

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

VOLUME 79

January 1, 1990 through December 31, 1990

DONALD J. HANAWAY
ATTORNEY GENERAL



MADISON, WISCONSIN

1990

SECRET

1950

MEMORANDUM FOR THE DIRECTOR

10-10-50

RE: [Illegible]

[Illegible]

[Illegible]

[Illegible]

[Illegible]

[Illegible]

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 Jan. 7, 1991

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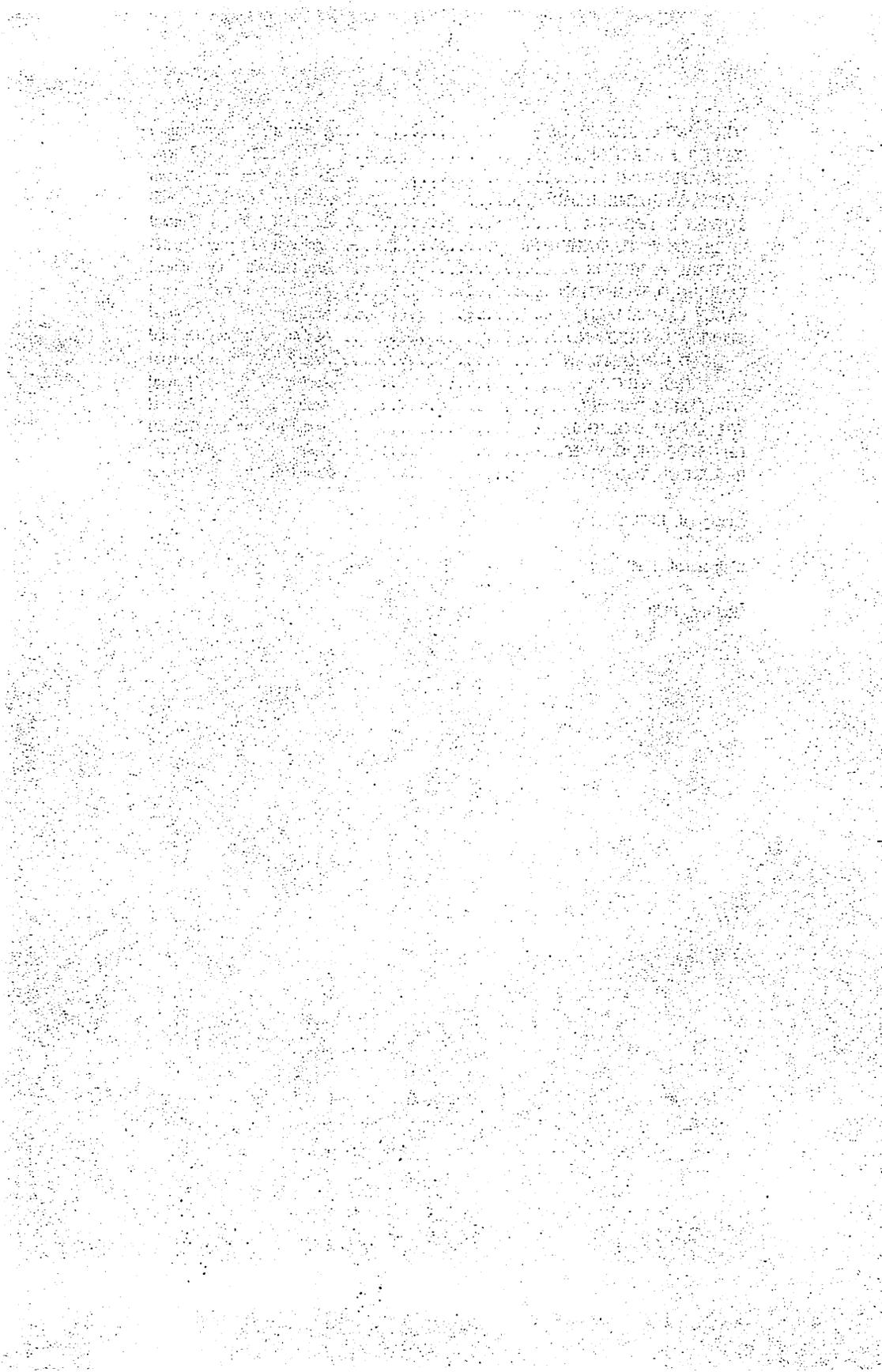
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OPINIONS
OF THE
ATTORNEY GENERAL

Volume 79

Criminal Law; Words And Phrases; The requirement in section 950.04(1), Stats., of notice to the victim of a defendant's release from custody applies to all felonies charged under chapter 948. Notice is to be given to the victims of all crimes charged under chapter 940, whether misdemeanors or felonies. The notice requirements of the statute apply to individual persons, not business enterprises or corporations. OAG 1-90

January 9, 1990

JOSEPH PAULUS, *District Attorney*
Winnebago County

You have asked for my opinion regarding two questions involving section 950.04(1), Stats., entitled "Basic bill of rights for victims and witnesses." The statute currently provides in relevant part: "If the crime charged is a felony or is specified in ch. 940, the victim shall be notified whenever the defendant or perpetrator is released from custody."

