not required for such removal.

“[W]hen there are several statutes relating to the same subject matter they should be read together and harmonized, if possible,” *City of Milwaukee v. Milwaukee County*, 27 Wis. 2d 53, 56, 133 N.W.2d 393 (1965). “A statute should be so construed that no part of it is rendered superfluous by the construction given.” *State ex rel. Knudsen v. Board of Education*, 43 Wis. 2d 58, 65, 168 N.W.2d 295 (1969). “The general rule of statutory construction is that where two provisions are susceptible of a construction which will give operation to both, without doing violence to either, it is incumbent on the court to search for a reasonable theory under which to reconcile them so that both may be given force and effect.” *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 292, 125 N.W.2d 636 (1964) (footnote omitted). Sections 17.20(1), 17.28 and 17.07(6) are properly harmonized by my construction. While ETF Board members are appointed and hold office for a four year term (or until a successor is appointed), the WR Board or TR Board may remove their appointees at pleasure during that four year term. Any other construction would effectively eliminate the authority to remove appointees “at pleasure” granted by section 17.07(6) and would preclude the WR Board or TR Board from replacing a holdover ETF Board member against his will, except for cause.

Once appointed, an ETF Board member serves for a four year term (and as a holdover thereafter) unless a vacancy, as defined by section 17.03, is created. Where there is an incumbent lawfully holding the office of ETF Board member, there is no vacancy to be

filled by appointment. As the Wisconsin Supreme court stated in *State ex rel. Thompson v. Gibson*, 22 Wis. 2d at 290:

Under sec. 10, art. XIII of the Wisconsin constitution, the power to declare when an office shall be deemed to be vacant is vested in the legislature. Sec. 17.03 provides that an office shall be deemed to be vacant upon (among other things) the death, resignation, or removal of the incumbent, but nowhere is it declared that an office is vacant when an incumbent holds over after expiration of the term for which he was initially appointed.

Since the legislature has the power to declare the circumstances under which an office shall be deemed vacant, and has so declared in sec. 17.03, Stats., and since there is no provision in that statute, or any other, providing that a vacancy exists when a lawful appointee holds over, it cannot be said that an office is "vacant" for the purposes of sec. 17.20, where the incumbent holds over after expiration of his term.

Section 17.03 is, in part, material to the question addressed here:

Vacancies, how caused. Any public office is deemed vacant upon the happening of any of the following events, except as otherwise provided:

- (1) The death of the incumbent.
- (2) His resignation.
- (3) His removal.

....

(10) The expiration of the term of the incumbent *if the office is elective*.

....

(13) On the happening of any other event which is declared by any special provision of law to create a vacancy.

Expiration of the term of ETF Board member does not create a vacancy since the office is not elective. Thus "removal" by the WR Board or TR Board "at pleasure" was authorized by the Legislature as the method of replacing ETF Board members both during and when holding over after the expiration of the four year term. Lacking the removal power granted by section 17.07(6), the WR Board or TR Board could only remove for cause. I find nothing in the statutes limiting the "at pleasure" removal authority to those

ETF Board members holding over after completion of a term and therefore construe the statute to authorize removal at anytime during the term.

Your second question is:

If the answer to Question #1 is "Yes" is there any reason why the Wisconsin Retirement Board or the Teacher Retirement Board cannot permit the incumbent to complete his or her term on the Employee Trust Funds Board?

I find no reason that precludes an incumbent ETF Board member appointed by the WR Board or TR Board from remaining on the ETF Board even though he is no longer a member of the WR Board or TR Board that appointed him.

Section 15.16, providing for the membership of the ETF Board, states in part:

(1) Employee Trust Funds Board. The employe trust funds board shall consist of 11 members. The board shall consist of the governor or the governor's designee on the group insurance board, the secretary of employment relations or the secretary's designee and 9 persons appointed for 4-year terms as follows:

(a) Four members shall be members of the teachers retirement board, appointed by that board.

....

(b) Four members shall be members of the Wisconsin retirement board, appointed by that board.

....

(c) One member shall be a public member who is not a participant in or beneficiary of the Wisconsin retirement system.

The requirement of membership in the WR Board or TR Board is a requirement at the time of appointment and does not continue during the term. Had the Legislature intended continued membership on the WR Board or TR Board to be a continuing requirement, it would have so provided in section 15.16.

Section 15.165, which provides at subsection (3) for election or appointment of WR Board and TR Board members, specifically states at subsection (1)(a) that "[a]ny member of a board created under this section [15.165] who loses the status upon which the appointment or election was based shall cease to be a member of

the board upon appointment or election to the board of a qualified successor.” The fact that the Legislature included this specific language in section 15.165, relating to the WR and TR Boards, is a significant indication that there was no intent to include this concept in section 15.16 relating to the ETF Board. Since section 15.165(1)(a) begins with the qualifier “[a]ny member of a board created under this section,” it is reasonable to infer that since section 15.16 contained no such language the Legislature did not intend to set the same requirement for ETF Board members. *Robinson v. Kunach*, 76 Wis. 2d 436, 445-46, 251 N.W.2d 449 (1977).

It is therefore my opinion, in answer to your questions, that an appointee to the ETF Board whose appointment was based upon membership on the WR Board or TR Board may continue to remain a member of the ETF Board even if he is no longer a member of the WR Board or TR Board. The WR Board or TR Board may, however, remove and replace their appointees to the ETF Board “at pleasure.”

BCL:WMS

Copyright; Libraries; Public Records; Computerized compilation of bibliographic records discussed in relation to copyright law; under public records law requester is entitled to copy of computer tape or a printout of information contained on the tape. OAG 27-86

August 12, 1986

HERBERT J. GROVER, *State Superintendent*
Department of Public Instruction

In your letter of June 5, 1985, you ask:

Would it be contrary to the state public records law for an authority, such as a state agency or local public library board, to enter into a contract for computerized cataloging services which would limit public access to records concerning that authority's holdings which were created on behalf of the authority pursuant to the contract?

The factual bases for your inquiry are complex but need to be understood in detail. You state the following in your letter:

Since 1975 the Department of Public Instruction, Division for Library Services (hereafter Division or DLS) and numerous public libraries within the state, including libraries in the University of Wisconsin System, have contracted through a statewide network of libraries (the Council of Wisconsin Libraries, known as COWL) to purchase the services of the Online Computer Library Center (OCLC), a not-for-profit corporation in Dublin, Ohio. OCLC operates a computerized cataloging service which utilizes a shared data base of bibliographic records. OCLC provides the computer storage and software necessary to create and manipulate the records, and the member libraries who contract with OCLC create the records by entering the necessary data on their holdings into computer terminals located at each library.

Member libraries, that is, libraries which have contractually agreed to be part of the OCLC system, have access to the combined catalog records of all libraries in the system, including records contributed by the Library of Congress. Member libraries may search the online data base for catalog records and may also purchase from OCLC printed catalog cards and machine-readable catalog records on tape, which are extracted from information in the OCLC data base. These machine-readable tapes

are an important product to local libraries because they can be transferred from one computerized system to another and may be used in a variety of library automation activities.

Currently 95 public and private libraries in Wisconsin are members of OCLC and use OCLC's online system to enter cataloging data. Since 1975 DPI has awarded approximately \$1.8 million in federal grants to Wisconsin public libraries to assist them in joining OCLC and using the OCLC system for such activities as cataloging, conversion of bibliographic records to machine-readable form, interlibrary loans and for local automation activities.

In 1982 the Division received permission from all Wisconsin OCLC-member libraries to use their OCLC machine-readable tapes to create a *statewide* data base to be distributed to all Wisconsin libraries, including non-OCLC member libraries. The Division also developed a microcomputer program which permits non-OCLC libraries to add their holdings to the records in the statewide data base. Once a library has added its holdings to the data base, the library then may extract a complete bibliographic record and use the record for other local automation projects, such as circulation and interlibrary loans. The Division's past practice of providing information in the statewide data base to non-OCLC libraries appears to be jeopardized by recent developments in contract negotiations with OCLC.

In 1983 OCLC filed for copyright of its data base as a compilation. The Library of Congress eventually registered the copyright, but specifically limited the registration to the online compilation only, and indicated that any competing copyright claims would also be registered. A number of OCLC-member libraries have since filed copyright claims as co-authors of the data base. The legality and extent of the copyright have not been determined and OCLC's actions in filing for the copyright have created much concern and dissent among OCLC-member libraries.

Further information obtained by our office will assist in understanding the nature of the records involved and how they come about.

The OCLC online data base contains approximately 12 million bibliographic title entries which contain the information one is accustomed to finding in a traditional card catalogue at the public library. Over fifty percent of these entries have been made by the

Library of Congress. All other entries have been made by OCLC-member libraries having access to the OCLC computer system. OCLC does not itself make entries.

When an OCLC member obtains a new title (*i.e.*, book or other publication) for its collection, it checks, through its computer access to the OCLC data base, to determine whether the title and bibliographic information have been entered. If not yet entered, the library will enter the new title into the OCLC system. Along with traditional bibliographic information, it will state that the new title is held by the library. The next library making a similar inquiry of OCLC will find that the title has been entered and that it is available at the library that made the initial entry. The second library may then simply add its name to the record indicating that it too has the title in its holdings. This information would in turn be available to the next library that inquires about that title. In addition, a library with access to OCLC may modify the bibliographic record to conform to the library's particular format or needs. Any library entering a new title or making a modification or just adding its name to the list of holding libraries pays a prescribed fee to OCLC for the transaction.

An OCLC-member can obtain a computer tape of those titles or bibliographic records which it holds in its collection. However, as stated by your legal counsel:

OCLC has a rather intricate pricing system it uses when a library requests a copy of the computer tape of its holdings. Besides paying for the tape itself and production costs, COWL also pays between \$.013 and \$.035 for each record on the tape, the price depending upon the number of records on the tape. For example, if a tape has less than 1,000 records, OCLC will charge \$.035 per record; if a tape has more than 200,000 records, the charge will be \$.013 per record. This means it is much more cost efficient for COWL to purchase one tape with the transactions of all Wisconsin libraries, than for each library to purchase its own tape individually. In Wisconsin, one of the uses being made of the OCLC tapes has been to create a database and microfiche system called WISCAT. WISCAT provides a list of bibliographic records and the holdings of all Wisconsin libraries (including non-OCLC members) by title, author and subject matter. Currently OCLC does *not* produce such a microfiche system or a

listing of holdings by subject matter. Consequently, WISCAT is not competing with OCLC in this regard.

In order to create WISCAT, the DLS first purchases a tape copy of the transactions which Wisconsin libraries have entered into the OCLC data base. DLS also adds records from some local databases (which were developed before OCLC came into being) plus additional Library of Congress MARC records. DLS then sends these tapes to a private vendor, Brodart, for additional data processing. Brodart eliminates all duplicate entries, adds local and regional information to each record, adds an identifying number that is unique to Brodart, and then translates all of this information into microfiche cards. The data base which is used to produce the microfiche now contains nearly three (3) million bibliographic records and requires 3,600 microfiche cards. To reproduce this information into paper records would require over 720,000 sheets of paper and at \$.15 per page would cost over \$10,000.

(Haas letter of October 18, 1985, at 2.)

Your legal counsel has further advised me of your MITINET project:

The other major Wisconsin project is MITINET. MITINET is a micro-computer program which can be used on IBM-PC or Apple computers to enter into a computer format the holdings records of a non-OCLC library. After a library has recorded its holdings information on a floppy disk, the disk is sent to DLS. DLS then sends the disks to the Madison Area Computer System at the UW-Madison to convert the disks into computer tapes. These tapes are then sent to Brodart which puts the records into Library of Congress/MARC format and then converts them into WISCAT microfiche records. The LC-MARC format used by MITINET is not the same as the OCLC-MARC format used by OCLC. MITINET permits smaller libraries, for which OCLC membership is not economically feasible, to include their local holdings records on the WISCAT database and microfiche. Until very recently OCLC did not produce a program such as MITINET. Consequently, although MITINET was in no way competitive with OCLC when it was introduced, OCLC now considers it to be a competitive product.

(Haas letter of October 18, 1985, at 3.)

Thus, a non-OCLC member that identifies its local holdings in this way can have the information merged into the WISCAT data base by Brodart. Then, the local library obtains a separate computer tape of all titles it holds from Brodart, usually ordered through DLS. The tape can be used for circulation purposes. The tape would also show other Wisconsin libraries holding the same title so it could also be used for interlibrary loans.

OCLC has undertaken to renegotiate contracts with its members to include provisions controlling the transfer of the OCLC data base to nonmembers. The proposal embraces the following principles among others, as stated by OCLC:

- A. Protection and enrichment of the OCLC database for the benefit of the OCLC membership, and the library world in general, is both necessary and desirable. Third Parties who receive copies of Records should normally reciprocate by making their records and holdings available to the OCLC database.
- B. Protection of the OCLC database is best achieved by means of specific language in contracts with users and with OCLC-affiliated networks.
- C. Contracts with Third Parties will normally provide for appropriate compensation to OCLC, financial or other, for the use of Records.
- D. In the absence of contract provisions governing transfers to and use by Third Parties, OCLC may seek to protect the OCLC database by means of its copyrights. OCLC will not invoke copyright against general members or networks with which contracts have been executed which include protective language dealing with the transfer of Records to Third Parties.

Principle D appears to give an OCLC member a choice — either agree to new contractual provisions controlling transfer to third parties or be exposed to copyright infringement actions. In essence, you ask whether the public records law precludes DPI from agreeing to a contractual provision that could serve to limit access to the computerized records.

As a general matter, computer tapes in the possession of a state agency are “records” as defined in section 19.32(2), Stats. Section

19.36(4) expressly provides that material used as input for a computer program and material produced as a product are subject to inspection and copying, but that a computer program is not. However, section 19.32(2) further specifically provides that the term "record" does not include "materials to which access is limited by copyright, patent or bequest"

COPYRIGHT CLAIM

Because of the factual and legal complexity of this matter and the national scope of the controversy, I expect a final resolution of OCLC's copyright claim will come from the federal appellate courts. However, I can give you some legal principles to consider and my evaluation of the strength of the copyright claim given the facts as I understand them.

While the Copyright Act of 1976, like the prior statute, was enacted to further the public interest and not the interests of those seeking to profit from their intellectual properties, it is premised on a recognition that creativity is fostered by affording protection against copying by others. "[T]he real purpose of the copyright scheme is to encourage works of the intellect, and . . . this purpose is to be achieved by reliance on the economic incentives granted to authors and inventors by the copyright scheme." *Universal City Studios v. Sony Corp. of America*, 659 F.2d 963, 965 (9th Cir. 1981). That protection extends beyond the copying of the literary work itself to appropriation by derivative works, such as the motion picture version of a copyrighted novel. 17 U.S.C. §§101 and 106. Copyright protection does not extend, however, "to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. §102.

National Business Lists v. Dun & Bradstreet, Inc., 552 F. Supp. 89, 91-92 (N.D. Ill. E.D. 1982) (hereinafter cited as "*D&B*").

Facts alone are not copyrightable. *Rand McNally & Co. v. Fleet Management Systems*, 591 F. Supp. 726, 731 (N.D. Ill. E.D. 1983) (hereinafter "*Rand McNally*"). Neither are ideas or their use. *Signo Trading Intern. Ltd. v. Gordon*, 535 F. Supp. 362, 365 (N.D. Cal. 1981) (hereinafter "*Signo*"). However, the compilation of facts may be protected by copyright even though the facts themselves are in

the public domain. *Schroeder v. William Morrow & Co.*, 566 F.2d 3, 5 (7th Cir. 1977).

The courts express some dismay that copyright protection is accorded to compilations. *D&B*, 552 F. Supp. at 91-92; *Rand McNally*, 591 F. Supp. at 731. Compilations do not usually involve the sort of original, creative or intellectual works that fall more readily within the concept of copyright protection. As stated by the court in *D&B*, 552 F. Supp. at 92:

That protection does not fit nicely into the conceptual framework of copyright law and has for that reason been criticized. *See 1 Nimmer on Copyright* §3.04 (1981). It has been suggested that the act of aggregating isolated pieces of information can be authorship, with the resulting collection of data being a work of authorship. . . . The courts have generally rested, however, not on an analysis of copyright concepts but on the economic incentives premise of the copyright law and the injustice of permitting one to appropriate the fruit of another's labor. . . . That concept of authorship is, moreover, supportable by the language of the Copyright Act of 1976, which defines compilations as "a work formed by the *collection* and assembling . . . of data that are *selected, coordinated, or arranged* in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. §101 (emphasis supplied). And the protection of copyright extends to protection against derivative works, which include any form "in which a work may be recast, transformed, or adapted." 17 U.S.C. §§101 and 106. Finally, 17 U.S.C. §103(b) distinguishes between material contributed by the author of a compilation and preexisting material, granting protection to the former but not to the latter.

Though protected, "compilations" are considered to be at the "outer boundaries of copyright law." *D&B*, 552 F. Supp. at 91, 94.

Thus, the protection accorded compilations is based on the premise that the fruits of the compiler's labors should be protected from appropriation. *D&B*, 552 F. Supp. at 92, 94. In the most recent case out of the Seventh Circuit Court of Appeals, the court rejects the importance of originality and focuses on the need for "industrious collection" and "substantial independent effort" on the part of the compiler. *Schroeder*, 566 F.2d at 5, 6.

Although OCLC's role can be seen as a collection activity, it may fall short of the kind of industrious and independent effort needed to establish protection. This is due to the fact that it is the OCLC-members, and not OCLC, who actually create the collection through their entries into the data base. It is the members who create, update and manipulate the data base.

Copyright in a compilation "extends only to the material contributed by the author." *Rand McNally*, 591 F. Supp. at 731; *D&B*, 552 F. Supp. at 92. It does not include input from other sources. *Rand McNally*, 591 F. Supp. at 733. It may be that OCLC does not contribute any substantive material to the data base. It provides only a means of collection, storage and retrieval. Copyright protection is not affected by the fact that a computer is used. 17 U.S.C. §117 (1977). In my view, this mere "mechanism" for compilation is not protected by the copyright laws.

FAIR USE

If it is determined that OCLC has a compilation that is copyrightable to some extent, use of the compilation in the manner now in controversy may nevertheless be defensible against a claim of copyright infringement based on the defense of "fair use."

The doctrine of "fair use" is codified in 17 U.S.C. §107 (1977), which reads:

Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The factors enumerated are not meant to be exclusive. *Harper & Row Publishers v. Nation Enterprises*, 105 S. Ct. 2218, 2231 (1985).

The general intention behind the provision is as follows:

General Intention Behind the Provision. The statement of the fair use doctrine in section 107 [this section] offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 [this section] is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

1976 U.S. Code Cong. & Ad. News 5680.

1. Purpose and character of the use.

The controversial use here involves the extraction of bibliographic entries from the OCLC data base and through various stages and processes the production of an individualized computer tape that can be used by a local library in Wisconsin for its particular holdings and needs. The service provided by DPI is entirely nonprofit. Indeed, the service is subsidized to some extent by state funds. There is no commercial motive. The motivating purpose is to improve the state's library system. All these factors are strong indicators of "fair use."

2. The nature of the copyrighted work.

Assuming OCLC qualifies as a copyrightable compilation, it has already been noted that compilations exist at the fringe of the copyright laws. *D&B*, 552 F. Supp. at 91. Also important is the fact that the critical input into the data base comes from and is really accomplished completely by the members, and OCLC provides only the mechanism. These factors indicate a lower form of copyright interest.

3. The relative amount of the portion used.

It is my understanding that the OCLC data base holds approximately 12 million titles and you extract about 2.6 million of those for the WISCAT data base for use in Wisconsin. When computer tapes are provided through DLS and Brodart for a local library, the number of titles ranges from 25,000 to 40,000 titles.

In *Williams & Wilkins Company v. United States*, 487 F.2d 1345, *aff.*, 420 U.S. 376 (1973), it was held that the absolute volume of copying is not decisive. *Williams*, 487 F.2d at 1355. There the National Institute of Health and the National Library of Medicine were copying 930,000 pages a year mainly from medical journals, but that volume did not preclude a decision that their use was a fair use.

In the instant situation a local library in Wisconsin is typically obtaining less than one-half percent of the total OCLC data base.

4. Effect on market for or value of the copyrighted work.

The burden would be on OCLC to show some substantial injury flowing from DLS's use of the data base, and OCLC could not simply rely on the assumption that your service is depriving it of clients. *Williams*, 487 F.2d at 1358-59.

The court in *Williams* was not convinced that the suppression of copying would result in more sales by the publisher. There are other means, or one could simply go without. *Williams*, 487 F.2d at 1359.

The same may be true here. If the local libraries cannot obtain computer tapes of their holdings from DLS, it may be very unlikely that they would be able to go to OCLC for the service. The result would be a return to the less efficient card catalog systems and interlibrary loan systems. The quality of the state's library system would suffer, and ultimately school children and others who rely on libraries would be deprived.

In addition to weighing the foregoing factors, the court in *Williams* also took into account the fact that there was some question as to the legal basis for the infringement claim. *Williams*, 487 F.2d at 1359. That factor is present here as well, as discussed earlier. Another factor vitiating against OCLC is that it has acquiesced to this practice since its inception. If there is a market, DLS has created it.

In the end, one must balance the public interest to be served against the copyright interests to be protected. *Williams*, 487 F.2d at 1359.

In *Williams*, the court decided that the risk to the plaintiff's business was unproven while there would be an obvious detrimental impact on medical science if copying of journal articles was suppressed. The court held the use to be a "fair use."

In the case before us, it appears equally true that suppression of established services to local libraries will have a detrimental effect on the state's library system without necessarily generating any benefit for OCLC. This, along with the fringe nature of OCLC's underlying copyright claim, lead me to believe that a reviewing court would hold your use to be a fair one.

COPYING COMPUTERIZED RECORDS

At the time when the only general statutory law on public records was section 19.21, the attorney general opined that there was a right to obtain a copy of computer tapes, including those containing computer programs. 59 Op. Att'y Gen. 144, 147 (1970); 63 Op. Att'y Gen. 303, 304 (1974). The question is whether the expanded codification of the public records law enacted by chapter 335, Laws of 1981, requires a change in that interpretation. It certainly does in part since section 19.36(4) now provides that a computer program is not subject to examination and copying. However, the new statutes do not prohibit the copying of computer tapes. Indeed section 19.36(4) affirmatively provides that the data base and "product of the computer program," which could be a computer tape, are subject to copying. If this were the end of section 19.36(4), I would say the law as expressed by the earlier opinions of this office with respect to computer tapes remains unchanged. That is, there is a right to copy a computer tape under the public records law.

However, further analysis is necessary because section 19.36(4) says it is subject to exceptions in section 19.35. Section 19.35(1)(a) carries over any common law principles. Section 19.35(1)(c) and (d) specifically authorize the copying of audio tapes and video tapes, and there is no specific authorization for copying of computer tapes. It may be argued this omission constitutes an implicit exception. But I do not believe this to be the legislative intention. In my opinion, there need be no specific authorization in section 19.35(1)

to copy a computer tape, because sections 19.36(4) and 19.21, as previously interpreted, authorize copies of computer tapes.

Section 19.35(1)(e) reads as follows: "Except 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." It appears from the drafting files in the Legislative Reference Bureau that the drafters had computerized information in mind when they drafted this paragraph. The language first appeared in the drafts that became Assembly Substitute Amendment 1 to 1981 Senate Bill 250, and the initial drafting instructions (LRB S 0810) included the following notation for section 19.35(1): "Computer (right to demand transcription)." Again, it may be argued that by specifically authorizing a copy of computerized information in written form, *i.e.*, a printout, the Legislature intended to prohibit copying of the computer tape that holds the information. Again, it is my opinion that such an exception by implication is not necessary or compelling and should not be found to overcome the affirmative provisions of sections 19.35(1)(a), 19.36(4) and 19.21, as previously interpreted.

If the Legislature had intended to preclude the copying of computer tapes it would have said so in section 19.36(4), where it expressly precludes the copying of computer programs. This is especially so since it specifically included "computer tapes" in the definition of a record in section 19.32(2).

It is well to note that statutory exceptions due to silence and implication are based on the general rule of statutory construction *expressio unius est exclusio alterius* which provides that the express mention of one matter excludes other similar matters not mentioned. *Teamsters Union Local 695 v. Waukesha County*, 57 Wis. 2d 62, 67, 203 N.W.2d 707 (1973). But our supreme court has cautioned against its use:

Although based upon logic and the working of the human mind, it is not a "Procrustean standard to which all statutory language must be made to conform." . . . Factually, there should be some evidence the legislature intended its application lest it prevail as a rule of construction despite the reason for and the spirit of the enactment.

Columbia Hospital Asso. v. Milwaukee, 35 Wis. 2d 660, 669, 151 N.W.2d 750 (1967).

In my opinion, section 19.35(1)(e) is intended to be supplemental. It makes clear that a requester may have computerized data reduced to written form if the data is otherwise not comprehensible to the requester. However, if a computer tape is comprehensible to the requester because the requester has a machine that can read a computer tape, it is my opinion the requester may obtain a copy of the computer tape. Indeed, in some cases I would expect that the computerized record would be meaningful and manageable only through access to the computer tape, and that a printout would be worthless.

Therefore, it is my opinion that any agreement to refuse to provide copies of computer tapes, other than those containing computer programs, would be inconsistent with the state's public records law.

BCL:RWL

Bus Drivers; The requirements of section 121.555(2)(a), (c)1., 2., 3. and 5. and (d), Stats., apply to all drivers transporting pupils other than only their own children to and from curricular and extracurricular activities, if such transportation has been provided by the school board. The requirements of section 121.555(2)(b) and (c)4. only apply if the vehicle used is owned or leased by a school or a school bus contractor or is operated by a school district employe. OAG 28-86

August 20, 1986

TIM CULLEN, *Chairperson*
Senate Organization Committee

You have asked whether section 121.555, Stats., applies to only those drivers of vehicles which are supplied and contracted for by the school board or whether it applies to all drivers transporting pupils to and from curricular and extracurricular activities. Your primary concern appears to be whether the scope of this section covers volunteer drivers, particularly parents, who help out by transporting pupils on field trips or to other extracurricular activities. •

Section 121.555(1)(a) provides:

A school board or the governing body of a private school may provide pupil transportation services by the following alternative methods:

(a) A motor vehicle transporting 9 or less passengers in addition to the operator.

It is my opinion that this section of the statutes applies to all drivers transporting pupils other than only their own children to and from curricular and extracurricular activities, if such transportation has been provided by the school board.

Section 121.55 is entitled “[m]ethods of providing transportation,” and specifies the various entities or persons with whom school boards may contract to provide transportation. All methods specified under this section require a contract except for subsection (1)(e) which allows a school board to purchase and operate a motor vehicle.

Section 121.555 is entitled “[a]lternative methods of providing transportation.” Neither of the methods delineated in this section

mention the word "contract." Section 121.555 appears, therefore, to clearly *not* be limited to drivers who contract with the school board.

Section 121.555 is, however, limited in application to those methods of transportation which are "provided" by a school board. When a school plans a field trip or extracurricular activity and the principal or other authorized person makes arrangements with parents to voluntarily transport the pupils participating in such an event, this appears to be transportation *provided by* the school. However, where a parent, without request, solicitation or approval by a school board or authorized administrator, voluntarily transports pupils to an extracurricular event, section 121.555 would not apply. Such a situation may, for example, arise when a parent transports pupils to participate as spectators in an out-of-town athletic event.

Section 121.555 specifies that a *school board* may provide pupil transportation services. Section 121.54(7)(a)4., which also deals with provision of transportation for extracurricular activities, lists as one of the conditions for the exercise of such power that "[t]he school principal or other person with comparable authority authorizes such use." Subsection (7)(a)1. of that statute refers to the use of a motor vehicle under section 121.555(1)(a). In my opinion, a school board may delegate its authority to provide transportation under section 121.555 to a school principal or other person with similar authority.

In determining the intent of the Legislature, it is reasonable to identify the legislative concern which gave rise to the provision to be construed. *St. John Vianney Sch. v. Janesville Ed. Bd.*, 114 Wis. 2d 140, 336 N.W.2d 387 (Ct. App. 1983). "The overall concern behind the school transportation statutes is the safety and welfare of pupils." *St. John Vianney School*, 114 Wis. 2d at 155. *Also see Morrisette v. DeZonia*, 63 Wis. 2d 429, 440, 217 N.W.2d 377 (1973). Although the *Morrisette* case involved the general provision of bus transportation under section 121.54, it is significant to note that the court concluded that exceptions to the provision of transportation should be narrowly construed.

In determining the meaning of an ambiguous statute, a court may also look at the statutory context, subject matter, scope, history and object to be accomplished. *In Interest of I.V.*, 109 Wis. 2d

407, 409-10, 326 N.W.2d 127 (Ct. App. 1982). It is proper to consider the Legislative Reference Bureau's analysis in construing a statute. *Tanck v. Clerk, Middleton Jt. School Dist.*, 60 Wis. 2d 294, 305, 210 N.W.2d 708 (1973); *Czaicki v. Czaicki*, 73 Wis. 2d 9, 16, 242 N.W.2d 214 (1976).

1983 Wisconsin Act 127, which created section 121.555, was introduced as 1983 Assembly Bill 480. The analysis by the Legislative Reference Bureau describes this bill as a reorganization and revision of the law relating to transportation services provided by schools for pupils and transportation services for elderly or handicapped persons. In part, this analysis states:

As an alternative to using school busses, school boards or governing bodies may elect to provide pupil transportation in a motor vehicle transporting the operator and 10 or less passengers. A similar provision exists in current law for transport of up to 9 passengers in cars or station wagons. If the vehicle is owned or leased by the school or a school bus contractor the current school bus insurance requirements are applicable, *otherwise* the vehicle must be insured for \$10,000 property, \$25,000 each individual and \$50,000 total accident. The operator must have a valid Wisconsin operator's license and be at least 18 years old. The current requirements for a physical examination and driving records are applicable. The vehicle must be inspected every year and may not be used to transport persons in excess of the permanent forward-facing seats in the vehicle.

(Emphasis added.)

This same bill also defined "human service vehicle" (HSV) which is used to transport elderly or handicapped persons. Vehicles driven by volunteers are expressly excluded from the definition of a HSV and are not subject to the insurance requirements for such vehicles. No such exclusion is made for vehicles driven by volunteers transporting pupils under section 121.555(1)(a)1.

By reason of the rule of respondeat superior a public body, including a school district, is liable for the torts of its officers, agents and employes occurring in the course of business of such public body. *Holytz v. Milwaukee*, 17 Wis. 2d 26, 40, 115 N.W.2d 618 (1962). When a school board, pursuant to statutory authority under section 121.555, arranges for a driver to transport pupils to an outside school activity, a court may conclude such a driver is an

agent of the district school for whose actions the municipality could be liable.

An unfortunate situation would also arise if a court found that the driver was not an agent, but was instead an independent contractor and the driver did not have adequate insurance coverage. The municipality would not be liable for the actions of an independent contractor. A pupil injured in such circumstances would have no remedy available from which to recover compensation. This outcome would be inconsistent with the legislative purpose to provide for the welfare of school children.

To conclude that parents transporting pupils other than only their own children are included within the scope of section 121.555 is also consistent with the intent of the Legislature in requiring a motor vehicle used as a school bus or other vehicle contracted for by a school board to be covered by liability insurance.

Section 121.53 is the general statute imposing insurance requirements on vehicles transporting pupils. The purpose behind this section is to protect a school district from loss due to the torts of its agents. Subsection (1) provides that no motor vehicle may be used as a school bus unless liability insurance of specified limits is maintained thereon. Subsection (2)(b) provides that insurance shall cover the transportation of pupils and other persons "in connection with any extracurricular school activity authorized by and made in compliance with s. 121.54(7)." Subsection (5) provides:

Subsections (1) to (4) do not apply to:

(a) A motor vehicle owned or operated by a parent or guardian transporting *only his own children*, whether or not any contract is made with or compensation paid to the parent or guardian for such transportation by a school board.

(b) A motor vehicle operated by a common carrier certificated under ch. 194, where such motor vehicle is used under contract pursuant to this subchapter, if the common carrier has complied with s. 194.41 or 194.42.

(c) A taxicab regulated by a municipal ordinance under s. 349.24 when used to transport pupils.

Section 340.01(56) defines "school bus." Subsection (a) states that a school bus is a motor vehicle which carries ten or more passengers in addition to the operator or a motor vehicle painted in

accordance with section 347.44(1). Subsection (b) excludes from the definition of a school bus:

1. A motor vehicle owned or operated by a parent or guardian transporting *only his or her own children*, regardless of whether a school has made a contract with or paid compensation to such parent or guardian for such transportation.
2. A motor vehicle operated as an alternative method of transportation under s. 121.555.
3. A motor bus operated for purposes specified in par. (a)2.
4. A motor vehicle operated in an urban mass transit system as defined in s. 85.20(1)(e) and (f).

Busses transporting pupils to extracurricular activities which are not under a written contract with the school must still comply with the school bus regulations prescribed by the motor vehicle department. 41 Op. Att'y Gen. 227 (1952). This opinion cites *Verbeten v. Huettl*, 253 Wis. 510, 34 N.W.2d 803 (1948), in which the court concluded that statutory authority vesting the motor vehicle department with the power to regulate the transportation of persons by motor vehicle in the interests of public safety is not limited to regulating only those school busses operating under contract.

There is nothing in the statutes to suggest that parents of school children who volunteer to transport pupils, other than only their own children, to and from extracurricular activities authorized by the school district are not intended to be covered by the insurance provisions found in section 121.555(2)(a). In fact, as certain school transportation statutes twice specifically exclude parents who transport *only* their own children, it appears that parents who transport other children *are* intended to be included. This result is consistent with the principles of statutory construction that the Legislature would not have used language which was clear on the face of a statute, if it did not intend it to have meaning, *State ex rel. Opelt v. Crisp*, 81 Wis. 2d 106, 260 N.W.2d 25 (1977); and statutes should be construed in a manner which avoids making any word or phrase superfluous. *Green Bay Broadcasting v. Green Bay Authority*, 116 Wis. 2d 1, 19, 342 N.W.2d 27 (1983).

Looking at all the statutes governing the transportation of pupils, it is clear that insurance requirements are not limited to those operators of vehicles meeting the statutory definition of

school bus, nor are they limited to operators under contract or vehicles owned by the school system.

