

**OPINIONS**  
OF THE  
**ATTORNEY GENERAL**

OF THE  
STATE OF WISCONSIN

VOLUME 77

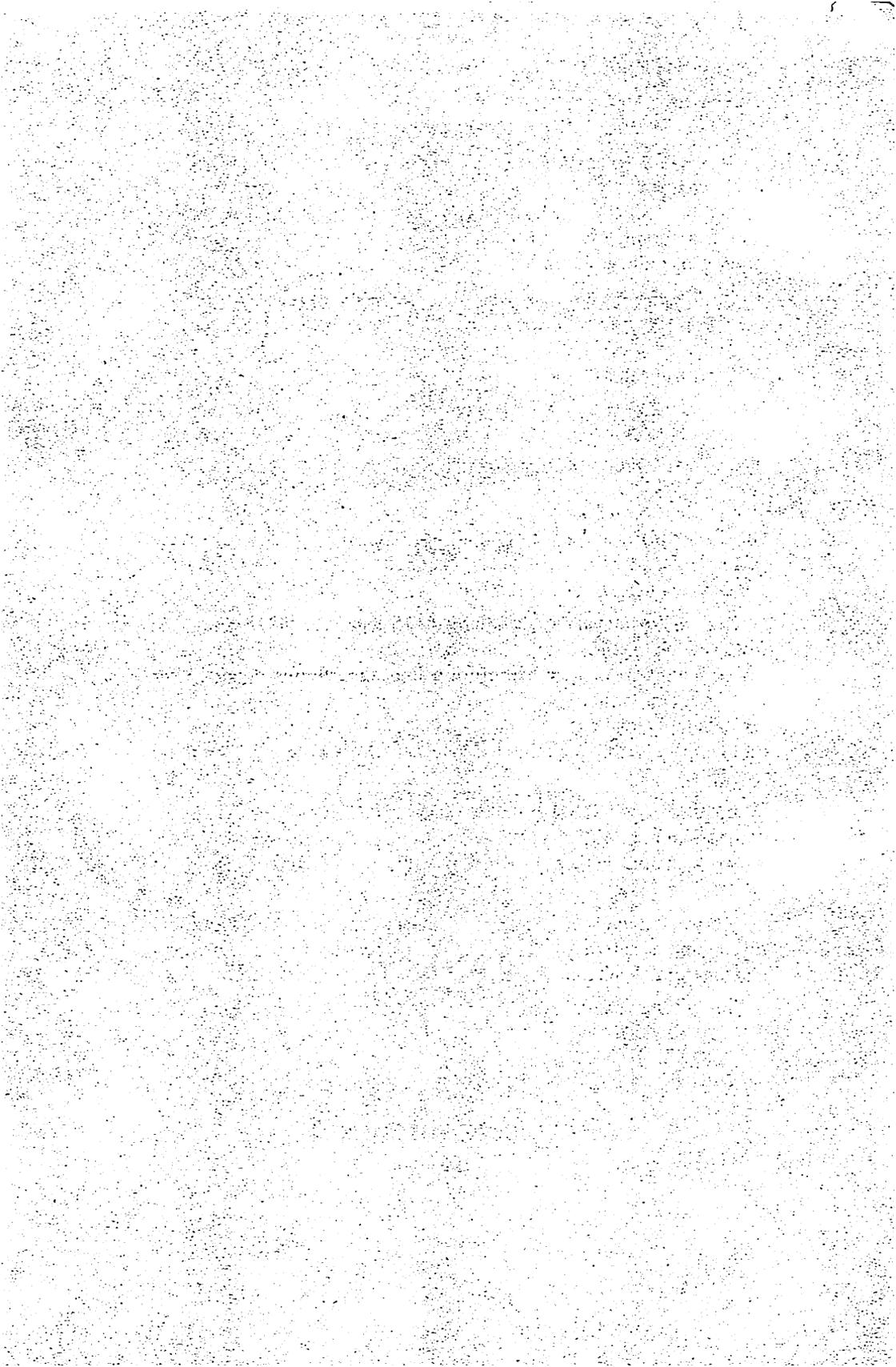
January 1, 1988 through December 31, 1988

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**DONALD J. HANAWAY**  
ATTORNEY GENERAL



MADISON, WISCONSIN  
1988



## IN MEMORIAM: JAMES POND ALTMAN

James P. Altman, an assistant attorney general for over 25 years, died unexpectedly on December 22, 1988. He was 53 years old. Speaking for the entire office, Attorney General Donald J. Hanaway commented: "Jim Altman was an outstanding attorney, and we are all saddened by his death."

Jim was born on October 6, 1935, in Quincy, Illinois. He graduated from Harvard University in 1957 and from the University of Wisconsin Law School in 1961. He served in the United States Army during the Berlin crisis.

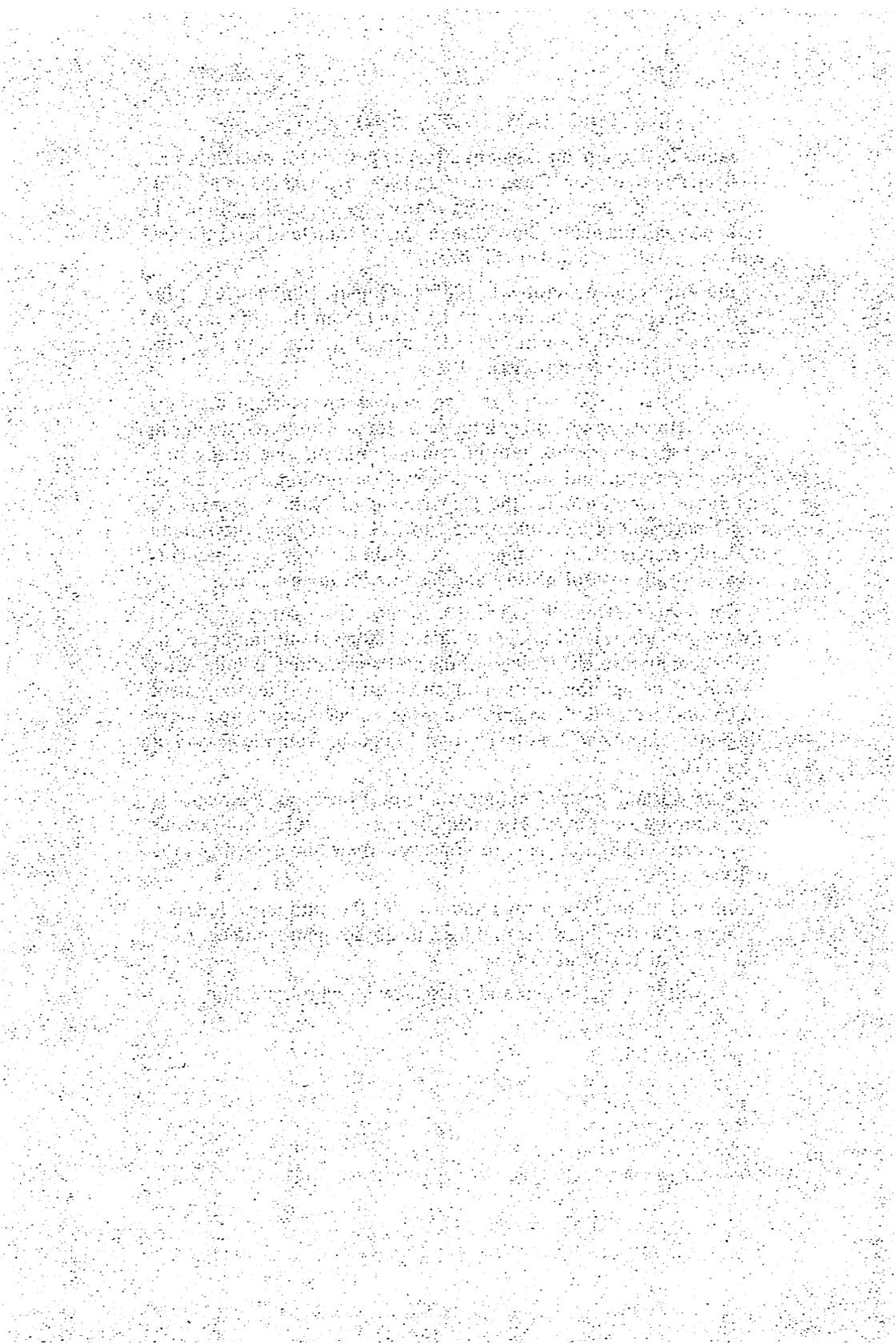
In February 1963, Jim was employed as an assistant attorney general. He served as public intervenor for the State of Wisconsin and he represented the state in criminal appeals. He also represented the Labor and Industry Review Commission, the Office of Insurance Commissioner, the Department of Natural Resources, the Department of Revenue, the Historical Society and the Bureau of Public Lands. He particularly enjoyed the latter two assignments because of his love of history and his interest in surveying.

Jim was an extremely efficient attorney. His written work was always concise. Indeed, the most famous story about Jim concerns his penchant to eschew elaboration and superfluous detail. After reviewing an opinion draft, and submitting a written comment which simply stated, "I concur," Jim was instructed to write a more "in depth" comment. Jim then wrote: "I concur from the *bottom* of my heart."

Jim's wit and sense of humor were always present. He also was compassionate and loyal. His friendship was treasured both by his co-workers and by the many persons who knew him away from the office.

Jim was an avid sportsman and lover of the outdoors. He was a hunter and a fisherman. He and his wife Joyce spent summer weekends in rural Richland County.

Jim will be remembered and missed by all who knew him.



# 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**  
**DONALD J. HANAWAY, DePere . . . . . from Jan. 5, 1987, to**

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MARK E. MUSOLF ..... Deputy Attorney General  
WILLIAM S. BECKER ..... Executive Assistant

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MARK E. SMITH . . . . .	Assistant Attorney General
STEPHEN M. SOBOTA . . . . .	Assistant Attorney General

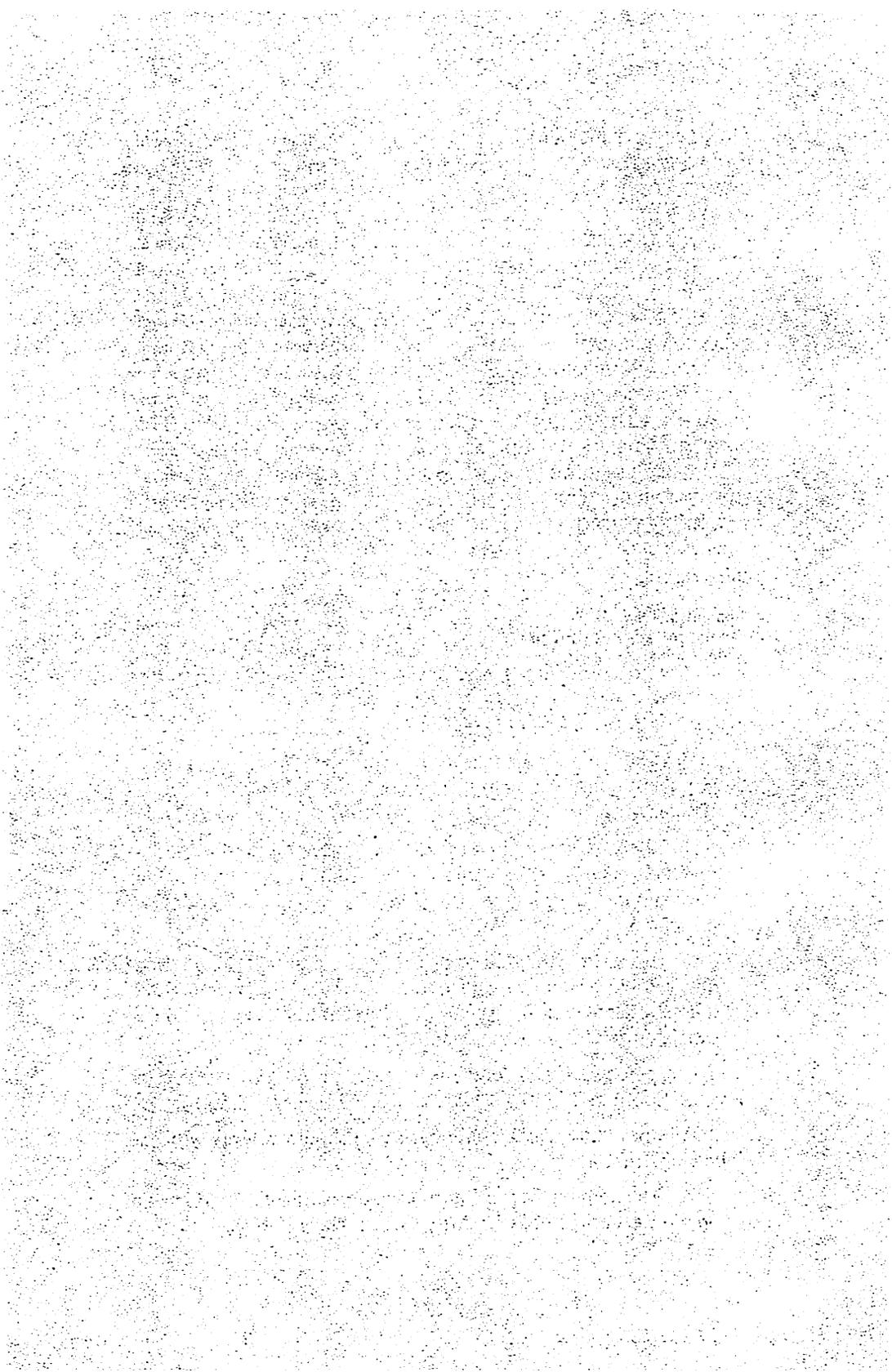
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<b>RICHARD A. VICTOR</b>	Assistant Attorney General
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<b>SALLY L. WELLMAN</b>	Assistant Attorney General
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<b>ARNOLD J. WIGHTMAN</b>	Assistant Attorney General
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<b>WILLIAM H. WILKER</b>	Assistant Attorney General
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<b>CHRISTOPHER G. WREN</b>	Assistant Attorney General
<b>E. GORDON YOUNG</b>	Assistant Attorney General

<sup>1</sup>Resigned, 1988

<sup>2</sup>Appointed, 1988

<sup>3</sup>Retired, 1988

<sup>4</sup>Died, 1988



## Preface

The criteria to be observed when requesting a formal opinion of the attorney general have not been summarized since 62 Op. Att'y Gen. Preface (1973). Many requesters are not familiar with those criteria, and other criteria have been established since that time. I am therefore taking this opportunity to summarize and refine those criteria that have been established in prior opinions. They are as follows:

1. Except as otherwise provided by statute, formal opinions may only be issued to the Governor, the Legislature, state officers and agencies, county corporation counsel and district attorneys in connection with matters within the scope of their respective official duties. Opinions may not be issued to city, village, town or other municipal attorneys or to private citizens. A request should not be made by any authorized agency or official to circumvent these requirements.

Although these have been longstanding guidelines, *see* 62 Op. Att'y Gen. Preface (1973), not all of them have been expressly stated in prior opinions.

2. Any request from a corporation counsel, district attorney or a state officer or state agency that has staff legal counsel should satisfy all of the following criteria:

A. The request should set forth a tentative conclusion upon any question presented and the reasoning upon which that conclusion is based.

B. The request should set forth and analyze all relevant statutory provisions, case law and other authorities, whether or not they support the tentative conclusion concerning the question presented.

C. A question should not be submitted simply because someone wishes it submitted. A question should not be submitted unless, after having given the problem careful consideration, a satisfactory legal answer cannot be reached.

These guidelines were previously stated in 62 Op. Att'y Gen. Preface (1973) and in 31 Op. Att'y Gen. Foreword (1942).

3. All opinion requests from any source should comply with the following criteria:

A. The request should state each question upon which an opinion is desired. 62 Op. Att'y Gen. Preface (1973).

B. The request should state all of the facts giving rise to each question presented. 62 Op. Att’y Gen. Preface (1973).

C. Any request requiring the resolution of questions of fact should not be submitted, since the attorney general has no authority to decide questions of fact. 77 Op. Att’y Gen. 36 (1988); 68 Op. Att’y Gen. 416 (1979); 40 Op. Att’y Gen. 3 (1951).

D. An opinion should not be requested on an issue that is the subject of current or reasonably imminent litigation, since an opinion of the attorney general might affect such litigation. 62 Op. Att’y Gen. Preface (1973).

E. Opinions on matters involving the exercise of legislative or executive judgment or the exercise of discretion by public officers should not be requested. 77 Op. Att’y Gen. 36 (1988); 62 Op. Att’y Gen. Preface (1973); 40 Op. Att’y Gen. 3 (1951).

F. Normally, opinion requests from the Legislature should be approved by the Senate Organization Committee or the Assembly Organization Committee. They should be limited to the validity or application of state statutes or to matters which are or will be pending before the Legislature, and should not be used as a vehicle to obtain legal advice for individual constituents or constituent governmental agencies. *See* OAG 58-88 (unpublished) (October 12, 1988).

G. Except in extraordinary circumstances, the attorney general will not issue opinions concerning the applicability of federal statutes and regulations administered exclusively by federal authorities. *See* 77 Op. Att’y Gen. 287 (1988).

H. Except in extraordinary circumstances, the attorney general will not issue opinions concerning the meaning or intent of municipal ordinances. *See* 77 Op. Att’y Gen. 120 (1988).

4. Although all of the foregoing criteria are subject to exception where the circumstances warrant, *see* 62 Op. Att’y Gen. Preface (1973), an opinion request which does not comply with these criteria may be returned to the requester with instructions to resubmit the request in an appropriate form.

OPINIONS  
OF THE  
ATTORNEY GENERAL

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Volume 77

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*Property; Taxation;* When the deadline dates for making property tax installment payments fall on Sundays, the deadlines for making personal payments and postmarking mailed payments are extended to the next business days, which in 1988 are February 1 and August 1. To satisfy section 74.025, Stats., the proper official should receive mailed payments within five days of those dates, not within five days of January 31 and July 31. OAG 1-88

January 11, 1988

CAL W. KORNSTEDT, *Corporation Counsel*  
*Dane County*

You have asked for my opinion regarding the final dates under sections 74.025 and 74.03, Stats., for the timely mailing of property tax payments in 1988.

Under section 74.03(2)(a) and (b), the first and second installments for the payment of property taxes are due on or before January 31 and July 31. In 1988, because those dates fall on Sundays, the deadlines become the next business days, which are Feb-

ruary 1 and August 1. *See* sec. 990.001(4)(b), Stats.; 60 Op. Att’y Gen. 411, 415 (1971); and 44 Op. Att’y Gen. 172 (1955).

The question you present is this: Under these circumstances, where the final dates for making payments in person are February 1 and August 1, what are the deadlines under section 74.025 for postmarking timely mailings of tax payments? Are the deadlines still January 31 and July 31, which are the dates specified in section 74.03(2)(a) and (b); or are the deadlines February 1 and August 1 under sections 74.03(2)(a) and (b) and 990.001(4)(b)?

Section 74.025 provides as follows:

Timely payment. Except as provided in ss. 74.03(10)(e) and 74.79(3), whenever in this chapter or in ch. 75 a payment is required to be made by a taxpayer on or before a certain date, payment shall be considered timely made if mailed in a properly addressed envelope with postage prepaid, which envelope is postmarked before midnight of the last date prescribed for the making of the payment and received by the proper official to whom directed within 5 days of the prescribed date. If the requirements set forth in the preceding sentence are not fulfilled due only to delay or administrative error on the part of the U.S. postal service, the payment shall be considered timely.

You state that the Dane County treasurer interprets the statutes to mean that when the deadline date falls on a Sunday, the deadlines for making personal payments and postmarking mailed payments are extended to the next business day, which in 1988 are February 1 and August 1. You also state that other municipalities have concluded that for mailing, the deadline for a timely postmark remains January 31 and July 31 because those are the *dates* specified by sections 74.025 and 74.03(2)(a) and (b) and because taxpayers can mail and obtain timely postmarks on the Sundays of January 31 and July 31.

In my opinion, when sections 74.025, 74.03(2)(a) and (b) and 990.001(4)(b) are read together, the deadlines for postmarking a timely mailing are February 1 and August 1; and to satisfy section 74.025, the proper official should receive the payment within five days of those dates, not within five days of January 31 and July 31.

Section 74.025 requires that mailed payments be postmarked before midnight “of the last date prescribed for the making of the payment.” Normally the last dates prescribed by section 74.03(2)(a)

and (b) are January 31 and July 31. When those dates fall on Sundays, however, the prescribed dates become February 1 and August 1. See sec. 990.001(4)(b), Stats.; 60 Op. Att’y Gen. at 415; and 44 Op. Att’y Gen. at 172-73. Section 990.001(4)(b), which provides that “[i]f the last day within which an act is to be done or proceeding had or taken falls on a Sunday or legal holiday the act may be done or the proceeding had or taken on the next secular day,” states a rule that shall be observed in construing Wisconsin laws unless construction in accordance with the rule would produce a result inconsistent with the manifest intent of the Legislature. See sec. 990.001, Stats. In this case, section 990.001(4)(b) is completely consistent with section 74.025.

The purpose of section 74.025 is to have the final dates for postmarking a mailed payment coincide with the final date for making the payment in person. This purpose is evidenced by the preamble to chapter 63, Laws of 1965, which stated, in part, that the law was passed “to create 74.025 of the statutes to provide that payments of certain taxes are timely made if mailed and post-marked by the due date.” It is proper to examine the preamble of the law to ascertain legislative intent. See *State ex rel. Cities S.O. Co. v. Bd. of Appeals*, 21 Wis. 2d 516, 526, 124 N.W.2d 809 (1963), and *Smith v. Brookfield*, 272 Wis. 1, 5-6, 74 N.W.2d 770 (1956).

My interpretation of sections 74.025, 74.03(2)(a) and (b) and 990.001(4)(b) achieves the purpose of the legislation.

DJH:SWK

*Courts; Criminal Law; Implied Consent Law;* An individual's fifth amendment privilege against self-incrimination need not be compromised by his or her testimony elicited at the evidentiary refusal hearing afforded to individuals who have requested the opportunity to litigate the lawfulness of their refusal to submit to chemical testing under the implied consent law. Consequently, absent any statutory guidelines, the scheduling of a refusal hearing is within the discretion and calendaring possibilities of the court to which it is assigned. OAG 2-88

January 11, 1988

PHILIP J. FREEBURG, *District Attorney*  
*Langlade County*

You have requested my opinion on several issues relating to the timeliness of and standards for staying the evidentiary hearing afforded to individuals who have requested the opportunity to litigate the lawfulness of their refusal to submit to chemical testing under the implied consent law. Sec. 343.305, Stats. Paraphrasing your questions, you ask:

1. When should the refusal hearing be held?
2. Can the refusal hearing be stayed until after the trial on the substantive operating while intoxicated ("OWI") charge?
3. If the refusal hearing can be stayed until after the substantive OWI trial, is the issue of self-incrimination a proper ground for such a stay?
4. In order to grant a stay, must an individual meet a standard of an "actual and/or substantial possibility of self-incrimination"?
5. Is it necessary and/or allowable for a prosecutor to replace the privilege of self-incrimination with a grant of immunity in order to hold the refusal hearing prior to the substantive OWI trial?

Your request is apparently prompted by a recent determination by the circuit court in your county to stay a refusal hearing until after the trial for the substantive OWI charge in order to protect an individual's fifth amendment privilege against self-incrimination. The argument favoring that determination would appear to be that the holding of a refusal hearing prior to the trial for the substantive

OWI charge violates an individual's fifth amendment constitutional right against self-incrimination by forcing him/her either to waive that right or to forfeit his/her due process right to meaningful participation in the refusal hearing.

In my opinion, an individual's fifth amendment privilege against self-incrimination need not be compromised by his/her testimony elicited at a refusal hearing. Consequently, a circuit court would not be required to stay a refusal hearing for this reason. To resolve a situation similar to the one which inspired your inquiry, it would therefore not be necessary to answer the remaining four questions. However, because the remaining questions involve matters of a recurring nature important to the prosecutors in the state, I choose to give each consideration in this opinion.

Before addressing your particular questions, I find it useful to consider the statutory scheme within which the refusal hearing is but one part, as well as the nature and parameters of the refusal hearing itself.

A refusal hearing is "separate and distinct" from an OWI prosecution. *Suspension of Operating Privileges of Bardwell*, 83 Wis. 2d 891, 902, 266 N.W.2d 618, 623 (1978). The former is a "special proceeding," civil in nature, *State v. Jakubowski*, 61 Wis. 2d 220, 223-24, 212 N.W.2d 155, 156 n.2 (1973), while the latter may be either a civil or a criminal proceeding depending on whether the defendant has been previously convicted of OWI within a prescribed period of time. Sec. 346.65(2), Stats. Although they are not unrelated actions, for both arise out of the same basic occurrence, *State v. Brooks*, 113 Wis. 2d 347, 354, 335 N.W.2d 354 (1983), the two proceedings are often prosecuted in two different forums. This is particularly true when the substantive OWI is a first offense brought by a municipality, and the corresponding refusal proceeding, as it must, is prosecuted as a state proceeding in the circuit court by the district attorney. *Bardwell*, 83 Wis. 2d at 903; see sec. 343.305(3)(b), Stats.

The issues to be considered at a refusal hearing are strictly limited to those specifically outlined in subsection 343.305(3)(b)5, Stats. *State v. Nordness*, 128 Wis. 2d 15, 29, 381 N.W.2d 300 (1986). Consequently, the scope of the inquiry is limited to the following:

1. Whether the officer had probable cause to believe that the person violated an impaired driving law and lawfully arrested him or her therefore;
2. Whether the officer complied with the statutory duty to inform the person about his or her obligations and rights under the implied consent law;
3. Whether the person refused to submit to testing requested by the officer.

“Reasonableness” of the refusal is *not* an issue at a refusal hearing. *City of Prairie Du Chien v. Evans*, 100 Wis. 2d 358, 359 n.2, 302 N.W.2d 61 (Ct. App. 1981).

The narrow view of the issues to be addressed at the refusal hearing also circumscribes the proof required of the prosecution to establish a refusal. First, the quantum of evidence necessary to establish the probable cause element exists when the totality of the circumstances within the arresting officer’s knowledge at the time of the arrest would lead a reasonable police officer to believe that an individual probably committed an impaired driving offense. *Nordness*, 128 Wis. 2d at 35. In analyzing the nature of this proof at a refusal hearing, the Wisconsin Supreme Court has utilized traditional notions of evidentiary analysis to establish probable cause:

We view the revocation hearing as a determination merely of an officer’s probable cause, not as a forum to weigh the state’s and the defendant’s evidence. Because the implied consent statute limits the revocation hearing to a determination of probable cause—as opposed to a determination of probable cause to a reasonable certainty—we do not allow the trial court to weigh the evidence between the parties. The trial court, in terms of the probable cause inquiry, simply must ascertain the plausibility of a police officer’s account.

*Nordness*, 128 Wis. 2d at 36 (citations omitted). Second, the requirement that the prosecution must prove that the accused was informed of his/her obligations and rights as those are identified in the applied consent law is also typically established through the testimony of the officer that a form “informing the accused” was read to the driver and by the introduction of the actual form into evidence. Third, the prosecution must prove that the driver refused to submit to the test. Ordinarily, the refusal is expressed verbally by

the accused, and the prosecutor's burden is discharged by eliciting testimony to that effect from the police officer.<sup>1</sup>

The preliminary background necessary to render the opinion now stated, I turn to the analysis of your specific questions.

Your first two questions require me to address the same issue—the timeliness of the refusal hearing. Section 343.305 fails to state when the refusal hearing should or must be held. Further, there are no other statutory provisions or case law authorities that either require or restrict the refusal hearing to the period of time either before or after the trial on the substantive OWI charge. Consequently, absent any guidelines, the scheduling of a refusal hearing is within the discretion and calendaring possibilities of the court to which it is assigned.

You have suggested several reasons to *require* the occurrence of the refusal hearing prior to the trial on the substantive OWI charge. Those reasons include: (1) a requirement that the refusal hearing be held within sixty (60) days from the date of the refusal based upon the language of subsection 343.305(3)(c); (2) a decision on the “reasonableness” of a refusal would be beneficial to the factfinder at the trial of the substantive OWI charge; and (3) a delay in the revocation resulting from a refusal violating section 343.305 violates the “intent and purpose” of the implied consent law. None of those reasons, however, are persuasive.

First, I find no support in subsection 343.305(3)(c) for the proposition that the refusal hearing should be held within sixty (60) days of the refusal of the chemical test. That subsection provides as follows:

The receipt given the operator shall clearly state the date of the refusal and shall serve as a driving permit for 30 days from the date of the refusal. If further proceedings or hearings on the refusal issues are necessary, the court shall certify the receipt for additional periods, *not to exceed 30 days*, until there is a final

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<sup>1</sup> In addition to a “failure of proof” defense relating to the statutory identified elements at a refusal hearing, the implied consent law establishes an affirmative defense available to the accused. If an individual can demonstrate by a preponderance of the evidence that the refusal to submit to a test was due to a physical inability to submit to the test caused by a physical disability or disease unrelated to the use of alcohol, controlled substances or drugs, the refusal was not unlawful. Sec. 343.305(3)(b), (5)(d), Stats.

determination of whether the person's operating privilege shall be revoked under this section.

(Emphasis added.) This subsection unambiguously provides the circuit courts of this state with the discretion to permit an unlimited number of extensions, as long as no individual extension exceeds thirty days. I do not believe that this subsection restricts those courts to a single thirty (30) day extension. I have been advised that this view of the statute is consistent with the longstanding interpretation and application of the implied consent law by the Wisconsin Department of Transportation. See *West Bend Education Association v. WERC*, 121 Wis. 2d 1, 12, 357 N.W.2d 534 (1984), citing *Nottelson v. ILHR Department*, 94 Wis. 2d 106, 115-18, 287 N.W.2d 763 (1980). See also *Chevrolet Division, G.M.C., v. Industrial Comm.*, 31 Wis. 2d 481, 488, 143 N.W.2d 532 (1966).

Second, under earlier versions of the implied consent law, the "reasonableness" of a refusal was an issue to be determined at the refusal hearing. Sec. 343.305(2)(b)5 (1975), Stats. However, as noted earlier, reasonableness of a refusal is no longer a statutory defense. *Evans*, 100 Wis. 2d at 359 n.2. The "reasonableness" of a refusal is not an issue enumerated in section 343.305(3)(b). Therefore, no determination of "reasonableness" would be available for the factfinder at the substantive OWI trial from a prior refusal hearing.

Third, while it may be argued that a delay in the revocation of an individual who has refused a chemical test may not be within the "intent and purpose" of the implied consent law, the effect of the delay in any particular case is but one of the many factors to be considered by the circuit court within the exercise of its discretion. Without question, the purpose of the implied consent law, including the refusal hearing subsections of section 343.305, is to facilitate the identification and immediate removal of intoxicated drivers from the public highways. See *State v. Nordness*, 128 Wis. 2d 15, 27 n.5, 381 N.W.2d 300 (1986); *State v. Neitzel*, 95 Wis. 2d 191, 193, 289 N.W.2d 828 (1980). This purpose is not compromised, however, by entrusting this determination to the discretion of the circuit courts of this state.

With the exception of delay in the imposition of the penalty of revocation, I perceive nothing burdensome upon the state in the delay of a refusal hearing until after the trial on the substantive

OWI charge. Despite the lack of a prior refusal hearing, the evidence of a refusal to submit to a chemical test is admissible at the substantive OWI trial to establish "consciousness of guilt." *State v. Zielke*, 137 Wis. 2d 39, 47-48, 403 N.W.2d 427 (1987); *State v. Crandall*, 133 Wis. 2d 251, 257-60, 394 N.W.2d 905 (1986), citing among others, *South Dakota v. Neville*, 459 U.S. 553 (1983), and *State v. Albright*, 98 Wis. 2d 663, 668-69, 298 N.W.2d 196 (Ct. App. 1980). This rule of admissibility is always subject to the corollary rule permitting an individual to introduce any evidence that tends to show that a refusal occurred for some reason other than a "consciousness of guilt." *State v. Sayles*, 124 Wis. 2d 593, 596-98, 370 N.W.2d 265 (1985); *State v. Bolstad*, 124 Wis. 2d 576, 585-86, 370 N.W.2d 257 (1985). And, despite the outcome of the substantive OWI trial, the prosecution may, in appropriate circumstances, continue to prosecute the refusal case. *State v. Brooks*, 113 Wis. 2d 347, 335 N.W.2d 354 (1983). Although the Wisconsin Supreme Court in *Brooks, supra*, held that a trial court had the discretion to dismiss a refusal case once there had been a plea of guilty to the substantive OWI charge, the court stated the following:

We stress that the power to dismiss is a discretionary one. There may be circumstances where the court may conclude in a particular case not to dismiss the refusal charge although a plea of guilty to OWI has been taken. Whether such refusal to dismiss can be justified as a proper exercise of discretion will be dependent upon the ambience of the particular case.

*Brooks*, 113 Wis. 2d at 359.

The previous observations now lead to my response to your most significant inquiry—question 3. While I believe the burdens on the state of a refusal hearing occurring after the substantive OWI trial are negligible, the facts inspiring your inquiries suggest a far greater concern perceived by those individuals facing a refusal hearing prior to their substantive OWI trial.

The basis for the perceived dilemma is the necessity of choosing between two constitutional rights: (1) the fifth amendment privilege against self-incrimination; and (2) the constitutionally protected interest in their driver's license, which prevents removal without due process. *Dixon v. Love* 431 U.S. 105 (1977); *Bell v. Burson*, 402 U.S. 535 (1971); *Best v. State*, 99 Wis. 2d 495, 299 N.W.2d 604 (Ct. App. 1980). Apparently, those individuals perceive a fifth amend-

ment dilemma in being forced to either present their reasons for refusal of a chemical test at the refusal hearing, thereby disclosing the theory of their defense to the substantive OWI charge, as well as disclosing possibly incriminating evidence by the waiver of their privilege against self-incrimination, or remaining silent and losing their driver's license for a period of sixty days.

A distinction must be made between the two discrete questions the perceived dilemma raises: (1) does an individual's concern about compromising his or her privilege against self-incrimination by testifying at the refusal hearing provide a proper factor that the court *may consider* in the exercise of its discretion in determining whether to grant a stay; and (2) does that concern *require* the granting of a stay to protect that privilege. In my opinion, a court may properly take into account self-incrimination concerns in ordering a stay. *Cf. State ex rel. Flowers v. Health and Social Services Department*, 81 Wis. 2d 376, 396-97, 260 N.W.2d 727 (1978) (circuit court did not abuse its discretion in delaying parole revocation proceeding until after trial on pending criminal charge because of possible self-incrimination concerns). However, it is also my opinion that the concern over self-incrimination does not require a stay of the refusal hearing. Even when the substantive OWI charge is a criminal offense, I cannot agree with the contention of those that argue that either of the earlier described consequences violates their fifth amendment privilege against self-incrimination.<sup>2</sup>

First, the risk of disclosing the theory of the defense to the substantive OWI charge does not differ from the pretrial disclosures required in all other criminal cases. For example, in *Williams v. Florida*, 399 U.S. 78 (1970), the United States Supreme Court upheld a statute compelling pretrial disclosure of the names and addresses of alibi witnesses intended to be called at trial. The Court noted that a criminal trial "is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." *Williams*, 399 U.S. at 82. The Court held:

At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date

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<sup>2</sup> If in a particular case the OWI charge is not criminal, self-incrimination concerns would have no validity whatsoever, either to support a claim that the refusal hearing must be stayed, or to support a claim that the trial court, in the exercise of its discretion, should grant a stay because of those concerns. *See Allen v. Illinois*, 478 U.S. 364(1986).

information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself.

*Williams*, 399 U.S. at 85. Subsequently, in *Wardius v. Oregon*, 412 U.S. 470, 475 (1973), the Court held that pretrial discovery in criminal cases was a "two-way street," requiring reciprocal disclosures by the state under the due process clause. The Court's holding in *Wardius* does not diminish its earlier holding in *Williams* that no fifth amendment rights were implicated by the disclosure required of a defendant.

Unlike the notice of alibi statutes discussed in *Williams* and *Wardius*, the implied consent law does *not* require a defendant to disclose information to the state regarding the defense to the substantive OWI charge. Rather, it merely gives an individual who has refused a chemical test the right to require the state to demonstrate that the police officers complied with the statute prior to requiring the test. Since to do so, the state must demonstrate that the officer had probable cause to arrest the individual on the substantive OWI charge, it is the state, not the defendant, which is compelled to "show its hand" on the merits of the substantive OWI charge in advance of the trial. Any lack of reciprocity in scheduling a refusal hearing prior to the substantive OWI charge is to the advantage of the individual who is not required to make equivalent disclosures.

Second, a more serious concern is the potential for compelling a disclosure of incriminating facts material to the defense at the substantive OWI trial. For the following reasons, however, I do not believe that an individual has a right to stay the refusal hearing on this basis. First, requiring an individual to defend a refusal hearing does not place that individual in an untenable position in a constitutional sense because he/she is forced to choose between not defending the refusal hearing or defending it by sacrificing his/her privilege against self-incrimination. Second, when and if such a dilemma would exist, a satisfactory resolution within the discretion of the trial court is available.

In *Neely v. State*, 97 Wis. 2d 38, 292 N.W.2d 859 (1980), the Wisconsin Supreme Court considered the difficulties attached to a defendant's decision not to answer relevant inquiries having once testified during a trial. The court recognized that individuals are often required to make choices between "hard alternatives" that do not result in unconstitutional dilemmas. In *Neely*, the court held that while a defendant has an interest in defending against the state's accusations by testifying on his own behalf, neither the choice to testify nor the choice of alternatives a defendant must make once he waives his privileges by testifying can be said to be unconstitutionally imposed on him. *Neely*, 97 Wis. 2d at 52. The court relied upon an earlier decision of the United States Supreme Court:

The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.

*Neely*, 97 Wis. 2d at 52, quoting *McGautha v. California*, 402 U.S. 183, 213 (1971) (citation omitted).

The language of *McGautha* is most compelling when one recognizes the significant choice faced by McGautha which was found acceptable by the United States Supreme Court. In *McGautha*, the Court found *no* intolerable tension between a defendant's constitutional right not to be compelled to be a witness against himself and the alleged due process right to be heard on the issue of punishment where the procedure provided for a unitary trial on both the issue of punishment and guilt in a capital case and the defendant was forced to choose whether to remain silent on the issue of guilt at the cost of surrendering any chance to plead his case on the issue of punishment or testify on the issue of punishment at the risk of damaging his case on guilt. *McGautha*, 402 U.S. at 214.

Subsequent decisions of the United States Supreme Court have further clarified the "hard choices" which do not compromise a defendant's fifth amendment rights. One area of concern has been in the context of public employe and public contractor law. The United States Supreme Court's major concern in this area has been in preventing testimony obtained from an employe under threat of

dismissal from being used against that person in a subsequent criminal proceeding. For example, in *Garrity v. State of New Jersey*, 385 U.S. 493, 500 (1967), police officers who were being questioned about alleged ticket fixing were informed that a refusal to answer questions on fifth amendment grounds would result in their dismissal. The Court held that “the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office.” Similarly, in *Unifor-med San. Men Ass’n v. Com’r of San.*, 392 U.S. 280, 284 (1968), city employes who refused to sign waivers of fifth amendment immunity before a grand jury were fired from their jobs. The Court acknowledged that the possible ineffectiveness of the waiver did not diminish the impropriety of the state’s action. The real constitutional controversy arose from the alternatives with which the employes were faced, because “the precise and plain impact of the proceedings . . . was to present them with a choice between their constitutional rights or their jobs.”

More recently, the Supreme Court considered the “hard choice” doctrine in the context of a prison disciplinary proceeding in *Baxter v. Palmigiano*, 425 U.S. 308 (1976). In *Baxter*, plaintiff asserted that a Rhode Island rule allowing the factfinder in a prison disciplinary proceeding to draw an adverse inference from a failure to testify derogated his fifth amendment privilege. The Court rejected this argument, finding the Rhode Island rule was not an invalid attempt to penalize the exercise of the privilege. Justice White wrote for the majority:

[A] prison inmate in Rhode Island electing to remain silent during his disciplinary hearing, as respondent Palmigiano did here, is not in consequence of his silence automatically found guilty of the infraction with which he has been charged. Under Rhode Island law, disciplinary decisions “must be based on substantial evidence manifested in the record of the disciplinary proceeding.” . . . It is thus undisputed that an inmate’s silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board. In this respect, this case is very different from the circumstances before the Court in the *Garrity [v. New Jersey]*, 385 U.S. at 493—*Lefkowitz [v. Turley]*, 414 U.S. at 70] decisions, where refusal to submit to interrogation and to waive the Fifth Amendment privilege, standing alone and without regard to

other evidence, resulted in loss of employment or opportunity to contract with the State. There, failure to respond to interrogation was treated as a final admission of guilt. Here, Palmigiano remained silent at the hearing in the face of evidence that incriminated him; and, as far as this record reveals, his silence was given no more evidentiary value than was warranted by the facts surrounding his case.

*Baxter*, 425 U.S. at 317-18 (citations omitted).

The lesson of the preceding “hard decision” cases is that it is not constitutionally impermissible to require an individual to defend a refusal proceeding prior to the substantive OWI trial. There is no indication that invocation of the fifth amendment at a refusal hearing will result in an adverse decision. The state must always prove its case at the refusal hearing by establishing each of the necessary elements. There exists no requirement at the refusal hearing that an individual waive his/her immunity under the fifth amendment. Nor is there a threat that an individual will have their license suspended simply for invoking the privilege. Since there is no requirement that an individual either answer questions which might incriminate him/her in future criminal proceedings or have their license suspended or revoked, there is no impermissible effect on an individual’s fifth amendment privilege in requiring the refusal hearing to occur prior to the substantive OWI trial.

The harshness of the “hard choice” doctrine militates against its implementation. However, the “hard choice” doctrine need not be determinative. In my opinion, a form of judicially created and judicially applied “use” immunity authorized by both decisions of the United States Supreme Court and our Wisconsin Supreme Court would be a preferable alternative.

In *Lefkowitz v. Turley*, 414 U.S. 70 (1973), after surveying numerous previous cases implicating an individual’s fifth amendment rights, the United States Supreme Court stated:

In any of these contexts, therefore, a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L.Ed.2d 212 (1972). Absent such protection, if

he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution.

*Lefkowitz*, 414 U.S. at 78. Subsequently, in *Baxter*, the prison disciplinary hearing case, the Court stated "if inmates are compelled in those proceedings to furnish testimonial evidence that might incriminate them in later criminal proceedings, they must be offered 'whatever immunity is required to supplement the privilege' and may not be required to 'waive such immunity.'" *Baxter*, 425 U.S. at 317.

The Wisconsin Supreme Court has already fashioned such limited "use" immunity. In *State v. Evans*, 77 Wis. 2d 225, 252 N.W.2d 664 (1977), the court resolved the issue of a defendant's fifth amendment rights being sacrificed by statements made to a probation officer by holding that:

[S]tatements or the fruits of statements made by a probationer to his probation agent or in a probation revocation hearing in response to questions which, as here, are the result of pending charges or accusations of particular criminal activity, may not be used to incriminate the probationer in a subsequent criminal proceeding.

*Evans*, 77 Wis. 2d at 227-28. In *Evans*, the court further stated:

In order to guarantee the fifth amendment rights of a probationer or a parolee and at the same time to preserve the integrity of the probation system, we hold that upon timely objection in criminal proceedings, the testimony of a probationer or a parolee given in response to questions by a probation or parole agent or at a probation or parole revocation hearing, which questions are prompted by pending charges or accusations of particular criminal activity, or any evidence derived from such testimony, is inadmissible against the probationer or parolee during subsequent proceedings on related criminal charges except for purposes of impeachment or rebuttal where his testimony at the criminal proceeding is clearly inconsistent with the statements made previously. In such case the trial court may admit the revocation testimony or its fruits for the purpose of showing the probability that the probationer or parolee has committed perjury.

*Evans*, 77 Wis. 2d at 235-36 (citations omitted). Likewise, testimony presented by a criminal defendant at a confession suppression hear-

ing is inadmissible at the criminal trial. *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 265, 133 N.W.2d 753 (1965).

A similar rationale is appropriate in the present context. If the perceived dilemma were to exist, it would be proper to allow an individual to testify at the refusal hearing without fear that the testimony could be used in a subsequent substantive OWI trial. This form of limited judicially created and judicially applied “use” immunity would not be burdensome upon prosecutors because the nature of issues addressed at the refusal hearing do not allow for incriminating or inculpatory statements. Rather, those issues encourage only explanations favorable to the individual.

Although I believe that my response to question 3 is determinative of both questions 4 and 5, I will briefly address the concerns in each of those questions.

In question 4, you ask if in order to grant a stay, an individual must demonstrate an actual and/or substantial possibility of self-incrimination. You derive that standard from a federal decision. *Liljenfeldt v. United States*, 588 F. Supp. 966 (E.D. Wis. 1984). However, that standard is really no different than the standard approved, *In Matter of Grant*, 83 Wis. 2d 77, 82, 264 N.W.2d 587 (1978)—“the fear of self-incrimination must be ‘real and appreciable,’ ‘not merely [an] imaginary possibility of danger.’” In my opinion, if such a situation of “real or appreciable” danger could be shown, a requirement akin to either of the two stated standards would be acceptable and within the discretion of a circuit court.

Your question 5 inquires regarding the necessity or availability of immunity to replace the potential loss of the privilege of self-incrimination. My previous response to question 3 demonstrates that I believe that a form of judicially created and judicially applied “use” immunity would be appropriate to supplant any claim of a loss of the privilege against self-incrimination.

DJH:JSS

*Garnishment; State;* The state is immune from suit in any garnishment action not involving a state employe or officer and, with the exception of those cases falling under sections 779.15 and 779.155, Stats., monies held in the state treasury on the account of independent contractors are not available to satisfy the judgment debts owed by them. OAG 3-88

February 10, 1988

JAMES KLAUSER, *Secretary*

*Wisconsin Department of Administration*

You ask whether the State of Wisconsin may be sued as a garnishee defendant in actions to collect money judgments obtained against persons who are owed money for services rendered on contracts with state agencies. You illustrated your inquiry with the example of private attorneys who have been retained under contracts with the State Public Defender to provide legal defense for indigents in criminal proceedings and who have unpaid balances on account that private judgment creditors seek in order to satisfy money judgments taken against those attorneys. While I will address your specific example, I believe the principles discussed in this opinion apply to all garnishment actions involving independent contractors who provide goods or service that are not connected with public improvement projects. In brief, I am of the opinion that neither the state nor any public officer is amenable to suit in such garnishment actions.

Under Wisconsin law, garnishment is a remedy that is available only in an action separate from that confirming the judgment debtor's liability on an underlying obligation, be it in tort or contract. Sec. 812.01(2a), Stats. The judgment creditor is seeking to reach monies owed to the judgment debtor by the state. In order to obtain that remedy, the judgment creditor must join the state as a garnishee defendant. The issue, then, is whether the doctrine of sovereign immunity precludes suits against the state under these circumstances.

It is well settled that the state may not be sued without the express consent of the Legislature. Wis. Const. art. IV, §27; *Lister v. Board of Regents*, 72 Wis. 2d 282, 240 N.W.2d 610 (1976); *Townsend v. Wisconsin Desert Horse Assn.*, 42 Wis. 2d 414, 167 N.W.2d 425 (1969). Garnishment actions are generally viewed as suits that fall within the rule that states may not be sued without legislative

consent. See Annot., 114 A.L.R. 261 (1938); 6 Am. Jur. 2d *Attachment and Garnishment* §78 (1963). Also, garnishments are purely a creature of statute and without statutory authorization will not lie. *Skalecki v. Frederick*, 31 Wis. 2d 496, 502, 143 N.W.2d 520 (1966). And being in derogation of common law, garnishment statutes are narrowly construed. *Gerovac v. Hribar Trucking, Inc.*, 43 Wis. 2d 328, 168 N.W.2d 863 (1969); *Mahrle v. Engle*, 261 Wis. 485, 53 N.W.2d 176 (1952). Thus, the answer to your inquiry turns on whether the Wisconsin garnishment statute (ch. 812, Stats.) expressly authorizes suit against the state to recover money owed to state contractors.

At the outset, it is clear that individual state officers having fiscal responsibilities in connection with the collection and disbursement of public monies are not liable as garnishees. Section 812.19(3) provides that “[n]o person shall be liable as garnishee . . . by reason of any money in his hands as a public officer.” And even if such state officer is named as the putative garnishee defendant, the suit is really one against the state. *Appel v. Halverson*, 50 Wis. 2d 230, 184 N.W.2d 99 (1971). Further, money kept in the state treasury remains the state’s money even though a contractor may be legally entitled to payment therefrom under the terms of the contract. See *Weinstein, Bronfin & Heller v. LeBlanc*, 249 La. 936, 192 So. 2d 130, 134 (1966). Therefore, if such monies can be reached by judgment creditors, the liability as garnishee must rest with the state as a sovereign entity. As noted above, the creation and enforcement of such liability depends on express legislative consent to be found within the terms of the garnishment statute itself.

The garnishment statute specifically includes the state in only one situation, that is, the garnishment of the earnings of state officers and employes. Sec. 812.23, Stats. There is no mention of monies owed to state contractors. In strictly construing the garnishment statute, as I must, I conclude that the Legislature has not consented to garnishment of monies held by the state in any other circumstances. Courts in other jurisdictions have reached the same conclusion. For example, in *Weinstein, Bronfin & Heller v. LeBlanc, ibid.*, the Louisiana Supreme Court held that a state statute waiving sovereign immunity in garnishment actions involving “public employes and contractors” did not extend to a state officer, in that case a state senator, because a senator was not an employe of the state under Louisiana law. Similarly, private attorneys retained

under contract with the state are neither employes nor officers, but independent contractors. *See* OAG 10-86 (unpublished opinion). They hold no position within the classified or unclassified civil service and hold no public office.

Further support for the conclusion that the Legislature generally has not waived sovereign immunity with respect to garnishments involving independent contractors who provide goods or services to the state can be taken from the fact that the Legislature has created a specific remedy akin to garnishment in the case of contractors involved in public improvement projects. Under section 779.15, certain subcontractors, laborers and material suppliers may obtain and enforce liens on monies due prime contractors. Moreover, judgment creditors can reach those contract proceeds through the procedures in section 779.155, although that remedy is subordinate to valid liens asserted by qualified claimants under section 779.15. There is no parallel recourse available to judgment creditors against contract balances due independent contractors who are not engaged in public improvement work. In my opinion, such a remedy is a matter that must await legislative action; it cannot be read within existing statutes that are drawn narrowly to fit a limited class of contractors.

In conclusion, it is my opinion that the state is immune from suit in any garnishment action not involving a state employe or officer and, with the exception of those cases falling under sections 779.15 and 779.155, monies held in the state treasury on the account of independent contractors are not available to satisfy the judgment debts owed by them.

DJH:DSF

*Public Records; Savings And Loan Associations;* Salary information submitted to the state commission of savings and loan in connection with an absorption application is not exempt from disclosure under the state public records law. OAG 4-88

February 10, 1988

LEO MORTENSEN, *Commissioner*  
*Savings and Loan Review Board*

You ask whether officer and director salary information submitted to the commissioner of savings and loan in an absorption application is exempt from disclosure under the public records law.

You advise that the absorption of one savings and loan association by another must be approved by the commissioner of savings and loan (state commissioner) under sections 215.53 and 215.73, Stats., and by the federal home loan bank board (federal board). If it involves a capital stock association it must be approved by the federal securities and exchange commission.

Absorption applications filed with the federal regulators are required to contain salary information about all officers and directors involved. You advise that state law does not specify required information, but it has been the long-standing practice of your agency to allow associations to submit copies of the same applications submitted to the federal regulators. Independent of federal requirements you would require submittal of salary information about the association to be absorbed in order to review compliance with section S-L 9.035 of the Wisconsin Administrative Code. It provides that as a condition precedent to approval of an absorption under section 215.53 or 215.73, it must be determined by the commissioner that compensation to officers, directors and employees of the absorbed association is not excessive.

Your question requires an interpretation of section 19.36(1), which reads as follows:

**APPLICATION OF OTHER LAWS.** Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35(1), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6).

You direct my attention to 12 C.F.R. §505.5 (1987) which contains the federal board's regulations on information that is exempt from disclosure under the federal Freedom of Information Act (5 U.S.C. §552 (1977)). The pertinent parts read as follows:

(a) General rule. Except as otherwise provided in this Part or as may be specifically authorized by the Board, information of the Board that has not been published in accordance with §505.3 and is not available to the public through other sources will not be made available to the public or otherwise disclosed if such information is—

....

(3) Privileged or related to the business, personal, or financial affairs of any person and is furnished in confidence;

....

(6) Contained in personnel, medical, and similar files (including financial files), the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; or

....

(b) Information available to insured institutions and to State and Federal agencies. A copy of each report of the regular examination of each insured institution or affiliate is made available by the Board's Supervisory Agent at the appropriate Federal Home Loan Bank to the institution examined. Reports of examination and other information relating to State-chartered insured institutions and affiliates are made available, upon request, by the Director of the Board's Office of Examinations and Supervision to the State governmental authority having general supervision of such State-chartered insured institutions. Reports of examination and other information may be made available by the Board to other agencies of the United States or a State for use where necessary in the performance of their official duties. *All reports or other information made available pursuant to this paragraph shall remain the property of the Board and, except as otherwise provided in this Part, no person, agency, or authority to whom the information is made available, or any officer, director, or employee thereof, shall disclose any such information except in published statistical material that would not disclose the affairs of any individual or corporation.*

(c) Prohibition against disclosure. Except as authorized by this Part or otherwise by the Board, no officer, employee, or agent of the Board or of any Federal Home Loan Bank shall disclose or permit the disclosure of any unpublished information of the Board to anyone (other than an officer, employee, or agent of the Board or of a Federal Home Loan Bank properly entitled to such information for the performance of his official duties), whether by giving out or furnishing such information or a copy thereof or by allowing any person to inspect, examine, or copy such information or copy thereof, or otherwise. Notwithstanding the foregoing, unpublished economic, statistical or similar information or unpublished information regarding interpretations by the Board of statutory or regulatory provisions may be disclosed, orally or in writing, by any officer, employee, or agent of the Board or of any Federal Home Loan Bank, acting in his capacity as agent of the Board, subject, however, to the restrictions stated in §505.5 of this Part.

(Emphasis added.)

You state that the federal board has construed the provisions of section 505.5(a)(3) and (6) to preclude the disclosure of salary information contained in absorption applications received by the board. The question is whether the federal exemption is incorporated in our state public records law by virtue of section 19.36(1). With one qualification, I think it is not.

In my opinion section 19.36(1) is intended to incorporate federal law that specifically requires a state governmental entity to keep a particular type of record confidential. Normally such federal confidentiality provision will exist in the context of a federal program or regulatory scheme under which the state governmental entity is required to or has agreed to perform certain responsibilities. Examples include handicap status, sex and ethnic information obtained by the state as part of its affirmative action program. This was discussed in 73 Op. Att'y Gen. 26, 29-30 (1984). Another example is the federal requirement that states participating in the AFDC program must keep confidential information concerning applicants and recipients. 42 U.S.C. §602(a)(9) (1983); 45 C.F.R. §205.50(a)(1) (1986); *State ex rel. Dombrowski v. Moser*, 113 Wis. 2d 296, 299, 334 N.W.2d 878 (1983).

The provisions of 12 C.F.R. §505.5(a) do not purport to apply to any state agency or program. They apply to information received by the federal board. A major distinguishing factor is that the state's regulation of savings and loan associations is not pursuant to or dependent upon or in concert with any overarching federal program or regulatory scheme. The state's regulatory authority in this area is independent and coordinate. Therefore, there would be a question whether the federal board would even have the legal authority to impose the restrictions of 12 C.F.R. §505.5 on state regulators.

The one qualification comes from 12 C.F.R. §505.5(b). It provides that if a state regulator receives confidential information *from* the federal board, it must honor the confidentiality of the information. This is necessary and appropriate to ensure that the federal board is preserving its own policies, but it does not extend confidentiality to similar information which is received directly from an association by the state regulators in accordance with state policies.

You note that section S-L 1.15(3)(a)5. of the Wisconsin Administrative Code might be used to exempt disclosure of the salary information. It exempts "[i]nformation which in the opinion of the legal custodian invades personal privacy to such an extent as to outweigh the public interest in disclosure." However, you believe this administrative rule which was adopted in 1976 has been superceded by the codification of public records law in sections 19.31 to 19.39, created by chapter 335, Laws of 1981. I would agree that a state agency may not adopt an administrative rule that is inconsistent with or departs from the statutory public records law, unless the state agency is given express authority to do so. It may be that section S-L 1.15(3)(a)5. of the Wisconsin Administrative Code could survive a challenge because its formulation could be construed to be compatible with the common law balancing test which is carried over in the new law and which could possibly be applied to keep the subject salary information confidential. However, such a determination must be made on a case-by-case basis. Secs. 19.31 and 19.35(1)(a), Stats.

DJH:RWL

*Gambling; Indians; Minors;* Laws regarding gambling will apply on Indian reservations if they prohibit gambling activities entirely, but not if they merely regulate these activities. Most state laws regarding the newly allowed gambling activities of lotteries and pari-mutuel betting will not apply on Indian Reservations because these activities will no longer be *entirely* prohibited. OAG 5-88

February 18, 1988

THOMAS LOFTUS, *Chairperson*  
*Assembly Organization Committee*

As Chairperson of the Assembly Committee on Organization you have requested an opinion concerning the effects of the Wisconsin constitutional amendment, which allows the state Legislature to authorize a state-operated lottery and pari-mutuel betting, on state jurisdiction over Indian gambling activities on Indian reservations in Wisconsin. The amendment to Wis. Const. art. IV, §24(5) provides in pertinent part:

This section shall not prohibit pari-mutuel on-track betting as provided by law. The state may not own or operate any facility or enterprise for pari-mutuel betting, or lease any state-owned land to any other owner or operator for such purposes.

The Legislature may authorize the creation of a lottery to be operated by the state as provided by law. . . .

This amending language is not self-executing. On November 25, 1987, the Governor signed legislation authorizing the creation of a lottery to be operated by the state. 1987 Wisconsin Act 119. Legislation which will authorize on-track pari-mutuel betting is still pending in the Legislature.

You have requested a formal opinion on certain specific questions listed in a letter to me from Representative John L. Merkt which I generally addressed in my reply dated March 25, 1987. Those questions focused on the concern that Indians may be able to conduct pari-mutuel games and lotteries in any manner they choose because gambling on Indian reservations may not be subject to regulation by the state.

#### SUMMARY OF MERKT QUESTIONS:

Following is a summary of the questions presented in Representative Merkt's letter. In general, these questions consider whether or

not gambling activities on Indian reservations will be subject to state regulatory and criminal laws.

What may Indians do on Indian-controlled territory?

1. Conduct any form of lottery or hire any operators? (Perhaps.)  
*E.g.* Lotteries based on other sports events like baseball, football or basketball games? (No.)
2. Sell lottery tickets from other states? (No.)
3. Site a dog track? (Yes.)
4. Site a horse track? (Yes.)
5. Open off-track gambling parlors? (No.)

What may the state do to oversee gambling on Indian-controlled territory?

1. Regulate advertisement on and off the reservation? (Only off-reservation.)
2. Prohibit gambling by minors? (Yes.)
3. Audit or oversee activities by the state gambling commission? (No.)
4. Conduct background checks of individuals running Indian gambling operations? (Yes, but only if requested by the tribe.)

#### SUMMARY OF ANALYSIS:

In Wisconsin, state laws generally are not enforceable against Indians within Indian country <sup>1</sup> if they merely regulate an activity, but they are enforceable if they prohibit an activity altogether. Because Wisconsin now allows some specific forms of gambling, it is likely that the courts will find that laws which authorize and govern these specific forms of gambling are regulatory. As regulatory laws they will not apply to Indian gambling activities on

<sup>1</sup> The term "Indian country" is defined in 18 U.S.C. §1151. It means "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." This definition applies whether the question involves criminal or civil jurisdiction. *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). The terms "reservation" and "Indian country" are used interchangeably herein. Any land held in trust for an Indian tribe may qualify as a "reservation." See 71 Op. Att'y Gen. 82 (1982).

reservations because the courts have found that tribal and federal economic interests in on-reservation gaming far outweigh any competing state interest. Laws which prohibit a specific form of gambling entirely would, in my opinion, continue to apply on reservations.

69 Op. Att'y Gen. 22 (1980) (an opinion primarily concerned with the operation of bingo on Indian reservations) and, more recently, 72 Op. Att'y Gen. 182 (1983), concluded that the state's criminal statutes which prohibit a specific gambling activity are enforceable against Indians under the authority granted by Pub. L. No. 280 (67 Stat. 588, 28 U.S.C. §1360, 18 U.S.C. §1162 (1984)). Under this statute, the state acquired limited civil and general criminal jurisdiction over Indians in "all Indian country within the state except the Menominee Reservation." I agree with the conclusions in those opinions that as long as a specific gambling activity is generally proscribed under state law, those laws are enforceable against Indians subject to Pub. L. No. 280 within Indian country. Since Wisconsin lacks jurisdiction under Pub. L. No. 280 on the Menominee Reservation, federal law incorporates by reference state laws that proscribe such activity. Those laws are enforceable by the federal government. See *United States v. Sosseur*, 181 F.2d 873 (7th Cir. 1950); *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980).

## I. STATE GAMING JURISDICTION WITHIN INDIAN RESERVATIONS.

### A. Underlying Indian Law Principles.

Following a similar constitutional amendment and legislative enactments decriminalizing the operation of bingo and raffles, the courts determined that the state was without regulatory jurisdiction over bingo games conducted by Indians within reservation boundaries. *Oneida Tribe of Indians of Wis. v. State of Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981); *Lac du Flambeau Band v. Williquette*, 629 F. Supp. 689 (W.D. Wis. 1986). The United States Supreme Court affirmed the reasoning used in those cases in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In *Cabazon*, the Court laid out the guidelines for determining whether or not state gambling laws apply to Indians within Indian country. California and its political subdivision, Riverside County, had sought to apply to the tribes state law governing the operation of bingo

games and local ordinances prohibiting the playing of draw poker and other card games. The Court held that state laws may be applied to Indians on their reservations if Congress has expressly consented. The Court concluded that Congress did not consent to California enforcing its gambling laws either by Pub. L. No. 280 or by the Organized Crime Control Act of 1970 (84 Stat. 937, 18 U.S.C.A. §1955 (1984)). Because the gambling activities in question did not violate California public policy, they were considered regulatory rather than prohibitory.

The Court did hold, however, that, absent express congressional consent, state and local regulatory laws may nevertheless be applied to on-reservation activities of tribes and tribe members but only in exceptional circumstances. *Id.* 480 U.S. at 215. The Court found no such circumstances surrounding gambling on Indian reservations in California.

#### 1. Public Law No. 280.

The *Cabazon* Court held that state laws will automatically apply on Indian reservations in states coming under Pub. L. No. 280 only if they are criminal/prohibitory. Although Pub. L. No. 280 does not mention "prohibitory laws," the *Cabazon* court held that not all laws which provide for criminal sanctions are included under its coverage. To fall under Pub. L. No. 280 and apply on Indian reservations a law must totally prohibit the public from engaging in a specific activity. In its final analysis, the Court applied the "short-hand test" of whether the specific activities in question were against public policy and found that gambling in the form of bingo and card games is not against public policy in California. This meant that state laws simply regulated these activities and therefore they were not enforceable on reservations under Pub. L. No. 280.

In all cases in federal court involving bingo the state laws have been found to be regulatory, *not* criminal. *Mashantucket Pequot Tribe v. McGuigan*, 626 F. Supp. 245 (D. Conn. 1986); *Langley v. Ryder*, 778 F.2d 1092 (5th Cir. 1985); *Barona Group of Capitan Grande Band, Etc., v. Duffy*, 694 F.2d 1185 (9th Cir. 1982); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981); *Oneida Tribe of Indians of Wis. v. State of Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981). Where the general public is not totally prohibited from playing a game like bingo, laws regarding how such gambling activity is to be conducted and played are deemed

regulatory/civil. In my opinion, analogous gambling activities generally allowed within the state would effect the same legal conclusion.

2. Preemption or infringement will bar the exercise of state regulatory jurisdiction.

Contemporary United States Supreme Court decisions make clear that the state is not absolutely prohibited from exercising regulatory jurisdiction over Indian tribes and tribe members. *Cabazon*, 480 U.S. at 214-15; *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). In *Rice v. Rehner*, 463 U.S. 713 (1983), the Court articulated the principles that must be met before state regulatory jurisdiction over Indians within reservation boundaries is allowable.

The *Cabazon* Court noted that it is only in exceptional circumstances that these principles can be met, thereby allowing a state to assert jurisdiction over the on-reservation activities of tribe members. 480 U.S. at 215.

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 emphasis in applying this test, commonly referred to as the “Rice Test,” is on federal preemption, which analysis is informed by considerations of tribal sovereignty. *Rice*, 463 U.S. at 718; *Chapman*, 122 Wis. 2d at 214; *Webster*, 114 Wis. 2d at 433.

Federal preemption is determined by a two-pronged analysis. First, one must assess the “backdrop” of tribal sovereignty by determining whether the tribe has a tradition of self-government in the subject area sought to be regulated and by balancing the state, federal and tribal interests involved. Against this backdrop, one can 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. There may be preemption in Indian law even though there is no congressional action explicitly precluding the assertion of state authority. *Rice*, 463 U.S. at 719; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983).

Under the *Rice* test, state civil/regulatory laws concerning Indian activity within Indian country are preempted by federal authority if the federal and tribal interests outweigh the state interests. In general, the federal and tribal interests in Indian self-sufficiency and sovereignty will outweigh any state interests. Gambling enterprises can be a life-saving source of income for Indian tribes. Tribes are using such revenues increasingly to fund local government and welfare programs and provide employment. In *Cabazon*, the Court found that these interests far outweighed the state's interest in guarding against infiltration of gambling by organized crime.

When preemption is not found, it is necessary to consider 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 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.

### 3. Principles governing other jurisdictional issues.

In addition to the prohibitory/regulatory problem and federal preemption and infringement considerations, there may be jurisdictional concerns depending on who violates the state's criminal prohibitory laws. For Pub. L. No. 280 areas (all of the state except for the Menominee Reservation), the state clearly has jurisdiction over anyone who commits a criminal offense. On the Menominee Reservation, the situation is more complex.

If an Indian violates any federal or state criminal law while on the Menominee Reservation, the federal government has exclusive jurisdiction through the Major Crimes Act, 18 U.S.C.A. §1153 (1984), General Crimes Act, 18 U.S.C.A. §1152 (1984), and Assimilative Crimes Act, 18 U.S.C.A. §13 (1969), with one important exception. If the activity was between Indians only and was not a major crime, the federal government will not have jurisdiction if the tribe has already punished the offender. Major crimes are those listed in 18 U.S.C.A. §1153 (1984), and they do not include any gambling related crimes. This may be important for gambling laws, which do not always have clear "victims."

If a non-Indian commits a crime that only involves a non-Indian on the Menominee Reservation, the state has exclusive jurisdiction.

If a non-Indian commits a crime that involves an Indian on the Menominee Reservation, the federal government has jurisdiction. The state might also have concurrent jurisdiction over crimes committed by non-Indians against Indians, but the law is unclear on this point. Dicta in several cases suggests that the federal government has exclusive jurisdiction over "inter-racial" crimes, but these statements all come from cases where an Indian commits a crime against a non-Indian. This is another situation where the exact definition of the crime could make a difference. If the crime has no victim and is committed by a non-Indian, then the state rather than the federal government may have jurisdiction.

Finally, the federal government has jurisdiction over anyone violating a federal law. For example, current federal law prohibits slot machines on reservations. 15 U.S.C.A. §1175 (1982). The Organized Crime Control Act may also relate to gambling activities operated in violation of state law over which violations the federal government would have exclusive jurisdiction. *Compare United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981) and *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal. v. Duffy*, 694 F.2d 1185 (9th Cir. 1982) with *United States v. Dakota*, 796 F.2d 186 (6th Cir. 1986).

## II. GAMBLING ACTIVITIES INDIANS CAN ENGAGE IN WITHIN THEIR RESERVATIONS FREE OF STATE LAW.

### A. Lotteries And Wisconsin Policy Concerning Related Forms Of Gambling.

The California experience, considered in *Cabazon*, is illustrative. The *Cabazon* decision was based in large part on the court's conclusion that California's general attitude toward gambling is not prohibitive. California itself runs and advertises a gambling operation (a lottery). In addition, other forms of gambling are allowed, such as bingo, raffles, pari-mutuel betting and certain card games, such as draw poker and lowball. These factors were sufficient to allow the court to conclude that in California gambling *per se* was not against public policy. To the contrary, gambling was generally allowed with only a few restrictions. Wisconsin, like California, has dramatically altered public policy concerning gambling with the

most recent constitutional amendment and with the enactment of the lottery legislation.

Although once generally prohibited, Wisconsin has been moving toward increasing acceptance of gambling. The constitutional prohibition against all lotteries was amended to allow bingo and raffles. The most recent amendment allowing a state-operated lottery and pari-mutuel on-track betting shows a trend not unlike the California experience toward increased public acceptance of these forms of gambling.

Section 945.01(5)(am), Stats., provides: "'Lottery' does not include bingo or a raffle as defined in s. 163.03 if conducted under ch. 163 or the state operated lottery as conducted under ch. 565." The current definitions in section 945.01 of lottery and betting do not clearly distinguish particular types of games. Lottery is broadly defined as any enterprise involving prize, chance and consideration. A bet is simply a "bargain in which the parties agree that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value specified in the agreement." Each of these definitions exempts activities (in addition to bingo, raffles and the state operated lottery) which would otherwise fit into the definition, such as business transactions, insurance policies, and prizes for contests. Once the amendment is fully implemented, the public generally will no longer be prohibited from placing bets on authorized lottery games or participating in on-track pari-mutuel betting.

Chapter 565 does not define the types of lottery games the state may offer. Section 565.27(1) does provide that "no game may be offered for which winners are selected based on the results of a race or sporting event." Considered together, these provisions empower the lottery board to conduct any type of lottery except ones based on the results of a race or sporting event, and permits persons in this state generally to participate in such gambling activities. This statutory scheme, in my opinion, effectively decriminalizes lotteries in the same manner that bingo and raffles were decriminalized in earlier legislation. As such, lotteries, like bingo, clearly are now a regulated form of gambling. It is my opinion that in view of *Cabazon*, the courts likely will find tribally conducted lotteries in whatever form beyond the reach of Wisconsin regulatory law.

Indian tribes probably will not be able to sell lottery tickets from other states. Federal laws prohibit transfer or sale of tickets across state lines. Title 18, ch. 61—Lotteries, section 1301-07. Some states do have multi-state lotteries which are legal, provided the lottery retains the “state-run” nature. If the courts determine that the federal laws do not apply, it may be very difficult for the state to establish a basis for its policy against such sales, which would mean that the state could not stop the sale of these tickets by Indians on Indian reservations because the “general activity” of playing a lottery is no longer prohibited.

#### B. Pari-mutuel Betting.

The constitutional amendment does not specify the types of events for which the Legislature is allowed to authorize pari-mutuel betting. It merely states “as provided by law.” The Legislature is empowered to authorize not only pari-mutuel betting on horse and dog races but also, as the LRB bulletin notes, under the amendment even pig racing may be allowed.

Arguably, tribes may be free to construct any type of track for any type of race regardless of the state statutory scheme. Pari-mutuel betting is not by definition now limited to a specific event such as horse racing. In my opinion, as a matter of public policy, the amendment lifted the ban on all lotteries and pari-mutuel betting, and later legislative limits on what types of events will be permitted is mere regulation. Under the Wisconsin Constitution, members of the general public are no longer prohibited from pooling their money and getting a portion of the total if they bet on the right outcome. If the legislative scheme enacted tracks the lottery legislation, the determination of what events they can bet on will likely be considered by the courts a matter of state regulation.

Carefully drafted legislation prohibiting pari-mutuel betting on specific events may preclude expanded tribal activity in this regard. One district court agreed with an analogous argument by New Mexico in a May 1987 case involving dog racing on an Indian reservation. *Pueblo of Santa Ana, et al. v. Hodel*, 663 F. Supp. 1300 (D.C. D.C. 1987). Under New Mexico law, the only pari-mutuel betting allowed was on horse races. The tribe wanted to establish pari-mutuel betting on dog races. The court held that state authorization of pari-mutuel betting on horse racing did not affect public policy against pari-mutuel betting on dog racing. The court distin-

guished *Cabazon*, concluding that New Mexico's total prohibition against other forms of pari-mutuel betting precluded application of the *Cabazon* analysis. No appellate court has considered this issue post-*Cabazon*, however.

Undoubtedly, tribes at minimum would be allowed to conduct on-track pari-mutuel betting at a tribal horse or dog track free of state regulation once the Legislature passed a statute authorizing betting on these activities. The general public would no longer be prohibited from engaging in the activity. It is clear that the voters intended to have horse racing (and perhaps dog racing) because that is generally what is meant by pari-mutuel betting.

Indians probably cannot establish off-track pari-mutuel gambling parlors on reservations, however, because the amendment specifically allows only "on track" pari-mutuel betting. There is a long-standing distinction between allowing on- and off-track betting in various states. Off-track is generally prohibited even when on-track is allowed. However, off-track betting done inside of a legal race track on a race run out of the state is legal in many states and is regulated by Title 15 U.S.C. ch. 57—Interstate Horseracing. Indians might be able to do this if, under the federal legislation, Wisconsin is considered a "separate state" from the reservation. Carefully drafted legislation could help to eliminate any uncertainty in this regard. The legislation should indicate that Wisconsin does not consider on- and off-track betting to be the same activity and should state the policy reasons for totally prohibiting all off-track betting.