You indicate that local law enforcement agencies are attempting to develop guidelines for the notification of victims when a person charged with a crime is released from pretrial custody. You ask two questions: First, are crimes specified in chapter 948 to be included for notification to victims? Second, are victims of all felonies to be notified of the defendant's release from custody?

Your first question arises because the enactment of section 950.04(1) predates the enactment of chapter 948. Section 950.04(1) was enacted by Chapter 219, Laws of 1979, and was published on May 7, 1980. Chapter 948 was enacted by 1987 Wisconsin Act 332 with an effective date of July 1, 1989. In my opinion, the notice requirements of section 950.04(1) apply to crimes charged under chapter 948.

Chapter 948 reorganized into a single code crimes against children which had previously been located in chapters 939 to 948. The drafting note to the legislative council's special committee on crimes against children states that the intent of the reorganization was to "emphasize the seriousness of these offenses against the most vulnerable of crime victims in our society; and make these crimes easier to locate and apply in practice, resulting in a more consistent pattern of charging decisions among prosecutors throughout the state." (Legislative Reference Bureau 3264.)

Chapter 950 is prefaced by a statement of legislative intent. The rights extended in the chapter to victims are to be honored and protected "in a manner no less vigorous than the protections afforded criminal defendants." Sec. 950.01, Stats. Consistent with this legislative intent, the crimes against children reorganized in chapter 948 must be viewed as subject to the notice requirement of section 950.04(1). This construction of the statute would also give effect to the legislative purpose in creating chapter 948 which was, in part, to emphasize the seriousness of crimes committed against children. The primary goal of statutory construction is to make effective the intent of the statute. *State v.*

Pham, 137 Wis. 2d 31, 34, 403 N.W.2d 35 (1987). An interpretation of a statute which fulfills the objectives of the statute is to be favored over an interpretation which defeats the statutory objective. *Belleville State Bank v. Steele*, 117 Wis. 2d 563, 570, 345 N.W.2d 405 (1984).

The fact that chapter 948 was created by legislative enactment after the creation of the notice requirement in section 950.04(1) does not alter my opinion. In some cases, the crimes reorganized in chapter 948 merely restate the crimes in language similar to predecessor statutes. However, in some cases the scope of liability is broadened or the penalty enhanced. Compare sec. 948.02(3), Stats. (1987–88), with its predecessor statute, sec. 940.225(1), Stats. (1985–86). In other cases, chapter 948 has created new crimes. See sec. 948.04, Stats. Again, these facts do not alter my opinion.

Section 950.04(1) is a statute remedial in nature. Its enactment by the Legislature did not affect any vested rights. There is no issue of due process. On the contrary, the statute was intended to create a remedy for the generally perceived neglect of the interests of crime victims. Remedial legislation should be construed broadly to achieve its statutory purpose. *Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 373, 243 N.W.2d 422 (1976). I have no doubt that the intent of the Legislature was that the notice requirement of section 950.04(1) should apply to all existing crimes and to all crimes created or substantively changed after its enactment. There is no constitutional impediment or principle of law which would defeat this construction of the statute. I am confident that a reviewing court would give effect to the legislative purpose by applying the notice requirement not only to crimes in existence at the time of its enactment but also to crimes created by subsequent statutes.

You should note that the notice requirement of section 950.04(1) does not apply to all crimes defined in chapter 948 or to the criminal code generally. Victims of a crime are to be notified of a defendant's release from custody in two situations:

if the crime charged is a felony or if the crime charged is specified in chapter 940. These two situations are stated in the disjunctive which means that each alternative is an independent ground for requiring notice to the victim. A literal application of the disjunctive form would appear consistent with the intent and purpose of the statute. *See State v. Duychak*, 133 Wis. 2d 307, 317, 395 N.W.2d 795 (Ct. App. 1986). The syntax of the statute also means that any crime charged in chapter 940 is subject to the notice requirement regardless of whether the crime is a felony or misdemeanor. Chapter 940 codifies crimes against life and bodily security.