On the other hand, section 121.555(2)(b) and (c)4., relating to motor vehicle inspection and operator requirements respectively were recently amended to add language which makes it clear that subsection (2)(b) and subsection 4. of (2)(c) are not intended to apply to volunteer drivers. As amended by 1985 Wisconsin Act 240, these subsections now read:

121.555(2)(b) Inspection. If the vehicle is owned or leased by a school or a school bus contractor or is operated by a school district employe, it shall be inspected annually for compliance with the requirements of s. 110.075, ch. 347, and the rules of the department of transportation. The owner or lessee of the vehicle is responsible for the annual inspection.

(c)4. Shall submit at least once every 3 years to the school a medical opinion in such form as the school may prescribe that the operator is not afflicted with or suffering from any mental or physical disability or disease such as to prevent the operator from exercising reasonable control over a motor vehicle. The examination report prescribed in s. 118.25(2) and (4) may be used to satisfy this requirement. This subdivision applies only if the vehicle used under sub. (1) is owned or leased by a school or a school bus contractor or is operated by a school district employe.

It is my opinion that section 121.555(2)(c)1., 2., 3. and 5. and (d) continue to apply to volunteer drivers transporting pupils other than only their own children. By specifically adding the language "owned or leased by a school or a school bus contractor or is operated by a school district employe" to only certain portions of section 121.555, the Legislature appears to have intended that it is only the requirements of those subsections which are limited in application.

I previously issued an opinion on December 8, 1976, that the legislative framework found in the school transportation statutes clearly evince an intent on the part of the Legislature that children transported to and from school and children being transported while engaged in extracurricular activities should be transported in vehicles meeting certain safety standards and driven by persons meeting certain requirements. 65 Op. Att'y Gen. 298 (1976).

Section 121.52 spells out vehicle, operator and driver requirements for vehicles operated under contract or for compensation. Similarly, subsection 121.555(2)(c) lists operator requirements clearly designed to insure that the driver of a vehicle not operated under contract, but who is also transporting pupils is a safe driver. Subsection (d) relating to seating requirements is also a safety feature. Concluding that these two subsections apply to volunteer drivers is consistent with legislative intent to provide safe transportation to school children.

BCL:JSM

Attorneys; Public Officials; State Bar; The State Bar of Wisconsin is a state agency created by the constitutional authority of the supreme court. The authorized functions of the State Bar may come under the "State Action" exemption to the antitrust laws and the procedures employed by the Unauthorized Practice Committee and the Ethics Committee appear to provide due process but specific opinions in this regard must be given on a case-by-case basis. Volunteer lawyers giving free legal advice in the "Lawyer Hotline" program are agents of the State Bar and are entitled to common law immunity and indemnification under section 895.46(1)(a), Stats. OAG 30-86

August 25, 1986

FRANKLYN M. GIMBEL, *President*
State Bar of Wisconsin

Your predecessor requested my opinion regarding possible liability of the State Bar (Bar) or individual committee members because of the "activities" of the State Bar Unauthorized Practice of Law Committee and the State Bar Ethics Committee especially as it relates to antitrust law and denial of due process. He also sought my opinion regarding the "activities" of the Lawyer Referral and Information Service, more popularly known as the "Lawyer Hotline," where volunteer lawyers talk by telephone to members of the public and give legal advice on simple legal questions. Since the "activities" are not fully described in the opinion request in terms of a factual setting, this opinion is limited to activities authorized by the supreme court.

I.

Our discussion appropriately begins with an examination of the nature of the Bar. The Bar is an integrated bar, that is, it was created "as a state agency to serve a public purpose" by constitutional authority of the supreme court. *Lathrop v. Donahue*, 10 Wis. 2d 230, 243, 102 N.W.2d 404 (1960), *aff'd*, 367 U.S. 820 (1961). The court has the exclusive authority to determine the functions of the Bar and has the exclusive authority to determine its existence or demise. Its supervisory function over the Bar was explained by the court in *Lathrop*, 10 Wis. 2d at 240:

However, as we pointed out in our opinion in the 1958 *In re Integration of Bar Case*, this court will exercise its inherent

power to take remedial action should the State Bar engage in an activity not authorized by the rules and bylaws and not in keeping with the stated objectives for which it was created.

The Bar's status as a state agency was explained in *Lathrop*, 10 Wis. 2d at 243:

The State Bar is a public agency the same as the judicial council. One has been created by the court and the other by the legislature but each was created by state action as a state agency to serve a public purpose.

It appears clear, therefore, that the Bar is a state agency as created by the constitutional judicial power of the supreme court. However, the supreme court expects "the bar to act freely and independently on all matters which promote the purposes for which the bar was integrated" provided such acts are "within the framework of its rules and by-laws," *Axel v. State Bar*, 21 Wis. 2d 661, 124 N.W.2d 671 (1963).

It is thus instructive to examine the functions of the Bar as authorized by rules and bylaws in the fields of unauthorized practice, ethics and the "Hotline," and then determine whether those functions are "in keeping with the stated objectives for which it [the Bar] was created." *Lathrop*, 10 Wis. 2d at 240. The Unauthorized Practice Committee derives its authority under Article IV, Section 10 of the bylaws which were originally approved by the supreme court in connection with the official integration of the Bar. Section 10 reads as follows:

Section 10. Committee on Unauthorized Practice of Law. This committee shall keep the membership informed with respect to the illegal practice of law by unlicensed laymen, and shall endeavor to eliminate the exposure of the public to the hazards of unskilled and unauthorized practice of law by those who have not met the education and moral standards and who are not subject to the ethical standards or disciplinary regulation required for those licensed to practice the profession of law.

In *Lathrop*, 10 Wis. 2d at 248, the court explained the duties of the Committee on Unauthorized Practice:

Discouraging Unauthorized Practice of the Law.

One of the standing committees of the State Bar is that of unauthorized practice of law. The primary purpose of such com-

mittee is to protect the public from incompetent laymen attempting to offer or perform legal services which they are not competent to render. This is a constant program since numerous trades and occupations keep expanding their services and frequently start offering services which constitute the practice of the law. As a result of integration the income from dues has enabled the State Bar to employ an additional lawyer on its staff whose major assignment is to investigate complaints made with respect to instances of unauthorized practice of the law, and to cause any unauthorized practices so discovered to be discontinued through persuasion or legal action.

Briefly stated, the committee, with the help of the staff attorney, reviews complaints received from the public, government agencies, judges and attorneys concerning unauthorized law practice. If the committee, after investigation, concludes that the complained of activities are the practice of law and unauthorized, efforts are made to secure voluntary compliance, usually by letter. If those efforts are successful the matter is closed.

In those cases where compliance is not forthcoming by "persuasion," the matter is referred to the Board of Governors with a recommendation for "legal action." *Lathrop*, 10 Wis. 2d at 248. If the board agrees, a request is sent to this office for appropriate legal action. If we agree that legal action is justified, we determine whether to bring a civil action or criminal action and, if the latter, we usually refer the matter to the district attorney of the county involved.

Since integration, the Bar has been involved as a complainant or party in several cases involving the unauthorized practice of law. *State ex rel. State Bar v. Keller*, 16 Wis. 2d 377, 114 N.W.2d 796, 116 N.W.2d 141 (1962), *vacated*, 374 U.S. 102 (1963); *State ex rel. State Bar v. Bonded Collections*, 36 Wis. 2d 643, 154 N.W.2d 250 (1967); *State ex rel. Baker v. County Court*, 29 Wis. 2d 1, 138 N.W.2d 162 (1965); and *State ex rel. Reynolds v. Dinger*, 14 Wis. 2d 193, 109 N.W.2d 685 (1961). The supreme court has recognized in those cases that the Bar has been acting within the delegated authority specified in *Lathrop*.

The second function to be discussed is the Ethics Committee which is also created by the State Bar Bylaws. Article IV, Section 5 reads as follows:

Section 5. Committee on Professional Ethics. This committee shall formulate and recommend standards and methods for the effective enforcement of high standards of ethics and conduct in the practice of law; shall consider the "Code of Professional Responsibility and Disciplinary Rules as adopted by the Wisconsin Supreme Court" and the observance thereof, and shall make recommendations for appropriate amendments thereto. The committee shall have authority to express opinions regarding proper professional conduct, upon written request of any member or officer of the State Bar. However, the committee shall not issue opinions as to the propriety of past or present conduct of specific member attorneys unless requested to do so by a grievance committee of the State Bar or by the Board of Governors of the State Bar. In those latter instances of requests relating to a specific member, they shall be treated as confidential and shall not be open to public inspection. In such cases, the opinion of the committee shall not disclose the names of any parties, but such opinion shall be open for inspection in the same manner as other opinions of the committee.

The supreme court acquiesced in the establishment of this committee when it approved the bar's original bylaws. The purpose of the committee was the promotion of high standards of ethics and conduct in the practice of law. The committee is authorized to express opinions interpreting chapter SCR 20 known as the "Code of Professional Responsibility." The opinions which are authorized by the committee can interpret whether specific conduct meets with the provisions of chapter SCR 20. However, as is the case with the unauthorized practice of law, whether certain conduct violates specific ethical standards is, in the final analysis, the responsibility of the supreme court. An opinion of the Ethics Committee to a member or officer of the Bar serves an advisory function but is not binding on the Board of Attorney's Professional Responsibility and the supreme court. The intent is to provide guidance to the profession and, as is explained in SCR 20.002: "The code is adopted by the Wisconsin supreme court both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standard stated in the disciplinary rules."

The Ethics Committee may not, however, issue opinions as to the propriety of past or present conduct of an attorney unless requested to do so by a grievance committee of the State Bar (now called Professional Responsibility Committee) or by the Board of

Governors. In those cases, the request and opinion are confidential and are not to be open to public inspection.

Finally, it should be noted that the supreme court rejected in 1983 and again in 1985 State Bar petitions seeking the supreme court's direct authorization of the Bar's ethics and unauthorized practice activities. In December of 1983, the Bar petitioned the court to set up the State Bar as an "official arm" of the court, acting in a quasi-judicial capacity. The Bar would have been "charged by the court with the duty of advising and educating State Bar members on matters pertaining to the standards of professional conduct." A reconstituted standing committee on professional ethics would have had the power and "responsibility" to issue advisory opinions. The supreme court denied the petition by order dated February 7, 1985.

The court observed that the petition¹ was "substantially the same" as petitions filed by the State Bar in April of 1982, which were denied by the court in January of 1983. The 1985 order provided in part as follows:

In [the 1983] order, the court stated that it was of the opinion "that it is not proper for the court, as final arbiter in unauthorized practice of law and professional ethics matters, to participate in the giving of advisory opinions by State Bar committees." The court continued to be of that opinion.

. . . [T]he State Bar is not the proper entity to render formal advisory opinions having any binding effect for the reason that it neither promulgates the rules of professional ethics or the rules prohibiting the unauthorized practice of law nor enforces them.

. . . [T]he regulation of the practice of the law is a judicial power and is vested exclusively in the Supreme court, although we have recognized the Legislature's authority to place additional penalties upon those who engage in the authorized practice of the law Consequently, it is not proper that this court participate to any extent in the rendering of advisory opinions on either issue.

Notwithstanding the State Bar's concern with the rules of professional ethics and the unauthorized practice of law and its desire to assist its membership in dealing with these matters, we decline to give it the authority, quasi-judicial or otherwise, to

¹ In the matter of the amendment of SCR Chapter 10 State Bar Rules (February 7, 1985).

issue advisory opinions that either are binding on the court and its Board of Attorneys Professional Responsibility or are subject to review by the court. (Emphasis added).²

The third activity on which you seek advice is the Lawyer Referral and Information Service, commonly known as the "Lawyer Hotline." You explain that the "Hotline" makes volunteer lawyers available to talk by telephone to members of the public who have simple legal questions. The service is offered totally without charge to the caller. If the person needs more assistance than can be provided during a short five minute telephone conversation, the caller is urged to consult an attorney of his or her choice. The volunteer lawyer does not give his or her name to the caller and is not available to perform services for a fee.

There is no specific bylaw or supreme court rule which directs the Bar to provide this service. It was originally conceived, I understand, by the State Bar Foundation and proved to be an extremely popular program. Eventually it became a joint function of the Foundation and the Bar and is included in the Bar budget which is submitted to the supreme court each year for approval.

Supreme Court Rule 10.02(2) is entitled "PURPOSES." The last three lines of that paragraph read as follows: "to promote the innovation, development and improvement of means to deliver legal services to the people of Wisconsin; to the end that the public responsibility of the legal profession may be more effectively discharged."

The functions of the "Hotline" seem to fall within the meaning of the above purposes of the Bar as approved by the supreme court. That the court approves of this function is fairly inferred from its knowledge that sums for this function are included in the budget and the function itself is part of an annual report and audit provided to the court.

II.

The first question posed is whether this office would provide legal counsel in case of a lawsuit against the Bar and individual lawyers performing authorized functions in connection with these three State Bar activities. Historically, this office has represented the integrated bar in connection with lawsuits brought against the Bar, members of the Board of Governors, and employes and agents of the Bar when such lawsuits arise out of the official state agency

² *Id.* at 1-2

functions of the Bar. We will continue to provide such representation where the law requires that we provide the representation. We have also provided legal services in the form of formal and informal opinions and consultations with members of the staff, the board and committees in regard to the Bar's state agency functions and will continue to do so where appropriate.

However, we may decline to provide representation in accordance with section 895.46(1)(a), Stats., where we conclude that the act complained of did not grow out of or was not committed in the course of an individual's state agency duties or is beyond the supreme court delegation. Also, where the Bar has an insurance policy covering liability asserted against the Bar, its officers, employees or agents, we may choose not to provide representation where the insurance company is obliged to do so and the claim is not in excess of the policy limits. Obviously, each case would be considered on its own merits. In those situations where there is a claim for declaratory and/or injunctive relief based on allegations of unconstitutionality of statutes or rules administered by the Bar, we have and will continue to provide legal representation without cost where appropriate.

This position, of course, assumes that this office does not have a more compelling duty not to provide such representation in a particular case. For instance if it was determined by this office that the Bar, its officers, employees or agents had exceeded the authority delegated by the supreme court and our advice to cease such conduct was ignored we would probably seek supervisory action against the Bar in the supreme court. Moreover, this office's duty to enforce the antitrust laws, see secs. 133.17, 165.065, Stats., might compel this office to act to remedy violations of the antitrust laws.

III.

The next question is in regard to possible antitrust actions being successfully maintained against the Bar because of the operation of the Unauthorized Practice and Ethics Committees. No specific cases are mentioned, but your predecessor indicates that "several observers have voiced concern that the activities of these two committees as presently constituted might raise antitrust law or constitutional due process of law problems." There is no further elaboration as to what the "observers" contend is the antitrust danger as the committees are presently constituted. Assuming that the contention is that the committees could potentially participate in anti-competitive activities, the question is whether the delegation from

the supreme court described above is adequate to provide blanket "state action" antitrust immunity within the meaning of *Parker v. Brown*, 317 U.S. 341 (1943).

Any analysis of the state action doctrine must revolve around the two-pronged test articulated by a unanimous court in *California Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). *Midcal* provided that for the immunity to apply (1) the state must have clearly articulated and affirmatively expressed a state policy compelling the displacement of competition in the area of the economy at issue, and (2) the state must actively supervise this displacement. Although *Midcal's* teaching appears superficially straightforward, reconciling it with three other Supreme Court decisions dealing with state action immunity in the context of state bar activities is no mean feat.

For example, both prongs of the *Midcal* test appear to have been diluted in *Hoover v. Ronwin*, 104 S. Ct. 1989 (1984), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

In neither *Hoover* nor in *Bates* did the state supreme court in question "compel" the specific conduct at issue. In *Hoover*, the Bar committee appointed by the supreme court was not compelled to adopt the grading system it adopted. The plaintiff's primary claim against the committee was that it had adopted a "grading scale on the February examination with reference to the number of new attorneys it thought desirable, rather than with reference to some 'suitable' level of competence." 104 S. Ct. at 1994. The plaintiff claimed that the state action doctrine did not apply because the supreme court had not directed the committee "to artificially reduce the number of lawyers in Arizona." *Id.* at 1999. The Court rejected plaintiff's argument stating that it largely ignored the facts surrounding the delegation of authority by the Arizona Supreme Court to the committee and, most importantly, the fact that the Arizona Supreme Court retained ultimate authority to grant or deny admission to the practice of law in the state. *Id.* at 1999-2000.

In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Court found that the state action exemption was applicable because the Arizona Supreme Court had in effect ratified and adopted the State Bar rule limiting advertising by attorneys. The plaintiff argued that because the state bar had not been compelled to recommend the advertising rule to the Arizona Supreme Court, the Court should

follow *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), and reject state action immunity. The Court, however, found state action immunity and distinguished *Cantor* on the basis that a "utility could not immunize itself from Sherman Act attack by embodying its challenged practices in a tariff approved by a state commission." *Bates* at 360. In addition to not being required to file the challenged practices in a tariff, the Court held that the state commission had never passed on the challenge practices, and hence, there could be no antitrust immunity. *Id.* In short, the court in *Bates* held that the advertising restriction was the action of the court and the mere fact that it was adopted without compulsion was not significant.

Similarly, it does appear to be fatal to a claim of state action immunity that the state has not clearly articulated and affirmatively expressed a state policy to replace competition with regulation as it relates to a specific action by a state agency. At one level, it is clear that the State of Wisconsin through both the Legislature and the Supreme Court has clearly articulated and affirmatively expressed a state policy to replace open competition in the market for legal services with barriers to entry in the practice of law (e.g., penalties for practicing without a license, sec. 757.30, Stats.) and ethical constraints on how those competing in the market operate their practices (e.g., authorization of Article IV, Section 5, of the State Bar Bylaws creating the Committee on Professional Ethics).

Hoover, Bates and Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), collectively suggest further that where a state bar or state bar committee acts to effect a state supreme court's policies on setting appropriate limits on competition among those seeking to provide legal services to the public, the court will find those actions which are in furtherance, to some unclear degree, of those policies to be exempt.

The issue, of course, is to what degree must the supreme court "guide" or "direct" the actions of the bar for the exemption to apply. On this point, the contrast between *Hoover* and *Goldfarb* is instructive. In *Goldfarb*, "state law did not refer to lawyers' fees, the Virginia Supreme Court rules did not direct the State Bar to supply fee schedules, and the Supreme Court rules did not approve the fee schedules established by the State Bar." *Hoover*, 104 S. Ct. at 2001 n.32. Consequently, even though the Virginia State Bar was a state agency, the Court concluded that the actions of the State Bar were not immune under the state action doctrine. Although no state law

or supreme court directive told the Arizona Bar committee what its grading formula ought to be, the Court in *Hoover* impliedly held that the grading formula adopted was “consistent enough” with the general policy of limiting admission to the market for legal services to those reaching a certain degree of competence.

In short, when one attempts to reconcile *Goldfarb* with *Bates* and *Hoover*, the test that emerges is no longer one of the traditional two-prong test of “compulsion” and “clearly articulated and affirmatively expressed state policy.” Rather, it seems that the exemption applies if a Bar or Bar committee acts pursuant to or consistent with the state supreme court guidelines—even if much discretion is left to the Bar committee (*e.g.*, *Hoover*), even if the Supreme Court did not initiate the action (*e.g.*, apparently in *Bates*), and even if the court did not specify in detail how the Bar committee should carry out its functions (*e.g.*, *Hoover*). Where the State Bar acts on its own without any guidelines from the state supreme court, state action immunity will not apply even though the actions of the State Bar are arguably consistent with the general policy of the state supreme court to temper competition among lawyers (*e.g.*, *Goldfarb*).

Ultimately, the dividing line between *Goldfarb*, on the one hand, and *Hoover* and *Bates*, on the other hand, seems to hinge on the specific activity of the Bar or Bar committee involved in light of the specific directions given by the state supreme court. For example, in *Goldfarb*, the State Bar had issued two ethical opinions indicating that the fee schedules could not be ignored. 421 U.S. at 777. Arguably, the fee schedules could be rationalized as consistent with some state supreme court policy affecting competition. Whether or not the activity of the Bar is connected enough to supreme court guidelines and directives would seem to be an issue that has to be decided on a case-by-case basis with reference to the specific setting of the Bar activity.

However, this dependency on the facts of the specific situations creates considerable confusion in dealing with the question of whether state action immunity is available for all actions of the two Bar committees at issue. Simply stating that the committees are acting “within their authority” does not resolve the question. For example, in *Goldfarb* the Supreme Court had delegated to the State Bar the “authority” to regulate the legal profession. But the Court determined that that was not enough direction to activate state

action immunity with regard to the adoption of fee schedules. If the Virginia Supreme Court had articulated a general policy that attorneys should price their services in a "reasonable manner," would that have been sufficient to give the State Bar state action immunity to adopt a specific fee schedule? What if the Bar had asked the Virginia court for more explicit authorization and had been rejected as was the case with the Wisconsin Bar? My reading of these cases suggests that the answer to these questions in the context of the state action doctrine are largely factual and ought to be dealt with on a case-by-case basis.

Hence, although I tend to believe that much of what the two State Bar committees in this case do may fall within the state action exemption, I share what I think is the Bar's concern that there may be situations where the actions of either committee may not be within the immunity. [For example, what if the Unauthorized Practice Committee decides a particular use of paralegals by an aggressive firm constitutes "unauthorized practice" in the absence of any specific supreme court policy thereby dampening the use of paralegals? Or what if the Ethics Committee rules that such use of paralegals is unethical?] My concern in this regard is not tied to any specific fact pattern, but rather relates to my conclusion that iron-clad guarantees are impossible in the face of a rather unsettled situation caused by three supreme court opinions within the last ten years which are more than a little difficult to reconcile.³ I suggest that if you have specific actions that either of the two committees intends to take that may be a cause for concern, that you frame those questions to us for an opinion on the state action doctrine at that time.

IV.

The next question relates to the likelihood of success of a claim against the Bar or individual committee members based on denial of property without due process of law. Due process is one of those terms in the law which is not easily defined except as it applies to specific situations. The constitutional provision, of course, prohib-

³ Note that the vote in *Goldfarb* was 8-0, the vote in *Bates* was 9-0 on the state action issue (5-4 on the first amendment issue), and in *Hoover* the vote was 4-3 with two abstentions and a vigorous dissent by Justice Stevens. The fact that Justice Rehnquist voted with the majority in both *Bates* and *Goldfarb*, while abstaining in *Hoover*, together with O'Connor's addition to the court after *Bates* and *Goldfarb* and her abstention in *Hoover*, makes it even more difficult to predict how the court would decide future such state action cases.

its denial of life, liberty and property without due process. To find a violation of due process where it concerns property, we have to determine first that it is property within the constitutional meaning, that there was a deprivation, and that the process afforded did not meet constitutional standards. The United States Supreme Court pointed out in *Board of Regents v. Roth*, 408 U.S. 564 (1972), in a case arising out of the University of Wisconsin-Oshkosh, that a nontenured professor whose one-year appointment was not renewed had no property interest in reappointment. The Court pointed out that property interests do not arise under the constitution: "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. at 577.

Frankly, it is difficult to identify property interests that might be affected by the Unauthorized Practice Committee in the abstract. It would be difficult to show "entitlement" and, therefore, difficult to show a property interest in the unauthorized practice of law. However, if the committees acted against other professionals, e.g., public accountants or paralegals, a protectible property interest may be a present. Again, it is difficult to answer the question you pose in the abstract.

Perhaps a more useful way to approach this question is with regard to the overall process of initiating unauthorized practice investigations and the prosecution thereof, whether civil or criminal which I outlined above. The Bar committees, in carrying out its unauthorized practice functions, merely requests this office to initiate the complaint process. This office decides whether to initiate an action and the type of action.

In the case of the Ethics Committee which deals with licensed attorneys who have a property interest in the license, there appears to be no due process problem in connection with the issuance of requested opinions relating to future conduct. In the case of opinions relating to past or present conduct being investigated by a professional responsibility committee (formerly grievance committee of the State Bar) or by the Board of Governors, there would appear to be a property interest involvement which would require appropriate due process at *some* stage prior to any sanctions. But if such opinion led to a hearing before a professional responsibility

committee, and subsequently before the Board of Attorneys Professional Responsibility in accordance with chapter SCR 22, the procedures afforded before those two bodies appear to provide adequate due process. If the Board of Governors reported directly to the Board of Attorneys Professional Responsibility concerning ethical conduct, again it appears that due process would be provided by a hearing before the Board of Attorneys Professional Responsibility and ultimately consideration by the supreme court. *Disciplinary Proceedings Against Eisenberg*, 117 Wis. 2d 332, 336 (1984).

V.

The final question relates to whether indemnification would be available from the state if a successful claim were made against the Bar, the board, members of the committees and the volunteer lawyers operating the "Hotline," assuming that "all action was in good faith and within the parameters established by State Bar Rule and Bylaw." Your question apparently assumes that liability has been established or is conceded.

There are, of course, defenses which should be considered whenever claims for money damages are made against the state, its agencies, officers and agents. One of these defenses, the immunity afforded public officers with respect to the performance of their official functions, deserves some discussion. This common law immunity has been recognized by our supreme court as protecting individuals who perform governmental functions from substantive liability for damages. The court listed the public policy considerations for such immunity in *Lister v. Board of Regents*, 72 Wis. 2d 282, 299, 240 N.W.2d 610 (1976).

These considerations have been variously identified in the cases as follows: (1) The danger of influencing public officers in the performance of their functions by the threat of lawsuit; (2) the deterrent effect which the threat of personal liability might have on those who are considering entering public service; (3) the drain on valuable time caused by such actions; (4) the unfairness of subjecting officials to personal liability for the acts of their subordinates; and (5) the feeling that the ballot and removal procedures are more appropriate methods of dealing with misconduct in public office.

This common law immunity is available only where the act complained of was within the scope of the official authority of the

individual and in line with official duty and involves the exercise of some discretion and judgment. The negligent performance of purely ministerial duties would not entitle the individual to common law immunity. There are various other exceptions to the rule which are determined by judicial balancing of the need of public officers to perform their functions freely against the right of an aggrieved party to seek redress.

The question of indemnification of volunteer lawyers who perform services in connection with the operation of the "Hotline" involves a determination as to whether such volunteers are agents of the state within the meaning of section 895.46(1)(a). That statute provides in part: "Agents of any department of the state shall be covered by this section while acting within the scope of their agency."

A similar question was raised in regard to the members of the professional responsibility committees appointed by the Bar who assist the Board of Attorneys Professional Responsibility in the investigation of lawyer conduct. I concluded in an unpublished opinion, OAG 48-78, that the committee members are "public officers" within the meaning of then sections 895.45 and 895.46. At that time, the statute covered agents of any department of the state where there was a written agreement entered into prior to the occurrence of any act. Chapter 20 of the Laws of 1981 adopted the present language in regard to agents which eliminates the requirement of a written agreement. If the volunteer members of the professional responsibility committees are considered to be "public officers," one might argue that "Hotline" volunteers are "agents." If so, indemnification would be appropriate subject to the limitations set out in section 895.46(1)(a) and subject to the limitations of section 893.82.

However, this issue may be moot given that Article VII of the bylaws of the Bar provides for indemnification of officers, employees and agents of the Bar and subsection 5 specifically authorizes the Bar to purchase and maintain insurance on behalf of any "State Bar Person" against any liability incurred in any capacity as a "State Bar Person." Article VII, section 1 defines a "State Bar Person." I understand that the Bar has errors and omissions insurance to cover the general liability of officers, committees, employees and agents of the Bar. Indemnity under section 895.46 would be available only to the extent that such liability is not covered by any

insurance which might be applicable, including such person's own malpractice liability insurance.

Section 893.82 contains both a notice of claim requirement and a limitation of damages provision which apply to state officers, employees or agents. Section 893.82(3) provides that a claimant must serve the attorney general with notice of claim within 120 days of the event causing the injury. The amount recoverable by any person is limited by section 893.82(6) to \$250,000 and no punitive damages may be recovered. The notice of claim and limitations on damages statutes do not apply to civil rights actions brought under 42 U.S.C. §1983. *Doe v. Ellis*, 103 Wis. 2d 583, 309 N.W.2d 375 (Ct. App. 1981); *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 340 N.W.2d 704 (1983).

BCL:KJO

Citizens Utility Board; Corporations; The Citizens Utility Board, a body corporate and politic, legally dissolved and reorganized as a non-stock, non-profit corporation. OAG 32-86

September 10, 1986

TOM LOFTUS, *Chairperson*
Assembly Organization Committee

The Assembly Organization Committee has requested my opinion regarding the legality of the action of the Citizens Utility Board ("CUB") "to transform itself into a private, non-profit entity."

By chapter 72, Laws of 1979, the Legislature created chapter 199, Stats., the Citizens Utility Board Act ("CUB Act").

The purpose of [the CUB Act] is to promote the health, welfare and prosperity of all the citizens of this state by insuring effective and democratic representation of individual farmers and other individual residential utility consumers before regulatory agencies, the Legislature and other public bodies and by providing for consumer education on utility service costs and on benefits and methods of energy conservation. Such purpose shall be deemed a statewide interest and not a private or special concern.

Sec. 199.02, Stats.

CUB was created as a non-profit "public body, corporate and politic." Sec. 199.04(1), Stats. Thus, as observed in an earlier opinion on the constitutionality of the CUB Act,¹ "CUB was not intended by the Legislature to be a corporation in the ordinary sense." As shorthand, CUB was referred to throughout the CUB Act as "the corporation." *E.g.*, sec. 199.03(5), Stats. I do not conclude from this that the Legislature intended CUB to be a corporation. Rather, CUB is one of a number of special "separate entities designed to carry on a public purpose." *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 425, 208 N.W.2d 780 (1973).² As an entity possessing both governmental and corporate characteristics, CUB in many respects resembled a corporation.³ In only two

¹ 69 Op. Att'y Gen. 153 (1980)

² For a summary and discussion of the characteristics of some of these entities see OAG 32-85, August 15, 1985.

³ The CUB Act itself, of course, in providing for bylaws and a board of directors, among other things, endowed CUB with a number of familiar corporate characteristics.

respects, however, was CUB made subject to chapter 181, the non-stock corporation law. CUB was required to conduct its membership meetings as provided under sections 181.14 to 181.18 and 199.08 and CUB was subject to dissolution, under sections 181.50 to 181.65 and 199.17. It is CUB's exercise of the authority to dissolve under chapter 181, which is the subject of your request.

At a special meeting held April 26, 1986, the membership of CUB voted to dissolve. Articles of Dissolution were issued by the Secretary of State on April 28, 1986. On the same date, Articles of Incorporation were filed by three former CUB directors, forming a new non-profit, non-stock corporation known as Citizens Utility Board, Inc.

Although not entirely free from doubt, I have concluded, based on my own factual and legal investigation, that the dissolution of CUB and the incorporation of CUB, Inc., were legally accomplished.

Despite the fact that CUB was created by a special act of legislation "to promote public purposes, not private ones," 69 Op. Att'y Gen. at 156, CUB clearly was given the power to unilaterally dissolve. The CUB board of directors acted pursuant to statute in adopting a dissolution resolution and calling a special membership meeting to vote on the dissolution. Articles of Dissolution were properly filed with the Secretary of State, who promptly issued Articles of Dissolution, effecting the extinguishment of the corporation. At the same time, Articles of Incorporation were filed with the Secretary of State. In accordance with the dissolution statutes, CUB has transferred its assets and liabilities to CUB, Inc., and has notified its creditors accordingly.

The only concern I have over the legality of CUB's dissolution is whether CUB acted in good faith in taking this step. Under the common law, the decision to dissolve or not must be made in good faith. Oleck, *Non-profit Corporations and Associations*, section 226 (1956). I must presume that CUB acted in good faith because neither the CUB Act nor chapter 181 contains any limitation on the grounds for dissolution. In other words, as far as the statutes are concerned, CUB could dissolve for any reason. In the case of business corporations, a court of equity will upset a dissolution despite compliance with the statutes:

[a]t the instance of minority stockholders where the dissolution is in bad faith and violates the rights of minority stockholders, or where it has been induced by undue influence or a result of fraud, or, it would seem, where the dissolution is not intended for the benefit of the corporation or in furtherance of its interests but merely to unjustly oppress the minority, or any of them, and cause a destruction or sacrifice of their pecuniary interests or holdings.

16 A, Fletcher *Cyclopedia of the Law of Private Corporations*, sec. 7966 (1979 rev. vol.). CUB, of course, had no stockholders. By analogy, however, members in the minority on the vote to dissolve might be found to have standing to challenge the dissolution on the ground that it was accomplished in violation of their rights. Clearly, a dissolution of CUB was prompted, at least in part, by a desire to avoid certain restrictions presented in the CUB Act.

In the Spring 1986 copy of the CUB newsletter, CUB president Thomas Lonsway told CUB members that the Legislature was not likely to amend the CUB Act to increase the classes of membership and that “only by reorganizing as a private non-profit organization could CUB broaden its membership base.” Members were also told that CUB received none of the advantages of being a state agency (except for the right to include an enclosure in utility bills, which was being questioned in litigation) and asked “why keep [the tie to government] if we get no corresponding advantages.” CUB was seen as having “essentially . . . many of the responsibilities of a government agency but none of the advantages.” Obviously, therefore, a CUB dissolution was at least in part prompted by a desire to avoid CUB’s statutory responsibilities.

One of those responsibilities, arguably, was to comply with the state’s public records law. CUB had refused to divulge its membership list. In resulting litigation, CUB has taken the position that it was not generally subject to the public records law, but rather was subject to only the special public records provision of section 199.125. One might argue that dissolution was accomplished to avoid disclosing its membership list. Yet, other than the circumstance of the timing of the CUB dissolution, relative to the pendency of the membership list litigation and President Lonsway’s statements in the CUB newsletter, nothing has come to my attention that would support a challenge to CUB’s dissolution based on a bad faith motivation to avoid statutory responsibilities.

As far as I know no member has come forward to challenge the dissolution on these or any other grounds. I believe that no one else would have standing to interfere with the dissolution. Even with respect to members, however, an action to upset the dissolution, being in equity, would be affected by the doctrine of laches. The CUB board voted to dissolve and reorganize in March. No steps were taken to enjoin the dissolution and it was accomplished in April. According to President Lonsway's article in the CUB newsletter, dissolution had been discussed for "countless hours during the past two years." It is now September and no member has spoken up. It is likely, therefore, that no court would interfere with the dissolution and reorganization of CUB at this time.