With respect to some activities, the distinction between pari-mutuel betting and participation in a lottery is not clear. For example, in *Opinion of the Justices*, 385 A.2d 695 (Del. 1978), the majority found that "pool-selling" on jai-alai games was not a form of lottery because pool-selling has historically been held to be a different activity from lotteries. If this sports betting were characterized as pari-mutuel betting, however, and not as a form of lottery, it might be allowed. The distinction between sports betting and lotteries is artificial, as evident from the federal law regarding lotteries. Congress felt it necessary to specifically state that lottery does not include "the placing or accepting of bets or wagers on sporting events or contests." As noted, Wisconsin's lottery legislation effects the same result by limiting the lottery board's choice of lottery

games to those for which winners are not selected based on the results of a race or sporting event.

Also, on-reservation betting on horse, dog or similar races, the outcome of which is determined by a mechanical device, may be prohibited under the current federal law which forbids slot machines or video gambling machines on Indian Country, 15 U.S.C.A. §1175 (1982). Only the federal government may enforce these laws. State statutes would have to specifically prohibit these forms of gambling before such laws could be applied concurrently.

### III. JURISDICTION, IF ANY, THE STATE DOES HAVE IN RELATED MATTERS.

#### A. Advertising On And Off The Reservation.

Wisconsin law regulating gambling related advertising would not apply on Indian reservations unless the state interests at stake are sufficient to justify the assertion of state authority. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983). It is doubtful whether the state's interest in regulating gambling advertisements within reservation boundaries is sufficient to overcome the congressional and tribal interest in encouraging tribal self-sufficiency and economic development. The ability of a tribe to promote its gambling business through advertisements within reservation boundaries would appear to be inextricably linked to the success of that business. The United States Supreme Court's focus on factors such as these strongly suggests that state regulatory authority in such matters is preempted by overriding federal and tribal interests. *See Cabazon*, 480 U.S. at 215-21.

Whether the state can regulate Indian advertising outside reservation boundaries requires a somewhat different analysis. Where off reservation activities are at issue, the Supreme Court has stated the general rule as follows: "Absent express federal law to the contrary Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (citations omitted); *see also, White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 n. 11 (1980); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 335 n.18 (1983), *quoted in Oregon Dept. of Fish v. Klamath Ind. Tribe*, 473 U.S. 753, 765 n.16 (1985). I am not aware of any federal law expressly prohibiting the state from regulating Indian advertising in

the same fashion advertising by others is regulated statewide. Accordingly, it is my opinion that the state does have regulatory authority over Indian gambling advertisements outside reservation boundaries.

#### B. Gambling By Minors.

I see no reason to think that laws making it criminal for persons to allow gambling by minors (as most states have) should not apply on reservations. It should not be difficult to show that gambling by minors is against public policy and generally prohibited. In addition, tribal governments probably have ordinances against gambling by minors. I am not aware of any case where minors have been gambling on Indian reservations. Even if the laws are not enforceable as criminal laws, they probably will pass the preemption/infringement test because the state's interest in children is strong.

#### C. Oversight Authority Of The State Gambling Commission.

The lottery board, like the bingo control board, is primarily a regulatory authority. I assume the same will be true with respect to the board overseeing on-track pari-mutuel betting. Because such boards are concerned primarily with regulatory issues, they would not have any independent oversight authority over tribal gambling operations conducted within reservation boundaries. As indicated above, if the state interests at stake with respect to a particular subject area within a board's jurisdiction are sufficient to justify the assertion of state authority, then the board would have oversight authority on Indian reservations concerning that subject.

#### D. Background Checks On Operators.

The authority of the state to conduct background checks on operators of tribal gaming operations also is regulatory. In *Cabazon*, one of the bingo laws not enforceable on reservations concerned operator qualifications. The Court rejected the state's argument that it was trying to prevent organized crime. State arguments concerning the importance of keeping corrupt individuals out of tribal gambling businesses, or from taking advantage of their state citizens, would probably fail given the similar *Cabazon* facts.

DJH:JDN

*Public Officials; Public Service Commission; Words And Phrases;* Section 15.06(3)(a), Stats., does not prohibit a commissioner from having any business interests. It prohibits a commissioner from pursuing business interests which would prevent him or her from properly fulfilling the duties of the office of commissioner and precludes a commissioner from holding any public or private office or position of profit. OAG 6-88

February 19, 1988

FRED A. RISSER, *Chairperson*  
*Senate Organization Committee*

On behalf of the Senate Organization Committee, you have asked whether Public Service Commission Chairman Charles Thompson's business interests violate section 15.06(3)(a), Stats., which provides: "A commissioner may not hold any other office or position of profit or pursue any other business or vocation, but shall devote his or her entire time to the duties of his or her office."

According to information provided by Commissioner Thompson, he has relinquished all offices in his family corporations and has been removed from all payroll accounts maintained by those corporations. He continues to receive income from the family businesses and remains a partner in a family partnership. The partnership pays rent to Mr. Thompson, but Mr. Thompson's daughter is the general manager and manages the daily affairs of the partnership.

Section 15.06(3)(a) first prohibits a commissioner from holding any other office or position of profit without defining those terms and without even distinguishing between private and public offices and positions. Our supreme court has held that an "office of trust, profit or honor" means a public office. *Martin v. Smith*, 239 Wis. 314, 1 N.W.2d 163 (1941). That part of article VI, section 4 of the Wisconsin Constitution which provides that "sheriffs shall hold no other office" has been interpreted as applying only to the holding of a second *public* office. 40 Op. Att'y Gen. 163, 166 (1951). The history of the statute itself is of little assistance. Section 15.06 was created as part of the Kellett reorganization of 1967. The phrase "other office or position of profit" appears to have been taken from section 195.01(4) concerning public service commissioners. Other statutes preceding the reorganization prohibited Wisconsin Employment Relations commissioners from "engaging in any other

business, vocation or employment,” section 111.03, Stats. (1965), or required other commissioners to devote full-time to their duties. Sec. 220.02(1), Stats. (1965), and sec. 215.02(6), Stats. (1965). The statute concerning the insurance commissioner, on the other hand, read: “Such commissioner shall devote his entire time to the duties of the office, and shall not hold any position of trust or profit . . . .” Sec. 200.01(2), Stats. (1965). A search of the legislation’s history at the Legislative Reference Bureau revealed no explanation for choosing the phrase “office or position of profit.”

The best, because it is the only, indication of legislative intent is a 1969 law which amended section 15.06(3)(a) and created section 15.06(3)(b), to provide: “[T]he commissioner of insurance shall not engage in any other occupation, business or activity that is in any way inconsistent with the performance of his duties as commissioner, nor shall he hold any other public office.” The Legislature’s use of the modifier “public” in section 15.06(3)(b) seems to be a legislative recognition of the difference between “office” and “public office.” The comment to the law creating section 15.06(3)(b), rather than reflecting this clarity of legislative insight, however, only compounds the confusion. Ch. 337, sec. 4, Laws of 1969.

In that comment, the drafters of the amendment state the intent as making the requirements applicable to the commissioner of insurance less rigid than the original section 15.06(3). The comment concludes, however, that other work would be forbidden to the commissioner either because of its demands on his time and energies or because of conflict of interest and refers to paragraph (a) as forbidding the commissioner from doing other work. But the amendment, if it does anything clearly at all, most certainly exempts commissioners of insurance from the strictures of section 15.06(3)(a) by stating in that paragraph: “This paragraph does not apply to the commissioner of insurance nor to the members, except the chairman, of the tax appeals commission.”

I must conclude that the authors of the comment to chapter 337, section 4, Laws of 1969, were confused, but we should not ascribe the authors’ confusion to the Legislature. As amended, the statute on its face distinguishes between “office” and “public office.” I must conclude that the preferred interpretation of “office” includes private office. This interpretation is also consistent with the Legislature’s recognition that the prohibition in section 15.06(3) is very broad.

Having concluded that "office" includes private offices, I must also conclude that "position" includes private positions because the statute makes no attempt to distinguish between the two on the basis of whether they are private or public. Our supreme court, in the context of discussing who is a public officer, has distinguished an officer from an employe, holding that an officer holds an office of trust, profit or honor and an employe holds a position. *Martin v. Smith*, 239 Wis. at 333; *Sieb v. Racine*, 176 Wis. 617, 624, 187 N.W. 989 (1922); *Hall v. State*, 39 Wis. 79, 86 (1875), *rev'd*, 103 U.S. 5 (1880). I interpret the phrase "position of profit" in section 15.06(3)(a) as synonymous with employment, public or private. The first phrase of section 15.06(3)(a), therefore, prohibits a commissioner from holding a private or public office of profit, or a public or private position of profit.

The statute also provides that a commissioner shall not "pursue any other business or vocation, but shall devote his or her entire time to the duties of his or her office." I interpret the phrase "shall devote his or her entire time to the duties of his or her office" as summarizing the preceding prohibitions, not adding to them. I interpret the word "but," therefore, in the sense of "on the contrary." I adopt this interpretation because of the context and because I conclude that the prohibition against pursuing any other business or vocation is the equivalent of a requirement to devote full-time to the duties of the office.

The prohibition against pursuing any other business or vocation is not an absolute prohibition against having any other business interests. If it were, section 15.79, which prohibits public service commissioners from having any financial interests in a railroad or public utility, would be superfluous. That construction of the statute, therefore, must be avoided. *Green Bay Broadcasting v. Green Bay Authority*, 116 Wis. 2d 1, 342 N.W.2d 27 (1983), *modified*, 119 Wis. 2d 251, 349 N.W.2d 478 (1984). This interpretation is also consistent with predecessor statutes which imposed a full-time requirement but did not prohibit all business interests. *E.g.*, secs. 111.03, Stats., 220.02(1), Stats. and 215.02(6), Stats. (1965). The statute is titled "[f]ull-time offices." Although the title is not part of the statute it can be persuasive of the interpretation to be given that statute. Sec. 990.001(6), Stats. *Pure Milk Products Coop. v. NFO*, 64 Wis. 2d 241, 219 N.W.2d 564 (1974).

Our supreme court has not had occasion to interpret the "full-time" requirement for public officers. In a similar context, our court held that an agreement requiring a corporate officer "to give his full time to the company's service" did not require twenty-four hours a day of an employe's time or even every moment of his waking hours. It stated that the agreement "undoubtedly does require that he shall make that employment his business, to the exclusion of the conduct of another business such as usually calls for the substantial part of a manager's time or attention." *Johnson v. Stoughton Wagon Co.*, 118 Wis. 438, 446-47, 95 N.W. 394 (1903). The court specifically held that persons working under such agreements could seek and make investments of their private funds as long as they did not "trespass substantially" upon the ordinary business hours.

The Arizona Supreme Court reached a similar conclusion when interpreting Arizona's law which prohibited a commissioner from engaging in any occupation or business other than his duties as a commissioner.

This is not a prohibition against a commissioner owning a business or having an occupation. It would hardly be possible to find a person fit for the position of commissioner who had no business or occupation, and one could hardly imagine a governor who would appoint such a person. If the appointee to the office of commissioner is, for instance, a carpenter, he would not be required to sell his tools or refrain from repairing his home at odd times or of evenings. If he were a builder or architect, we can see no reason why he could not incorporate his business and employ others to carry it on. And if he should advise its managers and agents on holidays, Sundays and at times when his official duties did not require his attention, he would not be engaged in the occupation or business of a builder or architect. To "engage in any occupation or business" . . . as that phrase is here used, we think means that the person is giving time, energy and attention to his own affairs that rightfully belong to the state. An occasional reversion to his occupation, trade, business or profession for the purpose of preserving and keeping it for himself and his family when he no longer is an officer is not engaging in an occupation or business in the sense intended by the legislature to be forbidden.

*Holmes v. Osborn*, 57 Ariz. 522, 115 P.2d 775 (1941).

The comment to chapter 337, Laws of 1969, notes that on some questions, “no more can be done than to state a general principle which, in its nature, can only be enforced in egregious cases but which can nevertheless provide a useful standard for the commissioner and for public opinion.” That is all that is possible here. This office cannot decide the factual issues which would form the basis for any conclusion that Commissioner Thompson is in violation of section 15.06(3). The attorney general has no authority to decide questions of fact, nor can his judgment be substituted for the discretion vested in another state officer. 40 Op. Att’y Gen. 3, 4 (1951).

It is not possible to delineate with any certainty when a commissioner is actively pursuing another business or vocation. No one would suggest that a commissioner who merely collects interest on savings accounts or dividends from stocks, even if the amount is sizable, is pursuing a business or a vocation. Most people would agree, however, that someone who is actively managing a sizable portfolio of stocks and bonds is pursuing a business or vocation. The requirement that an officer devote his or her “entire time” to the office has been interpreted to mean the entire time necessary to faithfully perform the duties of the office. *Miller v. Walley*, 122 Miss. 521, 84 So. 466 (1920); *State v. Cumpston*, 362 Mo. 199, 240 S.W.2d 877 (1951); 40 Op. Att’y Gen. 163 (1951). Whether Commissioner Thompson or any other commissioner subject to section 15.06(3) is devoting his or her “entire time” or “full-time” to the office is a question that must be answered in the first instance by the commissioner himself or herself and in the final instance by the authority with the power to remove the commissioner.

If the Governor believes a commissioner is neglecting his or her official duties, whether that neglect is caused by pursuit of personal business or anything else, that neglect would be cause for the Governor to remove the commissioner under section 17.07(3). *Moses v. Board of Veterans Affairs*, 80 Wis. 2d 411, 259 N.W.2d 102 (1977). Because commissioners are appointive state officers, they would also be subject to interpellation under section 13.28 and removal under section 13.30 by joint resolution.

In this case, given the opacity of the statute and the information you have provided, I cannot conclude that Chairman Thompson’s business interests violate section 15.06(3)(a). If more specific standards or guidelines are deemed desirable or necessary, I recommend that the Legislature consider clarifying section 15.06(3)(a) so as to

provide further guidance to the appointing authority and to commissioners in the conduct of their business interests.

DJH:AL

*Law Enforcement; Public Records; Sheriffs; Sheriff's criminal investigation files are not covered by a blanket exemption from the public records law, but denial of access may be justified on a case-by-case basis. OAG 7-88*

February 19, 1988

KENNETH E. GOERKE, *Corporation Counsel*  
*Green County*

You ask:

1. Is the Sheriff's investigative file in a first degree murder case open to access to the defendant by a post conviction request for access to the entire file under the Wisconsin Public Records Law?

2. If the answer to your first question is yes, what documents, if any, are protected from access?

Some of the issues generated by your questions have already been considered and I believe resolved correctly by my predecessor in 67 Op. Att'y Gen. 12 (1978). That opinion concluded that sheriff's radio logs and other interdepartmental documents were not "books and papers required [by law] to be kept in his office" and thus were not subject to the absolute right of access provisions under section 59.14, Stats., which reads:

Offices where kept; when open. (1) Every sheriff, clerk of the circuit court, register of deeds, county treasurer, register of probate, county clerk and county surveyor shall keep his or her office at the county seat in the offices provided by the county or by special provision of law; or if there is none, then at such place as the board directs. The board may also require any elective or appointive county official to keep his or her office at the county seat in an office to be provided by the county. All such officers shall keep their offices open during the usual business hours of any day except Sunday, as the board directs. With proper care, the officers shall open to the examination of any person all books and papers required to be kept in his or her office and permit any person so examining to take notes and copies of such books, records, papers or minutes therefrom except as authorized in sub. (3) and s. 19.59(3)(d) or under ch. 69.

The opinion at 67 Op. Att'y Gen. 12 concluded that section 59.14 would not apply to criminal complaint and investigation reports

because they are nowhere “required by law to be kept” in the sheriff’s office. In contrast, the sheriff’s docket, daily jail records and cash books are required by law to be kept by the sheriff. Sec. 59.23, Stats.

The significance is that section 59.14 is what the supreme court has called an absolute right of access statute. *State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d 539, 553, 334 N.W.2d 252 (1983). As such, the possible available bases for denying access to a record are more restricted than under the general public records law which was then based on section 19.21 and which has now been expanded statutorily by section 19.31 to section 19.39. *Bilder*, 112 Wis. 2d at 552. In line with 67 Op. Att’y Gen. 12, it is my opinion that the question of access to a sheriff’s criminal investigation file is to be analyzed in the context of the general public records law.

Under the general public records law, there is a presumption in favor of access to public records and access is to be denied only under extraordinary circumstances. Sec. 19.31, Stats. “[T]he general presumption of our law is that public records shall be open to the public unless there is a clear statutory exception, unless there exists a limitation under the common law, or unless there is an overriding public interest in keeping the public record confidential.” *Hathaway v. Green Bay School Dist.*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984).

There is one clear statutory exception involving law enforcement records. Section 19.36(2) reads:

**LAW ENFORCEMENT RECORDS.** Except as otherwise provided by law, whenever federal law or regulations require or as a condition to receipt of aids by this state require that any record relating to investigative information obtained for law enforcement purposes be withheld from public access, then that information is exempt from disclosure under s. 19.35(1).

However, there is no indication that there is the required relationship between federal law or aid and the records in the instant situation, so I assume this clear exception does not apply.

There is also section 905.09, which creates an evidentiary privilege and reads as follows:

The federal government or a state or a subdivision thereof has a privilege to refuse to disclose investigatory files, reports and

returns for law enforcement purposes except to the extent available by law to a person other than the federal government, a state or subdivision thereof. The privilege may be claimed by an appropriate representative of the federal government, a state or a subdivision thereof.

However, the judicial council committee's note that follows the statute in the Wisconsin Statutes Annotated makes clear that the phrase "except to the extent available by law to a person other than the federal government, a state or subdivision thereof" is intended to preserve the supremacy of the public records law. Thus rather than the privilege being a possible exception to the public records law, the public records law works to qualify the privilege. Therefore, to my knowledge there is no clear statutory provision that would exempt the instant investigative file from the public records law.

Neither am I aware of any common law limitation that exempts criminal investigative files from the public records law. In 74 Op. Att'y Gen. 4 (1985), my predecessor considered whether there was a common law limitation on access to a prosecutor's file. It was reasoned that since at common law a defendant had no right of access to the prosecutor's file, it must also have been true that the general public would not have access under the public records law. 74 Op. Att'y Gen. at 10. There were also dicta available indicating common law limitations on access to prosecutor's files. *International Union v. Gooding*, 251 Wis. 362, 372, 29 N.W.2d 730 (1947); *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 680, 137 N.W.2d 470, 139 N.W.2d 241 (1965). However, I can find no such common law underpinning relating to access to sheriff's investigative files.

Along another line, it may be that the prosecutor can assert an attorney work product privilege with respect to investigative work conducted at his direction and relating directly to anticipated litigation. The United States Supreme Court has held that the attorney work product privilege applies in criminal as well as civil matters. *United States v. Nobles*, 422 U.S. 225, 237 (1975). The same has been said for Wisconsin law. October 1985 Wisconsin Bar Bulletin at 23.

In *Nobles*, the privilege was asserted with respect to the defendant's attorney and his private investigator. It may follow that the privilege could also be asserted with respect to the prosecutor and

those conducting investigations for him, including public law enforcement officials. The prevailing view seems to be that investigative reports that are prepared in the ordinary course of business and not tied directly to preparation for litigation do not qualify for work product protection, *e.g.*, *Scott Paper Co. v. Ceilcote Co., Inc.*, 103 F.R.D. 591 (1984); *State v. Shipton*, 339 N.W.2d 87, 89 (N.D. 1983); *State ex rel. Fallis v. Truesdell*, 493 P.2d 1134, 1136 (Okla. 1972). *But see State ex rel. Keaton v. Cir. Ct. of Rush County*, 475 N.E.2d 1146 (Ind. 1985), where the foregoing proposition was the minority view.

Finally, the impact of the privilege may be limited by the counteracting requirement that the prosecutor is required to disclose exculpatory evidence. *Brady v. State of Maryland*, 373 U.S. 83, 86 (1963).

As to the common law balancing test, I believe the approach and guidance of my predecessor in 67 Op. Att'y Gen. 12 continue to be sound:

The sheriff as custodian has a right and duty to determine whether there is a public interest in withholding partial or total inspection which is paramount to the stated statutory public interest permitting inspection. In such case such officer must give specific reasons for refusal, and the person seeking inspection can then resort to a mandamus action to test the reason. 63 Op. Att'y Gen. 400, 405-406 (1974), contains a summary of the criteria to be considered by the custodian in making a determination to permit or deny public access to records. Please refer to that opinion and to 65 Op. Att'y Gen. 31 (1976). The pendency of criminal prosecution or the investigation of incidents which might result in prosecution would in most cases justify denial of inspection on a case-by-case basis. Denial may also be appropriate where there are unsubstantiated charges which might *unduly* harm the person or persons involved, if disclosed. Care must also be taken to guarantee an accused a fair trial.

67 Op. Att'y Gen. at 13-14.

There is also dictum that indicates a judicial receptiveness to applying the balancing test to keep criminal investigation records closed, but only while the investigation or prosecution is still pending. *Youmans*, 28 Wis. 2d at 685; *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979). The attorney general has also

made the distinction between pending and completed investigations. 73 Op. Att’y Gen. 38, 44 (1984).

The mere pendency of an investigation or possible prosecution is not determinative. There must be some actual underlying concerns that warrant protection. For example, there may be some of the same types of concerns that have been identified as justifying the secrecy of John Doe proceedings, *to wit*:

- (1) keeping a John Doe target from fleeing, or an arrested defendant from knowledge which might cause him to flee;
- (2) preventing defendants from collecting perjured testimony for the trial;
- (3) preventing those interested in thwarting the inquiry and tampering with prospective testimony or secreting evidence;
- (4) freeing witnesses from the threat of immediate retaliation; and
- (5) preventing testimony which may be mistaken or untrue or irrelevant from becoming public.

*In re Wis. Family Counseling Services v. State*, 95 Wis. 2d 670, 677, 291 N.W.2d 63 (Ct. App. 1980).

If there is a reasonable basis for having concerns such as the foregoing then secrecy may well be justified. I assume it is because these kinds of concerns are typically present in a pending criminal investigation that my predecessor said at 67 Op. Att’y Gen. at 15: “The pendency of criminal prosecution or the investigation of incidents which might result in prosecution would *in most cases* justify denial of inspection on a *case-by-case* basis” (emphasis added). However, if in fact there is not a reasonable basis for these or other legitimate concerns in a particular case then secrecy is not justified even though the matter is pending.

Even where there are legitimate reasons justifying nondisclosure during the pendency of an investigation or prosecution, most of the reasons will dissipate once the matter comes to a close. For example, concern that a suspect may flee is removed once the suspect is convicted and imprisoned. On the other hand, even though the trial is over, the pendency of an appeal and possibility of another trial may keep concerns about disclosure alive. Whether there are residual concerns that justify nondisclosure of all or part of a closed file will also have to be made on a case-by-case basis. For example,

there may be a residual concern about the release of information that would have a substantial and undue adverse impact on a person's reputation as where the record contains highly damaging allegations which are wholly unsubstantiated by credible and competent evidence. *See* secs. 19.35(1)(a) and 19.85(1)(f), Stats., and *Youmans*, 28 Wis. 2d at 685.

In conclusion, my response to your first question is that I do not find a legal basis for according blanket confidentiality to a sheriff's file regarding a first degree murder case. Although it would not be uncommon for there to exist specific concerns that would justify nondisclosure of such a file while a criminal investigation is pending, such a determination must be made on a case-by-case basis. Since underlying legitimate concerns normally would relate to the integrity and security of the investigation or possible prosecution, the reasons for nondisclosure will be removed or reduced once the matter comes to a close. Whether there are continuing reasons for nondisclosure will also have to be made on a case-by-case basis. This leads to your second question as to what if any types of records might be properly withheld.

The framework for analysis is the same. In order to justify nondisclosure of particular records in the file you must find some specific statutory exception or common law limitation or that the interests to be protected by nondisclosure outweigh the general presumption in favor of access to public records. You state that you are specifically interested in the records of the eyewitness accounts of the five year old daughter of the defendant. It appears the video tapes and audio tapes of interviews with the juvenile were provided to the defendant during pretrial discovery and I assume she testified at the trial. You state that the child is not in the custody or control of the defendant but she does visit him, I assume in prison. You feel the release of the information provided by the child would be against the public interest.

As a general matter "[p]eace officers' records of children . . . shall not be open to inspection or their contents disclosed except . . ." by court order. Sec. 48.396(1), Stats. That confidentiality provision is most clearly intended to apply to records on juveniles who have been investigated and possibly processed for wrongdoing. *See State ex rel. Herget v. Waukesha Co. Cir. Ct.*, 84 Wis. 2d 435, 450-51, 267 N.W.2d 309 (1978). However, the language is broad enough to also cover police records of juveniles who are witnesses or victims or

who otherwise become involved in a police investigation. The legislative purpose of the Children's Code is to protect and promote the "best interests of the child" and the provisions of chapter 48 are to be liberally construed to effect that objective. Sec. 48.01(2), Stats. Therefore, it is my opinion that the confidentiality provisions of section 48.396 are available to protect the best interests of any juvenile who somehow becomes the subject of police records.

Thus I believe the eyewitness accounts of the juvenile involved in the instant case may properly be considered protected by those confidentiality provisions. Questions remain, however, whether confidentiality is affected by the fact that the statements were made available to the defendant during discovery or by the fact that the juvenile testified at trial.

In my opinion the fact that records may be available in discovery does not mean they must subsequently be made available under the public records law. These are two wholly separate and independent bases for obtaining access to records. It is quite possible that a litigant's need to know will result in access to records via discovery which would not be available to the general public under the public records law. For example, in *Herget* cited above, the court held that a plaintiff in a civil action seeking recovery of damages resulting from vandalism might be able to have access to police records regarding a juvenile even though those records are generally confidential.

It may be argued that since the juvenile's testimony at trial is public, any right of confidentiality attaching to the juvenile's statements to the police has been lost. On the other hand, one could argue that the juvenile's statement is public to the extent made so in open court and it is unnecessary and redundant to require access to previous statements made to the police. In my opinion the answer may be based on the question that underlies the confidentiality provisions in chapter 48: what is in the best interests of the child? If you determine that the best interests of the child would be disserved by disclosure of her statements to the police and if there is factual and rational underpinning for your determination, it is my opinion that your determination will be sustained by a reviewing court.

DJH:RWL

*Confidential Reports; Veterans;* Under current law the authority of the Department of Veterans Affairs to release veterans loan status information to lenders and credit reporting agencies is very limited. OAG 8-88

February 25, 1988

JOHN J. MAURER, *Secretary*  
*Department of Veterans Affairs*

You ask whether loan status information regarding veterans receiving benefits from your department may be released to credit reporting agencies and grantors of credit. It is my opinion that your authority to do so is severely limited under current law.

As with all governmental agencies, records on file with your agency are presumed to be open to the public under the public records law. However, section 19.36(1), Stats., provides as follows:

Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35(1), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6).

For your question, the pertinent statute is section 45.36 which reads as follows in pertinent part:

(5) DISCLOSURE OF MONETARY BENEFITS. The department shall disclose to any person who requests such information the amount of any grant or loan made by the department to any applicant. A person seeking such information shall be required to sign a statement setting forth his name, his address, his reason for making such request and certifying that he will not use the information obtained for commercial or political purposes.

(6) DISCLOSURE OF OTHER INFORMATION. Except as provided in subs. (2) to (5), all files, records, reports, papers and documents pertaining to applications for benefits from the department, and information contained therein, shall only be released by the department or service office pursuant to rules of the department. Such rules must provide for the furnishing of information required for official purposes by any agency of the U.S. government, any agency of this state, any law enforcement or public welfare agency of any Wisconsin county, or by members

of the state senate and assembly, and will otherwise provide for release of personal information pertaining to or contained in any application for benefits, whether pending or adjudicated, only where authorized in writing by the applicants or where necessary to assist applicants in securing veterans benefits to which they may be entitled or where necessary for the efficient management of loans made by the department.

It appears that the statutory exceptions in subsections (2) to (5) are not pertinent. Therefore, pursuant to subsection (6) it is necessary to refer to department rules. The pertinent ones read as follows:

Release of information and records. All records and papers of the department or of a county veterans service office, hereinafter in this section referred to as service office, are to be utilized in a manner to best serve the public interest, but the veteran's right of privacy as to information pertaining to his military or naval service and to confidential information contained in applications for benefits will be respected.

. . . .

(3) RECORDS ARE CONFIDENTIAL. Records pertaining to any application for benefits, whether pending or adjudicated, will be deemed confidential and no disclosure therefrom will be made except in the circumstances and under the conditions set forth in subs. (4) through (15), and any person making application for benefits shall hereinafter be referred to as the applicant.

. . . .

(7) DISCLOSURE OF LOAN INFORMATION. Information contained in loan files, information pertaining to action taken by the department on loan applications, or *loan status* information may be made available to any party having a security interest in the property securing such loans upon approval by the secretary or pursuant to rules promulgated by him.

. . . .

(13) RELEASE OF INFORMATION TO AUTHORIZED LENDERS. All information and exhibits in the possession of the department pertaining to direct housing loan applications or direct housing loans may be released to authorized lenders servicing, closing or processing the applications or loans involved.

Wis. Admin. Code §VA 1.10 (emphasis added).

In summary, loan status information is made confidential by section VA 1.10(3) and section VA 1.10(7) and (13) are the only exceptions that have a bearing on the question you pose. However, the exceptions authorize release of loan status information only under very limited circumstances. They do not authorize release of such information to credit reporting agencies and grantors of credit, generally. Rather, under section VA 1.10(7), it appears loan status information may be released to a grantor of credit only where it has a security interest in the property which secures the grantor's loan.

If you consider exercising your rulemaking authority under section 45.36 to adopt a new rule on this subject, you should be mindful of the parameters of that authority. Since a rule authorizing release to credit agencies and grantors would not fall within the authority to release information to the various specified governmental agencies and officials, it would have to qualify as a rule that:

[W]ill otherwise provide for release of personal information pertaining to or contained in any application for benefits, whether pending or adjudicated, *only* where authorized in writing by the applicants or where necessary to assist applicants in securing veterans benefits to which they may be entitled or where necessary for the efficient management of loans made by the department.

If these qualifications are not acceptable, it is my opinion that the underlying rulemaking authority in section 45.36 will have to be changed.

DJH:RWL

*Automobiles And Motor Vehicles; Forests; Highways; Words And Phrases;* County forest roads which are open to vehicular traffic are highways which can be designated as all-terrain vehicle routes under section 23.33(8)(b), Stats., and minors under sixteen years of age holding valid all-terrain vehicle safety certificates can operate all-terrain vehicles on highways which have been designated as all-terrain vehicle routes under the limited conditions set forth in section 23.33(4). OAG 9-88

March 8, 1988

DARWIN L. ZWIEG, *District Attorney*  
*Clark County*

You have requested my opinion concerning the definition of a highway in the context of the recently adopted statute regarding all-terrain vehicles, section 23.33, Stats. You have indicated that there is a county forest in Clark County within which are several roadways and have questioned whether these roadways are highways so as to permit them to be designated as all-terrain vehicle routes under section 23.33(8)(b). You have also questioned the status of these county forest roadways as to traffic enforcement.

As you have noted, section 340.01 defines various terms for purposes of section 23.33. This section provides in relevant part as follows:

Words and phrases defined. In s. 23.33 and chs. 340 to 349 and 351, the following words and phrases have the designated meanings unless a different meaning is expressly provided or the context clearly indicates a different meaning:

. . . .

(22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

. . . .

(46) "Private road or driveway" is every way or place in private ownership and used for vehicular travel only by the owner and those having express or implied permission from the owner and every road or driveway upon the grounds of public institutions other than those under the jurisdiction of the county board of supervisors.

The listing of examples in section 340.01(22) tends to obscure the plain meaning of its first sentence which provides that all public ways and thoroughfares are highways. If the roadways in county forests are public ways or thoroughfares, then they constitute highways as well. As the Supreme Court stated in *Weirich v. State*, 140 Wis. 98, 100, 121 N.W. 652 (1909): "As has often been said, judicial construction is only invocable [sic] to solve uncertainties. So where there is no ambiguity there cannot, legitimately, be judicial construction."

The Wisconsin Supreme Court in *State ex rel. Happel v. Schmidt*, 252 Wis. 82, 86, 30 N.W. 220 (1947), quoted with approval from 25 Am. Jur. *Highways* §2 (1940):

"A highway is a way open to the public at large, for travel or transportation, without distinction, discrimination, or restriction, except such as is incident to regulations calculated to secure to the general public the largest practical benefit therefrom and enjoyment thereof. Its prime essentials are the right of common enjoyment on the one hand, and the duty of public maintenance on the other. It is the right of travel by all the world, and not the exercise of the right, which constitutes a way a public highway, and the actual amount of travel upon it is not material. If it is open to all who desire to use it, it is a public highway although it may accommodate only a limited portion of the public or even a single family or although it accommodates some individuals more than others."

County forests are established by section 28.11 for the various public purposes set forth in section 28.11(1), which provides as follows:

**Purpose.** The purpose of this section is to provide the basis for a permanent program of county forests and to enable and encourage the planned development and management of the county forests for optimum production of forest products together with recreational opportunities, wildlife, watershed pro-

tection and stabilization of stream flow, giving full recognition to the concept of multiple-use to assure maximum public benefits; to protect the public rights, interests and investments in such lands; and to compensate the counties for the public uses, benefits and privileges these lands provide; all in a manner which will provide a reasonable revenue to the towns in which such lands lie.

The right of the public to the use of county forests is confirmed by section 28.11(4)(f): "The general public shall enjoy the privilege of entering such lands for the purpose of hunting, fishing, trapping and other recreation pursuits subject to such regulation and restrictions as may be established by lawful authority."

The maintenance of county forest roads is within the management authority of the county forestry committee under section 28.11(5) and is clearly public in nature.

Given the right of the public to use those county forest roads which are open to vehicular traffic and the authority of the county forestry committee to maintain such roads as a part of the county forest, it is my opinion that such roads constitute highways as that term is used in section 340.01(22) and can therefore be designated as all-terrain vehicle routes pursuant to section 23.33(8)(b).

Having concluded that such county forest roads are highways which can be designated as all-terrain vehicle routes pursuant to section 23.33(8)(b) requires consideration of your second inquiry.

You have noted that sections 23.33(5) and 23.33(4)(d)4. permit persons at least twelve years of age but under sixteen years of age to operate all-terrain vehicles on roadways if such operators hold valid all-terrain vehicle safety certificates. Persons under sixteen years of age may also operate all-terrain vehicles on roadways if accompanied by a parent, guardian or person over eighteen years of age. You question whether these provisions permit the operation of all-terrain vehicles by such persons on roadways which are highways without the need for a valid driver's license.

Section 23.33(4)(d), which permits operation of all-terrain vehicles on roadways, is very limited in its scope. It permits such operation in only the following five circumstances:

1. To cross a roadway. . . .

2. On any roadway which is not seasonally maintained for motor vehicle traffic . . . only during the seasons when no maintenance occurs. . . .

3. To cross a bridge, culvert or railroad right-of-way. . . .

4. On roadways which are designated as all-terrain vehicle routes. . . .

5. On roadways if the all-terrain vehicle is an implement of husbandry, if the all-terrain vehicle is used exclusively for agricultural purposes and if the all-terrain vehicle is registered for private use . . . .

Subsection 4, most relevant to your inquiry, is further limited to operation “only for the extreme right side of the roadway except that left turns may be made from any part of the roadway which is safe given prevailing conditions.”

Given the limited nature of the operating privileges granted to those under sixteen years of age by section 23.33(4) and 23.33(5), I believe it is reasonable to conclude that the Legislature intended that such operation be permissible without the need for a valid driver’s license. In all other respects, operators of all-terrain vehicles, regardless of age, are required to comply with the provisions of chapters 340 to 349 except where there is a direct conflict with section 23.33.

DJH:RAV

*Garnishment; Landlord And Tenant;* The recently enacted provisions of section 49.41(2), Stats., which provide that effective April 1, 1988, grants of AFDC may be garnished by landlords as provided under section 812.233, conflict with provisions of Title IV-A of the Social Security Act. OAG 10-88

March 10, 1988

TIMOTHY F. CULLEN, *Secretary*  
*Department of Health and Social Services*

For several years, section 49.41, Stats., has provided that all grants of aid to families with dependent children and other benefits listed therein are "exempt from every tax, and from execution, garnishment, attachment and every other process and shall be inalienable." With the enactment of 1987 Wisconsin Act 27, subsection (2) to section 49.41 was created and provides that grants of AFDC may be garnished as provided under section 812.233 which also was created by 1987 Wisconsin Act 27.

You ask whether these new provisions which allow landlords to garnish AFDC grants conflict with provisions of Title IV-A of the Social Security Act. The United States Department of Health and Human Services in consultation with the Office of General Counsel has concluded that such a garnishment is prohibited because it contravenes several legal requirements under Title IV-A. It is the federal agency's position that such garnishment would not further the statutory purpose of maintaining the AFDC family together at a subsistence level or serve the best interests of the AFDC child. Instead that agency views the garnishment as state interference with the AFDC family's application of the money due them which is not among the limited, statutorily authorized forms of interference.

The federal response is perhaps far more meaningful than my independent opinion because of the stated potential for reduced federal financial participation if these state provisions are implemented. I find no apparent reason for disagreement with this federal response even though a contrary argument can be constructed. For example, where Congress intended to preserve the inalienability of the right to future payments of old-age, survivors and disability insurance benefits (OASDI) from garnishment, it did so in clear and unequivocal language. 42 U.S.C. §407 (1987).

In contrast, the federal opposition to these new garnishment provisions is based upon federal policy and interpretation which rejects the use of the state AFDC payment machinery to provide collection services for creditors of public assistance recipients. The recognized purpose of the AFDC program is to provide recipients with the necessities of life, not to make public funds available to pay preexisting debts. 42 U.S.C. §602 (1987); *Northwest Eng. Credit Union v. Jahn*, 120 Wis. 2d 185, 187, 353 N.W.2d 67 (Ct. App. 1984). The court in the latter case noted that several other states have held that public welfare funds are exempt from garnishment under various situations.

In *Guardian Loan Company of Plainfield v. Baylis*, 112 N.J. Super. 44, 270 A.2d 304 (1970), the court noted the similarity between the clearly stated exemption from levy of OASDI benefits in 42 U.S.C. §407 (1987) and the overall intent of the AFDC program and concluded that a bank account fund consisting of money received by the depositor as AFDC benefits was exempt from levy. The court reasoned that:

To hold otherwise would clearly frustrate the intent of our Aid To Dependent Children Program, and allow public funds to be utilized for the benefit of unintended beneficiaries. Since the payments to eligible persons are to enable them to meet their current living expenses, any diversion of these payments would require additional expenditures of welfare funds to enable the recipients to purchase the necessities of life. Plaintiff cannot be permitted to benefit at public expense.

*Guardian Loan Company*, 270 A.2d at 305.

Notwithstanding any laudable purpose behind the garnishment provisions, they clash with the principles underlying the AFDC program. The federal statute provides for supervision of recipients and for the failure of these recipients to expend the aid for its allotted purpose. See 42 U.S.C. §605 (1985); *Goodyear Service Store v. Speck*, 48 Ohio App. 2d 115, 355 N.E.2d 886 (1976). Under this authority a state agency may assure payment of shelter by use of protective payments which are in the best interests of the children.

The interpretation of any agency charged with administering a statute or program is entitled to great deference. *Schweiker v. Hogan*, 457 U.S. 569, 588 (1982); *Sudomir v. McMahan*, 767 F.2d 1456, 1459 (9th Cir. 1985). Clearly in this instance such deference

should be extended to the United States Department of Health and Human Services' interpretation of Title IV-A provisions.

DJH:DPJ

*Legislation; Public Defenders; Public Officials; Section 16.49, Stats., does not prohibit or restrict an officer or employe from informing citizens of budget deliberations or suggesting that those citizens inform their elected officials of their opinions. OAG 11-88*

March 11, 1988

FRED A. RISSER, *Chairperson*  
*Senate Organization Committee*

On behalf of the Senate Organization Committee you have asked what constitutes a violation of section 16.49, Stats., what the penalties are for violating that statute and who is charged with enforcing the statute. Section 16.49 provides:

No department or any officer or employe thereof shall present any request for increased appropriations or any explanation, argument or appeal in support of any such request, except at a hearing of the governor or the joint committee on finance or at the request of either house or any committee thereof. Nor shall any department, officer or employe attempt to procure an increased appropriation other than through the regular and orderly presentation of budget requests in the manner provided in this chapter or to the governor in emergencies.

You specifically ask whether State Public Defender Richard Phelps violated section 16.49 during the deliberations on the last budget bill. Part of the Governor's proposed budget provided that private attorneys who were hired by the public defender program for misdemeanor cases would receive a flat-fee reimbursement of \$200 per case when the case settled before trial. The public defender board and the public defender opposed this concept, believing that pay for each hour of work performed was preferable. The Legislature ultimately removed the Governor's proposal. That change, according to the Legislative Fiscal Bureau, resulted in an appropriation increase in the public defender's budget.

You have provided me with copies of correspondence between Mr. Phelps and various persons interested in the flat-fee issue. All of these people share the public defender board's opposition to the flat-fee reimbursement proposal. It is fair to say that the correspondence shows that Mr. Phelps certainly did not discourage, and in most instances encouraged, these people to inform legislators, the Governor and cabinet officials of their opposition to flat-fee reim-

bursement. In one letter to the private bar, Mr. Phelps expressed his opposition to flat-rate reimbursement plans and said that such approaches could lead to a substantial decrease in the number of practitioners participating in the program. In another letter, the chairman of an *ad hoc* committee of the Wisconsin Association of Criminal Defense Lawyers (WACDL) wrote to the members of that organization asking them to write to the members of the Joint Committee on Finance to express opposition to the flat-fee reimbursement system. Mr. Phelps is the director at large of the WACDL. Without discussing all of the material which you provided, I believe it is accurate to summarize it as correspondence from Mr. Phelps to various individuals enlisting and encouraging their assistance in defeating the flat-fee reimbursement system.

In my opinion, section 16.49 does not preclude a state officer or employe from informing individuals or groups that they may be affected by certain budget actions and telling or reminding them to whom they should write if they wish to express an opinion. I believe the first sentence of section 16.49 prohibits only requests made to legislators by a state officer or employe; it requires those requests to be made at hearings. The second sentence is a broader prohibition but still is directed only at contacts between state officers or employes and the Legislature. The first sentence prohibits presenting or arguing for an increased appropriation except at public hearings of the bodies involved. The second sentence prohibits attempting to get a budget increase other than through the procedures outlined in chapter 16.

Section 16.49 had its genesis in 1929 Senate Bill 1. That bill created the state budget department, the office of director of budget and provided for the state budget system which the state essentially still follows. The bill was an attempt to consolidate and systematize the state budget process. Apparently the Legislature felt it necessary to prohibit state agencies and employes from attempting to subvert that system. Nothing in the act's history or the law's language indicates that it was meant to prohibit or even to discourage state officials from informing citizens of the status of budget deliberations or suggesting to those citizens that they inform their elected officials of their opinions.

Expressions of opinions from citizens on any legislative matter, and certainly the budget, should be encouraged and welcomed. It hardly would be surprising to find that citizens write about issues

which concern them. Similarly, it is not surprising that agencies inform individuals and groups which share their positions on the issues of the need for their assistance on those issues. For example, the Department of Development may contact chambers of commerce, business associations and tourist industry groups for their assistance in obtaining an increase in the department's budget to promote tourism or provide other aid to businesses. Other departments or officials may also do so on appropriation matters within their agency budgets. If section 16.49 is read expansively, all of these activities would be prohibited.

Lobbying by state agency officials is regulated in chapter 13. Section 16.49 is designed to force agency officials to use the budget process set by the Legislature. It is not an attempt to stop agencies or state officials from expressing their concerns on budgetary matters to the public. The communications which I have reviewed for this opinion all fall within the latter category. I do not consider any of them to be a violation of section 16.49.

Speech on public issues occupies the "highest rung of the hierarchy of first amendment values." *NAACP v. Claiborn Hardware Co.*, 458 U.S. 886 (1980). The first amendment protects a public employe's comments on matters of public concern. *Connick v. Myers*, 461 U.S. 138 (1983). That amendment requires the state to balance the interests of the employe, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employes. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). Section 16.49, as interpreted, is not an unconstitutional restraint on first amendment rights but a reasonable regulation of employment. *Minnesota State Bd. For Com. Colleges v. Knight*, 465 U.S. 271, 288 (1984).

You also ask who is charged with enforcing section 16.49 and what the penalties for violating that statute are. 1929 Senate Bill 1 provided that violations of that section were just and adequate cause for removal from office or dismissal from employment. That language was not included in the actual law, but I would conclude that an employe violating section 16.49 could be subject to personnel action under section 230.34, which provides that an employe may be removed, suspended without pay, discharged, reduced in base pay or demoted for just cause. Certainly, violation of a state statute regulating the conduct of a state employe could be just

cause. Those state officers who serve at the pleasure of a board, such as Mr. Phelps, would be subject to removal under section 17.07(6). An appointed state officer would also be subject to interpellation under section 13.28 and removal under section 13.30.

Section 946.12 prohibits any public officer or employe from doing any act "which he knows is in excess of his lawful authority or which he knows he is forbidden by law to do in his official capacity." Since a violation of section 946.12 is a felony, it is also possible that an officer or employe violating section 16.49 could be charged with a violation of section 946.12.

DJH:AL

*District Attorney; Law Enforcement; Salaries And Wages;* A grant from the Wisconsin Office of Justice Assistance may properly be paid as salary increases to the district attorney and his or her assistants in the form of overtime, without violating section 59.49(1), Stats., provided the county makes allowance for such grant funds in its budget and duly passes salary increases for the district attorney and his assistants as provided by sections 66.197 and 59.15(2)(c). OAG 12-88

March 15, 1988

RAND KRUEGER, *District Attorney*  
*Marathon County*

You have requested my opinion on the following facts:

Your office, along with the Marathon County sheriff's department and several out-of-county law enforcement agencies, has applied to the Wisconsin Office of Justice Assistance (WOJA) for a law enforcement drug case grant for 1988. The purpose of the grant, so far as it affects your office, is to pay "overtime" compensation for prosecutorial support of increased enforcement efforts in the drug abuse area.

The county board approved a budget with a contingency for the grant money. You and your assistants will keep detailed time records for cases covered by the grant. The county will then pay overtime at the appropriate collective bargaining contract rate, based on these time records. The payments will be debited from the district attorney account budgeted by the county. The grant money will then be paid by the council to reimburse the county for the salaries paid. The money from the council will be paid into the county treasury.

You ask whether or not there are any legal impediments for the use of these funds to pay the district attorney and his assistants for overtime in preparing and trying drug cases. You further indicate that it may be assumed that all grant requirements will be strictly complied with.

Section 59.49(1), Stats., provides: "No district attorney may receive any fee or reward from or on behalf of any prosecutor or other individual for services in any prosecution or business to which it is the district attorney's official duty to attend." It is my opinion that a grant from WOJA is not a "fee or reward" within

the meaning of this section. Likewise, the WOJA is not a prosecutor or an individual as required by this section. Further, the district attorney is not directly receiving the grant monies as they are being paid to the county. The county is empowered to accept grants pursuant to section 59.07(17). Therefore, I do not believe section 59.49(1) would provide an impediment to the grant structure as you have described it.

Section 59.15(1) provides that the county board shall establish the "total annual compensation for services to be paid" to the district attorney. That section further provides: "The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the board." However, section 66.197 provides that:

The governing body of any county may, during the term of office of any elected official whose salary is paid in whole or in part by such county, increase the salary of such elected official in such amount as the governing body determines. The power granted by this section shall take effect notwithstanding any other provision of law to the contrary . . . .

Thus, the Legislature has specifically provided an exception to section 59.15 which allows the salaries of elected county officials to be increased during their term. *See also* 61 Op. Att'y Gen. 441 (1972).

It is my opinion that the power to raise the salaries of elected officials conferred by section 66.197 implies the power to determine the manner of such increased compensation. The county can, if it chooses, elect to pay "overtime" to a district attorney. It is within the county board's power to establish this type of compensation so long as the county complies with the necessary budget requirements and the provisions of section 59.15.

Likewise, section 59.15(2)(c) provides: "The board may provide, fix or change the salary or compensation of any . . . employe or deputies to elected officers without regard to the tenure of the incumbent . . . and may establish regulations of employment for any person paid from the county treasury . . ." Under the authority of this section the county can provide for assistants to the district attorney "overtime" in a like manner as I have previously set out for the district attorney.

The fact situation which you pose is sufficiently different to distinguish my predecessor's opinion at 67 Op. Att'y Gen. 31 (1978), which relies primarily on *Biemel v. The State*, 71 Wis. 444, 37 N.W. 244 (1888), and *State v. Peterson*, 195 Wis. 351, 218 N.W. 367 (1928).

The treatment of the grant funds should, as you have indicated will be the case, comply with all union contracts, county ordinances and state and federal statutes in distributing the increased compensation derived from this grant.

It is, therefore, my conclusion that a grant from WOJA may properly be paid as salary increases to the district attorney and his assistants in the form of overtime, provided the county makes allowance for such grant funds in its budget and duly passes salary increases for the district attorney and his assistants as provided by the appropriate statutes.

DJH:WDW

*Constitutionality; Establishment Clause, United States Constitution; Legislation; Schools And School Districts; 1987 Senate Bill 366 is facially constitutional. OAG 13-88*

March 17, 1988

FRED A. RISSER, *Chairperson*  
*Senate Organization Committee*

You ask whether 1987 Senate Bill 366, which directs the superintendent of public instruction to loan textbooks to elementary and secondary school students, would be constitutional if enacted into law. Under the bill, the superintendent would, at the request of the student or the student's parent or guardian, loan items on an approved list of textbooks which could not promote the interest of any religion. The bill also requires that public and private school students participate equally in the program.

Although my opinion is necessarily limited to facial constitutionality since no such textbook loan program has ever existed in Wisconsin, it is my opinion that the proposed legislation would not violate the religion clauses contained in the federal and state constitutions.

In analyzing the constitutionality of the proposed legislation, it cannot be overemphasized that "[a]ll statutes are presumed constitutional and will be held to be so unless proven otherwise beyond a reasonable doubt . . ." *St. ex rel. Ft. How. Paper v. Lake Dist. Bd.*, 82 Wis. 2d 491, 505, 263 N.W.2d 178 (1978). If possible, I must also "avoid construing a statute in such a way as would render that statute unconstitutional." *United States Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis. 2d 305, 319, 313 N.W.2d 833 (1982). These principles and their importance are described in detail in *Treiber v. Knoll*, 135 Wis. 2d 58, 64-65, 398 N.W.2d 756 (1987), quoting *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973) and *State ex rel. Carnation M. P. Co. v. Emery*, 178 Wis. 147, 160, 189 N.W. 564 (1922). Also see *Unnamed Petitioners v. Connors*, 136 Wis. 2d 118, 120-21 n.2, 401 N.W.2d 782 (1987). See 76 Op. Att'y Gen. 233, 236 (1987).

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 . . ." By virtue of the fourteenth amendment, this provision applies to the states.

*Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). The following three-part test is applied in order to determine the facial constitutionality of a statute under this provision, which prohibits the "establishment" of religion: "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, 612-13 (1971).<sup>1</sup> Although *Lemon* indicates that direct state reimbursement to parochial schools for the cost of textbooks is not constitutionally permissible, the United States Supreme Court has almost uniformly upheld the constitutionality of various textbook loan programs, using this same three-part test. *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Board of Ed. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236 (1968).<sup>2</sup>

1987 Senate Bill 366 is obviously modeled after 1979 Assembly Bill 227, which in turn "bears a striking resemblance to the statutory language approved by the Court in *Wolman*." 68 Op. Att'y Gen. 287, 289 (1979). In *Wolman*, 433 U.S. at 236-37, the Ohio statute approved by the Court limited the textbook loan program to "secular textbooks" and defined the term "textbook" as "any book or book substitute which a pupil uses as a text or text substitute in a particular class or program in the school he regularly attends." 1987 Senate Bill 366 contains definitions similar to those used in *Wolman*. It defines "textbook" as "a book, reusable workbook or reusable manual, intended as a principal source of study material for an individual pupil in a particular class." It also prohibits the use of any such textbook which "promotes the interests of any religion . . ." For the purpose of analyzing the constitutional question raised in your letter, I perceive no meaningful distinction between the definitions contained in 1987 Senate Bill 366, the definitions contained in *Wolman*, or the definitions contained in

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<sup>1</sup> Political divisiveness, a fourth test which is sometimes used by the Court, see *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring), applies only where "direct financial subsidies are paid . . ." *Mueller v. Allen*, 463 U.S. 388, 403 n.11 (1983).

<sup>2</sup> In *Norwood v. Harrison*, 413 U.S. 455 (1973), the Court did invalidate a statute permitting textbooks to be loaned without regard to whether the public or private school engaged in racially discriminatory policies. However, 1987 Senate Bill 366, section 4, conditions public or private school eligibility for the program on compliance with 42 U.S.C. §2000d (1964), which prohibits such discrimination.

1979 Assembly Bill 227 which are outlined in 68 Op. Att'y Gen. 287.

In *Wolman*, 433 U.S. at 240, the Court found that a textbook loan program serves a secular legislative purpose because “[t]here is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education.” It was indicated in 68 Op. Att’y Gen. at 298, that a statement of legislative purpose would have strengthened the facial constitutionality of 1979 Assembly Bill 227. That suggestion has been heeded in the current bill. 1987 Senate Bill 366, section 1, provides in part that the purpose of the textbook loan program is to “ensure that all pupils in this state share equitably in educational benefits . . .” under Wisconsin Constitution article X, section 3, which provides for the establishment of a uniform system of public schools, but prohibits sectarian instruction in such schools.

I have not discovered any case involving a legal challenge to the constitutionality of a textbook loan program which holds that any such program lacks a secular legislative purpose. The statement of legislative purpose contained in the bill, coupled with the Supreme Court’s statement in *Wolman*, are more than sufficient to indicate that 1987 Senate Bill 366 has a secular legislative purpose.

Turning to the primary effect test, in *Allen*, 392 U.S. at 243, the Court emphasized that, since the books in that case were always owned by the State of New York and were loaned to parents and children rather than parochial schools, the primary effect of the statute was to “make available to all children the benefits of a general program to lend school books free of charge.” Similarly, in *Mueller*, 463 U.S. at 399, where the Court upheld state tax deductions for the partial cost of tuition, textbooks and transportation incurred at public or private schools, the Court acknowledged “that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools . . .” but nonetheless indicated that “the attenuated financial benefits flowing to parochial schools . . .” are not the “evil against which the Establishment Clause was designed to protect.”

*Wolman*, *Allen* and *Mueller* indicate that the federal courts would hold that the primary effect of 1987 Senate Bill 366 is to enhance educational opportunities for students by making secular textbooks equally and readily available to public and private ele-

mentary and secondary school students. Any advancement of religion which would occur in the form of cost savings by parochial schools would be found to constitute merely a secondary or incidental effect of operating such a program.

As to excessive entanglement, the following language by which the Court specifically upheld deductions for the cost of nonreligious textbooks is instructive because it is equally applicable to the compilation of an approved list of nonreligious textbooks by the superintendent:

Turning to the third part of the *Lemon* inquiry, we have no difficulty in concluding that the Minnesota statute does not “excessively entangle” the State in religion. The only plausible source of the “comprehensive, discriminating, and continuing state surveillance,” . . . necessary to run afoul of this standard would lie in the fact that state officials must determine whether particular textbooks qualify for a deduction. In making this decision, state officials must disallow deductions taken for “instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship.” . . . Making decisions such as this does not differ substantially from making the types of decisions approved in earlier opinions of this Court.

*Mueller*, 463 U.S. at 403 (citing *Allen*, *Wolman* and *Meek*).

Given the Court’s holding in *Mueller*, it is abundantly clear that 1987 Senate Bill 366 also does not foster excessive entanglement with religion and therefore may permissibly be enacted under the Establishment Clause.

For the purpose of federal constitutional analysis, it remains largely true that “the constitutionality of the textbook loan programs is one issue to which the Supreme Court’s answer has remained constant.” 68 Op. Att’y Gen. at 291. Thus, in applying the Supreme Court’s decisions concerning the constitutionality of textbook loan programs, lower federal courts have not hesitated to uphold the facial constitutionality of statutes that establish such programs. *See, e.g., Elbe v. Yankton Independent School Dist. No. 1*, 714 F.2d 848 (8th Cir. 1983). I therefore have no hesitation in concluding that 1987 Senate Bill 366 is a permissible enactment under the Establishment Clause.

A state constitutional analysis yields a similar result. Wisconsin Constitution article I, section 18 provides in part as follows: “[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.” Although the same three-part test used by the United States Supreme Court has been employed by the Wisconsin Supreme Court for the purpose of state constitutional analysis, *State ex rel. Warren v. Nusbaum*, 64 Wis. 2d 314, 219 N.W.2d 577 (1974), the court has also noted that this state constitutional provision is “more prohibitive” than the Establishment Clause. *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 227, 170 N.W.2d 790 (1969). Nevertheless, in construing *Reuter*, the court later held as follows:

However, of the difference in wording, this court has recently held: “. . . While words used may differ, both the federal and state constitutional provisions relating to freedom of religion are intended and operate to serve the same dual purpose of prohibiting the ‘establishment’ of religion and protecting the ‘free exercise’ of religion. . . .”

*State ex rel. Holt v. Thompson*, 66 Wis. 2d 659, 676, 225 N.W.2d 678 (1975). And in *State ex rel. Wis. Health Fac. Auth. v. Lindner*, 91 Wis. 2d 145, 163-64, 280 N.W.2d 773 (1979), the court indicated that, if a statute passes muster under the primary effect test with respect to the Establishment Clause of the United States Constitution, it will also pass muster under the identical test with respect to Wisconsin Constitution article I, section 18.

In construing these decisions of the Wisconsin Supreme Court concerning Wisconsin Constitution article I, section 18, the court of appeals has held as follows:

The Wisconsin Supreme Court has recently noted that despite the different wording of the federal and state constitutional provisions respecting religion, both are intended to effect the same objects of preventing the government from “establishing” religion and preserving to individual citizens the right to exercise their religious beliefs freely. . . . Consequently, it has employed the tests enunciated by the United States Supreme Court in construing the requirements of the establishment clause to determine whether specific state laws or actions are violative of either constitutional provision.

*American Motors Corp. v. ILHR Dept.*, 93 Wis. 2d 14, 29, 286 N.W.2d 847 (1979) (citations omitted). Other state courts have employed this same approach in upholding textbook loan programs, reasoning that their state constitutions should be construed in the same manner that the Supreme Court has construed analogous provisions of the federal constitution. See, e.g., *Opinion of the Justices*, 109 N.H. 578, 258 A.2d 343 (1969); *Bowerman v. O'Connor*, 104 R.I. 519, 247 A.2d 82 (1968). See also *People ex rel. Klinger v. Howlett*, 56 Ill. 2d 1, 305 N.E.2d 129, 130 and 139 (dissenting opinion) (1973). Like the court of appeals, I conclude that the test applied by the Wisconsin Supreme Court under article I, section 18 of the Wisconsin Constitution is not significantly different from the three-part test applied by the United States Supreme Court under the Establishment Clause. See 68 Op. Att'y Gen. at 295-99.<sup>3</sup>

I am aware that a number of state courts have held textbook loan programs to be impermissible under various state constitutional provisions. *Fannin v. Williams*, 655 S.W.2d 480 (Ky. 1983); *California Teachers Ass'n v. Riles*, 29 Cal. 3d 794, 176 Cal. Rptr. 300, 632 P.2d 953 (1981); *Bloom v. School Committee of Springfield*, 376 Mass. 35, 379 N.E.2d 578 (1978); *McDonald v. School Bd. of Yankton, Etc.*, 90 S.D. 599, 246 N.W.2d 93 (1976); *Paster v. Tussey*, 512 S.W.2d 97 (Mo. 1974) (*en banc*); *Gaffney v. State Department of Education*, 192 Neb. 358, 220 N.W.2d 550 (1974); *Dickman v. School District No. 62C, Oregon City*, 232 Or. 238, 366 P.2d 533 (1960); *Almond v. Day*, 197 Va. 419, 89 S.E.2d 851 (1955). See also *Epeldi v. Engelking*, 94 Idaho 390, 488 P.2d 860 (1971). But caution is warranted in according weight to these decisions for at least three reasons.

First, even though these courts were construing state constitutional provisions, it is likely that many of them would have been influenced to construe their constitutional counterparts to the Establishment Clause differently if they had had the benefit of all four of the Supreme Court's decisions in *Mueller*, *Wolman*, *Meek* and *Allen*. Second, even where more stringent analyses than that em-

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<sup>3</sup> I am not suggesting that all provisions of the state constitution will automatically be construed by the courts of this state in the same fashion that the Supreme Court construes analogous provisions of the federal constitution. See *Jacobs v. Majors*, 139 Wis. 2d 492, 407 N.W.2d 832 (1987). Compare Abrahamson, "Reincarnation of State Courts," 36 Sw. L.J. 951 (1982) with Hudnut, "State Constitution and Individual Rights: The Case For Judicial Restraint," 63 Den. U. L. Rev. 85 (1985).

ployed by the Supreme Court were utilized by these courts, insofar as might be applicable to Wisconsin Constitution article I, section 18, primary effect appears to be the principal reason advanced by these courts for striking down textbook loan programs. *See, e.g., Riles*, 632 P.2d at 960 (citing cases). Since such an approach was specifically rejected in *Lindner*, that kind of rigorous analysis is not required under Wisconsin Constitution article I, section 18. Finally, and perhaps most importantly, none of the constitutional provisions construed by these state courts contains language precisely identical to that in Wisconsin Constitution article I, section 18.

With respect to the Establishment Clause, I have already indicated that the proposed legislation has a secular legislative purpose, has a primary effect that would neither inhibit nor advance religion and would not foster excessive governmental entanglement with religion. That same analysis indicates that the proposed legislation is also a permissible enactment under Wisconsin Constitution article I, section 18.

I therefore conclude that 1987 Senate Bill 366 would be constitutional on its face if enacted into law.

DJH:FTC

*Automobiles And Motor Vehicles; Law Enforcement; Municipalities; Ordinances;* The ordinance adopted by the Village of West Milwaukee which authorizes the placement of an immobilization device on an automobile of an individual who has ten or more outstanding or otherwise unsettled traffic violations does not constitute a valid exercise of a municipality's authority under Wisconsin law. OAG 14-88

March 30, 1988

E. MICHAEL MCCANN, *District Attorney*  
*Milwaukee County*

You have requested my opinion as to the validity of an ordinance adopted by the village of West Milwaukee which authorizes the police department to apply an immobilization device to the automobile of an individual who has ten or more outstanding or otherwise unsettled traffic violations. The pertinent portions of the ordinance read as follows:

- A. A motor vehicle parked on a public street or highway at any time may, by or under the direction of a Police Officer of the Village of West Milwaukee Police Department, be immobilized in such a manner as to prevent its operation if there are ten or more outstanding or otherwise unsettled traffic violations, pending against the owner of such motor vehicles.

. . . .

- C. The owner of such immobilized vehicle or other authorized person, shall be permitted to secure release of the vehicle upon:
1. Depositing the amount of the penalty for each violation for which there is an outstanding or otherwise unsettled traffic violation notice or warrant; and
  2. The payment of the fees as required by Subsection E of this paragraph.

. . . .

- D. The immobilizing device or mechanism shall remain in place for forty-eight (48) hours unless the owner has complied with Subsection 3 of this Section. If such compliance has not occurred within forty-eight (48) hours the vehicle shall be towed or impounded. Towing and storage fees as specified in

Subsection E of this paragraph shall be paid along with fees specified in Subsection C of this paragraph before the owner of such vehicle, or authorized person, shall be permitted to repossess or secure the release of the vehicle.

- E. The owner of an immobilized vehicle shall be subject to a fee of \$35.00 for such immobilization. The owner of an immobilized vehicle which was impounded shall be subject to a total fee of \$80.00 plus a fee for storage.

The first question presented is whether the ordinance and the procedures to enforce it violate the due process and equal protection clauses of the fourteenth amendment to the United States Constitution. The second question is whether the ordinance constitutes a valid exercise of a municipality's authority under Wisconsin law. Since I conclude that the ordinance does not constitute a valid exercise of a municipality's authority, the constitutional question is moot.

Villages may manage and control their highways to provide for the public health, safety and welfare except as provided elsewhere in the statutes. Sec. 61.34(1), Stats. Further, they may regulate parking "beyond the prohibitions, limitations or restrictions imposed by ch. 346, except that they may not modify the exceptions set forth in s. 346.50." Sec. 349.13(1), Stats. Section 61.34(5), Stats., mandates a liberal construction of these rights and powers.

Despite the breadth of a village's power over parking violations, a municipality may not exact a penalty greater than that provided for in state law. See *Madison v. McManus*, 44 Wis. 2d 396, 401, 171 N.W.2d 426 (1969). In my opinion, the ordinance in question exacts a penalty greater than that authorized by state law. Section 345.28 expressly prescribes the methods by which parking ordinances may be enforced. It provides that forfeitures may be assessed and describes the payment procedures or, in default of payment, it establishes that a summons and warrant may be issued. A request may be made to the Department of Transportation to suspend the registration of the vehicle involved. The Department of Transportation may suspend the registration of the vehicle pursuant to section 341.63(1)(c). Furthermore, section 349.13(3) authorizes a municipal traffic officer to move or tow an illegally parked vehicle. However, no statute expressly authorizes a traffic officer to "immobilize" a vehicle.

Moreover, the same principles of statewide uniformity of traffic laws apply to nonparking and other traffic violations. *See* secs. 349.03(1)(a) and (b) and 349.06(1), Stats. A municipality can enact its own law if the Legislature has been silent. *See City of Janesville v. Garthwaite*, 83 Wis. 2d 866, 266 N.W.2d 418 (1978) (ordinance could regulate squealing tires because the Legislature had remained silent on the subject). Here, the Legislature has been anything but silent on such traffic violations and the manner of enforcement and forfeiture collection. *See* sec. 345.47, Stats.

Accordingly, it is my opinion that the ordinance is in excess of current authority provided by the Legislature and thus is not a permissible exercise of the village's authority.

DJH:GBS

*Intoxicating Liquors; Malt Beverages; Section 125.33(1)(a), Stats., prohibits a person from having an interest in real estate leased to a Class "B" licensee while also being a director, officer or shareholder of a brewery. OAG 15-88*

March 31, 1988

KAREN A. CASE, *Secretary*  
*Department of Revenue*

You have asked whether under Wisconsin's liquor laws, specifically section 125.33(1)(a), Stats., a person is prohibited from having an interest in real estate leased to a Class "B" licensee while also being a director, officer or stockholder of a brewery. For the reasons stated below, I have determined that section 125.33(1)(a) prohibits such a relationship.

Your letter describes the following scenario:

"D", a brewery, holds a Wisconsin brewery permit and a Wisconsin wholesale beer license. "X" is president of the brewing company, as well as chairman of the board, chief executive officer, a director, and major stockholder. The results of an investigation conducted by the Department of Revenue show that "X" and his wife, "Y", are directly involved in two partnerships that hold an interest in the real estate leased to a Class "B" licensee. "X" and "Y" are partners in ABC Properties, each owning a 25% interest. The remaining 50% interest is held by the Trust of "Z", deceased father of "Y". The real estate manager for ABC Properties is "Y". "X" and "Y"'s home address is also the business address for ABC Properties. During an interview the Department of Revenue conducted with the Class "B" licensee, who leases property from ABC Properties, it was revealed that the licensee entered into a five-year lease with ABC Properties and the licensee negotiated and signed his lease with "X." Moreover, an inspection of the Class "B" licensee's premises was conducted by the Department of Revenue and it was discovered that "D"'s beers were sold exclusively.

Section 125.33(1)(a), Wisconsin's "tied-house" law, with certain exceptions not here applicable, prohibits brewers or wholesalers from giving things of value to Class "B" licensed retailers. This section states, in relevant part:

[N]o brewer or wholesaler may furnish, give, lend, lease or sell any furniture, fixtures, fittings, equipment, money or other thing of value to any campus or Class "B" licensee or permittee, or to any person for the use, benefit or relief of any campus or Class "B" licensee or permittee, or guarantee the repayment of any loan or the fulfillment of any financial obligation of any campus or Class "B" licensee or permittee. Such actions may not be taken by the brewer or wholesaler directly or indirectly, or through a subsidiary or affiliate corporation, or by any officer, director, stockholder or partner thereof.

"Tied-house" laws are designed to prevent the integration of retail and wholesale outlets, and to stop manufacturers, wholesalers and distributors from owning or controlling retail outlets. 48 C.J.S. *Intoxicating Liquors* §226 (1981). Historically, Wisconsin's liquor control laws have evinced a legislative intent that the fermented malt beverage industry be divided into three levels: the manufacturer, the distributor and the retailer. *State v. Kay Distributing Co., Inc.*, 110 Wis. 2d 29, 37, 327 N.W.2d 188 (Ct. App. 1982). The object and intent of Wisconsin's "tied-house" law is:

[T]o prevent manufacturers and wholesalers from acquiring complete or partial control of specific Class "B" retailers, directly by owning them or *indirectly by creating financial or moral obligations*. The purpose is clearly to assure the freest competition in the industry by preventing monopolistic practices and, to divorce *entirely* the wholesaler from the Class "B" retailer.

61 Op. Att'y Gen. 68, 69 (1972) (emphasis supplied).

The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. *State v. Hurd*, 135 Wis. 2d 266, 276, 400 N.W.2d 42 (Ct. App. 1986). In determining legislative intent, first resort is to the language of the statute itself. *State v. Pham*, 137 Wis. 2d 31, 34, 403 N.W.2d 35 (1987). When the language of the statute is clear and unambiguous, the statute must be interpreted on the basis of the plain meaning of its terms. *State v. Trongeau*, 135 Wis. 2d 188, 191, 40 N.W.2d 12 (Ct. App. 1986). A cardinal rule in interpreting statutes is to favor a construction that fulfills the purpose of the statute over a construction that defeats it. *State v. Stoehr*, 134 Wis. 2d 66, 76, 396 N.W.2d 177 (1986).

The language of the statute is clear and unambiguous. The plain meaning of its terms must be given effect. The ban of the statute in

terms of wholesaler-retailer relationships is extended to the doing of the forbidden acts indirectly as well as directly. No brewer or wholesaler, either “*directly or indirectly*,” or through a subsidiary or affiliate corporation, or by *any* officer, director, stockholder or partner,” may “give, lend, lease or sell any furniture, fixtures, fittings, equipment, money, or other thing of value to any . . . Class ‘B’ licensee.” Sec. 125.33(1)(a), Stats.

My interpretation of the plain meaning of section 125.33(1)(a) finds support in 44 Op. Att’y Gen. 34 (1955). In that opinion, the issue addressed was whether section 66.054(4)(a), Wisconsin’s former “tied-house” law, prohibited the furnishing, giving or lending of money or other thing of value by either a brewer, bottler or wholesaler to a trade association comprised of holders of Class “B” licensees. In resolution of the issue, my predecessor concluded that “the interposition of a trade association of the character that you describe between the brewer, bottler, or wholesaler, and the individual licensee is no defense to a charge of violation of the statute.” 44 Op. Att’y Gen. at 36. Similarly, under this set of facts, a partnership owned by “X” and his immediate relatives interpositioned between the brewery-wholesaler and the Class “B” licensee does not work to remove it from the proscription of section 125.33(1)(a). To conclude otherwise would ignore the plain language and the long recognized intent of the statute.

It might be argued that the language of section 125.33(1)(a) should be construed to merely prohibit officers, directors, stockholders or partners who have effective control over a brewery or wholesale distributing business from providing or leasing things of value to Class “B” retailers. This proposition finds support in Wis. Admin. Code §TAX 8.87(4)(e), as well as in 22 Op. Att’y Gen. 814 (1933). Section TAX 8.87(4)(e) sets forth the following as an example of a prohibited “indirect interest” under chapter 125: “A natural person who has effective control in a partnership, association, or corporation which holds a wholesale permit and who leases premises to a retail licensee.” The opinion at 22 Op. Att’y Gen. 814 concluded that Wisconsin’s then existing “tied-house” law did not bar a fixture corporation from furnishing or leasing fixtures to a Class “B” licensee, even though stockholders of a brewery also owned stock in the fixture corporation, as long as the fixture corporation was a legitimate business and not a mere subterfuge. Notwithstanding these authorities, however, I have determined that the

applicability of section 125.33(1)(a) does not hinge upon whether a particular officer, director, stockholder or partner has effective control over a brewery or wholesale licensee or upon whether the furnishing of things of value constitutes legitimate business.

First, the statute does not limit itself in applicability to officers, directors, stockholders and partners who have a specified degree of control over a brewery or wholesaler. The statute is all prohibitive. Section 66.05(10)(c) as created by chapter 207, Laws of 1933, a precursor to section 125.33(1)(a), originally limited the application of our "tied-house" laws to conduct engaged in by a "brewer, bottler, wholesaler, or corporation a majority of whose stock is owned by any brewer, bottler or wholesaler." But with the passage of chapter 121, Laws of 1941, the Legislature expressly broadened the scope of the proscription to include prohibited conduct engaged in by "a subordinate or affiliate corporation, or by any officer, director, stockholder or partner thereof." By doing so the Legislature evinced an intent to fill the gap in the law which allowed interested third parties to engage in conduct which was prohibited to brewers and wholesalers.