Section 950.04(1) was amended by 1987 Wisconsin Act 332, section 64, to add the language "or s. 948.02, 948.03 or 948.05" to define the crimes which require notice to the victim. 1987 Wisconsin Act 332 was the legislative act which created chapter 948. It would appear that this amendment was surplusage because the existing statute already required notice if the crime charged was a felony and each of the crimes defined in sections 948.02, 948.03 and 948.05 are felonies. *See State v. Ross*, 73 Wis. 2d 1, 5, 242 N.W.2d 210 (1976). Section 948.02 proscribes sexual assault of a child. Section 948.03 proscribes physical abuse of a child. Section 948.05 proscribes sexual exploitation of a child.

The Legislature apparently recognized that the cross-reference created in section 950.04(1) to three statutes in chapter 948 was unnecessary and potentially misleading. By 1989 Wisconsin Act 31, section 2837r, the Legislature removed the cross-reference in section 950.04(1) to sections 948.02, 948.03 and 948.05. The effective date of this act is August 9, 1989. This most recent amendment of section 950.04(1) is convincing evidence that the Legislature acknowledged that the notice requirements to the victim already applied if the crime charged under chapter 948 was a felony. A cross-reference to individual crimes in chapter 948 was not necessary.

The second question you raised in your letter was whether victims of *all* felonies are to be notified of the defendant's release

from custody? My answer is yes. Section 950.04(1) provides for notice to the victim if the crime charged is a felony. There is no qualifying clause. The plain meaning of the statutory directive should be given effect. *State v. Lossman*, 118 Wis. 2d 526, 535, 348 N.W.2d 159 (1984). As mentioned, if the crime charged is found in chapter 940, notice to the victim is required for both misdemeanor and felony charges. Crimes found in chapter 940 are specifically identified in section 950.04(1) as crimes requiring notice to the victim.

Your inquiry was occasioned by several fact situations described in your opinion request. You point out that, ordinarily, felony drug offenses present no civilian victims and felony DNR offenses present no human victims. The word victim is defined in section 950.02(4) as a "person against whom a crime has been committed." The meaning of this statutory definition is clear. *Smith v. Kappell*, 147 Wis. 2d 380, 385, 433 N.W.2d 588 (Ct. App. 1988). If there is an identifiable person against whom a crime has been committed, the notice requirements of section 950.04(1) apply. If the victim is not a person, the statute does not apply. If the victim is an undercover officer making a controlled drug buy, I believe it is reasonable to conclude that the notice provisions of the statute need not be applied. See *State v. Burkman*, 96 Wis. 2d 630, 292 N.W.2d 641 (1980).

You also point out that the prosecution of worthless check cases under the felony provision of the statute, section 943.24(2), often involves an aggregate of worthless checks and potentially a large number of victims. You ask whether notification, based on felony worthless check charges, is required to a large group of merchants who may be identifiable as victims. Section 950.04(1) does not exclude any felony from the notice provisions of the statute. However, the notice requirement is limited to a victim or witness defined in section 950.02(4) as a "person against whom a crime has been committed." Your question inferentially raises the issue of whether the Legislature intended that section 950.04, "Basic bill of rights for victims and

witnesses," was to be applied to business enterprises and corporations.

Section 990.01(26) defines person to include "all partnerships, associations and bodies politic or corporate." However, the preamble to section 990.01 provides that the definitions given in the statute "shall be construed as indicated unless such construction would produce a result inconsistent with the manifest intent of the legislature[.]"

The clear intent of chapter 950 is to protect the rights and interests of individual victims and witnesses. The provisions of the chapter are not directed to business enterprises and corporations. The notice requirement is found in subsection (1) of the "Basic bill of rights for victims and witnesses," section 950.04. This statute also provides, *inter alia*, for notice of court proceedings, law enforcement protection in cases of threats, advice on financial assistance and social services, and employer intervention programs to insure that employers of victims and witnesses cooperate with the criminal justice system. Sec. 950.04(2), (3), (4) and (7), Stats. The legislative intent stated in section 950.01 provides that the legislation is intended to "ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy and sensitivity" Again, this language evinces an intent to protect the rights and interests of individual persons, not business enterprises or corporations.

Principles of statutory construction would support a conclusion that the word "person," as used in section 950.02(4), refers to individual citizens and not to business enterprises and corporations. A term capable of a broad or narrow meaning in the abstract must be determined by its context in a particular statute. The same word might receive a different construction in different statutes. *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 528, 271 N.W.2d 69 (1978). Similarly, the intent of the Legislature in using a word is to be determined by analyzing it in relation to the scope, context, subject matter and object to be accomplished. *West Allis School Dist. v. DILHR*, 116 Wis. 2d

410, 419, 342 N.W.2d 415 (1984). The scope, context, subject matter and object of chapter 950 is to protect the rights and interests of individual citizens who may be victims of or witnesses to a crime.