BCL:ESM

Bids and Bidders; Conflict of Interest; A county board supervisor who is an employe of a law firm which has been hired by a third party to represent it in negotiations with the county board does not violate either section 946.13(1)(a) or (b), Stats., if a supervisor has absolutely nothing to do with the contract either as an attorney or as a supervisor. OAG 33-86

September 12, 1986

ROBERT G. MAWDSLEY, *Corporation Counsel*
Waukesha County

You ask whether section 946.13(1), Stats., is violated if a law firm of which a county board supervisor is an associate member represents a corporation in making proposals and negotiating with the county board for purchase or lease of a county facility. The county supervisor will not be performing any legal work on the corporation's proposal to the county board, but will perform legal services on behalf of the corporation not related to the county. The corporation has retained the law firm on an hourly fee basis to represent it in its negotiations with the county.

I agree with your conclusion that, on the specific facts presented here, the supervisor can avoid the strictures of section 946.13(1) if she totally abstains, in both a private and public capacity, from participating in the contract negotiations.

Section 946.13(1)(a) prohibits a public officer or employe, in a private capacity, from negotiating, bidding for or entering into a contract in which the officer or employe has a private pecuniary interest, direct or indirect, if that officer or employe is authorized or required by law to participate in the making of that contract or exercises some official discretion involving that contract. Section 946.13(1)(b) prohibits a public officer or employe, in that capacity, from participating in the making of a contract in which the officer or employe has a private pecuniary interest, whether direct or indirect, or performing some function requiring official discretion. Subsection (a) is violated if the public officer or employe is even authorized to participate in an official capacity. Subsection (b), on the other hand, requires actual participation before there is a violation. 60 Op. Att'y Gen. 367, 370 (1971). Although it is a close question, and slightly different facts might lead to an opposite conclusion, I conclude that on the facts presented, there is no violation of section

946.13(1)(a) if the county supervisor abstains from all participation in the contract.

Section 946.13(1)(a) has three elements: (1) a direct or indirect private pecuniary interest in a public contract; (2) negotiating, bidding or entering into the contract in a private capacity; and (3) being authorized or required to participate in the making of the contract or to perform some act with regard to the contract in an official capacity. There is no dispute that the county supervisor is authorized to participate in the making of the contract in her capacity as county supervisor. The other two elements are not so easily resolved.

It is agreed that the county supervisor has no direct, private pecuniary interest in the negotiations or the contract. The law firm which employs her, however, certainly has a direct interest in the negotiations and would have an interest in any contract resulting from those negotiations. It is equally obvious that the employe has a pecuniary interest in her employer's prosperity. Therefore, although the associate/supervisor's salary is not directly influenced by the contract, she would receive indirect benefit from the firm's successful negotiation of the contract and continued employment by the corporation. The law firm's overall prosperity, of which this client is part, has a direct effect on future salaries, benefits and even employment. It is clear that the indirect interest under section 946.13(1) is not restricted to an ownership interest. If it were, section 946.13(7), which provides some exceptions to section 946.13(1) if the officer or employe is, *inter alia*, employed by a bank, would be unnecessary.

It may be true that at some point the indirect interest becomes so attenuated that it virtually disappears. For example, a county supervisor might be employed by a windshield manufacturer which sells its windshields to an automobile manufacturer, which wants to sell squad cars to the county. Both companies, and the employes of both companies, have an interest in selling as many cars and windshields as possible. The hypothetical supervisor's interest in one sale, however, is *de minimus*. In the present case the law firm's interest in the contract, and the associate's interest in the law firm, are not so attenuated. I must conclude that the associate has an indirect pecuniary interest in the negotiations.

The final question is whether the supervisor is negotiating, bidding for or entering into the contract in her private capacity. Clearly she is not doing so directly. It is equally clear, however, that the law forbids a public officer or employe from accomplishing through an agent that which the law prohibits her from doing directly. 52 Op. Att'y Gen. 367, 370 (1963). In the present case, the law firm which employs the county supervisor is acting as the agent for the corporation, not as agent for the employe/supervisor. There would be no violation of section 946.13(1)(a), therefore, unless we could conclude that the law firm is also acting as the agent of the supervisor or that because of their relationship they should be treated as one entity. An employe ordinarily acts as an agent of the employer; only in limited circumstances does the employer act as agent for the employe. This is not such a case; the law firm is representing the corporation's interests, not the employe's interests; the corporation, not the supervisor, can terminate the agency relationship.

Although an owner of an interest in a corporation or a partner in a law firm might have the kind of identity of interest with the corporation or law firm which would cause an objective observer to conclude that the business' actions are those of the owner or partner, I cannot find such an identity of interest on the present facts.

Although it is not at all dispositive, some statutes treat an organization with which a public official is associated as having an identity of interest with that public official for the purposes of conflicts of interest and bribery. *E.g.* secs. 19.44 and 19.45(2), Stats. Section 19.42(2), however, defines "associated" as including any organization in which an individual or a member of his or her immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least ten percent of the outstanding equity. The Legislature, at least in the ethics code, determined that an employer/employe relationship should be treated differently from an ownership interest.

The unique relationships among a client, law firm and an associate of that law firm might well raise concerns not present in other employment relationships. Because the statute is a criminal statute, however, it must be strictly construed. *Menasha Wooden Ware Co. v. Winter*, 159 Wis. 437, 150 N.W. 526 (1915). The statute sets no higher, or lower standard for attorneys. The Legislature has statutorily determined that specific conduct by attorneys presents a con-

flict of interest. For example, section 757.22 prohibits certain conduct by partners of district attorneys; section 757.23 prohibits court commissioners from acting in any manner in which the commissioner's law partner, employer, employe or clerk is interested or appears as a party. *See also* sec. 767.16, Stats. Similarly, section 196.675 prohibits district attorneys, assistant district attorneys, city attorneys, or assistant city attorneys or any person holding a judicial office from being retained or employed by a common carrier. Again, although it is not dispositive, the fact that the Legislature has spoken directly on attorney conflicts in these statutes, and not in section 946.13, leads to the conclusion that there should be no different legal standard under section 946.13 for attorneys *per se*.

I must emphasize that any analysis under section 946.13(l) depends on facts unique to each situation. If the facts in this case were slightly different, if for example the county supervisor were a partner in the law firm or were hired directly by the corporation, my answer might well be different. I must also emphasize that the conclusion reached in this opinion is based on the facts present at the time the opinion was requested. If the relationship between the firm and the client changes or the relationship between the firm and the employe changes, the statute might well be violated. Because of the unsettled nature of the relationships and negotiations, the supervisor and the county must be especially vigilant in guarding against actual violations of the statute. Both the supervisor and the county should also realize that the arrangements described, although not a violation of the criminal code, might well raise legitimate questions about the propriety of the arrangements.

On the facts presented, I conclude that if the supervisor abstains from acting on the contract in her official capacity, there is no violation of section 946.13(l)(b). If she and the law firm make absolutely certain that as an employe of that law firm she is not involved at all in negotiating, bidding or entering into the contract with the county, there is no violation of section 946.13(l)(a).

BCL:AL

Constitutional Law; State; Transportation; State regulation prohibiting single-hulled barges and requiring double-hulled barges on the Mississippi River adjacent to Wisconsin would violate the Supremacy Clause of the United States Constitution. OAG 34-86

September 12, 1986

TIM CULLEN, *Chairperson*
Committee on Senate Organization

You ask whether the State of Wisconsin has authority to “enforce regulations to require double hulls on barges transporting hazardous substances in the Wisconsin portion of the Mississippi River.” The answer to your question is no.

Under our federal system of government, power is divided into four classes: exclusive national power; exclusive state power; power which is shared concurrently and independently by both; and power which may be exercised by the state but only until congress acts to occupy the field in which case state power retires and lies in abeyance until circumstances or the federal courts allow a reexercise thereof. *The Chicago & N.W. R. Co. v. Fuller*, 84 U.S. 710, 714 (1873).

Your question appears to fall in the last category stated in *Fuller* and the leading case, *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (hereinafter *ARCO*), indicates that the federal government has moved to preempt the fields of vessel safety and design by imposing national standards under the Ports and Waterways Safety Act of 1972 (PWSA). See 33 U.S.C. §1221 *et seq.* and 46 U.S.C. §2101(16) and (17) *et seq.*, requiring state regulation to yield under the Supremacy Clause, article VI, clause 2 of the United States Constitution.

Federal preemption and the supremacy thereof in maritime matters has been discussed by the United States Supreme Court in several cases. In *Sinnot et al. v. Davenport et al.*, 63 U.S. 227, 243 (1859), the Court stated:

The whole commercial marine of the country is placed by the Constitution under the regulation of Congress, and all laws passed by that body in the regulation of navigation and trade, whether foreign or coastwise, is therefore but the exercise of an undisputed power. When, therefore, an Act of the Legislature of a State prescribes a regulation of the subject repugnant to and

inconsistent with the regulation of Congress, the state law must give way; and this, without regard to the source of power whence the State Legislature derived its enactment.

In accord, Parden v. Terminal R. of Alabama Docks Dept., 377 U.S. 184, 192 (1964).

In the *ARCO* case, a State of Washington regulation required oil tankers operating in Puget Sound to have double-bottomed hulls. The court held that PWSA prescribed the minimum safety and design standards for vessels, leaving the state "no room" for regulation. *ARCO*, 435 at 163-64, 168. In fact, the double-hull concept was specifically rejected during federal rulemaking. 47 Fed. Reg. 128-29 (1982). Further, river barges fall within the purview of PWSA. 46 U.S.C. §§2101(34), 3301(4)(a), 3305(a)(1), (3)-(5), 3306(a)(4) and 3301(1)(a). Also the PWSA mandates safety inspections by the Coast Guard. *ARCO*, 435 at 165; 33 U.S.C. §244 *et seq.*

It is, therefore, my opinion that state regulation requiring double-hulled barges on the Mississippi River adjacent to Wisconsin would be invalid under article VI, clause 2 of the United States Constitution.

BCL:JPA

Compatibility; Office of county supervisor and position of assistant state public defender are compatible. OAG 35-86

September 23, 1986

JAMES C. BABLER, *District Attorney*
Barron County

You request my opinion whether the office of county supervisor and the office or position of assistant state public defender are compatible so as to permit the same person to serve in both capacities at the same time. I am of the opinion that they are compatible.

Your statement of facts indicates that one person has been serving as a member of the Barron County Board of Supervisors and as an assistant state public defender at the same time. This person, licensed to practice law in Wisconsin, was elected to the Barron County board and has served as a member of that board since April 1982. On or about September 1, 1985, this same person was appointed as an assistant state public defender to handle cases in Barron, Polk and Rusk counties. He is currently supervisor of the Barron office and primarily handles criminal, criminal traffic, delinquency, paternity, children in need of protection (CHIPS) and child support cases in Barron County.

You note that the Barron County Board of Supervisors appoints a corporation counsel for the county, and you are concerned that this is a source of potential conflict because the county board supervisor-public defender represents interests opposed to those of the corporation counsel in court and administrative cases. Specifically, you've pointed out that the county board supervisor-public defender and corporation counsel could represent opposing interests in paternity, child support and CHIPS matters.

You also note that the Barron County Board of Supervisors votes on salaries for county officials and employes, as well as on budgets for the offices of district attorney, corporation counsel, sheriff and county department of social services. As to the board's fiscal power, your concern is that the county board supervisor-public defender may have an interest in having district attorneys and corporation counsels who do not vigorously prosecute their cases and that the board's budgetary decisions can directly affect the quality of investigation and prosecution.

My finding of compatibility is strongly influenced by the fact that the two posts occupied by the individual in question exist in different units of government, which, although related, have substantially separate structures of organization. The constitution authorizes the Legislature to "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 59.02(1), Stats., provides that "[t]he powers of a county as a body corporate can only be exercised by the board thereof, or in pursuance of a resolution or ordinance adopted by it." A county supervisor is a *county* officer elected for a definite term who takes an oath of office. Secs. 59.025(3), 59.03(3)(d) and 59.13, Stats.

The assistant public defender is either a state officer or he holds a position of state employment. In either event, the common law doctrine of incompatibility is applicable. *Otradovec v. City of Green Bay*, 118 Wis. 2d 393, 347 N.W.2d 614 (Ct. App. 1984). Otradovec served as a member of the common council which had power to vote on contracts setting the terms of his employment as an appraiser in the city assessor's office and to vote on approval of the appointment of the city assessor in whose office he must work. The court stated, 118 Wis. 2d at 397:

These potential conflicts are substantial and establish the incompatibility of the public office and the position of public employment Otradovec holds. It does not matter that he may be permitted to abstain from voting in these areas or whether conflicts exist in all or a greater part of the functions of his office and position. . . . It is sufficient that substantial conflicts might arise that would be detrimental to the public.

Otradovec and the cases cited on page 397 of that opinion were concerned with a single governmental unit and with conflicts which could occur between an office which was superior in some respect to another position or office. In the Barron County situation, the office of county board supervisor is not superior with respect to the position of assistant state public defender. Potential conflicts cited by you are indirect as to that state position and are primarily concerned with conflict not as between the office of county board supervisor and assistant state public defender, but with respect to possible animus which might be directed at certain county officers and departments, because of work associations they might have

with the assistant state public defender. Possible conflict from such work associations would be similar to that which might exist if a private attorney who specialized in criminal defense work were to also serve on the county board.¹

Similarly, this office has recently received citizen inquiries questioning the propriety of teachers' spouses, retired teachers and teachers from other districts sitting on school boards. The complaining citizens feel strongly that those involved with the teaching profession have an inherent bias in favor of increased educational expenditures and against property taxpayers. Though our courts have not had occasion to deal with the issue, decisions from other jurisdictions suggest that it is lawful for such individuals to sit on school boards. *See, e.g., Jones v. Kolbeck*, 119 N.J. Super. 299, 291 A.2d 378 (1972) and *Petitpren v. Wayne-Westland Community Schools*, 91 Mich. App. 590, 283 N.W.2d 812 (1979).

The court in *Otradovec*, 118 Wis. 2d at 396-97, recognized that the public policy served by the doctrine of incompatibility is avoidance of substantial conflicts that would be detrimental to the public. There is, however, a countervailing public policy favoring the right of electors to be represented by persons of their own choice. *See generally, O'Malley v. Macejka*, 44 N.Y.2d 530, 378 N.E.2d 88, 89-90 (1978). In the absence of conflicts of the type evident in *Otradovec*, it is my opinion that the ultimate determination of whether the assistant state public defender's presence on the county board presents a threat to law enforcement services ought to be reserved to the voters of Barron County.

Nonetheless, the county supervisor-assistant state public defender would have to attempt to avoid situations in which the county was the opposing party in a lawsuit or administrative proceeding. In 72 Op. Att'y Gen. 61 (1983), it was stated that the state

¹ In 62 Op. Att'y Gen. 118 (1973), it was stated that under the then statutes, appointment of counsel for an indigent involving a public contract and a county board supervisor who was also an attorney would risk violation of section 946.13 if he or she entered into a contract exceeding the \$2,000 maximum annual receipts and disbursements figure. An officer or employe cannot avoid violation of section 946.13(1)(a) by abstention from voting where such person enters into or negotiates for a non-exempt public contract in which such person has a private pecuniary interest if "at the same time he is authorized or required by law to participate in his [official] capacity as such officer . . . in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on his part" Your statement of facts does not indicate any public contract involvement and specifically none in which the county supervisor-assistant state public defender is alleged to have a private pecuniary interest.

public defender does not have authority to represent indigents in civil forfeiture actions including traffic violations. Some county ordinances are enforced through civil forfeiture actions. The duties of the state public defender are set forth in section 977.05(4) and I am not aware that the county would be the plaintiff in situations there involved.

You may wish to inquire of the Board of Professional Responsibility with respect to attorney-client ethical considerations and of the state public defender as to any employment rules such office may have with respect to office holding by assistant state public defenders. It can be argued that an assistant state public defender may place a client at a disadvantage if he or she cannot plea bargain to have a charge changed to a county ordinance violation because of a conflict or the appearance of a conflict.

BCL:RJV

Historic Sites Foundation, Inc.; Historical Society, State; Public Purpose Doctrine; It was constitutional for the Legislature to extend indemnity and other liability protections to the corporation and its agents and employes who manage and operate a state-owned circus museum. OAG 36-86

October 8, 1986

TIM CULLEN, *Chairperson*
Senate Organization Committee

You have requested, on behalf of the Senate Organization Committee, my opinion on the following question:

Does the inclusion of officers, directors, employees and agents of the Historic Sites Foundation, Inc., within the state's risk management program as provided by 1985 Wisconsin Acts 29 and 66, creating Wisconsin Statute section 895.46(1)(e), violate any constitutional provision?

BACKGROUND

It is necessary to understand the relationship between the State Historical Society (Society), the Historic Sites Foundation, Inc. (Foundation), and the Circus World Museum (Museum) at Baraboo, Wisconsin.

The Society is a state agency. OAG 11-85. It is empowered to "enter into a lease agreement with the [Foundation] for the purpose of operating [the Museum], located at Baraboo, Wisconsin." Sec. 44.16(1), Stats., created by 1985 Wisconsin Act 29, sec. 755.

The Society acquired the Museum by gift in 1959. The Society owns the Museum entirely, including all real and personal property.

The Museum provides live demonstrations for public viewing. These include demonstrations on circus animal training; loading wagons on circus trains in the manner done from 1872 to 1956; a 55-minute big top performance with acts chosen for historic merit, including acts of elephants, horses, dogs, and clowns and aerial artists; a high wire walk; a clown show of the 1820-1830 vintage; a recreation of an 1830 circus street parade; an elephant playtime swim in the Baraboo River; tiger feeding and lecture; and a unique instruments concert with instruments dating back to the 1920's. A library of circus history adjoins these grounds.

In concluding that the Museum is not subject to a sales tax on admission charges, the Wisconsin Tax Appeals Commission said the Museum's primary objective is "the collection, preservation and dissemination of the history of the Wisconsin circus heritage." *Historic Sites Foundation, Inc. v. Wisconsin Department of Revenue*, No. S-10066 (Jan. 21, 1986) (decision slip op. at 17). The Society is charged with the duty to promote the collection, advancement, and dissemination of knowledge of the history of Wisconsin and the West. Sec. 44.02(15), Stats. "The purpose of the [Society's] owning the [Museum] site is to let people know one aspect of the rich history and heritage of Wisconsin." *Historic Sites Foundation, Inc.*, at 17-18. The Museum "is a fun way to learn about circus history." *Id.* at 20.

The Foundation is a private corporation created in 1960 under chapter 181, Stats., to operate the Museum. The articles of incorporation provide that the Foundation is organized "exclusively for educational, scientific and literary purposes . . . all for the benefit of" the Society. In fact, its sole function consists in operating the Museum. It has twelve directors: an appointee of the Governor, subject to senate confirmation, *see* sec. 44.16(2), Stats., as created by 1985 Wisconsin Act 29; the Mayor of Baraboo; the chair of the Sauk County Board; two curators of the Society; and a legislator. The remainder are appointed by the Society's Board of Curators.

The lease and management agreement recites that the Society retains the Foundation as the "manager, operator and promoter" of the Museum. The Society leases all its Museum property, real and personal, to the Foundation. The Foundation's duties include:

[G]athering, collecting and properly displaying printed manuscript materials and artifacts; establishing, maintaining and operating a circus museum and library; sponsoring or conducting research in circus history and publishing the results; encouraging in every possible way an appreciation of the role of the circus in American life through a combination of activities which educate, inform and entertain the public both on the property of the Museum and elsewhere as the Foundation shall determine.

Lease, para. 2. Section 44.16(1), provides that the lease between the Society and the Foundation "shall not include any provision for the payment of a percentage of gross admissions income at Circus World Museum to the historical society." By the terms of the lease,

the Foundation must insure the Society's property; the Foundation supplies the Society with minutes of meetings of its directors and committees, as well as financial statements; and all Foundation publications and stationery must clearly identify the Museum as the property, of the Society. Further, the Society must approve all long-range Foundation planning, all additions of real property and all accessions. Any property acquired by the Foundation must be transferred to the Society. State procedures must be followed in selling personal property. All general purpose state funding must be used to reduce admission fees. The Foundation's board must comply with the open meetings law, and its corporate records are open to inspection the same as with any state agency. The Foundation must follow state affirmative action and equal opportunity policies, and the directors and employees must comport themselves under the ethical standards applicable to state officials and employees. On dissolution, the articles of incorporation require distribution of the Foundation's assets to the Society.

The legislation I am asked to opine on, 1985 Wisconsin Act 29 as amended by 1985 Wisconsin Act 66 ("Act"), has the effect of giving the Foundation and its directors, officers, employees, and agents the same liability protections as are enjoyed by state officers, employees and agents. The consequence is that no action may be brought against them unless, within 120 days of the event complained of, notice is given to the attorney general as required by section 893.82; no compensatory damages in excess of \$250,000 may be recovered against any one defendant; no punitive damages may be recovered; the attorney general will provide legal representation; and the state will indemnify the defendant for judgments and costs rendered. More specifically yet, the Act extends this treatment to the individuals and to "any nonprofit corporation operating a museum under a lease agreement with" the Society. The Foundation is treated as a department of state for purposes of requesting representation by the attorney general. See sec. 165.25(8), Stats., as created.

PUBLIC PURPOSE

The first issue is whether the Act furthers a statewide public purpose. Although the public purpose doctrine is not found in the state constitution in express terms, the rule that public funds must be expended only for a public purpose is a well-established constitutional tenet. *Wisconsin Solid Waste Recycling Auth. v. Earl*, 70 Wis. 2d 464, 478, 235 N.W.2d 648 (1975). Additionally, state funds

may be spent only if the purpose is of statewide concern. *State ex rel. La Follette v. Reuter*, 33 Wis. 2d 384, 397, 147 N.W.2d 304 (1967). It is for the Legislature in the first instance to determine what constitutes a public purpose. The court will sustain the Legislature's determination if any public purpose rationally can be conceived. The challenger's burden is to show there can be no benefit to the public from the expenditure. *Hopper v. Madison*, 79 Wis. 2d 120, 128-30, 256 N.W.2d 139 (1977). The public purpose depends essentially on what the people want and expect. It is a fluid concept; yesterday's hope is today's entitlement. *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 213, 170 N.W.2d 790 (1969).

Unquestionably the state itself could operate the Museum by state employes rather than through the Foundation. The public purpose is the Museum's contribution to the state's historic appreciation. Indeed, the Society already directly operates other museums. The entitlement of its employes and agents to the state's liability protections cannot seriously be questioned under the public purpose doctrine: Whether seen as an employment fringe benefit or an incentive to render service, the public purpose of the indemnity program is clear.

The fact of the Foundation's private, corporate nature is of no consequence for purposes of the public purpose doctrine. The state may use a private corporate entity to discharge a public purpose, at least so long as the entity remains under state control. *See State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 176, 277 N.W. 278, 280 N.W. 698 (1938). Since the public purpose is served by indemnifying private individuals who are state employes when carrying out the state objective of historic circus appreciation, the public purpose is equally served by extending the same benefit to nonstate employes to do the same thing.

But the Act, standing alone, does not freeze the extant Society controls over the Foundation. For example, requiring the Foundation to report to the Society, and to adhere to public records and open meetings law, is established by the lease agreement, not by statute. The Act does not prevent the Foundation from changing its bylaws to staff the board of directors with private, wholly nonpublic officials. The Act does not confine Foundation activities to serving the state's public purpose. Nothing in the Act prevents the Society and the Foundation from deleting the requirement of Society approval over the Foundation's long-term planning. And the

Foundation is empowered to certify that an individual's conduct grew out of his/her duties and to request the attorney general to provide legal representation. Sec. 165.25(8), Stats., as created.

Although the Act, standing alone, has these deficits, other related legislation can be construed as imposing controls to assure public accountability and a public purpose. And the courts will so construe them if necessary to sustain the Act's validity. See *Joncas v. Krueger*, 61 Wis. 2d 529, 535-36, 213 N.W.2d 1 (1973).

First, the Society's only statutory power in this area is to deal with the Foundation "for the purpose of operating [the Museum]." Sec. 44.16(1), Stats., as created. That power implicitly is limited to the public purpose of the state's Museum. While there necessarily is discretion as to the precise terms that may be negotiated with the Foundation, any terms that depart from the public purpose of the Museum would be invalid under section 44.16(1). Therefore, reasoning *in pari materia*, the Act contemplates only the kind of agreement the Society is authorized to make under section 44.16(1). In any event, the Act is operative only to the extent the Society has dealt with the Foundation in terms that comply with section 44.16(1) and the public purpose doctrine.¹

Second, the Foundation does not have final authority over the decision whether the individual's conduct grew out of duties entitling him or her to legal representation by the attorney general. The attorney general, a popularly elected constitutional officer, may contest the individual's entitlement in court. Sec. 895.46(1)(a), Stats. In other words, if in a particular case a defendant's conduct is outside the Society's statutory and public purpose limitations, so as to prevent extending the benefits of state representation and indemnity protection, the attorney general may so contend before a court even if the Foundation asserts otherwise. I believe this mechanism suffices as an additional procedural safeguard against diverting public resources for a nonpublic purpose.

¹ Obviously neither the Foundation nor the Society should agree to any modification to the present relationship, including amendments to the Foundation's bylaws, without the approval of the attorney general. To do so imperils indemnity of judgments. Of course, neither my approval of the modification nor this opinion on the validity of the Act binds the courts. A court declaration of invalidity would instate the peril. While the Legislature thereafter might hold individuals harmless as a matter of discretion, the affected individuals should understand such result is a matter of grace, not right.

In my opinion, the Act, as construed and limited above, does not offend the public purpose doctrine, but the importance of maintaining ultimate Society control over programming and Foundation accountability to assure that the public purpose of the Museum is preserved, both in theory and in practice, cannot be over emphasized.

EXTENDING CREDIT

A second possible ground of attack on the Act rests on the constitutional provision that "the credit of the state shall never be given, or loaned, or in aid of any individual, association or corporation." Wis. Const. art. VIII, §3.

This provision applies only if the state acts "as a surety or guarantor of the collateral obligation of another party." *State ex rel. Thomson v. Giessel*, 271 Wis. 15, 29, 72 N.W.2d 577 (1955). It does not apply if the state "incur[s] liability directly or only to such other parties as, for example, where the state lawfully employs someone to perform an authorized service for the state." *Dammann*, 228 Wis. at 197.

The state's liability program is one of indemnity. See *Fiala v. Voight*, 93 Wis. 2d 337, 348, 286 N.W.2d 824 (1980). The defendant controls whether the indemnity is paid, not the plaintiff: it is not paid if the defendant fails to give notice of the action or if the defendant fails to cooperate in the defense. Sec. 895.46(1)(a), Stats. The very distinction between an indemnity and a guarantee or suretyship turns on the fact that the indemnity obligation goes to the judgment debtor, not the third-party creditor. See 41 Am. Jur. 2d *Indemnity* §§1, 4 (1968); 38 Am. Jur. 2d *Guaranty* §§2, 15 (1968). An indemnity program operates "solely for the benefit of the insured . . ." 8 Appleman, *Insurance Law and Practice*, §4831 at 416 (1981). The indemnity obligation arises *after* judgment is rendered; it gives the plaintiff no right of action against the state or the indemnitee. See *Cords v. Ehly*, 62 Wis. 2d 31, 37-38, 214 N.W.2d 432 (1974). *Accord, Duckworth v. Franzen*, 780 F.2d 645, 650-51 (7th Cir. 1985) (plaintiff's suit is not one against the state for purposes of the eleventh amendment even "[i]f the state chooses to pick up the tab for its errant officers"). *But see Miller v. Smith*, 100 Wis. 2d 609, 623, 302 N.W.2d 468 n.16 (1981) (declining to decide whether the indemnity obligation extends only to the judgment debtor).

Here, the indemnity obligation is extended directly to someone (the Foundation, its employees, etc.) that the state has "lawfully employ[ed] . . . to perform an authorized service for the state." *Dammann*, 228 Wis. at 197. Therefore, there is no more an extension of credit in this case than in indemnifying any other state agent who incurs a judgment for conduct in the scope of his/her agency, e.g., when causing injury to another by negligently driving a car while on state business.

EQUAL PROTECTION

A third possible line of attack rests on equal protection grounds. This attack would have two components. First, the challenge would be from the perspective of the plaintiff whose rights of recovery are limited procedurally and substantively when suing persons protected by the state's indemnity program. The second challenge would assert there is nothing special about the Foundation to distinguish it from other entities which also have a close nexus with the state in discharging various public purpose functions, e.g., authorities, foundations, and other chapter 181 corporations, like the Wisconsin Higher Education Corporation. See OAG 32-85.

The equal protection challenge is tested by the "rational basis" criterion. As stated in *Yotvat v. Roth*, 95 Wis. 2d 357, 363-64, 290 N.W.2d 524 (Ct. App. 1980):

All legislative acts are presumed to be constitutional. A heavy burden is placed upon the party challenging a statute's constitutionality. All doubts must be resolved in favor of the constitutionality of a statute. *Stanhope v. Brown County*, 90 Wis. 2d 823, 837, 280 N.W.2d 711 (1979).

The appropriate test for review of the classifications of governmental and non-governmental tortfeasors and of their victims is whether a rational basis exists for the differentiation. *Stanhope*, 90 Wis. 2d 823, 837; *Binder v. Madison*, 72 Wis. 2d 613, 622, 241 N.W.2d 613 (1976).

Stanhope, 90 Wis. 2d 823, 837-38, 280 N.W.2d 711, 717, applies the "rational basis" test as described in *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961):

"[T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is

offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The supreme court earlier had upheld the notice requirement, *i.e.*, plaintiffs' pre-suit duty of filing notice with the governmental unit. The court reasoned it was rationally related to the objective of preserving public property in a safe condition. "The public tortfeasor may conduct a timely investigation of public property, to determine liability and prevent future accidents. The nature of much public property is such as to make it difficult to maintain, and impossible to maintain in completely safe condition at all times." *Binder v. Madison*, 72 Wis. 2d 613, 623, 241 N.W.2d 613 (1976). The notice requirement also enables an investigation of the claim while fresh. *Ibrahim v. Samore*, 118 Wis. 2d 720, 726-27, 348 N.W.2d 554 (1984). As to liability limits, in upholding a \$25,000 municipal liability cap the court said: "It is the legislature's function to evaluate the risks, the extent of exposure to liability, the need to compensate citizens for injury, the availability of and cost of insurance, and the financial condition of the governmental units." *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 377, 293 N.W.2d 504 (1980). Additionally, the court has sustained tortfeasor classifications designed to enable the government "to provide those services which it believes benefits the citizen[s]," *Stanhope v. Brown County*, 90 Wis. 2d 823, 842, 280 N.W.2d 711 (1979), and for its own protection in paying the cost of the judgment. *See Ibrahim*, 118 Wis. 2d at 727; *Doe v. Ellis*, 103 Wis. 2d 581, 589-90, 309 N.W.2d 375 (Ct. App. 1981); *Binder*, 72 Wis. 2d at 623. In sustaining these classifications, the courts also have looked to the historic differential between public and private tortfeasors. *See Stanhope*, 90 Wis. 2d at 838-44, and *Sambs*, 97 Wis. 2d at 372.

But for the private nature of the Foundation, the equal protection issue would easily be resolved vis-a-vis the tort victim. The individuals protected are those who manage the state's own property in discharging the state's mission of historic circus enrichment. The notice requirement serves to assure safe property, to enable a prompt investigation of accidents, and to ultimately protect the indemnity fund. Providing the indemnity induces people to this

public service without fear of personal loss. The alternative of state-purchased liability insurance rationally could be seen as needlessly expensive or, because of its rising costs, prohibitive to the integrity of the historic circus appreciation program.

The fact of the private nature of the Foundation should make no difference. The public purpose remains the same; the property remains the state's; the mission remains the state's; and the risk that liability insurance costs might defeat the best use of this property for the maximum obtainment of historic circus enrichment also remains the state's risk. To be sure, the Legislature could have chosen to appropriate funds directly to the Society to purchase liability insurance as part of the consideration flowing to the Foundation for its services. But the court has rejected this basis of attack. "The availability of liability insurance . . . is not by itself a basis for holding the challenged classification invalid, however. The 'rational basis' test for equal protection does not require that the legislature choose the best or wisest means to achieve its goals." *Stanhope*, 90 Wis. 2d at 843. And the rising costs of private liability insurance makes all the more reasonable the choice of bringing the Museum operatives directly within the state's own risk management program.

Moreover, there is nothing novel about establishing different procedures and tort liability rules within the private sector itself. Medical malpractice is a prime example. See Ch. 655, Stats.; 1985 Wisconsin Act 340 (\$1 million liability cap). Worker's compensation abrogated certain private sector tort liability altogether in favor of an alternate remedial scheme, and it was sustained over equal protection objections. *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N.W. 209 (1911). Sometimes the law grants a limited class of private entities a qualified tort immunity, but for certain torts only. See *New York Times Company v. Sullivan*, 376 U.S. 254 (1964). And sometimes the law grants private actors absolute tort immunity. See sec. 895.48, Stats. (good samaritan law). As to tort law classifications involving the private sector, if the court can "conceive any facts on which the legislation could reasonably be based, it must hold the legislation constitutional." *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 506, 261 N.W.2d 434 (1978). Therefore, the rational basis test is not limited to tort classifications based on the private versus public sector distinction.

In my opinion, therefore, the Act does not deny equal protection to the injured plaintiff. The private nature of the Foundation and the theoretic availability of liability insurance, even if they raised public purpose concerns, do not create equal protection infirmities. What counts is the rationality of successfully achieving a state program of historic circus enrichment by attracting qualified personnel to serve under separate tort procedures and rules, especially when faced with the alternative of high liability insurance costs.

These considerations also dispose of the second prong of the equal protection attack, that nothing distinguishes the Foundation from other similar entities serving state government. The Legislature rationally might have found that the Foundation uniquely serves the state in a high risk, high cost liability area and that the jeopardy to citizen historic circus appreciation is unacceptable as a matter of policy, either because of necessary pass-through of insurance costs to ticket purchasers, or the feared reduction of programs, or the anticipated loss of quality from cut backs in other areas. The rational basis test applies even to classifications among different governmental units. The Legislature “ “may address itself to only that phase of a problem that appears most acute” . . . even if the net result resembles a crazy quilt more than a carefully balanced sculpture.’ ” *Sambis*, 97 Wis. 2d at 378 n.13.