Second, the opinion at 22 Op. Att'y Gen. 814 is not persuasive insofar as it was offered before the change in the law in 1941 which expanded the coverage of Wisconsin's "tied-house" law. The obsolescence of the opinion at 22 Op. Att'y Gen. 814 was discussed in 61 Op. Att'y Gen. 68. In that opinion, it was recognized that the change in the law occurring in 1941 indicated that "the principal concern of the legislature was to broaden the scope of the tied-house prohibition so as to eliminate the loopholes that had been created by the original language of the tied-house laws." *Id.* at 73.

Finally, Wisconsin Administrative Code §TAX 8.87(4)(e) is but one of a number of examples of prohibited interests under chapter 125 set forth in the code. That section of the code expressly states that the list of business interests is not an exhaustive statement of prohibited interests under chapter 125. Prohibited interest relationships can exist without regard to whether effective control or improper influence is present.

It is my opinion, therefore, that section 125.33(1)(a) prohibits the business relationships described in your letter. Proof regarding a violation of 125.33(1)(a) does not require an actual showing of influence by a brewer or wholesaler upon the product choices of a

retailer. Tied-house laws are specifically designed to alleviate the need for such a showing. That is why the Legislature broadly chose to bar the described relationships whether they exist directly or indirectly.

DJH:JMG

*Municipalities; Waste Management;* Proposed municipal solid waste facilities which replace existing municipal solid waste facilities are not exempt from the needs determination under section 144.44(2)(nm), Stats. OAG 16-88

March 31, 1988

CAL W. KORNSTEDT, *Corporation Counsel*  
*Dane County*

You have requested my opinion on the meaning of section 144.44(2)(nm)4., Stats., relating to the application of the so-called "needs" determination to the replacement of existing municipal solid waste disposal facilities. Specifically, you ask whether a municipality is exempt from the needs determination if it is applying for a facility to replace an existing facility. It is my opinion that proposed municipal solid waste disposal facilities are not exempt from the needs determination. It is further my opinion that the Department of Natural Resources may approve a municipal facility whose need is not otherwise justified if it is needed to replace an existing facility, but that the mere showing that the proposed facility will replace an existing facility is not sufficient justification.

Section 144.44(2)(nm) provides:

(nm) *Determination of need; issues considered.* A feasibility report shall contain an evaluation to justify the need for the proposed facility unless the facility is exempt under par. (nr). The department shall consider the following issues in evaluating the need for the proposed facility:

1. An approximate service area for the proposed facility which takes into account the economics of waste collection, transportation and disposal.
2. The quantity of waste suitable for disposal at the proposed facility generated within the anticipated service area.
3. The design capacity of the following facilities located within the anticipated service area of the proposed facility:
  - a. Approved facilities, as defined under s. 144.441(2)(a)1, including the potential for expansion of those facilities on contiguous property already owned or controlled by the applicant.
  - b. Nonapproved facilities, as defined under s. 144.442(1)(c), which are environmentally sound. It is presumed that a nonap-

proved facility is not environmentally sound unless evidence to the contrary is produced.

c. Other proposed facilities for which feasibility reports are submitted and determined to be complete by the department.

d. Facilities for the recycling of solid waste or for the recovery of resources from solid waste which are licensed by the department.

e. Proposed facilities for the recycling of solid waste or for the recovery of resources from solid waste which have plans of operation which are approved by the department.

f. Solid waste incinerators licensed by the department.

g. Proposed solid waste incinerators which have plans of operation which are approved by the department.

4. If the need for a proposed municipal facility cannot be established under subds. 1 to 3, the extent to which the proposed facility is needed to replace other facilities of that municipality at the time those facilities are projected to be closed in the plans of operation.

In construing a statute, it must be given its plain and unambiguous meaning. *State v. Wittrock*, 119 Wis. 2d 664, 670, 350 N.W.2d 647 (1984). Resort to legislative history is appropriate only when the statute is ambiguous and subject to alternative reasonable interpretations. *State v. Engler*, 80 Wis. 2d 402, 406, 259 N.W.2d 97 (1977); *In Matter of Estate of Johnson*, 113 Wis. 2d 126, 133, 334 N.W.2d 574 (Ct. App. 1983). Additionally, a statute must be read *in pari materia* with related statutes. *State v. Wagner*, 136 Wis. 2d 1, 5, 400 N.W.2d 519 (Ct. App. 1986).

I find that section 144.44(2)(nm)4. is clear and unambiguous, particularly when read in conjunction with related statutes, and that it does not exempt municipal replacement facilities from the needs determination. The Legislature has specifically exempted certain facilities from the needs determination in section 144.44(2)(nr). Since municipal replacement facilities are not expressly included in section 144.44(2)(nr), they are excluded under the rule *expressio unius est exclusio alterus*. *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974); *State v. Smith*, 103 Wis. 2d 361, 366, 309 N.W.2d 7 (Ct. App. 1981), *aff'd* 106 Wis. 2d 17, 315 N.W.2d 343 (1982). Moreover, section 144.44(2)(om) states that

“[e]xcept for a facility which is exempt under par. (nr), the department shall issue a determination of need . . . .”

The language of section 144.44(2)(nm) clearly indicates that whether the facility is needed to replace an existing facility is but one factor to be evaluated in a needs determination for a proposed municipal facility. The statute’s opening paragraph provides that “[t]he department shall *consider* the following issues in *evaluating* the need for a proposed facility . . . .” (Emphasis added.) It then lists those factors which must be considered, including the projected service area, potential waste volumes and specific categories of existing, proposed or potentially expanded facilities. Sec. 144.44(2)(nm)1.-3., Stats. Section 144.44(2)(nm)4. only requires the department to consider whether “the proposed facility is needed to replace other facilities of that municipality . . . .” if the need for the proposal “cannot be established under subds. 1 to 3 . . . .” Thus, the Legislature has, in essence, created a separate factor which must be evaluated under limited circumstances.

As a final matter, the statute does not require the department to find that the facility is needed merely because it is a replacement facility. Such an interpretation would create an effective exemption, which is inconsistent with the structure of the statute as well as section 144.44(2)(nr) and (om). It would also render meaningless the language in section 144.44(2)(nm)4. which requires the department to evaluate whether the proposed facility is “needed” to replace existing facilities.

It is therefore my opinion that municipal replacement facilities are not exempted from the needs determination. The need for a replacement facility must be considered by the department to the same extent as those categories of facilities listed in section 144.44(2)(nm)3., except that this factor must be considered only if need cannot otherwise be established. Finally, there is nothing in the statute which mandates that the department determine that the facility is needed solely because it is a replacement facility.

DJH:CAS

*Children; Confidential Reports; Counties; Public Records;* A county department of social services has no discretion to refuse to disclose reports and records of child abuse or neglect to the subject of the report or the subject's attorney under section 48.981(7)(a)1. and (c), Stats. OAG 17-88

April 8, 1988

RALPH E. SHARP, JR., *Corporation Counsel*  
*Dodge County*

Your office asks whether a county department of social services has any discretion to disclose or not to disclose reports and records under section 48.981(7)(a)1. and (c), Stats., which provides:

(a) All reports and records made under this section and maintained by the department, county departments and other persons, officials and institutions shall be confidential. Reports and records may be disclosed only to the following persons:

1. The subject of a report, except that the person or agency maintaining the record or report may not disclose any information that would identify the reporter.

. . . .

(c) Notwithstanding par. (a), the subject of a report may authorize the disclosure of a record to the subject's attorney. The authorization shall be in writing. Any information that would identify a reporter shall be deleted before disclosure of a record under this paragraph.

Under section 48.981 generally, certain persons are required and other persons are encouraged to report suspected cases of child abuse or neglect. Chapter 355, Laws of 1977, repealed and recreated section 48.981 and for the first time provided for confidentiality in subsection (10) with the following language:

(a)1. All reports and records made under this section and maintained by the department, county agencies, the central registry and other appropriate persons, officials and institutions shall be confidential, except that confidentiality of and access to preliminary investigative reports maintained by the department shall be governed solely by sub. (7). Information shall not be made available to any individual or institution except to:

. . . .

This original language under subsection (10) evinces the legislative intent that the information be made available upon request to the four persons or entities thereafter enumerated. An analysis prepared by the Legislative Reference Bureau at that time states in pertinent part:

Reports and records relating to child abuse, mental injury or neglect *will be confidential, except* to the subject, staff, and attending physician, or a court conducting abuse, neglect or child protective proceedings. Information will be available for bona fide researchers, but persons and reporters will not be identified. Subjects will not be told the name of the initial reporter.

(Emphasis added.)

The present version of section 48.981(7)(a) was enacted by 1983 Wisconsin Act 172 with no apparent change intended except to expand the list of persons to whom records and reports may be disclosed.

The Legislature in 1977, therefore, established an absolute right to know and inspect the contents of these reports and records in plain and unambiguous language for the persons and entities covered by the exceptions to the general rule of confidentiality. *See State ex rel. Journal Co. v. County Court*, 43 Wis. 2d 297, 308-09, 168 N.W.2d 836 (1969); *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N.W. 30 (1887). Thus, the Legislature has removed from consideration the balancing test of weighing any possible harm done to the public interest against the right of a member of the public to have access to particular public records or documents. *See*, for example, *State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d 539, 334 N.W.2d 252 (1983). The public records statutes under sections 19.21 to 19.37 only apply “[e]xcept as otherwise provided by law.” Sec. 19.35(1), Stats.

Section 48.981(7)(a) in clear and unambiguous mandatory language establishes an exemption from disclosure. After stating the general rule that all such reports and records shall be confidential, however, subsection (7)(a) enumerates fourteen exceptions to whom reports and records may be disclosed, including the subject of a report under subsection (7)(a)1. and, when authorized, the subject’s attorney under subsection (7)(c). It is well settled that an exception takes out of the statute something that otherwise might be part of the subject matter of that statute. *Garcia v. Chicago & N.*

*W. R. Co.*, 256 Wis. 633, 638, 42 N.W.2d 288 (1950); *Pabst Brewing Co. v. Milwaukee*, 148 Wis. 582, 586-87, 133 N.W. 1112 (1912).

In analyzing whether the Legislature intended a provision to be mandatory or directory, it is necessary to consider the consequences resulting from one construction or the other. *Karow v. Milwaukee County Civil Serv. Comm.*, 82 Wis. 2d 565, 572, 263 N.W.2d 214 (1978). Although the word “may” often is construed as permissive, it is my opinion for the reasons hereafter set forth that the county department of social services has no such discretion in disclosing reports and records to the subject of a report and to the subject’s attorney where the subject of the report authorizes such disclosure in writing.

Furthermore, the word “may” logically applies to all of the persons enumerated thereafter. It is my opinion that absurd consequences would arise from granting to a county department of social services the authority to refuse disclosure, for example, to (1) appropriate staff of the department of health and social services or a county department, (2) an attending physician for purposes of diagnosis and treatment, (3) a law enforcement officer or agency for purposes of investigation or prosecution, (4) a court conducting proceedings related to a petition under section 48.13 for a child in need of protection or services or (5) the county corporation counsel or district attorney representing the interests of the public in such court proceedings.

In particular, subsection (7)(c) implies the need for disclosure to the subject’s attorney presumably because some legal action is pending or anticipated. Under such circumstances principles of due process are a potential concern although it is not necessary to reach this issue in light of my interpretation of these confidentiality provisions.

DJH:DPJ

*Conservation; Counties; Ordinances;* A county ordinance passed under section 92.11, Stats., may be applicable to incorporated as well as unincorporated areas of the county, whereas a county ordinance passed under section 92.16 is applicable only in the unincorporated areas of the county. OAG 18-88

April 29, 1988

PATRICK J. FARAGHER, *Corporation Counsel*  
*Washington County*

You have asked for my opinion whether ordinances adopted by counties pursuant to sections 92.11 and 92.16, Stats., are applicable to the incorporated as well as the unincorporated areas of a county. Both statutes were recently amended by 1987 Wisconsin Act 27.

In considering the applicability of the county's ordinances, the starting point is the rule stated in *St. ex rel. Teunas v. Kenosha County*, 142 Wis. 2d 498, 503, 418 N.W. 2d 833 (1988): "[T]he powers of the county boards of supervisors are limited to those which are conferred by the legislature . . ." The court also stated at 504: "It has consequently become well recognized that 'a county board has only such powers as are expressly conferred upon it or necessarily implied from the powers expressly given or from the nature of the grant of power.'" *Town of Vernon v. Waukesha County*, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981). Stated otherwise, "counties are creatures of the Legislature and their powers must be exercised within the scope of authority ceded to them by the state . . ." *Dane County v. H&SS Dept.*, 79 Wis. 2d 323, 329-30, 255 N.W.2d 539 (1977) (citing *State ex rel. Conway v. Elvod*, 70 Wis. 2d 448, 450, 234 N.W.2d 354 (1975)).

Prior to amendment, section 92.11(1) provided: "To promote soil and water conservation or nonpoint source water pollution abatement, a land conservation committee may develop proposed county ordinances for the regulation of land use and land management practices."

As amended by section 1692ge of 1987 Wisconsin Act 27, section 92.11(1) now provides: "To promote soil and water conservation or nonpoint source water pollution abatement, a county, city or village may develop ordinances for the regulation of land use, land management and pollutant management practices."

As a result of the amendment, cities and villages as well as counties are authorized to develop the ordinances for the regulation of land use, land management and pollutant management practices. Even though the amendment added cities and villages as governments that could develop the ordinances, the remainder of section 92.11 remained unchanged, including section 92.11(2)(a) which provides: "An ordinance enacted under this section may be applicable throughout the county or to any part of the county, including both incorporated and unincorporated areas." Also, as before the amendment, section 92.11(4) provides that no ordinance adopted under section 92.11 may take effect in any town, village or city in the county unless the ordinance is approved by referendum.

Even though section 92.11(1) now authorizes cities and villages to develop the same type of ordinances that counties may adopt, the ordinances adopted by the county under section 92.11 may still be applicable to incorporated as well as unincorporated areas. To interpret section 92.11 otherwise would be to ignore subsections (2) and (4); and statutes are not to be construed in such a way that would result in rendering a part of the statute surplusage. *Teunas*, at 511. To give those subsections meaning, section 92.11 must be interpreted to provide that ordinances adopted by the county may still be applicable to incorporated as well as unincorporated areas; and that county ordinances must still be approved by referendum before they can be effective in towns, villages or cities.

The express language making a county ordinance applicable to the incorporated as well as the unincorporated areas is lacking in section 92.16, however. Prior to amendment, section 92.16 provided: "A county may adopt an ordinance requiring all earthen manure storage facilities constructed after July 2, 1983, to meet the technical standards of the county and rules of the department. The department shall adopt rules for ordinances setting standards and criteria for construction of earthen manure storage facilities."

As amended by section 1692hm of 1987 Wisconsin Act 27, section 92.16 now provides:

**Manure storage facilities.** A county, city or village may adopt an ordinance requiring manure storage facilities constructed after July 2, 1983, to meet the technical standards of the county, city or village and rules of the department. The department shall

adopt rules for ordinances setting standards and criteria for construction of manure storage facilities.

In section 92.16, the Legislature has not expressly given the county authority to enact an ordinance that is applicable in incorporated areas. There is no necessary implication the county has such authority. Indeed, the implication is to the contrary because section 92.11 expressly makes the county ordinance applicable to incorporated areas while section 92.16 is silent, and because cities and villages are expressly granted the authority to enact the same type of ordinance that the county can enact.

A conclusion that the county's ordinance under section 92.16 is not applicable to incorporated areas is consistent with the statement in 56 Op. Att'y Gen. 126, 128 (1967), quoting from 20 C.J.S. *Counties* §92 (1940):

*Territorial limitations.* A county ordinance is effective only within the boundaries of the county. Furthermore, since municipalities and counties are separate and distinct governmental entities . . . a county ordinance which involves the exercise of any of the police powers granted to municipalities cannot be effective within the limits of municipalities located within the county.

The conclusion is also consistent with the summary of the law stated in 62 C.J.S. *Municipal Corporations* §114 (1949).

The attorney general opinion cautioned that the general rule stated in C.J.S. is not always applicable in Wisconsin; but the opinion then cited statutes that expressly specify the areas covered by county ordinances. 56 Op. Att'y Gen. at 128. Section 92.16, however, does not contain such express language. In my opinion, an ordinance adopted by a county under section 92.16 would be applicable only to the unincorporated areas of the county.

DJH:SWK

*Advertising; Constitutional Law; Legislation;* Section 13.72, Stats., which prohibits anonymous paid advertising favoring or opposing pending legislation, is unconstitutional. OAG 19-88

April 29, 1988

DOUGLAS LA FOLLETTE, *Secretary of State*

You have asked whether section 13.72, Stats., is constitutional. That statute provides:

Compensation for published articles on matters pending before legislature to be reported; penalty. (1) Whenever any thing of value is paid or a promise or agreement to pay any thing of value is given to the owner or publisher or any editor, reporter, agent or employe of any newspaper or other periodical for the publication therein of any article, editorial or other matter favoring or opposing, or which is intended or tends to favor or oppose, any bill, resolution or other matter pending in the legislature, excepting a paid advertisement showing the name and address of the person authorizing the publication and the amount paid or agreed to be paid therefor, the owner or publisher of such newspaper or periodical shall, within 10 days after such publication, file with the secretary of state a statement showing the amount of money or other thing of value paid or agreed to be paid and the name and address of the person from whom such payment or agreement was received.

(2) Violation of this section is a misdemeanor and punishable by a fine of not less than \$500 nor more than \$5,000 for each offense.

I must conclude the statute violates fundamental first amendment rights and is unconstitutional on its face.

When a statute is challenged as unconstitutional, the courts, and this office, must indulge every presumption in favor of constitutionality and will sustain a statute if it is at all possible to do so. *Quinn v. Town of Dodgeville*, 122 Wis. 2d 570, 364 N.W.2d 149 (1985). When a statute infringes on fundamental first amendment rights, however, the burden of establishing the constitutionality of the statute is on the statute's proponent. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971). The state must have a compelling interest in the regulation of a subject within its constitutional power to regulate in order to justify limiting first amendment free-

doms. *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963). Even when the state may regulate an area, it must do so in a manner that does not unduly infringe the protected freedom. *Cantwell v. State of Connecticut*, 310 U.S. 296, 304 (1940). Therefore, even if the state may regulate in the area, the statute "must be narrowly tailored to further the State's legitimate interest." *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972).

If a statute purports to regulate in areas protected by the first amendment, the statute is unconstitutional on its face or unconstitutionally overbroad. *Grayned*, 408 U.S. at 114-15. An overbroad statute is one "that is designed to burden or punish activities which are not constitutionally protected, but the statute sweeps too broadly and includes within its compass activities protected by the First Amendment." *State v. Princess Cinema of Milwaukee*, 96 Wis. 2d 646, 655, 292 N.W.2d 807 (1980). Section 13.72 is overbroad and unconstitutional on its face.

Certainly lobbying activities may be regulated consistent with the first amendment. The Supreme Court upheld federal lobbying regulations in both *United States v. Rumely*, 345 U.S. 41 (1953), and *United States v. Harriss*, 347 U.S. 612 (1954). The lobbying regulations were upheld, however, only because the Court construed the phrase "lobbying activities" to mean lobbying in its commonly accepted sense, that is, "representations made directly to the Congress, its members, or its committees." *Rumely*, 345 U.S. at 47. In *Harriss*, 347 U.S. at 623, the Court found it necessary to construe the legislation narrowly "to avoid constitutional doubts." One of the necessary limiting constructions was that the lobbying must have been through direct communication with members of Congress. To the extent section 13.72 attempts to regulate a lobbyist's right "to saturate the thinking of the community," *Rumely*, 345 U.S. at 47, it impinges directly on the lobbyist's constitutionally protected right to "purvey his wares without penalty or restraint when his approach is to others than members of Congress." *Zwickler v. Koota*, 290 F. Supp. 244, 256 (1968), *rev'd on other grounds*, 394 U.S. 103 (1969).

That is not the law's only fault. Although located in that section of the statutes regulating lobbying, the prohibitions of section 13.72 apply to every citizen: A citizen wishing to purchase newspaper space to comment on drunk driving legislation, handgun control or any other issue before the Legislature would have to agree to have

his or her name, address and the amount paid published in the advertisement or the newspaper would have to report that citizen to the secretary of state.

In *Talley v. California*, 362 U.S. 60 (1960), the Supreme Court considered the constitutionality of a municipal ordinance prohibiting the distribution of handbills which did not include the names and addresses of the persons who prepared, distributed or sponsored the handbills. Violation of the ordinance was a criminal offense. The Court noted that the ordinance was not limited to handbills whose content was obscene or offensive to public morals or which advocated unlawful conduct and was not limited to providing a way to identify those responsible for fraud, false advertising or libel. The ordinance was constitutionally infirm because it barred all handbills under all circumstances that did not have the names and addresses printed on them in the place the ordinance required. *Talley*, 362 U.S. at 64. Section 13.72 suffers the same defect. The ordinance in *Talley* prohibited anonymous handbills; section 13.72 prohibits anonymous paid advertising. Neither is acceptable under the first amendment. *Accord People v. White*, 116 Ill. 2d 171, 506 N.E.2d 1284 (1987).

In *American Civil Liberties Union, Inc. v. Jennings*, 366 F. Supp. 1041 (D.C. Cir. 1973), the court considered the constitutionality of that part of the Federal Election Campaign Act of 1971 which prohibited newspapers from charging a candidate for advertising unless the candidate first certified to the publisher that the payment for the advertising would not violate campaign spending limits. The media was required to take "reasonable precautions under the particular circumstances to verify the identity and affiliation of such person and the accuracy of the written statement." Because the publication of the advertisements without the representations made the media vulnerable to criminal prosecution, the court found that the statute was "tantamount to government prescription of what may or may not appear in public print." The alternative, compliance with the certification requirements, was "nothing less than the enforcement of a system of prior restraints upon publication." *American Civil Liberties Union*, 366 F. Supp. at 1050-51.

I realize that application of the overbreadth doctrine is "strong medicine and should be employed only sparingly and only as a last resort." Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.

*Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). The Wisconsin Supreme Court has limited the definition of lobbying, *State v. Hoebel*, 256 Wis. 549, 553, 41 N.W.2d 865 (1950), but that limiting definition is of no assistance in construing section 13.72. No limiting construction can change the fact that section 13.72 does not regulate lobbying; it regulates “pure speech.” *Lovell v. City of Griffin*, 303 U.S. 444 (1938). No limiting construction can save section 13.72 from these multiple constitutional defects.

DJH:AL

*County Board; Prisons And Prisoners; Sheriffs;* Neither the sheriff nor the county board may “privatize” the jailer function of the office of sheriff under section 59.23(1), Stats., by contracting with a private firm to take charge and custody of county prisoners held in the county jail. OAG 20-88

April 29, 1988

WILLIAM A.J. DRENGLER, *Corporation Counsel*  
*Marathon County*

You advise that various committees of the Marathon County board, in cooperation with the county administrator, the sheriff and citizen advisory groups, are discussing the issue of “privatization” of the county jail. As a result, you request my opinion on the following related questions:

1. Is it legal to “privatize” the jailer function of the Sheriff’s duties under Wis. Stat. 59.23(1) by the method of a county contracting with a private firm for the care and custody of county prisoners held in a county jail?
2. Does your opinion change if a sheriff is party to such a contract either in his official capacity alone or in concert with a county board budgetary and contractual decision?

The answer to both questions is no.

Section 59.23(1), Stats., provides that the sheriff shall “[t]ake the charge and custody of the jail maintained by his county and the persons therein, and keep them himself or by his deputy or jailer.” This function of the sheriff is one of the most central and important of his historic duties and was early recognized by our supreme court as a distinctive constitutional feature of the office from time immemorial, which even the Legislature is not competent to take away or transfer to another. *State ex rel. Kennedy v. Brunst*, 26 Wis. 412 (1870). See also *Professional Police Ass’n v. Dane County*, 106 Wis. 2d 303, 310, 316 N.W.2d 656 (1982); *Schultz v. Milwaukee County*, 245 Wis. 111, 114-15, 13 N.W.2d 580 (1944). Referring to the above-quoted language of section 59.23(1), in *Bell v. Fond du Lac County*, 53 Wis. 433, 433-34 (1881), the supreme court further stated that “the statute imposes the absolute duty and responsibility” upon the sheriff to take charge of the persons confined in the county jail and that “the sheriff has no election or choice in the matter.”

A contract of the character you describe would be inappropriate whether or not the sheriff participated in its execution and implementation. The sheriff is a constitutional officer in whom a portion of the sovereign power of government is delegated to be exercised for the benefit of the public. See *Martin v. Smith*, 239 Wis. 314, 330, 332, 1 N.W.2d 163 (1941). As noted in *Professional Police Ass'n*, 106 Wis. 2d at 309: "In the exercise of executive and administrative functions, in conserving the public peace, in vindicating the law, and in preserving the rights of the government, he (the sheriff) represents the sovereignty of the State and *he has no superior in his county.*' (Emphasis added.)" When engaging in his duties relating to the imprisonment of offenders and others in his keeping, he partakes in an important core function of the sovereign. However, the power to contract with private parties to perform such functions is not an immemorial principal and important duty that characterized and distinguished the office. Moreover, section 59.23(1) is painfully explicit in directing that the jail and prisoners must be kept by the sheriff "himself," *i.e.*, by him personally, or by "his deputy or jailer." Therefore, it also appears that the power or discretion to so contract is not presently reposed in him by statute, expressly or by implication, and a county officer has no power to contract "except in cases of express grant of authority, or where it may be fairly implied from the nature of the act authorized." *Endion Improvement Co. v. Evening Telegram Co.*, 104 Wis. 432, 438, 80 N.W. 732 (1899); see also *Marathon County v. Industrial Comm.*, 218 Wis. 275, 281, 260 N.W. 641 (1935).

As explained in *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 80, 205 N.W.2d 784 (1973), a governmental subdivision "may, by contract, curtail its right to exercise functions of a business or proprietary nature, but, in the absence of express legislative authority, it cannot surrender or contract away its governmental functions and powers," not even partially. See also *Wausau Jt. Venture v. Redevelopment Authority*, 118 Wis. 2d 50, 59, 347 N.W.2d 604 (Ct. App. 1984). Consistent with this basic proposition, it is said that such an entity may not contract for the performance of public duties which the law requires its public officers or employes to perform. See 3 *McQuillin Municipal Corporations* §12.126, §12.127 (1982); 10 *McQuillin Municipal Corporations* §29.08 (1981); and 2 *McQuillin Municipal Corporations* §10.38 (1979). Moreover, powers conferred on a county officer by statute

cannot be altered by the county board, except as authorized by the Legislature. See 63 Op. Att'y Gen. 196, 199 (1974); 65 Op. Att'y Gen. 132, 136 (1976).

It has been repeatedly held in Wisconsin that "a county board has only such powers as are expressly conferred upon it [by the legislature] or necessarily implied from the powers expressly given or from the nature of the grant of power." *St. ex. rel. Teunas v. Kenosha County*, 142 Wis. 2d 498, 504, 418 N.W. 2d 833 (1988) citing *Town of Vernon v. Waukesha County*, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981)). However, the constitution does not prohibit the Legislature from exercising any control of the powers, duties, functions and liabilities of a sheriff as they existed at common law, and it may regulate many such matters, including the appointment and compensation of his deputies and other subordinates. See *State ex rel. Milwaukee County v. Buech*, 171 Wis. 474, 177 N.W. 781 (1920). In this respect the sheriff derives his powers and duties from the same source as the county board, *i.e.*, from the Legislature. 29 Op. Att'y Gen. 482, 484 (1940). The Legislature has, of course, exercised its authority by statute, including express statutory provisions for the selection and compensation of such county officials. See, for instance, secs. 59.15, 59.21 and 59.29, Stats. No provision is made for the type of arrangement you suggest.

Counties exercise considerable legislatively delegated authority to regulate their own organizational or administrative affairs. However, such power is subject to "the constitution and any enactment of the Legislature which is of statewide concern and which uniformly affects every county." See secs. 59.025, 59.026 and 59.07(intro.), Stats. The maintenance of law and order encompassed in the jailer function involves just such an exercise of the sovereign power of the state. As explained in *Van Gilder v. Madison*, 222 Wis. 58, 76, 267 N.W. 25, 268 N.W. 108 (1936): "The determination of other courts and a consideration of the fundamental reasons which underlie those determinations require us to hold that the preservation of order, the enforcement of law, the protection of life and property, and the suppression of crime are matters of state-wide concern." Counties, as governmental subdivisions of the state, "are merely agencies of the state in respect to the performance of these primary obligations of the state." *Van Gilder*, 222 Wis. at 75. See also *Milwaukee County v. District Council 48*, 109 Wis. 2d 14, 33, 325 N.W.2d 350 (Ct. App. 1982); *Brown County v. H&SS Depart-*

*ment*, 103 Wis. 2d 37, 43, 307 N.W.2d 247 (1981); *Dane County v. H&SS Dept.*, 79 Wis. 2d 323, 329-30, 255 N.W.2d 539 (1977).

It is my opinion that the provisions of section 59.23(1), describing the statutory responsibilities of the sheriff, his deputies and his jailer, not only implicate immemorial constitutional duties of the sheriff but also constitute a substantive legislative enactment “of statewide concern and which uniformly affects every county,” within the meaning of sections 59.025 and 59.07(intro.), which neither the sheriff nor the county board may augment by a contract to “privatize” the jailer function of the office of sheriff.

DJH:JCM

*County Executive; Waste Management;* In counties with a population of less than 500,000 having a county executive, a solid waste management board established by the county board pursuant to section 59.07(135), Stats., is restricted to performing advisory, policy-making or legislative functions, and the county executive is responsible for the administrative functions set forth in the statute. OAG 21-88

April 29, 1988

KENNETH J. BUKOWSKI, *Corporation Counsel*  
*Brown County*

You advise that the Brown County code of ordinances provides for the creation of a solid waste management system and a Brown County Solid Waste Management Board, pursuant to section 59.07(135), Stats. You also point out that recent significant statutory changes expanding the administrative authority of the county executive over county "departments" have been enacted by 1985 Wisconsin Act 29, including section 59.031(2r), since renumbered by 1985 Wisconsin Act 176 as section 59.031(2)(br). The latter statute limits the authority of "boards and commissions" over such departments to "advisory or policy-making" functions. Since your county has a county executive and you conclude that at least some of the powers granted your solid waste management board are more than advisory or policy-making and are in fact administrative in nature, you request my opinion on the following question: "Is a Solid Waste Management Board established by County Board ordinance pursuant to Section 59.07(135), Wis. Stats., a 'Board or Commission' as denominated in Section 59.031(2)(br), Wis. Stats."

It is my opinion that the Solid Waste Management Board is restricted to the performance of "advisory or policy-making functions," regardless of whether or not that board is a "board or commission" under section 59.031(2)(br). My opinion is based on the recent statutory changes expanding the administrative authority of the county executive.

Section 59.031(2)(intro.), as amended by 1985 Wisconsin Act 29, now expressly provides that "[t]he county executive shall be the chief executive officer of the county" and shall take care that "every" county ordinance and state law is "administered" within his or her county. Section 59.031(2)(a) states that the duty and power of the county executive is to "[c]oordinate and direct by

executive order or otherwise *all administrative and management functions of the county government* not otherwise vested by law in other elected officers.” Prior to amendment by 1985 Wisconsin Act 29, the latter provision had excepted administrative and management functions vested by law in “boards or commissions” from control by the county executive, but that exception was deleted by the session law.

Finally, even prior to the enactment of 1985 Wisconsin Act 29, the attorney general had opined that “[i]n counties having a County Executive, the role of the County Board becomes primarily, but not exclusively, policy-making and legislative.” 63 Op. Att’y Gen. 220, 228 (1974). The above session law has now repealed and recreated section 59.07(intro.) to expressly condition and limit the general power of the county board of supervisors in this regard in counties which have a county executive, as follows: “The board of each county shall have the authority to exercise any organizational or administrative power, *subject only to the constitution and any enactment of the legislature which grants the organizational or administrative power to a county executive . . . .*”

DJH:JCM

*Public Records; Words And Phrases;* Treatment of drafts under the public records law discussed. OAG 22-88

May 11, 1988

DIANNE GREENLEY

*Wisconsin Coalition for Advocacy*

Pursuant to section 19.39, Stats., you ask my advice on the applicability of the public records law to certain documents that have been developed by employes of the Department of Health and Social Services and have been circulated for review and comment within the department. The department has denied your request on the ground that the documents are not "completed documents" and will not be released until "fully developed and approved" and reach "official status."

It is my opinion that the department's position may not fully comport with the state public records law, as discussed in this opinion. This opinion amplifies the earlier opinion on this subject, contained in 72 Op. Att'y Gen. 99 (1983).

"Record" means any material on which written, drawn, printed, spoken, visual or electromagnetic information is recorded or preserved, regardless of physical form or characteristics, which has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes (including computer tapes), and computer printouts. "Record" does not include drafts, notes, preliminary computations and like materials prepared for the originator's personal use or prepared by the originator in the name of a person for whom the originator is working; materials which are purely the personal property of the custodian and have no relation to his or her office; materials to which access is limited by copyright, patent or bequest; and published materials in the possession of an authority other than a public library which are available for sale, or which are available for inspection at a public library.

Sec. 19.32(2), Stats.

It appears that the documents have been created or are being kept by an authority. The issue is whether they nevertheless fall within the exclusion for "drafts, notes, preliminary computations and like materials prepared for the originator's personal use or

prepared by the originator in the name of a person for whom the originator is working . . . .”

It has been stated as a rule of statutory construction “that qualifying or limiting words or clauses in a statute are to be referred to the next preceding antecedent, unless the context or the evident meaning of the enactment requires a different construction.” *Jorgenson and another v. City of Superior*, 111 Wis. 561, 566, 87 N.W. 565 (1901). It is also said:

Under rule *reddendo singula singulis* when one sentence . . . contains several antecedents . . . and several consequents . . . they are to be read distributively, so that each word . . . is applied to the subjects or consequents to which it appears by context most properly to relate and to which it is most applicable.

*Mutual Fed. S&L Asso. v. Sav. & L. Adv. Comm.*, 38 Wis. 2d 381, 387, 157 N.W.2d 609 (1968).

It is my opinion that the terms “drafts, notes, preliminary computations and like materials” are all modified by the phrases “prepared for the originator’s personal use or prepared by the originator in the name of a person for whom the originator is working . . . .”

This reading is consistent with the development of the legislation that resulted in the statute quoted above. The legislation was initially introduced as 1981 Senate Bill 250. The product that passed the senate, Engrossed 1981 Senate Bill 250, provided that “[r]ecord’ does not include drafts, notes, preliminary computations and like writings prepared for the author’s personal use.” *Id.*, page 6, lines 12-14. The phrase about preparations for one’s superior was tacked on in Assembly Substitute Amendment 1 to 1981 Senate Bill 250, page 6, lines 11 and 12. It seems clear that the “personal use” qualification was thus intended to apply to all antecedents and the preparation for one’s superior applies to any reasonably appropriate antecedent.

In construing the public records law it is important to keep in mind the mandate of section 19.31, which provides:

Declaration of policy. In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be the public policy of this state that all persons

are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employes who represent them. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employes whose responsibility it is to provide such information. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

Consonant with this mandate is the proposition that exceptions to the public records law should be narrowly construed. *Hathaway v. Green Bay School Dist.*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984).

It follows that exclusion of material prepared for the originator's personal use is to be construed narrowly. Most typically this exclusion may be invoked properly where a person takes notes for the sole purpose of refreshing his or her recollection at a later time. If the person confers with others for the purpose of verifying the correctness of the notes, but the sole purpose for such verification and retention continues to be to refresh one's recollection at a later time, it is my opinion the notes continue to fall within the exclusion. However, if one's notes are distributed to others for the purpose of communicating information or if notes are retained for the purpose of memorializing agency activity, the notes would go beyond mere personal use and would therefore not be excluded from the definition of a "record."

As to the exclusion of materials "prepared by the originator in the name of a person for whom the originator is working," it is my opinion the exclusion is likewise to be construed narrowly. Its terms contemplate interplay between the author and the author's superior. I assume the reason for the exclusion is to treat as a nullity language which is drafted for but which is not accepted by one's superior.

Your letter gives rise to the question whether a draft in the name of one's superior continues to fall within the draft exclusion if it is distributed to others before it is submitted to or approved by the

superior. In my opinion there should be some latitude for collegial exchange with respect to drafts. On the other hand, I would generally consider a draft to be taken beyond the intended scope of the draft exclusion when it is distributed to persons beyond those over whom the designated superior has jurisdiction. Here are some examples:

1. A bureau staff employe drafting an analysis in the name of the bureau director may circulate a draft analysis among bureau colleagues for review and comment without having the draft become a "record." If the draft is circulated outside the bureau it becomes a "record."

2. A bureau staff employe drafting a document in the name of a division administrator could circulate the draft in other bureaus in the division as well as his own bureau without having the draft lose draft status, because the division administrator would have jurisdiction over all personnel involved.

3. A document prepared in the name of a department secretary would retain draft status until it is distributed outside the department or is approved by the secretary.

Once a draft prepared for the signature of one's superior is approved by the superior for circulation, it is no longer a "draft." This is so whether the material is described as a "draft" or not and whether the circulation is considered "formal" or "official" or not. The key thing is that the person having responsibility for the disposition of the "draft" has decided to use it in a way that is beyond the drafting relationship that exists between the drafter and the superior.

As with most public records issues, determinations as to the exact status of a "draft" will have to be made on a case-by-case basis taking into account the specific facts involved. The foregoing guidance is not absolute, but I believe it provides a reasonable and useful framework for analyzing recurring questions concerning "draft" documents under the public records law. It is the framework my office will use in dealing with the subject.

Turning to the situation at hand, you describe the documents you requested as follows:

The first was a draft policy on "fairness" in the Department's dealings with inmates of Mendota Mental Health Institute and

Winnebago Mental Health Institute. To the best of my knowledge it was distributed to Mendota Staff for their review sometime in the winter of 1985-86. It may also have been distributed to Winnebago staff.

The second is a draft document on informed consent which has been prepared by a committee of doctors who work in the various state institutions. I believe that [th]ere may be a consent form and supporting documents. There may be additional documents on informed consent which were prepared by Division staff approximately a year and a half ago and which were circulated to the mental health institutes and state centers for the developmentally disabled.

In the first situation, the facts are not specific enough to enable a definite answer. It is clear that the material would not qualify as something prepared for one's "personal use." Under the guidelines set forth above, the status of the materials will depend on who is responsible for signing the policy on fairness and who authorized the circulation of the policy among institute staff.

If, for example, the policy on fairness is to be signed by the administrator of the division having jurisdiction over the institutions involved, the materials may be considered "drafts" to the extent their preparation and circulation occurs within the division at levels below the administrator. Thus a draft policy prepared by the staff of one institution, but for the signature of the division administrator, could be prepared and circulated among staff at the institution and would continue to qualify as a draft prior to the time it is submitted to the division administrator. However, if under these same facts the administrator approves the circulation of the "draft" policy for review and comment, the materials no longer fall within the draft exclusion under the public records law. Again, the draft exclusion is intended to relieve governmental systems of materials which are drafted but are not accepted by the person for whom they are created. Once the person for whom a draft is created accepts the product for the purpose of circulation for review and comment, the material becomes a "record" for that purpose.

The other materials you request relating to a policy on informed consent may be analyzed in the same way, except your reference to a committee raises new issues. Where there is a formally constituted committee having a specified membership and mission, the work

product of the committee may call for a case-by-case analysis to determine its status for the purpose of the public records law. For the purpose of your request I am assuming that the committee referred to is not a formally constituted and distinct entity and thus no further special analysis need be undertaken, and the individual and collective work product of the doctors referred to may be analyzed in the way discussed above, without regard to the existence of a "committee."

DJH:RWL

*Bridges; Natural Resources, Department Of; Railroads;* The Department of Natural Resources is not governed by section 190.08, Stats., relating to the duty of corporations to maintain bridges and other structures, where the Department of Natural Resources has acquired abandoned railroad property for the purpose of developing hiking and biking trails. OAG 23-88

May 23, 1988

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

You have requested my opinion as to whether the Department of Natural Resources (DNR) has a duty to repair and maintain certain highway bridges pursuant to section 190.08, Stats. That statute provides:

Every corporation constructing, owning or operating a railroad shall restore every watercourse, street, highway, road or canal across, along or upon which such railroad may be constructed to its former state or to such condition that its usefulness shall not be materially impaired and thereafter maintain the same in such condition against any effects in any manner produced by such railroad. And may acquire any lands required to change or restore any highway, street, canal or watercourse, and lands so taken shall become a part of such highway or street. This section shall not apply to sloughs or bayous closed by the government prior to April 14, 1893, to aid the navigation of rivers; but in case such sloughs or bayous are thereafter closed by any railroad company such company shall be liable in damages to any person owning lands thereon injured thereby. The statutes for acquiring land by right of eminent domain shall apply in assessing damages for such closing.

You advise that the DNR acquired abandoned railroad right of ways spanned by these highway bridges upon abandonment of the railroads, not for the purpose of operating railroads, but to develop hiking and biking trails.

In my opinion the answer is no.

First, the statute applies to corporations. It is clear that DNR is a state agency and not a corporation as understood in ordinary parlance. Moreover, no statute applies to the detriment of the state or a state agency unless the state or the agency is expressly included

within the language of the statute. See *State ex rel. Dept. of Pub. Instruction v. ILHR*, 68 Wis. 2d 677, 680-84, 229 N.W.2d 591 (1975), and *Wis. Vet. Home v. Div. Nurs. Forfeit. Appeals*, 104 Wis. 2d 106, 110, 310 N.W.2d 646 (Ct. App. 1981). Nothing in section 190.08 expressly includes either the state or a state agency.

Second, the statute would apply only if DNR were constructing, owning or operating a railroad. You advise that DNR acquired these properties upon abandonment of railroad operations and that DNR uses the properties for other purposes, specifically, for hiking and biking trails. In my judgment, that means that DNR is not constructing, owning or operating a railroad within the meaning of this statute. Moreover, as a state agency DNR lacks constitutional authority to run a railroad inasmuch as to do so would offend the internal improvements clause of the Wisconsin Constitution article VIII, section 10. See, e.g., *State ex rel. Jones v. Froehlich*, 115 Wis. 32, 41, 91 N.W. 115 (1902); *Bushnell v. Beloit*, 10 Wis. 155 (1860); and *Clark and others v. The City of Janesville*, 10 Wis. 119 (1859). All statutes must be given a construction that serves to save, rather than impeach, their constitutionality. *Joncas v. Krueger*, 61 Wis. 2d 529, 535-36, 213 N.W.2d 1 (1973). Therefore, this statute must be construed so as to avoid any suggestion that DNR may run a railroad. On that construction, it becomes even more evident that the Legislature did not contemplate including any state agency within the coverage of this statute.

State law would be controlling here since there is no federal preemption under federal railroad abandonment law as to post-abandonment state control over the properties in question. *Hayfield Northern R. v. Chicago and N.W. Transp.*, 467 U.S. 622 (1984). Since DNR does not own or operate a railroad, the common law rule that a state is subject to regulation as a railroad when it undertakes to own or operate a railroad, see *Parden v. Terminal Ry. of Ala. State Docks Dept.*, 377 U.S. 184 (1964), is inapposite.

Your legal staff has advised that there are no known agreements concerning maintenance of the bridges and that the documents of conveyance contain no references to maintenance of such bridges. The existence of any such agreements or references could independently impose obligations not imposed by statute. See 75 Op. Att'y Gen. 10 (1986). But your question relates only to the terms of this statute and, for the reasons stated, DNR is not governed by its

terms when using abandoned railroad property for hiking and biking purposes.

DJH:CDH

*Constitutional Law; Real Estate Brokers; Section 452.11(1), Stats., requiring nonresident real estate brokers to maintain an active place of business and prohibiting them from employing brokers or salespersons in this state, is unconstitutional since it violates the privileges and immunities clause of the United States Constitution. OAG 24-88*

May 23, 1988

MARLENE A. CUMMINGS, *Secretary*  
*Department of Regulation & Licensing*

You ask whether section 452.11(1), Stats.,<sup>1</sup> which requires a nonresident real estate broker to maintain an active place of business and prohibits the nonresident broker from employing brokers or salespersons in this state, is constitutional.

It is my opinion that if the statute were challenged in litigation, a court would find that the statute contravenes the privileges and immunities clause of the United States Constitution, article IV, section 2, which provides: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

The statutory provision under consideration expressly treats nonresident brokers differently from resident brokers in two ways. First, since nonresident brokers are not allowed to employ brokers or salespersons in this state regardless of whether these employed brokers or salespersons have a Wisconsin real estate license, if a nonresident corporate broker wished to do business in Wisconsin, it would be required to have corporate officers licensed as real estate brokers or salespersons. A partnership could be formed under Wisconsin law and one or more of the partners be licensed as brokers. A nonresident sole proprietor would be totally barred from having other brokers or salespersons operate for him or her in this state. A resident broker is not under any of these restrictions.

The second way in which the statute gives disparate treatment to nonresidents is that it requires a nonresident broker to maintain an

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<sup>1</sup> Section 452.11(1) reads: "A nonresident may become a broker or salesperson by conforming to all the provisions of this chapter, except that a nonresident broker shall maintain an active place of business in the state in which the broker holds a license. Nonresident brokers may not employ brokers and salespersons in this state."

active place of business. Resident brokers are not required by law to maintain an active place of business in this state.

Recent United States Supreme Court decisions hold, in cases involving the licensing of a profession, business or trade, that a state may not, under the privileges and immunities clause, establish restrictions for nonresident licensees disparate to those imposed upon resident licensees unless there are substantial reasons for the disparate treatment and that the treatment bears a substantial relationship to the state's objective. *Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1985).

Since the right to pursue one's profession, trade or calling is a fundamental right, the courts will closely scrutinize a statute that discriminates against nonresidents when these rights are involved. *Baldwin v. Fish & Game Com'n of Mont.*, 436 U.S. 371 (1978).

In determining whether the discrimination bears a substantial relationship to a state's interest or objective, the court will consider the availability of less restrictive means. If there are less restrictive means, the statute will fail. *Piper*, 470 U.S. at 284.

In *Baldwin*, the Supreme Court held that the right to hunt elk was not a fundamental right protected by the privileges and immunities clause, as was the right to pursue one's livelihood. Thus, the "rational basis" test would be applied to constitutionally sustain Montana's higher license fee for nonresidents who desire to hunt elk.

*Baldwin* may be contrasted with *Mullaney v. Anderson*, 342 U.S. 415 (1952), where the Court struck down a territory of Alaska law imposing higher license fees for nonresident *commercial* fishermen, and *Toomer v. Witsell*, 334 U.S. 385 (1948), where the court invalidated a South Carolina law imposing higher license fees on nonresident *commercial* shrimp fishermen.

In *Hicklin v. Orbeck*, 437 U.S. 518 (1978), the United States Supreme Court struck down Alaska's "Alaska Hire" law, which required that all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes and unitization agreements to which the state is a party must contain a provision requiring the hiring of qualified Alaska residents in preference to nonresidents in that it contravened the privileges and immunities clause. The Court employed the "close scrutiny" test in rejecting Alaska's reasons for its law.

If Alaska is to attempt to ease its unemployment problem by forcing employers within the State to discriminate against non-residents—again, a policy which may present serious constitutional questions—the means by which it does so must be more closely tailored to aid the unemployed the Act is intended to benefit.

*Hicklin*, 437 U.S. at 527-28.

In *Piper*, the Supreme Court invalidated New Hampshire's residency requirements for license to practice law as being in violation of the privileges and immunities clause, again employing the "close scrutiny" test.

You state in your request that you have not been made aware of any substantial reason for the disparate treatment of nonresident brokers and that you do not know of any state objectives served by the discrimination. In the absence of proof that the discrimination against nonresidents is an effort to treat an evil with which the state is concerned or that the treatment bears a relationship and is closely tailored to the state objectives, it is difficult to advance an argument that would satisfy the Supreme Court's "close scrutiny" test under the privileges and immunities clause.

However, the "active place of business" requirement arguably springs from the legislative concern that nonresident brokers can be located and made subject to a lawsuit. The argument is weak, especially in view of the fact that resident brokers are not required to maintain an active place of business. If locating a broker is a valid concern, it must be valid for resident brokers as well as nonresident brokers. But of greater importance is the fact that this argument fails the "availability of a less restrictive means" test. Since section 452.11(3) and (4) requires that nonresident applicants file an irrevocable consent to be sued in this state with an authorization that the Department of Regulation and Licensing may be served with process in any suit against a nonresident broker, the less restrictive means of enabling people to sue nonresident brokers is already in place. Further, since nonresident brokers are subject to all of the provisions of chapter 452, they are equally subject to discipline by the real estate board as are resident brokers.

I am unable to perceive any state interest that is served by the proscription that nonresident brokers may not employ a broker or salesperson in this state. Since this proscription is a severe impedi-

ment to nonresident brokers desiring to engage in their profession in this state, it is unconstitutional under the United States Supreme Court decisions recited earlier.<sup>2</sup>

Since section 452.11(1) is unconstitutional, the administrative rule enacted to implement it, Wisconsin Administrative Code §RL 20.01(2) (1983), is also unconstitutional for the same reasons recited.

DJH:WHW

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<sup>2</sup> I would note that under the ruling in *Paul v. Virginia*, 75 U.S. 168 (1869), a corporation does not enjoy the status of a citizen within the meaning of the privileges and immunities clause and thus a corporation would not be able to raise the constitutional issue involved.

*County Executive*; An elected county executive does not have authority to reorganize another elected county official's office so as to remove functions or responsibilities mandated by statute. An elected county executive does have authority, along with the county board, to impose reasonable organizational and budgetary constraints upon such officials, which neither narrow nor frustrate the proper exercise of the constitutionally or statutorily mandated official duties of such elected county offices. OAG 25-88

May 23, 1988

FRED A. RISSER, *Chairperson*  
*Senate Organization Committee*

The Senate Organization Committee has requested my formal opinion on a number of questions concerning the authority of an elected county executive as it relates to the administrative and management powers and duties of the other elected county constitutional officers. Your questions are sufficiently related and interdependent such that my answers to your first two questions should also effectively dispose of your remaining questions. You first ask: "Does an elected county executive have the power to reorganize another elected official's office and remove functions or responsibilities mandated by Wisconsin Statutes?"

For reasons detailed herein, it is my opinion that the county executive does not have the authority to reorganize another elected official's office so as to remove functions or responsibilities mandated by statute.

In recent years, through constitutional amendment and statutory changes, there has been a gradual but significant expansion in the authority delegated by the Legislature to counties to determine their local administrative organization, including legislative authorization for county executives and administrators with expanded powers and a legislative grant of a certain measure of county organizational autonomy. *See* secs. 59.025, 59.031 and 59.032, Stats. (1983-84).

I assume that your initial question arises because of the most recent of these legislative delegations dealing with the administration of county government, enacted by 1985 Wisconsin Act 29. Among the numerous changes to chapter 59, Stats., affected by this enactment, the legislation requires that every county now have

either an elected county executive, a board-appointed county administrator or an administrative coordinator; it authorizes counties to create a department of administration and adopt certain budgetary procedures previously reserved for larger counties, and it further expands the administrative and appointment power of the county executive and administrator. The law also repealed and recreated sections 59.025 and 59.07(intro.) and created section 59.026 to read as follows:

**59.025 Administrative home rule.** Every county may exercise any organizational or administrative power, subject only to the constitution and any enactment of the legislature which is of statewide concern and which uniformly affects every county.

**59.026 Construction of powers.** For the purpose of giving to counties the largest measure of self-government in accordance with the spirit of the administrative home rule authority granted to counties in s. 59.025, it is hereby declared that this chapter shall be liberally construed in favor of the rights, powers and privileges of counties to exercise any organizational or administrative power.

**59.07 General powers of board.** The board of each county shall have the authority to exercise any organizational or administrative power, subject only to the constitution and any enactment of the legislature which grants the organizational or administrative power to a county executive or county administrator or to a person supervised by a county executive or county administrator or any enactment which is of statewide concern and which uniformly affects every county. Any organizational or administrative power conferred under this section shall be in addition to all other grants. A county board may exercise any organizational or administrative power under this section without limitation due to enumeration. The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language . . . .

The original "executive budget bill" containing these sections, 1985 Assembly Bill 85, included the following analysis by the Legislative Reference Bureau, at 42: "Language giving counties limited administrative home-rule power is replaced by language modeled after municipal home-rule language used in the constitution and statutes. The language is intended to establish broader county administrative

home rule." A Legislative Fiscal Bureau analysis characterized the effect of these provisions as follows:

Replace current law concerning the authority of a county to administratively organize itself by specifying that every county may exercise any organizational or administrative power, subject to the state's constitution and laws. This recommendation includes a provision stating that it is intended that the administrative home rule granted under this modification be liberally interpreted in favor of the power of counties to exercise any organizational power.<sup>1</sup>

As pointed out by the Legislative Fiscal Bureau analysis, while 1985 Wisconsin Act 29 did provide for the expansion of local administrative and organizational authority at the county level, such authority nevertheless remains "subject to the state's constitution and laws." Moreover, in interpreting and applying sections 59.025, 59.026 and 59.07(intro.), particularly those provisions excepting enactments of statewide concern, it must be recognized that the Legislature utilizes counties primarily as its agent in matters of state concern. As stated in *Milwaukee County v. District Council 48*, 109 Wis. 2d 14, 33, 325 N.W.2d 350 (Ct. App. 1982):

In Wisconsin, counties, as quasi-municipal corporations, have no inherent power to govern. The municipalities are created almost exclusively in view of the state's policy at large for purposes of political organization and civil administration in matters of state concern. *Columbia County v. Board of Trustees*, 17 Wis. 2d 310, 317, 116 N.W.2d 142, 146 (1961).

See also *Dane County v. H&SS Dept.*, 79 Wis. 2d 323, 329-30, 255 N.W.2d 539 (1977); *Brown County v. H&SS Department*, 103 Wis. 2d 37, 43, 307 N.W.2d 247 (1981).

In this regard, it is my opinion that the substantive statutory scheme established for elective county officers by the Legislature constitutes legislative enactments "of statewide concern and which uniformly affects every county," within the meaning of sections 59.025 and 59.07(intro.). Under such a view, neither the various elective county offices nor their constitutional or statutory duties, functions and authority can be abolished, consolidated or altered

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<sup>1</sup> "Comparative Summary of Budget Recommendations [of] Governor and Joint Committee on Finance," Assembly Substitute Amendment 1 to 1985 Assembly Bill 85, Legislative Fiscal Bureau, June 1985, Vol. II at 624.

under the newly enacted provisions of chapter 59 here being considered. Rather, I view these new enactments as authorizing counties to expand upon and “fill the gaps” in the organizational and administrative structure which is already in place in such a fashion as not to conflict with the performance of such elected officers’ mandated functions. Despite the more recent legislative recognition of the need of counties to have greater flexibility in addressing their administrative and management problems, then, it remains true that counties have only such powers as are expressly granted or necessarily implied. *Town of Vernon v. Waukesha County*, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981); *Maier v. Racine County*, 1 Wis. 2d 384, 385, 84 N.W.2d 76 (1957).

In reviewing the statutes under consideration, I note that the expanded county administrative authority is general in character, while the Legislature’s directions as to what functions are to be performed by the county’s elective officials are typically expressed in much more specific terms. It may be presumed that those more detailed statutory directives are intended to prevail over a statute of general application in the event of any conflict. *Schlosser v. Allis-Chalmers Corp.*, 65 Wis. 2d 153, 161, 222 N.W.2d 156 (1974). Such a conclusion is supported by *Harbick v. Marinette County*, 138 Wis. 2d 172, 179, 405 N.W.2d 724 (Ct. App. 1987). While the *Harbick* case recognized that sections 59.025, 59.026 and 59.07 require a liberal construction of county power to exercise organizational and administrative powers, it also acknowledged that those statutes do not affect duties specifically conferred on county officers by statute or performed by them on an immemorial basis. *Harbick*, 138 Wis. 2d at 172.

In reaching our conclusion, we recognize that the position of county clerk is a constitutional office established under art. VI, sec. 4, of the Wisconsin Constitution. *State ex rel. Williams v. Samuelson*, 131 Wis. 499, 510-11, 111 N.W. 712, 716 (1907). We further acknowledge that the clerk of each county performs vital and invaluable services in those areas designated by the legislature in sec. 59.17. Statutory powers and duties conferred upon a county officer cannot be narrowed, enlarged, or taken away by a county board unless the legislature has authorized such action. *Reichert v. Milwaukee County*, 159 Wis. 25, 35, 150 N.W. 401, 403-04 (1914).

*Harbick*, 138 Wis. 2d at 179. See also 67 Op. Att’y Gen. 1, 3-4 (1978); 65 Op. Att’y Gen. 132, 135 (1976); 63 Op. Att’y Gen. 196, 199 (1974); 63 Op. Att’y Gen. 220, 225 (1974).

My conclusion in response to your question is further supported by a plain reading of the applicable statutes. Both section 59.031(2)(br), relating to county executives in counties under 500,000 population, and section 59.033(2)(b), relating to county administrators, expressly provide that such officers appoint and supervise the heads of all county departments “*except those elected by the people.*” Likewise, the statutes which authorize county executives and administrators to coordinate and direct by order or otherwise “all administrative and management functions of the county government” expressly except such functions “*otherwise vested by law . . . in other elected officers.*” Secs. 59.031(2)(a) and 59.033(2)(a), Stats.<sup>2</sup> Finally, section 59.035(2), created by 1985 Wisconsin Act 29 to provide authority for counties of less than 500,000 population to create a county department of administration with such administrative functions as the county deems appropriate, contains a similar express limitation that, with certain exceptions not relevant here, “[n]o such function shall be assigned to the department where the performance of the same by some other county office, department or commission is required by any provision of the constitution or statutes of this state.” See also sec. 59.035(1), Stats.

While 1985 Wisconsin Act 29 expanded the statutory duties and powers of county administrative officers in certain respects, it also clarified and confirmed the semi-autonomous status of county elective officers whose duties and authority are established or augmented by statutory directive.<sup>3</sup> The act does not negate the implicit authority of the principal county elective officers identified in section 59.12 to exercise substantive administrative and management functions vested in them by law, free of supervisory control by the county executive, administrator or coordinator.

<sup>2</sup> Section 59.034, enacted by 1985 Wisconsin Act 29 to require the creation of either an elective or appointive administrative coordinator in every county which has neither a county executive or administrator, incorporates the same exception.

<sup>3</sup> The statutes set forth the specific duties to be performed by the county clerk, treasurer, sheriff, coroner or medical examiner, clerk of court, register of deeds and surveyor and expressly mandate, in essentially identical language, that such officers “[p]erform all other duties required by law.” Secs. 59.17(25), 59.20(12), 59.23(7), 59.34(4), 59.395(8), 59.51(15) and 59.60(1)(e), Stats. See also section 59.47 for the duties of the district attorney.

Your second question asks: "Does an elected county executive have the authority to structure another elected official's budget in such a manner as to make that official accountable to another elected or appointed official or department, including the legislative body?"

It is not possible to provide you with more than a general response to such a question in the absence of a more detailed fact situation. See 44 Op. Att'y Gen. 262, 266-67 (1955). However, the constitution does clearly authorize the Legislature to confer broad powers of a local, legislative and administrative character upon county boards and provides authority for an elective county executive with extensive administrative and veto powers. Wis. Const. art. IV, §§22, 23 and 23a. In counties with an elective executive, both the county board and the county executive jointly exercise broad authority to establish the county budget and approve appropriations for all county departments. See secs. 65.90, 59.031(5) and (6) and 59.84, Stats. In fact, the county executive's partial approval/partial veto authority with respect to appropriations carries with it a power, legislative in nature, similar to that exercised by the Governor in reference to acts of the Legislature, to change the policy of the law as originally envisaged by the county board. 74 Op. Att'y Gen. 73, 74 (1985); 73 Op. Att'y Gen. 92, 93-94 (1984). Moreover, "[t]he executive's influence as to the amounts and subjects to be included in a budget is probably more direct and greater at formulating time than at veto time," because of his responsibility to formulate the initial submission of the annual budget for consideration by the county board. 74 Op. Att'y Gen. at 76.

While it may be said that an elected county constitutional officer is answerable to no one but the electorate in the faithful discharge of his or her constitutional and statutory duties, such officers are, and always have been, subject to reasonable budget constraints. The courts will refrain from interfering with the exercise of discretion by the county board and county executive in the adoption of the county budget, even though their actions may not appear wise or best calculated to serve the public interest, unless they act in violation of the law. See *Appleton v. Outagamie County*, 197 Wis. 4, 11-12, 220 N.W. 393 (1928).

Therefore, in the final analysis, the answer to your second question will probably depend, in most instances, upon whether the county board and the elected county executive have exercised their

budgetary and organizational authority so arbitrarily or unreasonably as to effectively narrow or frustrate the proper exercise of the constitutionally or statutorily mandated official duties of such other elected county officers. *See Schultz v. Milwaukee County*, 250 Wis. 18, 23, 26 N.W.2d 260 (1947); *Reichert v. Milwaukee County*, 159 Wis. 25, 35, 150 N.W. 401 (1914); 49 Op. Att’y Gen. 26, 30 (1960). Determinations bearing on such issues must, of course, be dealt with on a case-by-case basis.

DJH:JCM

*Attorney General; Contracts; County Board; Ordinances; Public Works; The Milwaukee County board may not delegate the exclusive authority to approve contracts for budgeted public works projects to the museum board or to the zoological board. Except in extraordinary circumstances, the attorney general will not issue opinions concerning the meaning or intent of municipal ordinances. OAG 26-88*

June 3, 1988

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

You ask two questions concerning the procedure for letting public works contracts involving the expenditure of budgeted county funds for museum and zoological operations in Milwaukee County.

Your first question may be restated as follows:

Under existing statutes and ordinances, do the Milwaukee County Museum Board of Trustees and the Milwaukee County Zoological Board of Trustees have the exclusive authority to award contracts for public works projects within their respective supervisory functions?

I decline to answer this question since it turns exclusively upon the meaning of local ordinances.

According to the information you have submitted, the Milwaukee County Museum Board of Trustees ("museum board") and the Milwaukee County Zoological Board of Trustees ("zoological board") are not referenced in the statutes but rather were established by the Milwaukee County board of supervisors to oversee museum and zoological department operations, respectively.

The museum board is in charge of the operations of the public museum acquired from the City of Milwaukee. Milwaukee County Ordinances, section 89.02. It consists of eleven members appointed by the county executive and confirmed by the county board, two of whom must be county board supervisors and nine of whom are citizen members who may not have any affiliation with the county. Milwaukee County Ordinances, section 89.02. Insofar as relevant to your inquiry, the powers of the museum board are as follows:

**Duties.** Subject to the general supervision of the County Board of Supervisors and to such regulations as it may prescribe, the Museum Board of Trustees shall have charge of the operation and maintenance of the public museum acquired by the County from the City of Milwaukee, and any additions or improvements to such museum. It shall control the receipt, selection, arrangement and disposition of the specimens and objects pertaining to such museum. It shall prescribe regulations for the management, care and use of the institution and shall adopt such measures as shall promote the public utility thereof.

It may accept in the name of the County any bequests or gifts for the purpose of said museum, which gifts or bequests, unless otherwise requested by the donor, shall be under the management and control of the Museum Board of Trustees.

Milwaukee County Ordinances, section 89.02.

The zoological board oversees the zoological department which is headed by an executive director and which operates the zoo and the surrounding zoological gardens. Milwaukee County Ordinances, sections 50.01-50.03. It consists of eight members, one of whom is an ex-officio nonvoting member chosen from the committee on parks, recreation and culture and seven of whom are citizen members appointed by the county executive and confirmed by the county board. Milwaukee County Ordinances, section 50.02. Insofar as relevant to your inquiry, according to sections 59.03 and 59.04 of the Milwaukee County Ordinances, the powers of the zoological director and the zoological board are as follows:

**50.03 Powers, duties of the Zoological Director.** Subject to the executive authority of the County Executive [and] overall policies promulgated by the County Board of Supervisors, the Zoological Director shall have general authority and responsibility to include the following:

. . . .

3) With approval of the Board of Trustees, contract and arrange for planning, designing and construction of new exhibits and other capital improvements within the Zoological Park, with other branches of County Government or private firms, as provided by Milwaukee County Purchasing Ordinances and County Procedures.

4) Contract, when necessary, for all other work and materials in the maintenance and operation of the Zoological Gardens with other branches of County Government or with private firms as provided by the Milwaukee County Ordinances and County procedures. Except for emergency maintenance repairs the Director shall inform the Board of Trustees of the need for major maintenance and secure their prior approval.

. . . .

7) Carry out all decisions made by the Zoological Board of Trustees concerning the expenditure of all funds, bequests and gifts as described in Section 50.04(2) of this ordinance.

8) Prepare, under the guidance of the Board of Trustees, and annually submit a budget to the County Executive; which, after adoption by the County Board, shall serve as a plan for expenditures during the succeeding year.

50.04 Powers and duties of the Zoological Board of Trustees. The Zoological Board of Trustees shall have general authority and responsibility to:

. . . .

2. Administer and control:

- a) The Zoo Railroad Fund . . . .
- b) The Zoo Specimen Fund, and
- c) Other Trust Funds

d) . . . The Board of Trustees shall, in consultation with the Zoological Society of Milwaukee County, make all decisions concerning the use thereof, subject to general supervision of the County Board. Said Board may also, in the name of Milwaukee County, accept and administer any and all additional bequests and gifts of other funds or monies made for the support or improvement of the Zoological Gardens, including any funds derived from the sale of surplus animals.

. . . .

3. Make policy recommendations to the Zoological Director concerning the operation of the Gardens, and plans for future capital improvements.

4. Review and advise the Zoological Director on the proposed annual budget to be submitted to the County Executive.

Because the museum board and the zoological board are not referenced in the statutes and because there is no general statute automatically empowering such kinds of boards to award public works contracts, their existing authority can be determined only by reference to local ordinances. In response to an opinion request from the county board, you have already opined that these ordinances do not empower the museum board and the zoological board to award public works contracts.

In 76 Op. Att’y Gen. 60, 64 (1987), I declined to decide whether a town’s ordinance violated state law because “such a judgment would require a factual analysis as to how the town’s ordinance operates in actual practice.” More recently, I indicated that “[t]he attorney general has no authority to decide questions of fact, nor can his judgment be substituted for the discretion vested in another state officer. 40 Op. Att’y Gen. 3, 4 (1951).” 77 Op. Att’y Gen. 36, 40 (1988). *See also* 68 Op. Att’y Gen. 416, 421 (1979). Although the meaning of a county ordinance presents a question of law rather than a question of fact, the facts and documents necessary to ascertain the meaning of any municipal ordinance are or should be readily available to that municipality’s attorney. And, as a public officer, it is the function of the municipal attorney to provide legal advice concerning the meaning of the ordinances enacted by that municipality.

For the policy reasons expressed in 77 Op. Att’y Gen. at 40 and in 76 Op. Att’y Gen. at 64, I decline to offer any opinion concerning the meaning or intent of the quoted ordinances.<sup>1</sup> I am also taking this opportunity to advise state and local officials that, except in extraordinary circumstances, the attorney general will not issue opinions concerning the meaning or intent of municipal ordinances.

Your second question may be restated as follows:

May the exclusive authority to approve such contracts for budgeted public works projects be delegated by the county board to the museum board or the zoological board?

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<sup>1</sup> To the extent, if any, that your opinion to the county board was influenced by state law issues, you do, of course, remain free to reconsider your opinion in light of my response to your second question.

In my opinion, the answer is no.

In 74 Op. Att'y Gen. 228, 230-31 (1985), I indicated that, within certain statutory limitations, section 59.06(1), Stats., permits a county board to delegate the power to approve various kinds of transactions to its standing committees, provided that the delegation contains sufficient standards. However, section 59.06(1) applies only to "committees [selected] from the members of the board." Since the museum board and the zoological board consist primarily of citizen members and are not county board committees, it is unnecessary for me to decide whether section 59.06(1) may be used to delegate the authority to award public works contracts under the facts presented by your inquiry.

In order for the kind of delegation you describe to be permissible, it must be authorized under the express terms of section 59.08, which provides in part as follows:

Public work, how done; public emergencies. (1) All public work, including any contract for the construction, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind where the estimated cost of such work will exceed \$20,000 shall be let by contract to the lowest responsible bidder. Any public work, the estimated cost of which does not exceed \$20,000, shall be let as the board may direct. If the estimated cost of any public work is between \$5,000 and \$20,000, the board shall give a class 1 notice under ch. 985 before it contracts for the work or shall contract with a person qualified as a bidder under s. 66.29(2). A contract, the estimated cost of which exceeds \$20,000, shall be let and entered into under s. 66.29, except that the board may by a three-fourths vote of all the members entitled to a seat provide that any class of public work or any part thereof may be done directly by the county without submitting the same for bids. This section does not apply to highway contracts which the county highway committee or the county highway commissioner is authorized by law to let or make.

The underscored language was inserted by 1983 Wisconsin Act 260. The word "it" in the phrase "it contracts" which is contained in the third sentence of section 59.08(1) (the second complete sentence of the insertion) appears unambiguously to refer to the antecedent "board," which can only mean the county board. However,

it can be argued that the phrase “shall be let as the board may direct,” which is contained in the preceding sentence, was intended to permit the county board to delegate the authority to approve public works contracts, at least where the estimated cost of the contract is less than \$20,000.

Since the statute is ambiguous, I have examined its legislative history. 74 Op. Att’y Gen. at 233. See *State Historical Society v. Maple Bluff*, 112 Wis. 2d 246, 252-53, 332 N.W.2d 792 (1983). 1983 Wisconsin Act 260(intro.) provides as follows: “AN ACT to amend 59.08 (1) of the statutes, relating to the size of a county public work contract which can be let without advertising for bids.” In light of this introductory language, it is my opinion that the phrase “shall be let as the board may direct” refers to the procedure for soliciting bids and does not constitute express authority for the board to delegate the power to accept such bids.

I, therefore, conclude that the county board may not delegate the exclusive authority to approve contracts for budgeted public works projects to the museum board or to the zoological board.

DJH:FTC

*Lobbying; State; Words And Phrases;* The state and its agencies are not "principals" under section 13.62(12), Stats. OAG 27-88

June 16, 1988

DOUGLAS LA FOLLETTE, *Secretary of State*

You ask whether a state agency which has officers or employes who are paid a salary and whose regular duties include lobbying as defined in section 13.62(10), Stats., is a "principal" under section 13.62(12). The question arises because under section 13.625(3) a state officer, employe, official or candidate is prohibited from soliciting or accepting something of pecuniary value from a principal. You ask whether a state agency is included within that prohibition. I conclude that it is not.

Before the lobby law was amended by chapter 278, Laws of 1977, "principal" had a two-part definition. The first definition paralleled the present definition, essentially defining principal as any person who engages a lobbyist. The second definition defined principal as "[a]ny board, department, commission or other agency of the state . . . which engages a lobbyist or other person in connection with any legislation . . ." Sec. 13.62(4)(b), Stats. (1975). The Legislative Council notes accompanying chapter 278, Laws of 1977, state: "This two-part definition is replaced in Ch. 278 by a definition which defines 'principal' as 'any person who employs a lobbyist.' 'Person' is broadly defined to include individuals, partnerships, associations and bodies politic and corporate (s. 990.01(26), Wis. Stats.)." Wis. Stat. Ann. §13, Legislative Council Note 93 (West 1986).

The reference to section 990.01(26) is instructive because in *State ex rel. Dept. of Pub. Instruction v. ILHR*, 68 Wis. 2d 677, 683, 229 N.W.2d 591 (1975), the Wisconsin Supreme Court had held that the state was not included within the definition of person in section 990.01(26) because the phrase "bodies politic and corporate" was conjunctive. The unmistakable legislative intent in chapter 278, therefore, was to exclude the state and its agencies from the definition of principal by amending the statute to exclude those groups and by referring to the general definition of "person" which did not include the state or its agencies.

Chapter 169, Laws of 1979, changed the definition of person in section 990.01(26) to include "bodies politic *or* corporate." The

analysis of the legislation by the Legislative Reference Bureau notes that it was introduced as remedial legislation because if “person” only refers to bodies politic and corporate, as the court held in *State ex rel. Dept. of Pub. Instruction*, corporations which are not bodies politic would not be included within the definition of “person.” The effect of the change in section 990.01(26), therefore, “clarifies that a ‘person’ when mentioned in the statutes without further qualification or definition, includes bodies politic (governments) or bodies corporate (corporations) individually.” The definition “does not alter the rule that a regulatory statute will not be applied to the state unless it expressly so provides.” Legislative Reference Bureau Analysis to 1979 Assembly Bill 875. There is no reason to conclude that the remedial change in the definition of “person” was intended to repeal the Legislature’s specific removal of the state and its agencies from the definition of “principal” in section 13.62(12). The manifest intent of the Legislature is pellucidly expressed in the chapter 278 amendments. The later remedial change in section 990.01(26) does not alter that intent. *See* sec. 990.01(intro.), Stats.

The state and its agencies are not included within the definition of principal in section 13.62(12). Rather, the lobby law treats agencies separately and differently from other lobbyists. *E.g.*, secs. 13.695, 13.70(2), 13.70(1)(a) and 13.685(7), Stats. The lobby law, therefore, applies to state agencies only as specifically noted within that law. The state and its agencies do not come under the general prohibitions governing principals.

DJH:AL

*Constitutional Law; Constitutionality; Real Estate; Taxation;*  
Section 70.325, Stats., violates article VIII, section 1 of the Wisconsin Constitution. OAG 28-88

June 16, 1988

FRED A. RISSER, *Chairperson*  
*Senate Organization Committee*

On behalf of the Senate Organization Committee you have asked whether section 70.325, Stats., offends the uniformity clause of the Wisconsin Constitution. The uniformity clause is part of article VIII, section 1 of the Wisconsin Constitution, and provides, so far as relevant to this opinion: "The rule of taxation shall be uniform . . . . Taxation of agricultural land and undeveloped land, both as defined by law, need not be uniform with the taxation of each other nor with the taxation of other real property."