You ask in your second question whether section 950.04(1) requires notice to a large group of merchants who may be victims of the felonious issuance of worthless checks. If the worthless check is issued to an individual person, who may be a merchant, my answer is that notice is required under the statute. If the check is issued to a business enterprise or corporation, notice to the victim is not required by the statute.

DJH:MRK

County Board; Prisons And Prisoners; Sheriffs; A county board is not statutorily obligated to charge costs incurred as a result of court-ordered placement in a secure juvenile detention facility to the budget of the county social service department rather than to the budget of the sheriff's department. A sheriff is statutorily obligated to comply with an order of the juvenile court commanding the sheriff to transport a juvenile to or from a secure detention facility. Section 302.34, Stats., is not applicable to a county that has both a county jail and a cooperative agreement with another county for the provision of secure juvenile detention facilities. OAG 2-90

January 12, 1990

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

You indicate that Dodge County does not have a secure juvenile detention facility and therefore has entered into a contract with Waukesha County for the purchase of secure detention bed space for juveniles. Payment for such bed space is made from the budget of the sheriff's department. You also indicate that the juvenile court in your county has recently started to order the detention of various categories of juveniles other than those who have been adjudicated delinquent or against whom delinquency petitions have been filed. Apparently, at the time the contract was signed, it was not contemplated that the sheriff's department would incur costs in connection with proceedings other than delinquency proceedings. You therefore ask whether a county sheriff or a county department of social services is statutorily liable for costs incurred as a result of court-ordered placement in the out-of-county juvenile detention facility for (a) a status offense/violation; (b) violation of a state or federal criminal law; (c) a habitual runaway awaiting further court proceedings; or (d) failure to appear in response to a summons.

I am of the opinion that no statute requires that such costs be paid either by the county sheriff's department or by the county

welfare department. It is therefore the obligation of the county board to determine the department to which such costs should be budgeted.

In general, allocation of costs between county departments is the prerogative of the county board. Section 65.90(2), Stats., provides as follows:

Such budget shall list all existing indebtedness and all anticipated revenue from all sources during the ensuing year and shall likewise list all proposed appropriations for each department, activity and reserve account during the said ensuing year. Such budget shall also show actual revenues and expenditures for the preceding year, actual revenues and expenditures for not less than the first 6 months of the current year and estimated revenues and expenditures for the balance of the current year. Such budget shall also show for informational purposes by fund all anticipated unexpended or unappropriated balances, and surpluses.

Under section 48.22(1)(a), the decision as to whether a secure detention facility should be established or provided rests with "[t]he county board of supervisors" Although chapter 48 is replete with references to duties prescribed by law upon county social services departments in connection with the administration of the juvenile justice system, nothing in that chapter expressly requires that the costs incurred as a result of placement in a secure detention facility must be allocated to the county social services department, if the county board chooses to establish such a facility.

Section 48.06(2)(a) does provide in part as follows:

In counties having less than 500,000 population, the county board of supervisors shall authorize the county department or court or both to provide intake services required by s. 48.067 and the staff needed to carry out the objectives and provisions of this chapter under s. 48.069. Intake services shall be provided by employes of the court or county department and may not be subcontracted to other

individuals or agencies, except any county which had intake services subcontracted from the county sheriff's department on April 1, 1980, may continue to subcontract intake services from the county sheriff's department.

Under section 48.06(2), your county social services department can be assigned the duty and charged with the concomitant cost of providing intake services. But *placement* in a secure detention facility under any of the four situations you describe cannot be characterized as an intake service "for the purpose of screening children taken into custody and not released under s. 48.20(2)" within the meaning of section 48.067(1) or as any other duty performed by an intake worker pursuant to section 48.067(2)-(9). The Legislature also did not see fit to impose any prohibition on the provision of secure detention facilities comparable to that imposed on sheriff's departments under section 48.06(2)(a) in connection with the provision of intake services.

It is remotely possible that costs incurred in some of the circumstances you describe may be contained in the budget submitted by your county social services department to the Wisconsin Department of Health and Social Services pursuant to section 46.031(1)(a). To that extent, your county social services department's approved budget becomes a "contract containing the allocation of funds and such administrative requirements as necessary." Sec. 46.031(2g)(a), Stats. However, any of the costs you describe which are not contained in the budget submitted pursuant to section 46.031(1)(a) do not have to be included in the budget of your county social services department.

You have also given no indication that any other statute relating to the county budgeting process is applicable to the fact situation you describe. In OAG 38-82 (May 20, 1982) (unpublished) at 2, it was stated that "[a] single county sec. 51.42 board . . . is not an independent agency or body corporate and is not *sui juris*, but, rather, is a county agency." The same is true of a county social services department and a county sheriff's department, although a sheriff does retain some residual

independence by virtue of his or her status as a constitutional officer. Absent some statutory provision to the contrary, the county board is therefore free to determine how the cost of placement in a secure juvenile detention facility will be allocated to its constituent agencies or departments.