For the foregoing reasons I believe the Act is constitutional.

BCL:CDH

Constitutionality; Revisor of Statutes; Veterans Affairs, Department of; Words and Phrases; Section 3017(2) of 1985 Wisconsin Act 29 (the 1985 state budget bill) violates article IV, section 18 of the Wisconsin Constitution. OAG 37-86

October 14, 1986

GARY I. GATES, *Secretary*
Department of Employe Trust Funds

You request my opinion as to whether section 3017(2) of 1985 Wisconsin Act 29 (the 1985 budget bill) violates article IV, section 18 of the Wisconsin Constitution. The statute and constitutional provision are set forth in full below:

Section 3017(2) of 1985 Wisconsin Act 29.

EXECUTIVE SERVICE EXEMPTIONS. Notwithstanding section 40.02(30) of the statutes, the revisor of statutes serving on the effective date of this subsection and the secretary of veterans affairs serving on the effective date of this subsection are deemed, as of July 1, 1983, and May 1, 1985, respectively, to be participants who are not elected officials, executives or protective occupation participants. The revisor of statutes serving on the effective date of this subsection, the secretary of veterans affairs serving on the effective date of this subsection, the revisor of statutes bureau and the department of veterans affairs shall each make contributions as required under section 40.05 of the statutes as if this subsection had been in effect on July 1, 1983, and May 1, 1985, respectively.

Article IV, section 18 of the Wisconsin Constitution:

No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title.

It is my opinion that section 3017(2) is a private law and thus violates article IV, section 18 of the Wisconsin Constitution because its enactment did not comply with the single subject and title requirements of such section of the Wisconsin Constitution.

The Wisconsin Supreme Court stated in *Milwaukee Brewers v. DH&SS*, 130 Wis. 2d 79, 84, 387 N.W.2d 254 (1986):

[T]he constitutional mandate of art. IV, sec. 18 of the Wisconsin Constitution acts to inform the legislature that if it desires to

enact legislative provisions that are specific as to any location, individual, or entity, it must do so in a separate bill under separate title.

I begin my analysis, as the supreme court did, by determining whether the bill is private or local.

The court set forth the test for determining whether a law was a "private law" in *Milwaukee Brewers*, 130 Wis. 2d at 115:

Consistent with these principles and the purposes underlying art. IV, sec. 18, we hold that a legislative provision which is specific to any person, place or thing is a private or local law within the meaning of art. IV, sec. 18, unless: 1) the general subject matter of the provision relates to the state responsibility of statewide dimension; and 2) its enactment will have direct and immediate effect on a specific statewide concern or interest.

This test, which determines whether this type of specific provision is an exception to the separate bill requirement, is a two-part test. Both must be fulfilled in order for the provision to be an exception to the separate bill requirement. The general subject matter of the provision must relate to a state responsibility of statewide dimension. In addition, the enactment of the provision must have direct and immediate effect on a specific statewide concern or interest. By "specific" we mean more than a relatively generic interest or concern such as found in *Soo Line*. As we said earlier, most legislation is enacted under the state's relatively generic police power in the safety, health, welfare, morals, and security of the state's citizens. An appeal to those generic concerns or interests is insufficient; there must be more.

Section 3017(2) is a law specific to two persons. By its language, it relates only to the revisor of statutes and secretary of veterans affairs serving in those positions on July 20, 1985, the effective date of 1985 Wisconsin Act 29. It exempts the two individuals "serving" in these offices "on the effective date" from the restriction against executive pay category employes receiving creditable service after reaching age 62.

"Executive participating employe" in the Wisconsin Retirement System "means a 'participating employe' employed in a position designated under s. 20.923 (4), (8) or (9)." Sec. 40.02(30), Stats. The positions of revisor of statutes and secretary of veterans affairs are designated under section 20.923(4) at subsection (d)9. and 16. Nor-

mal retirement for the "executive participating employe" is established as age 62. Sec. 40.02(42)(c), Stats. Crediting of service and salary for retirement benefit calculations is limited to age 62 by virtue of section 40.02(17)(c) which states:

An executive participating employe holding a position designated under s. 20.923(4), (8) or (9) may not receive creditable service for service in that position on and after the first day of the 4th month commencing after the executive participating employe attains the age of 62 years.

Section 3017(2) thus removes the present revisor of statutes and secretary of veterans affairs from the age 62 restrictions established for "executive" employes, but does not remove these two positions from designation as "executive" positions by section 20.923(4). Since future holders of these positions would not be affected by section 3017(2), the class concerned is limited to the two present holders of the offices. Thus, the class created by section 3017(2) is "specific" to two persons and the section constitutes a private law under article IV, section 18 of the Wisconsin Constitution unless it relates to a state responsibility of statewide dimension and has a direct and immediate effect on a specific statewide concern or interest.

As the court held in *Milwaukee Brewers*, 130 Wis. 2d at 115, a legislative provision specific to a person "is a private . . . law . . . unless: 1) the general subject matter of the provision relates to a state responsibility of statewide dimension; and 2) its enactment will have direct and immediate effect on a specific statewide concern or interest." Section 3017(2) meets neither of these two requirements for excluding a provision specific to one or more persons from the prohibition of article IV, section 18 of the Wisconsin Constitution. The general subject matter of the provision is exemption of two specific persons from certain restrictions applicable to executive pay category employes, not a state responsibility of statewide dimension. While the retirement benefits of state employes generally involve a state responsibility of statewide dimension, the treatment of two specific employes does not rise to that magnitude.

Nor does section 3017(2) meet the second requirement that "its enactment will leave a direct and immediate effect on a specific statewide concern or interest." The provision affects only two persons and does not change the status of the offices held by those

persons. Thus, the provision does not address a specific statewide concern nor directly affect a statewide concern. Contrast this with the facts in *Milwaukee Brewers* where the court held that prison overcrowding is a specific type of statewide concern which would be directly and immediately affected by a provision which required a prison to be built in Milwaukee. 130 Wis. 2d at 119-20.

The *Milwaukee Brewers* court provided an example of the application of this latter test based upon the facts in *Soo Line R. Co. v. Transportation Dept.*, 101 Wis. 2d 64, 303 N.W.2d 626 (1981). *Soo Line* concerned a budget bill provision requiring the Soo Line Railroad to establish an at-grade crossing at a specific location in the state. In *Milwaukee Brewers*, 130 Wis. 2d at 117, the court said:

This test, applied to the facts of *Soo Line*, provides an example of its application. The legislative provision in *Soo Line* was both entity and location specific. The provision involved a matter of state responsibility of statewide dimension — the construction of railroad crossings. The espoused statewide concern for highway safety was not sufficiently specific, nor was the effect on statewide highway safety direct and immediate. The court correctly concluded that the legislative provision required a separate bill.

Similarly, in the instant situation, while retirement benefits for state employees generally is a statewide concern, an increase in benefit for two specific employees (not offices) does not have a “direct and immediate” effect on the espoused statewide concern. Section 3017(2) is therefore a private bill.

I must now determine whether 1985 Wisconsin Act 29 meets the requirements which article IV, section 18 of the Wisconsin Constitution imposes on a private law. The law cannot embrace more than one subject, which subject must be expressed in the title.

As the court stated by analogy in *Soo Line*, 101 Wis. 2d at 77: “Without elaborating, it is obvious from the nature of the act, the length of the act and the numerous sections in the act, that the budget review bill embraces many subjects in addition to the question of [these executive service exemptions].”

The court in *Soo Line*, 101 Wis. 2d at 77-78, states:

This court has explained how to test the sufficiency of the title of a private or local bill as follows:

“Probably as comprehensive a rule as can be found stated in the books, for testing the sufficiency of a title to a private or local legislative act, is the one deduced from the authorities by the New York court of appeals and approved in *Milwaukee County v. Isenring*, 109 Wis. 9: When one, reading a bill with the full scope of the title thereof in mind, comes upon provisions which he could not reasonably have anticipated because of their being in no way suggested by the title in any reasonable view of it, they are not constitutionally covered thereby.” *Diana Shooting Club v. Lamoreux*, 114 Wis. 44, 50-51, 89 N.W. 880 (1902).

It is clear that the title of ch. 418 gives no hint that the act regulates the crossing of the Soo Line Railroad tracks and state trunk highway 13. The requirements of sec. 18, art. IV, Wis. Const., have not been satisfied.

Similarly, the title of the 1985 budget bill, “AN ACT relating to state finances and appropriations, constituting the executive budget bill of the 1985 legislature, and making appropriations” provides no hint that the bill contains a provision relating only to two “executive” employees.

1985 Wisconsin Act 29, as it relates to the revisor of statutes and secretary of veterans affairs at section 3017(2), is a private law. The Act embraces multiple subjects and its title makes no mention of the exemption of two “executives” from the creditable service restrictions. I, therefore, conclude that section 3017(2) violates article IV, section 18 of the Wisconsin Constitution and is unconstitutional.

BCL:WMS

Banks and Banking; Conflict of Interest; Public Officials; Banking Review Board members are not authorized to act in cases involving banks in which they or their spouses own stock. OAG 38-86

October 16, 1986

RICHARD E. GALECKI, *Commissioner*
Office of Commissioner of Banking

Your June 23, 1986, letter asks whether members of the State of Wisconsin Banking Review Board may vote on an issue involving a bank in which they, or members of their family, hold stock. With respect to ownership by a member himself or herself, the answer to your question is clear: the member is disqualified. With respect to ownership by a family member, the answer to the question depends upon the facts of the particular situation.

Section 15.555(1), Stats., provides: "No member is qualified to act in any matter involving a bank in which he is an officer, director or stock holder, or to which he is indebted." Clearly, if a member of the Banking Review Board owns stock in a particular bank, he or she is absolutely prohibited from acting in any matter involving that bank. Equally clearly, a member may not avoid this prohibition by transferring title of stock to his or her spouse. Generally speaking, all property of spouses is considered marital property to which each spouse has a present undivided fifty percent interest. Sec. 776.31(1) and (3), Stats. Time of acquisition of property and certain marital agreements may affect these provisions. Generally speaking, however, you should advise members of the Banking Review Board that they may not simply transfer title to any stock to their spouse and expect, thereby, to avoid the provisions of section 15.555(1).

Transfer of title ownership to a member's children is also strongly advised against. Title is only one incident of ownership. *Mitchell Aero, Inc. v. Milwaukee*, 42 Wis. 2d 656, 662, 168 N.W.2d 183 (1969). One may still be the owner of property, without title, depending upon the existence or non-existence of other incidents of ownership. There is a difference between "real or true ownership" and "paper title only" ownership. *Id.* at 662. The courts will look to see who is the "real beneficial owner of the property" in determining who is the owner of that property. *State ex rel. Wisconsin Univ. Bldg. Corp. v. Bareis*, 257 Wis. 497, 504, 44 N.W.2d 259 (1950).

In construing words like “own,” “owner” and “ownership,” as found in statutes, the supreme court has “given the widest variety of construction, usually guided in some measure by the objects sought to be accomplished in the particular instance.” *Merrill R. & L. Co. v. Merrill*, 119 Wis. 249, 254, 96 N.W. 686 (1903). More recently, the supreme court has stated that ownership is a question which must be determined in the context of the purpose of the determination. *Mitchell Aero Inc. v. Milwaukee*, 42 Wis. 2d at 662.

The obvious purpose of section 15.555(1) is to avoid conflicts of interest. The Legislature has adopted an absolute rule of disqualification whenever a member of the Banking Review Board is a stockholder, officer, director or debtor. It is conclusively presumed that the person cannot separate personal interest from regulatory responsibilities. Limiting the word “stockholder” to title holders only would permit circumvention of the purpose of the statute by allowing stock certificates to be held in the name of another person while beneficial ownership remained with the Banking Review Board member.

Of course, this is not to say that a member of the Banking Review Board necessarily would be deemed to be the holder of stock in all cases in which his or her children held title. The answer would turn on the reasons for the transfer of title and the existence of beneficial use by the board member or other incidents of ownership. Moreover, the reasons for the stock transfer and the person from whom the stock is transferred could be relevant. For example, stock received by children as gifts from grandparents might not raise the same questions as stock received from parent board members. Conflict of interest statutes are strictly enforced and construed against the public officer involved. 67 C.J.S. *Officers* §204 (1978). This rule of construction will be applied to the facts of any particular transaction to determine whether or not a member is a “stockholder” regardless of the title holder.

Under Wisconsin’s Code of Ethics for Public Officials and Employees, disqualification may be mandated as well. Recently, the Ethics Board offered to address the application of the Ethics Code to the Banking Review Board after the attorney general rendered an opinion regarding section 15.555(1). I suggest you pursue the Ethics Board inquiry expeditiously.

I understand that members of the Banking Review Board own stock in certain bank holding companies. In my opinion, section 15.555(1) does not automatically disqualify those members from acting with respect to banks which are owned by bank holding companies. This is due to the literal wording of the statute. The statute speaks in terms of a "bank." A bank holding company is not itself a bank. 19 Op. Att'y Gen. 141, 143 (1930). I would advise you to explicitly include in your inquiry to the Ethics Board a question regarding the applicability of the Ethics Code to actions with respect to banks owned by corporations of which Banking Review Board members are stockholders. A member may be so financially interested in the parent corporation as to have a conflict of interest under the Ethics Code.

Finally, your letter states: "Some of the Banking Review Board members are involved with banks that have trust companies and in some cases vote the proxy. The board is also questioning if this causes any conflict?" If I understand this question correctly, some members own stock in banks which own trust companies. Under section 15.555(1), those members are disqualified to act with respect to the trust company.

BCL:ESM

Attorneys; Corporations; Dentistry; Optometry; Physicians and Surgeons; Restrictions on business corporations providing medical, legal and dental services discussed. OAG 39-86

October 21, 1986

TIM CULLEN, *Chairman*
Senate Organization Committee

As chair of the Senate Organization Committee you have requested this office's opinion on whether Wisconsin's statutes allow for-profit business corporations to charge fees for services provided by licensed professional employees. Your request includes four specific questions. These questions can best be answered after a brief explanation of the policy reasons why states have historically restricted the practice of the medical and legal professions.

In 53 Op. Att'y Gen. 35 (1964), this office stated that in general a corporation may not practice medicine, surgery or dentistry. The opinion pointed out that state statutes only permit individuals to obtain licenses to practice in these areas. 19 C.J.S. *Corporations* §956 (1940) states the same general rule:

It is not within the power of a corporation to carry on the business of practicing one of the learned professions

. . . .

The lack of capacity of a corporation to practice a learned profession extends to its hiring practitioners to carry on the business of practicing for it.

This prohibition against corporate practice applies to all of the learned professions: law, medicine and dentistry. Many states have also applied this prohibition to the practice of optometry.

The number of statutes which have been construed to prohibit corporate practice of the professions and the length of time these statutes have been in effect suggest that there are some important public policy concerns behind the prohibition against corporate practice. Some reasons for prohibiting a corporation from practicing law were discussed by the court in *In re Education Law Center, Inc.*, 86 N.J. 124, 429 A.2d 1051, 1056-57 (1981):

[T]he relationship of confidentiality, trust and undivided loyalty which must exist between a lawyer and his client could be impaired if the lawyer is employed by a corporation. . . .

. . . .

. . . [T]he corporation may place its own interests, whether political goals or profits, ahead of the interests of its clients

The court also noted that corporations, unlike attorneys, are not subject to the control and discipline of state courts.

Similar concerns are the basis for prohibiting the corporate practice of medicine. For-profit corporations have traditionally been prohibited from practicing medicine because corporate control could interfere with the personal relationship between physician and patient. 61 Am Jur. 2d *Physicians and Surgeons* §154 (1981). In *Bartron v. Codington County*, 68 S.D. 309, 2 N.W.2d 337 (1942), the court concluded that contracts executed by a for-profit corporation to provide medical services were unenforceable and against public policy. The court determined that the corporate practice of medicine was against public policy because it placed "undue emphasis on mere money making, and commercial exploitation of professional services." *Bartron*, 2 N.W.2d at 346.

The prohibition against the corporate practice of medicine includes a prohibition against the corporate practice of dentistry. In *State v. Boren*, 36 Wash. 2d 522, 219 P.2d 566 (1950), the court held that a corporation was illegally practicing dentistry by employing a licensed dentist. The court stated:

The general rule throughout the country is that no unlicensed person or entity may engage in the practice of medicine, surgery, or dentistry through licensed employees. . . .

. . . Experience has shown that the care and treatment of the teeth requires, not only skill, but the personal relationship between dentist and patient.

Boren, 219 P.2d at 572.

In some states, the prohibition against the corporate practice of medicine has also historically prohibited the corporate practice of optometry. See *Kendall v. Beiling*, 295 Ky. 782, 175 S.W.2d 489 (1943), and *State v. Standard Optical Co. of Oregon*, 182 Ore. 452, 188 P.2d 309 (1947). In these states, the courts or the Legislature determined that the same important public health concerns behind regulation of medicine required that the practice of optometry be limited only to licensed individuals.

This general historic prohibition against the corporate practice of professions was intended to protect the public, but the prohibition also had the effect of preventing professionals from taking advantage of certain benefits of corporate form. Most importantly, professionals could not benefit from federal tax treatment as a corporation. To allow professionals to obtain corporate tax benefits while at the same time preventing the perceived problems which gave rise to the historic prohibition against corporate practice by professionals, states promulgated professional service corporation statutes.

Wisconsin first promulgated a professional service corporation law in 1961. The law allowed professional persons licensed in the same field to form professional service corporations. The act specifically preserved the professionals' responsibility to patients or clients, and it expressly provided that licensing or disciplinary bodies would retain their control over professionals, despite the fact that the professionals might be corporate shareholders or employees.

A draft of section 180.99, Stats., submitted on April 15, 1961, by the State Medical Society contains an introductory note and comments which explain the purpose and function of the act:

Two points are strongly emphasized. First, the legislation is designed to do nothing more than provide a legal device which will give self employed persons the same tax treatment enjoyed since 1942 . . . by those who could qualify as "employees" under the Internal Revenue Code. Second, it is intended that service corporations authorized by such legislation *not* practice a profession . . . but that they serve as a convenience to shareholders so as to enable them to meet a technical and substantial tax problem. The professional . . . would continue to render service as if the corporation were not in existence, and would incur the same legal liability and continue the same contract and other relationships with the person served which have been established previously by general law.

In addition, the draft specifically recognizes the historical prohibition against the corporate practice of professions, and the introductory note refers to the prohibition as a matter of "sound public policy." It, therefore, appears that Wisconsin's service corporation law was intended to provide corporate tax benefits to professionals

while affirming the general prohibition against the corporate practice of professions. *See also*, 51 Op. Att'y Gen. 157 (1962).

This general discussion of the prohibition against corporate practice of professions provides a logical framework for answering these specific questions. In the following discussion, unless indicated otherwise, the term "corporation" means a for-profit business corporation, not a service corporation. The discussion does not apply to corporations operating voluntary health care plans under section 628.36(1).

- (1) Would the practice of a corporation receiving compensation for medical services provided by an employed professional violate section 448.08(1) and (2)?

Section 448.08(1) states:

FEE SPLITTING. Except as otherwise provided in this section, no person licensed or certified under this chapter may give or receive, directly or indirectly, to or from any person, firm or corporation any fee, commission, rebate or other form of compensation or anything of value for sending, referring or otherwise inducing a person to communicate with a licensee in a professional capacity, or for any professional services not actually rendered personally or at his or her direction.

This provision prohibits, *inter alia*, a medical professional from giving any compensation to a corporation in exchange for the corporation referring patients to the professional. If a corporation receives fees for services provided by a professional employe, this compensation could be construed as payment made by the professional to the corporation in exchange for the corporation's referring patients to the professional.

In *United Calendar Mfg. Corp. v. Huang*, 94 A.D.2d 176, 463 N.Y.S.2d 497 (1983), a New York court found that an agreement between a business corporation and two physicians violated New York's fee splitting statute. Under the agreement, the corporation had received thirty percent of the total fees generated by the two physicians.

In Wisconsin, the terms of the fee splitting statute are violated whenever a physician compensates a corporation in exchange for referrals. If a corporation receives compensation for a physician's professional services and the physician receives patients through his

or her employment with the corporation, this practice would violate section 448.08(1).

But while the practice of a corporation receiving compensation for medical services would violate section 448.08(1), section 448.08(2) does not apply to this arrangement. Section 448.08(2) applies only to medical practitioners, requiring that each medical practitioner treating a patient must submit a separate statement of charges for services provided to the patient.

- (2) Would the practice of a corporation receiving compensation for medical services provided by an employed professional violate section 448.03(1)?

Section 448.03(1) provides: "LICENSE REQUIRED TO PRACTICE. No person may practice medicine and surgery, podiatry or physical therapy, or attempt to do so or make a representation as authorized to do so, without a license granted by the board." The practice of medicine or surgery is defined in section 448.01(9), which states:

"Practice of medicine and surgery" means:

(a) To examine into the fact, condition or cause of human health or disease, or to treat, operate, prescribe or advise for the same, by any means or instrumentality.

(b) To apply principles or techniques of medical sciences in the diagnosis or prevention of any of the conditions described in par. (a) and in sub. (2).

(c) To penetrate, pierce or sever the tissues of a human being.

(d) To offer, undertake, attempt or do or hold oneself out in any manner as able to do any of the acts described in this subsection.

Read together, sections 448.03(1) and 448.01(9) prohibit any unlicensed person from engaging in any of the activities which constitute the practice of medicine.

This prohibition applies to corporations. Under section 990.01(26), when the word person appears in the Wisconsin statutes, it is to be construed as including all partnerships, associations and bodies politic or corporate. Therefore, section 448.03(1) prohibits corporations from practicing medicine.

While it is possible for an individual to qualify under section 448.05 for a license to practice medicine, it is not possible for a corporation to qualify for a license. Section 448.05(2) requires that to obtain a license to practice medicine, an applicant must have graduated from a medical school and must have completed twelve months of postgraduate training. Those requirements can only be satisfied by an individual. Therefore, a corporation cannot be licensed to practice medicine.

Because a corporation cannot be licensed to practice medicine, sections 448.03(1) and 448.01(9) prohibit it from engaging in any activities which constitute the practice of medicine. Section 448.01(9)(d) prohibits a corporation from offering, attempting or holding itself out as able to perform any of the medical acts specified in section 448.01(9)(a) to (c). If a business corporation supplied medical services through licensed physicians, it would be offering to provide and providing services which constitute the practice of medicine. Therefore, section 448.03(1) prohibits a corporation from providing medical services through employed professionals.

The conclusion that a corporation cannot practice medicine, although clear from the reading of the statutes enumerated above, becomes pellucid when viewed in the context of other statutes. If corporations were not prohibited from practicing medicine, section 628.36, which permits corporations which operate voluntary health plans to pay their health care professionals on a salary, per patient or fee-for-service basis, would be unnecessary. Similarly, the service corporation law discussed earlier would be unnecessary.

In your third and fourth requests you ask in what manner business corporations could be involved in providing professional service through employed licensed professionals. It is impossible to provide an answer to that broad question. The following discussion, therefore, assumes, as the introduction to the opinion request indicates, that the corporation wishes to charge fees for the professional services rendered by its employees.

- (3) May a for-profit business corporation employ professionals to provide medical services?

The Wisconsin statutes regulating medical practices and the policies behind the general rule prohibiting the corporate practice of professions both dictate that in Wisconsin a business corporation may not provide medical services through employed professionals.

Such an arrangement would violate section 448.08(1), Wisconsin's fee splitting statute, and it would violate section 448.03(1), which prohibits any person from practicing medicine without a license.

In addition to violating the language of the statutes, the employment arrangement violates the traditional rule that business corporations cannot practice medicine. As the drafters of Wisconsin's professional service corporation law recognized, the prohibition against corporate practice of the professions reflects sound public policy. The prohibition protects physician-patient relations and maintains regulatory control over the practice of medicine.

(4) May a for-profit business corporation employ professionals to provide legal, dental or other professional services?

The historic prohibition against a corporation practicing the professions has been extended to law, dentistry and, in some states, optometry. This answer will cover briefly the legality of a Wisconsin business corporation employing lawyers, dentists and optometrists to provide professional services.

Wisconsin's statutes and public policy prohibit a business corporation from employing either attorneys or dentists to provide professional services in Wisconsin.

Section 757.30 makes it a crime to practice law in Wisconsin without a license. A corporation that provides legal services through an employed attorney would be practicing law without a license. In *State ex rel. State Bar v. Bonded Collections*, 36 Wis. 2d 643, 154 N.W.2d 250 (1967), the Wisconsin Supreme Court found that a collection agency had engaged in the unauthorized practice of law. The collection agency had employed an attorney to bring suit on behalf of its creditor clients. The court stated:

If the attorney is in fact the agent or employee of the lay agency, his acts are the acts of his principal or master. . . . The prohibition against the practice of law by a layman . . . applies alike to the practice by a layman directly and in person and to the indirect practice through an agent or employee.

State ex rel. State Bar, 36 Wis. 2d at 655-56, quoting *Nelson v. Smith*, 107 Utah 382, 394, 154 P.2d 634 (1944).

The practice of dentistry by unauthorized persons is also prohibited. Section 447.02(1) prohibits the unauthorized practice of dentistry and defines acts which constitute the dental practice. Under

section 447.02(1)(d), the practice of dentistry includes undertaking the practice of dentistry “by any means or methods, including those defined in this chapter, gratuitously, or for a . . . fee . . . paid directly or indirectly . . .” Any corporation employing dentists to provide dental services would be practicing dentistry through the means of employing the dentists.

In addition to violating the statutory language prohibiting unlicensed practice of law and dentistry, employment of attorneys and dentists by a business corporation would contravene the important public policies behind the general prohibition of corporate practice. Such an arrangement would interfere with attorney/client, dentist/patient relations, and would interfere with regulating bodies’ control over the legal and dental practices.

In Wisconsin, there is one profession which a corporation can practice through employment of professionals. Section 449.02(1) states that no person shall practice optometry in Wisconsin without a license. However, in *State ex rel. Harris v. Kindy Optical Co.*, 235 Wis. 498, 292 N.W. 283 (1940), the Wisconsin Supreme Court found that Wisconsin law allowed corporations to employ optometrists. The court concluded that optometry was not a learned profession, stating “[o]ur legislature has dealt with optometry as a skilled calling, not as a profession involving a relation of special confidence between practitioner and patient.” *Harris*, 235 Wis. at 501.

Although a corporation is allowed to provide optometric services through an employed optometrist, the optometry statutes include a fee splitting prohibition. Section 449.08(1)(d) states that unprofessional conduct for optometrists includes splitting any optometric service fee with anyone other than an associate licensed optometrist.

In summary, under current Wisconsin law, a corporation which is not a service corporation may not receive fees for services provided by employed physicians. Similarly, the corporation could not receive fees for services provided by employed attorneys or employed dentists. However, a business corporation may employ optometrists to provide optometric services. When employing optometrists, a corporation should be aware that under section 449.08(1),

an optometrist may only split optometric fees with other optometrists.

BCL:AL

Bail; Law Enforcement; Police; Prisons and Prisoners; Sheriffs; Acting under the authority of section 969.07, Stats., local law enforcement officials may deny release from custody to a person arrested for a misdemeanor if in the officials' opinion the person is not in a fit condition to care for his or her own safety or would constitute, because of his or her physical condition, a danger to the safety of others. OAG 40-86

October 22, 1986

ROBERT D. ZAPF, *District Attorney*
Kenosha County

You have asked for my opinion whether a portion of section 969.07, Stats., is constitutional and whether a local law enforcement practice of denying misdemeanor arrestees release on bail is valid under that statute.

Section 969.07, with the questioned portion emphasized, provides:

Taking of bail by law enforcement officer. When bail has been set for a particular defendant, any law enforcement officer may take bail in accordance with s. 969.02 and release the defendant to appear in accordance with the conditions of the appearance bond. Bail shall not be required of a defendant who has been cited for commission of a misdemeanor in accordance with s. 968.085. The law enforcement officer shall give a receipt to the defendant for the bail so taken and within a reasonable time deposit the bail with the clerk of court before whom the defendant is to appear. Bail taken by a law enforcement officer may be taken only at a sheriff's office or police station. The receipts shall be numbered serially and shall be in triplicate, one copy for the defendant, one copy to be filed with the clerk and one copy to be filed with the police or sheriff's department which takes the bail. *This section does not require the release of a defendant from custody when an officer is of the opinion that the defendant is not in a fit condition to care for his or her own safety or would constitute, because of his or her physical condition, a danger to the safety of others. If a defendant is not released under this section, s. 970.01 shall apply.*

Your questions have been prompted by the procedure used by the Kenosha County Sheriff's Department and the Kenosha Police

Department in which the arresting officer requests that the person arrested for a misdemeanor be denied bail and be taken before a judge within a reasonable time pursuant to section 970.01.

The request form that is completed by the officer states:

I hereby request that Bail on the above charges be denied this subject and that he/she be held until he/she can be taken before a Judge pursuant to Section 970.01 of the Wisconsin Statutes.

It is the opinion of the arresting officer that this subject is not in a fit condition to care for his or her own safety or would constitute a danger or safety to others because:

In the form the arresting officer is required to give his or her reasons that release should be denied; and the request is reviewed by a supervising officer.

In questioning the legality of this practice under section 969.07, you have expressed concern that the denial of bail without any objective standards and without assurance that the accused will be taken before a judge within a reasonable time amounts to preventive detention, that is, the denial of liberty to a presumably innocent person.

Compliance with section 969.07 should alleviate these concerns. The statute provides objective criteria because it permits an officer to deny release only when "the defendant is not in a fit condition to care for his or her own safety or would constitute, because of his or her physical condition, a danger to the safety of others." Thus, the accused can be denied release only when his or her condition poses the problem. An officer acting in compliance with these criteria does not deprive the accused of liberty without due process of law in violation of the accused's federal constitutional rights. *See Syarto v. Baker*, 500 F. Supp. 888, 890-91 (E.D. Wis. 1980).

Compliance with the statute also assures that the accused will not be detained for an unreasonably long time. The accused should be released as soon as the condition requiring the detention subsides to the point that the accused can care for his or her own safety and to the point where the accused is no longer, because of his or her condition, a danger to the safety of others. However, if the condition persists, the accused is protected because the last sentence of section 969.07 requires that any person not released under the section must be taken before a judge within a reasonable time

pursuant to section 970.01. The incorporation of section 970.01 adequately protects the accused's right to liberty since "no person arrested on any basis has any automatic constitutional right to immediate bail." *Syarto*, 500 F. Supp. at 890. Therefore, under the statute, the accused should be released when the condition subsides or he or she should be taken before a judge within a reasonable time after the arrest, whichever occurs first.

You also believe that the validity of section 969.07 is in doubt because of the following statement made in 63 Op. Att'y Gen. 241, 244-45 (1974): "Our legislature has not authorized judges to delegate their authority to fix the amount or form of bail. Accordingly, a schedule or rule which allowed officers to exercise any discretion with respect to the amount or form of bail would constitute an unlawful delegation of judicial authority."

This statement does not cast any doubt on the validity of section 969.07. The point of the statement is that the Legislature assigns the authority in regard to bail. The Wisconsin Court of Appeals has noted that "it is within the province of the legislature's police power to regulate who shall determine bail." *Kahn v. McCormack*, 99 Wis. 2d 382, 388, 299 N.W.2d 279 (Ct. App. 1980). The authority of the sheriff to take, accept or approve bail is limited to that conferred on him by statute. 8 C.J.S. *Bailments* §40.b. (1962). Therefore, the officers are acting validly as long as they act in compliance with the authority vested in them by section 969.07.

In regard to the practice of the sheriff's and the police departments in Kenosha, the officers have the authority to deny a person release on bail if the criteria set forth in section 969.07 are satisfied. There is, however, a problem with the procedure employed in Kenosha County because the form used by the officers is not in compliance with the statute. Under the terms of the form, an officer can request denial of bail because the arrested person "would constitute a danger or safety to others." This reason for denying bail is not valid. The statute states that a person may be denied release if he or she constitutes a danger to the safety of others "because of his or her physical condition." The physical condition of the arrested person is the important qualifier that has not been included on the form the officers use. It must be included if the officers are to act in compliance with the objective criteria set forth in the statute.

The form should clearly require the arresting officer to state the reasons for denying release. If denial of the release is arbitrary or for any reason not provided for in the statute, the officers involved and the city or county could be liable. *See Syarto*, 500 F. Supp. at 891. Therefore, the arresting officer should set forth the facts that substantiate his or her belief that denial of release is authorized under the statute.

The form should be altered to indicate that the arresting officer is requesting denial of release only until the condition justifying the denial of release subsides or until the accused is taken before a judge pursuant to section 970.01, whichever occurs first.

You have also questioned whether section 969.07 is constitutional in light of section 969.035 and other unspecified provisions.

Apparently your concern is that the authority of the officer to deny the accused release under section 969.07 somehow conflicts with the authority of the court to deny the accused pretrial release under section 969.035. As noted above, however, the Legislature regulates who shall determine bail; and the Legislature has passed both statutes. It is obvious that in creating section 969.035, the Legislature was aware of section 969.07 because in the same law that created section 969.035, the Legislature amended section 969.07. *See* chapter 183, sections 9 and 13, Laws of 1981. The Legislature, therefore, did not believe that the authority of the officers conflicted with the authority of the courts.

Without an explanation of the constitutional problems that you perceive, it is difficult to further assess other possible constitutional challenges to the statute.

BCL:SWK

Conflict of Interest; Corporations; Investment Board, Wisconsin;
The State of Wisconsin Investment Board lacks the statutory authority to place one of its board members or an employe on the board of directors of a private corporation. OAG 41-86

October 28, 1986

GEORGE W. CROWNHART, *General Counsel*
State of Wisconsin Investment Board

The State of Wisconsin Investment Board (SWIB) requests my opinion on a number of questions relating to placing an employe or member of the SWIB on the board of directors of a private corporation in which the SWIB has an equity or debt investment.

Your first question asks:

Does the Investment Board have the statutory authority to have its employes serve on one or more Board of Directors of a private corporation where the Investment Board has an equity or debt investment in the corporation?

It is my opinion that the SWIB lacks the statutory authority to have its employes serve on boards of directors of private companies except during the limited period in which the SWIB is liquidating a corporation, 100 percent of whose common stock it owns.