Section 70.325 provides: "In determining the market value of lots in a recorded subdivision, the assessor shall take into consideration the time and expense necessary to market the lots."

Our supreme court was asked to construe the uniformity clause within one year of Wisconsin's becoming a state. In *Knowlton v. Supervisors of Rock County*, 9 Wis. 378 (\*410), 389 (\*420-21) (1859), the court held that uniformity meant equality, that:

the course or mode of proceeding in levying or laying taxes shall be uniform; it shall in all cases be alike. The act of laying a tax on property consists of several distinct steps, such as the assessment or fixing of its value, the establishing of the rate, etc.; and in order to have the rule or course of proceeding uniform, each step taken must be uniform. The valuation must be uniform, the rate must be uniform.

The court restated the main principles of uniformity in *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 424, 147 N.W.2d 633 (1967):

1. For direct taxation of property, under the uniformity rule there can be but one constitutional class.
2. All within that class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden equally on an *ad valorem* basis.
3. All property not included in that class must be absolutely exempt from property taxation.

4. Privilege taxes are not direct taxes on property and are not subject to the uniformity rule.

5. While there can be no classification of property for different rules or rates of property taxation, the legislature can classify as between property that is to be taxed and that which is to be wholly exempt, and the test of such classification is reasonableness.

6. There can be variations in the mechanics of property assessment or tax imposition so long as the resulting taxation shall be borne with as nearly as practicable equality on an *ad valorem* basis with other taxable property.

In *Gottlieb*, the court was considering the constitutionality of Wisconsin's urban redevelopment law. Under that law, local governing bodies were authorized to enter into contracts with persons who had formed redevelopment corporations. Those contracts required the erection of improvements according to an approved plan in exchange for the privilege of a partial tax freeze. The court noted that the Legislature considered it important that the property of the redevelopment corporation be given preferential treatment in order to encourage development in that area of the city found to be substandard. The court found that the law accomplished its intended purpose, the unequal taxation of property, but that such a purpose was constitutionally prohibited. The property of the redevelopment corporation was subject only to a portion of the property tax because its valuation was frozen at the value assessed just before its acquisition by the redevelopment corporation. The partial tax exemption was unconstitutional because the redevelopment corporation's property "[was] not subject to all of the tax that would fall on other property of equal current value." *Gottlieb*, 33 Wis. 2d at 429.

Section 70.32 sets the basis for real estate assessments. In pertinent part it provides: "(1) Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided under s. 73.03(2a) from actual view or from the best information that the assessor can practicably obtain, *at the full value which could ordinarily be obtained therefor at private sale.*" This provision consistently has been construed to mean that real property must be assessed at fair market value, that is, the amount it will sell for upon negotiations in the open market between an

owner willing but not obliged to sell and a buyer willing but not obliged to buy. *Rosen v. Milwaukee*, 72 Wis. 2d 653, 661, 242 N.W.2d 681 (1976).

Section 70.325 permits assessors to use their judgment in reducing the fair value that might otherwise be imposed on such lots. Hack and Sullivan, *Taxation of Undeveloped Real Property in Wisconsin*, 47 Wis. Bar Bull. 37, 38 (1974). The statute's purpose is unequivocally stated in the 1955 Legislative Council Report, vol. IV: Subdivision and Platting of Land.

One of the most frequently mentioned reasons for the evasion of the subdivision law is the increase in real estate tax assessment resulting from platting the land. If taxes are appreciably increased by the platting of the land, the subdivider may find himself faced with a substantial burden if his lots do not sell rapidly. Increased taxes are particularly burdensome to the subdivider because unlike other costs he may incur in establishing his subdivision — grading the streets or having his land surveyed and mapped — they do not increase the value of his investment. Their cost cannot be passed along to the purchaser; taxes are money down the drain.

The legislative council committee recommended the adoption of present section 70.325.

Unlike section 70.327 which requires assessors to take into consideration the time and expense necessary to replace or repair a contaminated well or water supply, or section 70.32(1g) and (1m) which requires the assessors to take into consideration the effect of zoning or environmental impairment on the value of the property, section 70.325 does not involve disadvantages or liabilities which affect the property's fair market value. *See State ex rel. Wis. Edison Corp. v. Robertson*, 99 Wis. 2d 561, 569, 299 N.W.2d 626 (Ct. App. 1980). Marketing costs may affect the fair market value of property. Unlike the liabilities or disadvantages referred to in the other statutes, however, the cost of marketing the lots does not automatically decrease the value of the lots.

Section 70.325 is a command to the assessor to reduce the fair market value of the land by an amount which takes into consideration the time and expense necessary to market the lots. That amount, however, has little to do with the land's fair market value, that is what a willing buyer will pay a willing seller. Presumably, the

seller's price reflects the time and expense necessary to market the lots; there is no reason to assume that a buyer, however, will be so accommodating as to pay what the seller is asking. More importantly, the seller's asking price which includes the expense of marketing the lots, and which presumably the seller thinks is a fair market price, should not be reduced by the amount necessary to market the lots. That amount is part of the land's value. Subtracting that amount from the land's value results in the same kind of partial tax exemption found unconstitutional in *Gottlieb*.

Section 70.325 applies only to "lots in a recorded subdivision." Sellers of lots not located in recorded subdivisions also incur time and expense marketing their lots. The statutes make no provision for deducting these costs from the lots' fair market value. Section 70.325 requires assessors to value lots in recorded subdivisions at something other than their full market value and thus creates an unconstitutional class.

It is suggested that the part of article VIII, section 1, which provides that the taxation of agricultural and undeveloped land need not be uniform with the taxation of other real property might supply a constitutional foundation for section 70.325. That might be the case if the real property referred to in section 70.325 met the constitutional requirement of "undeveloped land . . . as defined by law." The clause is not self-executing, however; before agricultural or undeveloped lands can be taxed at a different rate those terms must be defined by law. That has not been done.

The report of the joint survey committee on tax exemptions which accompanied 1973 Rule Joint Resolution 29, the second consideration of the constitutional amendment, states that the law "if fully implemented" would grant property tax relief for farmers and also preserve open spaces for recreational and other ecological uses. That report also urges the Legislature to implement the law cautiously to avoid great disparities in taxation. The committee's report confirms that agricultural and undeveloped lands can be taxed at different rates only after those terms are defined.

The provision for classification of agricultural and undeveloped lands was added to the constitution in 1974. Section 70.325 was enacted in 1955. Quite clearly, the authors of section 70.325 were not relying on the constitutional amendment for the statute's validity.

In my consideration of the constitutionality of section 70.325, I have indulged the presumption in favor of constitutionality, but that analysis leads me to conclude that the statute is unconstitutional beyond a reasonable doubt. *Quinn v. Town of Dodgeville*, 122 Wis. 2d 570, 364 N.W.2d 149 (1985). I am also aware that the court of appeals has applied the statute, holding that the assessor should have taken into consideration the time and expense necessary to market subdivision lots. *East Briar v. Rome Board of Review*, 113 Wis. 2d 33, 39, 334 N.W.2d 692 (Ct. App. 1983). In that case, the constitutionality of section 70.325 was not raised; the only question was whether the statute had been used. My analysis leads me to conclude that if presented with the issue, our courts would conclude that section 70.325 is unconstitutional.

DJH:AL

*Counties; Real Estate; Taxation; Tax Sales; Subsections (5), (6) and (7) of section 75.35, Stats., created by 1987 Wisconsin Act 27 first apply to sales of property the county acquired at a section 74.39 tax sale on or after the effective date of section 3203(47)(c) of 1987 Wisconsin Act 27. OAG 29-88*

June 17, 1988

FREDERIC P. FELKER, *Corporation Counsel*  
*Douglas County*

You have asked whether the newly created subsections (5), (6) and (7) of section 75.35, Stats., as of their effective date, are applicable to lands already sold for taxes under section 74.39 but not yet resold under section 75.35. In my opinion, the answer is no, the new subsections are not applicable to those lands.<sup>1</sup>

The request is prompted by the creation and modification of statutes in 1987 Wisconsin Act 27. The newly created subsections provide for the disposal of the proceeds received from the sale of property that was acquired by the county at a tax sale. Prior to the changes, the disposal of proceeds was provided for in section 74.39, Stats. (1985), which was amended by 1987 Wisconsin Act 27, section 1557m as follows:

Sale of real estate. On the day designated in the notice of sale the county treasurers shall begin the sale of those lands on which the taxes, penalty and interest have not been paid and shall continue every day, Sundays excepted, until enough of each parcel has been sold to pay the taxes, interest and penalty as provided under s. 74.80 upon the amount of such taxes from January 1 of the next year after the tax levy. ~~Of the proceeds of the sale, an amount equal to the actual costs of the sale and the taxes, penalty and interest shall be paid into the county treasury; any special assessments owed and penalties and interest in respect to those assessments shall be sent to the unit of government to which they are owed and the remainder of the proceeds shall be paid to the person whose property was sold~~ *All moneys received from that sale shall be paid into the county treasury.* If the treasurer discovers before the sale that because of irregular

<sup>1</sup> Sections 74.39, 74.46(3), 75.34(3), 75.35(5) and (6) and 75.67(4), which are discussed in this opinion, have been amended or repealed by 1987 Wisconsin Act 378, sections 75, 114, 120, 121 and 153m. However, these changes do not become effective until January 1, 1989. See 1987 Wisconsin Act 378, sections 181 and 182.

assessment or any other error any of the lands ought not to be sold, the treasurer shall not offer them for sale but shall report the lands withheld from sale and the reasons for withholding them to the county board at its next session.

To provide for the dispersal of the proceeds, subsections (5), (6) and (7) of section 75.35 were created by 1987 Wisconsin Act 27, sections 1560m, 1560p and 1560r, respectively, which provided:

**SECTION 1560m. 75.35(5)** of the statutes is created to read:

**75.35(5) NOTICE; PROCEEDS.** Upon acquisition of a deed under s. 75.14, the county treasurer shall notify the former owner, by registered mail sent to the former owner's mailing address on the tax bill, that the former owner may be entitled to a share of the proceeds of a future sale. If the former owner does not request, in writing, payment within 60 days after receipt of that notice, the former owner forfeits all claim to those proceeds. If the former owner timely requests payment and if the property is not subject to a special assessment the proceeds of which are pledged under s. 66.54(10), the county shall send to the former owner the proceeds minus any delinquent taxes, interest and penalties owed by the former owner to the county in regard to other property and minus the greater of the following amounts:

(a) Five hundred dollars plus 50% of the amount obtained by subtracting \$500 from the proceeds.

(b) The actual costs of the sale as specified under s. 75.36(7) plus 2% of the sale price plus all delinquent taxes, interest, penalties and special assessments owed on the property sold and plus the amount of property taxes that would have been owed on the property for the year during which the sale occurs if the county had not acquired the property.

**SECTION 1560p. 75.35(6)** of the statutes is created to read:

**75.35(6) SPECIAL ASSESSMENTS.** From the amounts retained under sub. (5), the county shall pay any special assessments owed and penalties and interest on those assessments to the unit of government to which they are owed.

**SECTION 1560r. 75.35(7)** of the statutes is created to read:

**75.35(7) LIABILITY PRECLUDED.** Absent fraud, no county is liable for acts or omissions associated with the sale of property under this section.

The dispersal provisions of subsections (5), (6) and (7) of section 75.35 were also made applicable to the proceeds received from the sale of tax certificates. See sections 74.46(3) and 75.34(3) as created by 1987 Wisconsin Act 27, sections 1558m and 1559m, respectively. Finally, the dispersal provisions in section 75.35 were made applicable to the procedures in populous counties by the creation of section 75.67(4) in 1987 Wisconsin Act 27, section 1562m.

The question of the effective date of these changes is answered by the interpretation of 1987 Wisconsin Act 27, section 3203(47)(c), which provides: "Proceeds of tax sales. The treatment of sections 74.39, 74.46(3), 75.34(3), 75.35(5), (6) and (7) and 75.67(4) of the statutes first applies to sales of property acquired by counties on the effective date of this paragraph."

In regard to this provision, you have asked whether the "sales" referred to means the initial tax sale in section 74.39 or the subsequent sale to which section 75.35 is applicable. You also ask whether the phrase "acquired by counties" refers to the county's acquisition at the section 74.39 sale or the acquisition when the tax deed is taken.

In my opinion, the "acquired by counties" language refers to property acquired by the county at the section 74.39 sale. Because section 3203(47)(c) refers to sales of tax certificates (sections 74.46(3) and 75.34(3)) as well as tax deeded property (section 75.35), the "acquired by counties" phrase cannot be limited to property for which the county has received a tax deed since the county would not have received the tax deed when it sold the tax certificates. Therefore, section 3203(47)(c) applies to property the county acquired at the section 74.39 tax sale.

The other question is whether the new statutes apply to sales of tax certificates and tax deeds for property the county acquired in section 74.39 sales before the effective date of section 3203(47)(c) or only to sales of tax certificates and tax deeds for property acquired by the county on or after the effective date. The answer rests on whether the phrase "on the effective date of this paragraph" in section 3203(47)(c) modifies the word "sales" or the phrase "property acquired by counties."

For two reasons, I conclude that the phrase modifies "property acquired by counties." The first reason is grammatical. No punctuation indicates that the phrase "on the effective date of this para-

graph” refers to the word “sales.” It is more logical to read the phrase “on the effective date of this paragraph” to refer to the words immediately preceding it, which is the phrase “property acquired by counties.”

The second reason concerns the subject matter of the statutes affected by the changes. Prior to the change, section 74.39 accounted for the dispersal of the proceeds. If the newly created subsections (5), (6) and (7) of section 75.35 are applied to the sale of tax certificates and tax deeds of property the county acquired under the old section 74.39, then two disposal statutes would be applied to the same property, those statutes being the old section 74.39 and the new subsections 75.35(5), (6) and (7). However, if the new statutes apply only to property acquired by the county in a section 74.39 sale on or after the effective date, then each sale of tax certificates or tax deeds is covered by one disposal statute: property acquired under section 74.39 before the effective date is covered by the disposal provisions of the old section 74.39 and property acquired under section 74.39 on or after the effective date is covered by the disposal provisions of the new subsections (5), (6) and (7) of section 75.35.

Therefore, in my opinion, the new provisions apply to the sale of tax certificates or tax deeds for property the county acquired in a section 74.39 tax sale on or after the effective date of 1987 Wisconsin Act 27, section 3203(47)(c).

DJH:SWK

*Firearms; Fish And Game; Ordinances;* A town ordinance which purports to prohibit the use of firearms but exempts town residents and their guests is in effect a restriction on hunter numbers. As such, it infringes on and exceeds the authority of the Department of Natural Resources, and presents possible equal protection problems. OAG 30-88

July 5, 1988

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

You ask whether an ordinance enacted by the Town of Menasha, Winnebago County, impermissibly infringes on the state's authority to regulate hunting. The ordinance is titled "Offenses Endangering Public Safety: Discharging and Carrying Dangerous Weapons Prohibited." It purports to ban all use of firearms and bows and arrows within the town, with exceptions for shooting galleries, cleaning of firearms, carp fishing by bow and arrow and destruction of a property owner's domestic animals on the owner's property. However, the ordinance then excepts seven named families in the no-weapons area, plus all residents (and their guests) of an area covering parts of five sections of the town.<sup>1</sup> (Those residents and their guests are forbidden to carry or discharge weapons within specified distances from buildings, streets, parks, railroad rights of way and the town landfill.)

You suggest that the exceptions shift the goal of the ordinance from the safe use of weapons to the regulation of hunting, through the impermissible device of limiting hunter numbers. I agree. To the extent that the ordinance bars the discharge of weapons by both residents and non-residents, with the limited exceptions first noted, I will assume that the ordinance is rationally related to protecting safety within the town. However, any effort by the town to enforce the ordinance against non-guest, non-residents in the resident-weapons area would infringe on the state's exclusive authority to regulate hunting. It would also exceed the very limited authority which the Legislature has delegated to the Department of Natural Resources ("Department") to control hunter numbers.

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<sup>1</sup> For convenience, I will refer to the two main areas covered by the ordinance as the "no-weapons" area (despite an exception for seven named families) and the "resident-weapons" area.

These conclusions are consistent with opinions of my predecessors: 27 Op. Att’y Gen. 705 (1938); 32 Op. Att’y Gen. 370 (1943); 36 Op. Att’y Gen. 589 (1947); 57 Op. Att’y Gen. 31 (1968); and 68 Op. Att’y Gen. 81 (1979).

Depending on the facts of a case in which the ordinance is challenged, persons charged with violating the ordinance may be able to raise a successful denial of equal protection defense, as will be discussed below.

Towns have only those powers specifically delegated to them by statute or necessarily implied therefrom. *Pugnier v. Ramharter*, 275 Wis. 70, 73, 81 N.W.2d 38 (1957). Section 60.23(6), Stats., allows a town board, if so authorized by its town meeting, to appropriate money for conservation of natural resources. Section 60.23(18) authorizes a town board to regulate the careless use of firearms. I am informed that the no-weapons area can generally be described as “urbanized,” and the resident-weapons area as “rural.” It is thus likely that the town board has rationally concluded that discharge of firearms in the no-weapons, urbanized area is *per se* careless. (I am deferring, for the moment, the question of the grandfathered families.)

While chapters 940 and 941 evidence extensive legislative regulation of firearms and other weapons, that regulation does not appear to be comprehensive enough to pre-empt the town’s ban on weapons in its urbanized areas.

My main concern is with the resident-weapons portion of the ordinance, which allows residents and their guests to possess and discharge weapons (that is, to hunt) throughout the exempted area. In the context of the ordinance as a whole, it is highly unlikely that a court would find residents and their guests to be presumptively careful in their hunting, and non-residents to be presumptively dangerous to town residents or property. I therefore believe the resident-weapons portion of the ordinance is simply a limitation on hunter numbers, or a “controlled hunting” law, enacted by a town.

Authority to regulate hunting is committed to the state. *State v. Herwig*, 17 Wis. 2d 442, 446, 117 N.W.2d 335 (1962); *Krenz v. Nichols*, 197 Wis. 394, 400, 404, 222 N.W. 300 (1928). The Legislature has designated the Department of Natural Resources as its only agent to regulate the taking of fish and game. Secs. 23.09(!)

and (2) and 29.174(1), Stats. The latter section is particularly comprehensive:

The department shall establish and maintain open and close seasons for the several species of fish and game and any bag limits, size limits, rest days and conditions *governing the taking of fish and game* as will conserve the fish and game supply and ensure the citizens of this state *continued opportunities for good fishing, hunting and trapping*.

Other sections regulate the use of firearms in hunting: for example, sections 29.221 and 29.222, duties and penalties for hunter who injures another person with a weapon and fails to report accident; and section 29.227, limiting use of weapons by persons under certain ages. Wisconsin Administrative Code chapter NR 10 is an extensive and detailed set of hunting and fishing regulations, promulgated by the department.

The Wisconsin Supreme Court has held that extensive state legislative and regulatory activity may be evidence that the Legislature did *not* intend to authorize the same activity at a municipal level. *Maier v. Racine County*, 1 Wis. 2d 384, 386, 84 N.W.2d 76 (1957). The laws just cited support the conclusion that the Legislature intends hunting to be regulated at the state and not the local level.

Matters of exclusively statewide concern are not within the proper scope of the home rule powers of cities and villages under article XI, section 3 of the Wisconsin Constitution. *Van Gilder v. Madison*, 222 Wis. 58, 73, 267 N.W. 25, 268 N.W. 108, (1936). Except when a town is exercising village board powers pursuant to a town meeting delegation (sections 60.10(2)(c) and 60.22(3)), the language of the home rule amendment prohibits a town from exercising home rule powers in any event.

Even if the Town of Menasha had the power to regulate hunting, I doubt that it could regulate by limiting the number of hunters, rather than by the methods specified in section 29.174(1). Despite its broad power to regulate hunting, the department, after many unsuccessful attempts, has obtained legislative approval of controlled hunting provisions in only a handful of circumstances. Thus, the Town of Menasha ordinance not only infringes on, but exceeds the bounds of, state authority.

Section 29.174(1) authorizes the Department to apply the regulatory methods listed to the state as a whole, or to any specified

county or part of a county, but does not allow hunter *numbers* to be limited. The following subparagraphs of section 29.174 authorize the department to limit the number of hunters for wild turkeys (subsection (2)(b)) and Canada geese (subsection (2)(c)), and the number of trappers for wild fisher (subsection (2)(d)). Sections 29.103, 29.107 and 29.1085 also refer to hunter number restrictions. The express mention of species for which the number of hunters or trappers may be limited implies a prohibition on otherwise regulating by limiting the number of hunters. *See also* the legislative history cited in 57 Op. Att’y Gen. at 35-36.

In conclusion, I adhere to a 1943 opinion of the attorney general, which stated:

By way of recapitulation we conclude that the authority to regulate hunting is vested in the state conservation commission [now the department] by statute and to the complete exclusion of the exercise of such power by towns, villages, cities or counties, but that in their conduct of local affairs it may well be that villages, cities and Milwaukee county may properly prevent the use of firearms and the like in such a way that hunters may be able to make but little or no use of the open season for hunting in the area affected by such ordinances, and assuming, of course, that such ordinances do not purport to regulate hunting as such but have been adopted in good faith for the purpose of protecting the public peace and safety.

32 Op. Att’y Gen. at 374.

The exceptions for the seven named families and for residents and their guests present equal protection questions, although the Department may not have standing to raise them. Both exceptions create distinct classes within the people present in the town. The seven families may hunt on their own land, within the no-weapons area, which is allegedly urbanized. Residents and their guests may hunt anywhere within the resident-weapons area, which is allegedly rural. These classifications must be “*rationally* related to a *legitimate* legislative goal.” *United States v. 16.92 Acres of Land*, 670 F.2d 1369, 1373 (7th Cir. 1982) (emphasis added). I doubt the rationality of the assumption that only residents and their guests, and only the seven families, can conform to the safety needs of the areas in which they may hunt. I strongly doubt the legitimacy of

limiting hunter numbers to residents and their guests, or to a few named individuals.

The Town of Menasha ordinance purports to enhance public safety by forbidding the discharge and possession of hunting weapons. However, the exceptions are, in my opinion, fatal to any valid public welfare justification. Common sense compels the conclusion that a "firearm safety" ordinance which exempts seven families in a settled area of the town and all residents and their guests in rural areas is in fact a "residents only" hunting law. As such, it infringes on authority committed exclusively to the Department and exceeds even the permissible scope of the department's authority.

DJH:MVB

*Liability; North Central Wisconsin Regional Planning Commission; Employees of regional planning commissions organized under section 66.945, Stats., are not state agents, officers or employes within the meaning of section 895.46(1)(a), but they are protected by that subsection's requirement that such planning commissions themselves indemnify them for liability incurred in the course of their duties. OAG 31-88*

July 15, 1988

N. L. BERGSTROM, *Corporation Counsel*  
*Lincoln County*

You have requested my opinion with respect to potential liability of the North Central Wisconsin Regional Planning Commission for acts or omissions of its individual members or the liability of the agency itself for acts or omissions of its employes. In order to address this question it is necessary to understand the nature and purpose of the entity. Regional planning commissions are authorized pursuant to section 66.945, Stats., and their formation is initiated by a petition in the form of a resolution of the governing body of a local governmental unit directed to the Governor or the Governor's designee. A public hearing on the petition is then required unless the governing bodies of all local units of government in the proposed region join in the petition.

If the Governor finds that there is a need for a regional planning commission and the local units of government (with more than fifty percent of the population at equalized valuation of the region) consent, the Governor may create the commission by order.

Section 66.945(3)(a) requires that one member be appointed by the county board of each county in the region and two members from each county are to be appointed by the Governor, at least one of whom had been nominated by the county board. All members are required to have experience in appointed or elected office in local government or to have experience in advising local government in areas of land use planning, transportation, law, finance, engineering or natural resources development.

The commission is then required to appoint an executive director and such employes as it deems necessary. Commission members are authorized to be paid a per diem, and to receive reimbursement for

actual expenses incurred as members in carrying out the work of the commission.

Section 66.945(8) provides that the commission's functions are solely advisory and in order to facilitate performance of its advisory role it is authorized to conduct research, collect and analyze data, prepare charts and conduct studies and prepare plans for social and economic development of the region. It is required to provide an annual report of its activities to the legislative bodies of the local units of government, and to prepare a master plan for development of the region.

The Wisconsin Supreme Court has held that a planning commission is "merely an advisory body." *Kegonsa Jt. Sanit. Dist. v. City of Stoughton*, 87 Wis. 2d 131, 154, 274 N.W.2d 598 (1979). Although the court in that case referred to the planning commission as an agency of the state, it distinguished this agency from administrative agencies of the state which are authorized to issue decisions and issue orders which are reviewable pursuant to chapter 227.

Thus, although members of regional planning commissions are appointed by the Governor to a state agency composed of members from the counties of the region on petition of local governmental units, they are not agents, officers or employees of the state entitled to indemnification by the state.

Section 66.945(4) makes it clear that the appointment to the commission of officers, employees or agents of local units of government does not change their status. In the event a claim is made against them or an action is commenced for acts committed while carrying out their duties, their employer, local units of government, would be required to indemnify and defend such persons pursuant to section 895.46. The regional planning commission is responsible for the acts of the director and employees appointed pursuant to section 66.945(6) and would be entitled to indemnification by the planning commission pursuant to section 895.46. The planning commission is a governmental agency subject to the notice of claim process of section 893.80; and pursuant to section 893.80(3), its liability is limited to \$50,000 per claimant.<sup>1</sup>

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<sup>1</sup> County and local governmental units liability for motor vehicle claims is subject to section 345.05(3), and 1987 Wisconsin Act 377 limits motor vehicle accident liability for such units of government to \$250,000.

Members of a planning commission and commission employees are immune from liability for discretionary acts done in the course of their employment and can be found liable only for breach of a ministerial duty. A ministerial duty has been defined by the Wisconsin Supreme Court as one which is "absolute, certain, and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode, and occasion for its performance with such certainty that nothing remains for judgment or discretion." *Meyer v. Carman*, 271 Wis. 329-30, 73 N.W.2d 514 (1955); *Hjerstedt v. Schulz*, 114 Wis. 2d 281, 338 N.W.2d 317 (Ct. App. 1983).

Your opinion request also raises the question whether the liability risk of the planning commission should be shared between the local governmental unit which sought its creation and the state. Except for the legislatively authorized creation, commission authority and funding mechanism, the state has no control or right to control the planning commission activity. Indeed, it is clear from the enabling statute that its purpose is to facilitate local or regional planning activity; and under current statutes, there is no basis for the state to accept any risk sharing with either the planning commission or the local units of government which seek its creation.

DJH:TLP

*Liability; Vocational, Technical And Adult Education;* The limitation of damages by section 893.80(3), Stats., in actions founded upon tort against governmental bodies, officers, agents or employes, unless modified or rendered inapplicable by other statute, applies to vocational, technical and adult education districts, their officers and employes. OAG 32-88

July 15, 1988

ROBERT P. SORENSEN, PH.D., *State Director*

*Wisconsin Board of Vocational, Technical and Adult Education*

You have requested my opinion as to the extent that Wisconsin statutes limit the amount recoverable from vocational, technical and adult education districts, their board members and employes for damages, injury or death in a variety of situations.

The limitation upon the amount recoverable in actions founded on tort is contained in section 893.80(3), Stats., pertinent portions of which provide as follows:

The amount recoverable by any person for any damages, injuries or death in any action founded on tort against any . . . political corporation, governmental subdivision or agency thereof and against their officers, officials, agents or employes for acts done in their official capacity or in the course of their agency or employment, whether proceeded against jointly or severally, shall not exceed \$50,000 . . . . No punitive damages may be allowed or recoverable in any such action under this subsection.

Also pertinent to this discussion is section 895.46(1)(a), which would require the district to pay any judgment, in excess of applicable insurance, rendered against its officers or employes proceeded against individually or in their official capacities, because of acts committed while carrying out duties as an officer or employe and acting within the scope of their employment, and to provide their defense.

Your various areas of inquiry are set forth and addressed separately.

I.

**BODILY INJURY AND PROPERTY DAMAGE LIABILITY  
IN THE OPERATION, OWNERSHIP AND USE OF AUTO-  
MOTIVE VEHICLES**

Where the cause of action arose prior to May 3, 1988, the general statutory limitation on recovery has been superseded by specific statutory provision as to an action founded on tort arising out of the operation, ownership or use of a motor vehicle. Sec. 345.05(3), Stats. In such cases involving a motor vehicle, the liability exposure is unlimited. *Lemon v. Federal Ins. Co.*, 111 Wis. 2d 563, 565, 331 N.W.2d 379 (1983).

However, effective May 3, 1988, section 345.05(3) is amended to provide a limit of \$250,000 on the amount that can be recovered in such cases. 1987 Wisconsin Act 377. The amendment makes other provisions of section 893.80(3), including the bar on recovery of punitive damages, applicable to these cases.

## II.

### BODILY INJURY AND PROPERTY DAMAGE LIABILITY IN THE OPERATION, OWNERSHIP AND USE OF AN AIRCRAFT

There is no specific statute comparable to section 345.05(3) for aircraft. The Wisconsin Supreme Court has held that the state's vehicle code is not applicable to airplane collisions. *Air Wisconsin, Inc. v. North Cent. Airlines, Inc.*, 98 Wis. 2d 301, 327, 296 N.W.2d 749 (1980). Accordingly, I conclude that the limitation provision of section 893.80(3) is applicable with respect to liability arising out of the operation, ownership and use of aircraft.

## III.

### BODILY INJURY AND PROPERTY DAMAGE LIABILITY RESULTING FROM POLLUTION AND CONTAMINATION ACCIDENTS

At the outset, it should be mentioned that the district, its officers and employes are immune from liability for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions. Sec. 893.80(4), Stats. These functions are sometimes denominated "discretionary." The Wisconsin Supreme Court has said that "quasi-legislative" or "quasi-judicial" and "discretionary" are synonymous; namely, acts which involve the exercise of judgment and discretion. *Gordon v. Milwaukee County*, 125 Wis. 2d 62, 66, 370 N.W.2d 803 (Ct. App. 1985).

However, public officials and employes can be found liable for damages in tort for the negligent performance of a ministerial duty,

as distinguished from discretionary acts. *Maynard v. City of Madison*, 101 Wis. 2d 273, 279, 304 N.W.2d 163 (Ct. App. 1981).

A ministerial duty has been defined by the Wisconsin Supreme Court as one which is "absolute, certain, and imperative, involving merely the execution of a set task, and when the law which imposes it prescribes and defines the time, mode, and occasion for its performance with such certainty that nothing remains for judgment or discretion." *Meyer v. Carman*, 271 Wis. 329, 73 N.W.2d 514 (1955); *Hjerstedt v. Schultz*, 114 Wis. 2d 281, 338 N.W.2d 317 (Ct. App. 1983).

In regard to your inquiry, assuming that the bodily injury or property damage resulted from an act or acts for which the officers or employes do not enjoy immunity, then the limitation provision of section 893.80(3) would be applicable.

#### IV.

#### BODILY INJURY AND PROPERTY DAMAGE LIABILITY FROM DIRECTLY OR INDIRECTLY PROVIDING OR ASSISTING WITH PROFESSIONAL MEDICAL SERVICES

Assuming that the actor or actors do not enjoy either the governmental immunity above described or the so-called good samaritan immunity provided by section 895.48, it is my opinion that the limitations provision of section 893.80(3) would apply.

#### V.

#### LIABILITY FROM ALLEGATIONS OF LIBEL, SLANDER, DEFAMATION OF CHARACTER, FALSE IMPRISONMENT, DISCRIMINATION, SEXUAL HARASSMENT, ETC. (PERSONAL INJURY) FROM BROADCASTING AND NON-BROADCASTING ACTIVITIES

These are allegations of intentional tort. The district itself is not subject to direct action for the intentional torts of its officers and employes. Sec. 893.80(4), Stats. However, it may be required to pay any judgment against its officers or employes. *Ibrahim v. Samore*, 118 Wis. 2d 720, 348 N.W.2d 554 (1984).

Under circumstances where the alleged act or acts arose out of the performance of duties and in the scope of employment or, in the relatively rare case, where such acts are found to be the result of negligence rather than intent, and the defense of immunity is not available, the limitation provision of section 893.80(3) would apply.

This question is further complicated by the fact that at least some of the allegations, *e.g.*, sexual harassment, might rise to the level of a federal constitutional deprivation, for which no limitation would exist.

## VI.

### LIABILITY CLAIMS AGAINST BOARD MEMBERS AND ADMINISTRATIVE PERSONNEL FOR LOSSES OTHER THAN BODILY INJURY, PROPERTY DAMAGE OR PERSONAL INJURY (*I.E.*, ALLEGATIONS OF MISMANAGEMENT OF PUBLIC FUNDS IN THE PURCHASE OF CERTAIN MATERIALS OR SUPPLIES)

Assuming that the occurrence complained of arose out of the good faith performance of duties of the board member or members in an official capacity in the scope of employment, and, if the defense of immunity was not available, then, by its terms, section 893.80(3) would be applicable.

Your opinion request contains three additional inquiries. I have rearranged their order for a logical sequence of answers.

#### I.

### WHAT EFFECT DOES A CLAIM UNDER FEDERAL LAW HAVE UPON THE LIMIT CONTAINED IN SECTION 893.80?

The limitations of section 893.80(3) are not applicable in a federal civil rights case, such as an action brought pursuant to 42 U.S.C.A. §1983 (1981). The damages which may be recovered in such case are unlimited. *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 340 N.W.2d 704 (1983).

#### II.

### DOES THE PURCHASE OF INSURANCE IN AMOUNTS GREATER THAN \$50,000 ACT AS A WAIVER OF THE LIMIT AS ESTABLISHED IN SECTION 893.80?

No. The mere existence of a contract of insurance with limits greater than \$50,000 does not constitute a waiver of the statute. Unless the policy of insurance contains an express provision prohibiting use of immunity defenses or reliance on the statutory liability limitation, there is no waiver of the provisions of section

893.80. *Gonzalez v. City of Franklin*, 137 Wis. 2d 109, 403 N.W.2d 747 (1987).

### III.

**HOW JUDICIALLY STRONG IS SECTION 893.80 AND OTHER PROVISIONS LIMITING RECOVERIES AGAINST GOVERNMENTAL ENTITIES AND SHOULD VTAE DISTRICTS RELY ON THIS RATHER THAN THE PURCHASE OF THE INSURANCE?**

Section 893.80 is a state statute and where applicable, it is absolute and must be given effect by the courts.

The question of the purchase of insurance by the districts is a policy decision and function of the district boards, not a legal question which I should address. Obviously, from this opinion, it is clear that among the many factors which the boards should include in their consideration, are the following:

1. The amount recoverable in actions involving the operation, ownership and use of motor vehicles is unlimited prior to May 3, 1988, and \$250,000 where the cause of action arises after May 3, 1988.

2. The amount recoverable in federal civil rights actions is unlimited.

3. The district has an obligation to provide counsel and a defense for officers and employes in cases arising out of the performance of their duties in the scope of their employment, whether or not the cases have merit.

DJH:AJW

*Compatibility; Conflict Of Interest;* The office of superintendent or administrator of a county health care center providing mental health related services, appointed under section 46.19(1), Stats., and the office of member of the county community programs board, appointed under section 51.42(4), are incompatible. OAG 33-88

August 1, 1988

LAVERNE MICHALAK, *District Attorney*  
*Trempealeau County*

You advise that two questions have arisen regarding the appointment of your county health care center administrator to the county community programs board, created by your county board under section 51.42, Stats., by ordinance in 1985 (hereafter "51.42 board"). Your county does not have either an elected county executive or an appointed county administrator.

You ask whether the appointment of such county health care administrator to the 51.42 board (1) gives rise to a potential conflict of interest of a substantive nature and (2) violates the terms of your county's ordinance creating the 51.42 board. For reasons more fully set forth hereafter, it is my opinion that such appointment does indeed create a conflict of interest and that the offices of member of such 51.42 board and county health care center administrator are incompatible. It is therefore unnecessary to address your remaining question.

I understand that the county health care center involved in your question is a county health care institution which is under the management of a board of trustees appointed by the county board under section 46.18. Such trustees appoint to "the office of superintendent or administrator" of such institution, exercise the power of removal from such office and prescribe its duties. *See* secs. 46.18(2) and 46.19(1) and (2), Stats. By virtue of his office, the superintendent is also the secretary of the board of trustees. Sec. 46.18(5), Stats.

You indicate that the administrator of the county's health care center is also a member of the governing board of a private human services agency located in the county and that both the center and that agency contract with the 51.42 board to provide services for persons needing mental health related services. In 1987 the 51.42 board purchased services from the center totaling over \$80,000. During the same year, the 51.42 board purchased \$236,000 of ser-

vices from the nongovernmental agency (affiliated with a medical hospital).

In my opinion, under the circumstances you describe, the same person may not serve simultaneously as the administrator or superintendent of a county health care institution, appointed under section 46.19(1), and as a member of a county community programs board, appointed under section 51.42(4).

The rule for determining whether two offices are incompatible is stated in 58 Op. Att'y Gen. 247 (1969):

[T]wo offices are incompatible if there is a conflict of interest or duties, so that the incumbent of one office cannot discharge with fidelity and propriety the duties of both. Incompatibility is not simply a physical impossibility to discharge the duties of both offices at the same time, but is an inconsistency in the functions of the two offices.

*See also* 74 Op. Att'y Gen. 50, 52-54 (1985). Moreover, “[t]he common law doctrine of incompatibility extends to positions of public employment as well as public offices,” and where the potential conflicts are substantial the incompatibility is not avoided by the holder of the public office and position of public employment abstaining from voting in those areas. *Otradovec v. City of Green Bay*, 118 Wis. 2d 393, 396, 397, 347 N.W.2d 614 (Ct. App. 1984).

Relying upon the common law rule for determining incompatibility of offices, this office has previously opined that in the situation where a county maintains a hospital authorized to furnish services to prevent or ameliorate mental disabilities, etc., the offices of trustee of such county institution and member of the 51.42 board are incompatible. 65 Op. Att'y Gen. 138 (1976). Although the office involved in your fact situation is that of administrator or superintendent of such county health care institution, rather than trustee, the obvious interests and required allegiance attending each office, as well as the potential conflicts which confront each officer, are essentially the same.

One of the principal responsibilities of the 51.42 board is to oversee “all care of any patient in a state, local or private facility under a contractual agreement between the county department of community programs and the facility” (section 51.42(3)(as)1.), which responsibility would include determinations as to the need for inpatient care in any such facility and judgments concerning the

allocation of services where necessary to reflect the availability of limited services. *See* sec. 51.42(3)(aw)2., Stats. When an administrator of a county health care institution who is appointed as a 51.42 board member would be called upon to deal with the same board of trustees which functions as his superior in another context, and in reference to issues affecting the very institution of which he or she is principal responsible operating officer, the potential conflicts of interest which would arise are obvious and real.

A public official, such as the 51.42 board member you describe, who has private business interests touching on the board's activities, also has further potential conflicts of interest which are distinguishable from those which give rise to incompatibility of office, but which may have equally serious consequences. Just as the interest of a trustee of a county hospital in keeping hospital beds full could present a potential conflict creating an incompatibility with the office of a 51.42 board member, the similar interest of a member of the governing board of a private human services agency in keeping such agency's facility at full capacity "may sometimes conflict with the interest of a sec. 51.42 board member in providing the most appropriate patient care, when such care may best be obtained by contracting with another public or private facility." *See* 65 Op. Att'y Gen. at 140. A person holding a public office may not place himself in a position where his private interest and his public duty conflict and must be free from influence other than that which arises from his obligation to the public at large. *Heffernan v. Green Bay*, 266 Wis. 534, 541, 64 N.W.2d 216 (1954). Under the circumstances you describe, the 51.42 board member involved clearly risks violation of section 946.13, which imposes criminal and civil sanctions for prohibited practices involving private interest in public contracts. *See State v. Stoehr*, 134 Wis. 2d 66, 396 N.W.2d 177 (1986).

Section 51.42(4), which provides for the creation of 51.42 boards, does not specifically address the issue of the appointment of providers to a 51.42 board. However, counties may establish a county human services department, under section 46.23, which assumes and exercises the combined powers and duties of the county's departments under sections 46.22, 51.42 and 51.437. Sec. 46.23(3)(b)1., Stats. Section 46.23(4)(a)1., which relates to the composition of the county human services board, does expressly state that "[n]o public or private provider of services may be appointed"

to such board. While the latter statutory provision refers to a section 46.23 combined services board, it is also a specific legislative recognition of the potential conflict which exists where providers are represented on a board exercising section 51.42 and similar contracting authority.

In light of the foregoing discussion, it is unnecessary to address your second question, which asks whether the appointment of such superintendent to replace the fifth county board member on such 51.42 board violates the provisions of the Trempealeau County ordinance which requires that five members of the 51.42 board be county board members. Moreover, a proper response to such inquiry is conditioned upon the detailed and studied consideration of various facts most readily available locally and upon legal and other considerations most easily identified and explored by the municipal attorney who routinely performs the duty of drafting such local legislation and rendering advice to the municipal officers concerning its implementation. As I recently explained in 77 Op. Att'y Gen. 120 (1988), except in extraordinary circumstances, I will not issue opinions concerning the meaning or intent of such municipal ordinances in the future.

DJH:JCM

*Acquired Immune Deficiency Syndrome; County Board; Marriage And Divorce;* A county board has no statutory authority to charge a higher marriage license fee to certain nonresidents who would be required to submit to AIDS testing in their home state or, in the alternative, require AIDS testing as a condition of obtaining a Wisconsin marriage license. OAG 34-88

August 1, 1988

FRANK VOLPINTESTA, *Corporation Counsel*  
*Kenosha County*

You advise that Kenosha County has experienced an influx of marriage license applicants seeking to avoid newly enacted State of Illinois legislation which requires mandatory testing for AIDS of all marriage license applicants. The increase in the number of such applicants apparently has caused substantial increases in staff time for various county offices, including the county clerk's office.

Based on the foregoing, you first inquire whether the county board of supervisors of your county may charge a higher marriage license fee only to those certain nonresidents who would be required to submit to AIDS testing in their home state. As an alternative question, you inquire whether members of the above-described class could be required to submit to AIDS testing as a condition of obtaining a Wisconsin marriage license. The answer to both questions is no.

Section 765.15, Stats., provides in part, as follows:

Fee to county clerk. Each county clerk shall receive as a fee for each license granted the sum of \$29.50, of which \$4.50 shall become a part of the funds of the county, and \$25 shall be paid into the state treasury. *Each county board may increase the license fee of \$29.50 by any amount*, which amount shall become a part of the funds of the county.

Counties have no inherent power to govern, and they function almost exclusively in view of the state's policy at large and for the purpose of providing political organization and civil administration in matters of state concern. *See Columbia County v. Wisconsin Retirement Fund*, 17 Wis. 2d 310, 317, 116 N.W.2d 142 (1961); *Dane County v. H&SS Dept.*, 79 Wis. 2d 323, 329-30, 255 N.W.2d 539 (1977); *Brown County v. H&SS Department*, 103 Wis. 2d 37, 43, 307 N.W.2d 247 (1981). It is well recognized that "a county board

has only such powers as are expressly conferred upon it or necessarily implied from the powers expressly given or from the nature of the grant of power.” *St. ex rel. Teunas v. Kenosha County*, 142 Wis. 2d 498, 504, 418 N.W. 2d 833 (1988), quoting from *Town of Vernon v. Waukesha County*, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981); see also *Maier v. Racine County*, 1 Wis. 2d 384, 385, 84 N.W.2d 76 (1957).

While section 765.15 clearly authorizes your county board to increase “by any amount” the portion of such marriage license fee which the county is authorized to retain, the authority to collect that portion of the license fee is undoubtedly only intended by the Legislature to insure that counties are allowed to offset or recover the administrative costs associated with the processing of marriage licenses at the county level.<sup>1</sup> Those costs do not differ appreciably as between applicants who are residents and those who are not residents. Moreover, the express statutory grant of authority to county boards to increase “the license fee of \$29.50 by any amount” does not give rise to a necessary implication that the county may establish a number of different marriage license fee classifications. The statute implies quite the contrary.<sup>2</sup>

Finally, I do not discern any indication in the legislative treatment of the issuance of Wisconsin marriage licenses which reflects a state policy intended to discourage nonresidents from contracting marriage in Wisconsin. Wisconsin also has no laws providing for mandatory testing for AIDS similar to those you describe. Therefore, under the general principles cited above, it would be inappropriate for the county board to attempt to exercise authority in the fashion you suggest to enforce the social policies of another state.

DJH:JCM

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<sup>1</sup> Section 765.08(2) also allows the clerk to charge “an *additional fee* of not more than \$10 to cover any *increased processing cost* incurred by the county” for issuing a marriage license on an expedited basis; see also 1 Op. Att’y Gen. 287, 289 (1911); 7 Op. Att’y Gen. 561, 562 (1918).

<sup>2</sup> The proposed differential treatment by your county between residents of Wisconsin and other states in the granting of marriage licenses might also give rise to constitutional concerns, particularly under the equal protection clause of section 1 of the fourteenth amendment, United States Constitution, and Wisconsin Constitution article I, section 1. See 60 Op. Att’y Gen. 18 (1971). However, the conclusions reached herein, based upon the statutes involved, render further discussion of such concerns unnecessary.

*Uniform Durable Power Of Attorney Act; Section 243.07, Stats., the Uniform Durable Power of Attorney Act, can permit an attorney-in-fact to make medical decisions but cannot be used to place someone in a nursing home or to avoid the other requirements of chapters 880 and 55. OAG 35-88*

August 5, 1988

MARK HAZELBAKER, *Corporation Counsel*  
*Manitowoc County*

You have asked whether a person's attorney-in-fact, relying on a durable power of attorney, may lawfully consent to placement of the person in a nursing home or consent to the provision of medical services to that person. I conclude that a durable power of attorney cannot be used to place someone in a nursing home but that it can be used to specifically delegate to another the ability to make medical decisions.

As you note in your request, a power of attorney simply describes the common-law relationship of principal and agent. Under the common law, the agency relationship automatically terminated when the principal died or became legally incompetent. 2A C.J.S. *Agency* §135, 141 (1972). The Legislature changed that common law principle when it adopted the Durable Power of Attorney Act, section 243.07, Stats.

The power of attorney in section 243.07 is "durable" because it is not affected by the subsequent disability or incapacity of the principal. Under the common law, the question whether an attorney-in-fact could consent to medical procedures or placement in a nursing home on behalf of an incapacitated principal could never arise because the agency relationship expired upon the principal's incapacity. Because the durable power of attorney does not expire, it has been suggested that the attorney-in-fact may consent to placement in a nursing home or may approve the provision of medical services.

The Legislature created section 243.07 effective May 1, 1982. The statute adopts the Uniform Durable Power of Attorney Act passed by the National Conference of Commissioners on Uniform State Laws in 1979. The commissioners explain that the purpose of the act

was to recognize a form of senility insurance comparable to that available to relatively wealthy persons who use funded, revocable trusts for persons who are unwilling or unable to transfer assets as required to establish a trust.

. . . .

. . . The general purpose of the act is to alter common law rules that created traps for the unwary by voiding powers on the principal's incompetency or death.

Uniform Durable Power of Attorney Act (U.L.A.) prefatory note. A copy of the Uniform Act is the only document in the Legislative Reference Bureau's files on section 243.07.

The purpose in construing a statute is to ascertain and give effect to the intent of the Legislature. *State v. Denter*, 121 Wis. 2d 118, 357 N.W.2d 555 (1984). There is nothing in the legislative history of the Uniform Durable Power of Attorney Act to suggest that the Legislature at all intended either to restrict or expand the powers which could be delegated under common law. On the contrary, the clear intent was simply to allow the delegation of those powers beyond the principal's incompetency or death. Therefore, if a person could properly appoint an agent to do an act under a power of attorney, the person may properly appoint an agent to do the same act under a durable power of attorney.

"As a general rule, a person may properly appoint an agent to do the same acts and achieve the same legal consequences . . . as if he had acted personally, unless public policy . . . requires personal performance . . ." 3 Am. Jur. 2d *Agency* §20 (1986). Some actions have always been regarded as too personal to delegate to another, for example, voting, taking marriage vows, performing personal service contracts, oath taking and making wills. Note, *Appointing An Agent To Make Medical Treatment Choices*, 84 Colum. L. Rev. 985, 1009 (1984). But the public policy reasons behind prohibiting the delegation of oath taking, voting or performing personal service contracts do not apply to medical decisions. Some people prefer that difficult medical decisions be made by family physicians or other family members, perhaps in the realization that those individuals will decide the best course of treatment rather than the easiest course of treatment. Indeed, when the person is incapacitated, for example, unconscious, a personal decision is impossible and the

physician must resort to an informal or ad hoc power of attorney by consulting with the patient's next of kin.

I conclude, therefore, that medical decisions can be delegated through a durable power of attorney. A *general* durable power of attorney, however, is not sufficient to delegate medical decision making. The rule is that a power of attorney must be strictly construed and that the instrument granting the power of attorney will be held to grant only those powers specified. 3 Am. Jur. 2d *Agency* §31 (1986). Therefore, an instrument which simply appoints someone an attorney-in-fact, or simply grants a general power of attorney, is not sufficient to delegate medical decision making. That delegation must be specific if it is to be effective.

A delegation of authority to make medical decisions, however, cannot be construed to allow the agent to make decisions which would otherwise be controlled under chapter 880, the guardianship law, or chapter 55, Wisconsin's Protective Services Act. Section 243.07(3)(b) of the Durable Power of Attorney Act permits a principal to nominate, "by a durable power of attorney, the conservator, guardian of his or her estate, or guardian of his or her person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced." Quite clearly, the Legislature did not intend to impliedly repeal or amend chapters 55 or 880 when it adopted the Durable Power of Attorney Act. To so hold would be to conclude that the Legislature would allow agents under the durable power of attorney statute greater powers than permitted guardians under chapter 880 and permit the assumption of those powers without the procedural protections of chapter 880.

Interpreting the durable power of attorney statute to permit the attorney-in-fact to place the principal in a nursing home is inconsistent with the protective placement statutes in chapter 55. A guardian may not, on his or her own authority, place a ward in a nursing home except on a very short term basis. Sec. 55.06, Stats. The guardian must petition the court for an order for such placement unless the placement is in a home of sixteen or fewer beds or the stay is limited to three months. Sec. 55.05(5)(b), Stats. When the guardian has placed the ward in a nursing home without court order and the ward later objects, the administrator of the facility must immediately notify the county protective services agency, that agency must within seventy-two hours visit the ward, and steps

must be taken under section 55.05(5)(c) to have the principal released, moved to another facility or a determination must be made that the existing facility is appropriate.

The Durable Power of Attorney Act only permits the principal to nominate a guardian. If the act were interpreted as allowing the attorney-in-fact to make placement decisions, the power to nominate would be surplusage since the attorney-in-fact could make those decisions without court appointment. I must conclude, therefore, that although a durable power of attorney may include the specific authority to make medical decisions, it cannot supplant and cannot be used to avoid the requirements of chapters 880 or 55 in order to place the principal in a nursing home.

DJH:AL

*Lobbying; Public Officials; State; University;* The lobby law prohibits a state employe from accepting compensation for serving on the board of directors or providing any other service to a principal as defined in section 13.62(12), Stats. OAG 36-88

August 9, 1988

JUDITH A. TEMBY, *Secretary*

*Board of Regents of the University of Wisconsin System*

On behalf of the Board of Regents you have asked whether a state employe serving on the board of directors or accepting compensation for services from a company that is a principal under section 13.62(12), Stats., violates section 13.625, the prohibited practices section of the lobby law.

Section 13.625(3) provides: "No candidate for an elective state office, elective state official or other officer or employe of the state may solicit or accept anything of pecuniary value from a lobbyist or principal, except as permitted under subs. (1)(c) and (2) and s. 19.56." A "principal" is defined as any person or organization who employs a lobbyist. Sec. 13.62(12), Stats. It has not been suggested that compensation for services as a director is not something of pecuniary value. Therefore, unless one of the exceptions applies, the state official or employe could not receive compensation for services from a principal.

Section 13.625(1) allows lobbyists and principals to make campaign contributions during certain times of the year. Section 13.625(2) applies the general prohibited practices section to principals but also provides that the general prohibitions should not be construed as applying "to the furnishing of transportation, lodging, food, meals, beverages or any other thing of pecuniary value which is also made available to the general public." That exception to the law is also inapplicable in this situation. Therefore, if an exception is to be found it must be found in section 19.56.

Section 19.56 provides an exception to the state ethics code for honoraria, fees and expenses. Section 19.56(1) states the general legislative intent as encouraging public officials to meet with clubs, conventions, special interest groups and other groups to discuss and interpret legislative, administrative and other governmental processes and proposals. Section 19.56(2) requires public officials who receive anything with a combined pecuniary value of more

than \$50 “for a published work or for the presentation of a talk or participation in a meeting” to report that receipt to the state ethics board. Although section 19.56(2) contains some exceptions to the reporting requirements, it does not provide any exceptions to the substantive provisions of the ethics code.

Those exceptions are found only in section 19.56(3), which provides that notwithstanding section 19.45, the substantive ethics code,

a state public official may receive and retain reimbursement or payment of actual and reasonable expenses for a published work or for the presentation of a talk or participation in a meeting and may receive and retain reasonable compensation if the work is published or the activity is accomplished by the official without the use of the state’s time, facilities, services or supplies not generally available to all citizens of this state and, in the case of an official not holding an elective office, outside the course of his or her official duties.

If an official receives payment which is not authorized, the law prohibits the official from retaining the payment.

The exception in section 19.56(3) applies only to reasonable expenses for a “published work,” “presentation of a talk” or “participation in a meeting.” The statute, therefore, does not provide a general exception for compensation for services. The exception for participation in a meeting must be read in context with the other exceptions for presenting a talk or publishing a work. It does not include the kind of meeting generally held by corporate boards of directors. Boards of directors may accomplish their work at meetings and may be reimbursed on a per meeting basis, but the compensation paid the directors is for their services as directors, not simply for attending a meeting. The exception for “meetings” is explained in section 19.56(1) as meeting with clubs, conventions, special interest groups, etc. “to discuss and to interpret legislative, administrative, executive or judicial processes and proposals . . . .” A board of directors meeting would not be included within that definition.

Because none of the exceptions listed in section 13.625(3) applies, a state employe may not be compensated for serving on the board of directors or for providing any other service to a principal. One may certainly question whether the Legislature was aware that

it was prohibiting *any* state employe from accepting any employment from a principal, no matter what position that employe holds in state government. For example, under the clear and unambiguous language of the statute, a janitorial employe of the state could not accept employment in the same capacity from a company which was also a principal. But since the statute is not at all ambiguous, I must conclude that the Legislature meant what it said. The statute does not make any distinction between employes with decision-making responsibilities, who lobbyists may wish to influence, and those who perform ministerial duties. This broad sweep may indeed have been intentional; the Legislature may have been unwilling to attempt to draw such distinctions or may have found it impossible to do so.

It is also possible, however, that the Legislature did not intend the sweeping effect of the statutory language, given the potential impact it could have on the generally accepted goal of encouraging university professors and other state employes to share their expertise with the private sector and the practice of such sharing that has developed over the years.

I am bringing this opinion to the attention of the Governor and Legislature so they will be fully aware of the law's broad sweep in the event corrective action is deemed desirable.

DJH:AL

*Marketing And Trade Practices*; The treatment of cash discounts in section 100.30(2), Stats., the minimum markup law, and proposed Wisconsin Administrative Code chapter Ag 119 does not violate federal antitrust laws, constitutional due process or exceed statutory authority. OAG 37-88

August 12, 1988

TOM LOFTUS, *Chairman*  
*Assembly Organization Committee*

FRED A. RISSER, *Chairperson*  
*Senate Organization Committee*

You have asked whether Wisconsin's Unfair Sales Act, section 100.30, Stats., and proposed Wisconsin Administrative Code chapter Ag 119 interpreting that statute violate the Sherman Act or constitutional due process in the treatment of cash discounts in the cigarette resale industry. In addition, the Assembly Committee on Organization asks whether the proposed rules exceed statutory authority by limiting the use of such cash discounts to reduce the distributor's cost.

Section 100.30(3) prohibits the sale of merchandise by a retailer or wholesaler at less than cost. In the cigarette resale industry, the statute defines "cost" to a wholesaler, distributor or multiple retailer in section 100.30(2)(c)1.a. and b. as follows:

(c)1.a. With respect to the sale of cigarettes or other tobacco products, fermented malt beverages, intoxicating liquor or wine, or motor vehicle fuel, "cost to wholesaler" means, except as provided in subd. 1.b., the invoice cost of the merchandise to the wholesaler within 30 days prior to the date of sale, or the replacement cost of the merchandise to the wholesaler, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise taxes imposed on the sale thereof prior to the sale at retail, and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, to which shall be added, except for sales at wholesale between wholesalers, a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be 3% of the cost to the wholesaler as herein set forth.

b. For every person holding a permit as a distributor as defined in s. 139.30(3) or as a multiple retailer as defined in s. 139.30(8), with respect to that portion of the person's business which involves the purchase and sale of cigarettes "cost to wholesaler" means the cost charged by the cigarette manufacturer, disregarding any manufacturer's discount or any discount under s. 139.32(5), plus the amount of tax imposed under s. 139.31. Except for a sale at wholesale between wholesalers, a markup to cover a proportionate part of the cost of doing business shall be added to the cost to wholesaler. In the absence of proof of a lesser cost, this markup shall be 3% of the cost to wholesaler as set forth in this subparagraph.

The statute expressly excludes the use of cash discounts given by manufacturers in order to reduce the wholesaler's cost, and all manufacturer's discounts to reduce the distributor's cost. It goes on, in relevant part, to require a minimum markup of three percent to cover the cost of doing business, in the absence of the distributor providing proof of a lesser cost of doing business. The Department of Agriculture, Trade and Consumer Protection has proposed Wisconsin Administrative Code chapter Ag 119 as a uniform method to determine a wholesaler's cost of doing business when attempting to prove that it is less than the three percent set by the statute. Wholesalers, distributors and multiple retailers would be permitted, by proposed Wisconsin Administrative Code section Ag 119.08(2)(b) and (3)(b), to use manufacturers' cash discounts to reduce their cost of doing business, but only to the extent that the discounts "offset interest expenses and other bank charges" incurred by the seller in providing a service or item of value to the manufacturer in order to receive the cash discount.

The materials included in your request from Representative Neubauer state that all "distributors" of cigarettes for resale promptly pay manufacturers to receive a 3.25% cash discount, and that manufacturers "universally" offer this discount. Your materials do not make it clear whether this situation applies equally to distributors and multiple retailers. You also state that distributors routinely sell at less than a three percent markup because their cost of business is very low. Their interest expenses and other bank charges are minimal, resulting in the inability of distributors to use, under the proposed rule, a significant portion of cash discounts to lower their permitted cost of doing business. Your concern appears

to be that disallowing the use of the full cash discount to reduce a distributor's cost of doing business results in an inaccurate and artificially high cost of doing business. You state that the statute, as interpreted by the proposed rule, goes beyond the purpose of preventing sales below cost and, in effect, requires a minimum profit of about three percent, by not permitting an actual, *bona fide* cost reduction cash discount to be utilized.

Your first specific question is whether or not section 100.30 violates provisions of antitrust law contained in the Sherman Act and related United States Supreme Court cases. I assume the theory behind this question is that by not allowing manufacturers' cash discounts to be used to reduce costs, the statute requires wholesalers to unlawfully fix prices, in this case by guaranteeing a three percent profit.

The answer to your first question is no.

The issue of whether section 100.30 violates the Sherman Act is really a question of whether the Sherman Act, which embodies the anti-price fixing policy of Congress, preempts Wisconsin's policy against below-cost pricing contained in section 100.30. The standard for addressing this preemption question is to determine whether or not the Sherman Act and the state plan contain an irreconcilable conflict. *Rice v. Norman Williams Co.*, 458 U.S. 654, 660 (1982). If there is no irreconcilable conflict between federal antitrust policy and the state statute, even though the state scheme might have a hypothetical anticompetitive effect, the state law is not preempted. *Id.* at 660. If the state statute does not authorize, require or irresistibly force private conduct that in all cases violates the Sherman Act, "the statute cannot be condemned in the abstract." *Id.* at 662.

In applying the irreconcilable conflict standard, two state resale price maintenance statutes have recently been struck down. California's statutory scheme for wine wholesalers required that wine resale prices be fixed either by the producer through a fair trade contract dictating price or by the wholesaler through a published resale price schedule. The California statute was struck down as unlawful resale price maintenance and vertical price control by producers, in violation of the Sherman Act. *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97 (1980).

New York's liquor price maintenance statute was also struck down in that it caused an unlawful maintenance of retail prices at artificially high levels, in violation of the Sherman Act. 324 *Liquor Corp. v. Duffy*, 479 U.S. 335 (1987). Although New York's scheme of statutory price maintenance was complex, the Supreme Court's focus was on the statute's permission for wholesalers to reduce case prices of liquor, while at the same time requiring the bottle retail price to be fixed at 112 percent of the bottle cost at wholesale. Wholesalers could then reduce case prices well below bottle prices, resulting in an artificially high bottle price at retail, with artificially high retail profits. The Court, relying on *Midcal's* emphasis on illegal vertical price control, held that the New York statute illegally mandated resale price maintenance. 324 *Liquor Corp.*, 479 U.S. at 341-43.

The key features relied on by the Supreme Court to strike down the statutory schemes in California and New York are not present in section 100.30. It has no requirement that has the effect of permitting any single wholesaler or producer to fix prices. It does not require producers to fix prices by contract or require all wholesalers to resell at the same published price. Nor does section 100.30 authorize, require or encourage wholesalers to collude with one another to set uniform resale prices to retailers, as was present in the New York and California schemes. Section 100.30 requires each wholesaler to determine its actual cost, based upon prevailing market conditions, irrespective of other wholesaler's costs. There is no concerted action or conspiracy condemned by the Sherman Act.

The issue of whether or not section 100.30 is in violation of the prohibition against price fixing embodied in the Sherman Act has been addressed by Wisconsin courts. In *State v. Eau Claire Oil Co.*, 35 Wis. 2d 724, 733, 151 N.W.2d 634 (1967), the court agreed with another state's decision characterizing statutes which prohibit sales below cost as not of a price-fixing nature, since they "merely fixed a floor beneath which prices may not be set . . ." In other words, section 100.30 does not require the distributor to sell at a state-determined price, but rather prohibits sales below cost as unfair and deceptive. More recently, the West Virginia Supreme Court of Appeals held that West Virginia's Unfair Practices Act did not violate the antitrust provisions of the Sherman Act because, not only did it not fix prices, but the two acts had harmonious purposes, to "prohibit sales below cost for the purpose of injuring or

destroying competition.” *Hartsock-Flesher Candy v. Wheeling Wholesale*, 328 S.E.2d 144, 156 (W. Va. 1984). It is worthwhile noting that *Hartsock-Flesher* also involved state exclusion of customary cash discounts in determining cost to cigarette wholesalers. In a similar vein, dealing with below cost milk sales, Tennessee’s minimum markup law has been upheld. *Walker v. Bruno’s, Inc.*, 650 S.W.2d 357 (Tenn. 1983).

To some extent your first question takes for granted that section 100.30 is in violation of the Sherman Act, and therefore that it must pass the court-created test of exemption from application of the Sherman Act by virtue of being a clearly articulated, actively supervised state action. However, *Hartsock-Flesher*, *Eau Claire Oil* and other state and federal decisions indicate that unfair sales acts such as section 100.30 do not violate the Sherman Act because they do not fix prices, and therefore the state action exemption question is superfluous. *Baseline Liquors v. Circle K Corp.*, 630 P.2d 38, 45 (Ariz. App. 1981); *cert. denied*, 454 U.S. 969 (1981); *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2d Cir. 1981).

You then ask whether section 100.30, as interpreted by proposed Wisconsin Administrative Code chapter Ag 119, is invalid under state and federal due process concepts since it excludes full consideration of actual cash discounts in determining cost. The answer is no.

I take your question to mean that since cash discounts are real and virtually uniform in the industry, disallowing them completely or partially to reduce cost is a regulatory scheme which is arbitrary and unreasonable.

Minimum markup statutes such as section 100.30 are unconstitutional “only if arbitrary, discriminatory, or demonstrably irrelevant to the policy” of the state. *Nebbia v. New York*, 291 U.S. 502, 538-39 (1934). *Nebbia* upheld a milk price statute as reasonably necessary to protect the public welfare. Wisconsin has followed this general rule, specifically upholding section 100.30 and indicating that the Legislature is entitled to embody economic and social issues through statutes designed to attack unfair marketplace practices. *Ross*, 259 Wis. at 379. Other courts have upheld statutes regulating unfair practices in cigarette sales. *Corr-Williams Wholesale Co. v. Stacy Williams Co.*, 622 F. Supp. 156, 159 (S.D. Miss. E.D. 1985). *Corr-Williams* also indicates that due process does not

even require the state to pick the least restrictive means for furthering the goal of market protection. *Id.* at 159, citing *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 485-88 (1955). The court will not substitute its judgment for the Legislature's. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

Is section 100.30(2)(c)1. discriminatory with respect to how cash discounts are treated? Since wholesalers, distributors and multiple retailers are required to treat cash discounts in the same manner, it appears that absent further factual information the statute is not discriminatory. The fact situation described in your materials indicates that all resellers obtain the same discount. Those courts which have struck down unfair sales acts as discriminatory have done so because different categories of wholesalers had to treat cash discounts in opposite ways. *Cohen v. Frey & Son*, 197 Md. 586, 80 A.2d 267 (1951); *Serrer v. Cigarette Service Co.*, 74 N.E.2d 841 (Ohio 1946). In addition, the proposed administrative rules treat all categories of wholesalers the same in allowing cash discounts to be used to offset interest expenses and bank charges. If anything, the rules would soften the alleged statutory arbitrariness by at least permitting a portion of the cash discounts to be utilized to offset costs.

The essence of your due process query is the potential arbitrariness of disallowing full cash discounts to be used to reduce the wholesalers' cost of doing business. However, courts generally will approve of regulations which, although arguably not perfect, result in a cost figure using reasonable accounting methods. In the fact situation closest to the one you describe, where the West Virginia unfair sales act regulating cigarette resales set up a method for determining *bona fide* cost, which eliminated cash discounts, the court found no due process arbitrariness. *Hartsock-Flesher Candy*, 328 S.E.2d at 144, citing with approval *Trade Commission v. Skaggs Drug Centers, Inc.*, 21 Utah 2d 431, 446 P.2d 958 (1968); *Red Owl Stores, Inc. v. Com'r of Agriculture*, 310 N.W.2d 99, 103 (Minn. 1981). Disallowing cash discounts while allowing other discounts for reducing the seller's cost is a recognized statutory distinction in other jurisdictions, based upon the concept that cash discounts relate to prompt payment and the cost of financing, whereas other discounts reduce the actual selling price of the item. *E&H Wholesale, Inc. v. Glaser Bros.*, 158 Cal. App. 3d 728, 734, 204 Cal. Rptr. 838 (1984).

Also, where there has been a proper delegation of rulemaking power, an administrative agency can interpret the details of cash or trade discount treatment in determining what is a below cost sale. The administrative agency's authority "is not price-fixing power, but essentially only power to prevent evasion under the guise of discounts." *Dundalk Liquor Co. v. Tawes*, 92 A.2d 560, 566 (Ct. App. Md. 1953). The department has that proper delegation of authority in section 93.07(1).

Finally, with respect to the due process "arbitrariness" issue, a statutory scheme which prohibits below cost sales, requires a fixed cost of business minimum markup and also permits a showing of proof of a lesser cost than the statutorily fixed percentage has been held not arbitrary and a "reasonable means" of reaching the statutory goal. *Baseline Liquors*, 630 P.2d at 38.

The final question raised is whether the department has exceeded its statutory authority by proposing Wisconsin Administrative Code section Ag 119.08(3)(b) which would limit the full use of cash discounts in proving a "lesser cost of business" under section 100.30(2)(c)1.b. The answer is no. The statute itself disallows the use of cash discounts in order to reduce the cost of the merchandise to the wholesaler. The fact that an administrative rule largely recognizes that prohibition, by disallowing most of such cash discounts in determining a cost of doing business below three percent, would not support an assertion that statutory authority has been exceeded. The opposite assertion flows logically from the department's rulemaking proposal, that in fact the statutory disposition regarding cash discounts is, in large part, affirmed by the rule. If anything, the other side of this argument could be asserted in more logical fashion: that *any* permission by rule to use any portion of a cash discount to reduce the cost of doing business exceeds the statutory mandate that these discounts be disregarded.

However, the department's rule is based on the concept that the industry should have guidelines on how to establish proof of a lesser cost of doing business. The proposed rule is ostensibly for the purpose of setting down certain basic accounting principles by which the industry will not be able to circumvent the goal of the statute, and under which all similar wholesalers will operate using the same accounting structure.

Your concern relates to the fact that cash discounts are received by distributors, and that since section 100.30(2)(b) defines “cost” as “bona fide costs,” there should be no reason why an actual cash discount should not be used to adjust the distributor’s cost. This is not an issue relating to the department’s proposed rule, since the disallowance of cash discounts is statutory. Nevertheless, your concern seems to be that since distributors are permitted by the statute to provide proof of a lesser cost of doing business than the statutory three percent, distributors should be allowed to use cash discounts to lower that cost of doing business, because they are *bona fide* reductions. The proposed rules prevent such full use. The department’s rationale for permitting deductions for cash discounts, to the extent that they offset interest expenses or bank charges, is that the statutory prohibition against using cash discounts is related only to the cost of the merchandise, not to the cost of doing business. Your question seems to accept this distinction since it asks whether the department can limit the use of the full cash discount in determining cost of doing business.

I do not believe that reliance upon the statutory language “bona fide costs” will further the claim of exceeding statutory authority. The term “bona fide costs” in section 100.30(2)(b) is used to clarify the terms “cost to retailer” and “cost to wholesaler,” and the statute goes on to explicitly exclude cash discounts in determining “cost to retailer” and “cost to wholesaler.” In other words, “bona fide costs” is used to clarify the meaning of cost of the merchandise. The term “bona fide costs” has also been held, in unfair sales act terminology, to mean “nonfraudulent,” as opposed to the sense of being technically perfect. *Baseline Liquors*, 630 P.2d at 38. This concept of “bona fide costs” reinforces the basic notion that as long as the statutory and administrative scheme of determining a minimum markup is arguably reasonable, the fact that it may not be the perfect manner in which to calculate a price is not a basis for courts to substitute their judgment for that of the Legislature.

A prior opinion of the attorney general noted in discussing section 100.30(2) and trade discounts that a statutory nonrecognition of conditional promotional allowances is softened by permitting the seller to provide proof of a lesser cost. 72 Op. Att’y Gen. 126, 129 (1983). The fact that the department now is proposing rules to sellers for establishing proof of a lesser cost while preserving the overall statutory scheme of preventing below cost sales is

not inherently excessive, and the department's judgment regarding the details of such proof is to be given deference.

An earlier attorney general's opinion emphasized that in attempting to prove a lesser cost of business than the statutory minimum markup, the general requirements are that the seller use a "reasonable rate," "good faith," and "an acceptable system of accounting." 53 Op. Att'y Gen. 1, 6 (1964). The department, in proposed Wisconsin Administrative Code chapter Ag 119, is using its expertise to establish a reasonable, good faith, acceptable standard. There is no private statutory or constitutional interest which overrides the proposal.

I believe that the department's proposed rule on treatment of cash discounts is a constitutionally and statutorily permissible regulation of an accounting method, designed to ensure that the prohibition against unfair below cost sales is preserved.

DJH:MES:kdh

*Administrative Law And Procedure; Agriculture, Department Of; Animals; Automobiles And Motor Vehicles; Criminal Law; Authorized agents of the Department of Agriculture, Trade and Consumer Protection have the authority to stop and search vehicles transporting livestock in Wisconsin so long as they comply with certain constitutional safeguards. OAG 38-88*

August 17, 1988

HOWARD C. RICHARDS, *Secretary*

*Department of Agriculture, Trade and Consumer Protection*

You have asked for my opinion as to whether authorized agents of the Department of Agriculture, Trade and Consumer Protection's Animal Health Division may stop and search vehicles transporting livestock in Wisconsin. You have directed my attention to various statutes in chapters 93 and 95, Stats., as well as administrative rules concerning importation of various animals, their transportation and movement and the licensing of livestock dealers, truckers and markets.

Specifically, section 93.08 provides:

The department and its authorized agents have power to enter, within reasonable hours, any field, orchard, garden, packing ground, building, freight or express office, warehouse, *car, vessel, vehicle*, room, cellar, storehouse, cold storage plant, packing house, stockyard, railroad yard or any other place of business, which it may be necessary or desirable for them to enter in performing their duties or in enforcing the laws entrusted to their administration.

Section 95.23(1) relating to the investigation and enforcement of diseased animals provides: "Authorized inspectors and agents of the department may enter at reasonable times any premises, building or place to investigate the existence of animal diseases or to investigate violations of or otherwise enforce the laws relating to animal health."

Administrative agencies "have only such powers as are expressly granted to them or necessarily implied . . ." *American Brass Co. v. State Board of Health*, 245 Wis. 440, 448, 15 N.W.2d 27 (1944). Under the above-quoted statutes, the department has the express power to enter any car, vessel or vehicle within reasonable hours to enforce the laws entrusted to its administration. It is my opinion

that the statute necessarily implies the power to stop cars, vessels or vehicles in order to enter them. I do not believe the Legislature intended the department to have only the power to enter those cars, vessels or vehicles which happen to be stopped at the time the enforcement need to enter arises. It is my opinion, therefore, that agents of the department's Animal Health Division are authorized under state law to stop and search vehicles transporting livestock in the state of Wisconsin. However, such authority is subject to the protections against unreasonable searches and seizures provided under the fourth amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution.