You next ask whether a sheriff is statutorily obligated to comply with an order of the juvenile court commanding the sheriff to transport a juvenile to or from a secure detention facility.

In my opinion, the answer is yes.

Section 59.23 provides in part as follows:

Sheriff; duties. The sheriff shall:

. . . .

(4) Personally, or by his undersheriff or deputies, serve or execute according to law all processes, writs, precepts and orders issued or made by lawful authority and to him delivered.

Under section 48.19(1)(a), any judge may issue a warrant to take a juvenile into custody. Section 48.19(1)(b) and (c) also specifically authorizes a juvenile judge to issue a *capias* or a court order to take a juvenile into custody. In addition, a juvenile court possesses the same inherent powers as any other court. *See* 70 Op. Att'y Gen. 98 (1981).

In 50 Op. Att'y Gen. 47, 49 (1961), it was stated that, even in connection with municipal ordinance violations, section 59.23(4) obligates the sheriff to provide transportation pursuant to any warrant issued by a judge "because such warrants are directed to the sheriff and he has a duty to execute such process." You do not suggest that an order requiring the sheriff to provide transportation to or from a secure detention facility is beyond the statutory or inherent power of a court. Section 59.23(4) therefore obligates a sheriff to comply with any such order.

Assuming without deciding that a sheriff may in some circumstances be entitled to reimbursement from some other

county department for the provision of such transportation services, I also cannot accept your suggestion that the sheriff may insist on prepayment from that department in connection with court-ordered transportation. In a somewhat related context, the following statement was made in 68 Op. Att'y Gen. 223, 225 (1979):

It also is clear that the sheriff's duty [to provide transportation] is not contingent upon receiving monies from the respective boards. . . . This construction is consistent with the long-standing rule that public officers take their offices *cum onere*, and services required of them by law for which they are not specifically paid must be considered compensated by the fees allowed for other services or by their official salaries.

In my opinion, the quoted language is equally applicable with respect to a sheriff's obligation to provide transportation to juveniles.

Finally, you ask whether section 302.34, as renumbered by 1989 Wisconsin Act 31, section 1649, authorizes the sheriff "to select alternative juvenile detention facilities for use that are contrary to the direction provided in . . . [a] [c]ourt [o]rder."

In my opinion, the answer is no.

Section 302.34 provides in part that "[c]ourts, judges and officers of any county having no jail and no cooperative agreement under s. 302.44 may sentence, commit or deliver any person to the jail of any other county as if that jail existed in their own county."

The term "secure detention facility" is defined in section 48.02(16). That term is not synonymous with the term "jail." Under section 48.209(1)(a), as amended by 1989 Wisconsin Act 31, section 1188, a juvenile may be held in a county jail only if no other secure detention facility is available and "[t]he jail meets the standards for secure detention facilities established by the department of corrections." That apparently is not the case

with respect to your county jail. Section 48.209(2) also permits a judge, after hearing, to transfer a juvenile who becomes violent from a secure detention facility to a jail. You have a county jail which may be used for that purpose.

In short, your county has a jail as well as a cooperative agreement with Waukesha County for the provision of secure detention facilities. Section 302.34 therefore has no application to the detention of juveniles by your county.

DJH:FTC

Gambling; Indian Gaming Regulator's Act; Indians; Lotteries; Words And Phrases; Under article IV, section 24 of the Wisconsin Constitution, and chapter 565, Stats., the state lottery board may conduct any lottery game which complies with the ticket language in the constitution and chapter 565. The term "lottery" in the constitution and statutes does not include any other forms of betting, the playing or operation of gambling machines and devices and other forms of gambling defined in chapter 945. The Legislature can statutorily authorize other non-lottery gambling including casino-type games.

Under the Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 (West Supp. 1989), gambling activities as defined and prohibited in chapter 945, other than lotteries and pari-mutuel on-track wagering, are not permitted by any person within or without Indian country in the State of Wisconsin. This prohibition includes all non-lottery gambling such as casino-type games, gambling machines and other devices. The Legislature can statutorily authorize non-lottery gambling within Indian country. OAG 3-90

February 5, 1990

WILLIAM F. FLYNN, JR., *Executive Director*
Wisconsin Lottery

You have requested my opinion on two questions regarding the types and scope of gambling which may be legally allowed to be conducted in Wisconsin. Specifically your questions are: (1) what is the scope of gaming in which the Wisconsin Lottery is authorized or permitted to engage by article IV, section 24 of the Wisconsin Constitution and chapter 565, Stats.; and (2) if the Wisconsin Lottery cannot legally offer a particular type of gaming or gambling operation as part of the lottery, can such type of game or gambling operation be lawfully included in a state/tribal gaming compact within the Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 (West Supp. 1989)?