As an administrative agency created by the Legislature, the SWIB has only those powers which are expressly conferred or which are necessarily implied by statutes under which it operates. Furthermore, any reasonable doubt as to the existence of implied power should be resolved against the exercise of such authority. *Kimberly-Clark Corp. v. Public Service Comm.*, 110 Wis. 2d 455, 461-62, 329 N.W.2d 143 (1983); *State (Dept. of Admin.) v. ILHR Dept.*, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977).

The SWIB executive director is employed under the authorization of section 25.156(2), Stats., which reads:

(2) The members of the board shall employ an executive director, who shall serve outside the classified service, at the pleasure of the members of the board. Such director shall be qualified by training and prior experience to manage, administer and direct the investment of funds.

Other SWIB employes are employed under the authority of section 25.16(2) and (3), as amended by 1985 Wisconsin Act 29, section 629:

(2) The executive director shall appoint the employes necessary to perform the duties of the board under the classified service. ~~These, except that the executive director shall include~~ *appoint investment directors in the unclassified service.* The members of the board shall participate in the selection of such directors. Such investment directors shall serve a probationary period of not less than 6 months nor more than 2 years as determined by the members of the board. Neither the executive director, any investment director nor any employe shall have any financial interest, either directly or indirectly, in any firm engaged in the sale or marketing of real estate or investments of any kind, nor shall any of them render investment advice to others for remuneration.

(3) The executive director may appoint an executive assistant who shall serve at the pleasure of the executive director outside the classified service. The executive assistant shall perform the duties prescribed by the executive director.

The primary duty of the investment director and other SWIB employes is to "invest" state funds. Sec. 25.17, Stats. Subsidiary "additional powers" are granted by section 25.18 to aid the SWIB in its duty to "invest." I find nothing in these sections nor in the remainder of chapter 25, Stats., that authorizes the SWIB to place an employe on the board of directors of a private corporation. Since there is no specific delegation of such authority by the Legislature, I must inquire whether that authority is implied in the duty to "invest."

Webster's Ninth New Collegiate Dictionary at page 636 defines "invest" as "to commit (money) in order to earn a financial return." Participation in the management of the company which is the subject of the investment does not appear to be an element of the definition. It further appears that the Legislature's view of "invest" was so limited, since additional powers which the Legislature deemed necessary, but which are not included within the definition of "invest," are granted in section 25.18. For example at subsection (1)(d), section 25.18 authorizes the SWIB to:

Liquidate or cause to be liquidated any corporation 100% of whose common stock is owned by the board, *or operate such corporation until it can be liquidated* to recoup the investment of the board, but such period shall not exceed 5 years.

The Legislature has therefore specifically authorized the SWIB to manage a corporation under the limitations set forth in such section.

The maxim or rule that a statute which expresses one thing is exclusive of another, is applied to statutory interpretation. Where a form of conduct, the naming of its performance and operation, the persons and things to which it refers, are designated, there is an inference that all omissions should be understood as exclusions. The rule is that if a statute provides one thing, a negative of all others is implied.

Gottlieb v. Milwaukee, 90 Wis. 2d 86, 95, 279 N.W.2d 479 (Ct. App. 1979) (footnotes omitted).

I see no basis for necessary implication that the authority to “invest” includes the authority to participate in management of the subject of the investment. The Legislature has specifically considered and in section 25.18 sets forth the “additional powers” granted to the SWIB to aid in its duty to “invest.” The right to manage a private corporation is granted only in specific circumstances. I find no necessary implication in the statutes to support an expansion of the expressly granted authority of section 25.18.

You also ask the following:

If, at some point in time, the Investment Board should own a majority interest in a company and is solicited by the company to either nominate or put onto the Board of Directors a member of the Investment Board, would the service of a member of the Investment Board on such outside corporate board be as an employe of the State of Wisconsin?

It is my further opinion that the statutes do not expressly or by necessary implication authorize the SWIB to place one of its board members on the board of directors of a private corporation. Sections 25.17 and 25.18, previously discussed, set the parameters of legislatively delegated authority, whether that authority is exercised by the board itself or through its employes. I find nothing addi-

tional in chapter 25 that requires further discussion or leads to a different result.

You ask a number of questions regarding the liability of a SWIB representative on the board of directors of a private corporation. These questions are rendered moot since I have previously determined herein that the SWIB lacks the statutory authority to place an employe or SWIB board member as its representative on the board of directors of a private corporation.

BCL:WMS

Physical Therapists; Public Health; Discussion of circumstances under which a physical therapist may practice without a referral pursuant to section 448.04(1)(e), Stats. OAG 42-86

October 29, 1986

TIM CULLEN, *Chairman*
Senate Organization Committee

You have requested my opinion concerning interpretation of 1985 Wisconsin Act 290, which amends the Medical Practices Act, section 448.04(1)(e), Stats. The amendment allows physical therapists to practice without referral in certain limited situations.

As amended, section 448.04(1)(e) provides as follows. The amending language is underlined.

448.04(1)(e) License to practice physical therapy. A person holding a license to practice physical therapy may practice as defined in s. 448.01(4) upon the written referral of a physician, dentist or podiatrist. Written referral is not required if a physical therapist is appointed to a multidisciplinary team under s. 115.80(3) to assist in the identification of children with exceptional educational needs, provides services as part of a home health care agency or provides services to a patient in a nursing home pursuant to the patient's plan of care. The board may, by rule, provide for various classes of temporary licenses to practice physical therapy.

You ask the following questions regarding the newly amended statute:

1. Physical therapists usually are not appointed to multidisciplinary teams (M-team) for the purpose of identifying children with exceptional educational needs. Does the language mean "evaluate" the child for purposes of M-team screening?
2. If appointed to an M-team, may a physical therapist provide services without referral to children who are identified as having physical therapy needs?
3. If appointed to an M-team, may the physical therapist "screen" kindergarten children without referral?
4. If a physical therapist is under contract to a home health care agency, may that physical therapist provide services to

any of the home health care agency's clients without physician referral?

5. Within a nursing home, is there a requirement for the patient's plan of care to specify particular physical therapy services? Many care plans are very general.

Your first three questions concern physical therapists' participation, as part of M-teams, in identifying children with exceptional educational needs. Sections 115.76 through 115.996 establish a statewide program for these children, who are defined as those having mental, physical or learning disabilities which require specialized education. *See* sec. 115.76(3), Stats.

Children suspected of having exceptional educational needs are identified by two methods. The first consists of direct referral by reporting the name of the child to the school board. *See* sec. 115.80(1)(a), Stats., and s. PI 11.02(1), Wis. Adm. Code. This referral can be initiated by parents, teachers, psychologists, social workers, social agency administrators, doctors or nurses. *See* sec. 115.80(1)(a), Stats. The second method consists of continuous screening, both formal and informal, which is conducted in the public schools and in state and county residential facilities. *See* sec. 115.80(2), Stats., and s. PI 11.02(2), Wis. Adm. Code.

Once these children are preliminarily identified, they are evaluated by an M-team. *See* sec. 115.80(3), Stats., and s. PI 11.03(1), Wis. Adm. Code. The M-team is appointed by the school board and consists of two or more persons who have expertise in assessment and programming for the exceptional educational needs of the child being evaluated. *See* sec. 115.80(3)(a), Stats., and s. PI 11.03(3), Wis. Adm. Code. The M-team is responsible for determining whether a child does indeed have exceptional educational needs and, if so, for recommending to the school board an educational program fitted to the individual child's needs. *See* sec. 115.80(3)(b)-(e), Stats., and s. PI 11.03(1), Wis. Adm. Code.

The language of section 448.04(1)(e) is clear and unambiguous: by its plain meaning it permits physical therapists to participate as M-team members "to assist in the identification of children with exceptional educational needs." Under the amended statute, physical therapists are now permitted to participate, without referral, in the M-team process outlined above and set forth more fully in sections 115.80(3) and PI 11.03. The answer to your first question,

therefore, is "yes"; the statutory language plainly permits physical therapists to participate in evaluating a child for purposes of M-team screening.

In response to your second question, section 448.04(1)(e) provides only for physical therapists' participation in the "identification" of children with special needs. Nothing in the statutory language further permits physical therapists to provide professional services without referral once the identification process is concluded. Thus, the answer to your second question is "no."

In responding to your third question, I will assume that you use the word "screen" synonymously with the word "evaluate" as used in your first question. Although the words have a somewhat different meaning, both are part of the process of identifying children under section 115.80. The "children" to be identified are defined as any persons under the age of twenty-one years. Sec. 115.76(2), Stats. M-team examination, however, is restricted to children who have attained the age of three years. Sec. 115.80(3)(b), Stats. Therefore, physical therapists, as part of M-teams, may screen or evaluate kindergarten children without referral. The answer to your third question is "yes."

Your fourth question concerns "home health care agencies," which I assume are the same as "home health agencies" as defined by section 141.15. Section 448.04(1)(e), by its plain meaning, now permits physical therapists to "provide services as part of a home health care agency" without referral. The answer to your question is therefore "yes."

As for your final question, section 448.04(1)(e) now states that physical therapists may "provide services to a patient in a nursing home pursuant to the patient's plan of care." The fact that the term "pursuant to the patient's plan of care" is included in the revised statute indicates that physical therapy must be specifically noted in the plan. Otherwise, the term would be superfluous. A statute should be construed so that no word or clause is rendered surplusage, and so that every word is given effect. *Donaldson v. State*, 93 Wis. 2d 306, 315, 286 N.W.2d 817 (1980). Accordingly, the answer to your fifth question is "yes."

BCL:BLB

Indians; Licenses and Permits; Mineral Rights; Pollution; Taxation; The state net proceeds occupation tax and mining permit process are generally not applicable to mining operations on the Sokaogon Reservation, whether those operations are conducted by the tribe or by a non-Indian lessee. Any federal environmental impact statement required by the federal government would legally need to be shared with or presented to the state. The applicability of state pollution control laws to mining activity on the reservation is also discussed. OAG 43-86

November 7, 1986

ANTHONY S. EARL

Governor

You have asked a series of questions relating to possible future mining operations on the reservation of the Mole Lake (Sokaogon) Chippewa Community. Specifically, you ask whether the Wisconsin net proceeds occupation tax, mining permit process and pollution control laws would apply to mining activities by the Sokaogon Tribe, and whether leasing the mining operation to a non-Indian would affect the applicability of these laws. In addition, you wish to know whether an environmental impact statement, if required by the federal government, legally needs to be shared with or presented to the state.

For the reasons explained below, it is my opinion that neither the net proceeds occupation tax nor the mining permit process is applicable to mining operations on the Sokaogon Reservation, whether the mining is conducted by the Tribe or by a non-Indian lessee. In order to answer comprehensively your question concerning the application of state pollution control laws, this opinion would need to analyze in the context of Indian law each state environmental statute and its federal counterpart. An analysis of that depth is beyond the scope of this opinion. Consequently, the section addressing pollution control laws will discuss certain general principles and guidelines, but will not attempt a definitive answer to your question. Finally, it is my opinion that where a federal environmental impact statement must be prepared, the state is entitled to a voice in the process under federal regulations.

The following discussion will first describe the analytical framework used to determine issues of state regulatory authority on Indian reservations. Each of the three regulatory issues — the net

proceeds occupation tax, the mining permit process and state pollution control laws — will then be discussed in turn, as each applies both to a tribal mining operation and to mining conducted by a non-Indian lessee. Finally, your question concerning environmental impact statements will be addressed.

I.

ANALYTICAL FRAMEWORK FOR STATE JURISDICTION

The enactment of Pub. L. No. 280, 67 Stat. 588 (1953), conferred on Wisconsin criminal and civil jurisdiction over all Indian reservations within the state other than the Menominee Reservation. 18 U.S.C. §1162; 28 U.S.C. §1360. The grant of civil jurisdiction has been interpreted by the United States Supreme Court to refer to state court jurisdiction over private civil matters arising on Indian reservations to which Indians are parties. Pub. L. No. 280 did not, the Court held, confer on the state any regulatory jurisdiction, including the power to tax. *Bryan v. Itasca County*, 426 U.S. 373, 388-90 (1976).

The state is not absolutely prohibited, however, from exercising jurisdiction over Indian tribes and tribe members. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980); *County of Vilas v. Chapman*, 122 Wis. 2d 211, 214, 361 N.W.2d 699 (1985); *State v. Webster*, 114 Wis. 2d 418, 432, 338 N.W.2d 474 (1983). State regulatory jurisdiction within reservation boundaries is determined according to established principles most recently articulated by the United States Supreme Court in *Rice v. Rehner*, 463 U.S. 713 (1983). There exist “two independent but related barriers” to state jurisdiction: federal preemption of state authority and infringement of the tribal right to self-government. *Rice*, 463 U.S. at 718-19 (citing *Bracker*, 448 U.S. at 142); *Chapman*, 122 Wis. 2d at 214; *Webster*, 114 Wis. 2d at 432. The trend in recent cases has shifted the emphasis away from the second barrier of tribal sovereignty and toward reliance on federal preemption. *Rice*, 463 U.S. at 718; *Chapman*, 122 Wis. 2d at 214; *Webster*, 114 Wis. 2d at 433.

The test for federal preemption is two-pronged. Initially, the courts must assess the “backdrop” of tribal sovereignty by determining whether the tribe has a tradition of self-government in the area sought to be regulated and by balancing the state, federal and tribal interests involved. Against this backdrop, the courts then determine whether the federal government has preempted the

state's exercise of jurisdiction. *Rice*, 463 U.S. at 719-20; *Webster*, 114 Wis. 2d at 434-36. A finding of preemption in Indian law, however, does not necessarily require that Congress explicitly preempt the assertion of state authority. *Rice*, 463 U.S. at 719; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

Judicial analysis of regulatory issues has recently favored the doctrine of federal preemption. Where preemption is not found, however, the courts will address the second and independent barrier of state infringement on the tribal right of self-government. "Although self-government is related to federal preemption in the sense that both depend on congressional action and in the sense that preemption is considered in the context of the deeply ingrained traditional notions of self-government, the self-government doctrine is an independent barrier to state regulation." *Crow Tribe of Indians v. Montana*, 650 F.2d 1104, 1110 (9th Cir. 1981), cert. denied, 459 U.S. 916 (1982). See also *Bracker*, 448 U.S. at 143.

Each of your first three questions, regarding the applicability of the state net proceeds occupation tax, mining permit process and pollution control laws to reservation mining activities, whether operated by the tribe or leased to non-Indians, raises an issue of state regulatory authority within reservation boundaries. Consequently, each is analyzed below using this general preemption/infringement framework.

II.

NET PROCEEDS OCCUPATION TAX

The Wisconsin net proceeds occupation tax, section 70.37 *et seq.*, Stats., is designed to compensate the state and its municipalities for the loss of irreplaceable metalliferous minerals and for the costs associated with that loss. Sec. 70.37(2), Stats. The tax is imposed on all "persons engaged in the activity of mining metalliferous minerals in this state." *Id.* A "person" is defined as "a sole proprietorship, partnership, association or corporation and includes a lessee engaged in mining metalliferous minerals." Sec. 70.375(1)(d), Stats. Under this taxing scheme, if the Sokaogon Tribe or a tribal enterprise were to conduct mining operations on the reservation, the legal incidence of the net proceeds occupation tax would clearly fall on the tribe.

A. Sokaogon Tribe

A basic tenet of preemption in federal Indian law is that "Indian tribes and individuals generally are exempt from state taxation within their own territory." *Montana v. Blackfeet Tribe of Indians*, 105 S. Ct. 2399, 2402 (1985). Application of the doctrine has been uniform: states may not, for example, tax Indian income derived solely from reservation sources (*McClanahan v. Arizona State Tax Com.* 411 U.S. 164 (1973)); personal property of an Indian which is located on trust lands within the reservation (*Bryan v. Itasca County*, 426 U.S. 373 (1976)); or on-reservation sale of cigarettes to Indians by Indian retailers (*Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)).

This line of tax cases establishes a tradition of tribal immunity from state taxation, which may be overcome only "where Congress has expressly provided that state laws shall apply." *McClanahan*, 411 U.S. at 171 (quoted in *Rice*, 463 U.S. at 719-20). The United States Supreme Court has recently reiterated this application of Indian law preemption:

In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.

Blackfeet Tribe, 105 S. Ct. at 2403. The question here, then, is whether Congress has clearly authorized the State of Wisconsin to impose its net proceeds occupation tax on Indian mining activities within reservation boundaries.

As noted earlier in this opinion, Wisconsin was granted criminal and civil jurisdiction within the Sokaogon Reservation pursuant to Pub. L. No. 280. The United States Supreme Court has expressly held, however, that Pub. L. No. 280 did not confer on the states the power to tax reservation Indians. *Bryan*, 426 U.S. at 378-79, 390. Nor am I aware of any other congressional enactment which would confer on the state taxing authority over Indian mining activities on the reservation. Consequently, in the absence of congressional intent to permit state taxation, it is my opinion that the Wisconsin net

proceeds occupation tax does not apply to on-reservation mining operated by the Sokaogon Tribe or a tribal enterprise.

B. Non-Indian Lessee

You also ask whether the net proceeds occupation tax would apply if the mining operation were leased to a non-Indian. If the non-Indian lessee were permitted to pass the net proceeds occupation tax along to the tribe, then the legal incidence of the tax would fall on the tribe and the tax would not be applicable for the reasons stated above. See *Montana v. Blackfeet Tribe of Indians*, 105 S. Ct. 2399 (1985), and the district court's explanation of the tax there involved, *Blackfeet Tribe of Indians v. Montana*, 507 F. Supp. 446, 448 (D. Mont. 1981). Unlike the Montana net proceeds tax held inapplicable to Indian mining in *Blackfeet Tribe*, however, the Wisconsin scheme may tax directly "a lessee engaged in mining metaliferous minerals," with no provision permitting the lessee to pass the tax along to the owner of the minerals. Sec. 70.375(1)(d), Stats.

The fact that the legal incidence of the Wisconsin tax falls on the non-Indian lessee, however, does not necessarily mean that the tax may be imposed. The United States Supreme Court has consistently found that where a comprehensive federal regulatory scheme is present and the actual economic burden of the tax would ultimately fall on the tribe, the legal incidence test is not controlling. *Ramah Navajo School Bd. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 844 n.8 (1982); see also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Central Machinery Co. v. Arizona State Tax Com.*, 448 U.S. 160 (1980); *Warren Trading Post Co. v. Arizona Tax Com.*, 380 U.S. 685 (1965). On the other hand, where the preemptive effect of pervasive federal regulation is not present, the Court has upheld state taxes which burden non-Indians. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

Under this preemption analysis, the Court has invalidated a number of state taxes imposed on non-Indians engaged in business on Indian reservations. The Court has struck down both a state sales tax and a state "transaction privilege tax" on the privilege of doing business in the state, imposed on non-Indian sellers for sales to Indians on the reservation. *Warren Trading Post*, 380 U.S. 685; *Central Machinery*, 448 U.S. 160. In each case, the Court held that

the federal Indian trader statutes preempted the state tax. “[B]y enacting these statutes Congress ‘has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the states to legislate on the subject.’” *Central Machinery*, 448 U.S. at 166 (quoting *Warren Trading Post*, 380 U.S. at 691 n.18). Similarly, the Court invalidated state motor carrier license and use fuel taxes applied to a non-Indian company engaged in logging over tribal and Bureau of Indian Affairs roads within the reservation. *Bracker*, 448 U.S. 136. The Court held that the federal government had so comprehensively regulated the harvesting of Indian timber as to preclude the state taxes, noting that the state performed no governmental services in return for the taxes it sought to assess.¹ *Id.* at 148, 150. More recently, the Court struck down a state gross receipts tax on a non-Indian company constructing a school for Indian children on the reservation. *Ramah Navajo School Bd.*, 458 U.S. 832. The Court determined that federal regulation of the financing and construction of Indian schools was pervasive and comprehensive, “leav[ing] no room for the additional burden sought to be imposed by the State through its taxation of the gross receipts.” *Id.* at 841-42. As in *Bracker*, the Court noted that the state did not seek to assess the tax in return for governmental services provided to the non-Indian contractor, nor did the state assert “any specific, legitimate regulatory interest to justify the imposition of its gross receipts tax.” *Id.* at 843.

The applicability of the Wisconsin net proceeds occupation tax to non-Indian lessees must be judged against the standards articulated in this line of cases — specifically, the existence of a comprehensive federal regulatory scheme, and the balance of federal, state and tribal interests involved. The first question, then, is whether there is a comprehensive federal scheme regulating non-Indian mining within reservation boundaries.

The Indian Mineral Leasing Act of 1938,² 52 Stat. 377, 25 U.S.C. §396a *et seq.*, governs the leasing of unallotted reservation

¹ See also *Hoopa Valley Tribe v. Nevins*, 590 F. Supp. 198 (N.D. Cal. 1984). Relying on the preemption analysis in *Bracker*, the California district court invalidated a tax on the value of timber at the time of harvest as levied against non-Indian purchasers of tribal timber. The court held that neither regulatory nor revenue-raising interests of the state permitted the burden which the tax imposed on the federal regulatory scheme.

² The 1938 Act repealed all acts or parts of acts “inconsistent herewith.” Act of May 11, 1938, sec. 7. The Act of May 29, 1924, 43 Stat. 244, 25 U.S.C. §398 *et seq.*, amending an 1891 Act, authorized state and local governments to levy and collect

lands for mining purposes.³ The Act provides that an Indian tribe may, with the approval of the Secretary of the Interior, lease its lands for mining operations.⁴ 25 U.S.C. §396a; *see also* 25 C.F.R. §211.2. Various sections of the Act address the duration of leases (section 396a), the type of bond to be furnished by the lessee (section 396c), and the officials authorized to approve leases (section 396e). Pursuant to authority granted by section 396d, the secretary promulgated the rules found at 25 C.F.R. pt. 211, described by the Ninth Circuit as follows:

The regulations promulgated by the Secretary under authority of the 1938 Act cover many aspects of mineral leasing between tribes and non-Indian lessees, including the procedures for acquiring mineral leases, minimum rates for rentals and royalties and the manner in which payments are to be made, penalties for failure to comply with the terms of leases, information to be supplied by lessees, acreage limitations, inspections of lessees' records by Indian lessors or by Department of Interior officials, and cancellation of leases.

Crow Tribe of Indians v. Montana, 650 F.2d 1104, 1112 n.9 (9th Cir. 1981), as amended, 665 F.2d 1390 (9th Cir. 1982), *cert. denied*, 459 U.S. 916 (1982).

It appears from these descriptions of the statutes and regulations that the federal scheme governing non-Indian leasing of tribal lands for mining purposes is as pervasive and comprehensive as the federal regulation of Indian traders (*Central Machinery*), harvesting of Indian timber (*Bracker*) and school construction (*Ramah Navajo*

taxes on mineral lessees of Indian lands "in the same manner as such taxes are otherwise levied and collected." 25 U.S.C. §398c. The United States Supreme Court recently concluded, however, that neither the text nor the legislative history of the 1938 Act suggests a congressional intention to permit state taxation. Consequently, the Court held, "if the tax proviso survives at all, it reaches only those leases executed under the 1891 Act and its 1924 amendment." *Blackfeet Tribe*, 105 S. Ct. at 2404. Any mineral lease issued today would, of course, be under the 1938 Act, and thus not subject to the tax provision of the 1924 Act.

³ Allotted lands may also be leased for mining purposes pursuant to 25 U.S.C. §396 and its attendant regulations, 25 C.F.R. pt. 212 (1985). This opinion will not address mining on allotted lands, however, since it is my understanding that there are no allotted lands on the Sokaogon Reservation.

⁴ In addition, Congress in 1982 enacted the Indian Mineral Development Act, 96 Stat. 1938, 25 U.S.C. §2101 *et seq.* The major purpose of the Act was to expand mineral development options available to tribes beyond the usual lease agreements and into the possibility of joint ventures and other non-lease arrangements. H.R. Rep. No. 746, 97th Cong., 2d Sess. 4, reprinted in 1982 U.S. Code Cong. & Ad. News 3465, 3466. Since you have asked only about leasing of the mining operation to non-Indians, a discussion of the 1982 Act is beyond the scope of this opinion.

School Bd.)⁵ Once such a comprehensive federal regulatory scheme has been identified, the federal, state and tribal interests involved must be identified and balanced.

The federal interests involved derive both from general federal Indian policy and from the specific policy goals of the 1938 Indian Mineral Leasing Act. On the more general level, “[i]n a variety of ways, the assessment of state taxes would obstruct federal policies.” *Bracker*, 448 U.S. at 148. Foremost among these is “a firm federal policy of promoting tribal self-sufficiency and economic development. Ambiguities in federal law have been construed generously in order to comport with . . . the federal policy of encouraging tribal independence.” *Id.* at 143-44. More specifically, the 1938 Act was designed to achieve three goals: uniformity of laws governing Indian mineral leases, revitalization of tribal governments and encouragement of tribal economic development. *Crow Tribe*, 650 F.2d at 1112-13, citing generally H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938), and S. Rep. No. 985, 75th Cong., 1st Sess. (1937). A tax which would keep from the tribe the economic benefits of its minerals would conflict with these purposes of the Act. *Crow Tribe*, 650 F.2d at 1113.

The Wisconsin net proceeds occupation tax may, in particular, reduce the royalties or other compensation a lessee is willing or able to offer the tribe. *Id.* at n.13. Moreover, the tax may “undermine the Secretary’s ability to make the wide range of determinations committed to his authority concerning the setting of fees and rates” with respect to mineral leasing. *Bracker*, 448 U.S. at 149; see 25 C.F.R. §211.15. “The assessment of state taxes would throw additional factors into the federal calculus, reducing tribal revenues and diminishing the profitability of the enterprise for potential contractors.” *Bracker*, 448 U.S. at 149. Finally, the burden of the net proceeds occupation tax, though imposed indirectly through the non-Indian lessee, may “necessarily impede” the strong federal interest in promoting tribal economic development by depleting

⁵ In a previous opinion of this office, in the specific context of prospecting and mining activity conducted on non-Indian lands within the reservation, I stated that “the federal government has not undertaken comprehensive regulation of mining activities, in general, or groundwater, in particular, within reservation boundaries.” 72 Op. Att’y Gen. 54, 60 (1983). Given the sources cited above, that conclusion clearly does not apply to federal regulation of mineral leasing of Indian lands within reservation boundaries.

available funds. *Ramah Navajo School Bd.*, 458 U.S. at 842, 844 n.8.

The next factor in the preemption analysis is the state's interest in the tax: whether the state seeks to assess the tax in return for governmental functions it provides, or whether it asserts any specific, legitimate regulatory interest to justify the imposition of the tax. *Bracker*, 448 U.S. at 150; *Ramah Navajo School Bd.*, 458 U.S. at 843-44. Neither services provided by the state to the non-Indian lessee off the reservation nor a generalized interest in raising revenue is sufficient to justify a state tax where the federal government has comprehensively regulated the area. *Ramah Navajo School Bd.*, 458 U.S. at 843-44; *Bracker*, 448 U.S. at 150.

The governmental functions to be supplied by the state to those upon whom the net proceeds occupation tax is levied are identified in the statutes as "highways, sewers, schools and other improvements which are necessary to accommodate the development of a metalliferous mining industry." Sec. 70.37(1)(d), Stats. The state's asserted regulatory interests are also identified; they include controlling environmental damage, counteracting potential adverse impacts on the quality of life in communities directly affected by mining, and taxing the privileges enjoyed by those mining in the state. Secs. 70.37(1)(e)-(h), Stats. The Wisconsin Legislature expressly declared its intent that the tax was "established in order that the state may derive a benefit from the extraction of irreplaceable metalliferous minerals and in order to compensate the state and municipalities for costs, past, present and future, incurred or to be incurred as a result of the loss of valuable irreplaceable metallic mineral resources." Sec. 70.37(2), Stats. To this end, forty percent of the tax collected is transferred to the general fund, while sixty percent of the net proceeds occupation tax is deposited in a local "impact fund" for the use of municipalities in meeting both "long- and short-term costs associated with social, educational, environmental and economic impacts of metalliferous mineral mining." Secs. 70.395 and 70.37(1)(i), Stats. Payments from the local impact fund are made yearly in an amount equal to \$100,000 to each city, town or village and to each county in which metalliferous minerals are extracted; each such county also receives twenty percent of the net proceeds occupation tax collected in that county, or \$250,000, whichever is less. Sec. 70.395(2)(d), Stats. These annual disbursements from the fund include an amount equal to \$100,000 to "any

Native American community that has tribal lands within a municipality qualified to receive a payment” from the impact fund. Sec. 70.395(2)(d)(2m), Stats. In its entirety, the Wisconsin taxing scheme “demonstrates a purpose to keep the value represented by the state’s nonrenewable assets intact, for use by [the state’s residents] in the future.” *Crow Tribe*, 650 F.2d at 1114.

These asserted state interests must be balanced against the interests of the federal and tribal governments. The basic problem inherent in the state’s interest in a mining tax has been identified by the Ninth Circuit: “While the state may have an interest in perpetuating the value of mineral wealth subject to its general civil jurisdiction, it has no such legitimate interest in appropriating Indian mineral wealth.” *Crow Tribe*, 650 F.2d at 1114. Put simply, subsurface minerals on the reservation are “not the state’s to regulate.” *Id.* Unlike metalliferous minerals located elsewhere in the state, reservation minerals do not belong in any sense to the state. The subsurface minerals, rather, like the land under which they lie, are held by the federal government in trust for the tribe. *See, e.g., Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1461 (9th Cir. 1986).

Like the State of Montana in *Crow Tribe*, 650 F.2d at 1114, Wisconsin does assert other legitimate interests in imposing its net proceeds occupation tax, including governmental services provided and costs incurred by the state and municipalities, and the adverse effect of mining on the area’s environment and quality of life. However, while some of the governmental functions identified in the Wisconsin statutes will be performed by the state even for an on-reservation mining operation, many more will not. A number of the governmental services necessary to a mining operation within reservation boundaries likely will be provided by the Sokaogon Tribe. Off-reservation services performed by the state for the non-Indian lessee would not justify the tax in question since presumably state tax revenues from the lessee’s business activities outside the reservation are adequate to reimburse the state for those services. *Ramah Navajo School Bd.*, 458 U.S. at 843-44 and n.9. Moreover, the net proceeds occupation tax is intended to compensate the state and its municipalities for costs incurred as a result of mining operations, but many of the costs from on-reservation mining will be borne by the tribe. Similarly, the tribe rather than the state will absorb the bulk of the detrimental effects of mining on the local environment and quality of life.

In *Crow Tribe*, the Ninth Circuit balanced the similar interests of the State of Montana against those of the federal and tribal governments, and concluded: "On balance, we suspect that these legitimate interests will not be shown [at trial] to be enough to save the severance tax from fatal conflict with the purposes behind the 1938 [Indian Mineral Leasing] Act." 650 F.2d at 1114. The court went on to note, however, that "[a] tax carefully tailored to effectuate the state's legitimate interests might survive." *Id.* As with the Montana tax, a "major purpose" of the Wisconsin net proceeds occupation tax is "to establish a fund that would keep the value of the [minerals] for future generations of [Wisconsin residents]. To the extent that this tax is not related to the actual governmental costs associated with the mining of the Indian [minerals], . . . the state's interest in acquiring revenues is weak in comparison with the Tribe's right to the bounty from its own land." *Id.* at 1117 (citation omitted).

An Indian tribe's interest in taxing "is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Colville*, 447 U.S. at 156-57. The state's interest in taxation "is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Id.* at 157. In the case of applying the net proceeds occupation tax to mining activities conducted on the reservation by a non-Indian lessee, the value to be taxed will be generated on the reservation, the activity will involve the tribe and the taxpayer, although receiving some state services, will also be the recipient of tribal services.

Considering all these factors, along with the comprehensive federal regulation of Indian mining leases and the burdens on federal policy, it appears that the balance must tip in favor of federal preemption of the Wisconsin tax. Consequently, it is my opinion that in this case "the federal regulatory scheme is so pervasive as to preclude the additional burdens sought to be imposed" by the Wisconsin tax. *Bracker*, 448 U.S. at 148. The Wisconsin net proceeds occupation tax may not, therefore, be applied to non-Indian lessees of mining operations on the Sokaogon Reservation.

III.

MINING PERMIT PROCESS

Wisconsin law provides that “[n]o operator may engage in mining or reclamation at any mining site that is not covered by a mining permit and by written authorization to mine under s. 144.86(3).”⁶ Sec. 144.85(1)(a), Stats. An operator is defined as “any person who is engaged in, or who has applied for or holds a permit to engage in, prospecting or mining, whether individually, jointly or through subsidiaries, agents, employes or contractors.” Sec. 144.81(9), Stats. An application for a mining permit must include, among other items, a mining plan, including a description and detailed map of the proposed site; a detailed reclamation plan showing the manner, location and time of reclamation; satisfactory evidence of application for all necessary approvals under local zoning ordinances and for all necessary licenses and permits issued by the Department of Natural Resources (DNR); and an itemized estimation of the cost to the state of reclamation. Secs. 144.85(3)-(4), Stats. In addition, the applicant must pay DNR’s actual cost of evaluating the mining permit application. Sec. 144.85(2), Stats. Following a public hearing, DNR shall issue a mining permit if it finds that the application meets certain conditions set out in the statutes. Sec. 144.85(5), Stats.

A. Sokaogon Tribe

Your first question concerning the mining permit process is whether the Sokaogon Tribe would be required to obtain a permit in the event that it conducted mining activities on the reservation. The application of the mining permit process to a tribal mining operation “involves an attempt to regulate Indian use of Indian trust lands.” *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 658 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). Indian tribes are “distinct, independent political communities,” possessing inherent sovereign powers to regulate “their internal and social relations,” and to make “their own substantive law in internal matters.” *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978). As such, Indian tribes exercise “attributes of sovereignty over both their members and their territory.” *United States v. Mazurie*, 419 U.S. 544, 557 (1975). This “significant territorial com-

⁶ Written authorization is issued upon approval of the bond required of the operator pursuant to section 144.86.

ponent to tribal power,” *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982), forms part of the “backdrop” of Indian sovereignty against which the courts determine whether the federal government has preempted state jurisdiction.

The second component of the “backdrop” is the balance of federal, state and tribal interests. In a situation such as tribal mining of minerals located under trust lands, the balance will usually tip in favor of the tribal and federal interests. “When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the state’s regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest.” *Bracker*, 448 U.S. at 144; *see also* 72 Op. Att’y Gen. 54, 56 (1983).