It is well-settled that administrative searches and seizures are subject to the protections of the fourth amendment of the United States Constitution because "[t]he basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). The Supreme Court of the United States in the *Camara* decision held that inspectors of the department of health of the city of San Francisco were required to obtain a warrant prior to a routine search of an apartment building for possible violation of the city's housing code. The Court, in a companion case, held that the warrant requirement applied to commercial as well as residential premises. *See v. The City of Seattle*, 387 U.S. 541 (1967). "If the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-13 (1978). *See also Michigan v. Tyler*, 436 U.S. 499 (1978); 63 Op. Att'y Gen. 337 (1974); 68 Op. Att'y Gen. 225 (1979). *Also see gen. 3 La Fave, Search and Seizure* §10.2 (1987).

Because unreasonable searches and seizures even for administrative purposes are prohibited by the fourth amendment, an exception to the warrant requirement contained in the fourth amendment must be found for stopping vehicles. Such an exception to the requirement for a warrant has been found in the cases of automobiles so long as probable cause exists for the search. *Carroll v. United States*, 267 U.S. 132 (1925). Additionally, in *Terry v. State of Ohio*, 392 U.S. 1 (1968), the Supreme Court recognized that a stop could be effected on a less stringent test than probable cause. In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Supreme Court held

that a routine stop of an automobile was a seizure within the meaning of the fourth amendment. *Prouse* involved a routine stop of an automobile for a driver's license and registration spot check. The Court held that in determining whether such a spot check was reasonable, the law enforcement practice must be balanced against the intrusion on the individual's fourth amendment interest. In holding the routine stop unreasonable, the Court said that the reasonableness standard

usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against "an objective standard," [footnote omitted] whether this be probable cause [footnote omitted] or a less stringent test [footnote omitted]. In those situations in which the balance of interests precludes insistence upon "some quantum of individualized suspicion," [footnote omitted] other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field," [citations omitted].

*Prouse*, 440 U.S. at 654-55. See also *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *State v. Guzy*, 139 Wis. 2d 663, 407 N.W.2d 548 (1987).

Since violations of the animal disease law or the requirements for the various health certificates for the importation and transportation of animals do not lend themselves readily to individualized suspicion of the vehicle in question, some other safeguard must be relied upon to justify the stop in the instances which you pose.

It is my opinion that, in the absence of particularized suspicion that a vehicle is violating the animal health or other health laws administered by your Animal Health Division, you will need to resort to the use of permanent or temporary roadblocks.

Permanent roadblocks have been upheld without a reasonable individualized suspicion in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). The use of a permanent roadblock or checkpoint might coincide with weigh stations which are located throughout the state on major transportation arteries. Animal health inspectors could work in conjunction with open weigh stations to check documentation of vehicles transporting animals in the state with little or no additional intrusion upon the truck drivers.

Although nonpermanent checkpoints or roadblocks have not been passed on by the United States Supreme Court, such checks have been found constitutional by a number of other states. *State v. Martin*, 145 Vt. 562, 496 A.2d 442 (1985); *State v. Garcia*, 500 N.E.2d 158 (Ind. 1986); *People v. Bartley*, 109 Ill. 2d 273, 93 Ill. Dec. 347, 486 N.E.2d 880 (1985); *State v. Halverson*, 277 N.W.2d 723 (S.D. 1979); and *State v. Hilleshiem*, 291 N.W.2d 314 (Iowa 1980) (a case striking down a roadblock not meeting the proper criteria while approving nonpermanent roadblocks in principle).

The case law criteria for constitutionally valid nonpermanent roadblocks are: (1) the location of the roadblock must be selected for its visibility and safety; (2) the roadblock must give adequate advanced warning by way of signs and illumination at night, which timely inform the motorist of the impending intrusion; (3) the roadblock must be manned by uniformed officers and official vehicles in sufficient quantity to show the motorists stopped the authority of the police power of the community; (4) the location, manner of selection of the vehicles stopped and general procedures at the roadblock must be dictated by higher administrative officials and must be in a sufficiently systematic manner to avoid the random discretion of field officers and to indicate to the motorists stopped that they are not being singled out for attention; and (5) the purpose of the stop must be explained to motorists and the detention must be minimal to perform the object of the roadblock. I must also caution that wholesale searches of vehicles without probable cause have been struck down even at fixed border checkpoints. *United States v. Ortiz*, 422 U.S. 891 (1975). Thus, a search of the vehicle is probably not justified unless the brief seizure ripens into probable cause.

In reaching my conclusion, I am mindful that some cases have permitted inspection of commercial premises without any probable cause or reasonable suspicion. *United States v. Biswell*, 406 U.S. 311 (1972) (the firearms business); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor business); *Donovan v. Dewey*, 452 U.S. 594 (1981) (the operation of mines). The justification for these inspections has been a history in the business in question of close governmental supervision and inspection such that the owner and operator of the business have no reasonable expectation of privacy. Even then, however, the inspection can become "so random, infrequent, or unpredictable that the owner,

for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." *Donovan*, 452 U.S. at 599. In my view, the animal health area is not the type of closely supervised business upon which these cases turn. Animal health is more akin to the Occupational Safety and Health Administration Act for which warrants were required in *Barlow*, city health codes for which warrants were required in *Camara* and fire codes for which warrants were required in *See*.

I am also mindful that the Supreme Court has upheld against a constitutional challenge the boarding of ocean going vessels upon inland waterways with ready access to the open sea. *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983). The justification for this holding, however, was that the vessel had ready access to the open sea and could not be readily channeled as on a roadway. The Supreme Court has further held that state or territorial borders are not in the same class constitutionally as international borders. *Torres v. Com. of Puerto Rico*, 442 U.S. 465 (1979).

I am also mindful that random automobile stops for game violations have been struck down as unconstitutional. *See United States v. Munoz*, 701 F.2d 1293 (9th Cir. 1983); *Com. v. Palm*, 315 Pa. Super. 377, 462 A.2d 243 (1983).

In conclusion, it is my opinion that officials of the Animal Health Division of the Department of Agriculture, Trade and Consumer Protection have the authority to stop vehicles provided that they have an articulable suspicion of individualized violation of the animal health statutes or regulations or the stops are made at permanent roadblocks or temporary roadblocks which meet the constitutional criteria set forth above.

DJH:WDW

*Municipalities; Open Meeting; Public Officials;* Sections 895.35 and 895.46, Stats., apply to actions for open meetings law violations to the same extent they apply to other actions against public officers and employees, except that public officials cannot be reimbursed for forfeitures they are ordered to pay for violating the open meetings law. OAG 39-88

August 18, 1988

LAWRENCE J. HASKIN, *City Attorney*

*City of Oak Creek*

You have asked for my opinion whether a city can pay the plaintiff's attorneys fees as part of settlement of an action against a city official for an open meetings law violation.

You explain that the former mayor, two aldermen and four fire and police commissioners from the city of Oak Creek are defendants in an action commenced in the name of the president of the city's police union for alleged violations of the open meetings law. As part of settlement negotiations, counsel for the union president has proposed dismissal of the action upon payment of attorneys fees by the defendants.

Your specific question is: after a settlement of an open meetings law action that provides for dismissal and for the defendants to pay for the plaintiff's attorneys fees, can the city reimburse the defendants for the payment of the plaintiff's attorneys fees?

You have also asked whether the city attorney, pursuant to section 62.115, Stats., can be authorized to defend the city officials in the open meetings law action?

In my opinion, the answer to both questions is yes.

The two statutes providing for reimbursement to public officials who are defendants in legal actions are sections 895.35 and 895.46. Where section 895.35 applies, the designated governmental unit has the discretion to pay all reasonable expenses that the officer necessarily expended. Where section 895.46 applies, the governmental unit has an obligation to pay the judgment and expenses identified in the statute.

Section 895.35 provides:

Whenever in any city, town, village, school district, vocational, technical and adult education district or county charges

of any kind are filed or an action is brought against any officer thereof in his official capacity, or to subject any such officer, whether or not he is being compensated on a salary basis, to a personal liability growing out of the performance of official duties, and such charges or such action is discontinued or dismissed or such matter is determined favorably to such officer, or such officer is reinstated, or in case such officer, without fault on his part, is subjected to a personal liability as aforesaid, such city, town, village, school district, vocational, technical and adult education district or county may pay all reasonable expenses which such officer necessarily expended by reason thereof. Such expenses may likewise be paid, even though decided adversely to such officer, where it appears from the certificate of the trial judge that the action involved the constitutionality of a statute, not theretofore construed, relating to the performance of the official duties of said officer.

Section 895.46(1)(a) provides:

If the defendant in any action or special proceeding is a public officer or employe and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employe and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employe in excess of any insurance applicable to the officer or employe shall be paid by the state or political subdivision of which the defendant is an officer or employe. Agents of any department of the state shall be covered by this section while acting within the scope of their agency. Regardless of the results of the litigation the governmental unit, if it does not provide legal counsel to the defendant officer or employe, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employe did not act within the scope of employment. If the employing state agency or the attorney general denies that the state officer, employe or agent was doing any act growing out of or committed in the course of the discharge of his or her duties, the attorney general may appear on behalf of the state to contest that issue without waiving the state's sovereign immunity to suit. Failure by the officer or employe to give notice to his or her department head of an action or special proceeding

commenced against the defendant officer or employe as soon as reasonably possible is a bar to recovery by the officer or employe from the state or political subdivision of reasonable attorney fees and costs of defending the action. The attorney fees and expenses shall not be recoverable if the state or political subdivision offers the officer or employe legal counsel and the offer is refused by the defendant officer or employe. If the officer, employe or agent of the state refuses to cooperate in the defense of the litigation, the officer, employe or agent is not eligible for any indemnification or for the provision of legal counsel by the governmental unit under this section.

Several years ago, my predecessor concluded that section 895.35 applied to actions for open meetings law violations, but that section 895.46 did not because that statute did not apply to forfeiture actions. *See* 66 Op. Att'y Gen. 226, 229-30 (1977). In light of subsequent supreme court and court of appeals' decisions, the 1977 opinion must be withdrawn in regard to section 895.46.

In *Crawford v. City of Ashland*, 134 Wis. 2d 369, 396 N.W.2d 781 (Ct. App. 1986), the court of appeals held that section 895.46 was applicable to forfeiture actions. The court said that the attorney general's conclusion that the statute did not apply to forfeiture actions was unpersuasive. *Crawford*, 134 Wis. 2d at 376. However, the court said that the attorney general was correct to the extent that section 19.96 prohibits reimbursement to officials because the open meetings law statute is specific to those prosecutions.

The supreme court has repeatedly stated that sections 895.35 and 895.46 were enacted by the Legislature to offer the broadest protection reasonably available to public officials and public employes. *See Beane v. City of Sturgeon Bay*, 112 Wis. 2d 609, 614, 619, 334 N.W.2d 235 (1983); *Schroeder v. Schoessow*, 108 Wis. 2d 49, 67, 321 N.W.2d 131 (1982); and *Bablitch & Bablitch v. Lincoln County*, 82 Wis. 2d 574, 579, 263 N.W.2d 218 (1978).

These court decisions compel me to withdraw part of the 1977 opinion and now conclude that sections 895.35 and 895.46 apply to actions for open meetings law violations to the same extent they apply to other civil actions against public officers and employes, with the exception that public officials cannot be reimbursed for the forfeitures they are ordered to pay for violating the open meetings law. *See* sec. 19.96, Stats.

Your specific question is whether the city can reimburse the defendant officials if they pay for the plaintiff's attorneys fees as part of a settlement to obtain dismissal of the open meetings law action. Under section 895.35, the city may exercise its discretion to pay the officials' reasonable expenses, which includes the officials' costs. *See Bablitch*, 82 Wis. 2d at 583-84. Therefore, the city has the authority to reimburse the officials if as part of the settlement they pay for the plaintiff's attorneys fees.

You also ask whether the city attorney under section 62.115 may represent the officials in an open meetings action. Section 62.115 provides:

(1) The common council of any city, however incorporated, may by ordinance or resolution authorize the city attorney to defend actions brought against any officer or employe of such city or of any board or commission thereof, growing out of any acts done in the course of his employment, or out of any alleged breach of his duty as such officer or employe, excepting actions brought to determine the right of such officer or employe to hold or retain his office or position, and excepting also actions brought by such city against any officer or employe thereof.

(2) Nothing in this section contained, nor any action taken by any city or by any city attorney pursuant to the provisions of this section, shall be construed to impose any liability, either for costs, damages or otherwise, upon such city or city attorney.

Because I have concluded that, with the one exception covering the reimbursement for forfeitures, sections 895.35 and 895.46 apply to open meetings law cases, I also conclude that the city attorney would be able to represent officials in open meetings law cases to the same extent the city attorney can represent the officials in other forfeiture cases.

DJH:SWK

*Acquired Immune Deficiency Syndrome; Employer And Employee; Paramedic;* A police and fire commission is an employer under section 103.15, Stats., and may not test paramedic candidates for the HIV virus. Civil liability of the commission and the city it serves for claims brought by individuals who can prove that they contracted the HIV virus through employment-related contacts with paramedics discussed. OAG 40-88

August 22, 1988

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

You have requested my opinion on two questions. You ask whether the police and fire commission of the city of South Milwaukee can require testing for the AIDS virus as part of the normal medical physical examination given to paramedic candidates in the absence of a declaration by the Department of Health and Social Services that paramedics provide a significant risk of transferring the AIDS virus to other individuals. It is my opinion that the commission may not require such testing. You also ask whether section 103.15, Stats., provides any immunity to the commission and the city from claims by individuals who can establish that they contracted the virus from a paramedic while the paramedic was performing his or her duties. The statute itself offers no such immunity. However, the general principles of immunity and indemnification which apply to the fact situation you pose do provide general guidance to the commission and the city.

Section 103.15(2), as amended by 1987 Wisconsin Act 70, section 36, provides in relevant part:

[U]nless the state epidemiologist determines and the secretary of health and social services declares under s. 140.05(1) that individuals who have HIV infections may, through employment, provide a significant risk of transmitting HIV to other individuals, no employer or agent of an employer may directly or indirectly:

(a) Solicit or require as a condition of employment of any employe or prospective employe a test for the presence of an antibody to HIV.

(b) Affect the terms, conditions or privileges of employment or terminate the employment of any employe who obtains a test for the presence of an antibody to HIV.

The initial question is whether a police and fire commission is an “employer” within the meaning of section 103.15. Although other sections of chapter 103 define employer within their relative scopes, *see* sections 103.01(1), 103.13(1)(b), 103.14(1)(b), 103.21(1), 103.37(3), 103.545(1)(a), 103.64(1) and 103.90(2), the term is not defined in section 103.15. The general rule that statutes of general application do not apply to the state and its agencies does not apply with equal force to governmental subunits. *Compare State ex rel. Dept. of Pub. Instruction v. ILHR*, 68 Wis. 2d 677, 681, 229 N.W.2d 591 (1975) with *Lakeland Home v. Nursing Home Appeals Div.*, 118 Wis. 2d 636, 640, 348 N.W.2d 523 (1984). Even where a statute does not expressly include a governmental subunit in its scope, the statute has been applied to the governmental subunit. *Ibid.*

Moreover, a police and fire commission has all the attributes of an employer as that term is generally understood, section 62.13, and is an employer for other purposes, such as fair employment, section 111.32(6), and employment relations, section 111.70(1)(j).

Further, inclusion of a police and fire commission under the coverage of section 103.15 is consistent with the statute’s purposes. The statute is designed to protect potential employes from having to take HIV tests as a condition of employment except where there is a significant risk of transmitting AIDS, and to remove from the employer the decision whether significant risk is present. Inclusion of the paramedics sought to be hired by the commission would further the purposes of the statute. I conclude that the police and fire commission is an employer under the statute.

The statute prohibits employers from requiring HIV tests of current or prospective employes unless the state epidemiologist and the secretary of the Department of Health and Social Services determine that employes with HIV infections present a substantial risk of transmitting the virus to others through their employment. To date, the state epidemiologist has not determined that paramedics present such a risk. The police and fire commission, therefore, may not test current or prospective paramedics for HIV.

In my opinion, members of the police and fire commission and the city of South Milwaukee would be immune from money dam-

age suits by individuals who could prove that they became infected with HIV through employment-related contact with a paramedic. "The general rule is that a public officer is not personally liable to one injured as a result of an act performed within the scope of his official authority and in the line of his official duty." *Lister v. Board of Regents*, 72 Wis. 2d 282, 300, 240 N.W.2d 610 (1976). The refusal to test paramedic candidates and employes is such an act. Moreover, even if the commission members had discretion to require testing, "public officers are immune from liability for damages resulting from their negligence or unintentional fault in the performance of discretionary functions." *Id.*, 72 Wis. 2d at 301.

Under section 893.80(4), political corporations, governmental subdivisions and their officers, agents and employes are insulated from liability for their quasi-legislative acts. Thus, under state law, commission members would be immune from money damage liability if they adopted a policy of non-testing, whether or not section 103.15 prohibited testing. *Lifer v. Raymond*, 80 Wis. 2d 503, 511-12, 259 N.W.2d 537 (1977); *Kimpton v. New Lisbon School Dist.*, 138 Wis. 2d 226, 233-34, 405 N.W.2d 740 (Ct. App. 1987). However, it is possible that such an official municipal policy could form the basis of a civil rights lawsuit. See *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 690-91 (1978); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986). For this reason, I would advise the commission not to adopt a non-testing policy of its own, but to rely instead on the statutory testing prohibition. Under the civil rights statutes, personal responsibility is the touchstone for liability. *Adams v. Pate*, 445 F.2d 105, 108 (7th Cir. 1971). The liability of commission members cannot be predicated on the state's prohibition against AIDS testing.

The foregoing is not to say that the commission and the city are insulated from all liability. If a judgment is obtained against a public employe because of acts committed while carrying out duties, and while acting within the scope of employment, the employing political subdivision is liable for the judgment. Sec. 895.46, Stats. Thus if a rescued person obtained a judgment against a paramedic for a tortious AIDS transmission that occurred while the paramedic was acting within the scope of his or her employment, the employing unit would be liable for the judgment, in spite of the testing prohibition of section 103.15.

DJH:BAO

*Constitutionality; Freedom Of Speech; Lobbying;* Section 19.45(12), Stats., is constitutional. OAG 41-88

August 23, 1988

R. ROTH JUDD, *Executive Director*  
*Ethics Board*

1987 Wisconsin Act 365 repealed section 16.49, Stats., and replaced it with section 19.45(12), which reads:

No agency, as defined in s. 16.52(7), or officer or employee thereof may present any request, or knowingly utilize any interests outside the agency to present any request, to either house of the legislature or any member or committee thereof, for appropriations which exceed the amount requested by the agency in the agency's most recent request submitted under s. 16.42.

The Act also requires the Ethics Board to report to the Legislature by January 1, 1989, on the "effectiveness, wisdom and constitutionality" of the new statute. You ask whether section 19.45(12) is constitutional.

All legislative acts are presumed constitutional and the person challenging the statute must prove unconstitutionality beyond a reasonable doubt. It is insufficient simply to establish doubt as to a law's constitutionality. The courts indulge every presumption in favor of the law and will sustain the law if at all possible. *Quinn v. Town of Dodgeville*, 122 Wis. 2d 570, 577, 364 N.W.2d 149 (1985).

Earlier this year, in 77 Op. Att'y Gen. 59 (1988), I construed section 16.49 and found that as interpreted, it was not an unconstitutional restraint on first amendment rights but a reasonable regulation of employment. I have reached the same conclusion as to section 19.45(12).

If the law purported to regulate a state employee's right to express his or her opinions as a private individual, the law would certainly be unconstitutional. "The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so." *Smith v. Arkansas State Highway Emp.*, 441 U.S. 464, 465 (1979). Public employes cannot be compelled to relinquish those first amendment rights they might otherwise enjoy as citizens to comment on matters of public interest even in relation to the operation of the public agencies in which they work. *Pickering v. Board of Ed. of Tp. H. S.*

*Dist. 205, Ill.*, 391 U.S. 563 (1968). Therefore, a teacher must be allowed to speak on union issues at a public meeting of a school board even when that teacher is not a representative of the recognized union and despite a state law requiring that all negotiations be conducted with recognized representatives of the union. *City of Madison, Etc. v. Wis. Emp. Rel. Com'n*, 429 U.S. 167 (1976). In that case, the court held that a teacher was speaking simply as a member of the community in expressing his views on the subject. The court noted:

Surely no one would question the absolute right of the nonunion teachers to consult among themselves, hold meetings, reduce their views to writing, and communicate those views to the public generally in pamphlets, letters, or expressions carried by the news media. It would strain First Amendment concepts extraordinarily to hold that dissident teachers could not communicate those views directly to the very decisionmaking body charged by law with making the choices raised by the contract renewal demands.

*City of Madison*, 429 U.S. at 176 n.10.

If section 19.45(12) were interpreted as regulating the free speech rights of public employes in their private capacities, the statute would be overbroad and therefore unconstitutional. The state may legitimately, however, restrict the class of persons to whom it will listen. In *Minnesota State Bd. for Com. Colleges v. Knight*, 465 U.S. 271 (1984), the court held that a Minnesota statute requiring public employers to engage in official exchanges of views only with their professional employes' exclusive union representatives did not unconstitutionally infringe upon nonrepresented employes' first amendment rights. In that case, the court questioned whether a state official acting on behalf of the state in a policy-making capacity could even raise a first amendment objection to the state's instructions concerning how that official conducted his official activity. *Minnesota Bd.*, 465 U.S. at 283 n.7. The court held that there was "no constitutional right to force the government to listen . . ." *Minnesota Bd.*, 465 U.S. at 283.

Section 19.45(12) prohibits any state employe from lobbying the Legislature for appropriations which exceed the amount requested by the employe's agency in the agency's budget request. It also prohibits employes from knowingly utilizing any interests outside

of the agency to do what the employe is prohibited from doing. I believe that under *Minnesota Bd.*, this is a reasonable regulation of public employment. The Legislature is expressing its determination that agency budget requests must follow an orderly process once that request is submitted. The statute does not presume to limit the public employe's freedom to express himself or herself on matters of public policy, including budget requests, except "to either house of the legislature or any member or committee thereof." Sec. 19.45(12), Stats. That restriction falls well within the accepted definition of lobbying. *United States v. Rumely*, 345 U.S. 41 (1953). The statute, therefore, is not overbroad.

DJH:AL

*Confidential Reports; Inebriates And Drug Addicts; Minors; Except for those services for which parental consent is necessary under section 51.47(2), Stats., a physician or health care facility may release outpatient or detoxification services information only with the consent of the minor patient provided that the minor is twelve years of age or over. Wis. Admin. Code §HSS 92.06(2) (1986) and 42 C.F.R. §2.14(b) (1987). OAG 42-88*

August 26, 1988

DARWIN L. ZWIEG, *District Attorney*  
*Clark County*

You ask a series of questions concerning the treatment and release of information for minors in alcohol or other drug abuse programs. Your questions arise under circumstances where a child over twelve years of age presents himself or herself to the county community services clinic for an outpatient evaluation and is subsequently determined to have an alcohol or other drug abuse problem. Thereafter, outpatient services are recommended, and the minor begins participating in ongoing alcohol or drug abuse counseling. It is at this time that the minor often tells the counselor that he or she does not want the parents notified of this treatment.

You ask whether the community services department can honor a minor's request for alcohol and other drug abuse treatment without parental notification. For most forms of outpatient treatment, parental consent and notification are unnecessary. Under section 51.47(1), Stats., any physician or health care facility licensed, approved or certified by the state for the provision of health services may render preventive, diagnostic, assessment, evaluation or treatment services for the abuse of alcohol or other drugs to a minor twelve years of age or over without obtaining the consent of or notifying the minor's parent or guardian except where consent is specifically required under section 51.47(2). Section 51.47(2) requires the physician or health care facility to obtain the consent of the minor's parent or guardian:

(a) Before performing any surgical procedure on the minor, unless the procedure is essential to preserve the life or health of the minor and the consent of the minor's parent or guardian is not readily obtainable.

(b) Before administering any controlled substances to the minor, except to detoxify the minor under par. (c).

(c) Before admitting the minor to an inpatient treatment facility, unless the admission is to detoxify the minor for ingestion of alcohol or other drugs.

(d) If the period of detoxification of the minor under par. (c) extends beyond 72 hours after the minor's admission as a patient.

You also ask two related questions which I will answer together for purposes of clarity. First, referring to portions of section 51.30, you ask whether the community services department is required to notify parents after treatment is completed or whether it is necessary for the parents to request the information on their own. Second, you ask whether the treatment facility must obtain the minor's consent to release information about treatment to the parents or whether the parents have a right to access without consent.

If it were not for specific limitations on release of alcohol or drug treatment records, parents could be notified that their child is a patient at an inpatient facility under section 51.30(4)(b)13. Further, the parents of a developmentally disabled minor have an absolute right of access to the minor's treatment records at all times except in the case of a minor aged fourteen or over who files a written objection to such access with the custodian of the records. Sec. 51.30(5)(b)1., Stats. This subdivision provides that the parent, guardian or person in place of a parent of other minors shall have the same rights of access as provided to subject individuals under that section. However, such rights are not absolute in the specific areas of alcohol or other drug abuse treatment and must be subject to the minor's right to grant or withhold consent for release of this information.

It is a cardinal rule of statutory construction that conflicts between different statutes, by implication or otherwise, are not favored and will not be held to exist if they may otherwise be reasonably construed. *Mack v. Joint School District No. 3*, 92 Wis. 2d 476, 489, 285 N.W.2d 604 (1979). Where a conflict or inconsistency exists between two statutes on the same subject matter, there is a duty to construe the statutes in a manner that will harmonize them in order to give each full force and effect. *State Central Credit*

*Union v. Bigus*, 101 Wis. 2d 237, 242, 304 N.W.2d 148 (Ct. App. 1981).

When harmonizing inconsistent statutes, the specific governs the general. *Caldwell v. Percy*, 105 Wis. 2d 354, 375, 314 N.W.2d 135 (Ct. App. 1981). Access without informed written consent to treatment records is severely restricted by the express language in section 51.47(2)(c) and by a combined reading of section 51.30(4)(c) and rules and regulations limiting disclosure of information from alcohol or other drug abuse treatment records.

Notwithstanding the parents' general right to notice that their child is a patient at an inpatient facility under section 51.30(4)(b)13., parental consent is not necessary before admitting a minor to an inpatient treatment facility if the admission is to detoxify the minor for ingestion of alcohol or other drugs and if the period of detoxification does not extend beyond seventy-two hours after admission. Sec. 51.47(2)(c) and (d), Stats. Section 51.30(4)(c) provides:

Notwithstanding par. (b), whenever federal law or applicable federal regulations restrict, or as a condition to receipt of federal aids require that this state restrict the release of information contained in the treatment records of any patient who receives treatment for alcoholism or drug dependency in a program or facility to a greater extent than permitted under this section, the department may by rule restrict the release of such information as may be necessary to comply with federal law and regulations. Rules promulgated under this paragraph shall supersede this section with respect to alcoholism and drug dependency treatment records in those situations in which they apply.

Wisconsin Administrative Code chapter HSS 92 (1986) is promulgated pursuant to section 51.30(12) which directs the department to promulgate rules to implement certain portions of section 51.30(4). Wis. Admin. Code §HSS 92.01(2) (1986). There are specific limitations on the release of information on outpatient or detoxification services under Wisconsin Administrative Code section HSS 92.06(2) (1986), which provides:

Information may be released from the alcohol or drug abuse treatment records of a minor only with the consent of both the minor and the minor's parent, guardian or person in the place of a parent, except that outpatient or detoxification services infor-

mation, with the qualifications about these services indicated in s. 51.47(2), Stats., shall be disclosed only with the consent of the minor provided that the minor is 12 years of age or older.

By federal regulation, when a minor under state law can obtain treatment for alcohol or other drug abuse without the parent or guardian's approval, as under section 51.47, only the minor's consent is required for disclosure of information from records of that treatment. 42 C.F.R. §2.14 (1987) provides in pertinent part:

(b) *State law not requiring parental consent to treatment.* If a minor patient acting alone has the legal capacity under the applicable State law to apply for and obtain alcohol or drug abuse treatment, any written consent for disclosure authorized under Subpart C of these regulations may be given only by the minor patient. This restriction includes, but is not limited to, any disclosure of patient identifying information to the parent or guardian of a minor patient for the purpose of obtaining financial reimbursement. These regulations do not prohibit a program from refusing to provide treatment until the minor patient consents to the disclosure necessary to obtain reimbursement, but refusal to provide treatment may be prohibited under a State or local law requiring the program to furnish the service irrespective of ability to pay.

....

(d) *Minor applicant for services lacks capacity for rational choice.* Facts relevant to reducing a threat to the life or physical well being of the applicant or any other individual may be disclosed to the parent, guardian, or other person authorized under State law to act on the minor's behalf if the program director judges that:

....

(2) The applicant's situation poses a substantial threat to the life or physical well being of the applicant or any other individual which may be reduced by communicating relevant facts to the minor's parent, guardian, or other person authorized under State law to act in the minor's behalf.

Specifically for alcohol and other drug abuse treatment for minors, there is no need for parents to request the information to which they are entitled. Section 51.47(3) requires the physician or

health care facility to notify the minor's parent or guardian of any services rendered under that section "as soon as practicable."

In this latter respect, your next question is whether the treatment program is required to notify parents and, if so, whether this notification is to be given as soon as treatment is completed under section 51.47(3), which provides that "[t]he physician or health care facility shall notify the minor's parent or guardian of any services rendered under this section as soon as practicable." As section 51.47(1) permits, but does not require, the physician or health care facility to render treatment for the abuse of alcohol or other drugs to a minor twelve years of age or over without obtaining the consent of or notifying the minor's parent or guardian, it never would be "practicable" to notify the parent of any services rendered except for those services under section 51.47(2), quoted above, for which parental consent is necessary. Those services, except possibly for the administering of any controlled substances under section 51.47(2)(b), cover inpatient rather than outpatient treatment. Further, because the release of any such information concerning alcohol or other drug abuse outpatient treatment without the minor's consent is unlawful under both 42 C.F.R. §2.14(b) (1987) and Wisconsin Administrative Code section HSS 92.06(2) (1986), it is difficult to perceive how any notification to the parents would ever be practicable except where the law specifically permits notification in medical emergencies under 42 C.F.R. §2.14(d)(2) (1987).

The parental notification envisioned by section 51.47(3) only applies to services for which parental consent is necessary or in situations where a minor age twelve or over has given informed consent to parental notification. It also is my opinion that section 51.47(3) was intended to alert parents to the performance of those specific medical procedures of which they may not have been aware when consent initially was obtained under section 51.47(2) or when consent otherwise would have been required under section 51.47(2)(a) except for the existence of a medical emergency.

In all other situations, parental notification never could be viewed as "practicable." It should be noted, in passing, that even access to treatment records by the subject individual may be restricted during his or her treatment by the director of a treatment facility under the general terms of section 51.30(4)(d)1.

Your final question, quoting directly from your recent letter is:

In regard to non-alcohol or other drug abuse outpatient mental health services to minors; Is the Community Services Department on safest ground by continuing their present policy of addressing emergency referrals such as a suicidal adolescent without parental notification if necessary, but once the emergency has passed, declining to provide ongoing counseling without parental consent?

As this question appears to solicit practical rather than legal advice, I respectfully decline to answer it. I simply note that individual counselors are in the best position to assess any given situation involving an adolescent, subject to any statutory restrictions on the provision of services and release of information.

I also invite to your attention two recent acts dealing with subjects generally related to your overall inquiry. Section 51.30(4)(b)19. was created by 1987 Wisconsin Act 362 to permit the release of treatment records without informed written consent of the subject individual to, among others, the parent of the individual if the parent is directly involved in providing care to or monitoring the treatment of the individual and if the involvement is verified as therein provided. This subdivision does not apply to treatment records of a subject individual who is receiving or has received services for alcoholism or drug dependence, and the treatment records released are limited to a summary of the subject individual's diagnosis and prognosis, a listing of the medication which the subject individual has received and is receiving, and a description of the subject individual's treatment plan. As created by 1987 Wisconsin Act 367, section 51.14 now contains specific procedures for those cases where a minor wants certain treatment but where the parents are unwilling to consent. The refusal of either a minor age fourteen or older or the minor's parent or guardian to provide informed consent for outpatient mental health treatment, except psychotropic medications, is reviewable by the mental health review officer appointed by the juvenile court and by the juvenile court itself.

DJH:DPJ

*Libraries*; The express power of a library board under section 43.58(1), Stats., to control the expenditure of funds includes the authority to contract for necessary goods and services for the public library. OAG 43-88

August 31, 1988

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

You request my opinion on the following question involving the interpretation of provisions of section 43.58(1), Stats.: “Do the express powers of a library board under s. 43.58(1), Wis. Stats., to control the expenditure of funds carry with it the implied authority to contract or otherwise procure goods or services?” Section 43.58(1) reads:

The library board shall have exclusive control of the expenditure of all moneys collected, donated or appropriated for the library fund, and of the purchase of a site and the erection of the library building whenever authorized. The library board also shall have exclusive charge, control and custody of all lands, buildings, money or other property devised, bequeathed, given or granted to, or otherwise acquired or leased by, the municipality for library purposes.

The operative statutory language which most directly relates to your question is that which authorizes the library board to exercise “exclusive control of the expenditure” of library funds. Generally, the courts will interpret such statutory language on the basis of the plain meaning of the words. *In re Marriage of Abel v. Johnson*, 135 Wis. 2d 219, 226, 400 N.W.2d 22 (Ct. App. 1986). Therefore, in the absence of statutory or judicial definition, we should apply the common and generally understood meaning of such words, which can be established by reference to a recognized dictionary. *Menomonee Falls v. Falls Rental World*, 135 Wis. 2d 393, 397, 400 N.W.2d 478 (Ct. App. 1986). Webster’s dictionary defines “exclusive” as “1 a: excluding or having power to exclude b: limiting or limited to possession, control, or use by a single individual or group 2 a: excluding others from participation . . . .” Webster’s Ninth New Collegiate Dictionary 433 (1984). “Expenditure” is defined as “1: the act or process of expending . . . .” *Id.* at 437.

Based on the common and generally understood meaning of the above language of section 43.58(1), it is my opinion that the legislative grant to a library board of "exclusive control of the expenditure of all moneys collected, donated or appropriated for the library fund" contemplates that the board will exercise complete control over the *manner* in which such moneys are expended, which includes the authority to contract the expenditure of such funds to procure necessary goods and services for the public library.

Material submitted with your inquiry suggests that it has been questioned whether the library board has the authority to contract for goods and services because the statute does not expressly so provide. However, authority to exercise exclusive control of the expenditure of appropriated money is tantamount to such a grant, since it is inconceivable that the board could fully implement its authority under the statute without exercising the power to contract. Moreover, it is generally recognized that "an administrative agency's powers include not only those that are expressly conferred by the statute under which the agency operates, but also those that are fairly implied." *Watkins v. LIRC*, 117 Wis. 2d 753, 761, 345 N.W.2d 482 (1984).

The library board's authority to contract for goods and services is not subject to the limiting phrase in that portion of the first sentence of section 43.58(1), after the comma, which provides that the library board shall have exclusive control "of the purchase of a site and the erection of the library building whenever authorized." The latter language is properly read as separate and distinct from the board's authority over expenditures generally, and merely sets forth the requirement that the purchase of a site and erection of a building for library purposes must be authorized by the governing body of the municipality involved. The qualifying phrase "whenever authorized" is to be applied only to the words or phrase immediately preceding, unless the context or evident meaning of the statute requires a different construction:

In *Zwietusch v. East Milwaukee*, 161 Wis. 519, 522, 154 N.W. 981, 982, this court quotes from 36 Cyc. 1123, j, as follows:

"By what is known as the doctrine of the 'last antecedent,' relative and qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more

remote, unless such extension is clearly required by a consideration of the entire act." See, also, 2 Lewis's Sutherland, Stat. Constr. (2d ed.) §§420, 421; *Jorgenson v. Superior*, 111 Wis. 561, 87 N. W. 565.

*Dagan v. State*, 162 Wis. 353, 354, 156 N.W. 153 (1916); see also *State v. Carroll*, 239 Wis. 625, 632, 2 N.W.2d 211 (1942). I find nothing in the statute requiring a different construction. On the contrary, the history of the legislation supports such construction.

Much of the current statutory framework for the establishment and operation of municipal libraries and library boards, as principally set forth currently in sections 43.52, 43.54 and 43.58, originates with chapter 80, Stats. (1872), as amended by chapter 295, Laws of 1876. Requirements similar to those set forth in the first sentence of present section 43.58(1) are found in section 5, chapter 80, Stats. (1872), which provided in part that the board

shall have the exclusive control of the expenditures of all moneys collected to the library fund . . . . Said board shall have the power to occupy, lease or erect an appropriate building for the use of said library . . . *provided, however*, that no purchase or lease of land or buildings, and no order or contract for the erection or construction of buildings shall take effect without the previous approval of the mayor and common council of the city, or board of trustees of the village.

That early statutory provision demonstrates that from the outset, while the Legislature provided library boards with the broadest control of library expenditures generally, it treated the authority of library boards to acquire land and buildings separately and more restrictively. The authority of the library board continues to be separately treated in the latter regard.

DJH:JCM

*County Board; County Executive; Handicapped Children's Education Board;* In counties with a county executive, the county Handicapped Children's Education Board exercises advisory and policy-making functions associated with the special education programs and services authorized by the county board under section 115.83, Stats., and the county executive supervises the administrative functions. While the county Handicapped Children's Education Board and the county executive share budgetary responsibilities, the county executive makes the annual budget recommendation to the county board. County personnel and procurement ordinances, and other similar ordinances which regulate administration of county government generally, apply to the operation of such county special education programs and services to the extent such ordinances are otherwise authorized and do not conflict with the state laws regulating such special education programs and services. OAG 44-88

August 30, 1988

WILLIAM F. BOCK, *Corporation Counsel*  
*Racine County*

You advise that the county executive of your county has requested your advice on three questions dealing with his authority as it relates to the duties and responsibilities of your county's Handicapped Children's Education Board, previously established in your county pursuant to section 115.86, Stats. You have provided me with your analysis of the law and response to those questions and request my further consideration and opinion concerning such matters.

The first question asks: "Who is the direct supervisor of the Director of the County School Offices?"

The establishment of a county Handicapped Children's Education Board is discretionary with each county. However, in counties which have created such board, sections 115.83 to 115.88 authorize the board to exercise a broad range of duties and responsibilities, including the following set forth in section 115.86(5)(a):

**BOARD DUTIES.** (a) The board shall have charge of all matters pertaining to the organization, equipment, operation and maintenance of such programs and may do all things necessary to perform its functions, including, without restriction because of enumeration, the authority to erect buildings subject to

county board approval and employ teachers and other personnel. The board shall prepare an annual budget, which shall be subject to approval of the county board under s. 65.90 unless a resolution is adopted under sub. (9)(c), and shall include funds for the hiring of staff, the purchase of materials, supplies and equipment and the operation and maintenance of buildings or classrooms.

Moreover, section 115.86(6) expressly states that the board "may not assign by resolution or by contract the full administrative or instructional services of the board." The director of the county school offices in your county apparently heads the county schools office which administers the county special education program and instructional services authorized under the above statutes.

Recent significant statutory changes expanding the administrative authority of the county executive have been enacted by 1985 Wisconsin Act 29. Among these changes is section 59.031(2r), since renumbered by 1985 Wisconsin Act 176 as section 59.031(2)(br), which provides in part that "[n]otwithstanding any statutory provision that a board . . . appoint a department head . . . the county executive shall appoint and supervise the department head," and "[n]otwithstanding any statutory provision that a board . . . supervise the administration of a department, the department head shall supervise the administration of the department and the board . . . shall perform any advisory or policy-making function authorized by statute." Based on this language and other provisions of section 59.031, you conclude that the director of county school offices is a "department head" who now administers the county special education programs and instructional services under the supervision of the county executive and that the Handicapped Children's Education Board has now become a policy-making board.

Whether or not the county Handicapped Children's Education Board is a "board" which supervises the administration of a "department" and appoints a "department head" within the meaning of section 59.031(2)(br), it is my opinion that the administrative functions of the board, including those implemented through the director of the county school offices, would be under the direct supervision of the county executive and that the board would be restricted to the performance of "advisory or policy-making functions."

As recently pointed out in 77 Op. Att’y Gen. 98 (1988):

Section 59.031(2)(intro.), as amended by 1985 Wisconsin Act 29, now expressly provides that “[t]he county executive shall be the chief executive officer of the county” and shall take care that “every” county ordinance and state law is “administered” within his or her county. Section 59.031(2)(a) states that the duty and power of the county executive is to “[c]oordinate and direct by executive order or otherwise *all administrative and management functions of the county government* not otherwise vested by law in other elected officers.” Prior to amendment by 1985 Wisconsin Act 29, the latter provision had excepted administrative and management functions vested by law in “boards or commissions” from control by the county executive, but that exception was deleted by the session law.

Moreover, in counties with an elected county executive, Handicapped Children’s Education Board members are appointed by the county executive subject to county board confirmation. *See* secs. 115.86(3)(a) and 59.031(2)(c), Stats.

The second question asks: “Who has the responsibility of preparing the budget for the County School Office?”

Section 115.86(5)(a) provides that the county Handicapped Children’s Education Board “shall prepare an annual budget, which shall be subject to approval of the county board under s. 65.90.” However, in counties with a county executive, section 59.031(5) requires that “[n]otwithstanding any other provision of the law, he shall be responsible for the submission of the annual budget to the county board . . . .”

These two statutes may be read together and construed quite harmoniously. A “budget” is both an estimate of needs for stated purposes and a plan or method by which the expenditures and revenues are to be allocated to accomplish certain identified goals. Even under a county executive form of county government, the preparation of such an annual budget by the county Handicapped Children’s Education Board is quite consistent with the board’s continuing responsibility to perform advisory or policy-making functions. However, the county executive is responsible for the final overall policy considerations underlying the total annual budget proposal for all county functions, and the county executive controls

the ultimate annual budget recommendation to the county board. See 77 Op. Att'y Gen. 113 (1988).

The final question asks: "Is the Director of the County School Office obligated to follow the Racine County Affirmative Action Ordinance, the Racine County Personnel Ordinance, the Racine County Procurement Policy and any other policies and procedures directed by the County Board of Supervisors?"

In Wisconsin, "education constitutes a state function," and is a subject entirely within the control of the Legislature. *Hartford Union High School v. Hartford*, 51 Wis. 2d 591, 593-94, 187 N.W.2d 849 (1971); *State ex rel. Harbach v. Mayor, etc.*, 189 Wis. 84, 90, 206 N.W. 210 (1926). Therefore, to the extent the specific function here involved deals with special education programs and services, the county cannot enforce ordinances in conflict with state law and must act in accord with the statutory directives regulating that subject, including section 115.83(5), which provides that "[t]he courses, qualifications of teachers, coordinators, social workers and school psychologists and plan of organizing and maintaining special education programs and other services shall comply with requirements established by the state superintendent." In the absence of any contrary indication, I will assume for the purposes of this opinion that none of the ordinances to which reference is made present any such conflict.

The statutes grant county boards broad authority to enact ordinances regulating their organization and administration. See secs. 59.02(1), 59.025, 59.026 and 59.07(intro.), Stats. Moreover, it is the county board which is responsible for development of those broad policy determinations which are not unique to the operation of any particular office or department and which relate to and guide the administration of the county more generally. For instance, the county board has authority to "establish regulations of employment for any person paid from the county treasury," "may require that all purchases may be made in the manner determined by it" and may even enact an ordinance requiring its contractors to agree to a policy of nondiscrimination in employment. See secs. 59.15(2)(c) and 59.07(7), Stats.; 70 Op. Att'y Gen. 64 (1981).

Therefore, assuming the ordinances referred to in the question are otherwise within the authority of the county board to enact, the

director of the county school office would be obligated to comply with the same.

DJH:JCM

*Property; Taxation;* Section 74.73(2), Stats., provides that where a town, city or village refunds property taxes erroneously assessed as a result of an error or defect of law not caused by such local taxing jurisdiction or an official thereof, such entity is entitled to a credit by the county for that portion of such taxes previously paid over to the county. The statute does not direct that the next county levy be increased by such amount or authorize the county to levy a "special county charge" against such entity to recoup the amount so credited. OAG 45-88

September 1, 1988

WILLIAM G. WEILAND, *Corporation Counsel*  
*Wood County*

You have requested my opinion as to the application of section 74.73(2), Stats., to a city's recovery from the county of the county portion of property taxes refunded by the city to a taxpayer.

Section 74.73(2) provides in pertinent part:

If any town, city or village has paid such claim or any judgment recovered thereon after having paid over to the county treasurer the state, county . . . tax levied and collected as part of such unlawful tax . . . the town, city or village shall be credited by the county treasurer, on the settlement with the proper treasurer for the taxes of the ensuing year, the whole amount of such . . . tax so paid into the county treasury . . . unless such claim or judgment is the result of an error or defect, other than an error or defect of law, caused by the town, city or village or official thereof.

The situation you describe arises when a taxpayer successfully challenges a property assessment as an unlawful tax or an excessive assessment under section 74.73(1r) or 74.73(4), respectively, resulting in a refund to the taxpayer by the city. *See* 76 Op. Att'y Gen. 268 (1987). Inasmuch as the tax was initially collected from the taxpayer by the city on its own behalf as well as for other taxing jurisdictions, the prescribed procedure under section 74.73(2) is for the city to make refund of the entire tax erroneously collected. The city then seeks recovery under the statute in the form of a credit from the county of "the whole amount" of that portion of the unlawful or excessive taxes previously forwarded to the county.

You do not question the propriety of the refund to the taxpayer, and I assume that the refund comported with the conditions of section 74.73. "All reasonable presumptions must be made in favor of the regularity and validity of the action of public officers." *State ex rel. Willis v. Prince*, 45 Wis. 610, 613 (1878). Rather, you ask whether, in the year after the credit is given to the city, the county "must" then increase the total county levy by the amount of the credit given, "in order to maintain the levy." Alternatively, you ask whether the county instead may levy a "special county charge" against the city in the full amount of the claim paid so as to avoid a perceived lack of uniformity in taxation you postulate would otherwise occur with a county-wide levy. The answer to both questions is no.

Based on the language of section 74.73(2) quoted above, I am of the opinion that the statute clearly delineates the county's course of action. It states unambiguously that the city "shall be credited by the county treasurer, on the settlement . . . for the taxes of the ensuing year, the whole amount of such . . . tax so paid into the county treasury." If, in the year after the credit is given, the county finds it needs to increase its levy, it obviously has that general power to do so. However, that statutory power, and the need to exercise it, bears no necessary relationship to a refund made to a taxpayer.

While the county has some discretion in whether or not, at the proper time, to increase its total county levy, section 74.73(2) "provides the whole scheme for apportioning the loss and readjusting the credits and debits between the city, the county and the state." 14 Op. Att'y Gen. 162, 163 (1925). Section 74.73(2) neither makes express provision for a county to levy a "special charge" against a tax district as a method for recouping such credit nor sets forth any justification for doing so. Under such circumstances, there also can be no implied authority to do so, since "[i]n order to find that a power is implied under the terms of a statute, we must find by fair implication that the power was intended to be incident to and included in the authority that was expressly conferred." *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 353, 299 N.W.2d 259 (Ct. App. 1980). A tax cannot be imposed without clear and express language for that purpose. See *Plymouth v. Elsner*, 28 Wis. 2d 102, 106, 135 N.W.2d 799 (1965).

Where the Legislature has deemed that the circumstances justified a special charge by a county against a town, city or village, it has so provided in other statutory provisions relating to the collection of property taxes. *See* secs. 75.61(2) and 75.62(4), Stats.<sup>1</sup> The Legislature has determined that the essentially opposite circumstances involved under section 74.73(2), *i.e.*, where it is the local taxing jurisdiction rather than the county which made the refund, justify the granting of a credit by the county to such municipality. No further special charge-back by the county is recognized or provided for by the statute.

You assert that the equalized value of the city was not diminished consequent to the claim paid to the taxpayer, notwithstanding that the claim for refund of property taxes was in excess of \$110,000 and that an actual revaluation of the city was not done. You suggest that taxes owed by the city should not change, if there was no change in equalized value. While there is some logic to this argument, the statute provides for a credit to the city "of the *whole amount*." It makes no mention of a credit only in the event of a decreased equalized value, despite the fact that the concept of equalization can be found in Wisconsin law for well over a century. *See* ch. 498, Laws of 1852. This is significant because the predecessor to section 74.73 was enacted shortly after, in 1870. Though a reference to equalized value could have been inserted at that time or on the occasion of one of its numerous amendments, that has not occurred.

You also suggest that, as applied, section 74.73(2) raises the issue of a potential violation of the uniformity clause of Wisconsin Constitution article VIII, section 1. That is, if the county levy increases, whereby the various taxing districts ultimately pay a prorated share of the credit given to the city, the county residents would be paying more than their fair share of the tax burden.

Because all citizens are equal under the law, the laws of taxation must reflect that equality by being levied uniformly. However, perfect uniformity is not required. "Under sec. 1, art. VIII, constitution of Wisconsin, where a property tax is levied, there can be no classification which interferes with *substantial* uniformity of rate

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<sup>1</sup> Chapter 503, Laws of 1939, amended sections 75.61(2) and 75.62(4) to provide for a charge back which was similar to and the reciprocal of the credit which was then already provided a town, city or village under section 74.73(2).

based upon value.” *Barnes v. West Allis*, 275 Wis. 31, 37, 81 N.W.2d 75 (1957) (emphasis supplied). Indeed, “minor inequalities may exist in tax law without offending against rules of uniformity and equality.” *Plankinton Packing Co. v. Wisconsin Tax Comm.*, 198 Wis. 368, 373, 224 N.W. 121 (1929). Uniformity is required only “as far as practicable.” *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 425, 147 N.W.2d 633 (1967). Should any levy adjustment rise to greater than a *de minimis* level, it is possible that a uniformity question might be posed. Nonetheless, I am of the opinion that, on its face, section 74.73(2) does not violate the uniformity clause.

Seemingly apart from the uniformity issue, you challenge the fairness of a chargeback to the county, framing the question in terms of a “benefit” to the aggrieved taxpayer. To the contrary, though that taxpayer’s liability has, indeed, been reduced, it has only been adjusted to the level at which the taxpayer properly should have been assessed at the outset. The county is only being asked to return what it erroneously received and distributed, at least theoretically, throughout the county for the equal benefit of all county residents. Furthermore, the county, too, is entitled to a credit from the state for the amount of such tax it passed on to the state.

The facts presented to this office are few, and are ambiguous at best. If there are equitable considerations beyond the statute, the statute does not appear to address them.

You also ask a number of other questions having to do with the Mid-State Technical College Vocational, Technical and Adult Education District and the Unified School District of Marshfield. This office has the statutory duty to advise you on county concerns, but those other questions are more properly addressed by the legal counsel of those districts.

DJH:JCM

*Counties; Drugs; Ordinances; Counties may not enact ordinances in conformity with state statutes prohibiting the possession and sale of marijuana. OAG 46-88*

September 12, 1988

BENJAMIN SOUTHWICK, *Corporation Counsel*  
*Richland County*

You ask whether counties can enact ordinances in conformity with state statutes prohibiting the possession and sale of marijuana.

In my opinion, the answer is no.

“[A] county board has only such powers as are expressly conferred upon it or necessarily implied from the powers expressly given or from the nature of the grant of power.” *Town of Vernon v. Waukesha County*, 102 Wis. 2d 686, 689, 307 N.W.2d 227 (1981).

Section 59.07(64), Stats., does authorize counties to “[e]nact ordinances to preserve the public peace and good order within the county.” However, in *St. ex rel. Teunas v. Kenosha County*, 142 Wis. 2d 498, 513, 418 N.W.2d 833 (1988), the Wisconsin Supreme Court held that this subsection of the statutes authorizes the enactment of ordinances only in “those areas traditionally recognized as concerning public peace and order.” See 46 Op. Att’y Gen. 12, 13 (1957). Such areas have been described in the following fashion:

“Under charter or statutory power, ordinances may be enacted against disturbing the public order and peace by disorderly or boisterous conduct; unusual noises and other boisterous and improper conduct; abusive or indecent language, cursing, swearing, or any loud or boisterous talking; drunken, noisy and disorderly conduct; disorderly shouting, dancing and assembling; noisy, rude, insulting and disorderly words or conduct toward another; affrays and fighting; riots and disorderly or boisterous assemblages; molesting religious and other lawful meetings; undue or unnecessary blowing of whistles of factories, shops and the like; playing of musical instruments at certain hours except in specified appropriate places such as homes, churches and public buildings; parading in public thoroughfares with bands of music and making various kinds of noises, without legal permits; holding unlawful public meetings in streets and public places; and ringing bells for auction sales, etc., playing on hand organs and other musical instruments, giving false alarms of fire, etc.”

46 Op. Att'y Gen. at 13, *quoting* 6 McQuillin, *Municipal Corporations*, pp. 634-35 (3rd ed.).

In *Teunas*, 142 Wis. 2d at 509-15, the court also indicated that criminal statutes concerning public peace and order are generally found in chapter 947. The possession and sale of marijuana are generally prohibited by chapter 161. *See* 63 Op. Att'y Gen. 108 (1974). There is no provision contained in chapter 947 that explicitly prohibits the possession or sale of marijuana, and I am not aware of any statutory provision other than section 59.07(64) that would even arguably authorize counties to enact ordinances prohibiting such possession or sale.<sup>1</sup>

I therefore conclude that counties may not enact ordinances in conformity with state statutes prohibiting the possession and sale of marijuana.

DJH:FTC

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<sup>1</sup> The Wisconsin Supreme Court has not decided whether towns, villages or cities have the authority to enact such ordinances. *See State v. Karpinski*, 92 Wis. 2d 599, 602-03 n.6, 285 N.W.2d 729 (1979).

*Funeral Directors And Embalmers; Licenses And Permits; Physicians And Surgeons;* Special training is required of medical personnel as well as morticians before they perform eye enucleation. OAG 47-88

September 13, 1988

FRED A. RISSER, *Chairperson*  
*Senate Organization Committee*

The Committee on Senate Organization has asked for an interpretation of section 157.06(7m), Stats., regarding persons authorized to perform eye enucleation. The statute reads:

**REMOVAL OF EYES BY FUNERAL DIRECTORS AND PERSONS ACTING UNDER DIRECTION OF PHYSICIAN.** In addition to any physician licensed to practice medicine and surgery under ch. 448, any person acting under the direction of a physician or any funeral director licensed under ch. 445, who has completed a course in eye enucleation and holds a valid certificate of competence from a medical college approved by the medical examining board under s. 448.05(2), may enucleate the eyes of a deceased donor under this section. A certificate of competence shall be valid for 3 years. No licensed funeral director so certified and no funeral establishment with which such a funeral director is affiliated shall be liable for damages resulting from such enucleation.

The issue presented is whether the course training and certification requirement applies to both persons acting under the direction of a physician and any funeral director or whether it applies only to funeral directors. It is my opinion it applies to both.

The supreme court has stated that in statutes involving qualifying clauses it is appropriate to look to punctuation as an indication of legislative intent. *Service Investment Co. v. Dorst*, 232 Wis. 574, 288 N.W. 169 (1939). In *Dorst*, the court gave significance to punctuation similar to that involved here. The court said that the placement of a comma between the last antecedent and the modifying clause indicated "that the modifying clause was intended to modify all the preceding clauses and not only the last antecedent one. If the modifying clause had been intended to modify only the last antecedent clause, there would have been no occasion for the comma and it would have been omitted." *Dorst*, 232 Wis. at 577.

Applying this approach to section 157.06(7m), the comma after “ch. 445” would set up the qualifying clause “who has completed a course,” etc., to apply back to the entire antecedent clause “any person acting under the direction of a physician or any funeral director licensed under ch. 445.” Thus, the course training and certification requirement would apply to persons acting under the direction of a physician as well as to funeral directors.

The supreme court has also said that interpretations reached by relying upon a rule of grammatical construction must be reasonable and not obviously in conflict with indications to the contrary. *Dittner v. Town of Spencer*, 55 Wis. 2d 707, 711, 201 N.W.2d 45 (1972). In this regard, I was initially troubled by the last sentence of section 157.06(7m) which accords immunity from liability to “funeral directors so certified.” In the absence of a corresponding immunity to persons “acting under the direction of a physician,” the lack of symmetry could suggest that those acting under the direction of a physician are not intended to be certified (*i.e.*, trained additionally) in the first place. The drafting file in the Legislative Reference Bureau shows that in fact there is symmetry. A letter from the funeral directors association to the bill’s sponsor states that the bill should give immunity to funeral directors because those acting under the direction of a physician already have immunity by virtue of section 146.31(3). A look at section 146.31(3) confirms this is true.

This information, along with other information in the Legislative Reference Bureau file, may further be used as indications of legislative intent, if one assumes that the statute itself is ambiguous. *In re Estate of Haese*, 80 Wis. 2d 285, 296, 259 N.W.2d 54 (1977).

The initial “Drafting Request” in the Legislative Reference Bureau file appears primarily interested in enabling morticians to perform enucleation, and it calls for “some training requirement.” The end of the request contains the instruction “[i]n addition mortician, also same provision for hospital trained surgical technician.” The introduced bill by its terms clearly required enucleation training for both “embalmers” and “surgical technicians.” 1977 Assembly Bill 197. The Legislative Reference Bureau analysis states that the course requirement applies to both. The bill was modified to replace “surgical technicians” with persons “acting under the direction of a physician.” The reason for broadening the authorization from “surgical technicians” to any person “acting under the direction of

a physician" is not clear, but there is no indication of any intent to curtail the training requirement to apply only to embalmers.

It is my opinion that the information available in the Legislative Reference Bureau file supports the grammatical construction indicating that the Legislature intended the course training and certification requirement to apply to persons acting under the direction of physicians as well as to funeral directors.

DJH:RWL

*Ambulances; Counties;* A county does not possess the statutory authority to designate the level of ambulance services provided by the towns within that county. Absent a cooperative agreement between a county electing to provide ambulance services pursuant to section 59.07(41), Stats., and a town electing to provide ambulance services pursuant to section 60.565, a county dispatcher possesses considerable discretion to request assistance from the most appropriate and readily available statutorily authorized ambulance provider. OAG 48-88

September 14, 1988

RAY A. SUNDET, *Corporation Counsel*  
*La Crosse County*

You ask whether a county possesses the statutory authority to designate the level of ambulance service provided by towns within that county as well as the ambulance service provider that will respond to each medical emergency called into the county dispatch service from such towns.

I am of the opinion that a county lacks statutory authority to designate the level of ambulance service provided by the towns within that county. Absent the existence of a cooperative agreement between a county and a town, I am of the opinion that a county dispatcher possesses considerable discretion to request assistance from the most appropriate and readily available statutorily authorized ambulance provider.

You describe the fact situation which gives rise to your inquiry as follows:

In La Crosse County, there are a number of competing private ambulance services providing emergency care at the basic life support (BLS) level and at the advanced life support (ALS) or paramedic level. Due to the limited number of emergency medical service calls, the competition has been fierce between the private providers resulting in an unstable and chaotic market place. The EMS Board has been attempting to deal with the private ambulance providers in providing the best possible pre-hospital emergency care to the citizens of La Crosse County.

The various town boards have stated through resolutions that they desire a combination of varying BLS providers, while the cities in the County, namely La Crosse and Onalaska, have

requested that their citizens be provided with the ALS or paramedic level service.

We have determined that none of the townships in La Crosse County presently contract for, operate or maintain their own ambulance service. However, each township by resolution has requested that La Crosse County through its 9-1-1 dispatch send certain BLS units to its citizens.

Section 59.07(41), Stats., permits but does not require any county to “[p]urchase, equip, operate and maintain ambulances and contract for ambulance service for conveyance of the sick or injured and make reasonable charges for the use thereof.” See 65 Op. Att’y Gen. 87 (1976). Where a county elects to utilize this statutory authority, it may not unilaterally refuse to provide such service to any municipality within the county, even if that municipality provides its own ambulance services. See 42 Op. Att’y Gen. 18 (1953).

A town’s statutory authority to provide ambulance services is contained in section 60.565, which provides as follows: “The town board shall contract for or operate and maintain ambulance services unless such services are provided by another person. The town board may purchase equipment for medical and other emergency calls.”

The comments to section 60.565 accompanying 1983 Wisconsin Act 532, section 7, prepared by the Legislative Council’s special committee on revision of town laws, *reprinted in Wis. Stat. Ann. secs. 60.30 to 65* (West 1988), provide as follows:

Restates s. 60.29(17) [(1981)], adding authority to purchase equipment for any kind of emergency. While there is some question as to whether provision for ambulance service is mandatory or optional under current law, the special committee concluded that, given the importance of ambulance service, particularly in rural areas, provision of the service should be mandatory. Assembly amendment 4 added the qualification that if ambulance service is provided by another entity, the town *need not* provide it.

(Emphasis supplied.) The underscored language in the special committee’s note clearly indicates that, when ambulance service is provided by another entity such as a county, a town may, at its option, discontinue the service.

You point out, however, that section 146.35(3) authorizes “[a]ny county . . . [or] municipality . . . after submission of a plan approved by the department, [to] conduct a program utilizing emergency medical technicians—advanced (paramedics) for the delivery of emergency medical care to the sick and injured . . . .” Based upon this language, you indicate that “[i]t may not be possible to provide each township with the particular ambulance service that it has requested in order to develop a feasible County plan.”

I find no inconsistency in any of the statutes cited. It is not unusual for counties and municipalities in which they are located to possess concurrent jurisdiction to perform governmental functions. *See, e.g.*, 65 Op. Att’y Gen. 108 (1976); 63 Op. Att’y Gen. 69 (1974). As implicitly indicated in 42 Op. Att’y Gen. 18, such concurrent authority exists with respect to the provision of ambulance services. Thus, pursuant to section 146.35(3), a county may elect to staff all of its ambulances with paramedics. However, under section 60.565, a town remains free to provide or contract for ambulance services at the basic life support level. Since there is no apparent conflict between any of the statutes you have cited, I conclude that a county lacks statutory authority to designate the level of ambulance service provided by towns within that county.

Under the facts as you have stated them, no town in your county is in compliance with section 60.565. Where that is the case, a dispatcher in a county providing services under section 59.07(41) is under no obligation to accede to a town board’s resolution that merely constitutes a request to dispatch a particular ambulance provider not under contract to that town. However, if and when ambulance services become available both pursuant to section 59.07(41) and pursuant to section 60.565, absent a cooperative agreement between the county and a town electing to provide services under section 60.565, it is my opinion that a county dispatcher would possess considerable latitude to request assistance from the most appropriate and readily available statutorily authorized ambulance provider.

Since there has been no concurrent provision of ambulance services by the county and any of the towns within your county, I decline to speculate as to whether a dispatcher’s discretion would

be limited under any particular set of circumstances which has not yet transpired.

DJH:FTC

*Ambulances; Words And Phrases;* A private ambulance that is an authorized emergency vehicle usually kept in a given county pursuant to section 340.01(3)(i), Stats., may not avail itself of the special provisions of section 346.03(2) so as to proceed unsolicited to the scene of an accident or medical emergency in an adjacent county. OAG 49-88

September 15, 1988

**WILLIAM F. BOCK, Corporation Counsel**  
*Racine County*

You inquire as to the lawfulness of certain conduct by a private ambulance service, which you describe as follows:

It has come to the attention of the Racine County Sheriff that a private ambulance service located in Milwaukee County has been operating within Racine County without the authorization of the Racine County Sheriff. This private ambulance service claims that it is not required to have written authorization from the Racine County Sheriff as it has already been authorized by the Milwaukee County Sheriff. Apparently, this private ambulance service monitors police bands where it learns of a need for an ambulance within Racine County and responds [unsolicited] to that need. On a number of occasions, this private ambulance service has arrived on the scene when rescue vehicles from various towns in the County of Racine have been called. At the scene, there is confusion on the part of victims and law enforcement as to who is authorized to respond.

For the purpose of responding to your inquiry, I am assuming that the vehicle or vehicles in question are usually kept in Milwaukee County and are authorized emergency vehicles under section 340.01(3)(i), Stats., but are somehow able to timely respond to accidents or emergencies in Racine County.

It is my opinion that such conduct violates state law if the special privileges accorded emergency vehicles pursuant to section 346.03(2) are utilized when making an unsolicited response to an emergency call originating in your county. <sup>1</sup>

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<sup>1</sup> Although it would be inappropriate for me to construe federal statutes enforced exclusively by federal agencies, you may also wish to consult federal authorities in order to ascertain whether the conduct you describe violates the provisions of 47 U.S.C. §605 (1984). Also see *United States v. Fuller*, 202 F. Supp. 356 (N.D. Cal. 1962).

In order for an ambulance to be an authorized emergency vehicle, such designation must be obtained from the sheriff or someone else designated by the county board of the county in which the ambulance is usually kept. Section 340.01 provides in part as follows:

(3) "Authorized emergency vehicle" means any of the following:

. . . .

(i) Such ambulances which are privately owned and are operated by owners or their agents and which vehicles are authorized by the sheriff or others designated by the county board to be operated as emergency vehicles. The sheriff or others designated by the county board may make such authorization which shall be in writing and which shall be effective throughout the state until rescinded. The sheriff or others designated by the county board may designate any owner of ambulances usually kept in the county to operate such vehicles as authorized emergency vehicles. Such written authorization shall at all times be carried on each ambulance used for emergency purposes. The sheriff shall keep a file of such authorizations in his office for public inspection, and all other persons permitted to issue authorizations shall file a copy of all authorizations issued with the sheriff who shall keep them on file.

As section 340.01(3)(i) indicates, once the requisite designation is obtained in the county in which the ambulance is usually kept, it becomes an authorized emergency vehicle "throughout the state until rescinded." According to the committee notes accompanying chapter 260, Laws of 1957, *reprinted in* 39A Wis. Stats. Ann. p. 13 (West 1971), this designation "is important primarily from the standpoint of §346.03 which grants special privileges to authorized emergency vehicles."

Section 346.03 provides in part as follows:

(1) The operator of an authorized emergency vehicle, *when responding to an emergency call* or when in the pursuit of an actual or suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions stated in subs. (2) to (5).

- (2) The operator of an authorized emergency vehicle may:
  - (a) Stop, stand or park, irrespective of the provisions of this chapter;
  - (b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
  - (c) Exceed the speed limit;
  - (d) Disregard regulations governing direction of movement or turning in specified directions.

Related statutes such as sections 340.01(3)(i) and 346.03(1) and (2) should be construed so as to give effect to their leading idea or purpose and should also be construed so as to avoid absurd and unreasonable results. 76 Op. Att’y Gen. 126, 130 (1987); *DeMars v. LaPour*, 123 Wis. 2d 366, 372, 366 N.W.2d 891 (1985). According to the 1957 committee note, the leading idea or purpose behind these statutes is to permit operators of authorized emergency vehicles responding to emergency calls to do such things as proceed through stop signs and red lights, exceed the speed limit and disregard directional, turning and parking regulations where suitable and appropriate, but only “when responding to an emergency call” within the meaning of section 346.03(1).

Section 990.01(1) requires that the term “when responding to an emergency call” be construed according to its commonly understood usage. In my opinion, that term is commonly understood to mean that there has been a specific or general request (usually by a law enforcement agency) for assistance from that emergency vehicle or from any or all authorized emergency vehicles of a given type within a particular area. That is, the statutory term does not connote under any circumstance an unsolicited response by a private ambulance service.

To construe the statute in a contrary fashion would lead to absurd and unreasonable results. If any and all private ambulances within a particular vicinity were statutorily authorized to proceed pell-mell to the scene of an accident or medical emergency absent any form of request whatsoever by a law enforcement agency or even a private citizen, confusion at the scene would result from the presence of multiple ambulances, and the possibility exists that additional accidents or injuries would result as multiple vehicles rushed to the scene of the accident or emergency.

Historically, the term “ambulance chasing” as applied to the practice of law connoted conduct that was ethically or even criminally prohibited. See *Cohen v. Hurley*, 366 U.S. 117 (1961); *Anonymous Nos. 6 and 7 v. Baker*, 360 U.S. 287 (1959). It is inconceivable that the Legislature has somehow revitalized that term by permitting private ambulances themselves to do the chasing.

I therefore conclude that a private ambulance that is an authorized emergency vehicle usually kept in an adjoining county may not make an unsolicited response to an emergency call originating in Racine County by using any of the special privileges enumerated in section 346.03(2).

DJH:FTC

*Coroner; Cremation; Health And Social Services, Department Of;* Chapters 69 and 157, Stats., are not alternatives to the requirement in section 979.10 that anyone cremating a corpse first obtain a cremation permit from the coroner. University medical schools or anyone else qualified to receive a corpse can, however, receive a corpse for research without first obtaining the cremation permit. Section 979.10 only requires that the permit be obtained before the corpse is cremated. OAG 50-88

September 16, 1988

**TOMMY G. THOMPSON, Governor**  
*State of Wisconsin*

You request my opinion on two questions regarding the disposition of human corpses under chapters 69, 157 and 979, Stats. First, you ask whether university medical schools may obtain corpses for scientific study without obtaining a cremation permit from a coroner. Second, you ask whether following the procedures and requirements of chapters 69 and 157 is an alternative to the coroner's cremation permit under chapter 979. I will address your second question first, since the answer to this broader inquiry will provide some of the legal background necessary to answer your first question.

For the reasons stated below, it is my opinion that when a corpse is to be disposed of by cremation, the requirements of chapters 69 and 157 do not provide an alternative to the coroner's cremation permit under chapter 979. In my opinion, a person cannot cremate a corpse in Wisconsin without first obtaining a cremation permit from a coroner or medical examiner pursuant to section 979.10(1)(a).

The pertinent portion of section 979.10(1)(a), as amended by 1985 Wisconsin Act 315, section 18, states:

No person may cremate a corpse unless the person has received a cremation permit from:

1. The coroner or medical examiner in the county where the death occurred if the death occurred in this state;
2. The coroner or medical examiner in the county where the event which caused the death occurred if the death occurred in this state and if the death is the subject of an investigation under s. 979.01; or

3. The coroner or medical examiner of the county where the corpse is to be cremated if the death occurred outside this state. A cremation permit issued under this subdivision may not be used in any county except the county in which the cremation permit is issued.

The language in section 979.10(1)(a) is clear and unambiguous in prohibiting cremation of a corpse without first obtaining a cremation permit. In addition, the legislative drafting records for 1985 Assembly Bill 427, which was passed into law as 1985 Wisconsin Act 315 amending section 979.10, show that the Legislature intended that no one be allowed to cremate a corpse without a coroner's cremation permit. Section 979.10(1), Stats. (1983-84), was ambiguous in that it appeared to set forth different requirements depending upon whether the death occurred in Wisconsin or out-of-state. The purpose of 1985 Wisconsin Act 315, section 18, was to clarify this ambiguity by setting forth the uniform requirement that every person obtain a cremation permit from a coroner before cremating a corpse in Wisconsin.

Because section 979.10(1)(a) expressly requires a coroner's cremation permit for every cremation with no exceptions, it is my opinion that chapters 69 and 157 cannot be construed to provide an alternative to this requirement.

Chapter 69, Collection of Statistics, does not address the actual physical disposition of corpses by cremation or otherwise. Section 69.18, concerning death records, imposes requirements for being allowed to move a corpse for the purpose of final disposition, filing death certificates, obtaining medical certifications and completing final disposition reports. Because it does not set forth any rules for physically disposing of the corpse, section 69.18 does not conflict with, nor provide an alternative to, section 979.10(1)(a). The coroner's cremation permit is a distinct requirement independent of chapter 69.

Also relevant is the fact that the entire vital statistics portion of chapter 69, including death records, was substantially modified by 1985 Wisconsin Act 315; the same act that amended section 979.10(1). Since the amendments to chapters 69 and 979 were made in the same act, it is more reasonable to construe them to coincide with each other.

While the substantive coverage of chapter 157, Disposition of Human Remains, does overlap to some degree with that of section 979.10, it is my opinion that chapter 157 should not be interpreted as an alternative to the explicit cremation requirements of section 979.10.

Section 157.01 grants to the Department of Health and Social Services the power to make rules, not inconsistent with chapter 445, Funeral Directors, covering sanitary and health concerns in the preparation, transportation and disposition of dead human bodies. The department has promulgated rules in Wisconsin Administrative Code chapter HSS 135 (1988), Dead Human Bodies, pursuant to this statutory authority.

The administrative rule which could possibly be construed as an alternative to section 979.10 is Wisconsin Administrative Code section HSS 135.05(1)(b) (1988). This rule states that an official burial permit issued by the county register of deeds, city health officer or village clerk serves as authorization for the burial or other disposition of a corpse. Since "disposition" in Wisconsin Administrative Code section HSS 135.02(6) (1988) includes cremation, this chapter of the code could be read to mean that a burial permit is a legal alternative to a coroner's cremation permit. In my opinion, however, such an interpretation of Wisconsin Administrative Code section HSS 135.05 (1988) would not provide an alternative to chapter 979, but rather, would render the rule invalid.

There are several reasons why Wisconsin Administrative Code section HSS 135.05 (1988) cannot be interpreted as a valid alternative to the absolute language of section 979.10(1)(a). First, the rule would be invalid for conflicting with section 979.10. No administrative agency "may promulgate a rule which conflicts with a state law." Sec. 227.10(2), Stats. In addition, the rule would be invalid for conflicting with section 445.16, which states that no provision of chapter 445 shall apply to or interfere with the duties of an officer of a public institution. The duties of a coroner as an officer of county government include making a careful personal inquiry into the cause of death of any corpse which is to be cremated to determine whether an autopsy is necessary, and if an autopsy is not necessary, to certify that fact. Sec. 979.10(2), Stats. Therefore, Wisconsin Administrative Code section HSS 135.05 (1988) may not be interpreted to affect these duties in any way since section 157.01 prohibits it from being inconsistent with chapter 445. Thus, even if

the language of Wisconsin Administrative Code section HSS 135.05 (1988) was interpreted to mean that a burial permit could be used as an alternative to a cremation permit, the rule would be invalid for conflicting with sections 979.10 and 445.16.