From enactment in 1848 until 1965, article IV, section 24 of the Wisconsin Constitution (which is now subsection (1)) stated simply, in pertinent part, that "the legislature shall never authorize any lottery" In April of 1965 a constitutional amendment was approved by the voters which created article IV, section 24(2) of the Wisconsin Constitution, which set forth authorized exceptions to the definition of consideration as an element of a lottery. Those exceptions, listed by type in the constitutional amendment, were enacted to authorize Wisconsin residents to participate in a wide variety of sweepstakes, promotions and contests, conducted on both a national and local basis.

Additional constitutional amendments provided for the Legislature to authorize two additional types of lotteries. In 1973, the constitutional amendment created article IV, section 24(3) of the Wisconsin Constitution which provided that the Legislature may authorize bingo games licensed by the state and operated by religious, charitable, service, fraternal or veterans' organizations, or those to which contributions are deductible for federal or state income tax purposes. In 1977, the constitutional provision was again amended, creating article IV, section 24(4) of the Wisconsin Constitution, which provided that the Legislature may authorize raffle games licensed by the state and operated by local religious, charitable, service, fraternal or veterans' organizations or those to which contributions are deductible for federal or state income tax purposes.

The most recent amendments to article IV, section 24 of the Wisconsin Constitution took place in April of 1987. These amendments created two additional subsections. Subsection (5) removed from the constitutional prohibition pari-mutuel on-track betting and prohibited the state from owning or operating any pari-mutuel betting facility or enterprise or leasing any state owned land to anyone else for those purposes. Subsection (6) authorized the Legislature to create a state operated lottery and

established requirements regarding advertising the lottery, statement of odds and state use of proceeds.

Therefore, the provisions of article IV, section 24 of the Wisconsin Constitution pertinent to this opinion, are as follows:

(1) Except as provided in this section, the legislature shall never authorize any lottery or grant any divorce.

. . . .

(6) The legislature may authorize the creation of a lottery to be operated by the state as provided by law. The expenditure of public funds or of revenues derived from lottery operations to engage in promotional advertising of the Wisconsin state lottery is prohibited. Any advertising of the state lottery shall indicate the odds of a specific lottery ticket to be selected as the winning ticket for each prize amount offered. The net proceeds of the state lottery shall be deposited in the treasury of the state, to be used for property tax relief as provided by law.

Following adoption of subsections (5) and (6), the Legislature adopted chapters 562 and 565 creating and regulating the mechanisms for conducting racing and pari-mutuel betting and the state lottery, respectively, and amended pertinent provisions of chapter 945 to avoid conflict between chapter 945 and chapters 562 and 565.

To answer your first question, I must first analyze the meaning of the term "lottery" as used in the state constitution and chapters 945 and 565 and then determine whether other forms of gambling constitute a lottery so as to come within the purview of the 1987 constitutional amendment authorizing the state operated lottery.

Neither the constitutional provision in its original form as adopted in 1848, nor any of the four amendments thereto, nor any of the statutory enactments concerning lotteries and other forms of gambling, prior to the 1953-1955 recodification of the criminal code, defined or attempted to define the term lottery. At least three separate theories and interpretations exist regarding the

meaning of the term lottery. As stated in the discussion and conclusion reached below, I believe only one of these theories is legally supportable.

First, one can argue that the term lottery as used in subsections (1), (2) and (6) of article IV, section 24 of the Wisconsin Constitution carries a broad construction so as to prohibit all forms of gambling. This argument holds that since lotteries have been construed and defined in more recent times as constituting an enterprise containing the three elements of prize, chance and consideration, and since all activities which constitute various forms of gambling must contain, in some form, those same three elements, therefore, *ipso facto*, the term lottery encompasses all forms and types of gambling.

Second, arguably the term lottery as used in subsection (1) of article IV, section 24 of the Wisconsin Constitution is broad and generic (*i.e.*, it refers to and embraces all known forms of gambling); but that the term lottery as used in subsection (6) of article IV, section 24 of the Wisconsin Constitution is a separate, distinct and far narrower form of lottery (*i.e.*, it only refers to the state operated lottery and no other form of gambling).

Third, the meaning of the term lottery as used in the constitution can be construed to refer to only one specific form of gambling and not all other forms of gambling such as betting, the playing of gambling machines and devices, and similar forms of gambling.