The federal-tribal interests at stake here are particularly compelling. The established federal policy of promoting tribal self-government encompasses the “overriding goal of encouraging tribal self-sufficiency and economic development.” *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335 (1983) (quoting *Bracker*, 448 U.S. at 143). The Court has held that Indian tribes, “[i]n part as a necessary implication” of this federal policy, have the authority to manage and control the use of their territory and their resources. *Id.* More specifically, Congress has recognized mineral development of Indian lands as an appropriate tool for economic development and governmental revitalization. *See Crow Tribe*, 650 F.2d at 1112 (discussing the goals of the Indian Mineral Leasing Act).

A tribal mining operation doubtlessly would be undertaken to develop and manage the reservation’s resources for the benefit of the tribe’s members, generating revenues for essential tribal governmental services and providing employment for tribe members resident on the reservation. *See Mescalero Apache Tribe*, 462 U.S. at 341. Under these circumstances, state imposition of a regulatory scheme would serve as an obstacle to the full accomplishment of the federal goals for tribal self-determination and economic revitalization. *Id.*

The state’s interests in regulating tribal mining operations must be “justified by functions or services performed by the state in connection with the on-reservation activity.” *Id.* at 336. The state’s interests in imposition of its mining permit process, as reflected in the statutory criteria for permit approval, appear to be reclamation,

compliance with applicable state environmental laws, suitability of the site for mining, public health and safety, economic impact, and compliance with zoning ordinances. Sec. 144.85(5)(a)(1), Stats. While these are clearly legitimate state regulatory interests in mining activity elsewhere in the state, with respect to Indian mineral wealth, “[t]his coal is not the state’s to regulate, and assertion of such authority diminishes the Tribe’s own power to regulate.” *Crow Tribe*, 650 F.2d at 1114. Imposition of the state mining permit process could allow the state to dictate whether, when and how the tribe could choose to develop and manage the reservation’s resources for the benefit of the tribe members. Regulation by the state, through the mining permit process, could infringe substantially on Indian resource development, interfering with the federal policy of promoting tribal governmental and economic independence.

Because of the potential for significant infringement on tribal activity within reservation boundaries represented by the mining permit process, the state’s interest in regulating and controlling Indian mineral development is not sufficient to overcome the tribal and federal interests involved. The balance of interests concerning the state’s authority to impose the mining permit process on tribal mining operations must tip in favor of the tribe and the federal government.

Under these conditions — retained tribal sovereignty over reservation lands, subordinate state regulatory interests, and strong federal and tribal interests — state laws are generally not applicable to Indian activities on the reservation except where Congress has expressly provided that they shall apply. *McClanahan*, 411 U.S. at 170-71; 72 Op. Att’y Gen. at 56. As noted previously in this opinion, Pub. L. No. 280, which conferred upon the state jurisdiction over private civil actions, was not a grant of regulatory authority. *Bryan*, 426 U.S. at 378-79, 390. Nor am I aware of any federal enactment that does grant to the state such authority, either generally to regulate Indian activities within reservation boundaries or specifically to require mining permits of tribal mining operations. Without any clear congressional authorization, and in the absence of exceptional circumstances, it is my opinion that the mining permit process is not applicable to tribal mining operations on trust lands within reservation boundaries.

B. Non-Indian Lessee

Your next question is whether the mining permit process would be applicable to non-Indian lessees of mining operations on the reservation. In such cases, where the state asserts authority over the conduct of non-Indians engaged in on-reservation activity, federal enactments are examined "in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." *Bracker*, 448 U.S. at 144-45.

One such federal enactment is the grant of civil jurisdiction to Wisconsin contained in Pub. L. No. 280, codified at 28 U.S.C. §1360. Subsection (b), which concerns in part real property belonging to an Indian tribe and held in trust by the United States, provides in pertinent part that: "Nothing in this section . . . shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto." 28 U.S.C. §1360(b). The Secretary of the Interior has promulgated regulations which prevent the application of most state laws to the use and development of leased trust property, except where the Secretary has adopted such laws or made them applicable in specific cases or specific geographic areas. 25 C.F.R. §1.4 (1985). See *Santa Rosa Band*, 532 F.2d at 664-65. In relevant part, the federal regulation provides that:

[N]one of the laws, ordinances, codes, resolutions, rules or other regulations of any State . . . limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real . . . property . . . shall be applicable to any such property leased from or held or used under agreement with and belonging to any . . . Indian tribe, band, or community that is held in trust by the United States. . . .

25 C.F.R. §1.4(a) (1985). The Wisconsin mining permit process, if applied to non-Indian mineral lessees, clearly would regulate or control the use or development of trust lands leased from the tribe. Since it does not appear that the Secretary of the Interior has ever adopted or made applicable the state mining permit laws, it is my opinion that application of the permit process to a non-Indian lessee of mining operations would conflict with this federal regulation and, consequently, with Pub. L. No. 280.

A second, more specific federal enactment applicable in the mining permit context is the Indian Mineral Leasing Act of 1938, discussed previously in connection with the net proceeds occupation tax. As I concluded in that section, the 1938 Act and its attendant regulations, 25 C.F.R. pt. 211, comprise a comprehensive federal scheme regulating non-Indian leasing of tribal lands for mining purposes. The pervasiveness of the federal scheme is particularly clear in relation to the mining permit process, where the federal requirements correspond closely to state law provisions. Specifically, the 1938 Act requires approval by the Secretary of the Interior of all mining leases entered into with Indian tribes, and addresses the duration of leases and the type of bond to be furnished by the lessee. 25 U.S.C. §§396a and 396c. The regulations promulgated pursuant to the 1938 Act control such aspects of mineral leasing as procedures for acquiring leases, bonding requirements, penalties for failure to comply with lease terms, acreage limitations and cancellation of leases. *See generally* 25 C.F.R. pt. 211. Mine operators are required to submit a mining plan for the approval of the United States Geological Survey's Regional Mining Supervisor. 25 C.F.R. §216.7(a) (1985). These plans may include descriptions and maps of the site, proposed methods of operating, and proposed manner and time of reclamation. 25 C.F.R. §216.7(b) (1985). In addition, actual operations may not be started without written permission, and all operations must be conducted in accordance with the operating regulations promulgated by the Secretary of the Interior. 25 C.F.R. §211.20(b) (1985).

Federal policies underlying the 1938 Act were also noted previously in this opinion. Specifically, the three goals of the Act were uniformity in the laws governing Indian mineral leases, revitalization of tribal governments and encouragement of tribal economic development. *Crow Tribe*, 650 F.2d at 1112-13, citing generally H.R. Rep. No. 1872, 75th Cong., 3d Sess. (1938), and S. Rep. No. 985, 75th Cong., 1st Sess. (1937). More generally, federal Indian policy in recent decades has been firmly committed to promoting tribal self-government and self-sufficiency. *Mescalero Apache Tribe*, 462 U.S. at 334-35 n.17; *Bracker*, 448 U.S. at 143-44.

Viewed in light of these federal policies, the potential for conflict between the state and federal regulatory schemes is manifest. For example, the Secretary of the Interior could approve a lease, but the state could deny a mining permit, thereby blocking the federal

intent to permit that mining operation. Similarly, the state could cancel or revoke its mining permit, with the result that the non-Indian lessee would be prevented from mining under a valid, federally-approved lease. Either situation would directly conflict with all three goals of the 1938 Act: either would decrease uniformity in the laws governing Indian mineral leases, subordinate the tribe's lease to state control, thereby weakening the role of the tribal government, and discourage the economic development represented by mining operations on tribal lands. For the same reasons, application of the mining permit process to non-Indian lessees would interfere with federal Indian policy, and directly conflict with federal regulations preventing the application of state law to the development of leased trust property.

Consequently, it is my opinion that these federal enactments, along with their attendant regulations and underlying policies, preempt the application of the state's mining permit process to a non-Indian lessee of tribal mineral lands.

IV.

POLLUTION CONTROL LAWS

Wisconsin has legislated an extensive regulatory scheme to control environmental pollution within the state. The regulations address water and sewage, air pollution, solid waste, hazardous waste and refuse (ch. 144, Stats.) and water pollution (ch. 147, Stats.). In general, these state regulations are companion laws to federal regulatory statutes, such as the Clean Air Act, 42 U.S.C. §7401 *et seq.*, the Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.*, and the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.*, which provide mechanisms by which the states may administer their own pollution control programs in lieu of the federal programs.

As evidenced by the regulations in chapters 144 and 147, Wisconsin has implemented its own pollution control programs in a number of areas. The question you raise is whether these state regulations are applicable to mining operations on the Sokaogon Reservation, whether conducted by the tribe or by a non-Indian lessee. For the reasons explained below, I do not believe that a blanket determination of the applicability of state pollution control laws to on-reservation mining can be made.

As already noted, pollution control legislation, on both the state and federal levels, is diverse and complex. In particular, the degree to which these environmental laws address or are expressly applicable to Indian tribes varies from one statute to the next.⁷ An adequate and comprehensive response to your question, therefore, would require an analysis of (1) each federal statute, its legislative history and its application within reservation boundaries, (2) the equivalent state law and the extent to which it addresses Indian tribes, and (3) the principles of the preemption and infringement doctrines as applied to each set of paired statutes. A calculus of that depth and length — particular to each environmental statute — is simply beyond the scope of this opinion. Alternatively, a discussion of the applicability of pollution control laws in general would be inadvisable given the diversity and complexity of state and federal statutes.

Consequently, the following sections will provide no definite answer, either as to pollution control laws in general or, with a few exceptions, as to specific environmental statutes. The sections instead will discuss the available published law on the topic, and address general principles and guidelines to be employed in deciding on the applicability of any particular environmental law.

A. *Sokaogon Tribe*

In previous opinions, I have addressed the applicability of certain state environmental laws to Indian tribes and reservations. OAG 51-78 (unpublished, dated July 31, 1978); 72 Op. Att’y Gen. 54 (1983). In the earlier of these opinions, which addressed the on-reservation applicability of the Wisconsin Pollution Discharge Elimination System (WPDES), chapter 147, I concluded that the state was “without authority to issue WPDES permits” to Indian tribes or tribal organizations operating on reservations and Indian lands in Wisconsin. OAG 51-78 at 1, 3. I based my opinion on the fact that the Wisconsin Legislature did not include Indian tribes or organizations within the definition of persons covered by chapter 147, whereas the equivalent Federal Water Pollution Control Act (FWPCA) expressly extended its scope to both tribes and tribal organizations. *Id.* at 2-3. This failure plainly to include tribes, in my

⁷ For somewhat dated discussions of the federal environmental statutes and the extent to which each addresses Indian tribes, see Will, *Indian Lands Environment—Who Should Protect It?*, 18 Natural Res. J. 465, 474-87 (1978); Schaller, *The Applicability of Environmental Statutes to Indian Lands*, 2(8) Am. Indian J. 15 (1976).

opinion, represented a deliberate legislative decision. *Id.* at 2-4. I noted also that the federal Environmental Protection Agency currently was issuing permits to tribal dischargers pursuant to federal law, *id.* at 4, as a means of ensuring that on-reservation dischargers adhered to federal environmental standards.

I am not aware of any factor that would cause me to alter my existing opinion. Neither the federal nor state definition of persons covered has been changed; the federal statute still includes tribes and tribal organizations, while the state law still excludes them. Had the state Legislature wished to amend the state law to expressly cover Indian tribes, it certainly could have done so. Consequently, it remains my opinion that chapter 147 is not applicable to a tribal mining operation on the reservation.

An identical analysis would be applicable to hazardous waste regulations, since the federal Resource Conservation and Recovery Act (RCRA) expressly includes Indian tribes and organizations, 42 U.S.C. §§6903(13) and 6903(15), while the equivalent state Hazardous Waste Management Act does not. Secs. 144.61(9) and 144.01(6), Stats. It is not necessary to reach this analysis, however, because an express federal pronouncement preempts Wisconsin's hazardous waste jurisdiction on Indian reservations. In granting Wisconsin final authority to operate its hazardous waste management program in lieu of the federal program, the Environmental Protection Agency (EPA) specifically stated: "Wisconsin is not authorized to operate the RCRA program on Indian lands, and this authority will remain with the U.S. EPA." 51 Fed. Reg. 3783, 3784 (1986).⁸ The state Hazardous Waste Management Act, sections 144.60 to 144.74, therefore, is not applicable to tribal mining operations on the reservation.

The analysis employed for the water pollution control regulations does not appear to be applicable to other sets of paired state and federal environmental laws, because unlike FWPCA, other federal environmental statutes do not apply expressly to tribes and tribal organizations. Nor do there appear to be specific federal pronouncements concerning state environmental jurisdiction in any area other than hazardous waste management. Where neither the

⁸ The EPA's authority to make such a determination has been upheld by the Ninth Circuit. *State of Wash., Dept. of Ecology v. U.S. E.P.A.*, 752 F.2d 1465 (9th Cir. 1985).

FWPCA analysis nor a specific federal statement of preemption is applicable, state jurisdiction to impose environmental regulations on tribal activities is determined according to the same principles as jurisdiction to impose the mining permit process. While it is beyond the scope of this opinion specifically to apply those principles to the range of state environmental laws, the following general discussion may prove helpful.

An analysis of the applicability of a particular state environmental regulation to tribal mining operations would begin with the "backdrop" of tribal sovereignty. As noted in the mining permit process discussion, regulations such as pollution control laws and the mining permit process involve the regulation of Indian use of Indian trust lands, a situation in which the territorial component of tribal sovereignty forms a significant element of the "backdrop." Of significance also is the tradition of self-government which the Tribe exercises in the area of pollution control. While I am not aware of any tribal environmental protection laws at this time, the existence or development of such regulations, coupled with effective enforcement mechanisms, would weigh heavily against the applicability of state environmental laws.⁹ See, e.g., *Webster*, 114 Wis. 2d at 434-35.

The other component of the "backdrop" of tribal sovereignty is the balance of state, federal and tribal interests. In the area of environmental protection, those interests are particularly strong on all sides.

On one side of the balance of interests are those of the state. As the Ninth Circuit stated in the context of asserted state jurisdiction over hazardous waste: "We recognize the vital interest of the State of Washington in effective hazardous waste management throughout the state, including on Indian lands." *State of Wash., Dept. of Ecology v. U.S. E.P.A.*, 752 F.2d 1465, 1472 (9th Cir. 1985). The substantial character of the state's interest stems from the transboundary nature of pollution, and its migratory impact outside the reservation. See, e.g., Comment, *Developing Test for State Regulatory Jurisdiction in Indian Country: Application in the Context of*

⁹ A number of authors have suggested that the optimal approach to on-reservation environmental protection is the assumption of full responsibility by the tribes. See Will, *Indian Lands Environment—Who Should Protect It?*, 18 *Natural Res. J.* 465, 499 (1978); Comment, *The Applicability of the Federal Pollution Acts to Indian Reservations: A Case for Tribal Self-Government*, 48 *U. Colo. L. Rev.* 63, 93 (1976).

Environment Law, 61 Ore. L. Rev. 561, 564, 582 (1982). The United States Supreme Court has recognized the importance to the state of adverse "spillover" effects of on-reservation conduct or activities. *Rice*, 463 U.S. at 724. "A state's regulatory interest will be particularly substantial if the state can point to off-reservation effects that necessitate state intervention." *Mescalero Apache Tribe*, 462 U.S. at 336.

On the other hand, the federal and tribal interests are also compelling. Despite the potential for spillover, a tribal mining operation constitutes "on-reservation conduct involving only Indians," a situation in which "the federal interest in encouraging tribal self-government is at its strongest." *Bracker*, 448 U.S. at 144. In the context of hazardous waste management, the Ninth Circuit posited the interests involved as "the tribal interest in managing the reservation environment and the federal policy of encouraging tribes to assume or at least share in management responsibility." *State of Wash., Dept. of Ecology*, 752 F.2d at 1472. The court noted that "[t]he federal government has a policy of encouraging tribal self-government in environmental matters," a policy reflected both in federal environmental statutes giving tribes "a measure of control over policymaking or program administration or both" and in the policies and practices of the EPA. *Id.* at 1471 (footnote omitted). *See also*, Will, *Indian Lands Environment—Who Should Protect It?*, 18 Natural Res. J. 465, 474-87 (1978). More specifically, the court cites to EPA policy documents which advocate "an enhanced role for tribal government in relevant decision-making and implementation of Federal environmental programs on Indian reservations,"¹⁰ and which charge EPA to "endeavor where appropriate to give tribal governments the primary role in environmental program management and decisionmaking relative to Indian lands."¹¹

The "backdrop" of tribal sovereignty, consisting of the elements discussed above, informs the question whether the federal government has preempted state jurisdiction to impose a given environmental law. Factors which may be significant to the preemption analysis include the EPA policy statements quoted above and the

¹⁰ EPA Policy for Program Implementation on Indian Lands, Dec. 19, 1980, at 5, quoted in *State of Wash., Dept. of Ecology*, 752 F.2d at 1471.

¹¹ EPA Office of Federal Activities, *Administration of Environmental Programs on Indian Lands* 35 (1983), quoted in *State of Wash., Dept. of Ecology*, 752 F.2d at 1471 n.7.

authority of EPA, under certain federal statutes, to permit tribes the primary responsibility for environmental protection within reservation borders. *See Nance v. EPA*, 645 F.2d 701, 714 (9th Cir. 1981) (Indian tribes can set on-reservation air quality goals, independent of the states, under the Clean Air Act). Two additional factors, however, may be of more importance to the preemption analysis.

The first of these is that Congress has not expressly authorized the imposition of state pollution control laws within reservation boundaries. The general grant of state civil jurisdiction, Pub. L. No. 280, did not authorize the applicability of state regulations, such as environmental laws, to Indian uses of reservation lands. *Bryan*, 426 U.S. at 378-79, 390; Will, *Indian Lands Environment—Who Should Protect It?*, 18 Natural Res. J. 465, 489 (1978). Neither do the federal environmental statutes confer jurisdiction over reservation lands upon the states. *State of Wash., Dept. of Ecology*, 752 F.2d at 1467-68; *see also* Will, *Indian Lands Environment—Who Should Protect It?*, 18 Natural Res. J. 465, 474-87 (1978).

The second factor of importance is the retained authority of EPA to enforce adherence to federal environmental standards. As a rule, federal environmental statutes are generally applicable within reservation borders. Some of the federal environmental laws, such as RCRA and FWPCA, expressly include Indian tribes. *See State of Wash., Dept. of Ecology*, 752 F.2d at 1466-67; OAG 51-78 (unpublished, dated July 31, 1978). Other federal laws are applicable under the general rubric that federal statutes of a general nature apply to Indians and Indian tribes as to any other persons. Will, *Indian Lands Environment—Who Should Protect It?*, 18 Natural Res. J. 465, 468 (1978), citing *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960). Consequently, as the Ninth Circuit has noted, an absence of state environmental jurisdiction “does not leave a vacuum in which [pollutants] go unregulated. EPA remains responsible for ensuring that the federal standards are met on the reservations.” *State of Wash., Dept. of Ecology*, 752 F.2d at 1472.

The few authorities which have considered the applicability of particular state environmental laws within reservation borders have concluded that the state, at most, has environmental jurisdiction only in limited circumstances. The Ninth Circuit upheld EPA’s conclusion that under RCRA, the federal hazardous waste manage-

ment statute, states have no jurisdiction over Indian lands. *Id.* at 1469, 1472. *See also* 51 Fed. Reg. at 3784. Despite the “vital interest” of the state in hazardous waste management, the court reasoned that “the tribal interest in managing the reservation environment and the federal policy of encouraging tribes to assume or at least share in management responsibility are controlling.” *Id.* at 1472. *See also Nance*, 645 F.2d at 714 (under the Clean Air Act, tribes possess “the same degree of autonomy to determine the quality of their air as was granted to the states.”); Smith and Guenther, *Environmental Law: Protecting Clean Air: The Authority of Indian Governments to Regulate Reservation Airsheds*, 9 Am. Indian L. Rev. 83 (1981).

The Attorney General of Alaska, addressing the question of state jurisdiction to enforce air quality regulations on reservations, concluded that there is no “legally certain” basis for state jurisdiction over pollution sources within the reservation “absent evidence of transboundary pollution.” 1983 Op. Att’y Gen. Alaska No. 101. In a recent opinion of this office addressing state authority to monitor groundwater on Indian reservations, I reached a similar conclusion. 72 Op. Att’y Gen. 54 (1983). That opinion, in balancing the interests involved, determined that “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.” *Id.* at 59. Analogous to the Alaska opinion, I concluded as follows: “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.” *Id.* at 61.

The trend in reported case law and opinions appears to deny general state environmental jurisdiction within reservation boundaries, although exceptions may be recognized for on-reservation pollution sources with adverse off-reservation effects. The determination of the applicability of a given state regulation, however, will be determined on a case-by-case basis, employing the framework and general principles outlined above.

B. Non-Indian Lessee

You also ask whether state environmental protection laws are applicable to a non-Indian lessee conducting mining operations on the reservation. As noted in previous sections, questions of state authority over the on-reservation activities of non-Indians require an examination of the tradition of tribal sovereignty and of the broad policies underlying relevant federal enactments. *Bracker*, 448 U.S. at 144-45. The determination calls "for 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." *Id.* at 145.

Because the question of state environmental jurisdiction over non-Indians requires an examination of the "specific context," the following discussion, like the preceding section, will not attempt a definitive answer to your inquiry.¹² As with the applicability of state pollution control laws to tribal mining operations, an answer to your question concerning non-Indian lessees particular to each state environmental law is beyond the scope of this opinion, whereas a general answer would be a disservice given the diversity and complexity of state and federal regulation in the area. The following discussion, therefore, will briefly discuss the pertinent federal laws and regulations, and outline the state, federal and tribal interests that may be implicated by the assertion of state environmental authority over Indian mineral leases.

The relevant federal enactments and their underlying policies have to a large extent been described in previous sections of this opinion. One such enactment is the federal regulation which prohibits the state from "limiting, zoning or otherwise governing, regulating, or controlling the use or development" of trust lands leased from an Indian tribe. 25 C.F.R. §1.4(a) (1985). It would appear that state pollution control laws, through their permitting requirements, may substantially affect the use or development of property subject to the permits. Consequently, it seems that to the extent state

¹² The exception is state jurisdiction over hazardous waste management. As noted previously, the EPA, in granting Wisconsin final authority to operate its hazardous waste management program in lieu of the federal program, specifically exempted Indian lands. 51 Fed. Reg. at 3784. Authority under RCRA "on Indian lands" was reserved to the federal agency. This retained federal jurisdiction apparently would extend to all mining activity, whether conducted by the tribe or by a non-Indian lessee, on tribal lands within the reservation boundaries.

environmental laws conflict with the provisions of section 1.4, the state regulations would be preempted by federal law.

The other relevant federal enactment is the Indian Mineral Leasing Act of 1938. Previous sections of this opinion have established that the 1938 Act and its attendant regulations generally comprise a comprehensive federal scheme to regulate non-Indian mineral leasing of tribal lands. In the particular context of environmental protection, regulations promulgated by the Secretary of the Interior include 25 C.F.R. pt. 216, which is designed to provide procedures “to avoid, minimize, or correct damage to the environment — land, water, and air — and to avoid, minimize, or correct hazards to the public health and safety” which may arise from mineral development of Indian lands. 25 C.F.R. §216.1 (1985).¹³

To those ends, the regulations provide that, in connection with every lease application, the appropriate Bureau of Indian Affairs (BIA) officer shall make a “technical examination of the prospective effects of the proposed exploration or surface mining operations upon the environment.” 25 C.F.R. §216.4(a)(1) (1985).

The technical examination shall take into consideration the need for the preservation and protection of other resources, including cultural, recreational, scenic, historic, and ecological values; and control of erosion, flooding, and pollution of water; the isolation of toxic materials; the prevention of air pollution; the reclamation by revegetation, replacement of soil or by other means, of lands affected by the exploration or mining operations; the prevention of slides; the protection of fish and wildlife and their habitat; and the prevention of hazards to public health and safety.

Id. Based on this technical examination, the BIA sets “general requirements which the applicant must meet for the protection of nonmineral resources”; these standards are then incorporated in the operator’s mining lease. 25 C.F.R. §216.4(b) (1985). At any time the BIA may restrict or even prohibit operations if the mining cannot feasibly be conducted without lowering water quality below

¹³ For an argument that federal regulations preempt state environmental regulation of mineral lessees, see Comment, *The Applicability of the Federal Pollution Acts to Indian Reservations: A Case for Tribal Self-Government*, 48 U. Colo. L. Rev. 63, 81, 86 (1976); Comment, *The Developing Test for State Regulatory Jurisdiction in Indian Country: Application in the Context of Environmental Law*, 61 Ore. L. Rev. 561, 583-84 (1982).

certain standards or causing the destruction of other resources. 25 C.F.R. §216.4(d) (1985). If the operation appears likely to lower water quality, no lease will be issued until compliance with the Federal Water Pollution Control Act is assured. 25 C.F.R. §216.4(e) (1985). In addition, operators must submit a mining plan to the United States Geological Survey's Regional Mining Supervisor, who may require the plan to include proposed measures to prevent environmental pollution. 25 C.F.R. §216.7 (1985). Specific regulations for coal mining, moreover, address such issues as disposal of spoil and waste materials, topsoil handling and protection of the hydrologic system. 25 C.F.R. §§216.100 to 216.111 (1985).

This federal regulatory scheme must be viewed in light of the goals of the 1938 Act: uniformity in the laws governing Indian mineral leases, revitalization of tribal governments and encouragement of tribal economic development. To the extent that the imposition of state pollution control laws on non-Indian lessees, by requiring lessees to comply with two sets of environmental laws, would decrease uniformity in the laws applicable to mineral leases, weaken the tribal governmental role in development of reservation resources and discourage economic development by placing increased burdens on mineral lessees, the state laws may well be preempted.

In the balance of the state, federal and tribal interests involved, the state's interests are strong where, as here, the on-reservation activities may have off-reservation effects and the activities are conducted by non-Indians. The federal and tribal interests are also strong, however: they include "the tribal interest in managing the reservation environment and the federal policy of encouraging tribes to assume or at least share in management responsibility," *State of Wash., Dept. of Ecology*, 752 F.2d at 1472; the 1938 Indian Mineral Leasing Act goals of uniform laws, stronger tribal governments and increased tribal economic development; and the general federal Indian policy of encouraging tribal self-government and economic self-sufficiency. The authority of the state to impose a particular environmental law or regulation will require balancing these interests against the backdrop of the federal regulatory scheme for controlling environmental damage by non-Indian lessees. See *e.g.*, Comment, *The Developing Test for State Regulatory*

Jurisdiction in Indian Country: Application in the Context of Environmental Law, 61 Ore. L. Rev. 561, 583-84 (1982).

V.

ENVIRONMENTAL IMPACT STATEMENTS

Your final question concerns any Environmental Impact Statement (EIS) for mining activities on the Sokaogon Reservation, whether conducted by the tribe or by a non-Indian lessee, which may be required under the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 *et seq.* If a federal EIS is prepared pursuant to NEPA, you ask whether it would legally need to be shared with or presented to the state.

Under a number of federal regulations, the federal agency responsible for preparing an EIS must make the document publicly available. For instance, agencies are charged with ensuring public involvement in the EIS process through various notice procedures, including specific notice to those who have requested it on an individual action. 40 C.F.R. §1506.6 (1985). Agencies are also required to solicit comments at the draft stage of the EIS process from “appropriate State and local agencies which are authorized to develop and enforce environmental standards,” as well as any other agency “which has requested that it receive statements on actions of the kind proposed.” 40 C.F.R. §1503.1(a)(2) (1985). Moreover, the preparing agency is required to circulate both draft and final versions of the EIS, including the entire statement to any agency which has requested it and, for the final EIS, any agency which submitted substantive comments on the draft. 40 C.F.R. §1502.19 (1985).

Given these strictures, it is virtually certain that a federal agency preparing an EIS in connection with proposed mining operations on the Sokaogon Reservation would present the document, in both draft and final forms, to the state for comment and review. In the unlikely event that the preparing agency did not, the state need merely request the EIS under the regulations outlined above. The state thus can ensure, in either case, that it has input into the EIS process.

BCL:JDN

Licenses and Permits; Regulation and Licensing, Department of; Selection and terms of officers of regulatory and licensing boards discussed. OAG 44-86

November 11, 1986

BARBARA NICHOLS, *Secretary*

Department of Regulation and Licensing

You ask a number of questions concerning the selection and terms of officers of regulation and licensing boards. Board officers are those selected by the boards from among their members and normally will include board chairperson, vice-chairperson and secretary. Your questions read:

1. May a board at its first meeting of the year, decide not to elect officers at that time; but rather, set a definite future meeting date for the election of its chairman, vice-chairman and secretary?
2. May a board which has elected its officers at its first meeting of the year, at its sole discretion, decide to elect new officers at a meeting later in the year; specifically, can the board hold a new set of elections for all officers?
3. May a board terminate the tenure of a board officer by holding an election for a specific office at any time as determined by the board?
4. Under what circumstance may an officers' tenure in office be terminated?
5. Upon the occurrence of a vacancy in a board office, how must the vacancy be filled?
6. If a board member's term expires while he or she is serving as an elected officer, how must that officer's position be filled by the board?

Section 15.08(5)(b), Stats., provides that each board has the power to "promulgate rules for its own guidance." Under this broad grant of authority, it is clear that a board has a wide field of discretion to determine its own rules of procedure. *Pellett v. Industrial Commission*, 162 Wis. 596, 599, 156 N.W. 956 (1916); 59 Am. Jur. 2d *Parliamentary Law* §2 (1971). Thus, it would be proper for a board, in the exercise of its discretion, to adopt an administrative rule utilizing *Robert's Rules of Order* as a guide for the conduct of

its business. *State ex rel. Wis. Inspection Bureau v. Whitman*, 196 Wis. 472, 505-06, 220 N.W. 929 (1928); 59 Am. Jur. 2d at 318.

Eligibility as an officer of a board includes board membership and election, and retention by the board as a board officer. Thus, if a board member who is an officer of the board ceases to be a board member for any reason, the office he or she held would be vacant and the board must then select from its membership a new board officer.

The selection of board officers is an internal matter of each board. A board will select board officers who it perceives will best enable the board to function. A nonexclusive listing of factors that a board may consider in selecting board officers includes the willingness of a board member to serve as an officer, the time and resources of a board member to serve as a board officer, a member's proclivity to leadership, a member's experience and a member's ability to deal with other persons or entities necessary to accomplish board responsibilities.

Changing circumstances from time to time will dictate who among members of a board can best carry out the duties and responsibilities of board officers. Thus, a board must have the latitude and power to determine at any given time who shall serve as board officers. If at any time a board senses that there should be a change in the make-up of its officers, it has the discretion to make what changes are necessary. Board officers are not elected for nor do they serve for a specific period of time. They serve at the discretion of the board members.

Several things can cause a vacancy in a board office. We have already discussed the situation where a board member who is a board officer ceases to be a member of the board. This can happen by the death or resignation of a board member. Or the Governor can appoint different board members at the expiration of the terms of existing board members. Also, there may be instances where a board officer will resign as such but remain as a member of the board. In all such cases, the board must select new officers to fill vacancies because the office of chairperson, vice-chairperson and secretary should always be filled.

The chairperson has important duties and responsibilities. He or she normally must conduct the meetings. The chairperson has the authority to call meetings under section 15.08(3), and the duty to

give public notice of meetings as required by section 19.84. And, in the absence of another designation, the chairperson is the custodian of the board's records by virtue of section 19.32, and as custodian, has important responsibilities with respect to retention, disclosure or public access and disposition of records.

The vice-chairperson must be designated to be available to assume the duties and responsibilities of chairperson in the absence of a chairperson.

The secretary is normally responsible for keeping the minutes of meetings as required by section 19.88. The public is concerned that the boards have designated officers so that there is accountability and responsibility for performing the duties mandated by law.

Section 15.08(2) provides: "Selection of Officers. At its first meeting in each year, every examining board shall elect from among its members a chairman, vicechairman and, unless otherwise provided by law, a secretary. Any officer may be reelected to succeed himself or herself."

The direction in this statutory provision that boards elect officers at the "first meeting of each year" is directory rather than mandatory.

The word "shall" in a statute will be construed as directory if necessary to carry out the legislative intent, and statutes prescribing a time within which public officers must perform acts are construed as directory unless such construction denies the exercise of power after the time limit or the nature of the act, or the language of the statute itself, shows that the time prescription was meant to be a limitation. *Karow v. Milwaukee County Civil Serv. Comm.*, 82 Wis. 2d 565, 571, 263 N.W.2d 214 (1978).

The legislative intent expressed in section 15.08(2) is that regulatory and licensing boards select from among their members a chairperson, vice-chairperson and secretary, and in this respect, it is construed to be a mandatory requirement. But the provision that the selection be made at "the first meeting of each year" should be construed as directory. 2 Am. Jur. 2d *Administrative Law* §228 (1986). The quoted phrase does not contain words of art establishing a time limitation upon the selection process and I discern no legislative purpose in construing the language to be a time limitation. To construe the language as constituting a time limitation would result in a conclusion that the Legislature meant to interfere

with a matter that is properly in the discretion of the individual boards.

With the above discussion in mind, we may now answer your questions in a somewhat summary fashion.

1. A board should give deference to the directive of section 15.08(2) and hold an election of officers at its first meeting of the year, but it is not mandatory that it do so and a board may decide not to elect officers if the board offices of chairperson, vice-chairperson and secretary are filled. If any of these offices are not filled, a board must hold an election to fill the vacancy. This is a requirement whether the vacancy exists at the time of the first meeting of the year or at any other time.

A board cannot set a future date for an election if a board office is vacant at any time.

If, at the time of the first meeting of the year, no board office vacancy exists, the board can establish a future date at which time it will examine the question of who should be officers, but the board is not inexorably bound by its own timetable.

2. A board can conduct a new election of board officers at a meeting after the first meeting of the year at which time board officers were elected.

3. A board may terminate the tenure of any board officer at any time by holding an election and selecting new officers from among its members.

4. A board officer's tenure is terminated:

- a. By his or her ceasing to be a board member for any reason.
- b. By his or her resignation as a board officer.
- c. By his or her removal as a board officer by an election of the board.