The only other sections in chapter 157 which might possibly be considered alternatives to chapter 979 are sections 157.02 and 157.06. Section 157.02 allows schools to receive unclaimed corpses for anatomical study, while section 157.06 allows schools to receive donated corpses for the same purpose. Neither statute makes any provisions for the actual disposal of the corpses when the research is completed. Therefore, they cannot be alternatives to the cremation permit requirement. Section 979.10 is simply an additional requirement for schools receiving corpses under sections 157.02 and 157.06.

Furthermore, section 157.06(7)(d) states that section 157.06 is subject to the powers and duties of the coroner with respect to autopsies under chapter 979. Since section 979.10(2) requires a coroner to make a careful personal inquiry into the cause of death of every corpse before it is cremated to determine whether an autopsy is necessary, section 157.06 cannot interfere with these duties.

In concluding my answer to this question, I would point out that even if chapters 69 and 157 were construed as providing requirements for the physical disposal of corpses by cremation without violating other statutory provisions, accepted rules of statutory construction would negate them from being alternatives to the coroner's cremation permit in chapter 979. Because statutes relating to the same subject matter should be harmonized if possible, *City of Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 370, 243 N.W.2d 422 (1976), chapters 69 and 157 would be interpreted in a manner such that they would not conflict with, if possible, the cremation permit requirement in section 979.10. In addition, since the specific statute controls when a specific statute and a general statute relate to the same subject matter, *Kramer v. Hayward*, 57 Wis. 2d 302, 311, 203 N.W.2d 871 (1973), the explicit requirement in section 979.10 of a coroner's permit for all cremations would take precedent over the more general death provisions in chapters 69 and 157 if they were read as valid alternatives to section 979.10.

Moving to your first question, it is my opinion that university medical schools may obtain corpses for scientific study without obtaining a cremation permit from a coroner. The language of section 979.10(1)(a) only requires that a person get a coroner's cremation permit before actually cremating the corpse. Thus, university medical schools may use corpses for scientific study without obtaining a coroner's cremation permit. However, as explained in the answer to your other question, whoever received the corpse from the university for cremation would be required under section 979.10 to obtain a coroner's cremation permit before cremating the corpse upon completion of the research if that were to be the method of disposition.

The legislative intent behind this distinction between receiving the corpse for future cremation and actually cremating the corpse is demonstrated by Assembly Amendment 1, Number 31 to 1985 Assembly Bill 427. This amendment specifically deleted a provision in section 979.10(1)(a) which required a coroner's cremation permit before receiving a corpse for cremation. Correspondence in the drafting records indicates that the Wisconsin Funeral Directors Association requested this amendment for the benefit of its members since they frequently found it difficult to acquire the cremation permit before receiving the corpse.

To summarize, chapter 979 requires that anyone cremating a corpse first obtain a coroner's cremation permit. Chapters 69 and 157 do not provide an alternative to this requirement. University medical schools, or anyone else qualified to receive a corpse, do not have to obtain a cremation permit before receiving a corpse. Section 979.10(1)(a) only requires that the permit be obtained before cremating the corpse.

DJH:WHW:CS

*Acquired Immune Deficiency Syndrome; Licenses And Permits; Regulation And Licensing, Department Of*; Licensing boards do not have the authority to enact general regulations which would allow them to suspend, deny or revoke the license of a person who has a communicable disease. However, licensing boards do have the authority on a case-by-case basis to suspend, deny or revoke the license of a person who poses a direct threat to the health and safety of other persons or who, by reason of the communicable disease, is unable to perform the duties of the licensed activity. OAG 51-88

September 21, 1988

MARLENE A. CUMMINGS, *Secretary*  
*Department of Regulation and Licensing*

You have asked me to analyze whether licensing boards have the authority to deny, limit, suspend or revoke the professional license of a person who has a communicable disease. Your inquiry is prompted by the concern that professionals who have a communicable disease may pose a threat to the health of their clients, patients or customers.

It is my opinion that the licensing boards do not have the authority to enact *general* regulations which would prevent a person with a communicable disease from practicing his or her profession. However, licensing boards do have the authority on a case-by-case basis to revoke, suspend or deny the license of a person who poses a direct threat to the health and safety of other persons or who, by reason of the communicable disease, is unable to perform the duties of the licensed activity.

Sections 111.321, 111.322 and 111.325, Stats., prohibit licensing boards from denying someone a license because they are handicapped. Section 111.32(8) defines a "handicapped individual" as an individual who:

- (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
- (b) Has a record of such impairment; or
- (c) Is perceived as having such an impairment.

The federal Rehabilitation Act of 1973, which prohibits a federally funded state program from discriminating against a handi-

capped individual solely by reason of his or her handicap, contains a similar definition of handicapped individuals. See 29 U.S.C. §794 (1988) and 45 C.F.R. §84.3(j) (1987). The United States Supreme Court recently interpreted the act in *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987).

In *Arline*, the Court concluded that a woman with tuberculosis was handicapped within the meaning of the federal act. The Court reached this conclusion largely because the woman's disease substantially limited her ability to participate in major life activities. The Court would not decide, however, whether a carrier of a contagious disease such as AIDS could be considered to have a physical impairment, or whether such a person could be considered handicapped solely on the basis of contagiousness. *Arline*, 480 U.S. at 282 n.7. The Court did remark, though, that by amending the definition of handicapped individual to include not only those who are actually physically impaired, but also those who are regarded as impaired, Congress was acknowledging that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from such impairment. *Arline*, 480 U.S. at 284.

In 1987, after the *Arline* decision, Congress amended the Rehabilitation Act to state that a handicapped person does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a *direct threat* to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 28, 31-32 (to be codified at 29 U.S.C. §706). Thus, the term handicap includes a contagious disease or infection unless the carrier would constitute a direct threat to the public health and safety. In passing the Civil Rights Restoration Act, the Senate rejected an amendment which would have reversed the *Arline* decision to the extent that individuals with contagious diseases could not be considered handicapped under the 1973 Rehabilitation Act. The amendment was rejected because it would represent "a complete retreat from the principles for which section 504 stands: protection of handicapped individuals from discrimination based not only on the handicap itself, but from irrational fears and prejudice of others. As the Court made clear, Congress did not authorize broad

exceptions such as contagious diseases from the coverage of the law.” S. Rep. No. 64, 100th Cong., 2d Sess. 28, *reprinted in* 1988 U.S. Code Cong. & Admin. News 3, 30.

Federal court decisions since *Arline* and the Civil Rights Restoration Act have specifically found that persons diagnosed with AIDS are handicapped within the meaning of the 1973 Rehabilitation Act. See *John Doe v. Centinela*, No. CV-87-2514, 1988 U.S. Dist. LEXIS 8401 (C.D. Ca. June 30, 1988); *Robertson v. Granite City Com. Unit School D. 9*, 684 F. Supp. 1002, 1007 (S.D. Ill. 1988); *Chalk v. U.S. Dist. Court Cent. Dist. of California*, 840 F.2d 701, 704 (9th Cir. 1988); *Thomas v. Alascadero Unified School Dist.*, 662 F. Supp. 376, 381 (C.D. Cal. 1987). In *Doe*, an asymptomatic carrier of the AIDS virus was excluded from a federally funded hospital’s residential drug and alcohol treatment program. The hospital urged that its blanket policy of excluding AIDS carriers was necessary to protect other patients from a communicable virus. The hospital contended that contagiousness alone does not amount to a handicap under the Rehabilitation Act. The court disagreed, stating that no matter what else *Arline* may fairly be read to hold, it clearly states that discrimination based solely on fear of contagion is discrimination based on a handicap when the impairment has that effect on others.

In addition to finding that a person is handicapped, it is also necessary to find that a person is “otherwise qualified” in order to receive protection from the Rehabilitation Act. In the employment context, an otherwise qualified person is one who can perform the essential functions of a job. 45 C.F.R. §84.3(k) (1987). When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any reasonable accommodation by the employer would enable the handicapped person to perform those functions. 45 C.F.R. §84.12 (1987). In *Arline*, the Court stated that an *individualized* inquiry would be necessary to determine whether a handicapped person is otherwise qualified. If the person is handicapped by a contagious disease, the inquiry should include:

“[findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the

probabilities the disease will be transmitted and will cause varying degrees of harm.” Brief for American Medical Association as Amicus Curiae 19.

*Arline*, 480 U.S. at 288 (insert in original).

Thus, any action taken to revoke, suspend or deny a person’s license because he or she has a communicable disease would have to be done on a case-by-case basis. The various federal courts which have reviewed AIDS cases have largely condemned action taken to prevent AIDS carriers from, among other things, teaching, attending classes and receiving health care. See *Robertson, Chalk and Doe*. Therefore, based on federal case law and the federal Rehabilitation Act, any general rule which would prevent a person with a communicable disease from practicing his or her profession would most likely be struck down.

The federal Rehabilitation Act is applicable to the Department of Regulation and Licensing if the department, at any time, receives federal funds, authorized under section 20.165(1)(m). However, even if the department does not receive federal funding it is still likely that Wisconsin courts would reach the same conclusion as federal courts on this issue. As already mentioned, the Wisconsin and federal definitions of a handicapped individual are very similar and therefore there is a high probability that a Wisconsin court would also find that a contagious disease such as AIDS is a handicap. Also, the Wisconsin Supreme Court cited the *Arline* decision with approval in *La Crosse Police Comm. v. LIRC*, 139 Wis. 2d 740, 761, 407 N.W.2d 510 (1987). In *La Crosse*, the Court reviewed Wisconsin’s definition of a handicapped individual and concluded that the determination of “what makes achievement unusually difficult” rests not with respect to a particular job, but rather to a substantial limitation on life’s normal functions or a substantial limitation on a major life activity. *Id.* This explanation is identical to the federal definition. Finally, section 111.34(2)(b) states in relevant part that:

In evaluating whether a handicapped individual can adequately undertake the job-related responsibilities of a particular . . . licensed activity, the present and future safety of the individual, of the individual’s coworkers and, if applicable, of the general public may be considered. However, this evaluation shall be made on an individual case-by-case basis and may not be made

by a general rule which prohibits the employment or licensure of handicapped individuals in general or a particular class of handicapped individuals.

Therefore, any action taken by a licensing board will have to comply with the requirements that the Supreme Court laid down in *Arline* regarding the employment of persons with communicable diseases.

Next you ask whether section 227.51(3) gives emergency powers to licensing boards to summarily suspend the license of a professional who has a communicable disease. I do not believe that section 227.51(3), which allows an agency to summarily suspend a license if it finds that public health, safety or welfare requires emergency action, is that broad. It does not grant any additional authority to licensing boards beyond the ability to move in a summary fashion in the case of an extremely imperative emergency. For further discussion of the standards governing summary suspension, I direct you to a recent attorney general opinion addressed to your office. *See* 76 Op. Att'y Gen. 110 (1987).

Finally you ask whether licensing boards may establish practice restrictions which they find necessary to prevent the transmission of a communicable disease. Since practice restrictions are, in effect, a limited form of suspension, they would have to be made on a case-by-case basis and they would be subject to the same standards that apply to the denial or revocation of a license.

DJH:WHW:LS

*County Corporation Counsel; District Attorney;* An official oath is required by section 59.13(1), Stats., for a county corporation counsel but is not required for an assistant district attorney. OAG 52-88

September 22, 1988

TOM LOFTUS, *Chairperson*  
*Assembly Committee on Organization*

On behalf of the Assembly Committee on Organization, you request my opinion whether a county corporation counsel or an assistant district attorney must take and file an official oath under section 59.13(1), Stats. In my opinion, an official oath is required for a county corporation counsel but is not required for an assistant district attorney.

Section 59.13(1) requires each "county officer" named in chapter 59 to take and file an official oath. It also requires every "deputy" of such an officer to take and file an official oath.

In my opinion, a county corporation counsel is a "county officer" within the meaning of section 59.13(1). The statutes governing county corporation counsel refer to the "office of corporation counsel," sections 59.07(44)(b) and 59.455, and prior opinions of the attorney general do likewise. 63 Op. Att'y Gen. 468, 469 (1974); 70 Op. Att'y Gen. 148, 150 (1981). Moreover, the duties reposing in the office of a county corporation counsel, section 59.456, meet the common law definition of an "office." *Martin v. Smith*, 239 Wis. 314, 330, 1 N.W.2d 163 (1941). Indeed, where the duties of a county corporation counsel are concurrent with similar duties of a district attorney, an undisputed "county officer" within the meaning of section 59.13(1), such duties are to be performed thereafter by the corporation counsel. Sec. 59.04(44)(c), Stats. Consequently, I conclude that a county corporation counsel is a "county officer" within the meaning of section 59.13(1), and therefore is required to take and file an official oath.

In reaching this conclusion, I feel obligated to point out that although a county corporation counsel cannot be considered a *de jure* officer in the absence of taking and filing an official oath, he or she is a *de facto* officer if "in possession of [the office], performing its duties, and claiming to be such officer under color of an election or appointment." *State ex rel. Reynolds v. Smith*, 22 Wis. 2d 516,

522, 126 N.W.2d 215 (1964); *Burton v. State Appeal Board*, 38 Wis. 2d 294, 304-05, 156 N.W.2d 386 (1968); *State ex rel. Schneider v. Darby*, 179 Wis. 147, 158, 190 N.W. 994 (1922). The acts of a *de facto* officer are valid as to the public and third parties, and cannot be attacked collaterally. *Burton*, 38 Wis. 2d at 304-05; *Cole v. The President and Trustees of the Village of Black River Falls*, 57 Wis. 110, 113-14, 14 N.W. 906 (1883).

Although I conclude that a county corporation counsel is a "county officer" within the meaning of section 59.13(1), and therefore must take and file an oath, it is my opinion that an assistant district attorney is neither a "county officer" nor a "deputy" within the meaning of the statute, and therefore need not take and file an official oath. The statutes unambiguously distinguish an assistant district attorney from a district attorney (who is a "county officer" within the meaning of section 59.13), and from a deputy district attorney (who is a "deputy" within the meaning of section 59.13). See secs. 59.45-59.47, Stats. Moreover, the enumeration of "deputy" positions in chapter 59 does not mention an assistant district attorney. See secs. 59.16, 59.19, 59.21, 59.365, 59.38, 59.46, 59.50 and 59.59, Stats.

In summary, a county corporation counsel is required to take and file an official oath, but an assistant district attorney is not required to take and file such an oath.

DJH:DCR

*Insurance; State; Words And Phrases;* Mandatory assessment against “all insurers” which subsidizes Health Insurance Risk-Sharing Plan, subchapter II of chapter 619, Stats., does not apply to the state’s self-insurance plan because laws of general application do not apply to the sovereign. “Public employer” self-insurance plans are also exempt because, for purposes of this statute, they share in the state’s sovereignty and, thus, in its immunity to general laws. OAG 53-88

September 23, 1988

ROBERT HAASE, *Commissioner*  
*Office of the Commissioner of Insurance*

The Office of the Commissioner of Insurance (OCI) administers the mandatory Health Insurance Risk-Sharing Plan (HIRSP) under subchapter II of chapter 619, Stats. You request my opinion as to the correctness of the long-standing practice of the HIRSP board of exempting public employer self-insurance plans from the statutory assessment which subsidizes HIRSP’s operating costs. I am of the opinion that this is the proper procedure.

Secondly, you ask whether or not the State of Wisconsin’s self-insurance program should be assessed. In my opinion, the answer is no, the state’s self-insurance program is not subject to the statutory assessment.

Because it is less complicated, I will address your second question first.

HIRSP was created a decade ago as a means to provide health insurance coverage for persons unable to obtain such coverage in the voluntary market. Ch. 313, Laws of 1979. The costs of administering HIRSP are subsidized by an assessment levied on “every insurer.” Sec. 619.13(1)(a), Stats. Section 619.10(5) defines “insurer” to mean “any person or association of persons . . . offering or insuring health services on a prepaid basis . . . [and] includes any person providing health services coverage for individuals on a self-insurance basis.”

Despite the mandatory tone of section 619.13(1)(a) providing that “[e]very insurer shall participate in the cost of administering the plan . . . ,” it is irrelevant as to the state because, absent explicitly inclusive language to the contrary, “laws of general application do not apply to the sovereign.” *State ex rel. Martin v. Reis*,

230 Wis. 683, 688, 284 N.W. 580 (1939). See also *Sehlin v. State*, 256 Wis. 495, 500, 41 N.W.2d 596 (1950); *Konrad v. State*, 4 Wis. 2d 532, 538-39, 91 N.W.2d 203 (1958); *Kenosha v. State*, 35 Wis. 2d 317, 323, 151 N.W.2d 36 (1967); 30 Op. Att'y Gen. 69 (1941); and 62 Op. Att'y Gen. 47, 48 (1973). "The purpose of the rule . . . is to prevent interference with the exercise of authority in the administration of the affairs of state or community." *Wis. Vet. Home v. Div. Nurs. Forfeit. Appeals*, 104 Wis. 2d 106, 112-13, 310 N.W.2d 646 (Ct. App. 1981). In other words, the sovereign would not knowingly or intentionally pass laws which would inhibit its just and efficient functioning.

This often-reiterated statement of the law was reaffirmed in *State ex rel. Dept. of Pub. Instruction v. ILHR*, 68 Wis. 2d 677, 681, 299 N.W.2d 591 (1975). There it was held that Wisconsin's Fair Employment Act, sections 111.31 to 111.37, was not binding on the state as an employer because the state was not expressly included in the statutory definition of "employer." Certain other sections defining "employer" did include the state, leading the court to uphold appellant's contention that the legislative intent must have been to not hold the state to the strictures of the Fair Employment Act. *Id.* at 682.

Though that statute has since been amended to bring the state within the ambit of the Fair Employment Act's reach, chapter 31, Laws of 1975, the rationale remains sound. Its application to your question is clear. "Insurer" is defined twice in the insurance code; neither the definition found in section 600.03(27) (applicable in chapters 600 to 646), nor that in section 619.10(5) (specific to subchapter II of chapter 619) expressly or by necessary implication includes the state. Because of the absence of manifest legislative intent that the law apply to the state, I must conclude that here the state is immune to the reach of the law and should not be assessed by the HIRSP board.

The answer to your first question is less simple, arising, as it does, from a body of complicated, sometimes conflicting, common law. After careful consideration, it is my opinion that counties, cities, towns, villages, school districts and other political subdivisions of the state are public employers for the purposes of the HIRSP assessment. Therefore, congruent with the HIRSP board's current practice, these entities should not be subject to the statutory HIRSP assessment. I base my opinion on deference to agency

practice, what I understand “public employer” to mean in this context and the sovereignty principle already discussed in relation to the state.

As already noted, on the face of the statute all insurers appear to be subject to assessment. However, private employers offering self-insurance health plans have not been assessed since 1981 when the court in *General Split Corp. v. Mitchell*, 523 F. Supp. 427 (E.D. Wis. 1981), held that the federal Employee Retirement Income Security Act (ERISA) preempts state law.

Public employer health service self-insurance plans are exempt from ERISA. Nevertheless, to date the HIRSP board has not been assessing public employers, leading to your inquiry.

You state that from the effective date of chapter 313, Laws of 1979, the practice has been not to include public employers in the statutory assessment. “Long-standing administrative construction of a statute is accorded great weight in the determination of legislative intent because the legislature is presumed to have acquiesced in that construction if it has not amended the statute.” *Layton School of Art & Design v. WERC*, 82 Wis. 2d 324, 340, 262 N.W.2d 218 (1978). The HIRSP board has exempted public employers from the assessment for nearly a decade, and this practice has gone unchallenged. Consequently, I believe the agency’s procedure is entitled to great weight.

In addition to finding merit in current board practice, I also am of the opinion that any reasonable construction of the term “public employer” necessarily leads into the sovereignty issue. For the same reasons given in answering your question regarding the state’s assessability, I believe public employers should also remain exempt.

“Public employer” is not defined in chapter 619 or anywhere else in the insurance code. “Employer,” by contrast, is defined in no less than sixteen places in the statutes, eight of them in chapter 103 above. The definitions vary considerably. The inference to be drawn is that the Legislature said each time precisely what it meant to for that section and, further, that a particular definition cannot be moved freely into another section.

That is not to say we are without guidance. Chapter 40 establishes the Public Employe Trust Fund, and common logic, as well as specific wording in that chapter (*see, e.g.*, section 40.01(1)), suggest that a public employe is employed by a public employer. Sec-

tion 40.02(28) defines employer to mean “the state, including each state agency, and any county, city, village, town, school district, other governmental unit or instrumentality of 2 or more units of government now existing or hereafter created within the state.”

And though “public employer” is not defined in Black’s Law Dictionary 1104 (5th ed. 1979), it defines “public” as “[p]ertaining to a state, nation, or whole community . . . [b]elonging to the people at large . . . .” A related term, “public entity,” is defined as including “a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation.” Black’s Law Dictionary 1106 (5th ed. 1979).

Taking all of these definitions together, I am compelled to conclude that “public employer” includes the state and its political subdivisions: counties, cities, towns, villages and districts.

Once defined, there are only two ways that a statute would not apply to a public employer. One, of course, would be by express exclusion. This is clearly not the case here. The other way is if the particular entity is deemed to partake of a portion of the state’s sovereignty. It is my opinion that for the purposes of this statute, public employers do share in the state’s sovereignty, rendering this general law inapplicable as to them.

As explained earlier, “it is not the policy of a state or sovereignty to place limitations upon the power and means of maintaining its own existence.” 72 Am. Jur. 2d *States, Territories, and Dependencies* §1 (1974). I am informed that at the time of HIRSP’s creation, few public employers were self-insurers but that since then that number has grown considerably. Contributions to the fund by public employers must come from public monies, and

[w]here the effect of a statute in general terms is to restrict or limit the rights of the state, to affect its interests, or to impose liabilities upon it, the statute is deemed to be inapplicable to the state unless it is named expressly or by necessary implication. *And the same rule is applied as to whether state statutes will be deemed applicable to a political subdivision of a state, such as a municipality.*

72 Am. Jur. 2d *States, Territories, and Dependencies* §8 (1974) (emphasis supplied). Also, “[t]he subdivisions of a state, including administrative agencies, counties, cities and school districts, against

the claims of individuals, are recognized as branches of the 'sovereign,' so that they are not bound by the general language of a statute." 3 Sands, *Sutherland Statutory Construction* §62.01 (4th ed. 1986). See also *Butterworth v. Boyd*, 12 Cal.2d 140, 82 P.2d 434, 439 (1938); *Keeble v. City of Alcoa*, 204 Tenn. 286, 319 S.W.2d 249, 250 (1958); *Green County v. Monroe*, 3 Wis. 2d 196, 202, 87 N.W.2d 827 (1958).

That counties and towns at times share in the state's sovereignty may be easier to see than that incorporated cities and villages do. Counties and towns have both been termed "quasi-municipal corporations," defined as "a public agency created or authorized by the legislature to aid the state in, or take charge of, some public or state work, other than community government, for the general welfare." McQuillin, *Municipal Corporation* §2.13 (3d ed. 1987). And further, "[a] county in its political and legal aspect is a civil division of the territory of a state and a governmental agency of the state . . . to aid in the administration of governmental affairs and to exercise delegated sovereign powers of the state . . . ." McQuillin, *Municipal Corporations* §1.24 (3d ed. 1987).

A city on the other hand is "not strictly an arm of the state government, though it is a creature or agency of the state." McQuillin, *Municipal Corporations* §2.31 (3d ed. 1987). Also called municipal corporations, cities nevertheless do have more than a local mission. "The purpose of municipal corporations is, first, to serve the local inhabitants in regulating and promoting community affairs, and second, to serve the inhabitants of the state residing in the locality in common state matters as an agency of the state." McQuillin, *Municipal Corporations* §2.08 (3d ed. 1987). So while a municipal corporation is not itself sovereign, *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 538, 314 N.W.2d 321 (1982), as a political subdivision of the state a city does exercise a portion of the state's sovereignty. McQuillin, *Municipal Corporations* §2.08a (3d ed. 1987).

I refer you to a prior opinion from this office involving the application of state laws to a county. 56 Op. Att'y Gen. 225 (1967). That opinion concluded that where a county is engaged in a governmental function as an agent and arm of the state, general statutes granting powers to a city with respect to public buildings do not apply to the state or its agency, a county. *Id.* at 226. See also *Green County v. Monroe*, 3 Wis. 2d at 202, where the Wisconsin

Supreme Court held that “[t]he general words of the statutes conferring zoning powers on cities cannot be construed to include the state, or in this instance the county . . . .”

Just as a county is “a creature of the state [which] exists in large measure to help handle the state’s burdens of political organization and civil administration,” *State v. Mutter*, 23 Wis. 2d 407, 412-13, 127 N.W.2d 15, *appeal dismissed*, 379 U.S. 201 (1964), towns, too, “are political subdivisions and governmental agencies of the state.” *Milwaukee v. Sewerage Comm.*, 268 Wis. 342, 349, 67 N.W.2d 624 (1954), “[and] a constituent part of the plan of permanent organization of the state government, being a territorial and political subdivision, organized for the convenient exercise of portions of the political power of the state.” 87 C.J.S. *Towns* §4 (1954).

Though case law discussing a town’s immunity from the general laws does not abound, as illustrated by the above definitions, towns, as political and governmental entities, are closely akin to counties. Indeed, they are often linked in juxtaposition to cities and villages and it has been noted that some “fundamental differences” exist between the two pairs. *State ex rel. Bare v. Schinz*, 194 Wis. 397, 402, 216 N.W. 509 (1927).

For example, in contrast to the creation of a county or town as a “political subdivision of the state . . . performing primarily the functions of the state locally,” *id.* at 400, cities and villages are “created for the local convenience of the inhabitants,” *id.* at 401, and “to minister to local functions,” *id.* at 403. Nevertheless, the Wisconsin Supreme Court also was careful to point out that “[g]overnmental functions are exercised by cities and villages as well as by counties and towns. . . . The rule of immunity<sup>1</sup> applies to all where they act in a governmental capacity . . . .” *Id.* at 406. “A function is governmental when its primary objective is for health,

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<sup>1</sup> The immunity referred to in *Bare v. Schinz* is sovereign immunity from liability, a concept not identical to, but intrinsically rooted in the general sovereignty of concern here. The doctrine of governmental immunity to tort liability has been since expressly abrogated as to “all public bodies within the state: The state, counties, cities, villages, towns, school districts . . . and any other political subdivisions of the state.” *Holytz v. Milwaukee*, 17 Wis. 2d 26, 40, 115 N.W.2d 618 (1962). Immunity to liability for interest owed was similarly abrogated as to “all branches of government” in *Milwaukee v. Firemen Relief Asso.*, 42 Wis. 2d 23, 39, 165 N.W.2d 384 (1969). These were both narrow holdings, however, confined to areas of tort and interest liability. Neither holding upset the doctrine of sovereign immunity to other unconsented suits or the underlying concept of sovereignty in general. Furthermore, both cases underscored the commonalities uniting all political subdivisions of a state and, in fact, linked them intimately with the state.

safety and the public good.” *Wausau Jt. Venture v. Redevelopment Authority*, 118 Wis. 2d 50, 60, 347 N.W.2d 604 (Ct. App. 1984). And “in the exercise of governmental functions and powers municipal corporations execute the functions and possess the attributes of sovereignty by reason of authority delegated by the legislative department of government.” McQuillin, *Municipal Corporations* §10.05 (3d ed. 1979).

I also call your attention to the opinion I rendered to your office relating to insurance coverage of state and municipal employes by the Group Insurance Board (GIB). 76 Op. Att’y Gen. 311 (1987). I said then that “[m]unicipal employers are not ‘the state.’” 76 Op. Att’y Gen. at 315. I stand by that statement in the context of that question.

There are two differences between that situation and this. First, it was not a sovereignty question. Secondly, the statutory provision at issue there, section 40.03(6)(a)2., specifically mentioned the state but did not say “and its subdivisions” or in any way enumerate them. As noted earlier in this opinion, the Legislature is careful to include or exclude the entities to which it intends to have the statute apply. Thus, I inferred that only the state proper was legislatively intended by the phrase “on behalf of the state.”

Clearly, there are distinctions among the various political subdivisions of the state. For the purpose of your question, however, and for determining whether such entities can claim immunity from the statutory assessment mandated by chapter 619, I am satisfied that public employers should remain exempt, in accordance with the current practice of the HIRSP board. I refer specifically to counties, cities, towns, villages and school districts. If you have a question concerning other entities not addressed in this opinion, you may wish to submit a follow-up opinion request.

DJH:ESM

*Constitutional Law; Public Officials; Words And Phrases; Article XIII, section 11 of the Wisconsin Constitution discussed. OAG 54-88*

September 29, 1988

R. ROTH JUDD, *Executive Director*  
*Ethics Board*

You have asked several questions concerning the meaning of article XIII, section 11 of the Wisconsin Constitution. The Department of Administration has joined in your request for an interpretation and raises several other questions. All of the questions concern the meaning and general applicability of article XIII, section 11 of the Wisconsin Constitution. Rather than attempt to answer each individual question, therefore, I will discuss the constitutional provision generally. I believe the discussion answers all of the specific questions.

Article XIII, section 11 of the Wisconsin Constitution provides:

Passes, franks and privileges. SECTION 11. [As created Nov. 1902 and amended Nov. 1936] No person, association, copartnership, or corporation, shall promise, offer or give, for any purpose, to any political committee, or any member or employe thereof, to any candidate for, or incumbent of any office or position under the constitution or laws, or under any ordinance of any town or municipality, of this state, or to any person at the request or for the advantage of all or any of them, any free pass or frank, or any privilege withheld from any person, for the traveling accommodation or transportation of any person or property, or the transmission of any message or communication.

No political committee, and no member or employe thereof, no candidate for and no incumbent of any office or position under the constitution or laws, or under any ordinance of any town or municipality of this state, shall ask for, or accept, from any person, association, copartnership, or corporation, or use, in any manner, or for any purpose, any free pass or frank, or any privilege withheld from any person, for the traveling accommodation or transportation of any person or property, or the transmission of any message or communication.

Any violation of any of the above provisions shall be bribery and punished as provided by law, and if any officer or any

member of the legislature be guilty thereof, his office shall become vacant.

No person within the purview of this act shall be privileged from testifying in relation to anything therein prohibited; and no person having so testified shall be liable to any prosecution or punishment for any offense concerning which he was required to give his testimony or produce any documentary evidence.

Notaries public and regular employes of a railroad or other public utilities who are candidates for or hold public offices for which the annual compensation is not more than three hundred dollars to whom no passes or privileges are extended beyond those which are extended to other regular employes of such corporations are excepted from the provisions of this section. [1899 J.R. 8, 1901 J.R. 9, 1091 c.437, vote Nov. 1902; 1933 J.R. 63, 1935 J.R. 98, vote Nov. 1936]

Section 946.11(1), Stats., parallels the constitutional prohibition and makes violation of the prohibitions a Class E felony.

The rules governing the interpretation of statutes are used when construing the constitution. *The State ex rel. Bond v. French*, 2 Pin. 181 (1 Chand. 130) (1849).

The purpose of construction of a constitutional amendment is to give effect to the intent of the framers and of the people who adopted it; "and it is a rule of construction applicable to all constitutions that they are to be construed so as to promote the objects for which they were framed and adopted." [Citation omitted.] "But the intent is to be ascertained, not alone by considering the words of any part of the instrument, but by ascertaining the general purpose of the whole, in view of the evil which existed calling forth the framing and adopting of such instrument, and the remedy sought to be applied; and when the intent of the whole is ascertained, no part is to be construed so that the general purpose shall be thwarted, but the whole is to be made to conform to reason and good discretion." [Citation omitted.]

*State ex rel. Ekern v. Zimmerman*, 187 Wis. 180, 184, 204 N.W. 803 (1925), as quoted in *Kayden Industries, Inc. v. Murphy*, 34 Wis. 2d 718, 729-30, 150 N.W.2d 447 (1967).

Our supreme court has summarized the analysis which should be employed in interpreting provisions of the constitution. The court examines first the plain meaning of the words in the context used; second, the historical analysis of the constitutional debates and of what practices were in existence; and third, the earliest interpretation of the section by the Legislature as manifested in the first law passed following the adoption of the constitutional provision. *State v. Beno*, 116 Wis. 2d 122, 136-37, 341 N.W.2d 668 (1984).

Article XIII, section 11 of the Wisconsin Constitution was created in November 1902. The last paragraph was added in 1936. Our supreme court has not interpreted article XIII, section 11 of the Wisconsin Constitution except in *Dane County v. McManus*, 55 Wis. 2d 413, 198 N.W.2d 667 (1972). That case involved a challenge to a labor agreement and county ordinance which reserved an area in the county parking ramp for county employes. Among other defenses to the parking ticket, the defendant argued that article XIII, section 11 of the Wisconsin Constitution prohibited the county board from reserving parking spaces for county employes. The court noted that the purpose of article XIII, section 11 of the Wisconsin Constitution was to prevent corruption of public officials and was created to prevent the railroads and their employes from corrupting and influencing government officers and employes.

The court concluded: "The language of the section itself makes it clear that 'traveling accommodations or transportation of any person or property' pertains to privately owned public carriers and does not include municipally owned parking ramps." *McManus*, 55 Wis. 2d at 421. The court determined what was well within and absolutely beyond the section's ambit. It was not necessary for the court to define the section's exact boundaries. Therefore, although the *McManus* case may be instructive it is not determinative of the section's meaning. That meaning must be discerned from the section's language and history.

The first part of article XIII, section 11 of the Wisconsin Constitution applies to any "person, association, copartnership, or corporation." That clear language does not limit the section's application to railroads, public utilities or privately owned public utilities. The words and their meaning are unambiguous and expansive. If the words did leave any doubt concerning the intent of the section, the history of the section supports an expansive reading.

Before our constitution can be amended, the amendment must be passed by two sessions of the Legislature and approved by a majority of the voters at a general election. Article XIII, section 11 of the Wisconsin Constitution was initiated as Joint Resolution 8 in 1899. In that same year, Wisconsin passed its first law prohibiting public officers from accepting free passes. That law, chapter 357, Laws of 1899, was for our purposes identical to article XIII, section 11 of the Wisconsin Constitution. Although newspaper articles written at the time sometimes referred to the law as the "railroad pass" law, that title was descriptive of the evil sought to be cured, not the scope of the prohibition. In 1899 railroads were providing state and federal officeholders with free passes and as one newspaper noted, "[t]he men who hold the free books are usually voted as the companies desire." *Minneapolis Journal*, Jan. 31, 1905. See generally Address by Howard F. Ohm, Chief of Wisconsin Legislative Reference Library to Candidates' Dinner, October 26, 1936: "The Pending Free Pass Amendment to the Constitution." But the clear language of both the statute and the constitutional provision includes more than railroads. When the Legislature wanted to prohibit free passes or discrimination in rates by railroads alone, it did so in unequivocal language. Chapter 362, section 8, Laws of 1905: "This act shall not be construed as preventing railroads from giving free transportation or reduced rates therefor to any minister of the gospel . . . ."

Perhaps the best evidence of the broad sweep of the Wisconsin language is the 1936 amendment which exempted certain "notaries public and regular employees of a railroad or other public utilities" from the section's prohibitions. We must construe the constitutional provision and its amendment as a whole. *State ex rel. Martin v. Zimmerman*, 233 Wis. 442, 289 N.W. 662 (1940). The clear language of the prohibition applies to any person, association, co-partnership or corporation, but the exemption applies only to railroads or other public utilities. If the original prohibitory language of the section included only railroads and public utilities, there would have been no need to use those terms in the 1936 amendment. If the section's prohibitions applied only to railroads and public utilities in the first instance, there would have been no need to specify those entities in the amendment. I am convinced, therefore, that the clear language of the constitution reflects the unmistakable intent. The section applies to any person, association, co-

partnership or corporation; it is not limited to railroads or public utilities.

The words “promise,” “offer” and “give” must also be given their ordinary meaning. Similarly, the phrase “at the request or for the advantage of” simply means that the prohibition cannot be avoided by, *e.g.*, an officeholder asking a corporation to give a free pass to a friend for the officeholder’s use or the corporation giving that pass knowing that it would be for the officeholder’s use. Questions may arise whether specific acts fall within the accepted definitions of these words and phrases but that does not make the words and phrases ambiguous. Those are questions of application, not definition. The terms themselves are readily understood.

The prohibition extends to any “incumbent of any office or position under the constitution or laws, or under any ordinance of any town or municipality of this state.” Wis. Const. art. XIII, §11. An office is where, for the time being, a portion of the sovereignty, legislative, executive or judicial, attaches, to be exercised for the public benefit. *United States, ex rel. Boyd v. Lockwood*, 1 Pin. 359, 363 (1843). Our supreme court drew a distinction between employment and an office in *Martin v. Smith*, 239 Wis. 314, 333, 1 N.W.2d 163 (1941). In that case the court was asked to decide whether the president of the University of Wisconsin held a state office. The court held that he did not because the president was subject to the control of the Board of Regents, and that board, not the president, exercised the discretionary authority of the sovereign. The court concluded that the president “is an employee, not a public officer; he holds a position not an office of trust, profit, or honor under the state.” *Martin*, 239 Wis. at 333.

The terms “office” and “position” therefore include all officers and employes under the constitution or laws of the State of Wisconsin. The definition in section 16.002(3), although added well after the constitutional amendment, provides a good definition of position as “a group of duties and responsibilities in either the classified or the unclassified divisions of the civil service, which require the services of an employe on a part-time or full-time basis.” Therefore, someone working for the state either full-time or part-time as an officer or an employe is subject to the restrictions of article XIII, section 11 of the Wisconsin Constitution.

Having determined who cannot give and who cannot receive, we must now determine what may not be offered or accepted, that is, what is meant by “free pass or frank, or any privilege withheld from any person.” Within two years of the adoption of article XIII, section 11 of the Wisconsin Constitution, one of my early predecessors was asked whether a state officer could accept and use a pass from a railroad corporation while he was acting as an attorney for that corporation. 1904 Op. Att’y Gen. 412. That opinion concluded, based on New York precedent, that this was not a free pass because a state employe earned the pass as part of his compensation from the railroad. That opinion was interpreting not only article XIII, section 11 of the Wisconsin Constitution, but also the predecessor to section 946.11. In its next session the Legislature defined “free pass” as including “any form of ticket or mileage entitling the holder to travel over any part of the line or lines of any railroad issued to the holder as a gift or in consideration or partial consideration of any service performed or to be performed by such holder except where such ticket or mileage is used by such holder in the performance of his duties as an employee of the railroad issuing the same.” Sanborn & Sanborn, Wisconsin Statutes Supplement ch. 185, sec. 4556a, ann. at 1343-44 (1899-1906).

The decision to define “free pass” is important for two reasons. First, such immediate reaction to the attorney general’s opinion evidences a strong legislative policy that passes given as compensation for services should be prohibited. Second, this is the earliest interpretation of this section of the constitution by the Legislature, in this case coming only three years after the section’s adoption. As such, it is the best evidence of what was understood by the phrase “free pass.” *Buse v. Smith*, 74 Wis. 2d 550, 568, 247 N.W.2d 141 (1976); *Payne v. Racine*, 217 Wis. 550, 259 N.W. 437 (1935). Because the constitution’s prohibition is not limited to railroads, however, the statutory definition of free pass must be modified when applied to the constitution. Under article XIII, section 11 of the Wisconsin Constitution, therefore, a free pass includes any form of ticket or mileage entitling the holder to travel issued to the holder as a gift or in consideration or partial consideration of any service performed or to be performed by such holder except where such ticket or mileage is used by the holder in the performance of his duties as an employe of the entity issuing the pass. If the pass is used only for work, therefore, it is not a “free” pass.

The word "frank" is generally understood as the right to send something free of postage or other conditions. Webster's Third New International Dictionary 902-03 (1976). "Privilege" is generally understood as a right, advantage or favor especially granted to a certain individual or group and withheld from certain others. Webster's Third New International Dictionary 1805 (1976). In 1975, section 946.11 was amended to define "privilege" as it was then defined in section 11.40. That statute was created in 1973. The statutory definition is consistent with the dictionary definition and defines "special privilege" or "privilege" as any thing of value not available to the general public.

Under the canon of statutory construction, *ejusdem generis*, the meaning of a general phrase or word following enumeration of specific classes should be limited to matters of the same kind as those enumerated. *Cheatham v. State*, 85 Wis. 2d 112, 116, 270 N.W.2d 194 (1978). "Privilege," therefore, must be read in the same context as "free pass" or "frank." The word was not intended to expand the prohibition beyond the type of gratuity prohibited by free pass or frank. Rather, it was intended to prohibit those gifts which were not absolutely free but were substantial nevertheless. Therefore, a railroad pass given to a legislator at a substantial discount not available to the general public would be a "privilege withheld from any person, for the traveling accommodation or transportation of any person or property." Similarly, the provision of special accommodations at less than full price, if those accommodations were not available to the general public at the same price, would be prohibited. For example, a railroad could not charge a legislator the normal fare and provide that legislator with deluxe accommodations.

Article XIII, section 11 of the Wisconsin Constitution prohibits the giving of any free pass, frank or privilege involving traveling accommodation, or transportation of any person or property, or the transmission of any message or communication to any of the listed offices and positions, including all state officers and employees. The section's prohibitions are not limited to railroads or to public utilities. Rather, the section prohibits any person, business or corporation from offering or giving anything involving traveling accommodations or transportation for which it usually would charge. Therefore, an airline may not give a free pass to a state legislator and may not allow public officers or employees to travel first class at

tourist fares. Similarly, a taxi company or a bus company cannot give free passes or discounts. The section does not prohibit an individual, business or corporation from giving a public officer or employe a plane ride, bus ride or car ride if the person or entity furnishing that service does not usually charge for that service. Therefore, the Governor may accept a ride to a University of Wisconsin football game from his neighbor unless that neighbor owns a taxi company and provides the free ride in a taxi.

Article XIII, section 11 of the Wisconsin Constitution does not at all prohibit a person from reimbursing a state official or the State of Wisconsin for travel expenses that the official incurs in either his or her private capacity or public capacity, although other laws may restrict receipt of such reimbursement. The intent of the prohibitions in article XIII, section 11 of the Wisconsin Constitution was to prohibit bribery of public officials through gifts of transportation and traveling accommodation services; in short, to prohibit covert as well as overt bribery. Nothing in the section's language or history suggests that it was at all intended to restrict legitimate reimbursement of expenses or prohibit legitimate honoraria.

DJH:AL

*Employer And Employee; Public Officials; State;* Discussion of restrictions which section 16.417(2), Stats., imposes on dual state employment of state employes. OAG 55-88

October 3, 1988

JAMES R. KLAUSER, *Secretary*  
*Department of Administration*

You have asked several questions concerning recent amendments to statutory provisions which deal with dual employment for state public officials and employes. Prior to the changes, this subject was addressed in section 19.45(9m), Stats. Pursuant to 1987 Wisconsin Acts 365 and 399, section 19.45(9m) was renumbered section 16.417(2) and amended as follows:

~~No state public official or state employe individual who is employed or retained in a state full-time position full-time at an annual salary in excess of the current salary for the office of legislator established under s. 20.923(2) or capacity with an agency or authority may hold any other position or be retained in any other capacity with an agency or authority from which he or she the individual receives income from the state exceeding, directly or indirectly, more than \$5,000 per from the agency or authority as compensation for the individual's services during the same year. No department agency or authority may employ any individual or enter into any contract in violation of this subsection. Every The department shall annually check to assure that no employe of the department individual violates this subsection. Any employe who is found The department shall order any individual whom it finds to be in violation of this subsection shall be required to accept a termination or reduction in salary sufficient to bring the employe into compliance. This provision does not apply to those state public officials or state employes who accept other state employment during a period they are not receiving a full-time salary to forfeit that portion of the economic gain that the individual realized in violation of this subsection. The attorney general, when requested by the department, shall institute proceedings to recover any forfeiture incurred under this subsection which is not paid by the individual against whom it is assessed. This subsection does not apply to an individual who has a full-time appointment for less than 12 months, during any period of time that is not included in the appointment.~~

You first ask the following: "Can an individual who is employed full-time in a state position in one agency earn more than \$5,000 in positions with other state agencies as long as the individual does not earn more than \$5,000 from any one agency?"

I am of the opinion that an individual may do so without violating the provisions of section 16.417(2). Prior to its amendment, the statute prohibited an individual from receiving a second income "from the state" in excess of \$5,000. Thus, all state positions held in addition to the full-time position were to be considered cumulatively in reaching the \$5,000 maximum. The 1988 amendment, however, removes the income "from the state" terminology and replaces it with income "from the agency or authority." The new statutory language does not suggest that income is to be considered cumulatively, nor is the new terminology ambiguous. When statutory language is unambiguous, it is necessary to arrive at the intention of the Legislature by giving the language its ordinary and accepted meaning. *Dept. of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 48, 257 N.W.2d 855 (1977). I must therefore conclude that as amended, section 16.417(2) does not prohibit an individual from holding more than one additional position, as long as the individual does not earn more than \$5,000 from any one agency.

Your second question asks: "Can an individual who is employed full-time in a state agency hold another position in the same state agency and earn more than \$5,000 from the second position?"

I conclude that an individual may not do so without violating the statute. Section 16.417(2) prohibits a full-time employe from holding "any other position . . . with an agency" from which the individual earns more than \$5,000. The statute does not refer to employment with "any other agency" or "a different agency," and because it does not clearly make this distinction I must assume that the Legislature intended to prohibit all dual employment in excess of the \$5,000 limit regardless of whether it occurs within the same agency.

Your third question asks: "Does this statute also apply to consultants and what does full-time mean for a consultant?"

In answer to the first part of your question, section 16.417(2) applies to individuals who are either "employed" or "retained in

any other capacity.” It therefore applies on its face to consultant individuals who are retained by an agency or authority.

With respect to the second part of your question, neither section 16.417(2) nor related statutes offer a definition of “full-time.” Further, our supreme court has not had occasion to interpret that term in the context you suggest. When no statutory definition or case law exists to define a term in a statute, the common and generally understood meaning of the term should be applied. *State (Board of Regents) v. Madison*, 55 Wis. 2d 427, 433, 198 N.W.2d 615 (1972). The meaning of such a term, as construed in its common usage, can be established by reference to a recognized dictionary. *DNR v. Wisconsin Power & Light Co.*, 108 Wis. 2d 403, 408, 321 N.W.2d 286 (1982). Webster’s Dictionary defines “full time” as “the amount of time considered the normal or standard amount for working during a given period (as a day, week, or month).” Webster’s Third New International Dictionary 919 (1976). I therefore conclude that a consultant whose contract specifies a standard work week (*i.e.*, forty hours) or month or day is retained full-time for purposes of section 16.417(2). I also call your attention to the last sentence of section 16.417(2), which excludes from coverage individuals who have a full-time appointment for less than twelve months.

Your fourth question asks: “Does this statute apply when an individual employed full-time in an agency is also employed or is an officer or owner in any corporation or partnership under contract for more than \$5,000 to any agency?”

Section 16.417(2) by its terms applies only to “*individuals*” who, while employed or retained by an agency in a full-time position, also hold another position or are retained in any other capacity by an agency from which they receive more than \$5,000. Your question concerns a corporation or partnership which is retained by an agency. A corporation or partnership is not an “individual.” See Webster’s Third New International Dictionary 1152 (1976). Accordingly, I conclude that section 16.417(2) does not apply in the situation you describe.

Finally, you pass along a fifth question proffered by the Department of Health and Social Services. To paraphrase, that question asks: “Does section 16.417(2) apply when an employee’s first posi-

tion is budgeted as full time but the employe is working less than full time?"

I conclude that it does. Prior to amendment, the statute referred to individuals who were "employed in a state position full time." In that form, "full time" modified "employed." Thus, only those individuals actually working full-time were covered by the statute. Now, however, the statute refers to individuals who are "employed . . . in a full-time position." As amended, "full-time" modifies "position." Section 16.417(2) now covers all individuals working in full-time positions, regardless of whether the individuals are themselves employed full-time.

DJH:BLB

*Inebriates And Drug Addicts; Prisons And Prisoners; Sheriffs;* A sheriff may not refuse to book a person lawfully arrested and brought to the county jail by any state law enforcement agency, regardless of the medical condition of the arrestee, although he may require immediate medical screening pursuant to section 53.38, Stats. A sentencing court that imposes county jail time as a condition of probation may suspend that jail time while the probationer receives hospital care, and a sheriff and county department of human services may cooperate in the billing of medical care provided to county jail prisoners. OAG 56-88

October 3, 1988

HEIDI L. HABEL, *Corporation Counsel*  
*Monroe County*

You have requested my opinion on several issues relating to the responsibility of a sheriff in the provision of medical care for indigent arrestees and prisoners.

Paraphrasing your first question, you ask:

- 1) Can a sheriff refuse to book an arrestee brought to the county jail by another police agency until the arrestee undergoes a medical examination? Can the sheriff require the arresting agency to transport the arrestee to such examination and to pay the cost for it?

You indicate that Wisconsin sheriffs have had longstanding policies of refusing to accept arrestees in their county jails if they have blood alcohol concentrations above certain limits, until the arrestees have been given medical clearance. You also indicate that, at least in Monroe County, the sheriff has required the arresting agency to transport the arrestee to the medical examination and to pay for such examination. You ask if this procedure is proper.

For the reasons that follow, it is my opinion that a sheriff may not refuse to book a person lawfully arrested and brought to the county jail by any state law enforcement agency, regardless of the medical condition of the arrestee. I also conclude that a sheriff may require immediate medical screening of such "prisoner," with the cost of transporting and screening the prisoner to be apportioned according to section 53.38, Stats.

As you note, a person who has been arrested, but not yet booked into the county jail, is not a "prisoner" within the meaning of

section 53.38, which governs medical care of “prisoners.” *La Crosse Lutheran Hospital v. La Crosse County*, 133 Wis. 2d 335, 338, 395 N.W.2d 612 (Ct. App. 1986); *see also* 67 Op. Att’y Gen. 245 (1978). Thus, a sheriff’s responsibility to provide appropriate medical or hospital care to a “prisoner” under section 53.38 does not arise until an arrestee is booked into the county jail. You ask, therefore, whether a sheriff can avoid the operation of section 53.38 and hold the arresting agency responsible for the cost of intake medical screening by refusing to book certain arrestees until such screening is accomplished.

I find no clear statutory answer to the question of a sheriff’s authority to refuse to book arrestees into the county jail until they undergo medical screening. Section 59.23(1) requires a sheriff to “[t]ake the charge and custody of the jail maintained by his county and the persons therein, and keep them himself or by his deputy or jailer.” That section, however, does not expressly authorize a sheriff to decide who will and will not be accepted for booking.

Reading section 59.23(1) in conjunction with section 53.31, governing use of jails, and with the case law, commentary and opinions of my predecessors that touch upon this question, I conclude that a sheriff may not refuse to book a person lawfully arrested and brought to the county jail by any state law enforcement agency, regardless of the apparent medical status of the arrestee.

Section 53.31 provides that a county jail “may be used for the detention of persons charged with crime and committed for trial; . . . and for other detentions authorized by law.” It does not restrict use of the jail to detention of arrestees who are sober and healthy, nor does it bar particular law enforcement agencies from presenting arrestees for booking.

In *Grab v. Lucas*, 156 Wis. 504, 506-07, 146 N.W. 504 (1914), the Wisconsin Supreme Court intimates that a sheriff’s historical role as keeper of the jail does not include discretion to set an admissions policy. The court states:

Officers having persons under arrest in their custody may lawfully place them for safe-keeping in any proper and suitable place such as a city or county jail, otherwise they could not be safely kept. While the primary function of a jail is a place of detention for persons committed thereto under sentence of a court, they are also the proper and usual places where persons

under arrest or awaiting trial are kept till they appear in court and the charge against them is disposed of.

Although I find no Wisconsin decision amplifying upon this statement, I note that a federal court, construing Wisconsin law in dicta, has rendered its opinion that a sheriff would be liable for criminal contempt for "refusal to accept custody of prisoners." *Kish v. County of Milwaukee*, 441 F.2d 901, 905 (7th Cir. 1971). At least one court elsewhere and one commentator also have reached this conclusion. See *Griffin v. Chatham County*, 244 Ga. 628, 261 S.E.2d 570, 571 (1979), and Murfree, *A Treatise on the Law of Sheriffs and Other Ministerial Officers*, 614 (1890) ("[a constable] may arrest for a breach of the peace, committed in his presence, and lodge the offender in jail, and the jailer is bound to receive such a prisoner").

Additionally, in three separate opinions, my predecessors have concluded that, because the power of arrest would be meaningless without the power to imprison, a sheriff is obliged to receive persons arrested by city police, 39 Op. Att'y Gen. 50, 52 (1950), game wardens, 39 Op. Att'y Gen. 132, 133 (1950), and University of Wisconsin police, 43 Op. Att'y Gen. 141, 142-43 (1954).

Finally, indirect support for the conclusion that a sheriff must book all lawfully arrested persons may be found in section 53.38, which provides:

Medical care of prisoners. If a prisoner needs medical or hospital care or *is intoxicated or incapacitated by alcohol* the sheriff or other keeper of the jail shall provide appropriate care or treatment and may transfer him to a hospital or to an approved treatment facility under s. 51.45(2)(b) and (c), making provision for the security of the prisoner. The costs of medical and hospital care outside of the jail shall (if the prisoner is unable to pay for it) in the case of persons held under the state criminal laws or for contempt of court, be borne by the county and in the case of persons held under municipal ordinance by the municipality. The governmental unit paying such costs of medical or hospital care may collect the value of the same from him or his estate as provided for in s. 49.08.

The highlighted language in this section was added by chapter 198, Laws of 1973. Its separate addition reasonably suggests that a sheriff's power to provide care for intoxicated or alcoholic persons was not previously clear. It also reasonably suggests, however, that

the Legislature intended that a sheriff accept custody of such persons when presented for booking, because intoxicants within the jail are prohibited. Sec. 53.37(2), Stats.

Once an arrestee becomes a "prisoner," the cost of his medical care is governed by section 53.38 cited above. Thus, if a prisoner "is unable to pay for it," the municipality would be liable for the cost of a medical screening and transportation to that screening only if a prisoner is held for violation of a municipal ordinance. The county would be responsible for such costs if the prisoner is held for a violation of state criminal law. In either case, the governmental unit paying such costs may be able to recoup them from the indigent prisoner or his estate, pursuant to section 49.08.

If an arrestee were taken to a medical facility for screening before being booked into jail, and if he were unable to pay for such screening, the cost would be governed by section 49.02(5) of the public assistance laws. In that case, the prisoner's county of legal residence would be liable under section 49.02(5)(ar), subject to the application of section 49.08. *See* 67 Op. Att'y Gen. 245, 247 (1978).

Which agency physically must transport a prisoner who is deemed to need immediate medical screening would seem to be a matter of comity between the arresting agency and the sheriff under the exigencies of the particular case. Pursuant to section 59.23(4), the sheriff would be ultimately responsible for transportation of prisoners arrested pursuant to warrant or for violation of state criminal laws. *See* 50 Op. Att'y Gen. 47, 49 (1961).

Paraphrasing your second question, you ask:

- 2) May a sentencing court that imposes county jail time as a condition of probation suspend that jail time while the probationer receives hospital care? If so, who is responsible for the cost of hospital care after the jail term is suspended?

You describe the following situation. A convicted defendant is placed on probation with the condition that he serve time in the county jail. During the probationer's jail confinement, the sheriff transfers him to a local hospital, where it becomes clear that he will need extended care. Two days later, the trial court suspends the jail time for the duration of probationer's hospital stay.

It is my opinion that a sentencing court that imposes county jail time as a condition of probation may suspend that jail time while the probationer receives hospital care.

Section 973.09(1)(a) authorizes a trial court to place certain persons convicted of crime on probation to the Department of Health and Social Services (DHSS). Section 973.09(4) provides that the court “may also require as a condition of probation that the probationer be confined *during such period of the term of probation as the court prescribes*, but not to exceed one year.” This statute clearly allows a trial court to fix the specific time that a probationer must spend in a county jail.

Section 973.09(3)(a) states: “Prior to the expiration of any probation period, the court, for cause and by order, may extend probation for a stated period or modify the terms and conditions thereof.” Under this provision, the trial court has continuing jurisdiction to modify the conditions of probation for cause. *See State v. O'Connor*, 77 Wis. 2d 261, 295, 252 N.W.2d 671 (1977). In *State v. Gerard*, 57 Wis. 2d 611, 625, 205 N.W.2d 374, *appeal dismissed*, 414 U.S. 804 (1973), the Wisconsin Supreme Court indicated that the “‘cause’ contemplated by the statute includes impossibility, undue hardship and probably other causes.” It is my opinion that extended hospitalization of a probationer fits this definition of “cause,” entitling the trial court to suspend the probationer’s county jail time. In conjunction, it should be noted that the trial court is not suspending a “sentence” when it modifies jail time as a condition of probation, because probation is not a “sentence.” *Prue v. State*, 63 Wis. 2d 109, 114, 216 N.W.2d 43 (1974).

As discussed, section 53.38 governs payment of the costs of hospital care for prisoners transferred from the county jail. When a trial court suspends a probationer’s jail time, the probationer is no longer in the physical custody of the sheriff, although he remains in the legal custody of DHSS. Thus, the probationer ceases to be a “prisoner” within the meaning of section 53.38, and the sheriff no longer provides for the probationer’s “security” at the hospital.

It is my opinion, therefore, that, prior to suspension of the probationer’s jail term, section 53.38 governs liability for the costs of probationer’s hospital care. It also is my opinion that, after the trial court suspends a probationer’s jail time, the probationer himself is liable for the costs of his care, subject to section 49.02(5), the

general relief statute. Thus, if a probationer qualified for general relief, the county of his legal residence would be liable for the hospital costs under section 49.02(5)(ar), subject to potential recoupment under section 49.08. It also is conceivable that a certain limited class of probationers would qualify for medical assistance pursuant to section 49.47.

Finally, paraphrasing your third question, you ask:

- 3) May a sheriff contract with the county department of human services to have the latter agency negotiate with the care provider and process forms relating to the medical care of indigent prisoners held at the county jail?

You assert that, presently, the Monroe County Sheriff is billed at “top-dollar rate” for medical care rendered to indigent prisoners under section 53.38, while the county department of human services is billed at a lower rate for general relief given to indigent county residents under section 49.02. You ask, therefore, whether the sheriff can “enter into a cooperative agreement” with the county department of human services to have that agency handle billing for indigent prisoners in the hope of obtaining lower rates for such prisoners.

It is my opinion that, with county board approval, a sheriff and county department of human services may cooperate in the billing of medical care provided to county jail prisoners.

While section 53.38 requires a sheriff to make decisions concerning medical care of prisoners held in the county jail, it indicates only that the costs of hospital and medical care rendered to such prisoners outside the jail be borne by the county or appropriate municipality. Section 53.38 clearly distinguishes between county jail prisoners who can afford the costs of medical care and those who cannot, and it indicates that the county or municipality that pays the costs of such care for indigent prisoners may recoup those costs pursuant to section 49.08, which is part of the public assistance laws.

Section 49.08 provides in pertinent part:

*Recovery of general relief paid. If any person is the owner of property at the time of receiving general relief under this chapter or as an inmate of any county or municipal institution in which the state is not chargeable with all or a part of the inmate's mainte-*

nance or as a tuberculosis patient provided for in ch. 149 and s. 58.06, or at any time thereafter, or if such person becomes self-supporting, the authorities charged with the care of the dependent, or the board in charge of the institution, may sue for the value of the general relief from such person or the person's estate; but except as hereinafter provided the 10-year statute of limitations may be pleaded in defense in any such action to recover general relief.

Clearly, at some point, a determination must be made as to whether a county jail prisoner is "unable to pay" for medical/hospital care within the meaning of section 53.38. Presumably, this determination would be made at the outset of the provision of such care. It makes perfect sense to have the county department of human services participate in this determination.

Section 46.23(3)(b) directs the county board to transfer the powers and duties of section 46.22 to the county department of human services. Among those duties is administration of general relief. Sec. 46.22(1)(b)14., Stats. Although medical care provided to indigent prisoners under section 53.38 is technically distinct from "general relief" as defined in section 49.02, *see* 69 Op. Att'y Gen. 230 (1980), it is, as a practical matter, a similar species. I see no statutory obstacle, therefore, to the county department of human services processing forms and negotiating the cost of hospital and medical care for county jail prisoners unable to pay for it, lest there be logistical or budgetary constraints. In the face of such considerations, I believe that prior approval of the county board may be necessary. *See* secs. 59.07(3) and (5), and 65.90, Stats.

DJH:JMF

*Compatibility; Vocational, Technical And Adult Education, Board Of;* Criteria for appointment to district VTAE boards discussed, including changes in status of “employer,” “employee” and “elected official” representatives and incompatibility between board membership and the offices of sheriff and circuit judge. Discussion of meeting notice requirements of sections 38.10(2)(d)3. and 19.84(3), Stats. Definition of “public officer” for purposes of section 38.10(1m) relating to participation on board appointment committee. OAG 57-88

October 12, 1988

ROBERT P. SORENSEN, PH.D., *State Director*

*Wisconsin Board of Vocational, Technical and Adult Education*

You ask numerous questions concerning appointments to vocational, technical and adult education district boards. Your first, second and third questions are:

1. If a sheriff is appointed to and assumes a position on a vocational, technical and adult education district board, has the sheriff violated Article VI, Section 4(3) of the Wisconsin Constitution?
2. If the answer is yes, would this create a vacancy in the office of sheriff by operation of the common law principles applicable to holding incompatible offices?
3. If your answer is again in the affirmative, would vacation of the individual's sheriff office result in vacation of his district board office by operation of sec. 38.08(2m), Stats., as created by 1987 Wisconsin Act 94?

The answer to each of these questions is yes. Article VI, section 4(3) of the Wisconsin Constitution deals with incompatibility of offices and provides that “[s]heriffs shall hold no other office.” The leading case in Wisconsin establishing criteria to determine whether one is an officer or a mere employe of the state is *Martin v. Smith*, 239 Wis. 314, 1 N.W.2d 163 (1941). *Burton v. State Appeal Board*, 38 Wis. 2d 294, 299, 156 N.W.2d 386 (1968). This office has often been called upon to apply the *Martin* criteria to various factual situations and indeed has already done so in response to the same question you now ask. 60 Op. Att’y Gen. 178 (1971) concluded that a member of a local district board of vocational, technical and adult education exercises some portion of the sovereign power of

the state and is therefore “a public officer and an officer of a minor unit of government.” See also 63 Op. Att’y Gen. 453, 454 (1974). By assuming a position on the district board, a sheriff would hold a second public office in violation of article VI, section 4(3) of the Wisconsin Constitution.

The common law as to incompatibility of offices was in force in the territory of Wisconsin at the time the constitution was adopted and continues in force until altered or suspended by the Legislature. See Wis. Const. art. XIV, sec. 2. Under the common law, if a person holding a public office accepts another public office or other public employment incompatible with the position he or she holds, the person *ipso facto* vacates the first office. *Martin*, 239 Wis. at 326, and *Otradovec v. City of Green Bay*, 118 Wis. 2d 393, 396, 347 N.W.2d 614 (Ct. App. 1984). By accepting the office of district board member at the same time the person held the office of sheriff, a person would thereby vacate the latter. (See, however, 73 Op. Att’y Gen. 83 (1984) regarding possible *de facto* status of the sheriff in such a position.)

Section 38.08(2m), Stats., as created by 1987 Wisconsin Act 94 states that “[a]ny member of a district board serving as an elected official under sub. (1)(a)2 shall cease to be a member upon vacating his or her office as an elected official.” Inasmuch as section 38.08(2m) applies only to board members serving as elected officials, I will assume that the sheriff in the situation you describe is serving in that capacity. Under the plain meaning of that statute, once the person in the situation you describe vacates the office of sheriff by operation of the common law, he or she would cease to be a member of the board.

Your fourth, fifth and sixth questions are:

4. If a circuit judge is appointed to and assumes a position on a vocational, technical and adult education district board, has the judge violated Article VII, Section 10(1) of the Wisconsin Constitution?

5. If the answer is yes, would this create a vacancy in the office of circuit judge by operation of the common law principles applicable to holding incompatible offices?

6. If your answer is again in the affirmative, would vacation of the individual’s circuit judge office result in vacation of his dis-

strict board office by operation of sec. 38.08(2m), Stats., as created by 1987 Wisconsin Act 94?

The answer to each of these questions is yes. Article VII, section 10(1) of the Wisconsin Constitution also deals with incompatibility of offices and provides that “[n]o justice of the supreme court or judge of any court of record shall hold any other office of public trust, except a judicial office, during the term for which elected.” County judges are county officials. *State ex rel. Sachtjen v. Festge*, 25 Wis. 2d 128, 130 N.W.2d 457 (1964). The term “office of public trust” is used synonymously with “public office.” *See, e.g.*, 50 Op. Att’y Gen. 6 (1961). Again, assuming that the judge is serving on the board as an elected official, the same analysis applies as was undertaken in answer to your first three questions, and my conclusions are also the same.

Your seventh question is:

7. When an individual is appointed to a district board by the appointment committee, is approved by the State Board and then loses his or her status as an employer or employee prior to entering the office of district board member, can the individual take the oath of office and enter upon the duties of district board member?

I am of the opinion that the individual may not do so. Article IV, section 28 of the Wisconsin Constitution provides that “all officers, executive and judicial, except such inferior officers as may be by law exempted, shall before they enter upon the duties of their respective offices, take and subscribe an oath or affirmation.” The law providing for vocational, technical and adult education, including the creation and duties of district boards is found at chapter 38. That chapter does not expressly require board members to take and subscribe an oath, nor does it exempt them from doing so. However, section 19.01(4)(j) provides that official oaths and bonds of all members of a VTAE district board are to be filed with the secretary of that district. It is, therefore, apparent that district board members are not exempted from taking the oath.

Furthermore, section 19.01(5) states that “[e]very public officer required to file an official oath or official bond shall file the same before entering upon the duties of his office.” The filing of an oath is thus an additional qualification for taking office. Accordingly, I conclude that when an individual loses his or her prerequisite status

prior to filing the oath, that person has not fully qualified for the office and loses his or her eligibility for appointment.

Your eighth and ninth questions are:

8. When an elected official member of a district board vacates his or her elected office, does that member continue to serve until his or her successor is appointed and qualified or does the member immediately cease to be a district board member?

9. Would the same hold true if any of the events that create a vacancy under Chapter 17, Stats., occur?

In my opinion, once an elected official district board member "vacates" his or her elected office as that word is defined in chapter 17, that person immediately ceases to be a member of the board. Section 38.08(2) provides that "[m]embers of a district board shall serve until their successors are appointed and qualified." 1987 Wisconsin Act 94 created a new subsection of that statute, section 38.08(2m), which reads as follows: "Any member of a district board serving as an elected official under sub. (1)(a)2 shall cease to be a member upon vacating his or her office as an elected official."

I see no ambiguity in these provisions, and no conflict between the two. Pursuant to newly created section 38.08(2m), once an elected official board member vacates his or her elected office, that person "shall cease to be a member." Once that person ceases to be a member, section 38.08(2) no longer applies, inasmuch as on its face it concerns itself only with "members of a district board."

With respect to your ninth question, section 17.03 sets forth the circumstances under which a public office shall be deemed vacant. Clearly, when an individual vacates an elected office in one of the ways enumerated in section 17.03, the individual has vacated his or her elected office for purposes of section 38.08(2m).

Your tenth question is:

10. Can an appointment committee change the time of a previously noticed meeting under sec. 38.10(2)(d)3, Stats., within 14 days of that meeting without publishing a new notice and once again allowing for a 14 day period prior to holding the meeting?

I conclude that it may not. Section 38.10(2)(d)3. sets forth the minimum time within which appointment committee meeting notices must be published. In pertinent part, it provides as follows:

Notwithstanding s. 19.84(3), the appointment committee shall publish a notice of any meeting or public hearing at which the appointment committee will consider the filling of any vacancy on the district board or any other matter pertaining to the appointment of district board members at least 14 days before the meeting or public hearing.

In addition, section 19.84(2) provides that “[e]very public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting . . . .” Taken together, these two statutes require that notice of the time of upcoming meetings or hearings must be given at least fourteen days prior to holding the meeting. Anything less would violate these provisions.

Your eleventh and final question is:

11. Who is considered to be an officer of a governmental unit eligible under sec. 38.10(1m), Stats., to represent a county board chair or school board president at an appointment committee meeting?

In my opinion, any individual who meets the test set forth in *Martin* is eligible to do so. Section 38.10(1m) states: “An appointment committee member may designate another officer of his or her governmental unit to represent the member at appointment committee meetings.” The commentary attached to your request would seem to imply that it is necessary that a particular position be denominated in either the statutes or Wisconsin Constitution as an “officer” before it can be considered as such for purposes of section 38.10(1m). I do not believe this to be a necessary prerequisite.

As was noted in answer to your first three questions, *Martin* is the leading case in Wisconsin establishing criteria to determine whether one is a public officer or instead an employe. The *Martin* test has been utilized for purposes other than analysis of incompatibility of offices issues. See, e.g., *Heffernan v. Janesville*, 248 Wis. 299, 307, 21 N.W.2d 651 (1946) (whether a city patrolman was a public officer for the purpose of determining whether he was entitled to his salary during the time he was improperly suspended from duty); *Burton v. State Appeal Board*, 38 Wis. 2d 294, 299, 156 N.W.2d 386 (1968) (whether members of an agency school committee were state employes rather than officers for the purpose of determining whether a delegation of legislative power to them was unconstitutional); and *Wis. Law Enforce Stds. Bd. v. Lyndon Sta-*

*tion Vil.*, 98 Wis. 2d 229, 239, 295 N.W.2d 818 (Ct. App. 1980) (whether a village police chief was a public officer for the purpose of determining whether a state constitutional provision prohibiting convicted felons from holding public office applied to him). *See also* 60 Op. Att'y Gen. 178 and 74 Op. Att'y Gen. 208 (1985).

The *Martin* criteria are as follows:

“to constitute a position of public employment a public office of a civil nature, it must be created by the constitution or through legislative act; must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public; must have some permanency and continuity, and not be only temporary or occasional; and its powers and duties must be derived from legislative authority and be performed independently and without the control of a superior power, other than the law, except in case of inferior officers specifically placed under the control of a superior officer or body, and be entered upon by taking an oath and giving an official bond, and be held by virtue of a commission or other written authority.”

*Martin*, 239 Wis. at 332. Among these criteria, possession of “a delegation of the sovereign power of government to be exercised for the benefit of the public” has been recognized as the *sine qua non* for public office. *Martin*, 239 Wis. at 332; 74 Op. Att'y Gen. at 212. For a position to be a public office, it need not meet all of the *Martin* criteria. *Burton*, 38 Wis. 2d at 303. The principal consideration is the type of power that is wielded. *Burton*, 38 Wis. 2d at 300.

Whether any particular position qualifies as a public office under the *Martin* test must, of course, be addressed on a case-by-case basis. With the aid of *Martin* and the direction provided in this and previous attorney general opinions, I trust that your counsel will be in a position to provide the appropriate analysis as the need arises.

DJH:BLB

*County Board; Ordinances; Register Of Deeds;* A county board lacks statutory authority to enact ordinances directing the register of deeds to refuse to record documents containing restrictive covenants or requiring the register of deeds to place notices on liber volumes and copies of real estate documents, directing the public's attention to the possibility that such covenants may be legally unenforceable. OAG 59-88

October 12, 1988

CAL W. KORNSTEDT, *Corporation Counsel*  
*Dane County*

You ask three questions relating to the recording of legal documents containing restrictive covenants by the register of deeds in your county. Your first two questions are as follows:

1. Does the county board have the authority to direct the register of deeds to refuse to accept for recording documents which impose restrictive covenants which are in violation of law?
2. Does the county board have the authority to direct the register of deeds to place notices on liber volumes and on copies of real estate documents, calling the public's attention to the possibility that the volumes or copies may contain illegal restrictive covenants which are unenforceable as a matter of law?

In my opinion, the answer to both questions is no.

It is well settled that "statutory powers and duties conferred upon a county officer cannot be narrowed, enlarged, or taken away by a county board unless the legislature has authorized such action." *Harbick v. Marinette County*, 138 Wis. 2d 172, 179, 405 N.W.2d 724 (Ct. App. 1987). See also *Reichert v. Milwaukee County*, 159 Wis. 25, 35, 150 N.W. 401 (1914); 24 Op. Att'y Gen. 78, 80 (1935); 14 Op. Att'y Gen. 590 (1925). Moreover, in 77 Op. Att'y Gen. 113, 115 (1988), I concluded that "neither the various elective county officers nor their constitutional or statutory duties, functions and authority can be abolished, consolidated or altered" under section 59.025, Stats., the county administrative home rule statute.

Given this legal backdrop, the only possible source of authority for a county board to enact ordinances affecting the register of

deeds of the kind in question is section 66.432, which permits counties to enact fair housing ordinances forbidding discrimination of the type specified in the state fair housing act, section 101.22, including categories in addition to those enumerated in section 101.22(1m)(as), absent legislative intent to the contrary. *See generally* 74 Op. Att’y Gen. 234 (1985).

Section 101.22 provides in part as follows:

(1m) DEFINITIONS. In this section unless the context requires otherwise:

(as) “Discriminate” and “discrimination” mean to segregate, separate, exclude or treat any person or class of persons unequally because of sex, race, color, handicap, sexual orientation as defined in s. 111.32(13m), religion, national origin, sex or marital status of the person maintaining a household, lawful source of income, age or ancestry. It is intended that the factors set forth herein shall be the sole bases for prohibiting discrimination.