Although neither the constitutional provision in its original form nor any of the amendments thereto, nor any of the statutory enactments concerning lotteries (prior to 1953) defined the term lottery, that term has over the years been continuously, consistently and uniformly held to mean an enterprise being conducted in such a manner so as to include the three elements of prize, chance and consideration in one of several forms. *State ex rel. Cowie v. La Crosse Theaters Co.*, 232 Wis. 153, 286 N.W. 707 (1939); *State ex rel. Regez v. Blumer*, 236 Wis. 129, 294 N.W. 491 (1940); *State v. Laven*, 270 Wis. 524, 71 N.W.2d

287 (1955); and *Kayden Industries, Inc. v. Murphy*, 34 Wis. 2d 718, 150 N.W.2d 447 (1967).

As well, various attorney general opinions have concluded that an illegal lottery existed where there existed an enterprise involving the three elements of prize, chance and consideration. These appear as early as 1916 in 5 Op. Att'y Gen. 380 (1916) and continue up to more recent opinions in 61 Op. Att'y Gen. 405 (1972), 62 Op. Att'y Gen. 122 (1973), and 70 Op. Att'y Gen. 59 (1981).

I must and do recognize that the court decisions and attorney general opinions cited immediately above can be read in such a way so as to arguably indicate that the supreme court and the attorney general were taking a broad view of the meaning of the term lottery. However, it is critical to note that in neither the cases presented to the supreme court nor in the questions presented to the attorneys general were there ever issues or questions raised as to the nature or status of all forms of gambling. Thus, neither the supreme court nor the attorney general ever addressed the specific issue of what constitutes gambling and whether or not there are separate forms of gambling or just one form, *i.e.*, lotteries. For these reasons, your question and this opinion are unique.

What I believe to be not only important and critical for my analysis, but also dispositive of your question, is the fact that from a historical point of view and from today's perspective, the Legislature has recognized the distinctions between the several forms of gambling and has accorded them separate and distinct treatment in the criminal statutes prohibiting gambling in this state. Neither the Legislature nor the courts have ever equated lotteries with all other forms of gambling in the sense of finding and concluding that all types of gambling constitute "lotteries" as used in our constitution or statutes.

In construing language of our constitution, courts rely on the same rules that pertain to statutory construction. *Ripley v. Brown*, 141 Wis. 2d 447, 415 N.W.2d 550 (Ct. App. 1987). When the

intention of the Legislature is so apparent from the face of a statute that there can be no question as to its meaning, the rules of construction need not, and should not, be used. When the language of a statute is clear and unambiguous, a court should not look outside the statute itself in construing it. 2A Singer Sutherland Statutory Construction, §§ 46.01–46.04 (Sands 4th ed. 1984); *Clifford v. Colby School Dist.*, 143 Wis. 2d 581, 421 N.W.2d 852 (Ct. App. 1988); *State ex rel. Smith v. Oak Creek*, 139 Wis. 2d 788, 407 N.W.2d 901 (1987); *State v. Stepniewski*, 105 Wis. 2d 261, 314 N.W.2d 98 (1982); and others.

As our supreme court has stated: "a statute or portion thereof is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses." *Hoppenrath v. State*, 97 Wis. 2d 449, 460, 293 N.W.2d 910 (1980), *citing State ex rel. Neelen v. Lucas*, 24 Wis. 2d 262, 128 N.W.2d 425 (1964). As previously stated, there are three separate and distinct theories and interpretations of the term "lottery" as used in the Wisconsin Constitution, and there is significant question as to the meaning of such term; therefore, I conclude that the meaning of such term in our constitution is unclear and ambiguous.

The analysis that a court should employ in interpreting provisions of the Wisconsin Constitution is as follows:

- (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.
- (3) The earliest interpretation of this section by the Legislature *as manifested in the first law passed following the adoption of the constitution.*

Jacobs v. Major, 139 Wis. 2d 492, 502, 407 N.W.2d 832 (1987); *State v. Beno*, 116 Wis. 2d 122, 136, 341 N.W.2d 668 (1984). (Citations omitted; emphasis added.)

The plain meaning of the word "lottery" as defined in Webster's Ninth New Collegiate Dictionary 706 (1984) is: "a drawing of *lots* in which prizes are distributed to the winners among persons buying a chance" or "a drawing of *lots* used to decide something" (emphasis added). It can therefore be assumed that such definition was the meaning of the word "lottery" in the context that such word was used in subsections (1) and (6) of article IV, section 24 of the Wisconsin Constitution.