5. If there is a vacancy in a board office, the vacancy must be filled by a board election.

6. The answer to your question 6 is answered by the answers to your questions 4 and 5, above.

BCL:WHW

Schools and School Districts; Discussion of whether a private school pupil or a child in a home-based private educational program may participate in selected courses or activities of the public school district. A public school district may lease space in a sectarian school for holding classes for public school students. OAG 45-86

November 14, 1986

DR. HERBERT J. GROVER, *State Superintendent*
Department of Public Instruction

You have asked three questions:

1. May a school district permit a private school pupil or a child in a home-based private educational program to participate in selected courses or activities of the public school district?

2. What obligation does a public school district have to grant such permission? You also specifically inquire as to whether the answer to this question depends upon any of the following factors:

a. Whether the primary purpose of the program is to provide private or religious based education;

b. Whether the selected public school courses would be included in the criteria in sec. 118.165(1)(d), Stats.; or

c. Whether the public school district would incur additional costs in permitting the pupil to participate in the selected courses or activities?

3. May a Wisconsin public school district lease the use of a religious school facility where no religious activities are conducted during the daily periods of public school use, where religious symbols and artifacts are removed during the daily periods of public school use, where the public school use consists of public school teachers instructing public school students, and where a reasonable rental is paid for the use?

The answer to your first question is yes, but with certain limitations as set forth in the discussion below. The answer to your second question is that the obligation of a school district is to provide an "equal opportunity for education to all children in the district." Once the statutory opportunities required by the state are offered, the local district may provide additional programs to all

children in the district provided that such programs are within the parameters of the first amendment religion clause of the United States Constitution and article I, section 18 of the Wisconsin Constitution. The three factors you delineate with respect to your second question are important factors in determining the legality of providing for the participation of private or home-based pupils. In response to the third question, I conclude that such an arrangement would not violate the state or federal constitution and would be legal so long as statutory procedures for leasing school sites are followed.

I.

PARTICIPATION OF A PRIVATE SCHOOL PUPIL IN COURSES AND ACTIVITIES OF A PUBLIC SCHOOL DISTRICT

The propriety of the arrangements described in your questions depends upon the application of certain state and federal constitutional provisions. Because in Wisconsin the majority of private schools are religious schools,¹ the relevant constitutional provisions are the first amendment to the United States Constitution, and article I, section 18 and article X, section 3 of the Wisconsin Constitution.

A. *The United States Constitution*

The first amendment to the United States Constitution provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." This provision applies to the states through the fourteenth amendment. See *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940).

In determining the constitutionality of a statute under the establishment clause of the first amendment, three criteria must be applied: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion' [citations omitted]." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The Wis-

¹ "Most of the nonpublic schools in Wisconsin are parochial schools. The stipulation of facts in *State ex rel. Reynolds v. Nusbaum* (1962), 17 Wis. 2d 148, 151, 115 N.W.2d 761, was to effect there were 850 to 875 nonpublic schools in Wisconsin of which only 10 were not operated by any religious, church, or sectarian organizations." 63 Op. Att'y Gen. 473, 478 (1974).

consin Supreme Court has adopted this three-part test. *State ex rel. Warren v. Nusbaum*, 64 Wis. 2d 314, 219 N.W.2d 577 (1974).

1. Purpose

The arrangement you describe of permitting private school or private home-program pupils to participate in selected courses or activities of the public school district would not appear to violate the first criterion of the three-part test set forth above. Allowing such participation would have the permissible secular purpose of advancing the education of all the children in the state. "The State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education." *Levitt v. Committee for Public Education & Religious Lib.*, 413 U.S. 472, 479-80 n.7 (1973). The difficulties lie with the benefits which such arrangements confer on religious institutions and the potential for entanglement of church and state.

2. Effect

The United States Supreme Court has recently had occasion to look at the question of what limits exist on government's power to provide educational services to sectarian schools. These cases focused on whether the arrangements at issue had a principal or primary effect of advancing religion and whether they fostered "excessive entanglement" between church and state.

In *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985), which involved the provision of classes to nonpublic pupils at public expense in classrooms located in and leased from sectarian schools, the Court focuses on the "primary effects" test. These programs were invalidated by the Court because they impermissibly advanced the sectarian religious mission of the parochial schools, although they did have the permissible secular purpose of providing education. The Court found three ways in which the programs advanced religion: First, "state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overtly indoctrinate the students in particular religious tenets at public expense." Second, "state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public." Third, "the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." *Grand Rapids*, 105 S.

Ct. at 3230. Three subfactors are thus identified within the "effects" test: indoctrination, symbolism and subsidization.

A state law may have a legitimate "primary effect" of the provision of secular education to all students, but still be unconstitutional because it has an additional "primary effect" of advancing religion. *Nyquist*, 413 U.S. at 783-84 n.39. The United States Supreme Court has distinguished between those cases in which state aid has only an indirect or incidental benefit upon religious institutions and those that provide direct and substantial support which advances a sectarian enterprise. Indirect and incidental benefits to church-related schools do not violate the constitutional prohibition against the establishment of religion. *Meek v. Pittenger*, 421 U.S. 349, 365 (1975). In accord, see *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1 (1947), (Reimbursement of bus fare to parochial schools is indirect aid only and, therefore, does not violate the constitution). But see *Committee for Public Ed. & Religious Lib. v. Nyquist*, 413 U.S. 756, 783 n.39 (1973) (striking down a New York statute providing for payment out of public funds for maintenance and repair for private schools, tuition reimbursement to private school pupils and income tax benefits to parents of children attending private school), and *Sloan v. Lemon*, 413 U.S. 825 (1973) (holding that a Pennsylvania statute providing for reimbursement of tuition paid by parents who send their children to nonpublic schools had the impermissible effect of advancing religion and was, therefore, unconstitutional under the establishment clause).

In *Wolman v. Walter*, 433 U.S. 229 (1977), the Court upheld the constitutionality of an Ohio program whereby state funds were expended to provide therapeutic guidance and remedial services for nonpublic students in public schools or mobile units located off the nonpublic school premises. The Court explained why these types of programs were not in the nature of aid having a primary effect of advancing religious institutions:

The reason for considering diagnostic services to be different from teaching or counseling is readily apparent. First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves

chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student.

Wolman, 433 U.S. at 244. In addition, the Court emphasized that these services were offered under circumstances which reflected neutrality, *i.e.*, off the premises of private schools. *Also see Nyquist*, 413 U.S. at 783 n.39, and *Meek*, 421 U.S. at 371 n.21.

Similarly, neither of the subfactors expressed in *Grand Rapids* of indoctrination or symbolism would appear to be present where private school students are allowed to attend limited classes within public schools, so long as those classes are not of a religious nature.

In *Grand Rapids*, the Court was notably concerned with the possibility that public schools could gradually take on the entire responsibility for teaching secular subjects to religious school pupils, thereby providing a substantial subsidy to the nonpublic school. Private schools in Wisconsin are required by statute to teach certain basic secular courses. *See* sec. 118.165(1)(d), Stats. Instruction in these subjects is essential to the existence of these schools and their recognition by the state. If the state directly assumes part of the parochial schools' education requirements, this inevitably provides a substantial subsidy to a religious institution. The more courses the public school district allows the private school pupil to attend, the more subsidization is occurring. Direct aid in meeting this necessary function is prohibited just as provision of instructional material is prohibited.

The very purpose of many [religious] schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. *See Lemon v. Kurtzman*, 403 U.S., at 616-617, 91 S.Ct. [2105], at 2113. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.'

Meek, 421 U.S. at 366.

3. Entanglement

In the second case, *Aquilar v. Felton*, 105 S. Ct. 3232 (1985), the Court held that a program in which New York City used Title I funds to pay salaries of public school employes to teach in parochial schools violated the establishment clause. The Court reasoned that even if this aid did not have the primary effect of advancing religion, the fact that the program provided for a system of monitoring the content of publicly funded classes necessarily resulted in an excessive entanglement of church and state. The Court's discussion of the entanglement test analyzed both the sectarian environment itself and the conduct of state personnel inside the sectarian school.

The administrative cooperation that is required to maintain the educational program at issue here entangles Church and State in still another way that infringes interests at the heart of the Establishment Clause. Administrative personnel of the public and parochial school systems must work together in resolving matters related to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program. Furthermore, the program necessitates "frequent contacts between the regular and the remedial teachers (or other professionals), in which each side reports on individual student needs, problems encountered, and results achieved."

Aquilar, 105 S. Ct. at 3239.

Entanglement can flow from the need for frequent administrative supervision or from the potential for religious-political strife such involvement may generate. For example, in *Meek*, the teaching of special education courses in parochial schools by public school teachers was held to violate the first amendment to the United States Constitution because the Court concluded it was administratively impossible to keep the publicly provided program neutral and nonsectarian, and to politically maintain the program without dividing the community along religious lines.

Allowing private school pupils to attend classes in public schools, if the courses are not included within the criteria found in section 118.165(1)(d), would not violate the first amendment to the United States Constitution. The primary purpose of the program would not be to provide religious based education but to advance

the education of all children of the state. There would be little risk of subtle indoctrination in religious tenets by teachers, or the possible symbolic message of support conveyed by providing instruction on the premises of a sectarian institution. In addition, there would be no reason for frequent contact between administrative personnel of the public and private school systems involved, nor should the community have reason to oppose such arrangements. Finally, the state would not be subsidizing sectarian schools by providing the basic secular courses private schools are required to teach.

B. *The Wisconsin Constitution*

Article I, section 18 of the Wisconsin Constitution reads as follows:

The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; *nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.*²

Article I, section 18 is the freedom of worship section of the Wisconsin Constitution. The provisions of both the first amendment and article I, section 18 of the Wisconsin Constitution “are intended and operate to serve the same dual purpose of prohibiting the “establishment” of religion and protecting the “free exercise” of religion. . . .’” *State ex rel. Holt v. Thompson*, 66 Wis. 2d 659, 676, 225 N.W.2d 678 (1975), quoting *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 322, 198 N.W.2d 650 (1972). The test for an establishment clause violation is basically the same under both constitutions. *American Motors Corp. v. ILHR Dept.*, 93 Wis. 2d 14, 29-30, 286 N.W.2d 847 (Ct. App. 1979). However, the language of article I, section 18 of the Wisconsin Constitution is more specific than that found in the establishment and free exercise clauses in the first amendment. It contains the additional language: “[N]or

² It should be noted that the phrase “religious societies, or religious or theological seminaries” has been construed to include primary and secondary nonpublic schools. *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 156, 115 N.W.2d 761 (1962).

shall any money be drawn from the treasury *for the benefit of* religious societies . . .” The added “for the benefit of” language in the state constitution may require additional analysis. See 64 Op. Att’y Gen. 75, 78 (1975), and cases cited therein. However, the Wisconsin Supreme Court has explained:

This language has been construed by this court as encompassing the “primary effect test” such that:

“The crucial question . . . not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion.’” *State ex rel. Warren v. Nusbaum, supra*, at page 333, quoting *Tilton v. Richardson, supra*, at page 679.

State ex rel. Warren v. Nusbaum, 64 Wis. 2d 314, 328, 219 N.W.2d 577 (1974).

A number of attorney general opinions have addressed the scope of article I, section 18 of the Wisconsin Constitution. See 55 Op. Att’y Gen. 124 (1966) (article I, section 18 of the Wisconsin Constitution prohibits the use of funds received under Title I of the Elementary and Secondary Education Act to pay salaries of any persons teaching in church-affiliated schools, whether or not they were public school teachers sent to such schools); 64 Op. Att’y Gen. 136 (1975). (To confer Title I benefits on a parochial school would violate article I, section 18 of the Wisconsin Constitution, which provides, in part: “[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”); 64 Op. Att’y Gen. 75 (1975) (a school district can provide health and welfare services to students attending private schools, but not educational services).

In 64 Op. Att’y Gen. 139 (1975), however, I concluded that funds under section 406 of Title IV of the Elementary and Secondary Education Act may be spent on “dual enrollment” or “shared time” programs, where both public and private students are permitted to participate, as long as the services are provided on public school premises.

Implicit in any dual enrollment program is the requirement that both public and private school students be permitted to participate in the same program. Subject to this condition and the condition that the services be rendered on the premises of a public school, it is permissible for a public school district to

spend money to provide instructional programs and services to private school children and teachers.

64 Op. Att'y Gen. at 142.

Based upon case law which has developed since that opinion, it should be noted that the provision of such programs and services to private school children are permitted only so long as those services are in the nature of remedial programs, such as the instruction mandated by federal laws for those school districts receiving federal funds, or supplemental courses, and not those courses mandated by section 118.165(1)(d).

To the extent that the courses or activities which you propose to allow private school pupils to participate in are in the nature of therapeutic, guidance or remedial programs, or supplemental instruction, I conclude that such an arrangement would not violate federal or state constitutional prohibitions. *See Wolman, Meek and Nusbaum*. However, if the selected courses are those which provide basic education in the areas mandated by section 118.165(1)(d), *i.e.*, reading, writing, mathematics, social studies and science, I believe an arrangement permitting the attendance of private school pupils in publicly provided courses would unconstitutionally have the primary effect of advancing religion. In order to exist, private schools are required to provide these course subjects. If the state provides instruction in such areas for sectarian schools, this necessarily reduces their education costs and frees their resources for religious purposes. Such a result is not permitted by either the state or federal constitutions.

II.

OBLIGATION OF SCHOOL DISTRICTS

Article X, section 3 of the Wisconsin Constitution gives all children between the ages of four and twenty years the right to a free public education.

Article X, section 3 provides:

District schools; tuition; sectarian instruction; released time.
SECTION 3. [As amended April 1972] The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be

allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours. [1969 J.R. 37, 1971 J.R. 28, vote April 1972]

In analyzing this section, the court in *Buse v. Smith*, 74 Wis. 2d 550, 567, 247 N.W.2d 141 (1976), stated:

The involvement of the legislature from the framing of the constitution to the present and the many cases which have come before this court, emphasize that the equal opportunity for education as defined by art. X, sec. 3, is a fundamental right.

To hold that the right to equal opportunity for education is a fundamental right under the Wisconsin Constitution and *to hold that the legislature is constitutionally mandated to provide an equal opportunity for education as that term is defined by the criteria set forth in sec. 3, art. X, is not necessarily to validate as constitutional any means chosen by the legislature to achieve that end.*

(Emphasis added.) The analysis in the emphasized language can be applied to local public school districts, and forms the basis for a discussion of the powers and duties of the local school districts.

This provision does not indicate whether this right is only available to those students who attend public school full-time. Because section 118.155 gives public school students the right to be released from school to obtain religious instruction during school hours, it could be argued that the right to attend public school is not conditioned on full-time attendance. If this is true, then the right to attend public school part-time should not be denied to parochial school students. The comparison, however, is fatally flawed by the distinction that the parochial school pupil has chosen to receive his or her basic education in a sectarian school. A parochial school cannot take a student's tuition and then send that student off to public school for instruction in the basic courses which it is itself obligated to provide in order to fall within the statutory definition of a "private school."

To the extent the nature of courses being provided are those previously discussed as being permissible under the constitution, section 120.12, which gives a school district the power of general supervision and management over buildings, implies the authority to allow parochial pupils to attend public school part-time. 53 Op.

Att'y Gen. 187 (1964). This opinion, however, did not address the issue of whether a district is obligated to provide such services.

In response to the question of whether the state can provide for participation by private school children in Title IV programs if a local district refuses, or is legally unable to provide for their participation on an equitable basis, I stated:

Wisconsin has a firmly established policy of local control over elementary and secondary education. This policy is expressed throughout the statutes relating to education. For example, sec. 120.12(1), Stats., vests in the local school board the care, control and management of school district property and affairs. And sec. 120.49(1), Stats., authorizes school boards to establish and organize schools and prescribe courses of study. The proposal set forth in your sixth question to allow the state educational agency to provide for participation of private school children in Title IV programs in the event a local school district refuses to provide such programs is inconsistent with the policy of local control over education.

In addition, the Department of Public Instruction is without statutory authority to provide for participation of private school children in the place of a local school district which refuses or is legally unable to do so. For these same reasons your department may not supplant a local school district in the administration of Title IV programs.

64 Op. Att'y Gen. at 142-43. Therefore, I conclude the department could not obligate a district to provide access to courses to private school pupils.

School districts which receive federal funds under 20 U.S.C. §2701 (1982) *et seq.*, the Elementary and Secondary Education Act of 1965, as amended, are required to make arrangements for participation in funded special educational programs by children of the district enrolled in private schools to the extent local educational agencies are not prohibited by law from providing such participation. 20 U.S.C. §2740 (1982). The receipt of such funds would thus present a circumstance under which school districts would be obligated to provide access to courses or activities to private school pupils. These funds, however, are only to be used for supplemental instructional services and cannot supplant instruction in regular classes. See *Bennett v. Kentucky Dept. of Educ.*, 105 S. Ct. 1544

(1985). If the public school district incurs additional costs in permitting the pupil to participate in the selected courses or activities, such an arrangement again would be unconstitutional unless those costs are covered by federal funding which mandates provision of supplemental services to private pupils.

III.

LEASING SPACE FROM A SECTARIAN SCHOOL

Your third question asks whether a public school district could lease space in a religious school facility for the teaching of public school students by public school teachers. A public school district may lease the use of a religious school facility if no religious activities are conducted during the periods of public school use, if all religious symbols and artifacts are removed, if a reasonable rental is paid and if the use by the public school district involves public school teachers instructing public school students only. In addition, the district must comply with relevant statutory procedures. Wisconsin statutes authorize a public school district to lease "suitable buildings" for a period not exceeding twenty years with annual rentals fixed by the lease. Sec. 120.10(5), Stats.

Although the first amendment provides for separation of church and state, it does not prohibit reasonable cooperation between governmental entities and religious organizations.

The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.

Zorach v. Clauston, 343 U.S. 306, 312 (1952).

The rental of space in order to provide classrooms for public school students clearly fulfills a secular purpose. The classrooms leased would not be used to conduct classes for private school pupils, nor will public school teachers be teaching private school pupils. Thus, this arrangement is distinguishable from the leasing of classrooms in parochial schools by public school districts in order to provide educational programs under Title I of Elementary and Secondary Education Act to parochial school students, which I

previously advised your predecessor was prohibited by the establishment clause of the United States Constitution and article I, section 18 of the Wisconsin Constitution. 67 Op. Att’y Gen. 283 (1978). Even though the space would be under the control of the public school administration due to the lease, the arrangement was objectionable because of the benefit it would confer on parochial schools.

Neither does this arrangement appear to violate the “primary effect” or “excessive entanglement” tests. Although it is true that a religious institution may be receiving monies from the state as a result of this lease, these benefits are in the nature of indirect and incidental aid and are, therefore, not necessarily prohibited by the constitution. *Meek*, 421 U.S. at 359.

In *State ex rel. Sch. Dist. v. Nebraska State Bd. of Ed.*, 188 Neb. 1, 3, 195 N.W.2d 161, *cert. denied*, 409 U.S. 921 (1972), the Court upheld the “right of a public school district to use or lease all or a part of a church or other sectarian building for public school purposes” In its opinion denying certiorari, the United States Supreme Court explained why there appeared to be nothing unlawful in the rental of space: “There is not the slightest suggestion that this was a subterfuge to make a subsidy to the parochial school, or anything except an arrangement motivated solely by the lack of space in the public schools.” 409 U.S. at 925.

The isolation of the rooms leased and the precautions your question contemplates sufficiently insulate the public school students using such facilities from the religious influence of the sectarian institution. Any contacts the public school pupils would have with religious influences would be indirect and inconsequential.

The renting of space by a public school district in a private school would create a landlord-tenant relationship with public school officials having administrative control of the space rented. The fact of negotiating a lease, arranging for space and ensuring the restriction of contacts would, of course, result in some entanglement. However, it would not be so extensive as to be “excessive.” In the lease situation presented by your question those contacts would likely include a small number of meetings initially to discuss such non-ideological matters as allocation of space and scheduling.

Another aspect of the entanglement question is the potential for political divisiveness. This would not appear to be a concern here

where the lease arrangement is merely an expedient to provide temporary needed space to public school pupils. This situation is distinguishable from *Lemke v. Black*, 376 F. Supp. 87 (E.D. Wis. 1974), in which the court held the use of a church for a public school graduation ceremony unconstitutional on entanglement grounds. The specific facts of that case disclosed there had been active opposition to the holding of the ceremony in the church, and the decision to go ahead had resulted in increased religious tension and political divisiveness. The court did recognize that use of a religious facility by a state agency for a secular purpose does not necessarily violate the constitution. 376 F. Supp. at 88.

In *Dorner v. School District*, 137 Wis. 147, 118 N.W. 353 (1908), the Wisconsin Supreme Court approved the maintenance of a public school in a parochial school building. A few years later, the court held that holding public school graduation exercises in a church did not violate article I, section 18 of the Wisconsin Constitution. *State ex rel. Conway v. District Board*, 162 Wis. 482, 156 N.W. 477 (1916).

Further support for the opinion that such lease arrangements are constitutional may be found in discussions of the situation whereby a religious organization desires to lease space in a public building. My predecessor issued an opinion that the relationship of landlord and tenant which results from the use of state-owned facilities at a university campus by religious organizations would not result in "an excessive entanglement" between church and state. 63 Op. Att'y Gen. 374, 383 (1974).

BCL:JSM

Federal Aid; Fox Valley Technical Institute; Justice Assistance Act of 1984. The Fox Valley Technical Institute is not a “unit of local government” for the purpose of receiving federal Justice Assistance Act (JAA) funds. Also, JAA funds which are specified for use by local units of government for local projects cannot be used to support statewide crime prevention activities. OAG 46-86

December 18, 1986

MR. RICHARD FLINTROP, *Executive Director*
Wisconsin Council on Criminal Justice

You have asked for an opinion from this office on two questions relating to federal Justice Assistance Act of 1984 (JAA) funds:¹

1. Is the Fox Valley Technical Institute a “unit of local government” as defined by paragraph 33.11 of JAA’s implementing rules and regulations?
2. Is it proper to utilize JAA funds specifically designed for use by local units of government for “local projects and activities,” to support statewide crime prevention activities?

In my opinion, the Fox Valley Technical Institute is not a “unit of local government” as that term is intended to be interpreted under the JAA. I also do not believe JAA funds specified for use by local units of government for local projects can be used to support statewide crime prevention activities.

The JAA establishes within the Office of Justice Programs, United States Department of Justice, a bureau of justice assistance and authorizes the bureau to award block grants to states to assist in providing programs to improve their criminal justice systems. Units of local government are eligible to apply for and receive subgrants from the participating states. 28 C.F.R. §33.11 of the JAA rules and regulations provides that a unit of local government means “any city, county, township, borough, parish, village, or other *general purpose political subdivision* of a state and includes Indian tribes which perform law enforcement functions as determined by the Secretary of the Interior” (emphasis added).

¹ 42 U.S.C. §3701, *et. seq.*, amended (Pub. L. No. 90-351, as amended by Pub. L. No. 93-83, Pub. L. No. 93-415, Pub. L. No. 94-130, Pub. L. No. 94-503, Pub. L. No. 95-115, Pub. L. No. 96-157 and Pub. L. No. 98-473).

The Fox Valley Technical Institute (FVTI) is a regional vocational education and training school which operates under the State of Wisconsin Vocational, Technical and Adult Education Board (VTAEB). The VTAEB is responsible for initiating, developing, maintaining and supervising programs with "specific occupational orientations below the baccalaureate level, including terminal associate degrees, training of apprentices and adult education below the professional level." Sec. 38.001, Stats. Section 38.02 provides:

Establishment. There is established under this chapter a system of vocational, technical and adult education to foster and maintain instruction in courses approved by the board in part-time and full-time day or evening classes. Every person at least the age specified in s. 118.15(1)(b) who can profit thereby is eligible to receive instruction under this chapter and rules established by the board.

The purpose of the state VTAE system is to provide instructional services. To this end it may levy taxes. Sec. 38.16, Stats.

Under the framework of government organization in Wisconsin, school districts and VTAE districts are considered to be units of government. School districts and VTAE districts are, however, considered to be "special" units of government as opposed to "general purpose units," which are counties, towns, cities and villages. See Donoghue, *Local Government in Wisconsin*, 12 (1979) (reprinted from *The Wisconsin Blue Book 1979-80* at 110).

The purpose of JAA funds is to assist states' efforts in the area of its criminal justice functions. 42 U.S.C. §3743. The funding system is designed with a pass-through provision which requires a state to make available to local units of government a portion of the federal monies it receives equal to the local government share of total state and local criminal justice expenditures. Sec. 407(6) of the Act. 42 U.S.C. §3747(b)(1). For example, if local units of government in a state contribute seventy percent of all money spent in that state for such activities as law enforcement, courts, prosecutorial and defender services, corrections and other criminal justice functions, then the local units are eligible for seventy percent of the federal monies which are given to that state.

"Specialized" units of government do not contribute to criminal justice expenditures, and thus are not intended to be beneficiaries of these funds. A county or city could, however, apply for such funds

and then grant them to a school or vocational district in order to provide a program which fits within those described under the federal statute. 42 U.S.C. §3743.

Your second question asks whether it is proper to utilize JAA funds specifically designed for use by local units of government for "local projects and activities" to support statewide crime prevention activities.

The materials accompanying your request for an opinion indicate that this issue arose as the result of a FVTI application requesting funding for the development of a statewide technical assistance, training and public education/information service delivery system. As your letter to Mr. Charles Lauer, General Counsel for the federal Office of Justice Programs points out, this program "could be construed to be a long-term, multi-functional and potentially permanent statewide activity." Your letter further points out that your agency anticipates that a number of individual communities would participate in such a program. In fact, the program is specifically designed for use by communities statewide.

The Juvenile Justice and Delinquency Prevention Act of 1974 (JJDP A) has a pass-through provision similar to that found in the JAA. The JJDP A requires that at least two-thirds of JJDP A funds received by a state shall be allocated to local agencies. The State of Wisconsin had used such funds to support two Wisconsin Council on Criminal Justice (WCCJ) outreach centers. The funding for these centers was included in calculating the amount allocated for the required local share. However, these monies were not used for local programs, but were used by the centers for staff and administrative costs to perform activities such as assisting local representatives with the grant process and providing information about federal requirements.

The Legislative Audit Bureau in its Report No. 85-33 concluded that these two outreach centers operated as WCCJ regional offices and therefore the funds used to operate them should not be included as part of local share monies, but instead should be included as part of the state share. The program contemplated by the FVTI application would similarly provide services with a statewide impact.

The purpose of section 407(6) of the JAA, which requires that funds granted to the state are to be further subgranted to local units

of government in proportion to the local government share of total state and local criminal justice expenditures, appears to be designed to assist local units of government with their criminal justice programs. It is my opinion that funding for activities which have a statewide impact should come from the share of money the state agency administering the funds is allowed to retain. 42 U.S.C. §3747(b)(3).

BCL:JSM

Newspapers; Open Meeting; Schools and School Districts; Under section 120.11(4), Stats., a school district in which no newspaper is published may print legal notices of the proceedings of school board meetings in a shopper paper which does not meet the qualifications contained in section 985.03(1)(a). Other legal notices required to be published by law may not be printed in such a shopper paper. OAG 47-86

December 31, 1986

MR. JEFFREY R. KOHLER, *District Attorney*
Washburn County

In your letter of September 22, 1986, you indicate that a school district in your county desires to publish legal notices in a shopper paper which does contain some news items but does not meet the qualifications contained in section 985.03(1)(a), Stats. You also state that two newspapers which do meet the qualifications of that statute have paid circulation within the district, but that neither of them actually publishes within the school district within the meaning of section 985.01(5). It is also my understanding that neither of these newspapers has been designated as an official newspaper by the district.

Based upon the preceding fact situation, you ask whether section 120.11(4) empowers the school district to publish legal notices in the shopper paper. Your inquiry arises because unlawful publication could conceivably subject the school district or its officials to prosecution under section 985.03(2).

In my opinion, the district may lawfully publish legal notices concerning the proceedings of school board meetings in the shopper paper under the circumstances you describe. However, the shopper paper could not be used for the publication of other kinds of legal notices required to be published by law.

Section 120.11(4) provides as follows:

The proceedings of a school board meeting shall be published within 45 days after the meeting as a class 1 notice, under ch. 985, in a newspaper published in the school district, if any, or publicized by school district-wide distribution prepared and directed by the school board and paid out of school funds. If there is no newspaper published in the school district, the proceedings shall be posted or published as the school board directs. For the

purpose of publication, the proceedings shall include the substance of every official action taken by the school board at the meeting and a statement of receipts and expenditures in the aggregate. The school board shall make a detailed record of all receipts and expenditures available to the public for inspection at each school board meeting and upon request.

Section 985.08(5), provides as follows: "Except as otherwise provided in this section, no fee shall be paid and no public funds shall be used for subsidizing any privately owned newspaper for payment for any legal notice, which newspaper has not previously qualified as a public newspaper as defined in s. 985.03." Because of the prohibition contained in section 985.08(5), a municipality generally may not expend funds to publish the text of a legal notice in a shopper paper which does not meet the qualifications contained in section 985.03(1)(a). 71 Op. Att'y Gen. 177 (1982). This position was recently affirmed in OAG 29-86 (unpublished). In the absence of statutory language to the contrary, a school district and its officials are subject to the statutory prohibition contained in section 985.03(1)(a) because a school district is a "municipality" within the meaning of section 345.05(1)(c).

The term legal notice includes "[e]very publication of laws, ordinances, resolutions, financial statements, budgets and proceedings intended to give notice in an area." Sec. 985.01(2)(a), Stats. The notices required by section 120.11(4)(a) fit within the scope of this broad definition. However, neither 71 Op. Att'y Gen. 177 nor OAG 29-86 examines the impact of the exemption provision contained in section 120.11(4) upon the prohibition on publication contained in section 985.03(2).

Section 985.05(3) provides, in part, that "[i]n lieu of the requirements of this chapter, a school board may publish or publicize under s. 120.11(4)" Section 120.11(4), in turn, authorizes legal notices to be "publicized by school district-wide distribution prepared and directed by the school board and paid out of school funds." In the fact situation you describe, section 120.11(4) contains an additional exemption: "If there is no newspaper published in the school district, the proceedings shall be posted or published as the school board directs."

Statutes dealing with the same subject matter must be read together and harmonized. *City of Hartford v. Godfrey*, 92 Wis. 2d

815, 818, 286 N.W.2d 10 (Ct. App. 1979). Statutes are to be reconciled if possible and construed so as to avoid contradictory legislative intent. *Brookhill Development, Ltd. v. City of Waukesha*, 99 Wis. 2d 485, 491, 299 N.W.2d 610 (Ct. App. 1980), *aff'd*, 102 Wis. 2d 686, 307 N.W.2d 227 (1981). And, where two statutes relate to the same subject matter, the specific statute controls over the general statute. *Gottsacker Real Estate Co., Inc. v. State*, 121 Wis. 2d 264, 269, 359 N.W.2d 164 (Ct. App. 1984).

Applying these rules of construction, it is clear that, at a minimum, section 985.05(3) absolves a school district from the publication "requirements" of chapter 985. That is, in lieu of publication, a school district is free to "publiciz[e]" its proceedings "by school district-wide distribution prepared and directed by the school board and paid out of school funds" or, in this case, to "post[] or publish[] as the school board directs." Sec. 120.11(4), Stats. Thus, with the exception of school board elections under section 120.06, which are governed by the specific provisions of section 985.05(1), posting is permissible under section 985.02(2), and publication in one or more qualified newspapers likely to give notice within the district is permissible under section 985.02(1). In lieu of publication, a school district may also, pursuant to section 120.11(4), "publicize" its proceedings by means of a district-wide distribution (such as mailing or personal delivery of a letter or pamphlet) prepared and funded by the school board.

The difficult question is whether section 985.05(3) permits a school district to avoid the prohibition on publication contained in section 985.08(5). In my opinion, that prohibition does not apply when a school district publishes notice of its proceedings.

"In construing a statute, the general object is to give effect to the intent reflected in the language and to give every word, clause and sentence in a statute a construction that would not render it surplus." *State Central Credit Union v. Bigus*, 101 Wis. 2d 237, 242, 304 N.W.2d 148 (Ct. App. 1981). The use of the phrase "may publish" in section 985.05(3) indicates a belief on the part of the Legislature that school boards could engage in the process of publication in a manner other than that which is permissible under chapter 985. The only possible way in which to interpret section 120.11(4) so that such alternative modes of publication would be permissible is to construe the phrase "published as the school board

directs” as authorizing the school board to determine the manner of publication of school board proceedings.

I am unwilling, however, to conclude that sections 120.11(4) and 985.05(3) absolve newspapers from the entirety of the prohibition contained in section 985.03(1), or to conclude that those statutes absolve school districts from the entirety of the prohibitions contained in section 985.03(2).

In 71 Op. Att’y Gen. at 179-80, it was stated that “each time the text of an item which must be published appears in the print media, the publication of a ‘legal notice’ within the meaning of sec. 985.01(1), Stats., occurs.” Section 120.11(4) authorizes a school board to direct the manner of publication only with respect to “proceedings,” which is defined in section 985.01(4) as “the substance of every official action taken by a local governing body at any meeting, regular or special.” Generally, such notices would be of the kind mentioned in section 985.01(2)(a), which includes “publication of laws, ordinances, resolutions, financial statements, budgets and proceedings” However, other legal notices could not be published in newspapers that did not meet the qualifications contained in section 985.03(1)(a).

I, therefore, conclude that a construction which reconciles sections 120.11(4) and 985.05(3), with section 985.03, requires compliance with the prohibitions contained in section 985.03(3) whenever a municipality engages in the process of publication of all legal notices required to be published by law, except for notices of school board proceedings which are published by a school district.

BCL:FTC

Lotteries; Words and Phrases; Provisions of chapter 163 regarding eligibility for raffle license, scope of ticket sales, restrictions on ticket sales and payment of fees or salaries discussed. OAG 13-86

May 7, 1986

BARBARA NICHOLS, *Secretary*

Department of Regulation and Licensing

You have requested an opinion on six questions concerning various provisions of chapter 163, subchapter VIII, Stats., known as Wisconsin's raffle law. You advise that you are not requesting a review of the license issued under chapter 163 to Butch's Badger Bologna Benefit, Inc., but only a response to six general question areas which have arisen as a result of recent public attention to that raffle.

I.

DEFINITION OF "LOCAL ORGANIZATION"

You first ask for advice on the proper construction to be applied to the term "local organization" in section 163.90. That statute provides:

Any local religious, charitable, service, fraternal or veterans organization or any organization to which contributions are deductible for federal or state income tax purposes, which has been in existence for one year immediately preceding its application for a license or which is chartered by a state or national organization which has been in existence for at least 3 years, may conduct a raffle upon receiving a license for the raffle event from the board. No other person may conduct a raffle in this state.