. . . .

(2) DISCRIMINATION PROHIBITED. It is unlawful for any person to discriminate:

(a) By refusing to sell, lease, finance or contract to construct housing or by refusing to discuss the terms thereof.

(b) By refusing to permit inspection or exacting different or more stringent price, terms or conditions for the sale, lease, financing or rental of housing.

(c) By refusing to finance or sell an unimproved residential lot or to construct a home or residence upon such lot.

(d) *By publishing, circulating, issuing or displaying, or causing to be published, circulated, issued or displayed, any communication, notice, advertisement or sign in connection with the sale, financing, lease or rental of housing, which states or indicates any discrimination in connection with housing.*

Unless the italicized language in section 101.22(2)(d) authorizes the enactment of ordinances of the kind described in your inquiry, it is immaterial that a county has authority to prohibit categories of discrimination in addition to those enumerated in section 101.22(1m)(as).

In construing section 101.22(2)(d), I am aware that our courts “look to the federal courts for interpretive assistance when the state law is modeled after a federal statute.” *Marriage of Schinner v. Schinner*, 143 Wis. 2d 81, 91, 420 N.W.2d 381 (Ct. App. 1988). I am also aware that in *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (*en banc*), the court held that the District of Columbia recorder of deeds violated the following portion of the federal Fair Housing Act by accepting deeds containing illegal restrictive covenants for recording:

[I]t shall be unlawful —

. . . .

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

42 U.S.C. §3604 (1974).

Noting that the recorder had an affirmative duty under local regulations to refuse to record “any instrument which shall not be executed and acknowledged agreeably to law,” *Mayers*, 465 F.2d at 636, the court held that the recorder “make[s], print[s], [and] publish[es]” discriminatory notices or statements by accepting such documents for recording. *Mayers*, 465 F.2d at 633.

Two factors lead me to conclude that the construction of the federal Fair Housing Act adopted in *Mayers* is inapplicable to section 101.22(2)(d). First, the state enactment antedates the federal enactment. *See* ch. 439, sec. 4, Laws of 1965. For that reason, the rule of construction cited in *Schinner* is inapplicable, and I am therefore not required to attach any particular weight to any federal court decision construing the federal Fair Housing Act.

Second, absent any other legal prohibition to the contrary, in Wisconsin the register of deeds has a clear and absolute ministerial duty to record documents affecting title to real estate. Section 706.05(1) provides that “[e]very conveyance, and every other instrument which affects title to land in this state, shall be entitled to record in the office of the register of deeds of each county in which land affected thereby may be.” Thus, legal instruments which are in

compliance with sections 59.51(1), 59.516 and other state statutes delimiting the recordability of specific documents must be recorded by the register of deeds. See 48 Op. Att'y Gen. 54, 56 (1959); 15 Op. Att'y Gen. 72, 74 (1925). The discretion of the register of deeds is therefore limited to ascertaining whether the proffered documents are in compliance with such statutes. 34 Op. Att'y Gen. 181 (1945); 6 Op. Att'y Gen. 140 (1917).

Given these circumstances, it is my considered opinion that the courts of this state would construe section 101.22(2)(d) in a manner similar to that employed by the court in *Woodward v. Bowers*, 630 F. Supp. 1205 (M.D. Pa. 1986). In that case, after first noting that the issuance of two concurring and two dissenting opinions in *Mayers* resulted in the reversal of the district court's decision in that case, the court held that the rationale of the *en banc* decision in *Mayers* may not be appropriate in those states where the register of deeds is a ministerial officer. For that reason and for the other reasons indicated, it is my opinion that section 101.22(2)(d) does not apply in any way whatsoever to the process of recording real estate documents. Section 66.432 therefore does not authorize a county board to enact ordinances prohibiting the recording of documents containing restrictive covenants by the register of deeds or requiring the register of deeds to place notices on liber volumes and copies of real estate documents, directing the public's attention to the possibility that such covenants may be legally unenforceable.

Your third question is as follows: "Is there any difference between the county board's authority as between restrictive covenants which are violative of federal law and those which are violative of county ordinances the latter of which prohibit additional categories of restrictive covenants?"

Since I have already indicated that a county board lacks statutory authority to enact ordinances directing the register of deeds to place notices concerning the legality of restrictive covenants or to refuse to record documents containing restrictive covenants of any kind, the answer to this question is no.

Your inquiry indicates, however, that the proposed ordinance may represent an effort by the county board to achieve compliance with the federal Fair Housing Act. While it would be inappropriate for me to determine the applicability of or otherwise construe federal statutes enforced exclusively by federal agencies, see 77 Op.

Att’y Gen. 214 n.1 (1988), section 59.01(1) does authorize a county “to do such . . . acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it.” In addition, section 59.51(15) requires a register of deeds to “[p]erform all other duties required of him by law.” Thus, the county board and the register of deeds each have, within the scope of their respective state constitutional and statutory authority, an independent obligation to ensure that they are in compliance with applicable state and federal statutes. However, the method of compliance contemplated by the county board in this instance is not within the scope of its state constitutional and statutory authority.

DJH:FTC

*County Clerk; Fees;* Changes made to section 29.09(7m), Stats., by 1987 Wisconsin Act 27 did not alter the county board's authority to permit the county clerk to keep the issuing fees prescribed by sections 29.09(10) and 29.092(15) as part of his or her compensation. OAG 60-88

October 14, 1988

PAMELA J. KAHLER, *Corporation Counsel*  
*Dunn County*

You have asked for my opinion whether the issuing fees prescribed by sections 29.09(10) and 29.092(15), Stats., may be reserved to the county clerk as part of the clerk's annual compensation in light of the changes made to section 29.09(7m) by 1987 Wisconsin Act 27. It is my opinion that the clerk may continue to receive such fees as compensation.

The county board is authorized by section 59.15(1)(a) to base the clerk's annual compensation on a straight salary, fees or part salary and part fees. Under section 59.15(1)(b), the clerk or any other officer on a salary basis or part fees and part salary is required to collect all fees authorized by law and pertaining to his office and to "remit all fees not specifically reserved to him by enumeration in the compensation established by the board pursuant to par. (a) to the treasurer at the end of each month unless a shorter period of remittance is otherwise provided."

When issuing hunting, trapping or fishing approvals, in addition to collecting the approved fee to be remitted to the Department of Natural Resources, the clerk is required to collect an issuing fee to compensate for services rendered in issuing the license or stamp. *See secs. 29.09(7) and (10) and 29.092(15), Stats.* In the past, Dunn County has reserved to the clerk the issuing fees paid for the issuance of the licenses and stamps under section 29.092. Your question is whether the clerk can continue to keep the issuing fees in light of the changes in section 29.09(7m).

Section 29.09(7) and (7m) are concerned with how and when the approval fees collected by the clerk are sent to the Department of Natural Resources. Section 29.09(7)(a) provides:

Any fees for approvals collected by the county clerk except any issuing fee shall be remitted to the department by the 20th of each month, with a report of the number of licenses issued by the

clerk and his or her deputies during the preceding month with a report on the issuance of other approvals, as required by the department, and with a statement of the amount of money remitted. If the clerk does not remit, the clerk shall forfeit not more than \$100.00.

Section 29.09(7m) used to provide for different accounting procedures depending on whether the issuing fee was kept by the clerk or by the county. Section 29.09(7m)(a) covered the situation where the clerk was authorized to keep the issuing fee and section 29.09(7m)(b) covered the situation where the county kept the issuing fee. Section 29.09(7m) provided, in part:

(a) Except as provided under par. (b), each county clerk, to whom all or part of the issuing fee established under s. 29.092(15) is reserved as permitted under sub. (7) or (d) and in accordance with s. 59.15(1), shall establish either in a credit union a share draft account, in a savings and loan association a checking or negotiable order of withdrawal account or in a bank a checking account to be used for the deposit of collections of fees for approvals. These collections shall be deposited by the county clerk in the account within one week after receipt. Payment to the department of the monthly remittance specified under sub. (7) shall be made by check, share draft or other draft drawn against the account. The account is subject to ch. 34 and s. 66.042(6). Other collections made by the county clerk and due the county also may be deposited in this account but if the account includes collections other than fees for approvals, the county clerk's record of the balance in the account is required to show separately the exact amounts of fees for approvals and other collections.

(b) If a county retains issuing fees established under s. 29.092(15) as permitted under sub. (s) or (10) and the county board requires the county clerk to deposit collections of fees for approvals with the county treasurer, the county clerk shall deposit collections of fees for approvals with the county treasurer within one week after receipt. Payment to the department of the monthly remittance specified under sub. (7) shall then be made by the county treasurer upon written order of the county clerk. If the county board does not require collections of fees for approvals to be deposited with the county treasurer, the county

clerk shall make deposits and remittances of collections of fees for approvals as required under par. (a).

In 1987 Wisconsin Act 27, section 600n, the Legislature repealed section 29.09(7m)(a). In 1987 Wisconsin Act 27, section 600p, the Legislature amended section 29.09(7m)(b) to read as follows:

~~If a county retains issuing fees established under s. 29.092(15) as permitted under sub. (7) or (10) and the county board requires the county clerk to deposit collections of fees for approvals with the county treasurer, the county clerk shall deposit collections of fees for approvals with the county treasurer within one week after receipt. Payment to the department of the monthly remittance specified under sub. (7) shall then be made by the county treasurer upon written order of the county clerk. If the county board does not require collection of fees for approvals to be deposited with the county treasurer, the county clerk shall make deposits and remittances of collections of fees for approvals as required under par. (a).~~

In my opinion the change in section 29.09(7m) does not affect the authority of the county board to permit the county clerk to receive the issuing fees as compensation. The change in section 29.09(7m) seems to simplify the manner in which the approval fees are handled. Under the altered statute, where the county clerk is authorized to keep the issuing fee, the county clerk, pursuant to section 29.09(7), remits to the Department of Natural Resources each month the approval fees that have been collected, except for the issuing fee which is kept by the clerk.

In situations where the county retains the issuing fee, section 29.09(7m)(b) now requires the clerk to send all of the fees to the treasurer who then forwards the appropriate amount to the Department of Natural Resources. This is also consistent with the procedures set forth in section 59.15(1)(b).

The change in section 29.09(7m) seems only to have simplified the procedure for handling the fees and did not alter the county board's authority to authorize the clerk to keep the issuing fee as part of his or her compensation.

DJH:SWK

*Forfeitures;* The procedure to be used in seeking forfeitures for violations of statutes is set forth in chapters 23, 66, 345, 778, 799, 750-58 and 801-47, Stats. The procedures set forth in chapters 23, 66, 345 and 778 have priority. Where those chapters are not applicable, chapter 799 is accorded the next level of priority. Finally, where chapter 799 is not applicable, the rules of practice and procedure in chapters 750-58 and 801-47 are. OAG 61-88

October 14, 1988

DARWIN L. ZWIEG, *District Attorney*  
*Clark County*

You have asked for my opinion concerning the appropriate procedures to be used in seeking forfeitures for violations of statutes.

You have noted that under section 778.01, Stats., “[w]here a forfeiture imposed by statute shall be incurred it may be recovered in a civil action unless the act or omission is punishable by fine and imprisonment or by fine or imprisonment.” Specifically, you ask whether the appropriate summons to be used in such an action is the form in section 968.04(3)(b), or the one in section 801.095. Examples of the forfeiture cases processed by your office include violations of food regulations in chapter 97 and fireworks regulations in section 167.10.

You question whether the entire body of civil procedure applies to forfeiture actions so that a defendant could file a counterclaim and so that parties could file interrogatories and schedule depositions.

Following the directions of the Legislature, as the supreme court did in *State v. Peterson*, 104 Wis. 2d 616, 622-24, 312 N.W.2d 784 (1981), leads to the conclusions that the proper summons form is the one found in section 799.05 and that counterclaims, interrogatories and depositions are available in the forfeiture actions.

The Legislature directs in section 778.01 that forfeitures for violations of statutes may be recovered in civil actions. In section 799.01, the Legislature has said that, subject to specified limitations, the procedure in chapter 799 is the exclusive procedure to be used in circuit court in the actions specified in section 799.01(1) to (4). Among the actions for which chapter 799 provides the exclusive procedure in circuit court are “[a]ctions to recover forfeitures ex-

cept as a different procedure is prescribed in chs. 23, 66, 345 and 778, or elsewhere, and such different procedures shall apply equally to the state, a county or a municipality regardless of any limitation contained therein.” Sec. 799.01(2), Stats.

In section 799.04, the Legislature explains how the procedure in chapter 799 relates to other rules of civil procedure:

(1) **GENERAL.** Except as otherwise provided in this chapter, the general rules of practice and procedure in chs. 750 to 758 and 801 to 847 shall apply to actions and proceedings under this chapter. Any judicial proceeding authorized to be conducted under s. 807.13 may be so conducted in actions under this chapter.

(2) **FORMS.** Except as otherwise provided in this subsection and this chapter, the forms specified in chs. 801 to 847 shall be used.

These statutes tell us that in actions to recover forfeitures for violations of statutes, the procedures set forth in chapters 23, 66, 345 and 778 have priority. Where those chapters are not applicable, chapter 799 is accorded the next level of priority in establishing the procedure to be used. Finally, where chapter 799 is not applicable, the rules of practice and procedure in chapters 750 to 758 and 801 to 847 are.

Applying this methodology to your questions, neither the summons in section 968.04(3)(b) nor the one in section 801.095 is appropriate. Because actions to recover forfeitures for violations of chapter 97 or section 167.10 do not fall within the coverage of chapter 23, 66 or 345 and because chapter 778 does not specify the type of summons to be used, the appropriate summons is the one set forth in section 799.05.

Chapter 778 does not address the use of counterclaims. Therefore, it is again necessary to turn to chapter 799, which permits the use of counterclaims when appropriate under section 799.02.

Finally, because neither chapter 778 nor chapter 799 have any provision for interrogatories or depositions, the practice and procedure in chapters 801 to 847 apply; and interrogatories and depositions are available in the forfeiture action to the extent they are permitted by chapters 801 to 847.

Prior to the enactment of 1983 Wisconsin Act 228 in 1984, the plaintiff would have had the option of commencing the action to recover the forfeiture by using the small claims procedure or the regular civil procedure. Despite the language used in section 799.01 at the time of the opinion, the court decided in *State v. Hervey*, 113 Wis. 2d 634, 642, 335 N.W.2d 607 (1983), that the plaintiff had the option of commencing the actions specified in section 799.01(1) to (4) either as small claims actions or as regular civil actions. At that time section 799.01 provided in part: “[T]he procedure in this chapter shall be used in circuit court in the following actions”; and section 799.03 provided in part: “Sections 799.01 and 799.02 are procedural and not jurisdictional.”

The small claims act was subsequently amended by 1983 Wisconsin Act 228 as follows:

SECTION 2. 799.01 (intro.) of the statutes is amended to read:

799.01 Applicability of chapter. (intro.) Subject to the limitations of ss. 799.11 and 799.12, the procedure in this chapter ~~shall be used in circuit court in the following actions~~ *is the exclusive procedure to be used in circuit court in the actions specified in subs. (1) to (4), if all the defendants reside within the state and can be personally served in the state, and the procedure is permissive in those actions otherwise. The applicable actions are:*

NOTE: This SECTION specifies that the procedure provided for small claim type actions is the exclusive procedure if the defendant resides in and can be personally served in the state.

SECTION 3. 799.03 of the statutes is amended to read:

799.03 (title) Definition. ~~Sections 799.01 and 799.02 are procedural and not jurisdictional.~~ In this chapter unless otherwise designated, “court” means circuit court and “court” does not mean court commissioner.

NOTE: The first sentence of the statute is deleted because it has been construed to mean that actions for \$1,000 or less need not be jurisdictionally brought under ch. 799. *State v. Hervey*, 113 Wis. 2d 634 (1983). Under revised s. 799.01, the circuit court lacks jurisdiction over certain actions unless ch. 799 procedures are followed.

The comments in the notes show that the Legislature intended the amendments to overrule the decision in *Hervey* and to make the small claims procedure mandatory for the actions specified in section 799.01. The subsequent revisions to the small claims act by 1987 Wisconsin Act 208 continued the mandatory nature of the small claims procedure in such actions.

DJH:SWK

*Funds; Investments; Municipalities;* Municipalities and other local governmental entities may only invest in certain specifically authorized bonds, securities, deposits, etc., and may not invest in mutual funds, even if the assets of such funds consist solely of statutorily-allowed bonds and securities. OAG 62-88

October 24, 1988

FRED A. RISSER, *Chairperson*  
*Senate Organization Committee*

You ask whether a municipality may invest in mutual funds. In my opinion, the answer is no.

The manner in which, and the investments in which, public funds may be invested by local governmental entities is strictly regulated and specifically detailed in a number of statutes. The basic investment authority is outlined in section 66.04(2), Stats., which identifies various investments which municipalities and other local governmental entities may make. Section 66.04(2)(a), as amended by 1987 Wisconsin Acts 27 and 399, provides:

INVESTMENTS. (a) Any county, city, village, town, school district, drainage district, vocational, technical and adult education district or other governing board as defined by s. 34.01(1) may invest any of its funds not immediately needed in any of the following:

1. Time deposits in any credit union, bank, savings bank, trust company or savings and loan association which is authorized to transact business in this state if the time deposits mature in not more than 3 years.

2. Bonds or securities issued or guaranteed as to principal and interest by the federal government, or by a commission, board or other instrumentality of the federal government.

3. Bonds or securities of any county, city, drainage district, vocational, technical and adult education district, village, town or school district of this state.

4. Any security which matures or which may be tendered for purchase at the option of the holder within not more than 7 years of the date on which it is acquired, if that security has a rating which is the highest or 2nd highest rating category assigned by Standard & Poor's corporation, Moody's investor

service or other similar nationally recognized rating agency or if that security is senior to, or on a parity with, a security of the same issuer which has such a rating.

Such local governmental entities may also engage in repurchase agreement transactions with section 34.01(5) public depositories where the agreements are secured by federally issued or guaranteed bonds or securities. Sec. 66.04(2)(d), Stats. In addition, any town, city or village may invest surplus funds in bonds or securities issued under their own authority, and local governments, as defined under section 25.50(1)(d), may invest surplus funds in the local government pooled-investment fund. Sec. 66.04(2)(b) and (c), Stats.

Chapter 219 identifies other permissible municipal investments. Such investments include certain federally issued, guaranteed or secured notes, bonds or other evidences of indebtedness, section 219.01; state bonds and notes, and certain municipal obligations, section 219.04; certain savings accounts, section 219.05; bonds and other obligations issued by certain housing authorities or agencies or metropolitan sewerage districts, section 219.06; and bonds or other obligations issued by certain redevelopment authorities or urban renewal agencies, section 219.07.

The term “mutual fund” does not appear in any of these sections, and as a general rule, where the statutes authorize certain specified investments, those investments not enumerated are not permitted. *Expressio unius est exclusio alterius*; 38 Op. Att’y Gen. 92 (1949). The rule notwithstanding, we cannot end the analysis without a closer examination of what a “mutual fund” is.

Mutual funds, as such, are not defined in either the Wisconsin statutes or the Wisconsin Administrative Code. However, Black’s Law Dictionary 920 (5th ed. 1979) defines a “mutual fund” as follows:

An investment company that raises money by selling its own stock to the public and investing the proceeds in other securities, with the value of its stock fluctuating with its experience with the securities in its portfolio. Mutual funds are of two types: “open-end,” in which capitalization is not fixed and more shares may be sold at any time, and “closed-end,” in which capitalization is fixed and only the number of shares originally authorized may be sold.

See also Investment company; Open-end investment company.

The term “investment company” is generally defined in Black’s Law Dictionary 741 (5th ed. 1979) as follows:

A company or trust which uses its capital to invest in other companies. There are two principal types: the closed-end and the open-end, or mutual fund. Shares in closed-end investment companies are readily transferable in the open market and are bought and sold like other shares. Capitalization of these companies remains the same unless action is taken to change. Open-end funds sell their own new shares to investors, stand ready to buy back their old shares, and are not listed. Open-end funds are so called because their capitalization is not fixed; they issue more shares as demanded. See also Mutual fund.

Very simply, then, a mutual fund is a company that makes investments with the pooled assets of many investors. That pooled money is invested, presumably by professional money managers, in a variety of stocks, bonds and securities selected from either a limited or a wide range of sources. Each share represents an undivided interest in the total portfolio of the mutual fund company. It does not represent direct ownership of the stocks, bonds, or securities themselves.

The above referenced statutes indisputably grant the named municipal and other governmental entities the power to invest their surplus or other funds not immediately needed. However, they are only authorized to invest in certain specifically identified bonds, securities, deposits, etc. <sup>1</sup> Therefore, such municipalities and other local governmental entities clearly could not participate in mutual funds which would invest their monies in the type of bonds, securities, etc., which such governmental entities were not expressly authorized to acquire directly. The issue thus becomes whether a municipality may nevertheless invest in a mutual fund the assets of which consist solely of statutorily-allowed bonds and securities, etc.

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<sup>1</sup> There is limited legislative authority providing that funds in a deferred compensation plan of certain local governmental units and cemetery perpetual care funds or endowment funds may be invested in “shares of investment companies and investment trusts.” See secs. 66.04(2)(b) and (c) and 881.01(1), Stats. Municipalities may also, pursuant to section 66.30, jointly invest in those securities enumerated in section 66.04 without utilizing the investment vehicle of a mutual fund.

A recent Wisconsin Court of Appeals decision suggests that, at least for tax purposes, a mutual fund takes on the character of the types of investments within it. *Capital Preservation v. Rev. Dept.*, 145 Wis. 2d 841, 429 N.W. 2d 551 (Ct. App. 1988). While *Capital Preservation* demonstrates that the content of a mutual fund's portfolio may be relevant for certain tax purposes, I am of the opinion that the content of a mutual fund's portfolio is not relevant for the purpose of determining the investment authority of municipalities and other local governmental entities. In terms of the authority of local governmental entities to invest in certain statutorily identified investments, whatever the constituent investments in a mutual fund, the investor purchasing shares in the Fund has no ownership interest in the individual portfolio components and only owns shares of such fund. It does not matter that a municipality could properly invest in the individual fund components on a direct investment basis. To the extent mutual funds are not enumerated in section 66.04(2) nor in chapter 219, they are not a permitted investment.<sup>2</sup>

The absence of "mutual fund" from the statutory language is significant, too, in that as an investment vehicle, mutual funds are not a new or esoteric phenomenon. Mutual funds have a six decade history in this country and have become the nation's fourth largest financial institution, behind commercial banks, savings and loans and insurance companies.<sup>3</sup> Thus, the fact that "mutual fund" or "investment company" does not appear in the enumeration of permissible investments, except in the two limited instances previously identified,<sup>4</sup> suggests a general legislative intent not to include mutual fund investment. Moreover, the Legislature has created a pooled-investment fund expressly designed for the investment of local governmental funds that are not required to meet current expenditures or demands. Sec. 25.50, Stats. In effect, the Legislature has thereby established a kind of mutual fund in which such governments may participate.

However, the statutory treatment of the subject of your inquiry is not the sole basis for my reasoning. I also base my opinion on the fact that several features inherent in mutual funds may make them

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<sup>2</sup> See footnote 1.

<sup>3</sup> Source, Investment Company Institute, Washington, D.C.

<sup>4</sup> See footnote 1.

appear to the Legislature to be an inappropriate municipal investment.

First, as already described, the investment decisions of a mutual fund are largely directed by a professional manager called an investment adviser. The adviser may select brokers to carry out portfolio transactions and underwriters to sell fund shares to new investors. The actual sales may be made by yet another broker or dealer selected by the underwriter. I find no statutory support for allowing a municipality to delegate its general investment authority to such other persons.

The exercise of the general power of local government to manage and administer the investment of public funds is strictly regulated by statute, and the authority of their governing bodies to designate some other body or officer to invest such funds is severely restricted. Thus, where the statutes authorized the county board, or a committee thereof designated by it, to invest county funds, my predecessor opined that such authority could not be further delegated to the county treasurer. 68 Op. Att'y Gen. 133 (1979). The statute involved in that instance, section 59.75(1), was subsequently amended to authorize the county treasurer to exercise such authority under restrictions imposed by statute and the county board. See chapter 34, sections 858m, 859f and 863a, Laws of 1979. However, the underlying rationale for restricting the delegation of discretion to make municipal investments remains.

In villages and cities, the governing council or board has the management and control of the municipality's financial affairs. Secs. 61.34(1) and 62.11(5), Stats. In towns, that authority is typically shared by the town meeting and the town board. Secs. 60.10 and 60.22(1), Stats. However, the statutory authority of even the treasurers in cities, villages and towns is generally limited to the receipt, deposit and disbursement of public funds, and does not extend to discretionary decisions concerning the investment of those funds. Secs. 60.34(1) and (2), 61.26(2), (3) and (4) and 62.09(9)(a), (c) and (e), Stats.

Finally, as pointed out in *Burks v. Lasker*, 441 U.S. 471 (1979), there is a "potential for abuse inherent in the structure of investment companies," *id.* at 480, consequent to the unique management structure of a mutual fund. Because control of a mutual fund rests primarily with the investment adviser, an outside entity whose main

object is its own profit, the adviser's interests may not always be identical with the shareholders' interests. The "chain of command" of advisers, brokers, dealers and underwriters described earlier offers more opportunity for potentially conflicting interests. Therefore, mutual funds might be riskier enterprises than the statutorily-enumerated investments allowed to a municipality. As a matter of public policy, the Legislature restricts the investment of public funds to less speculative ventures.

DJH:JCM

*Forest Crop Law; Forests; Municipalities; Words And Phrases;* Although public tax-exempt entities such as municipalities may neither enter nor continue their lands in the forest tax programs of chapter 77, Stats., private entities whose property would otherwise normally be tax-exempt under chapter 70 may participate in such programs. OAG 63-88

October 24, 1988

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

You have requested my opinion as to whether tax-exempt entities such as municipalities and non-profit organizations may enter or continue lands under the forest tax programs of chapter 77, Stats. In my opinion, public tax-exempt entities such as municipalities may neither enter nor continue their lands in the forest tax programs of chapter 77, but private entities whose property would otherwise normally be tax-exempt under chapter 70, may participate in such programs.

Chapter 77 comprises, among other things, three tax programs designed to foster sound forestry programs in Wisconsin. These programs, the Forest Cropland Law (sections 77.01 to 77.15), the Woodland Tax Law (section 77.16) and the Managed Forest Land Law (subchapter VI of chapter 77), are all administered by the Department of Natural Resources (the Department). As of July 20, 1985, however, lands may be entered only under the Managed Forest Land Law. The other two programs, though being phased out, nonetheless must be examined because they still apply to a significant amount of forest acreage already entered under them. Furthermore, a discussion of the Forest Cropland Law in particular helps to construct a historical framework for the law's original and continuing intent.

The Forest Cropland Law, the first of the three programs, was enacted in 1927 in response to the rampant tax delinquency and wholesale land abandonment plaguing Wisconsin's northern counties, a direct result of overly-aggressive timber harvesting and a series of devastating forest fires.<sup>1</sup> What only a generation earlier

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<sup>1</sup> "County Forests in Transition," Report of the Forest Crop Advisory Committee to Governor Gaylord Nelson (Madison, WI 1962) pages 1-6. Also see generally E.D. Solberg, *New Laws for New Forests: Wisconsin's Forest Fire, Tax, Zoning, and County-Forest Laws in Operation* (UW Press 1961).

had been vast stretches of virgin timber was by the 1920's a cut-over, burned-over virtually nonproductive wasteland.<sup>2</sup>

The Forest Cropland Law was to serve a dual purpose.<sup>3</sup> First, it sought to restore damaged, unmarketable lands to productivity through sound forestry practices. The second aim was to equitably tax private lands while providing some measure of financial assistance to the financially-pressed counties and towns.

In general, the Forest Cropland Law provides that lands accepted by the Department are essentially exempted from the general property tax. In lieu thereof, such lands are subject to an annual tax, or "acreage share," payable to the town wherein the forest crop lies, and to a severance tax of ten percent of the stumpage value payable to the state when timber is cut or, if no cutting is done, at the end of the contract period. This arrangement is a contract between the state and the landowner which runs with the land for either twenty-five or fifty years.

This alternative tax scheme represents a tax burden to the owner less than that otherwise borne under the usual property tax laws. In exchange for such special tax treatment, the owner agrees to hold the land "permanently for the growing of timber under sound forestry practices, rather than for . . . other purposes." Sec. 77.02(3), Stats. Should the landowner elect to withdraw from the program, or should the department find the owner not to be in full compliance with the program's requirements, the withdrawal procedure laid out in section 77.10 is to be followed. Not surprisingly, this takes the form of a tax penalty measured in a manner similar to the general property tax imposed under chapter 70, so as to discourage intemperate withdrawals and misuse of the program.

The Woodland Tax Law, enacted in 1949, is similar in concept and purpose to the Forest Cropland Law. It differs, however, in that the Woodland Tax Law applies to smaller land parcels on fifteen-year contracts. There are some further differences in acreage shares, department administration and withdrawal penalties. Additionally, no severance tax is required. Finally, in contrast to the Forest Cropland Law which requires the town treasurer to pay twenty percent of amounts received under the program to the

<sup>2</sup> P.S. Lovejoy, "*Wisconsin's Idle Acres Should Be Put to Work*," pages 8-9 in *Put Idle Acres to Work* (March 1921) (published by the Milwaukee Journal).

<sup>3</sup> "*County Forests in Transition*" at page 1 and 66 Op. Att'y Gen. 78, 81 (1977).

county treasurer, all woodland tax revenues are retained by the town or city treasurer.

The Managed Forest Land Law was enacted by 1985 Wisconsin Act 29 to provide for the management of private forest lands in a single comprehensive program. As existing contracts under either the forest cropland or woodland tax programs expire, owners may petition the department to designate their land as managed forest land. The legislative reference library drafting file reveals that this law was meant to address a variety of concerns regarding inadequate tax rates, public use of such lands and the desire for stricter eligibility and management requirements.

As with the other programs, the Managed Forest Land Law provides an alternative, reduced tax scheme, yield tax and withdrawal penalties calculated in part like general property taxes. The revenues received for acreage shares, yield taxes and withdrawal taxes are distributed among the department, the county and the municipality in a similar fashion to that provided for by both of the other programs.

You state that, based upon statutory provisions and prior opinions of this office, "it appears clear that a county or the State of Wisconsin may not enter or continue lands under these forest tax programs." You further note that the department has also considered the forestry programs, and the tax benefits and the burdens attached to participation in such forestry contracts to be inapplicable to tax-exempt entities such as municipalities and non-profit organizations. Apparently these interpretations have been questioned, and you therefore seek my opinion.

Unfortunately, who can be an "owner" eligible to participate within the parameters of the forest tax programs set forth in chapter 77 is not immediately apparent on the face of the statutes. "Owner" is not defined anywhere in the chapter, nor does the definition found in Wisconsin Administrative Code section NR 46.15(23) <sup>4</sup> provide unambiguous direction. However, where one of several interpretations of a statute is possible, we must "ascertain the legislative intention from the language of the statute in relation to its scope, history, context, subject matter and object intended to

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<sup>4</sup> "Owner" or "ownership" means one with an interest in the land in fee or in equity, including that of a grantee of a land contract prior to satisfaction of all conditions of the contract, or as established by statute.

be accomplished.” *Heaton v. Independent Mortuary Corp.*, 97 Wis. 2d 379, 394, 294 N.W.2d 15 (1980).

Though the statutes only describe who may participate in these programs in general terms, an examination of the subject matter and language of the statutes in the context of the historical events surrounding their enactment leads me to conclude that neither the state nor the county may enter or continue its lands under any of the forest programs. The reasons that each may not participate in such programs differ. The statutes are inapplicable to the state because, under basic contract principles, it cannot enter into a contractual relationship with itself. *See* 66 Op. Att’y Gen. 78 (1977). The county’s ineligibility rests more directly on statutory grounds. Though early in the legislative history of the Forest Cropland Law it specifically authorized the entry of county acreage, *see* chapter 343, Laws of 1929, such participation has since been expressly terminated. *See* ch. 345, sec. 13, Laws of 1963. Administration of county forests is now entirely separate from chapter 77 and is governed by sections 28.10 and 28.11. The reason for the change was to achieve a more permanent program of management and development of forest products by the counties. Sec. 28.11, Stats.

An examination of the treatment of counties throughout the history of these programs is important because it helps to illustrate why I believe that other municipalities also never were intended to be participants in such programs.

Prior to 1927, counties were not expressly authorized to engage in forestry. They, therefore, found themselves in an extremely precarious financial position: tax-delinquency of cut-over land was widespread, but if such lands reverted to the counties by tax deed, the passing of the land from private to public ownership simply eroded the tax base and added to the store of unsaleable county property which generated no tax revenue. The only way to rehabilitate the over-harvested and fire-ravaged northern counties was through a long-term program providing for an increase in revenues of local government, effective fire control and the restoration of millions of acres of publicly owned tax deeded forest lands and private forest lands to productive use. Thus, the same Legislature that enacted the Forest Crop Law in 1927 empowered the counties, through then section 59.98 (now sections 28.10 and 28.11), the County Forest Reserve Law, to remove tax-delinquent lands from

the assessment rolls by taking tax deed to those lands, designating them as county forests and providing for expenditure of public funds for their management. Chs. 57 and 454, Laws of 1927.

In 1929, an amendment to the Forest Crop Law was enacted expressly authorizing *counties* to enter land under that program. Throughout the next three decades, several other amendments expressly directed at counties operated to make the Forest Cropland Law as attractive as possible to them. Therefore, given the repeated, unambiguous and solitary statutory inclusion of “counties” as an active participant in the forestry programs, together with the inclusion of the various other governmental entities only in the statutorily-defined tax distribution plan, the original placement of the County Reserve Forest Law in chapter 59 (counties) and its ultimate separate placement in sections 28.10 and 28.11, the exclusion of “all county lands” from participation under chapter 77, in 1963 (section 28.11(4)(b)), and the unmistakably separate treatment of community forests of cities, villages, towns and school districts (section 28.20), it is plain to me that the Legislature meant counties to be the only governmental entity to be included. *Expressio unius est exclusio alterius*. Moreover, the reference to counties cannot be viewed as a euphemism for “the state.” See 46 Op. Att’y Gen. 16 (1957). Undoubtedly, it was the large holdings by counties of tax delinquent lands qualifying for the type of forest restoration contemplated by the Legislature, as well as the county’s central role in the distribution of taxes, which insured that counties would play a unique governmental role in solving the problems which the Forest Cropland Law and its successors were designed to solve.

If the Legislature had been at all inclined to include other municipalities as potential participants in either the Forest Cropland or Woodland Tax Laws, the numerous amendments thereto provided ample legislative opportunity. The Legislature did not so provide. Moreover, there can be no question that municipalities are excluded from participation in the newly enacted managed forest land program. The stated purpose of that plan is “to encourage the management of *private* forest lands.” Sec. 77.80, Stats.

Finally, despite the unfortunate absence of a statutory definition of “owner,” other language used throughout chapter 77 strongly suggests that the Legislature did not contemplate general participation by municipalities. For instance, section 77.01 sets forth the purposes of the Forest Cropland Law:

Purposes. It is the intent of this subchapter to encourage a policy of protecting from destructive or premature cutting the forest growth in this state, and of reproducing and growing for the future adequate crops through sound forestry practices of forest products on lands not more useful for other purposes, so that such lands shall continue to furnish recurring *forest crops for commercial use* with public hunting and fishing as extra public benefits, all in a manner which shall not hamper the towns in which such lands lie from receiving their just tax revenue from such lands.

*See also* sec. 77.80, Stats. The term “commercial use” does not suggest participation by governmental entities. Moreover, the final clause relating to towns receiving their just revenues would prove cumbersome, if not impossible, to administer if a town entered or continued land in a forestation program.

A forestry program which is based in part upon providing the participating property owner with more favorable real property tax treatment than that ordinarily available under the provisions of chapter 70, may not appear attractive to a private non-profit organization in reference to any of its property which is otherwise tax exempt under that chapter. However, certain of the property of such an entity may be taxed under the provisions of chapter 70, since exemption may depend not only upon the nature of the organization involved but also upon the manner in which a property is used. The motivations of a private non-profit organization in reference to the taxation of such property would not differ appreciably from those of any other property owner. Moreover, if the purchaser of a parcel of property which is under a forest tax program does not continue under the program, for whatever reason, the purchaser must pay the withdrawal penalties, regardless of whether it has a tax-exempt status under chapter 70. *See* secs. 77.04, 77.10, 77.11, 77.16(7) and 77.88(5), Stats. Therefore, a private tax-exempt entity purchasing a parcel of property which is under a forest tax program might well be desirous of continuing the property under such program, and also be just as interested as a taxable entity in avoiding the payment of taxes which would be due upon withdrawal from the program.

Private non-profit entities are not precluded from purchasing lands which are under forest tax programs and are not precluded from agreeing to assume the obligations of the former owner under

such programs so as to forestall withdrawal and the payment of the attendant tax payments. Unlike the governmental entities discussed earlier in this opinion, there is no legislative history or other legal principle which prevents a private non-profit entity from being an “owner” eligible to participate in such a program. Moreover, “[a] cardinal rule in interpreting statutes is to favor a construction that will fulfill the purpose of the statute over a construction that defeats the manifest object of the act.” *Watkins v. LIRC*, 117 Wis. 2d 753, 761, 345 N.W.2d 482 (1984). An interpretation of the forestry tax statutes which encourages private non-profit entities to enter or continue their lands under the terms of the forestry programs established by the Legislature, while at the same time ensuring some measure of financial assistance to local governments, comports with the original purposes of the Legislature in enacting such statutes.

DJH:JCM

*Counties; Federal Aid; Medicaid;* A county may not, in a manner consistent with federal and state statutes and regulations prohibiting supplementation, contractually obligate itself to pay a visiting nurse association funds in addition to those received by such a home health care provider through the Medicaid program. Except in extraordinary circumstances, the attorney general will not issue opinions concerning the applicability of federal statutes and regulations administered exclusively by federal authorities. OAG 64-88

October 27, 1988

RICHARD L. HAMILTON, *Corporation Counsel*  
*Outagamie County*

You inquire as to the legality of a proposed contract pursuant to which your county would obligate itself to pay a visiting nurse association funds in addition to those received by such a home health care provider through the Medical Assistance ("Medicaid") or Medicare programs.

I am of the opinion that such contractual payments may not be made in a manner consistent with federal and state Medicaid statutes and regulations prohibiting supplementation. I decline to analyze the applicability of the pertinent Medicare statutes and regulations, since the Medicare program is administered by federal, not state, officials.

Your opinion request describes the fact situation which gives rise to your inquiry as follows:

The Visiting Nurse Association provides home health care services to residents of the City of Appleton and, in the past has received funds from the United Way and also some payment from the County to supplement the difference between what Medical Assistance or Medicare has paid for a particular care recipient and the normal VNA rate for such care. Due to a severe reduction in United Way funding the Visiting Nurse Association is now requesting greater funding from the County, hence the reason for this inquiry.

You have also verbally indicated that the county is considering entering into a contract with the VNA, pursuant to which the county would reimburse the VNA the difference between the Medicaid or Medicare rates and the VNA's actual cost of providing the

service to the Medicaid or Medicare recipient. In addition, you indicate that none of these Medicaid or Medicare patients are 51.42 or 51.437 board clients or county general relief recipients, and that the county is not under any other statutory or legal obligation to provide for their care. <sup>1</sup> Finally, you indicate that the VNA has not decided whether it will discontinue or refuse to provide services to Medicaid or Medicare patients if the county decides not to enter into the proposed contract.

Section 59.07(39), Stats., explicitly authorizes a county board to “[a]ppropriate money toward the support of organized and bona fide nursing associations in the county, such associations to have at least one qualified nurse.” However, it is my understanding that your county desires to ascertain whether funds appropriated pursuant to that statute would both be expended and received in a manner consistent with federal and state laws and regulations.

Medicaid is a cooperative federal-state program created under Title XIX of the Social Security Act. *Harris v. McRae*, 448 U.S. 297, 308-09 (1978). Although the federal and state governments share the costs of this program, the primary responsibility for its administration lies with a designated single state agency in each state. 42 U.S.C. §§1396a(a)(5) and 1396b (1987). In Wisconsin, the Department of Health and Social Services is that agency. The federal and state Medicaid statutes and regulations relevant to your request are found in 42 U.S.C. §1320a-7b(d)(1) (1987), 42 C.F.R. §447.15 (1987) and Wisconsin Administrative Code section HSS 106.04(3).

42 U.S.C. §1320a-7b(d) (1987) provides in pertinent part as follows:

**Illegal patient admittance and retention practices**

**Whoever knowingly and willfully—**

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

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<sup>1</sup> Your fact situation is therefore distinguishable from that examined in 73 Op. Att’y Gen. 68, 71 (1984). There, the counties desiring to make supplemental payments were not unrelated to the Medicaid patients in question. They had a legal obligation to provide for their care.

. . . .

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.

Under 42 C.F.R. §447.15 (1987), “[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 amounts paid by the agency plus any deductible, coinsurance or copayment required by the plan to be paid by the individual.” This regulation prohibits “supplementation” of the Medicaid rates established by the states. *See Dunlap Care Center v. Iowa Dept. of S.S.*, 353 N.W.2d 389, 394 (Iowa 1984).

Pursuant to the “broad discretion” which it possesses concerning the administration of the Medicaid program, *see Swanson v. Health & Social Services Dept.*, 105 Wis. 2d 78, 86, 312 N.W.2d 833 (Ct. App. 1981), the Wisconsin Department of Health and Social Services has promulgated Wisconsin Administrative Code section HSS 106.04(3), which provides in pertinent part as follows:

A provider shall accept payments made by the department in accordance with sub. (1) as payment in full for services provided a recipient. *A provider may not attempt to impose an unauthorized charge or receive payment from a recipient, relative or other person for services provided, or impose direct charges upon a recipient in lieu of obtaining payment under the program, except under any of the following conditions:*

(a) A service desired, needed or requested by a recipient is not covered under the program or a prior authorization request is denied and the recipient is advised of this fact before receiving the service.

(Emphasis added.) It is my understanding that this administrative code provision is incorporated by reference in the State Plan submitted by the department to the United States Department of Health and Human Services (“HHS”).

Home health care providers are certified by HHS for Medicare purposes and are also certified by the department to participate in the Medicaid program. *See* 42 C.F.R. §448.70(d) (1987) and Wis. Admin. Code §HSS 105.16. Like other Medicaid providers, they are required to sign provider agreements with the department which

obligate them to comply with all applicable provisions of federal and state law.

At least one other state, California, has enacted provisions similar to those contained in Wisconsin Administrative Code section HSS 106.04(3). See *Palumbo v. Myers*, 149 Cal. App. 3d 1020, 197 Cal. Rptr. 214, 217 (1983). The California Court of Appeals has twice construed those California provisions as precluding “balance-billing” for the difference between the provider’s usual and customary charge and the rate of payment established under the state’s Medicaid program. *Palumbo*, 197 Cal. Rptr. at 221-22; *Serafini v. Blake*, 167 Cal. App. 3d Supp. 11, 213 Cal. Rptr. 207, 209-11 (1985).

The fact situation you describe is similar to those in *Palumbo* and *Serafini* in that the contemplated contract would legally obligate the county to pay a sum in excess of the amount authorized under state law for the care of Medicaid patients. If the contract were adopted, it would enable the VNA to “impose an unauthorized charge or receive payment from . . . [an]other person for services provided,” contrary to the provisions of Wisconsin Administrative Code section HSS 106.04(3). Since that provision is incorporated in the State Plan and forms a part of the assurance submitted by the department to HHS pursuant to 42 C.F.R. §447.15 (1987), the proposed contract would also violate the provisions of 42 U.S.C. §1320a-7b(d)(1) (1987). I therefore conclude that the receipt of any funds by VNA pursuant to the proposed contract would be impermissible under both federal and state statutes and regulations prohibiting supplementation of Medicaid rates.

It should be emphasized that my conclusion is a narrow one which results from the legal obligations arising from the proposed contract. If the county desires to provide financial assistance to defray the cost of home health care, it may wish to consider making a purely gratuitous appropriation to the VNA as an entity pursuant to section 59.07(39), as opposed to creating a legal obligation to supplement the amounts paid by the department or otherwise earmarking funds for the care of Medicaid recipients.

As to Medicare, with exceptions not pertinent to your inquiry, Title XVIII of the Social Security Act is administered exclusively by HHS. Consequently, there are no state statutes or regulations applicable to the Medicare portion of the proposed contract. In 77

Op. Att’y Gen. 214 n.1 (1988), I indicated that “it would be inappropriate for me to construe federal statutes enforced exclusively by federal agencies . . . .” Although not stated in that opinion, my rationale is the same as that I have given for refusing to construe municipal ordinances:

Although the meaning of a county ordinance presents a question of law rather than a question of fact, the facts and documents necessary to ascertain the meaning of any municipal ordinance are or should be readily available to that municipality’s attorney. And, as a public officer, it is the function of the municipal attorney to provide legal advice concerning the meaning of the ordinances enacted by that municipality.

77 Op. Att’y Gen. 120,123 (1988).

Federal statutes and regulations concerning limitations on charges by Medicare providers are complex and have been changed frequently. *See Medicare & Medicaid Guide [CCH] ¶¶ 3185-3400 (1987).*<sup>2</sup> Just as the applicability of municipal ordinances should be determined by public officers who are municipal attorneys, the applicability of federal statutes administered exclusively by the United States government should be determined by public officers who are federal attorneys. It would be inappropriate for me to speculate as to how counsel employed by HHS will construe Medicare statutes and regulations, especially when such counsel can be contacted directly at HHS’ regional office in Chicago or at the Office of the General Counsel in Baltimore.

For the policy reasons expressed in 77 Op. Att’y Gen. 214 n.1 and in 77 Op. Att’y Gen. 123, I decline to offer any opinion concerning the applicability of federal Medicare statutes and regulations to the fact situation presented in your inquiry. I therefore express no opinion as to whether a county may contract to supplement the funds paid by HHS for the care of Medicare recipients. I am also taking this opportunity to formally advise state and local officials that, except in extraordinary circumstances,<sup>3</sup> the attorney general will not issue opinions concerning the applicability of fed-

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<sup>2</sup> For a description of the difference between the Medicare and Medicaid programs, *see generally Samuel v. California Dept. of Health Services*, 570 F. Supp. 566 (N.D. Cal. 1983).

<sup>3</sup> It would be particularly inappropriate for me to determine that such extraordinary circumstances exist when I have received no tentative opinion examining the applicability of such federal statutes and regulations. *See* 62 Op. Att’y Gen. Preface (1973).

eral statutes and regulations administered exclusively by federal authorities.

For the reasons indicated, I therefore conclude only that a county may not, in a manner consistent with federal and state statutes and regulations prohibiting supplementation, contractually obligate itself to pay a visiting nurse association funds in addition to those received by such a home health care provider through the Medicaid program.

DJH:FTC

*Compatibility; Coroner; Indians; Menominee Indians;* The positions of county coroner and tribal police officer are incompatible governmental positions but the positions of deputy county coroner and tribal conservation warden are not incompatible. OAG 65-88

November 18, 1988

A. R. HANSON, *Corporation Counsel*  
*Shawano County*

You have requested my opinion on two questions: (1) May a member of the Menominee Indian Tribal Police serve as the duly elected coroner for Menominee County, and (2) May a Menominee Indian Tribal Conservation Warden, with arrest powers, hold the position of Deputy Menominee County Coroner?

You state in your opinion request that the elected Menominee County coroner (a part-time position) is employed on a full-time basis by the Menominee Tribe in the tribal police department, and that the Menominee Indian Reservation and Menominee County are coterminous except for one parcel of land located in the Town of Red Springs in Shawano County which recently was declared to be part of the Menominee Reservation. Based on telephone conversations with local officials, I understand that members of the Menominee County Sheriff's Department and the Menominee tribal police force may be cross-deputized on an as-needed basis.

You also state that you have rendered an informal opinion to the Menominee County Board that the offices of Menominee County coroner and tribal police officer could give rise to an impermissible conflict of interest. I conclude that the two governmental positions may conflict and are therefore incompatible. I do not believe, however, that the positions of deputy Menominee County coroner and Menominee Indian tribal conservation warden are incompatible.

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). In *Jones*, the court held that if one office was superior in some respects to another office, so that the duties exercised under each office might conflict to the public detriment, the offices were incompatible. *Id.* at 575-76. The court's holding in *Jones* essentially followed the common law doctrine of incompatibility of offices. Under the common law, no person hold-

ing a public office or position of public employment can hold a second incompatible public office or position of public employment. In Wisconsin, the common law doctrine of incompatibility continues in force because neither the constitution nor legislation have altered or suspended the doctrine. *See* Wis. Const. art. XIV, §2.

The common law doctrine of incompatibility of public offices has, however, been supplemented in Wisconsin by various constitutional and statutory provisions. Article VI, §4(3) of the Wisconsin Constitution, for example, provides that “sheriffs shall hold no other office . . . .” Similarly, art. XIII, §3 of the Wisconsin Constitution provides that “No member of Congress, nor any person holding any office of profit or trust under the United States . . . shall be eligible to any office of trust, profit or honor in this state.” While these constitutional provisions seem very similar, their practical effects are quite different. Where a constitution or statute forbids the *holding* of two offices by the same person, one holding two offices in violation of the law must surrender the first position. 77 Op. Att’y Gen. 256 (1988); *see also* *Martin v. Smith*, 239 Wis. 314, 326, 1 N.W.2d 163 (1941); *State ex rel. Butera v. Lombardi*, 146 Conn. 299, 150 A.2d 309, 310 (1959); 67 C.J.S. *Officers and Public Employees* §32b (1978). Conversely, where a constitution or statute provides that a person holding one public office shall be *ineligible* for another office, one accepting a second public office in violation of the law must give up the second office. *Martin*, 239 Wis. at 326; *Hetrich v. County Commissioners of Anne Arundel County*, 222 Md. 304, 159 A.2d 642, 644 (1960); 67 C.J.S. *Officers and Public Employees* §32b (1978). These constitutional and statutory provisions against dual office-holding apply regardless of whether the two positions are incompatible under the common law doctrine.

Because there is no constitutional or statutory provision preventing coroners from holding or being eligible for a second public office, it is necessary to consider whether the common law doctrine of incompatibility applies in the circumstances you describe. In *Martin v. Smith*, the supreme court highlighted the public policy considerations behind the doctrine of incompatibility by stating that public offices are incompatible “where the nature and duties of two offices [are] such as to render it improper from considerations of public policy for one person to discharge the duties of both . . . .” *Id.* at 326. The doctrine of incompatibility of office applies to posi-

tions 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).

Earlier opinions of the attorney general have addressed the issues regarding the compatibility of the office of 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 concluded that the position of coroner is incompatible with both positions. Whether the position of county coroner is incompatible with the position of tribal police officer has not been addressed.

As a preliminary matter, it is necessary to consider whether the common law doctrine of incompatibility of offices applies to persons holding incompatible offices under different sovereigns, in this case, tribal government. The policy considerations underlying the doctrine of incompatibility suggest that the doctrine does apply to this situation. The doctrine exists to preclude one person from holding two public offices the duties of which could give rise to possible conflicts of governmental interests. *See, generally*, 63A Am. Jur. 2d., *Public Officers and Employees*, §65 (1984). This consideration applies to positions existing under different sovereigns as well as to positions existing under one sovereign, as evidenced by various state laws forbidding one person from simultaneously holding a state office and an office under another government.

Where the doctrine has been applied to offices existing under two sovereigns, however, the effect of the doctrine has sometimes been modified. Under the traditional common law rule, the one occupying the two positions would have to give up the first position. 77 Op. Att'y Gen. 256 (1988). In this case, the first position is the position of tribal police officer. The traditional common law rule cannot compel this result, however, because the state has no authority to disqualify one from holding an employment position with a different sovereign government. *See, e.g., De Turk v. Commonwealth*, 129 Pa. 151, 18 A. 757 (1889). Where public offices under different sovereigns are found to be incompatible, the traditional common law rule has been amended so that the holder of the two positions must give up the position held under the government declaring the incompatibility. *Id.* Analysis of the duties of coroner and tribal officer, therefore, is necessary to determine if the two positions are incompatible.

In section 979.04(3), Stats., the Legislature granted to district attorneys the right to request coroners to conduct preliminary investigations regarding suspicious deaths. Under this subsection of the statute, a district attorney may determine the scope of any preliminary investigation. 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's investigation. By making this division of investigative authority, the Legislature has demonstrated an intent to protect the integrity of separate investigations of suspicious deaths. 75 Op. Att'y Gen. 28, 31 (1986).

Because of the Legislature's desire to facilitate investigations by both the coroner and other law enforcement agencies, any individual simultaneously occupying the positions of coroner and tribal police officer could be confronted with a conflict of office. Conceivably, the district attorney could charge the coroner with the responsibility of conducting a limited investigation of a suspicious death, while the tribal and county police would be charged with conducting a separate, perhaps more thorough investigation. One employed as coroner and as tribal police officer would be required to operate under two conflicting sets of orders. Such a conflict could undermine the Legislature's grant of authority to the district attorney to decide the extent of a coroner's investigation.

Although limited state jurisdiction over the Menominee Tribe and tribe members may affect the coroner's jurisdiction on the reservation in individual cases, the coroner routinely works with the tribal police on cases involving tribe members. In most situations, one simultaneously occupying the positions of coroner and tribal police officer would not have to choose between orders given by the district attorney and orders given by the sheriff or the chief of the tribal police. A conflict could conceivably occur, however, where the one occupying both positions would have to disregard one set of orders in the effort to carry out the other set of orders. Such a choice is undesirable. The integrity of one investigation could be sacrificed for the integrity of the other. Public policy considerations thus dictate that coroners should not also serve as tribal police officers. The state thus has the authority to compel the one occupying the two offices to give up the position of coroner.

Another potential conflict presents itself in that section 59.34(2) provides that the coroner shall exercise all the power and duties of sheriff where no sheriff or under-sheriff is available. The responsi-

bilities of the sheriff include supervising police personnel. Because there is a verbal agreement between the Menominee County sheriff and the tribal police providing for cross-deputization of county and tribal officers on an as-needed basis, the sheriff has the power in some situations to exercise authority over tribal police officers who are acting as deputy sheriffs. This power could be subject to abuse if the positions of tribal police officer and sheriff could potentially come to be embodied in one individual.

If the coroner took over as sheriff, the coroner could potentially exercise authority over one of the positions (tribal police officer/county deputy sheriff) which he himself occupies. Sound public policy does not permit one to occupy two employment positions, one of which exercises supervisory power over the other. Incompatibility exists where in the established governmental scheme one office is subordinate to another or subject to its supervision or control. *Jones*, 130 Wis. at 575-76. Incompatibility of offices does not disappear by virtue of the office-holder's impartiality or ability to separate the functions of the two offices. If the duties of the two offices are such that placed on one person they might or will conflict even on rare occasions, the offices are incompatible. *See DeFeo v. Smith*, 17 N.J. 183, 110 A.2d 553 (1955).

Based on these considerations, it is my opinion that the positions of coroner and tribal police officer are incompatible. The one occupying these positions should thus give up one of them. Typically, by accepting a second office which is incompatible with a first office, one implicitly gives up the first position. *Martin*, 239 Wis. at 326; 77 Op. Att'y Gen. 256 (1988). The state cannot compel this result, however, because the first office is a tribal office. In this situation, the one occupying the two positions must give up the position of coroner.

While the positions of coroner and tribal police officer are incompatible, the positions of deputy coroner and tribal conservation warden are not incompatible. A deputy coroner has the authority to act in the coroner's name and on behalf of the coroner in matters on which the coroner has the authority to act. Section 59.365 provides that the coroner shall be responsible for the defaults or misconduct of deputy coroners.

Under section 29.07, the Legislature has provided that coroners, among others, are ex officio deputy conservation wardens and shall

assist the Department of Natural Resources in the enforcement of fish and game laws. The Legislature has thus implicitly determined that the positions of coroner and conservation warden are not incompatible. The Legislature's determination is probably conclusive. The functions of state conservation wardens and tribal conservation wardens are essentially the same. The duties of a deputy coroner and a tribal conservation warden thus do not overlap in a way that would give rise to an impermissible conflict of office. Because a deputy coroner exercises the functions of coroner and the position of coroner is not incompatible with the position of conservation warden, a deputy coroner probably can permissibly serve also as a tribal conservation warden.

DJH:JDN

*Gambling; Words And Phrases*; Section 562.057, Stats., which permits simulcasting of races conducted at other racetracks to a racetrack licensed by the Wisconsin Racing Board, does not violate article IV, section 24(5) of the Wisconsin Constitution requiring “on-track” betting. OAG 66-88

December 5, 1988

FRED A. RISSER, *Chairperson*  
*Senate Organization Committee*

The Senate Organization Committee has asked for my formal opinion on whether section 562.057, Stats., of the pari-mutuel enabling legislation violates article IV, section 24 of the Wisconsin Constitution as amended in April 1987.

The constitutional amendment ratified by the electorate in 1987, and which is now article IV, section 24(5) of the Wisconsin Constitution, provides: “This section shall not prohibit pari-mutuel on-track betting as provided by law. The state may not own or operate any facility or enterprise for pari-mutuel betting, or lease any state-owned land to any other owner or operator for such purposes.”

Section 562.057 provides:

Simulcasting permitted. The board may permit a licensee under s. 562.05(1)(b) to engage in simulcasting of not more than 9 races each year. All rules of the board governing pari-mutuel betting and all other laws governing pari-mutuel betting apply to simulcasting, except as otherwise provided by rule. No person may engage in simulcasting except as provided in this section.

The question the committee poses is whether simulcasting as permitted under section 562.057 violates the constitutional amendment because it is not “on-track betting.”

The Wisconsin Supreme Court has previously articulated the analysis which the courts employ in interpreting provisions of the Wisconsin Constitution. *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976); *Board of Education v. Sinclair*, 65 Wis. 2d 179, 222 N.W.2d 143 (1974).

We have said that the court will examine:

- “(1) The plain meaning of the words in the context used;
- “(2) The historical analysis of the constitutional debates and of what practices were in existence in 1848, which the court may

reasonably presume were also known to the framers of the 1848 constitution, *see State ex rel. Zimmerman v. Dammann* (1930) 201 Wis. 84, 88, 89, 228 N.W. 593; and *State ex rel. Comstock [v. Joint School District]*, 65 Wis. 631, 27 N.W. 829 (1886)]; and

“(3) The earliest interpretation of this section by the legislature as manifested in the first law passed following the adoption of the constitution. *Payne v. Racine* (1935), 217 Wis. 550, 259 N.W. 437.”

*State v. Beno*, 116 Wis. 2d 122, 136, 341 N.W.2d 668 (1984); *Jacobs v. Major*, 139 Wis. 2d 492, 502, 407 N.W.2d 832 (1987).

I therefore employ this analysis in determining whether section 562.057 is constitutional under the constitutional amendment enacted in 1987, except that I will refer to the legislative history of Assembly Joint Resolution 45 instead of the historical analysis of the constitutional debates of 1848.

#### THE PLAIN MEANING OF “ON-TRACK” BETTING

The constitution refers to “on-track” betting. There is no dictionary definition of on-track betting. However, several dictionaries do refer to “off-track” betting. The American Heritage Dictionary defines “off-track” as “of or pertaining to gambling on horse races that is conducted away from a racetrack,” and defines “off-track betting” as a “system of placing bets away from a racetrack.”

Webster’s New Collegiate Dictionary defines “offtrack” as “away from a racetrack.” Webster’s Ninth New Collegiate Dictionary 820 (9th ed. 1983).

The plain meaning of the words “on-track” would, therefore, indicate at a racetrack. The plain meaning, however, does not answer the question whether the racetrack on which the betting occurs must also be the racetrack conducting the race bet upon.

#### LEGISLATIVE HISTORY OF ASSEMBLY JOINT RESOLUTION 45

Prior to Assembly Amendment 3, article IV, section 24(5) of the Wisconsin Constitution provided: “This section shall not prohibit pari-mutuel betting on horse racing as provided by law.” That provision was very broad and would have permitted the Legislature to authorize even off-track betting.

Assembly Amendment 3 to Assembly Substitute Amendment 1 to 1985 Assembly Joint Resolution 45 limited the type of betting that could be allowed by adding the language "on-track betting as provided by law on horse races conducted in this state" after the word "pari-mutuel." Assembly Amendment 3 to Assembly Substitute Amendment 1 was adopted by the assembly.

After its adoption, the reworded article IV, section 24(5) of the Wisconsin Constitution read: "This section shall not prohibit pari-mutuel on-track betting as provided by law on horse races conducted in this state."

In approving this amendment, the assembly apparently believed that "on-track" referred to more than betting only on the races being conducted at the track at which the bet was placed since the assembly added the qualifying phrase "on horse races conducted in this state." If the assembly thought that "on-track" limited the betting to the races at the track where the bet was placed, the qualifying phrase would have been unnecessary.

When the joint resolution was acted on by the senate several differences arose and the resolution went to conference committee. The preliminary draft of Conference Amendment 1 to Assembly Substitute Amendment 1 to 1985 Assembly Joint Resolution 45 contained the following language as its first sentence: "This section shall not prohibit pari-mutuel on-track betting as provided by law on horse and dog races conducted in this state." In its final form the language "on horse and dog races conducted in this state" was removed and a period was inserted after the word "law." The Conference Amendment 1 to Assembly Substitute Amendment 1 to 1985 Assembly Joint Resolution 45 was adopted by both houses of the Legislature in that form. That form was adopted in the second consideration and ratified by the voters in 1987.

This legislative history leads me to conclude that the Legislature consciously removed the requirement that the horse or dog races which would be permitted under enabling legislation would not, by constitution, be required to be conducted in Wisconsin. Whether the electorate so viewed the language when they approved the amendment is much less clear to me but probably undeterminable. I must conclude that the framers did not intend "on-track" pari-mutuel wagering to exclude such wagering on races conducted in other states.

**STATUTORY IMPLEMENTATION OF  
THE CONSTITUTIONAL AMENDMENT**

The first legislation passed following the adoption of the constitutional amendment was chapter 562. Section 562.057 allows simulcasting to a facility licensed by the Wisconsin Racing Board. A fair reading of the language of section 562.057 leads me to conclude that the board may authorize pari-mutuel wagering only within the confines of a facility licensed under section 562.05(1)(b). That is pari-mutuel betting not located at a fair.

State constitutions typically establish governments of general powers which possess all power not denied by the state constitution. 16 Am. Jur. 2d *Constitutional Law* §§16, 329 (1979). "The legislature, therefore, has plenary power to legislate all laws not forbidden by the state constitution." *Jacobs*, 139 Wis. 2d at 507. Statutes enjoy a strong presumption of constitutionality. A statute will be upheld unless it is unconstitutional beyond a reasonable doubt. *Milwaukee Brewers v. DH&SS*, 130 Wis. 2d 79, 387 N.W.2d 254 (1986).

In view of the plenary power of the Legislature and the strong presumption of constitutionality, some courts have held that where a constitutional provision may have either of two meanings and the Legislature has by statute adopted one, that action is well nigh, if not completely, controlling on the courts. *City, etc., of San Francisco v. Industrial Acc. Commission*, 183 Cal. 273, 191 P. 26 (1920); *Pacific Indemnity Co. v. Industrial Accident Commission*, 215 Cal. 461, 11 P.2d 1 (1932).

In my opinion, the requirement of "on-track" betting may be reasonably interpreted in two ways: (1) "On-track" is limited to the pari-mutuel wagering only on a race which is conducted at the licensed racetrack at which such wagering occurs; (2) "On-track" allows the pari-mutuel wagering at a licensed racetrack regardless of where the race is conducted. I cannot say that the Legislature's selection of the latter interpretation in allowing simulcasting under section 562.057 is unconstitutional beyond a reasonable doubt. Therefore, it is my opinion that if our courts were presented with the question, they would uphold the constitutionality of section 562.057.

DJH:WDW

*Advertising; Lotteries; Marketing And Trade Practices;* A plan whereby a soft drink company would include a coupon for a Wisconsin lottery ticket with specified purchases and the customer could redeem the coupon for a lottery ticket at a retail lottery outlet would violate section 100.16. OAG 67-88

December 14, 1988

WILLIAM F. FLYNN, JR., *Executive Director*  
*Wisconsin Lottery*

You have asked this department to review a soft drink company's proposed promotional plan for compliance with chapter 565, Stats., the lottery law, and various trade statutes. Under the proposed promotion, a soft drink company would give its customers a coupon for a Wisconsin lottery ticket redeemable from any lottery retailer whenever the customer made a specified purchase. The company would pay for any advertising, would pay cash for all of the tickets and would pay the same price as retailers currently pay for lottery tickets. You indicate that every customer would receive a coupon if the specified purchase is made. The coupon could then be exchanged for a lottery ticket.

I conclude the proposed promotion would violate section 100.16(1), which provides:

No person shall sell or offer to sell anything whatever, by the representation or pretense that a sum of money or something of value, which is uncertain or concealed, is enclosed within or may be found with or named upon the thing sold, or that will be given to the purchaser in addition to the thing sold, or by any representation, pretense or device, by which the purchaser is informed or induced to believe that money or something else of value may be won or drawn by chance by reason of such sale.

Section 100.16(2) provides that subsection (1) does not apply to in-pack chance promotions if seven conditions are met. One of those conditions is that participation must be available, "free and without purchase of the package, from the retailer or by mail or toll-free telephone request to the sponsor for entry or for a game piece." Sec. 100.16(2)(a), Stats. The hypothetical facts you provided indicate that the customer would receive a coupon for the lottery only if a specified purchase is made. Therefore, if the promotion

violates section 100.16(1) the exceptions in section 100.16(2) would be inapplicable.

The proposed promotional scheme violates section 100.16(1) in two ways. First, the coupon is certainly something of value, and I must conclude that its value is uncertain. Of course, the coupon has the value of the lottery ticket for which it may be exchanged, currently \$1.00, but its value may be much greater because the lottery ticket for which the coupon is exchanged might be a winning ticket. It is that possibility that causes people to buy lottery tickets. In short, if the value of a lottery ticket were known it would not be a lottery.

Section 100.16(1) also prohibits any person from selling anything “by any representation . . . by which the purchaser is informed or induced to believe that money or something else of value may be won or drawn by chance by reason of such sale.” Section 945.01(5)(a) removes the state lottery from the statutory definition of lottery which is “an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance, even though accompanied by some skill.” Sec. 945.01(5)(a), Stats. Therefore, when the word “lottery” is used in the statutes it does not include the state lottery. That hardly means, however, that the state lottery is not a game of chance; if it were not a game of chance it would have few players. The Legislature did not amend section 100.16(1) when it amended the statutory definition of lottery, although it easily could have done so. There is no reason to conclude that the Legislature meant to remove the state lottery from the strictures of section 100.16.

It has been suggested that this particular promotion would violate other statutes in chapter 100. Because it clearly violates section 100.16, it is not necessary to speculate what other statutes might be violated by this or similar promotional schemes. This opinion should not be construed, however, to mean that a coupon plan which passes muster under section 100.16 and other trade statutes is necessarily legal. Chapter 565 attempts to carefully regulate the distribution of lottery tickets, and coupon plans would seem to run afoul of the law’s requirements. For example, lottery tickets may be sold only for cash. Sec. 565.17(3), Stats. One may question whether the exchange of a coupon for a lottery ticket is a cash sale. Similarly, section 565.17(4) prohibits a person under the age of eighteen from purchasing a lottery ticket. Under the proposed promotional

scheme, someone under the age of eighteen could purchase the soda and therefore receive a coupon. A question would arise whether that person could exchange the coupon for a lottery ticket. It would appear that coupon plans would remove many of the statutory controls over the persons who distribute the coupons, the persons who acquire them and the conditions of sale.

It may well be the case that no coupon plan involving lottery tickets is permissible. Because the proposed scheme violates section 100.16, however, it is not necessary to address the legality of this plan or other plans, whose facts are unknown, under chapter 565.

DJH:AL

*Job Training Partnership Act; Private Industry Council; Public Officials; Words And Phrases; Section 946.13(1)(a), Stats., may be violated by members of Private Industry Councils when private or public entities of which they are executives, directors or board members receive benefits under the Job Training Partnership Act. OAG 68-88*

December 19, 1988

JOHN P. ZAKOWSKI, *District Attorney*

*Brown County*

You have asked for my opinion whether members of a Private Industry Council (PIC) who are executives, directors or board members of private or public entities that receive benefits under the Job Training Partnership Act (JTPA) are violating section 946.13, Stats.

The JTPA provides that the Governor designate service delivery areas for the state, and that there be a PIC for each service delivery area. 29 U.S.C. §§1511 and 1512. The PIC is to consist of representatives from the private sector, educational agencies, organized labor, rehabilitation agencies, community-based organizations, economic development agencies and the public employment service. 29 U.S.C. §1512(a)(1) and (2). Members of the PICs are appointed by local elected officials to serve fixed and staggered terms; and they serve until their successors are appointed. 29 U.S.C. §1512. The PIC has a duty to provide policy guidance and oversight with respect to the job training plan for its service area. 29 U.S.C. §1513(a). It determines procedures for the development of the job training plan, selects as a grant recipient the entity to administer the program and approves its own budget. It also may hire a staff, incorporate, solicit contributions and grant funds. 29 U.S.C. §1513. The Governor certifies a PIC if he determines that its composition and appointments are consistent with the provisions of the federal law.

You have reported that the director of a local community agency is a member of a PIC. The PIC selects and contracts with an administrative agency, which allocates JTPA funds to subgrantees and ultimately to the users of JTPA funds. The local community agency and other local service providers submit applications for funding (usually in the amount of several hundred thousand dollars) to the PIC's administrative agency. The applications for funding are reviewed by the administrative agency and submitted to the

PIC. The PIC or designated committee meets to review and approve applications submitted for funding. In many instances, where numerous applications are made, some are denied as a result of the competitive selection process. The director of the local community agency abstains from voting on the application of that agency. That local agency's application is then approved and funds are awarded.

You note that there are other situations where PIC members are executives or board members of private or public entities that receive JTPA benefits.

Public officers are prohibited by section 946.13 from having private interests in specified public contracts. Section 946.13(1) provides:

Any public officer or public employe who does any of the following is guilty of a Class E felony:

(a) In his private capacity, negotiates or bids for or enters into a contract in which he has a private pecuniary interest, direct or indirect, if at the same time he is authorized or required by law to participate in his capacity as such officer or employe 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; or

(b) In his capacity as such officer or employe, participates in the making of a contract in which he has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on his part.

In a February 23, 1984, informal opinion to Governor Anthony S. Earl, my predecessor concluded that members of a PIC are public officials under section 946.13. The attorney general pointed out that the question of who is a "public officer" was considered in *Martin v. Smith*, 239 Wis. 314, 332, 1 N.W.2d 163 (1941), wherein the court adopted the reasoning of the Montana Supreme Court:

"[T]o constitute a position of public employment a public office of a civil nature, it must be created by the constitution or through legislative act; must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public; must have some permanency and continuity, and not be only temporary or occasional; and its powers and duties must be derived from legislative authority and be per-

formed independently and without the control of a superior power, other than the law, except in case of inferior officers specifically placed under the control of a superior officer or body, and be entered upon by taking an oath and giving an official bond, and be held by virtue of a commission or other written authority.”

This definition of “public office” is no doubt a summary of the law upon the subject arrived at by an analysis and careful consideration of the authorities. The conclusion reached by the Montana court is in accord with the statements contained in the note which is appended to the case. It is certain that a person employed cannot be a public officer, however chosen, unless there is devolved upon him by law the exercise of some portion of the sovereign power of the state in the exercise of which the public has a concern.

The attorney general concluded:

I am of the opinion, however, that they are “public officers” within the meaning of that term as used in section 946.13. They do exercise by delegation a portion of the sovereign power of government to be exercised for the benefit of the public; they are appointed by chief executive officers of units of local government and are certified by the Governor; they are appointed for specific terms. . . . It [meaning the PIC] is created pursuant to federal law, provisions of which have been accepted by the state pursuant to section 16.54. It is intended to serve, primarily, a public rather than a private purpose. I am aware that section 946.13 is a criminal statute and must be strictly construed. *Menasha Wooden Ware Co. v. Winter*, 159 Wis. 437, 150 N.W. 526 (1915). However, PIC members are concerned with the expenditure of state funds made available from the federal treasury under the JTPA. Members are nominated from the private sector and educational agencies, organized labor, rehabilitation agencies, community-based organizations, economic development agencies and the public employment service, but once appointed, their duty is to carry out the terms of the JTPA in the interest of the entire public.

I agree that PIC members are public officers under section 946.13. Section 946.13(1)(a), therefore, prohibits PIC members in a private capacity from negotiating, bidding for or entering into a

contract in which the member has a private pecuniary interest, direct or indirect, if that PIC member is authorized or required by law to participate in the making of the contract on behalf of the PIC or to exercise some official discretion involving that contract. Section 946.13(1)(b) prohibits the PIC member in that capacity from participating in the making of a contract in which the member has a private pecuniary interest, whether direct or indirect, or from performing some function requiring official discretion.

Section 946.13(1)(a) is violated if the PIC member is authorized to participate in an official capacity. Actual participation in an official capacity is not necessary. Section 946.13(1)(b), on the other hand, requires actual participation in an official capacity before there is a violation. 75 Op. Att'y Gen. 172 (1986).

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.