I conclude from the following analysis that the term "local organization" is to be construed according to its ordinary and established usage and refers to a status that is less than statewide.

In your request you state there exists no statutory definition of the word "local." It is true that chapter 163 nowhere defines the word "local" as used in that statute. However, the statutes along with other sources are replete with definitions which are instructive and helpful in reaching our conclusion. The following are some examples.

Section 340.01(26) defines local authorities as "every county board, city council, town or village board or other *local*

agency” Section 66.945(1)(b) defines local governmental units as meaning “cities, villages, towns and counties.” And section 5.02(9) defines local office to mean “any elective office *other than* a state or national office.”

In addition, the Wisconsin Supreme Court has developed a definition of the word “local.” The court has used this definition to distinguish between general legislation and local or special legislation. In *Milwaukee County v. Isenring and others*, 109 Wis. 9, 19, 85 N.W. 131 (1901), the court stated: “An act is ‘general,’ as contradistinguished from and inconsistent with ‘local,’ . . . when its operation extends to the whole state” In *Monka v. State Conservation Comm.*, 202 Wis. 39, 231 N.W. 273 (1930), the court refined the concept of general legislation to include any matter of statewide interest. In this context, then, the essential feature of a local matter is that it concerns and affects only a specific geographic area within the state.

This office has also previously examined the meaning of the word “local.” In particular, in 66 Op. Att’y Gen. 335 (1977) the statutory phrase “local public defender organization” was construed. *See* sec. 977.03, Stats. The opinion first cited several other Wisconsin statutes and cases which indicate that “local” means something other than statewide. The opinion then concluded that to qualify as a “local” organization, an organization must embrace “less than the entire state” and benefit “one specific geographical area.” 66 Op. Att’y Gen. at 336.

What emerges from these examples is the concept that the term “local organization” expresses a status that is less than that enjoyed by a statewide organization and I therefore so conclude.

I am aware that in federal commerce clause cases “local” is used to describe state laws and intrastate businesses. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), for example, the Supreme Court described a state statute as a “local regulation.” 397 U.S. at 143. Other commerce clause cases indicate that a local business is one that operates within state lines. *See, e.g., Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980). However, the meaning of the word “local,” when used in the context of federal commerce clause cases, has no bearing on the meaning to be ascribed to the word when used by the Wisconsin Legislature. The federal commerce clause cases use the word to distinguish entities that operate in interstate

commerce from those that operate strictly intrastate. The Wisconsin Legislature, on the other hand, clearly uses the word to distinguish entities that operate on a statewide basis from entities that are limited to a specific geographical area within the state.

You state that “[c]onsistently since passage of the raffle legislation in 1977, the department and board have uniformly interpreted the term ‘local . . . organization’ . . . as meaning an organization organized in this state.” However, it is well settled that while an interpretation placed upon a statute by the administrative agency charged with the duty of applying the statute is entitled to great weight, the interpretation is only significant where there is an ambiguity in the statute. *Milwaukee v. Lindner*, 98 Wis. 2d 624, 297 N.W.2d 828 (1980). Because I believe the meaning of the statute under consideration to be clear and unambiguous, your prior administrative interpretation cannot overcome the plain wording of the statute.¹

You also express concern that were I to reach the conclusion which I have in fact reached, the department “would be compelled to make arbitrary decisions on the meaning of ‘local.’” While I understand your concern, I do not believe that the department will necessarily face insurmountable practical difficulties in reaching such decisions in its licensing process. The Bingo Control Board can use its rule making authority under section 163.04(3) to interpret the word “local” and provide guidance for applicants. The rule could, for example, be patterned after the United States Treasury Regulation 1.501(c)(12)-1(b) which provides:

An organization of a purely local character is one whose business activities are confined to a particular community, place, or district, irrespective, however, of political subdivisions. If the

¹ Although it is unnecessary to resort to legislative history because the statute is clear and unambiguous on its face, it is noteworthy that the Legislature, in inserting the word “local” into the state raffle law, appears to have intended the word to have its ordinary and common meaning rather than the peculiar meaning adopted by the board. The specific language of section 163.90 is taken directly from the constitutional amendment which modified Wisconsin’s strict constitutional prohibition against lotteries. See Wis. Const. art. IV, §24. The drafting records show that the word local was not contained in the first draft of the amendment. The word was added by special request of State Representative Gunderson, the legislator who had requested the original draft. This drafting request expressly states that “local” was added because Representative Gunderson *did not* “want statewide or national organizations to be able to hold raffles or receive profits from them.”

activities of an organization are limited only by the borders of a State it cannot be considered to be purely local in character.

As previously discussed, in 66 Op. Att'y Gen. 335, 336 (1977), this office defined "local" as benefiting "one specific geographical area." Although the statutes do not contain a general definition of the word "local" they do contain definitions of particular local entities, such as local committees (section 144.445(7)), local public bodies (section 85.20(1)(d)) and local authorities (section 340.01(26)). Section 23.48(1)(e) defines "local unit of government" as "the governing body of any city, town, village, county . . ." My perusal of the statutes leads me to conclude that the board would be justified in presuming that any applicant which engages in its primary activities on a countywide or smaller area would be a "local" organization. The rule could provide that any organization which is organized on, or engages in its primary activities on, a basis larger than a county unit would have to meet the department's equivalent of the treasury regulation. This suggested approach, of course, is merely designed to provide you with a starting point for developing guidelines or a rule and is subject to further refinement based upon the experience of the department and the board in administering the statute.

Finally, before leaving question one, it should be noted that the construction of the term "local organization" in this opinion enjoys the benefit of hindsight and exhaustive research. Without the benefit of those factors, the past confusion concerning the meaning of "local" is certainly understandable. The Bingo Control Board's decisions are entitled to a presumption of validity. See C.J.S. *Public Administrative Law and Procedure* §153. Given that presumption, one might have concluded prior to this opinion that the board's decisions stood as authority for the proposition that the statutory reference to any "local organization" could include statewide organizations. In any event, the objective in issuing this opinion is to remove the cloud of uncertainty and provide guidance for future decisions.

II.

AREA OF DISTRIBUTION OF RAFFLE TICKETS

Your second question inquires whether a licensed local organization (as now defined) may sell raffle tickets throughout the entire state.

Generally speaking, the laws of this state do not limit the activities of local organizations to something less than a statewide basis. Section 181.04(9), for example, relating to the powers of non-stock corporations, specifically authorizes such organizations to carry out their operations and exercise the powers granted to them by chapter 181 "within or without this state." Section 180.04(9) grants the same authority to business corporations. Chapter 188, relating to all fraternal societies, is replete with provisions imbuing such local posts, county councils and the like with "full corporate power to transact business *in this state*."

Those are some of the statutes specifically referring to the *generalized* statewide authority of the very types of organizations which may be eligible to obtain licenses to conduct raffles. You, however, have specifically asked whether raffle tickets can be sold on a statewide basis by a licensed local organization. The answer to this question is inextricably intertwined with the answer to your first question.

Section 163.02(2) clearly indicates that the purpose of chapter 163 is, *inter alia*, to prevent commercialization of raffles in every respect. As previously discussed, the purpose of the legislation was to allow only small local raffles and not to allow statewide raffles. I, therefore, draw the following conclusions.

If the licensee makes random, sporadic and unorganized sales of raffle tickets in various parts of the state outside the organization's locality, these sales, because of their nature, do not convert a legitimate local raffle to a nonlocal or statewide raffle. For example, if a member of a licensed local organization in Dane County travels to Douglas County for a family reunion or on a business trip and takes a number of raffle tickets to Douglas County and sells them, this is not such an organized statewide sale as would be impermissible.

If, on the other hand, a licensed local organization engages in large-scale, organized and programmed sales of raffle tickets throughout the state, then it would appear that in fact a statewide raffle is being conducted by a so-called "local" organization and would appear to violate the intent and purpose of chapter 163. In addition, if the primary or sole purpose of the organization was in fact the raising of money through an organized, programmed statewide raffle, then the organization would not come within the meaning of

the word “local” as used in the statute and would, therefore, not be eligible for a raffle license.

III.

PAYMENT TO THIRD PARTIES BY A RAFFLE LICENSEE FOR ADMINISTRATIVE SERVICES IN CONNECTION WITH THE CONDUCT OF A RAFFLE

Your third question is whether section 163.94 prohibits all payments to organizations or individuals in connection with the conduct of a raffle or whether the statute merely prohibits such payments if their source is the profit made from raffles.

I conclude, based upon the statutory language involved and the clear and specific statement of the legislative policy and purpose underlying chapter 163, that the statute prohibits all such payments regardless of their source.

Section 163.02(1) states in part that “[a]ll phases of the conduct of bingo and raffles . . . should be closely controlled by appropriate laws and rules which should be strictly and uniformly enforced throughout this state.”

Subsection (2) of that statute states in part that “[t]he conduct of bingo, raffles and all attendant activities . . . should be so regulated as to discourage *commercialization* of bingo and raffles *in all forms*”

I believe it to be patently clear that to allow payment of fees or salaries to any person or organization in return for services rendered in conducting or promoting a raffle would result in commercialization in clear violation of the expressed legislative purpose and policy. The statute demands this conclusion.

Section 163.94 requires in pertinent part that “[a]ll profits from raffles shall be used by the organization conducting the raffles to further the organization’s purpose for existence and *no salaries, fees or profit shall be paid* to any other organization or individual in connection with the operation of a raffle.”

It is a maxim of statutory construction “that a law should be so construed that no word or clause shall be rendered surplusage.” *Mulvaney v. Tri State Truck & Auto Body, Inc.*, 70 Wis. 2d 760, 764, 235 N.W.2d 460 (1975).

It is also fundamental in construing statutes that “we attempt to find the common sense meaning and purpose of the words employed . . .” *State ex rel. Lynch v. Conta*, 71 Wis. 2d 662, 677, 239 N.W.2d 313 (1976), cited with approval in 66 Op. Att’y Gen. 215, 216 (1977).

Our supreme court has stated this principle in the following manner: “[t]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, or hidden sense . . .” *A.O. Smith Corp. v. Department of Revenue*, 43 Wis. 2d 420, 429, 168 N.W.2d 887 (1969), quoting from *State Bank of Drummond v. Nuesse*, 13 Wis. 2d 74, 78, 108 N.W.2d 283 (1961).

I, therefore, conclude that the common sense, plain, obvious and rational meaning of the statute involved prohibits any such payments. Also, the words utilized by the Legislature in section 163.94 have recognized meanings in the law.

The word profit is defined as meaning “[m]ost commonly, the gross proceeds of a business transaction less the costs of the transaction; *i.e.*, net proceeds. Excess of revenues over expenses for a transaction; sometimes used synonymously with net income for the period. Gain realized from business or investment over and above expenditures.” *Black’s Law Dictionary* 1090 (5th ed. 1979).

Were this the only word used and referred to in the statute under consideration, and the words “fees” and “salaries” were not present, the argument could be advanced that the payments about which you inquire are prohibited only if made from the net proceeds or “profits” from raffle activity.

They are present in the statute, however, and to construe them as being equivalent to the meaning of “profit” so as to prohibit such payments *only* if made out of profits would result in rendering the words fees and salaries surplusage. Those words do, in fact, have meanings separate and distinct from the word profit.

Black’s Law Dictionary defines fees in part as a reward, wage or compensation given to a person for performance of services or something done and defines salaries in part as reward or recompense for services performed. Clearly, they are not analogous or equivalent to the word profit.

Therefore, I conclude all such payments to be prohibited regardless of source.

IV.

ORGANIZATION-IMPOSED LIMITATION ON
DISTRIBUTION OF RAFFLE TICKETS

You next ask whether a licensed organization may: (a) require ticket purchasers to become a member of the licensed organization or pay a separate fee in order to buy raffle tickets, or (b) require ticket purchasers to buy more than one ticket as a condition to participating in the raffle.

Answering subquestion (a), I find nothing in the statutes or relevant court decisions regarding lotteries which prohibits an organization from restricting raffle ticket sales to members. However, an organization which charges prospective raffle ticket purchasers a separate fee in order to purchase tickets is in fact violating section 163.93(2) if the stated ticket cost plus the fee combine to exceed \$5.00 per ticket. I believe this conclusion to be further required by the expressed legislative policy of discouraging all types of commercialization.

In response to subquestion (b), the requirement that a prospective purchaser must buy multiple tickets flies straight in the face of the already mentioned and explicitly stated policy of the Legislature. In addition, there is implicit in your question another issue.

I am advised that some organizations have utilized a method of selling tickets wherein prospective purchasers are required to buy a sheet or block of tickets. Each "ticket" in the block or sheet is stated to cost \$5.00, and there are usually twenty "tickets" to a sheet or in a block, thereby costing the buyer \$100.00. However, for each sheet or block purchased the buyer receives only *one* entry for the eventual drawing for prizes.

If this method is utilized, such scheme clearly violates section 163.93(2) in that it is in actuality the sheet or block of tickets which comprises "a ticket" whose cost is therefore clearly in excess of \$5.00.

V.

DEFINITION OF "SERVICE ORGANIZATION"

You next ask me to define "service organization" as that phrase is used in section 163.90. You indicate in your request that the department has apparently adopted as a criterion for eligibility

under that section that an applicant organization must have as one of its principle purposes the benefit of the public. I agree with that conclusion.

Section 990.01(1) establishes a general rule in construction of statutes that nontechnical words and phrases and those to which the law has attributed no peculiar meaning shall be construed according to common and approved usage.

The Random House Dictionary of the English Language, unabridged edition, defines service club to mean "any of several organizations maintained to contribute to the growth and general welfare of its members and the community." And *See* 73 Op. Att'y Gen. 114 (1984).

Therefore, I conclude that an organization, in order to qualify as a "service organization," must as a minimum have as one of its principle purposes the benefit, the growth and the general welfare of the community.

VI.

AMENDMENTS TO RAFFLE LICENSES

Finally, you ask if a licensed organization may amend its raffle license, together with its articles of incorporation, constitution or bylaws, to change the organization's purpose for existence.

Section 163.92(2) provides in pertinent part that "[u]pon application by an organization licensed under this subchapter a license may be amended if the subject matter of the amendment properly and lawfully could have been included in the original license" and that "[a]n amendment may revise *any* of the information on the original license."

I conclude that so long as the organization remains fully eligible for a raffle license *after* the amendments, there is no question that the statute specifically allows such an amendment.

You also ask whether an organization that amends its raffle license to reflect a change in stated purpose during the course of selling raffle tickets is obligated to notify ticket purchasers of the change in stated purpose.

Section 100.18(1) prohibits untrue, deceptive or misleading statements in advertising. If the promotional materials for the raffle state that the proceeds are going to be used for a certain purpose

and that stated purpose is later changed by an amendment to the raffle license and the advertising for the sale of the raffle tickets remains unchanged, such advertising could then potentially violate the relevant provisions of section 100.18. Therefore, promoters of raffles should notify purchasers and prospective purchasers of raffle tickets of the change in use to which the proceeds would be put.

JDJ:JCM

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Indian reservation

- The state net proceeds occupation tax and mining permit process are generally not applicable to mining operations on the Sokaogon Reservation, whether those operations are conducted by the tribe or by a non-Indian lessee. Any federal environmental impact statement required by the federal government would legally need to be shared with or presented to the state. The applicability of state pollution control laws to mining activity on the reservation is also discussed. OAG 43-86 220

MUNICIPALITIES

Building permit

Under section 66.036, Stats., additions to, and the remodeling of, structures require an on-site inspection of the existing private sewage system before a building permit may be issued. OAG 7-86..... 38

Law enforcement contracts with counties

Under section 66.30, Stats., and subject to some limitation, a county may furnish certain supplemental law enforcement services to villages and towns within the county. The county sheriff's consent to provide such supplemental services and the sheriff's approval of such a contract is required. OAG 24-86 119

Sewage, private system

Under section 66.036, Stats., additions to, and the remodeling of, structures require an on-site inspection of the existing private sewage system before a building permit may be issued. OAG 7-86..... 38

NAMEKAGON PORTAGE TRAIL

Trust doctrine discussed

The "Namekagon Portage Trail" is not impressed with a public trust under article IX, section 1 of the Wisconsin Constitution. OAG 18-86 89

NET PROCEEDS OCCUPATION TAX

See TAXATION, Indians

NEWSPAPERS

Legal notice

A municipality may not expend funds to publish the text of a legal notice in a shopper paper which does not meet the qualifications contained in section 985.03(1)(a), Stats. 71 Op. Att'y Gen. 177 (1982) discussed and adhered to. (Unpub.) OAG 29-86

Under section 120.11(4), Stats., a school district in which no newspaper is published may print legal notices of the proceedings of school board meetings in a shopper paper which does not meet the qualifications contained in section 985.03(1)(a). Other legal notices required to be published by law may not be printed in such a shopper paper. OAG 47-86 269

Shopper paper

A municipality may not expend funds to publish the text of a legal notice in a shopper paper which does not meet the qualifications contained in section 985.03(1)(a), Stats. 71 Op. Att'y Gen. 177 (1982) discussed and adhered to. (Unpub.) OAG 29-86

Under section 120.11(4), Stats., a school district in which no newspaper is published may print legal notices of the proceedings of school board meetings in a shopper paper which does not meet the qualifications contained in section 985.03(1)(a). Other legal notices required to be published by law may not be printed in such a shopper paper. OAG 47-86 269

NURSING HOMES

Medicaid and contracts for prospective residents

Discussion of federal and state law regarding the practice of requiring a prospective nursing home resident to forego medical assistance benefits for a stated period of time as a condition of admission. OAG 4-86 14

OPEN MEETING

Public notice

A municipality may not expend funds to publish the text of a legal notice in a shopper paper which does not meet the qualifications contained in section 985.03(1)(a), Stats. 71 Op. Att’y Gen. 177 (1982) discussed and adhered to. (Unpub.) OAG 29-86
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School Board

Under section 120.11(4), Stats., a school district in which no newspaper is published may print legal notices of the proceedings of school board meetings in a shopper paper which does not meet the qualifications contained in section 985.03(1)(a). Other legal notices required to be published by law may not be printed in such a shopper paper. OAG 47-86 269

OPTOMETRY

Corporations

Restrictions on business corporations providing medical, legal and dental services discussed. OAG 39-86 200

PERMITS

See LICENSES AND PERMITS

PHARMACY, STATE BOARD OF

Registration renewal of pharmacist

Section 450.02, Stats., providing for the lapse of the right of a pharmacist to practice for failure to renew his or her registration within sixty days of the pharmacy board’s second notice of expiration, requires actual notice by the board. OAG 14-86 68

PHYSICAL THERAPISTS

Practicing without referral

Discussion of circumstances under which a physical therapist may practice without a referral pursuant to section 448.04(1)(e), Stats. OAG 42-86 217

PHYSICIANS AND SURGEONS

Corporations

Restrictions on business corporations providing medical, legal and dental services discussed. OAG 39-86 200

"Fee-splitting"

An organization qualifies as a medical education and research organization under section 448.08(5), Stats., if its dominant purpose and primary function is to provide medical education and conduct medical research and if it is otherwise a nonprofit organization. A parent and wholly-owned subsidiary corporation, together, may qualify as an organization. (Unpub.) OAG 31-86

Negligence finding

A finding of negligence by a patients compensation panel against a physician who is not a named party in the proceedings should be reported to the Medical Examining Board for investigation. OAG 15-86 71

PLATS AND PLATTING

Condominium

The legal description of condominium units must conform to the requirements of chapter 703, Stats., the condominium law. The requirements of chapter 236, dealing with platting and subdividing, may not be used to legally describe condominium units. OAG 19-86 94

POLICE

Release on bail denied discussed

Acting under the authority of section 969.07, Stats., local law enforcement officials may deny release from custody to a person arrested for a misdemeanor if in the officials' opinion the person is not in a fit condition to care for his or her own safety or would constitute, because of his or her physical condition, a danger to the safety of others. OAG 40-86 209

Retirement funds

Section 40.21(4), Stats., limits prospective mandatory Wisconsin Retirement System coverage to present and future police and firefighter employes of cities and villages that had police and firefighter employes included in the Wisconsin Retirement Fund prior to March 31, 1978. OAG 6-86 34

Testimony, credibility of

In a criminal case in which a police officer testifies as a witness for the prosecution, a district attorney may have a duty under *Brady v. Maryland*, 373 U.S. 83 (1963), to disclose to the defendant information that another police officer in the same police department had claimed that the officer-witness did not tell the truth under oath in court in another, unrelated case. OAG 12-86 62

POLLUTION

Mining operations

The state net proceeds occupation tax and mining permit process are generally not applicable to mining operations on the Sokaogon Reservation, whether those operations are conducted by the tribe or by a non-Indian lessee. Any federal environmental impact statement required by the federal government would legally need to be shared with or presented to the state. The applicability of state pollution control laws to mining activity on the reservation is also discussed. OAG 43-86 220

PRISONS AND PRISONERS

Release on bail denied discussed

Acting under the authority of section 969.07, Stats., local law enforcement officials may deny release from custody to a person arrested for a misdemeanor if in the officials' opinion the person is not in a fit condition to care for his or her own safety or would constitute, because of his or her physical condition, a danger to the safety of others. OAG 40-86 209

PROBATION AND PAROLE

Welfare fraud clients as state agents or employes

Probationers who provide child-care services under a state-run program as a condition of their probation are not agents of the state for purposes of indemnity, but they are county employes for purposes of worker's compensation. OAG 8-86 43

PROPERTY

Easements and owners' rights

The rights of property owners abutting a highway are subject to reasonable regulations imposed by highway maintenance authorities and are subordinate to the public's interest over the use of the land within the boundaries of a highway right of way. OAG 3-86 10

PUBLIC HEALTH

Physical therapists

Discussion of circumstances under which a physical therapist may practice without a referral pursuant to section 448.04(1)(e), Stats. OAG 42-86 217

PUBLIC OFFICIALS

Attorneys

The State Bar of Wisconsin is a state agency created by the constitutional authority of the supreme court. The authorized functions of the State Bar may come under the "State Action" exemption to the anti-trust laws and the procedures employed by the Unauthorized Practice Committee and the Ethics Committee appear to provide due process but specific opinions in this regard must be given on a case-by-case

PUBLIC OFFICIALS (*Continued*)

Attorneys (*Continued*)

basis. Volunteer lawyers giving free legal advice in the "Lawyer Hotline" program are agents of the State Bar and are entitled to common law immunity and indemnification under section 895.46(1)(a), Stats. OAG 30-86 153

Banking Review Board

Banking Review Board members are not authorized to act in cases involving banks in which they or their spouses own stock. OAG 38-86 197

PUBLIC PURPOSE DOCTRINE

Historic Sites Foundation, Inc.

It was constitutional for the Legislature to extend indemnity and other liability protections to the corporation and its agents and employees who manage and operate a state-owned circus museum. OAG 36-86 182

PUBLIC RECORDS

Computerized records

Computerized compilation of bibliographic records discussed in relation to copyright law; under public records law requester is entitled to copy of computer tape or a printout of information contained on the tape. OAG 27-86 133

Library Services, Division for

Computerized compilation of bibliographic records discussed in relation to copyright law; under public records law requester is entitled to copy of computer tape or a printout of information contained on the tape. OAG 27-86 133

RAFFLES

See **LOTTERIES**

REGULATION AND LICENSING, DEPARTMENT OF

Disciplinary proceedings; standard of proof

Placing the lowest standard of proof — preponderance of the evidence — upon the Department of Regulation and Licensing and the licensing boards attached to it, in proceedings that could result in a decision adversely affecting an occupational or professional license does not offend the fourteenth amendment due process requirement. OAG 16-86 76

Officers of boards

Selection and terms of officers of regulatory and licensing boards discussed. OAG 44-86 247

Raffles

Provisions of chapter 163 regarding eligibility for raffle license, scope of ticket sales, restrictions on ticket sales and payment of fees or salaries discussed. OAG 13-86 273

RELIGION

Driver's license photographs

The administrative rule of the Department of Transportation granting an exemption on religious grounds from the photograph-taking requirement of sections 343.17(2) and 343.14(3), Stats., is violative of the first amendment, United States Constitution, and of Wis. Const. art. I, § 18. OAG 23-86 115

University of Wisconsin, prayer before football games

University of Wisconsin athletes may not engage in voluntary prayer led by a coach prior to an athletic event, although silent meditation or prayer organized by athletes may be undertaken within certain guidelines. OAG 17-86 81

REVISOR OF STATUTES

Age restrictions

Section 3017(2) of 1985 Wisconsin Act 29 (the 1985 state budget bill) violates article IV, section 18 of the Wisconsin Constitution. OAG 37-86 192

SCHOOLS AND SCHOOL DISTRICTS

Open meeting

Under section 120.11(4), Stats., a school district in which no newspaper is published may print legal notices of the proceedings of school board meetings in a shopper paper which does not meet the qualifications contained in section 985.03(1)(a). Other legal notices required to be published by law may not be printed in such a shopper paper. OAG 47-86 269

Parochial and private schools

Discussion of whether a private school pupil or a child in a home-based private educational program may participate in selected courses or activities of the public school district. A public school district may lease space in a sectarian school for holding classes for public school students. OAG 45-86 251

SHERIFFS

Release on bail denied discussed

Acting under the authority of section 969.07, Stats., local law enforcement officials may deny release from custody to a person arrested for a misdemeanor if in the officials' opinion the person is not in a fit condition to care for his or her own safety or would constitute, because of his or her physical condition, a danger to the safety of others. OAG 40-86 209

SNOWMOBILES

Operation of "adjacent to a roadway"

The rights of property owners abutting a highway are subject to reasonable regulations imposed by highway maintenance authorities and are

SNOWMOBILES *(Continued)*

- Operation of "adjacent to a roadway" *(Continued)*
 - subordinate to the public's interest over the use of the land within the boundaries of a highway right of way. OAG 3-86 10

STATE

- Supremacy Clause of U.S. Const. in relation to state regulation of shipping
 - State regulation prohibiting single-hulled barges and requiring double-hulled barges on the Mississippi River adjacent to Wisconsin would violate the Supremacy Clause of the United States Constitution. OAG 34-86 176

STATE BAR

- Antitrust laws; "state action" exemption
 - The State Bar of Wisconsin is a state agency created by the constitutional authority of the supreme court. The authorized functions of the State Bar may come under the "State Action" exemption to the anti-trust laws and the procedures employed by the Unauthorized Practice Committee and the Ethics Committee appear to provide due process but specific opinions in this regard must be given on a case-by-case basis. Volunteer lawyers giving free legal advice in the "Lawyer Hotline" program are agents of the State Bar and are entitled to common law immunity and indemnification under section 895.46(1)(a), Stats. OAG 30-86 153

Ethics Committee

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"Lawyer Hotline" program

- The State Bar of Wisconsin is a state agency created by the constitutional authority of the supreme court. The authorized functions of the State Bar may come under the "State Action" exemption to the anti-trust laws and the procedures employed by the Unauthorized Practice Committee and the Ethics Committee appear to provide due process but specific opinions in this regard must be given on a case-by-case basis. Volunteer lawyers giving free legal advice in the "Lawyer Hotline" program are agents of the State Bar and are entitled to common law immunity and indemnification under section 895.46(1)(a), Stats. OAG 30-86 153

Unauthorized Practice Committee

- The State Bar of Wisconsin is a state agency created by the constitutional authority of the supreme court. The authorized functions of the

STATE BAR (*Continued*)

Unauthorized Practice Committee (*Continued*)

State Bar may come under the "State Action" exemption to the anti-trust laws and the procedures employed by the Unauthorized Practice Committee and the Ethics Committee appear to provide due process but specific opinions in this regard must be given on a case-by-case basis. Volunteer lawyers giving free legal advice in the "Lawyer Hotline" program are agents of the State Bar and are entitled to common law immunity and indemnification under section 895.46(1)(a), Stats. OAG 30-86

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STATE HISTORICAL SOCIETY

See HISTORICAL SOCIETY, STATE

SURVEYS

Condominium

The legal description of condominium units must conform to the requirements of chapter 703, Stats., the condominium law. The requirements of chapter 236, dealing with platting and subdividing, may not be used to legally describe condominium units. OAG 19-86

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TAXATION

Indians

The state net proceeds occupation tax and mining permit process are generally not applicable to mining operations on the Sokaogon Reservation, whether those operations are conducted by the tribe or by a non-Indian lessee. Any federal environmental impact statement required by the federal government would legally need to be shared with or presented to the state. The applicability of state pollution control laws to mining activity on the reservation is also discussed. OAG 43-86

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TRANSPORTATION

Mississippi River

State regulation prohibiting single-hulled barges and requiring double-hulled barges on the Mississippi River adjacent to Wisconsin would violate the Supremacy Clause of the United States Constitution. OAG 34-86

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TRANSPORTATION, DEPARTMENT OF

Religion

The administrative rule of the Department of Transportation granting an exemption on religious grounds from the photograph-taking requirement of sections 343.17(2) and 343.14(3), Stats., is violative of the first amendment, United States Constitution, and of Wis. Const. art. I, § 18. OAG 23-86

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UNIVERSITY

Prayer before football games

University of Wisconsin athletes may not engage in voluntary prayer led by a coach prior to an athletic event, although silent meditation or prayer organized by athletes may be undertaken within certain guidelines. OAG 17-86..... 81

VENUE

Changing venue to save costs not allowed

Section 48.185, Stats., does not authorize a change of venue, upon motion of a party or upon stipulation of the parties, after adjudication but before the first dispositional hearing, in a juvenile delinquency proceeding. OAG 20-86..... 100

Juvenile delinquency cases

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VETERANS AFFAIRS, DEPARTMENT OF

Secretary of the Department

Section 3017(2) of 1985 Wisconsin Act 29 (the 1985 state budget bill) violates article IV, section 18 of the Wisconsin Constitution. OAG 37-86 192

VOCATIONAL, TECHNICAL AND ADULT EDUCATION

Levy limit

The levy limit imposed on Vocational, Technical and Adult Education districts by section 38.16(1), Stats., does not include amounts charged under section 74.73(2), for recovery of unlawful taxes or overassessments. OAG 2-86 6

WISCONSIN ADMINISTRATIVE CODE

See ADMINISTRATIVE CODE

WISCONSIN MEDICAL ASSISTANCE PROGRAM

See STATE MEDICAL ASSISTANCE PROGRAM

WISCONSIN NET PROCEEDS OCCUPATION TAX

See TAXATION, Indians

WISCONSIN RETIREMENT FUND

Police and firefighter employees

Section 40.21(4), Stats., limits prospective mandatory Wisconsin Retirement System coverage to present and future police and firefighter employees of cities and villages that had police and firefighter employees

WISCONSIN RETIREMENT FUND (Continued)

Police and firefighter employes (Continued)

included in the Wisconsin Retirement Fund prior to March 31, 1978.
OAG 6-86..... 34

WISCONSIN RETIREMENT SYSTEM

Police and firefighter employes

Section 40.21(4), Stats., limits prospective mandatory Wisconsin Retirement System coverage to present and future police and firefighter employes of cities and villages that had police and firefighter employes included in the Wisconsin Retirement Fund prior to March 31, 1978.
OAG 6-86..... 34

WORDS AND PHRASES

“Building”

Under section 66.036, Stats., additions to, and the remodeling of, structures require an on-site inspection of the existing private sewage system before a building permit may be issued. OAG 7-86..... 38

“carrying place”

The “Namekagon Portage Trail” is not impressed with a public trust under article IX, section 1 of the Wisconsin Constitution. OAG 18-86 89

“executive participating employe”

Section 3017(2) of 1985 Wisconsin Act 29 (the 1985 state budget bill) violates article IV, section 18 of the Wisconsin Constitution. OAG 37-86 192

“local”

Provisions of chapter 163 regarding eligibility for raffle license, scope of ticket sales, restrictions on ticket sales and payment of fees or salaries discussed. OAG 13-86 273

“local organization”

Provisions of chapter 163 regarding eligibility for raffle license, scope of ticket sales, restrictions on ticket sales and payment of fees or salaries discussed. OAG 13-86 273

“navigable waters”

The “Namekagon Portage Trail” is not impressed with a public trust under article IX, section 1 of the Wisconsin Constitution. OAG 18-86 89

“Organization”

An organization qualifies as a medical education and research organization under section 448.08(5), Stats., if its dominant purpose and primary function is to provide medical education and conduct medical research and if it is otherwise a nonprofit organization. A parent and wholly-owned subsidiary corporation, together, may qualify as an organization. (Unpub.) OAG 31-86

“private law”

Section 3017(2) of 1985 Wisconsin Act 29 (the 1985 state budget bill) violates article IV, section 18 of the Wisconsin Constitution. OAG 37-86 192

WORDS AND PHRASES *(Continued)*

Respondeat superior

Entitlement to indemnity and immunity from suit of prosecuting counsel retained by the Board of Attorneys Professional Responsibility discussed. OAG 10-86 49

Probationers who provide child-care services under a state-run program as a condition of their probation are not agents of the state for purposes of indemnity, but they are county employes for purposes of worker's compensation. OAG 8-86 43

"service organization"

Provisions of chapter 163 regarding eligibility for raffle license, scope of ticket sales, restrictions on ticket sales and payment of fees or salaries discussed. OAG 13-86 273

"Structure"

Under section 66.036, Stats., additions to, and the remodeling of, structures require an on-site inspection of the existing private sewage system before a building permit may be issued. OAG 7-86 38

WORKER'S COMPENSATION

Welfare fraud clients as county employes

Probationers who provide child-care services under a state-run program as a condition of their probation are not agents of the state for purposes of indemnity, but they are county employes for purposes of worker's compensation. OAG 8-86 43

1. The first part of the document discusses the importance of maintaining accurate records of all transactions. It emphasizes that proper record-keeping is essential for the integrity of the financial system and for the ability to detect and prevent fraud.

2. The second part of the document outlines the specific procedures for recording transactions. It details the steps involved in the accounting cycle, from identifying the transaction to posting it to the appropriate ledger account. It also discusses the importance of double-checking entries to ensure accuracy.

3. The third part of the document addresses the role of internal controls in preventing errors and fraud. It describes various control measures, such as segregation of duties, authorization requirements, and regular reconciliations, and explains how they contribute to the overall reliability of the financial reporting process.