75 Op. Att'y Gen. at 173.

Whether an official has a private pecuniary interest in a contract must be decided on a case-by-case basis, but usually directors, executives and board members of private entities have the requisite direct or indirect pecuniary interest in a contract between their companies and the official bodies on which they serve. "It is generally held that an officer, director, or stockholder of a corporation has a pecuniary interest in the contracts of that corporation . . . ." Vol. V, Judiciary Committee Report on the Criminal Code, comments on section 346.13 (now section 946.13) at 180 (February 1953). *See also Bissell L. Co. v. Northwestern C. & S. Co.*, 189 Wis. 343, 207 N.W. 697 (1926), officials were treasurer and superintendent of company; 60 Op. Att'y Gen. 310 (1971), official was stockholder, board chairman and general manager of corporation; 18 Op. Att'y Gen. 329 (1929), official was officer and stockholder of company; and 18 Op. Att'y Gen. 70 (1929), official was secretary of company.

Salaried employes can also have the requisite pecuniary interest in the public contract. Again, the determination must be made on a case-by-case basis considering factors such as the compensation the

employee receives, the length and type of employment, the size of the community and the availability of other employment. *See Edward E. Gillen Co. v. Milwaukee*, 174 Wis. 362, 372, 183 N.W. 679 (1921), 75 Op. Att'y Gen. at 173 and 23 Op. Att'y Gen. 454, 455-56 (1934).

The same type of case-by-case analysis that is applied to employes of private entities to determine whether they have a pecuniary interest in the contract should be applied to the executives, directors and board members of the public entities. Although these officials of a public entity do not have a direct pecuniary interest in the contract, their positions with the public entity and the viability of that entity may be affected by the public contract to an extent that they have an indirect pecuniary interest in the contract.

The second element of section 946.13(1)(a) requires the official in his or her private capacity to negotiate, bid on or enter into the contract. This element can be satisfied by the official personally partaking in such activity or by the official acting through an agent. 75 Op. Att'y Gen. at 174; 63 Op. Att'y Gen. 43, 45 (1974) and 52 Op. Att'y Gen. 367, 370 (1963). Whether the official in his or her private capacity personally or through an agent negotiated, bid on or entered into the public contract must be decided on a case-by-case basis depending upon the facts of each case.

The final element of section 946.13(1)(a) is that the official be authorized or required to participate in an official capacity in the making of the contract or in the performance of some act requiring the exercise of discretion with regard to the contract. You have pointed out that the PIC or a committee reviews and approves applications for funding. If the individual PIC member whose company or private entity has submitted a bid is on the board or committee that is responsible for reviewing and approving the application for funds, the PIC member has satisfied the third element even if he or she abstains from participating. This is because the members of the committee and, ultimately, the members of the council, which delegated duties to the committee, have the authority to participate in the making of the contract or in the performance of some act requiring the exercise of discretion in regard to the contract. As noted above, actual participation is not required. The element is satisfied when the PIC member has the authority to act.

An official does not violate section 946.13(1)(b) if he or she does not act in his or her official capacity in regard to the contract. In

other words, the official does not violate section 946.13(1)(b) if he or she abstains from any official discussion, deliberation or voting on the contract and, for example, removes himself or herself from any official decision about how funds are spent or from official oversight of the performance of the contract subsequent to its approval. Under the facts you have presented, the PIC members do not violate section 946.13(1)(b) because they abstain from voting. I am assuming that, when you say they abstain from voting on the contract in which they have an interest, the facts would show that in their official capacity they do not participate in any other manner in the making of the contract and they do not perform any other function in regard to the contract that requires the exercise of their discretion.

In addressing your question, I have also assumed that the value of the contracts is in excess of \$7,500 so that the contracts would not be exempted from the coverage of section 946.13(1) by section 946.13(2)(a) as amended by 1987 Wisconsin Act 399, section 472zm.

DJH:SWK

*Newspapers; Open Meeting*; News media who have filed written requests for notices of public meetings cannot be charged fees by governmental bodies for the communication of such notices. OAG 69-88

December 19, 1988

FRED A. RISSER, *Chairperson*  
*Senate Organization Committee*

The Senate Organization Committee has asked whether a city and a county can charge fees to news media and private citizens to notify them of public meetings.

The question is prompted by the reported practice in the city of Green Bay and Brown County where news media and private citizens are allowed to pick up meeting notices at the city and county clerks' offices free, but are charged flat fees for mailed notices and agendas.

The open meetings law requires governmental bodies to give notices of their meetings. Section 19.84(1), Stats., provides:

Public notice of all meetings of a governmental body shall be given in the following manner:

(a) As required by any other statutes; and

(b) By communication from the chief presiding officer of a governmental body or such person's designee to the public, to those news media who have filed a written request for such notice, and to the official newspaper designated under ss. 985.04, 985.05 and 985.06 or, if none exists, to a news medium likely to give notice in the area.

The issue to be addressed is when may a governmental body charge private citizens and the news media for communicating notices of public meetings.

The requirement to communicate notice to the public can be satisfied by posting a notice or by publication of the notice in the newspaper. 66 Op. Att'y Gen. 93, 95 (1977); and 63 Op. Att'y Gen. 509, 510-11 (1974).

The notice to the news media who have requested it pursuant to section 19.84(1)(b) can be communicated either verbally (direct or by telephone) or in written form. 63 Op. Att'y Gen. at 511. If the written notice is mailed, the mailing must take place early enough

so that in the ordinary course of events the notice can reasonably be expected to be delivered to the media at least twenty-four hours in advance of the meeting, or two hours in advance where exceptional circumstances justify the shorter period. Sec. 19.84(3), Stats.

In my opinion, because the open meetings law places the burden on the governmental body to communicate notice of public meetings to the public and various news media, the city and the county cannot charge for providing the notices required by section 19.84(1) and (2). This means the city and county cannot charge the news media for mailing the notice required by section 19.84(1)(b). They may, however, charge private citizens who have requested mailed notices of public meetings if the statutory notice to the public has been satisfied.

Moreover, once the notices required by the statute have been given, the city and the county can charge fees permitted by the public records law in section 19.35(3) for additional copies of notices that are requested by the media or private citizens. It is also possible that the notices used by the city and the county may not be as detailed as agenda or other documents that are prepared for the meetings. Once the city and county have communicated notice that contains the information required by section 19.84(2), the city and county can charge citizens and the media for copies of the more detailed documents because those documents would be in addition to the statutorily required notice.

DJH:SWK

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SESSION LAWS, LEGISLATIVE BILLS,  
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*N.B. The texts of Unpublished Opinions appearing in this Index without page references are available on request from the Office of the Attorney General.*

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The positions of county coroner and tribal police officer are incompatible governmental positions but the positions of deputy county coroner and tribal conservation warden are not incompatible. OAG 65-88..	293
51.42 Board member	
The office of superintendent or administrator of a county health care center providing mental health related services, appointed under section 46.19(1), Stats., and the office of member of the county community programs board, appointed under section 51.42(4), are incompatible. OAG 33-88 .....	150
Judges	
Criteria for appointment to district VTAE boards discussed, including changes in status of "employer," "employee" and "elected official" representatives and incompatibility between board membership and the offices of sheriff and circuit judge. Discussion of meeting notice requirements of sections 38.10(2)(d)3. and 19.84(3), Stats. Definition of "public officer" for purposes of section 38.10(1m) relating to participation on board appointment committee. OAG 57-88.....	256
Menominee Indian	
The positions of county coroner and tribal police officer are incompatible governmental positions but the positions of deputy county coroner and tribal conservation warden are not incompatible. OAG 65-88..	293
Sheriffs	
Criteria for appointment to district VTAE boards discussed, including changes in status of "employer," "employee" and "elected official" representatives and incompatibility between board membership and the offices of sheriff and circuit judge. Discussion of meeting notice requirements of sections 38.10(2)(d)3. and 19.84(3), Stats. Definition of "public officer" for purposes of section 38.10(1m) relating to participation on board appointment committee. OAG 57-88.....	256
Tribal police officer	
The positions of county coroner and tribal police officer are incompatible governmental positions but the positions of deputy county coroner and tribal conservation warden are not incompatible. OAG 65-88..	293
Vocational, Technical and Adult Education, Board of	
Criteria for appointment to district VTAE boards discussed, including changes in status of "employer," "employee" and "elected official" representatives and incompatibility between board membership and the offices of sheriff and circuit judge. Discussion of meeting notice requirements of sections 38.10(2)(d)3. and 19.84(3), Stats. Definition of "public officer" for purposes of section 38.10(1m) relating to participation on board appointment committee. OAG 57-88.....	256

**CONFIDENTIAL REPORTS**

**Alcohol and drug abuse**

Except for those services for which parental consent is necessary under section 51.47(2), Stats., a physician or health care facility may release outpatient or detoxification services information only with the consent of the minor patient provided that the minor is twelve years of age or over. Wis. Admin. Code § HSS 92.06(2) (1986) and 42 C.F.R. § 2.14(b) (1987). OAG 42-88 ..... 187

**Child abuse**

A county department of social services has no discretion to refuse to disclose reports and records of child abuse or neglect to the subject of the report or the subject's attorney under section 48.981(7)(a)1. and (c), Stats. OAG 17-88 ..... 84

**County department of social services**

A county department of social services has no discretion to refuse to disclose reports and records of child abuse or neglect to the subject of the report or the subject's attorney under section 48.981(7)(a)1. and (c), Stats. OAG 17-88 ..... 84

**Juveniles**

Except for those services for which parental consent is necessary under section 51.47(2), Stats., a physician or health care facility may release outpatient or detoxification services information only with the consent of the minor patient provided that the minor is twelve years of age or over. Wis. Admin. Code § HSS 92.06(2) (1986) and 42 C.F.R. § 2.14(b) (1987). OAG 42-88 ..... 187

**Veterans**

Under current law the authority of the Department of Veterans Affairs to release veterans loan status information to lenders and credit reporting agencies is very limited. OAG 8-88 ..... 49

**CONFLICT OF INTEREST**

**Public officials**

The office of superintendent or administrator of a county health care center providing mental health related services, appointed under section 46.19(1), Stats., and the office of member of the county community programs board, appointed under section 51.42(4), are incompatible. OAG 33-88 ..... 150

**CONSERVATION**

**Ordinances, applicability of**

A county ordinance passed under section 92.11, Stats., may be applicable to incorporated as well as unincorporated areas of the county, whereas a county ordinance passed under section 92.16 is applicable only in the unincorporated areas of the county. OAG 18-88 ..... 87

**CONSTITUTIONAL LAW****First Amendment**

Section 13.72, Stats., which prohibits anonymous paid advertising favoring or opposing pending legislation, is unconstitutional. OAG 19-88 ..... 90

**Privileges and Immunities Clause of U.S. Constitution**

Section 452.11(1), Stats., requiring nonresident real estate brokers to maintain an active place of business and prohibiting them from employing brokers or salespersons in this state, is unconstitutional since it violates the privileges and immunities clause of the United States Constitution. OAG 24-88 ..... 109

**Thirteenth Amendment**

Article XIII, section 11 of the Wisconsin Constitution discussed. OAG 54-88 ..... 237

**Uniformity clause**

Section 70.325, Stats., violates article VIII, section 1 of the Wisconsin Constitution. OAG 28-88 ..... 128

**CONSTITUTIONALITY****Budget requests and employe lobbying**

Section 19.45(12), Stats., is constitutional. OAG 41-88 ..... 184

**Textbook loans to school students**

1987 Senate Bill 366 is facially constitutional. OAG 13-88 ..... 66

**Uniformity clause**

Section 70.325, Stats., violates article VIII, section 1 of the Wisconsin Constitution. OAG 28-88 ..... 128

**CONTRACTS****Milwaukee County zoo and museum**

The Milwaukee County board may not delegate the exclusive authority to approve contracts for budgeted public works projects to the museum board or to the zoological board. Except in extraordinary circumstances, the attorney general will not issue opinions concerning the meaning or intent of municipal ordinances. OAG 26-88 ..... 120

**CORONER****Cremation permits**

Chapters 69 and 157, Stats., are not alternatives to the requirement in section 979.10 that anyone cremating a corpse first obtain a cremation permit from the coroner. University medical schools or anyone else qualified to receive a corpse can, however, receive a corpse for research without first obtaining the cremation permit. Section 979.10 only requires that the permit be obtained before the corpse is cremated. OAG 50-88 ..... 218

**CORONER (continued)**

**Menominee**

The positions of county coroner and tribal police officer are incompatible governmental positions but the positions of deputy county coroner and tribal conservation warden are not incompatible. OAG 65-88 . . . 293

**COUNTIES**

**Ambulances**

A county does not possess the statutory authority to designate the level of ambulance services provided by the towns within that county. Absent a cooperative agreement between a county electing to provide ambulance services pursuant to section 59.07(41), Stats., and a town electing to provide ambulance services pursuant to section 60.565, a county dispatcher possesses considerable discretion to request assistance from the most appropriate and readily available statutorily authorized ambulance provider. OAG 48-88 . . . . . 210

**Lands sold for taxes**

Subsections (5), (6) and (7) of section 75.35, Stats., created by 1987 Wisconsin Act 27 first apply to sales of property the county acquired at a section 74.39 tax sale on or after the effective date of section 3203(47)(c) of 1987 Wisconsin Act 27. OAG 29-88 . . . . . 133

**Marijuana ordinance**

Counties may not enact ordinances in conformity with state statutes prohibiting the possession and sale of marijuana. OAG 46-88 . . . . . 205

**Medicaid**

A county may not, in a manner consistent with federal and state statutes and regulations prohibiting supplementation, contractually obligate itself to pay a visiting nurse association funds in addition to those received by such a home health care provider through the Medicaid program. Except in extraordinary circumstances, the attorney general will not issue opinions concerning the applicability of federal statutes and regulations administered exclusively by federal authorities. OAG 64-88 . . . . . 287

**Ordinances, applicability of**

A county ordinance passed under section 92.11, Stats., may be applicable to incorporated as well as unincorporated areas of the county, whereas a county ordinance passed under section 92.16 is applicable only in the unincorporated areas of the county. OAG 18-88 . . . . . 87

**Social services department**

A county department of social services has no discretion to refuse to disclose reports and records of child abuse or neglect to the subject of the report or the subject's attorney under section 48.981(7)(a)1. and (c), Stats. OAG 17-88 . . . . . 84

**Tax delinquent property, selling of**

Subsections (5), (6) and (7) of section 75.35, Stats., created by 1987 Wisconsin Act 27 first apply to sales of property the county acquired at a section 74.39 tax sale on or after the effective date of section 3203(47)(c) of 1987 Wisconsin Act 27. OAG 29-88 . . . . . 133

COUNTIES (continued)

Visiting Nurse Association

A county may not, in a manner consistent with federal and state statutes and regulations prohibiting supplementation, contractually obligate itself to pay a visiting nurse association funds in addition to those received by such a home health care provider through the Medicaid program. Except in extraordinary circumstances, the attorney general will not issue opinions concerning the applicability of federal statutes and regulations administered exclusively by federal authorities. OAG 64-88 .....

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COUNTY BOARD

Handicapped Children's Education Board

In counties with a county executive, the county Handicapped Children's Education Board exercises advisory and policy-making functions associated with the special education programs and services authorized by the county board under section 115.83, Stats., and the county executive supervises the administrative functions. While the county Handicapped Children's Education Board and the county executive share budgetary responsibilities, the county executive makes the annual budget recommendation to the county board. County personnel and procurement ordinances, and other similar ordinances which regulate administration of county government generally, apply to the operation of such county special education programs and services to the extent such ordinances are otherwise authorized and do not conflict with the state laws regulating such special education programs and services. OAG 44-88 .....

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Kenosha County

A county board has no statutory authority to charge a higher marriage license fee to certain nonresidents who would be required to submit to AIDS testing in their home state or, in the alternative, require AIDS testing as a condition of obtaining a Wisconsin marriage license. OAG 34-88 .....

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Marriage license fees

A county board has no statutory authority to charge a higher marriage license fee to certain nonresidents who would be required to submit to AIDS testing in their home state or, in the alternative, require AIDS testing as a condition of obtaining a Wisconsin marriage license. OAG 34-88 .....

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Milwaukee County zoo and museum

The Milwaukee County board may not delegate the exclusive authority to approve contracts for budgeted public works projects to the museum board or to the zoological board. Except in extraordinary circumstances, the attorney general will not issue opinions concerning the meaning or intent of municipal ordinances. OAG 26-88 .....

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Ordinance concerning Register of Deeds

A county board lacks statutory authority to enact ordinances directing the register of deeds to refuse to record documents containing restrictive covenants or requiring the register of deeds to place notices on

**COUNTY BOARD** *(continued)*

**Ordinance concerning Register of Deeds** *(continued)*

liber volumes and copies of real estate documents, directing the public's attention to the possibility that such covenants may be legally unenforceable. OAG 59-88 ..... 262

**Privatization of county jail**

Neither the sheriff nor the county board may "privatize" the jailer function of the office of sheriff under section 59.23(1), Stats., by contracting with a private firm to take charge and custody of county prisoners held in the county jail. OAG 20-88 ..... 94

**Register of Deeds**

A county board lacks statutory authority to enact ordinances directing the register of deeds to refuse to record documents containing restrictive covenants or requiring the register of deeds to place notices on liber volumes and copies of real estate documents, directing the public's attention to the possibility that such covenants may be legally unenforceable. OAG 59-88 ..... 262

**COUNTY CLERK**

**Fees**

Changes made to section 29.09(7m), Stats., by 1987 Wisconsin Act 27 did not alter the county board's authority to permit the county clerk to keep the issuing fees prescribed by sections 29.09(10) and 29.092(15) as part of his or her compensation. OAG 60-88 ..... 267

**COUNTY CORPORATION COUNSEL**

**Oath of office**

An official oath is required by section 59.13(1), Stats., for a county corporation counsel but is not required for an assistant district attorney. OAG 52-88 ..... 228

**COUNTY EXECUTIVE**

**Handicapped Children's Education Board**

In counties with a county executive, the county Handicapped Children's Education Board exercises advisory and policy-making functions associated with the special education programs and services authorized by the county board under section 115.83, Stats., and the county executive supervises the administrative functions. While the county Handicapped Children's Education Board and the county executive share budgetary responsibilities, the county executive makes the annual budget recommendation to the county board. County personnel and procurement ordnances, and other similar ordinances which regulate administration of county government generally, apply to the operation of such county special education programs and services to the extent such ordinances are otherwise authorized and do not conflict with the state laws regulating such special education programs and services. OAG 44-88 ..... 196

COUNTY EXECUTIVE (continued)

Powers

In counties with a population of less than 500,000 having a county executive, a solid waste management board established by the county board pursuant to section 59.07(135), Stats., is restricted to performing advisory, policy-making or legislative functions, and the county executive is responsible for the administrative functions set forth in the statute. OAG 21-88 ..... 98

An elected county executive does not have authority to reorganize another elected county official's office so as to remove functions or responsibilities mandated by statute. An elected county executive does have authority, along with the county board, to impose reasonable organizational and budgetary constraints upon such officials, which neither narrow nor frustrate the proper exercise of the constitutionally or statutorily mandated official duties of such elected county offices. OAG 25-88 ..... 113

Solid Waste Management Board

In counties with a population of less than 500,000 having a county executive, a solid waste management board established by the county board pursuant to section 59.07(135), Stats., is restricted to performing advisory, policy-making or legislative functions, and the county executive is responsible for the administrative functions set forth in the statute. OAG 21-88 ..... 98

COURTS

Refusal hearing

An individual's fifth amendment privilege against self-incrimination need not be compromised by his or her testimony elicited at the evidentiary refusal hearing afforded to individuals who have requested the opportunity to litigate the lawfulness of their refusal to submit to chemical testing under the implied consent law. Consequently, absent any statutory guidelines, the scheduling of a refusal hearing is within the discretion and calendaring possibilities of the court to which it is assigned. OAG 2-88 ..... 4

CREMATION

Medical schools

Chapters 69 and 157, Stats., are not alternatives to the requirement in section 979.10 that anyone cremating a corpse first obtain a cremation permit from the coroner. University medical schools or anyone else qualified to receive a corpse can, however, receive a corpse for research without first obtaining the cremation permit. Section 979.10 only requires that the permit be obtained before the corpse is cremated. OAG 50-88 ..... 218

Permits

Chapters 69 and 157, Stats., are not alternatives to the requirement in section 979.10 that anyone cremating a corpse first obtain a cremation permit from the coroner. University medical schools or anyone else qualified to receive a corpse can, however, receive a corpse for research without first obtaining the cremation permit. Section 979.10

**CREMATION** *(continued)*

Permits *(continued)*

only requires that the permit be obtained before the corpse is cremated. OAG 50-88 ..... 218

**CRIMINAL LAW**

Evidence

An individual's fifth amendment privilege against self-incrimination need not be compromised by his or her testimony elicited at the evidentiary refusal hearing afforded to individuals who have requested the opportunity to litigate the lawfulness of their refusal to submit to chemical testing under the implied consent law. Consequently, absent any statutory guidelines, the scheduling of a refusal hearing is within the discretion and calendaring possibilities of the court to which it is assigned. OAG 2-88 ..... 4

Fifth Amendment privilege

An individual's fifth amendment privilege against self-incrimination need not be compromised by his or her testimony elicited at the evidentiary refusal hearing afforded to individuals who have requested the opportunity to litigate the lawfulness of their refusal to submit to chemical testing under the implied consent law. Consequently, absent any statutory guidelines, the scheduling of a refusal hearing is within the discretion and calendaring possibilities of the court to which it is assigned. OAG 2-88 ..... 4

Search and seizure

Authorized agents of the Department of Agriculture, Trade and Consumer Protection have the authority to stop and search vehicles transporting livestock in Wisconsin so long as they comply with certain constitutional safeguards. OAG 38-88 ..... 172

Self incrimination

*See* Fifth Amendment privilege

**DISTRICT ATTORNEY**

Oath of office

An official oath is required by section 59.13(1), Stats., for a county corporation counsel but is not required for an assistant district attorney. OAG 52-88 ..... 228

Salaries and wages

A grant from the Wisconsin Office of Justice Assistance may properly be paid as salary increases to the district attorney and his or her assistants in the form of overtime, without violating section 59.49(1), Stats., provided the county makes allowance for such grant funds in its budget and duly passes salary increases for the district attorney and his assistants as provided by sections 66.197 and 59.15(2)(c). OAG 12-88 ..... 63

**DRUGS**

## County ordinance

- Counties may not enact ordinances in conformity with state statutes prohibiting the possession and sale of marijuana. OAG 46-88 ..... 205

**EMERGENCY VEHICLES***See* AMBULANCES**EMPLOYER AND EMPLOYEE**

## Acquired Immune Deficiency Syndrome

- A police and fire commission is an employer under section 103.15, Stats., and may not test paramedic candidates for the HIV virus. Civil liability of the commission and the city it serves for claims brought by individuals who can prove that they contracted the HIV virus through employment-related contacts with paramedics discussed. OAG 40-88 181

## Dual employment

- Discussion of restrictions which section 16.417(2), Stats., imposes on dual state employment of state employes. OAG 55-88 ..... 245

## Police and Fire Commission

- A police and fire commission is an employer under section 103.15, Stats., and may not test paramedic candidates for the HIV virus. Civil liability of the commission and the city it serves for claims brought by individuals who can prove that they contracted the HIV virus through employment-related contacts with paramedics discussed. OAG 40-88 181

## State

- Discussion of restrictions which section 16.417(2), Stats., imposes on dual state employment of state employes. OAG 55-88 ..... 245

**ESTABLISHMENT CLAUSE, UNITED STATES CONSTITUTION**

## Textbook loans to school students

- 1987 Senate Bill 366 is facially constitutional. OAG 13-88 ..... 66

**FEDERAL AID**

## Medicaid payments may not be supplemented

- A county may not, in a manner consistent with federal and state statutes and regulations prohibiting supplementation, contractually obligate itself to pay a visiting nurse association funds in addition to those received by such a home health care provider through the Medicaid program. Except in extraordinary circumstances, the attorney general will not issue opinions concerning the applicability of federal statutes and regulations administered exclusively by federal authorities. OAG 64-88 ..... 287

**FEES**

County Clerk

Changes made to section 29.09(7m), Stats., by 1987 Wisconsin Act 27 did not alter the county board's authority to permit the county clerk to keep the issuing fees prescribed by sections 29.09(10) and 29.092(15) as part of his or her compensation. OAG 60-88 ..... 267

**FIREARMS**

Ordinance by Town of Menasha exceeds authority

A town ordinance which purports to prohibit the use of firearms but exempts town residents and their guests is in effect a restriction on hunter numbers. As such, it infringes on and exceeds the authority of the Department of Natural Resources, and presents possible equal protection problems. OAG 30-88 ..... 137

**FIRST AMENDMENT**

*See* CONSTITUTIONAL LAW

**FISH AND GAME**

Regulation of firearms by Town

A town ordinance which purports to prohibit the use of firearms but exempts town residents and their guests is in effect a restriction on hunter numbers. As such, it infringes on and exceeds the authority of the Department of Natural Resources, and presents possible equal protection problems. OAG 30-88 ..... 137

**FOREST CROP LAW**

Discussed

Although public tax-exempt entities such as municipalities may neither enter nor continue their lands in the forest tax programs of chapter 77, Stats., private entities whose property would otherwise normally be tax-exempt under chapter 70 may participate in such programs. OAG 63-88 ..... 280

**FORESTS**

County forest roads

County forest roads which are open to vehicular traffic are highways which can be designated as all-terrain vehicle routes under section 23.33(8)(b), Stats., and minors under sixteen years of age holding valid all-terrain vehicle safety certificates can operate all-terrain vehicles on highways which have been designated as all-terrain vehicle routes under the limited conditions set forth in section 23.33(4). OAG 9-88 ..... 52

Forest Crop Law

Although public tax-exempt entities such as municipalities may neither enter nor continue their lands in the forest tax programs of chapter 77, Stats., private entities whose property would otherwise normally be tax-exempt under chapter 70 may participate in such programs. OAG 63-88 ..... 280

**FORESTS** (*continued*)**Managed Forest Land Law**

Although public tax-exempt entities such as municipalities may neither enter nor continue their lands in the forest tax programs of chapter 77, Stats., private entities whose property would otherwise normally be tax-exempt under chapter 70 may participate in such programs. OAG 63-88 ..... 280

**Woodland Tax Law**

Although public tax-exempt entities such as municipalities may neither enter nor continue their lands in the forest tax programs of chapter 77, Stats., private entities whose property would otherwise normally be tax-exempt under chapter 70 may participate in such programs. OAG 63-88 ..... 280

**FORFEITURES****Civil procedure action**

In recovering forfeitures for violations of statutes, the district attorney can commence a regular civil action or a small claims action. OAG 61-88 ..... 270

**District Attorney**

In recovering forfeitures for violations of statutes, the district attorney can commence a regular civil action or a small claims action. OAG 61-88 ..... 270

**Small claims procedure**

In recovering forfeitures for violations of statutes, the district attorney can commence a regular civil action or a small claims action. OAG 61-88 ..... 270

**FREEDOM OF SPEECH****Public employe**

Section 19.45(12), Stats., is constitutional. OAG 41-88 ..... 184

**FUNDS****Investments**

Municipalities and other local governmental entities may only invest in certain specifically authorized bonds, securities, deposits, etc., and may not invest in mutual funds, even if the assets of such funds consist solely of statutorily-allowed bonds and securities. OAG 62-88 ..... 274

**Municipalities**

Municipalities and other local governmental entities may only invest in certain specifically authorized bonds, securities, deposits, etc., and may not invest in mutual funds, even if the assets of such funds consist solely of statutorily-allowed bonds and securities. OAG 62-88 ..... 274

**FUNERAL DIRECTORS AND EMBALMERS**

Eye removals

Special training is required of medical personnel as well as morticians before they perform eye enucleation. OAG 47-88 ..... 207

**GAMBLING**

Indians

Laws regarding gambling will apply on Indian reservations if they prohibit gambling activities entirely, but not if they merely regulate these activities. Most state laws regarding the newly allowed gambling activities of lotteries and parimutuel betting will not apply on Indian Reservations because these activities will no longer be *entirely* prohibited. OAG 5-88 ..... 24

Pari-mutuel enabling legislation

Section 562.057, Stats., which permits simulcasting of races conducted at other racetracks to a racetrack licensed by the Wisconsin Racing Board, does not violate article IV, section 24(5) of the Wisconsin Constitution requiring "on-track" betting. OAG 66-88 ..... 299

Racetracks

Section 562.057, Stats., which permits simulcasting of races conducted at other racetracks to a racetrack licensed by the Wisconsin Racing Board, does not violate article IV, section 24(5) of the Wisconsin Constitution requiring "on-track" betting. OAG 66-88 ..... 299

Simulcasting of races

Section 562.057, Stats., which permits simulcasting of races conducted at other racetracks to a racetrack licensed by the Wisconsin Racing Board, does not violate article IV, section 24(5) of the Wisconsin Constitution requiring "on-track" betting. OAG 66-88 ..... 299

**GARNISHMENT**

AFDC grants

The recently enacted provisions of section 49.41(2), Stats., which provide that effective April 1, 1988, grants of AFDC may be garnished by landlords as provided under section 812.233, conflict with provisions of Title IV-A of the Social Security Act. OAG 10-88 ..... 56

State of Wisconsin

The state is immune from suit in any garnishment action not involving a state employe or officer and, with the exception of those cases falling under sections 779.15 and 779.155, Stats., monies held in the state treasury on the account of independent contractors are not available to satisfy the judgment debts owed by them. OAG 3-88 ..... 17

**HANDICAPPED CHILDREN'S EDUCATION BOARD**

Powers of board discussed

In counties with a county executive, the county Handicapped Children's Education Board exercises advisory and policy-making functions associated with the special education programs and services authorized by

**HANDICAPPED CHILDREN'S EDUCATION BOARD** *(continued)*

*Powers of board discussed (continued)*

the county board under section 115.83, Stats., and the county executive supervises the administrative functions. While the county Handicapped Children's Education Board and the county executive share budgetary responsibilities, the county executive makes the annual budget recommendation to the county board. County personnel and procurement ordinances, and other similar ordinances which regulate administration of county government generally, apply to the operation of such county special education programs and services to the extent such ordinances are otherwise authorized and do not conflict with the state laws regulating such special education programs and services. OAG 44-88 ..... 196

**HEALTH AND SOCIAL SERVICES, DEPARTMENT OF**

**Cremation**

Chapters 69 and 157, Stats., are not alternatives to the requirement in section 979.10 that anyone cremating a corpse first obtain a cremation permit from the coroner. University medical schools or anyone else qualified to receive a corpse can, however, receive a corpse for research without first obtaining the cremation permit. Section 979.10 only requires that the permit be obtained before the corpse is cremated. OAG 50-88 ..... 218

**HIGHWAYS**

**Definition**

County forest roads which are open to vehicular traffic are highways which can be designated as all-terrain vehicle routes under section 23.33(8)(b), Stats., and minors under sixteen years of age holding valid all-terrain vehicle safety certificates can operate all-terrain vehicles on highways which have been designated as all-terrain vehicle routes under the limited conditions set forth in section 23.33(4). OAG 9-88 ..... 52

**IMPLIED CONSENT LAW**

**Refusal to submit to testing**

An individual's fifth amendment privilege against self-incrimination need not be compromised by his or her testimony elicited at the evidentiary refusal hearing afforded to individuals who have requested the opportunity to litigate the lawfulness of their refusal to submit to chemical testing under the implied consent law. Consequently, absent any statutory guidelines, the scheduling of a refusal hearing is within the discretion and calendaring possibilities of the court to which it is assigned. OAG 2-88 ..... 4

**INDIANS**

**Coroner**

The positions of county coroner and tribal police officer are incompatible governmental positions but the positions of deputy county coroner and tribal conservation warden are not incompatible. OAG 65-88.. 293

**INDIANS (continued)**

**Gambling**

Laws regarding gambling will apply on Indian reservations if they prohibit gambling activities entirely, but not if they merely regulate these activities. Most state laws regarding the newly allowed gambling activities of lotteries and parimutuel betting will not apply on Indian Reservations because these activities will no longer be *entirely* prohibited. OAG 5-88..... 24

**INEBRIATES AND DRUG ADDICTS**

**Minors**

Except for those services for which parental consent is necessary under section 51.47(2), Stats., a physician or health care facility may release outpatient or detoxification services information only with the consent of the minor patient provided that the minor is twelve years of age or over. Wis. Admin. Code § HSS 92.06(2) (1986) and 42 C.F.R. § 2.14(b) (1987). OAG 42-88 ..... 187

**Sheriff's responsibilities**

A sheriff may not refuse to book a person lawfully arrested and brought to the county jail by any state law enforcement agency, regardless of the medical condition of the arrestee, although he may require immediate medical screening pursuant to section 53.38, Stats. A sentencing court that imposes county jail time as a condition of probation may suspend that jail time while the probationer receives hospital care, and a sheriff and county department of human services may cooperate in the billing of medical care provided to county jail prisoners. OAG 56-88 ..... 249

**INSURANCE**

**Assessments subsidizing HIRSP**

Mandatory assessment against "all insurers" which subsidizes Health Insurance Risk-Sharing Plan, subchapter II of chapter 619, Stats., does not apply to the state's self-insurance plan because laws of general application do not apply to the sovereign. "Public employer" self-insurance plans are also exempt because, for purposes of this statute, they share in the state's sovereignty and, thus, in its immunity to general laws. OAG 53-88 ..... 230

**Health Insurance Risk-Sharing Plan**

Mandatory assessment against "all insurers" which subsidizes Health Insurance Risk-Sharing Plan, subchapter II of chapter 619, Stats., does not apply to the state's self-insurance plan because laws of general application do not apply to the sovereign. "Public employer" self-insurance plans are also exempt because, for purposes of this statute, they share in the state's sovereignty and, thus, in its immunity to general laws. OAG 53-88 ..... 230

**INTOXICATING LIQUORS**

## Tied-house prohibitions

- Section 125.33(1)(a), Stats., prohibits a person from having an interest in real estate leased to a Class "B" licensee while also being a director, officer or shareholder of a brewery. OAG 15-88 ..... 76

**INVESTMENTS**

## Municipal funds

- Municipalities and other local governmental entities may only invest in certain specifically authorized bonds, securities, deposits, etc., and may not invest in mutual funds, even if the assets of such funds consist solely of statutorily-allowed bonds and securities. OAG 62-88 ..... 274

## Mutual funds

- Municipalities and other local governmental entities may only invest in certain specifically authorized bonds, securities, deposits, etc., and may not invest in mutual funds, even if the assets of such funds consist solely of statutorily-allowed bonds and securities. OAG 62-88 ..... 274

**JOB TRAINING PARTNERSHIP ACT**

## Private Industry Council

- Section 946.13(1)(a), Stats., may be violated by members of Private Industry Councils when private or public entities of which they are executives, directors or board members receive benefits under the Job Training Partnership Act. OAG 68-88 ..... 306

**LANDLORD AND TENANT**

## Garnishment of AFDC grants

- The recently enacted provisions of section 49.41(2), Stats., which provide that effective April 1, 1988, grants of AFDC may be garnisheed by landlords as provided under section 812.233, conflict with provisions of Title IV-A of the Social Security Act. OAG 10-88 ..... 56

**LAW ENFORCEMENT**

## Automobiles and motor vehicles

- The ordinance adopted by the Village of West Milwaukee which authorizes the placement of an immobilization device on an automobile of an individual who has ten or more outstanding or otherwise unsettled traffic violations does not constitute a valid exercise of a municipality's authority under Wisconsin law. OAG 14-88 ..... 73

## Discovery

- Sheriff's criminal investigation files are not covered by a blanket exemption from the public records law, but denial of access may be justified on a case-by-case basis. OAG 7-88 ..... 42

**LAW ENFORCEMENT** *(continued)*

Sheriff's files

Sheriff's criminal investigation files are not covered by a blanket exemption from the public records law, but denial of access may be justified on a case-by-case basis. OAG 7-88 ..... 42

Wisconsin Office of Justice Assistance

A grant from the Wisconsin Office of Justice Assistance may properly be paid as salary increases to the district attorney and his or her assistants in the form of overtime, without violating section 59.49(1), Stats., provided the county makes allowance for such grant funds in its budget and duly passes salary increases for the district attorney and his assistants as provided by sections 66.197 and 59.15(2)(c). OAG 12-88 ..... 63

**LEGISLATION**

Budget Bill for 1987

Section 16.49, Stats., does not prohibit or restrict an officer or employe from informing citizens of budget deliberations or suggesting that those citizens inform their elected officials of their opinions. OAG 11-88 ..... 59

Lobbying law

Section 13.72, Stats., which prohibits anonymous paid advertising favoring or opposing pending legislation, is unconstitutional. OAG 19-88 ..... 90

Textbook loans to school students

1987 Senate Bill 366 is facially constitutional. OAG 13-88 ..... 66

**LIABILITY**

North Central Wisconsin Regional Planning Commission

Employes of regional planning commissions organized under section 66.945, Stats., are not state agents, officers or employes within the meaning of section 895.46(1)(a), but they are protected by that subsection's requirement that such planning commissions themselves indemnify them for liability incurred in the course of their duties. OAG 31-88 ..... 142

Regional planning commission

Employes of regional planning commissions organized under section 66.945, Stats., are not state agents, officers or employes within the meaning of section 895.46(1)(a), but they are protected by that subsection's requirement that such planning commissions themselves indemnify them for liability incurred in the course of their duties. OAG 31-88 ..... 142

Vocational, technical and adult education districts

The limitation of damages by section 893.80(3), Stats., in actions founded upon tort against governmental bodies, officers, agents or employes, unless modified or rendered inapplicable by other statute, applies to vocational, technical and adult education districts, their officers and employes. OAG 32-88 ..... 145

**LIBRARIES****Board powers discussed**

The express power of a library board under section 43.58(1), Stats., to control the expenditure of funds includes the authority to contract for necessary goods and services for the public library. OAG 43-88 . . . . 193

**Expenditures**

The express power of a library board under section 43.58(1), Stats., to control the expenditure of funds includes the authority to contract for necessary goods and services for the public library. OAG 43-88 . . . . 193

**LICENSES AND PERMITS****Acquired Immune Deficiency Syndrome**

Licensing boards do not have the authority to enact general regulations which would allow them to suspend, deny or revoke the license of a person who has a communicable disease. However, licensing boards do have the authority on a case-by-case basis to suspend, deny or revoke the license of a person who poses a direct threat to the health and safety of other persons or who, by reason of the communicable disease, is unable to perform the duties of the licensed activity. OAG 51-88 . . . . . 223

**Communicable disease**

Licensing boards do not have the authority to enact general regulations which would allow them to suspend, deny or revoke the license of a person who has a communicable disease. However, licensing boards do have the authority on a case-by-case basis to suspend, deny or revoke the license of a person who poses a direct threat to the health and safety of other persons or who, by reason of the communicable disease, is unable to perform the duties of the licensed activity. OAG 51-88 . . . . . 223

**Eye removal**

Special training is required of medical personnel as well as morticians before they perform eye enucleation. OAG 47-88 . . . . . 207

**LOBBYING****Law**

The lobby law prohibits a state employe from accepting compensation for serving on the board of directors or providing any other service to a principal as defined in section 13.62(12), Stats. OAG 36-88 . . . . . 160

**Public employe**

Section 19.45(12), Stats., is constitutional. OAG 41-88 . . . . . 184

**State agency**

The state and its agencies are not "principals" under section 13.62(12), Stats. OAG 27-88 . . . . . 126

**LOTTERIES**

Soft drink company promotional plan

A plan whereby a soft drink company would include a coupon for a Wisconsin lottery ticket with specified purchases and the customer could redeem the coupon for a lottery ticket at a retail lottery outlet would violate section 100.16. OAG 67-88 ..... 303

**MALT BEVERAGES**

Tied-house prohibitions

Section 125.33(1)(a), Stats., prohibits a person from having an interest in real estate leased to a Class "B" licensee while also being a director, officer or shareholder of a brewery. OAG 15-88 ..... 76

**MARKETING AND TRADE PRACTICES**

Antitrust laws

The treatment of cash discounts in section 100.30(2), Stats., the minimum markup law, and proposed Wisconsin Administrative Code chapter Ag 119 does not violate federal antitrust laws, constitutional due process or exceed statutory authority. OAG 37-88 ..... 163

Cash discounts

The treatment of cash discounts in section 100.30(2), Stats., the minimum markup law, and proposed Wisconsin Administrative Code chapter Ag 119 does not violate federal antitrust laws, constitutional due process or exceed statutory authority. OAG 37-88 ..... 163

Cigarettes

The treatment of cash discounts in section 100.30(2), Stats., the minimum markup law, and proposed Wisconsin Administrative Code chapter Ag 119 does not violate federal antitrust laws, constitutional due process or exceed statutory authority. OAG 37-88 ..... 163

Lottery ticket coupons

A plan whereby a soft drink company would include a coupon for a Wisconsin lottery ticket with specified purchases and the customer could redeem the coupon for a lottery ticket at a retail lottery outlet would violate section 100.16. OAG 67-88 ..... 303

**MARRIAGE AND DIVORCE**

Acquired Immune Deficiency Syndrome

A county board has no statutory authority to charge a higher marriage license fee to certain nonresidents who would be required to submit to AIDS testing in their home state or, in the alternative, require AIDS testing as a condition of obtaining a Wisconsin marriage license. OAG 34-88 ..... 154

Fees for marriage license

A county board has no statutory authority to charge a higher marriage license fee to certain nonresidents who would be required to submit to AIDS testing in their home state or, in the alternative, require AIDS

**MARRIAGE AND DIVORCE** *(continued)*

**Fees for marriage license** *(continued)*

testing as a condition of obtaining a Wisconsin marriage license. OAG 34-88 ..... 154

**MEDICAID**

**County supplementary payments prohibited**

A county may not, in a manner consistent with federal and state statutes and regulations prohibiting supplementation, contractually obligate itself to pay a visiting nurse association funds in addition to those received by such a home health care provider through the Medicaid program. Except in extraordinary circumstances, the attorney general will not issue opinions concerning the applicability of federal statutes and regulations administered exclusively by federal authorities. OAG 64-88 ..... 287

**Visiting Nurse Association**

A county may not, in a manner consistent with federal and state statutes and regulations prohibiting supplementation, contractually obligate itself to pay a visiting nurse association funds in addition to those received by such a home health care provider through the Medicaid program. Except in extraordinary circumstances, the attorney general will not issue opinions concerning the applicability of federal statutes and regulations administered exclusively by federal authorities. OAG 64-88 ..... 287

**MENOMINEE INDIANS**

**Coroner**

The positions of county coroner and tribal police officer are incompatible governmental positions but the positions of deputy county coroner and tribal conservation warden are not incompatible. OAG 65-88.. 293

**MINORS**

**Alcohol and drug abuse**

Except for those services for which parental consent is necessary under section 51.47(2), Stats., a physician or health care facility may release outpatient or detoxification services information only with the consent of the minor patient provided that the minor is twelve years of age or over. Wis. Admin. Code § HSS 92.06(2) (1986) and 42 C.F.R. § 2.14(b) (1987). OAG 42-88 ..... 187

**Confidential reports**

Except for those services for which parental consent is necessary under section 51.47(2), Stats., a physician or health care facility may release outpatient or detoxification services information only with the consent of the minor patient provided that the minor is twelve years of age or over. Wis. Admin. Code § HSS 92.06(2) (1986) and 42 C.F.R. § 2.14(b) (1987). OAG 42-88 ..... 187

**MINORS** (*continued*)

**Gambling**

Laws regarding gambling will apply on Indian reservations if they prohibit gambling activities entirely, but not if they merely regulate these activities. Most state laws regarding the newly allowed gambling activities of lotteries and parimutuel betting will not apply on Indian Reservations because these activities will no longer be *entirely* prohibited. OAG 5-88..... 24

**Inebriates and drug addicts**

Except for those services for which parental consent is necessary under section 51.47(2), Stats., a physician or health care facility may release outpatient or detoxification services information only with the consent of the minor patient provided that the minor is twelve years of age or over. Wis. Admin. Code § HSS 92.06(2) (1986) and 42 C.F.R. § 2.14(b) (1987). OAG 42-88 ..... 187

**MUNICIPALITIES**

**Automobiles and motor vehicles**

The ordinance adopted by the Village of West Milwaukee which authorizes the placement of an immobilization device on an automobile of an individual who has ten or more outstanding or otherwise unsettled traffic violations does not constitute a valid exercise of a municipality's authority under Wisconsin law. OAG 14-88 ..... 73

**Forest tax programs**

Although public tax-exempt entities such as municipalities may neither enter nor continue their lands in the forest tax programs of chapter 77, Stats., private entities whose property would otherwise normally be tax-exempt under chapter 70 may participate in such programs. OAG 63-88 ..... 280

**Investments**

Municipalities and other local governmental entities may only invest in certain specifically authorized bonds, securities, deposits, etc., and may not invest in mutual funds, even if the assets of such funds consist solely of statutorily-allowed bonds and securities. OAG 62-88 ..... 274

**Mutual funds**

Municipalities and other local governmental entities may only invest in certain specifically authorized bonds, securities, deposits, etc., and may not invest in mutual funds, even if the assets of such funds consist solely of statutorily-allowed bonds and securities. OAG 62-88 ..... 274

**Open meeting**

Sections 895.35 and 895.46, Stats., apply to actions for open meetings law violations to the same extent they apply to other actions against public officers and employees, except that public officials cannot be reimbursed for forfeitures they are ordered to pay for violating the open meetings law. OAG 39-88 ..... 177

**Ordinances**

The ordinance adopted by the Village of West Milwaukee which authorizes the placement of an immobilization device on an automobile of

**MUNICIPALITIES** (*continued*)*Ordinances* (*continued*)

an individual who has ten or more outstanding or otherwise unsettled traffic violations does not constitute a valid exercise of a municipality's authority under Wisconsin law. OAG 14-88 ..... 73

## Solid waste facilities

Proposed municipal solid waste facilities which replace existing municipal solid waste facilities are not exempt from the needs determination under section 144.44(2)(nm), Stats. OAG 16-88 ..... 81

**MUTUAL FUNDS**

See INVESTMENTS

**NATURAL RESOURCES, DEPARTMENT OF**

## Railroad bridge repair

The Department of Natural Resources is not governed by section 190.08, Stats., relating to the duty of corporations to maintain bridges and other structures, where the Department of Natural Resources has acquired abandoned railroad property for the purpose of developing hiking and biking trails. OAG 23-88 ..... 106

**NEWSPAPERS**

## Legal notice

News media who have filed written requests for notices of public meetings cannot be charged fees by governmental bodies for the communication of such notices. OAG 69-88 ..... 312

## Open meeting

News media who have filed written requests for notices of public meetings cannot be charged fees by governmental bodies for the communication of such notices. OAG 69-88 ..... 312

**NORTH CENTRAL WISCONSIN REGIONAL PLANNING COMMISSION**

## Liability

Employees of regional planning commissions organized under section 66.945, Stats., are not state agents, officers or employees within the meaning of section 895.46(1)(a), but they are protected by that subsection's requirement that such planning commissions themselves indemnify them for liability incurred in the course of their duties. OAG 31-88 ..... 142

**OPEN MEETING**

## Attorney's fees

Sections 895.35 and 895.46, Stats., apply to actions for open meetings law violations to the same extent they apply to other actions against public officers and employees, except that public officials cannot be reimbursed for forfeitures they are ordered to pay for violating the open meetings law. OAG 39-88 ..... 177

**OPEN MEETING (continued)**

**Forfeiture**

Sections 895.35 and 895.46, Stats., apply to actions for open meetings law violations to the same extent they apply to other actions against public officers and employes, except that public officials cannot be reimbursed for forfeitures they are ordered to pay for violating the open meetings law. OAG 39-88 ..... 177

**Public notice**

News media who have filed written requests for notices of public meetings cannot be charged fees by governmental bodies for the communication of such notices. OAG 69-88 ..... 312

**ORDINANCES**

**Automobiles and motor vehicles**

The ordinance adopted by the Village of West Milwaukee which authorizes the placement of an immobilization device on an automobile of an individual who has ten or more outstanding or otherwise unsettled traffic violations does not constitute a valid exercise of a municipality's authority under Wisconsin law. OAG 14-88 ..... 73

**County conservation**

A county ordinance passed under section 92.11, Stats., may be applicable to incorporated as well as unincorporated areas of the county, whereas a county ordinance passed under section 92.16 is applicable only in the unincorporated areas of the county. OAG 18-88 ..... 87

**Firearm ordinance by Town exceeds authority**

A town ordinance which purports to prohibit the use of firearms but exempts town residents and their guests is in effect a restriction on hunter numbers. As such, it infringes on and exceeds the authority of the Department of Natural Resources, and presents possible equal protection problems. OAG 30-88 ..... 137

**Marijuana ordinance**

Counties may not enact ordinances in conformity with state statutes prohibiting the possession and sale of marijuana. OAG 46-88 ..... 205

**Milwaukee County ordinances**

The Milwaukee County board may not delegate the exclusive authority to approve contracts for budgeted public works projects to the museum board or to the zoological board. Except in extraordinary circumstances, the attorney general will not issue opinions concerning the meaning or intent of municipal ordinances. OAG 26-88 ..... 120

**Municipalities**

Except in extraordinary circumstances, the attorney general will not issue opinions concerning the meaning or intent of municipal ordinances. OAG 26-88 discussed and adhered to. (Unpub.) OAG 58-88

**Register of Deeds**

A county board lacks statutory authority to enact ordinances directing the register of deeds to refuse to record documents containing restrictive covenants or requiring the register of deeds to place notices on

**ORDINANCES** (*continued*)**Register of Deeds** (*continued*)

liber volumes and copies of real estate documents, directing the public's attention to the possibility that such covenants may be legally unenforceable. OAG 59-88..... 262

**West Milwaukee**

The ordinance adopted by the Village of West Milwaukee which authorizes the placement of an immobilization device on an automobile of an individual who has ten or more outstanding or otherwise unsettled traffic violations does not constitute a valid exercise of a municipality's authority under Wisconsin law. OAG 14-88 ..... 73

**PARAMEDIC****Acquired Immune Deficiency Syndrome**

A police and fire commission is an employer under section 103.15, Stats., and may not test paramedic candidates for the HIV virus. Civil liability of the commission and the city it serves for claims brought by individuals who can prove that they contracted the HIV virus through employment-related contacts with paramedics discussed. OAG 40-88 181

**PHYSICIANS AND SURGEONS****Eye enucleation**

Special training is required of medical personnel as well as morticians before they perform eye enucleation. OAG 47-88 ..... 207

**POWER OF ATTORNEY**

*See* **UNIFORM DURABLE POWER OF ATTORNEY ACT**

**PRISONS AND PRISONERS****Costs of medical care**

*See* **Medical care**

**County jail**

Neither the sheriff nor the county board may "privatize" the jailer function of the office of sheriff under section 59.23(1), Stats., by contracting with a private firm to take charge and custody of county prisoners held in the county jail. OAG 20-88 ..... 94

**Medical care**

A sheriff may not refuse to book a person lawfully arrested and brought to the county jail by any state law enforcement agency, regardless of the medical condition of the arrestee, although he may require immediate medical screening pursuant to section 53.38, Stats. A sentencing court that imposes county jail time as a condition of probation may suspend that jail time while the probationer receives hospital care, and a sheriff and county department of human services may cooperate in the billing of medical care provided to county jail prisoners. OAG 56-88 ..... 249

**PRISONS AND PRISONERS (continued)**

**Privatization**

Neither the sheriff nor the county board may "privatize" the jailer function of the office of sheriff under section 59.23(1), Stats., by contracting with a private firm to take charge and custody of county prisoners held in the county jail. OAG 20-88 ..... 94

**PRIVATE INDUSTRY COUNCIL**

**Job Training Partnership Act**

Section 946.13(1)(a), Stats., may be violated by members of Private Industry Councils when private or public entities of which they are executives, directors or board members receive benefits under the Job Training Partnership Act. OAG 68-88..... 306

**PROPERTY**

**Refunds of taxes erroneously assessed**

Section 74.73(2), Stats., provides that where a town, city or village refunds property taxes erroneously assessed as a result of an error or defect of law not caused by such local taxing jurisdiction or an official thereof, such entity is entitled to a credit by the county for that portion of such taxes previously paid over to the county. The statute does not direct that the next county levy be increased by such amount or authorize the county to levy a "special county charge" against such entity to recoup the amount so credited. OAG 45-88 ..... 201

**Tax payment dates for 1988**

When the deadline dates for making property tax installment payments fall on Sundays, the deadlines for making personal payments and postmarking mailed payments are extended to the next business days, which in 1988 are February 1 and August 1. To satisfy section 74.025, Stats., the proper official should receive mailed payments within five days of those dates, not within five days of January 31 and July 31. OAG 1-88..... 1

**Taxes erroneously assessed**

Section 74.73(2), Stats., provides that where a town, city or village refunds property taxes erroneously assessed as a result of an error or defect of law not caused by such local taxing jurisdiction or an official thereof, such entity is entitled to a credit by the county for that portion of such taxes previously paid over to the county. The statute does not direct that the next county levy be increased by such amount or authorize the county to levy a "special county charge" against such entity to recoup the amount so credited. OAG 45-88 ..... 201

**PUBLIC DEFENDERS**

**Budget Bill for 1987**

Section 16.49, Stats., does not prohibit or restrict an officer or employe from informing citizens of budget deliberations or suggesting that those citizens inform their elected officials of their opinions. OAG 11-88 ..... 59

**PUBLIC EMPLOYEES**

*See PUBLIC OFFICIALS; EMPLOYER AND EMPLOYEE; STATE*

**PUBLIC OFFICIALS**

**Bribery**

Article XIII, section 11 of the Wisconsin Constitution discussed. OAG 54-88 ..... 237

**Budget bills**

Section 16.49, Stats., does not prohibit or restrict an officer or employe from informing citizens of budget deliberations or suggesting that those citizens inform their elected officials of their opinions. OAG 11-88 ..... 59

**Business interests**

Section 15.06(3)(a), Stats., does not prohibit a commissioner from having any business interests. It prohibits a commissioner from pursuing business interests which would prevent him or her from properly fulfilling the duties of the office of commissioner and precludes a commissioner from holding any public or private office or position of profit. OAG 6-88 ..... 36

**Commissioners**

Section 15.06(3)(a), Stats., does not prohibit a commissioner from having any business interests. It prohibits a commissioner from pursuing business interests which would prevent him or her from properly fulfilling the duties of the office of commissioner and precludes a commissioner from holding any public or private office or position of profit. OAG 6-88 ..... 36

**Dual employment**

Discussion of restrictions which section 16.417(2), Stats., imposes on dual state employment of state employes. OAG 55-88 ..... 245

**Informing the public**

Section 16.49, Stats., does not prohibit or restrict an officer or employe from informing citizens of budget deliberations or suggesting that those citizens inform their elected officials of their opinions. OAG 11-88 ..... 59

**Liability**

Sections 895.35 and 895.46, Stats., apply to actions for open meetings law violations to the same extent they apply to other actions against public officers and employes, except that public officials cannot be reimbursed for forfeitures they are ordered to pay for violating the open meetings law. OAG 39-88 ..... 177

**Lobbying law**

The lobby law prohibits a state employe from accepting compensation for serving on the board of directors or providing any other service to a principal as defined in section 13.62(12), Stats. OAG 36-88 ..... 160

**Open meeting**

Sections 895.35 and 895.46, Stats., apply to actions for open meetings law violations to the same extent they apply to other actions against

**PUBLIC OFFICIALS** *(continued)*

Open meeting *(continued)*

public officers and employes, except that public officials cannot be reimbursed for forfeitures they are ordered to pay for violating the open meetings law. OAG 39-88 ..... 177

Passes, franks and privileges

Article XIII, section 11 of the Wisconsin Constitution discussed. OAG 54-88 ..... 237

Private interest in public contracts

Section 946.13(1)(a), Stats., may be violated by members of Private Industry Councils when private or public entities of which they are executives, directors or board members receive benefits under the Job Training Partnership Act. OAG 68-88..... 306

Reimbursement

Article XIII, section 11 of the Wisconsin Constitution discussed. OAG 54-88 ..... 237

**PUBLIC RECORDS**

Child abuse

A county department of social services has no discretion to refuse to disclose reports and records of child abuse or neglect to the subject of the report or the subject's attorney under section 48.981(7)(a)1. and (c), Stats. OAG 17-88 ..... 84

Definition of

Treatment of drafts under the public records law discussed. OAG 22-88 100

Salary information

Salary information submitted to the state commission of savings and loan in connection with an absorption application is not exempt from disclosure under the state public records law. OAG 4-88..... 20

Savings and loan associations

Salary information submitted to the state commission of savings and loan in connection with an absorption application is not exempt from disclosure under the state public records law. OAG 4-88..... 20

Sheriff's investigative file

Sheriff's criminal investigation files are not covered by a blanket exemption from the public records law, but denial of access may be justified on a case-by-case basis. OAG 7-88 ..... 42

**PUBLIC SERVICE COMMISSION**

Commissioner

Section 15.06(3)(a), Stats., does not prohibit a commissioner from having any business interests. It prohibits a commissioner from pursuing business interests which would prevent him or her from properly fulfilling the duties of the office of commissioner and precludes a commissioner from holding any public or private office or position of profit. OAG 6-88 ..... 36

**PUBLIC WORKS****Milwaukee County zoo and museum**

The Milwaukee County board may not delegate the exclusive authority to approve contracts for budgeted public works projects to the museum board or to the zoological board. Except in extraordinary circumstances, the attorney general will not issue opinions concerning the meaning or intent of municipal ordinances. OAG 26-88 ..... 120

**RACETRACKS**

See **AUTOMOBILES AND MOTOR VEHICLES; GAMBLING**

**RAILROADS****Abandoned right of ways**

The Department of Natural Resources is not governed by section 190.08, Stats., relating to the duty of corporations to maintain bridges and other structures, where the Department of Natural Resources has acquired abandoned railroad property for the purpose of developing hiking and biking trails. OAG 23-88 ..... 106

**REAL ESTATE****Assessments**

Section 70.325, Stats., violates article VIII, section 1 of the Wisconsin Constitution. OAG 28-88 ..... 128

**County**

Subsections (5), (6) and (7) of section 75.35, Stats., created by 1987 Wisconsin Act 27 first apply to sales of property the county acquired at a section 74.39 tax sale on or after the effective date of section 3203(47)(c) of 1987 Wisconsin Act 27. OAG 29-88 ..... 133

**Tax sale**

Subsections (5), (6) and (7) of section 75.35, Stats., created by 1987 Wisconsin Act 27 first apply to sales of property the county acquired at a section 74.39 tax sale on or after the effective date of section 3203(47)(c) of 1987 Wisconsin Act 27. OAG 29-88 ..... 133

**Taxation**

Section 70.325, Stats., violates article VIII, section 1 of the Wisconsin Constitution. OAG 28-88 ..... 128

**REAL ESTATE BROKERS****Nonresident**

Section 452.11(1), Stats., requiring nonresident real estate brokers to maintain an active place of business and prohibiting them from employing brokers or salespersons in this state, is unconstitutional since it violates the privileges and immunities clause of the United States Constitution. OAG 24-88 ..... 109

**REGISTER OF DEEDS**

Restrictive covenants in documents

A county board lacks statutory authority to enact ordinances directing the register of deeds to refuse to record documents containing restrictive covenants or requiring the register of deeds to place notices on liber volumes and copies of real estate documents, directing the public's attention to the possibility that such covenants may be legally unenforceable. OAG 59-88..... 262

**REGULATION AND LICENSING, DEPARTMENT OF**

Acquired Immune Deficiency Syndrome

Licensing boards do not have the authority to enact general regulations which would allow them to suspend, deny or revoke the license of a person who has a communicable disease. However, licensing boards do have the authority on a case-by-case basis to suspend, deny or revoke the license of a person who poses a direct threat to the health and safety of other persons or who, by reason of the communicable disease, is unable to perform the duties of the licensed activity. OAG 51-88 ..... 223

Communicable disease

Licensing boards do not have the authority to enact general regulations which would allow them to suspend, deny or revoke the license of a person who has a communicable disease. However, licensing boards do have the authority on a case-by-case basis to suspend, deny or revoke the license of a person who poses a direct threat to the health and safety of other persons or who, by reason of the communicable disease, is unable to perform the duties of the licensed activity. OAG 51-88 ..... 223

Rehabilitation Act of 1973 (U.S.)

Licensing boards do not have the authority to enact general regulations which would allow them to suspend, deny or revoke the license of a person who has a communicable disease. However, licensing boards do have the authority on a case-by-case basis to suspend, deny or revoke the license of a person who poses a direct threat to the health and safety of other persons or who, by reason of the communicable disease, is unable to perform the duties of the licensed activity. OAG 51-88 ..... 223

**SALARIES AND WAGES**

Grant money used as overtime wages

A grant from the Wisconsin Office of Justice Assistance may properly be paid as salary increases to the district attorney and his or her assistants in the form of overtime, without violating section 59.49(1), Stats., provided the county makes allowance for such grant funds in its budget and duly passes salary increases for the district attorney and his assistants as provided by sections 66.197 and 59.15(2)(c). OAG 12-88 ..... 63

**SAVINGS AND LOAN ASSOCIATIONS**

Public records

Salary information submitted to the state commission of savings and loan in connection with an absorption application is not exempt from disclosure under the state public records law. OAG 4-88 ..... 20

**SCHOOLS AND SCHOOL DISTRICTS**

Textbook loans to students

1987 Senate Bill 366 is facially constitutional. OAG 13-88 ..... 66

**SHERIFFS**

Booking arrestees

A sheriff may not refuse to book a person lawfully arrested and brought to the county jail by any state law enforcement agency, regardless of the medical condition of the arrestee, although he may require immediate medical screening pursuant to section 53.38, Stats. A sentencing court that imposes county jail time as a condition of probation may suspend that jail time while the probationer receives hospital care, and a sheriff and county department of human services may cooperate in the billing of medical care provided to county jail prisoners. OAG 56-88 ..... 249

Indigents

A sheriff may not refuse to book a person lawfully arrested and brought to the county jail by any state law enforcement agency, regardless of the medical condition of the arrestee, although he may require immediate medical screening pursuant to section 53.38, Stats. A sentencing court that imposes county jail time as a condition of probation may suspend that jail time while the probationer receives hospital care, and a sheriff and county department of human services may cooperate in the billing of medical care provided to county jail prisoners. OAG 56-88 ..... 249

Jail, privatization of

Neither the sheriff nor the county board may "privatize" the jailer function of the office of sheriff under section 59.23(1), Stats., by contracting with a private firm to take charge and custody of county prisoners held in the county jail. OAG 20-88 ..... 94

Medical care for indigent arrestees and prisoners

A sheriff may not refuse to book a person lawfully arrested and brought to the county jail by any state law enforcement agency, regardless of the medical condition of the arrestee, although he may require immediate medical screening pursuant to section 53.38, Stats. A sentencing court that imposes county jail time as a condition of probation may suspend that jail time while the probationer receives hospital care, and a sheriff and county department of human services may cooperate in the billing of medical care provided to county jail prisoners. OAG 56-88 ..... 249

**SHERIFFS** (*continued*)

Public records

Sheriff's criminal investigation files are not covered by a blanket exemption from the public records law, but denial of access may be justified on a case-by-case basis. OAG 7-88 ..... 42

**SOLID WASTE DISPOSAL**

*See* **WASTE MANAGEMENT**

**STATE**

Employe

The lobby law prohibits a state employe from accepting compensation for serving on the board of directors or providing any other service to a principal as defined in section 13.62(12), Stats. OAG 36-88 ..... 160

Discussion of restrictions which section 16.417(2), Stats., imposes on dual state employment of state employes. OAG 55-88 ..... 245

Garnishment

The state is immune from suit in any garnishment action not involving a state employe or officer and, with the exception of those cases falling under sections 779.15 and 779.155, Stats., monies held in the state treasury on the account of independent contractors are not available to satisfy the judgment debts owed by them. OAG 3-88 ..... 17

Lobbying

The state and its agencies are not "principals" under section 13.62(12), Stats. OAG 27-88 ..... 126

Sovereignty

Mandatory assessment against "all insurers" which subsidizes Health Insurance Risk-Sharing Plan, subchapter II of chapter 619, Stats., does not apply to the state's self-insurance plan because laws of general application do not apply to the sovereign. "Public employer" self-insurance plans are also exempt because, for purposes of this statute, they share in the state's sovereignty and, thus, in its immunity to general laws. OAG 53-88 ..... 230

**STATE PUBLIC DEFENDER**

*See* **PUBLIC DEFENDERS**

**TAX SALES**

Proceeds, disposal of

Subsections (5), (6) and (7) of section 75.35, Stats., created by 1987 Wisconsin Act 27 first apply to sales of property the county acquired at a section 74.39 tax sale on or after the effective date of section 3203(47)(c) of 1987 Wisconsin Act 27. OAG 29-88 ..... 133

**TAXATION**

**Counties**

Subsections (5), (6) and (7) of section 75.35, Stats., created by 1987 Wisconsin Act 27 first apply to sales of property the county acquired at a section 74.39 tax sale on or after the effective date of section 3203(47)(c) of 1987 Wisconsin Act 27. OAG 29-88 ..... 133

**County cannot levy a "special county charge"**

Section 74.73(2), Stats., provides that where a town, city or village refunds property taxes erroneously assessed as a result of an error or defect of law not caused by such local taxing jurisdiction or an official thereof, such entity is entitled to a credit by the county for that portion of such taxes previously paid over to the county. The statute does not direct that the next county levy be increased by such amount or authorize the county to levy a "special county charge" against such entity to recoup the amount so credited. OAG 45-88 ..... 201

**Property tax refund of taxes erroneously assessed**

Section 74.73(2), Stats., provides that where a town, city or village refunds property taxes erroneously assessed as a result of an error or defect of law not caused by such local taxing jurisdiction or an official thereof, such entity is entitled to a credit by the county for that portion of such taxes previously paid over to the county. The statute does not direct that the next county levy be increased by such amount or authorize the county to levy a "special county charge" against such entity to recoup the amount so credited. OAG 45-88 ..... 201

**Property taxes**

When the deadline dates for making property tax installment payments fall on Sundays, the deadlines for making personal payments and postmarking mailed payments are extended to the next business days, which in 1988 are February 1 and August 1. To satisfy section 74.025, Stats., the proper official should receive mailed payments within five days of those dates, not within five days of January 31 and July 31. OAG 1-88..... 1

**Real estate taxes**

Section 70.325, Stats., violates article VIII, section 1 of the Wisconsin Constitution. OAG 28-88 ..... 128

**UNIFORM DURABLE POWER OF ATTORNEY ACT**

**Attorney-in-fact**

Section 243.07, Stats., the Uniform Durable Power of Attorney Act, can permit an attorney-in-fact to make medical decisions but cannot be used to place someone in a nursing home or to avoid the other requirements of chapters 880 and 55. OAG 35-88 ..... 156

**Nursing home placement decision**

Section 243.07, Stats., the Uniform Durable Power of Attorney Act, can permit an attorney-in-fact to make medical decisions but cannot be used to place someone in a nursing home or to avoid the other requirements of chapters 880 and 55. OAG 35-88 ..... 156

**UNIVERSITY**

**Lobbying law**

The lobby law prohibits a state employe from accepting compensation for serving on the board of directors or providing any other service to a principal as defined in section 13.62(12), Stats. OAG 36-88 ..... 160

**VETERANS**

**Confidential records**

Under current law the authority of the Department of Veterans Affairs to release veterans loan status information to lenders and credit reporting agencies is very limited. OAG 8-88 ..... 49

**Loans**

Under current law the authority of the Department of Veterans Affairs to release veterans loan status information to lenders and credit reporting agencies is very limited. OAG 8-88 ..... 49

**VOCATIONAL, TECHNICAL AND ADULT EDUCATION**

**Liability**

The limitation of damages by section 893.80(3), Stats., in actions founded upon tort against governmental bodies, officers, agents or employes, unless modified or rendered inapplicable by other statute, applies to vocational, technical and adult education districts, their officers and employes. OAG 32-88 ..... 145

**VOCATIONAL, TECHNICAL AND ADULT EDUCATION, BOARD OF**

**Appointments to VTAE Board**

Criteria for appointment to district VTAE boards discussed, including changes in status of "employer," "employee" and "elected official" representatives and incompatibility between board membership and the offices of sheriff and circuit judge. Discussion of meeting notice requirements of sections 38.10(2)(d)3. and 19.84(3), Stats. Definition of "public officer" for purposes of section 38.10(1m) relating to participation on board appointment committee. OAG 57-88 ..... 256

**District board appointments**

Criteria for appointment to district VTAE boards discussed, including changes in status of "employer," "employee" and "elected official" representatives and incompatibility between board membership and the offices of sheriff and circuit judge. Discussion of meeting notice requirements of sections 38.10(2)(d)3. and 19.84(3), Stats. Definition of "public officer" for purposes of section 38.10(1m) relating to participation on board appointment committee. OAG 57-88 ..... 256

**WASTE MANAGEMENT**

**Brown County**

In counties with a population of less than 500,000 having a county executive, a solid waste management board established by the county board pursuant to section 59.07(135), Stats., is restricted to perform-

**WASTE MANAGEMENT** *(continued)*

**Brown County** *(continued)*

ing advisory, policy-making or legislative functions, and the county executive is responsible for the administrative functions set forth in the statute. OAG 21-88..... 98

**Counties**

In counties with a population of less than 500,000 having a county executive, a solid waste management board established by the county board pursuant to section 59.07(135), Stats., is restricted to performing advisory, policy-making or legislative functions, and the county executive is responsible for the administrative functions set forth in the statute. OAG 21-88..... 98

**Solid waste facilities**

Proposed municipal solid waste facilities which replace existing municipal solid waste facilities are not exempt from the needs determination under section 144.44(2)(nm), Stats. OAG 16-88..... 81

**WISCONSIN CONSTITUTION**

*See* **CONSTITUTIONAL LAW; CONSTITUTIONALITY**

**WORDS AND PHRASES**

**“at the request or for the advantage of”**

Article XIII, section 11 of the Wisconsin Constitution discussed. OAG 54-88 ..... 237

**“Authorized emergency vehicle”**

A private ambulance that is an authorized emergency vehicle usually kept in a given county pursuant to section 340.01(3)(i), Stats., may not avail itself of the special provisions of section 346.03(2) so as to proceed unsolicited to the scene of an accident or medical emergency in an adjacent county. OAG 49-88 ..... 214

**draft**

Treatment of drafts under the public records law discussed. OAG 22-88 100

**“entire time”**

Section 15.06(3)(a), Stats., does not prohibit a commissioner from having any business interests. It prohibits a commissioner from pursuing business interests which would prevent him or her from properly fulfilling the duties of the office of commissioner and precludes a commissioner from holding any public or private office or position of profit. OAG 6-88 ..... 36

**“frank”**

Article XIII, section 11 of the Wisconsin Constitution discussed. OAG 54-88 ..... 237

**“free pass”**

Article XIII, section 11 of the Wisconsin Constitution discussed. OAG 54-88 ..... 237

**WORDS AND PHRASES** (*continued*)

**highway**

County forest roads which are open to vehicular traffic are highways which can be designated as all-terrain vehicle routes under section 23.33(8)(b), Stats., and minors under sixteen years of age holding valid all-terrain vehicle safety certificates can operate all-terrain vehicles on highways which have been designated as all-terrain vehicle routes under the limited conditions set forth in section 23.33(4). OAG 9-88 52

**“office”**

Section 15.06(3)(a), Stats., does not prohibit a commissioner from having any business interests. It prohibits a commissioner from pursuing business interests which would prevent him or her from properly fulfilling the duties of the office of commissioner and precludes a commissioner from holding any public or private office or position of profit. OAG 6-88 ..... 36

Article XIII, section 11 of the Wisconsin Constitution discussed. OAG 54-88 ..... 237

**“On-track”**

Section 562.057, Stats., which permits simulcasting of races conducted at other racetracks to a racetrack licensed by the Wisconsin Racing Board, does not violate article IV, section 24(5) of the Wisconsin Constitution requiring “on-track” betting. OAG 66-88 ..... 299

**owner**

Although public tax-exempt entities such as municipalities may neither enter nor continue their lands in the forest tax programs of chapter 77, Stats., private entities whose property would otherwise normally be tax-exempt under chapter 70 may participate in such programs. OAG 63-88 ..... 280

**“position”**

Section 15.06(3)(a), Stats., does not prohibit a commissioner from having any business interests. It prohibits a commissioner from pursuing business interests which would prevent him or her from properly fulfilling the duties of the office of commissioner and precludes a commissioner from holding any public or private office or position of profit. OAG 6-88 ..... 36

Article XIII, section 11 of the Wisconsin Constitution discussed. OAG 54-88 ..... 237

**Principal**

The state and its agencies are not “principals” under section 13.62(12), Stats. OAG 27-88 ..... 126

**“privilege”**

Article XIII, section 11 of the Wisconsin Constitution discussed. OAG 54-88 ..... 237

**“Public employer”**

Mandatory assessment against “all insurers” which subsidizes Health Insurance Risk-Sharing Plan, subchapter II of chapter 619, Stats., does not apply to the state’s self-insurance plan because laws of general application do not apply to the sovereign. “Public employer” self-

**WORDS AND PHRASES** *(continued)*

“Public employer” *(continued)*

insurance plans are also exempt because, for purposes of this statute, they share in the state’s sovereignty and, thus, in its immunity to general laws. OAG 53–88 ..... 230

“public office”

Section 15.06(3)(a), Stats., does not prohibit a commissioner from having any business interests. It prohibits a commissioner from pursuing business interests which would prevent him or her from properly fulfilling the duties of the office of commissioner and precludes a commissioner from holding any public or private office or position of profit. OAG 6–88 ..... 36

Section 946.13(1)(a), Stats., may be violated by members of Private Industry Councils when private or public entities of which they are executives, directors or board members receive benefits under the Job Training Partnership Act. OAG 68–88 ..... 306

record

Treatment of drafts under the public records law discussed. OAG 22–88 100