There does not appear to be a record of the constitutional debates on the question of the meaning of the word "lottery" as used in our constitution.¹

Our constitution was, in part, based on New York's Constitution.² An analysis of New York's constitutional prohibition of lotteries in its 1821 and 1846 constitution is found in *Reilly v. Gray*, 77 Hun. 402, 28 N.Y.S. 811 (1894). In *Reilly* the New York court held that the New York statutes, existing

¹The Convention of 1846, Collections, Volume XXVII Constitutional Series, Vol. II, Publications of the State Historical Society of Wisconsin (1919), does report the following entry in the Constitutional Convention meeting of October 19, 1846: "Mr. Fuller introduced the following resolution, which was read, to wit: 'Resolved, that the committee on miscellaneous provisions be instructed to inquire into the expediency of providing in the constitution an article forbidding the existence of any *lottery*, or the *vending of any lottery tickets within this state*, and also that they be instructed to inquire into the propriety of adopting an article in the constitution prohibiting [any] license from being granted for the sale of spirituous liquor, or for the exhibition of any jugglers, mountebanks, or wire dancers in this state.'" (Emphasis added.)

²The pertinent 1821 New York constitutional provision on lotteries provided: "No lottery shall hereafter be authorized in this state; and the legislature shall pass laws to prevent the sale of all lottery tickets within this state except in lotteries already provided for by law."

prior to the 1821 and 1846 constitutions, distinguished between a "lottery" and a "bet" and concluded that the New York constitutional prohibition against lotteries therefore did not include betting or pari-mutuel wagering. The New York Supreme Court ruled in *Reilly*, 28 N.Y.S. at 815:

It seems to me very clear that it was not the intent of the framers of the constitution either in 1846 or 1821, in the use of the word "lottery," to include in it the subject of betting as then prohibited by statute. They were distinct subjects upon the statute book and in the public mind, and, if the design had been to cover both, they would have been named.

I believe a Wisconsin court today could reasonably presume that New York constitutional and statutory provisions existing prior to 1848 were known to the framers of Wisconsin's 1848 constitution.

The Wisconsin Legislature's interpretation of article IV, section 24 of the Wisconsin Constitution prohibition against lotteries and its interpretation of what constituted a lottery, as manifested by the first law passed on the subject by the Legislature following the adoption of the Wisconsin Constitution, is not only fascinating, but, I believe, crucial to the question here. Within one year after the adoption of our constitution, the Wisconsin Legislature, in 1849, enacted laws that clearly acknowledged various forms of gambling, separate and distinct from lotteries and each other. In its adoption of chapter 138, Stats. (1849), entitled "Of Offences Against Public Policy," the Legislature created no less than fourteen separate statutory sections prohibiting several different forms of gambling activities and providing criminal penalties therefore. It is very important to note and understand that the statutory scheme of this state's public policy regarding gambling prohibitions and sanctions, as first adopted in 1849, one year after the adoption of the Wisconsin Constitution, remains largely intact today, establishing a

continuous and consistent public policy and interpretation of article IV, section 24.

Sections 1 through 7 of chapter 138, Stats. (1849), established crimes of setting up, promoting and conducting of lotteries, of selling or buying a "lottery ticket, or share of ticket," and against advertising lotteries. Section 8 created a separate crime of dealing "cards at a game called faro" or keeping "any gambling device whatsoever." Faro was a very popular commercial gambling game during the period between the Revolutionary War and the Civil War.³ Section 9 established the separate crime of betting "at or upon any gaming table, game or device." Section 10 created the separate criminal offense of keeping or permitting "any gaming table, bank or device prohibited . . . to be set up or used." The remaining sections of chapter 138 set forth duties and responsibilities of law enforcement, witnesses and the courts in the enforcement of these first gambling statutes.

A reading of the 1848 Constitution, article IV, section 24 and chapter 138, Stats. (1849), make it patently clear that the Legislature understood, and enacted laws that specifically stated that there were several forms and types of gambling, separate and distinct from one another, criminally prohibited, and further that a lottery constituted only one of several forms of gambling.

The Legislature has, since 1849, created new criminal statutes prohibiting various types and forms of gambling, various gambling devices and places of gambling, consistent with its 1849 policy of identifying various forms of gambling and distinguishing those varied forms of gambling from lotteries.

In 1858, the Legislature established jail terms for commercial gamblers; sections 8, 9, chapter 169, Stats. (1858). In 1883 the Legislature set penalties for suppliers of policy or numbers and

³Farnsley, *Gambling and the Law: The Wisconsin Experience 1848-1980*, 1980 Wis. L. Rev. 811.

for policy or numbers players; section 4539a, Stats. (1889). In 1897, the crimes of conducting pool-selling or bookmaking or patronizing pool-selling or bookmaking establishments was enacted; sections 4539b, 4539c, 4539d, Stats. (1898). In 1903, "bucket shops" were prohibited; sections 4539e, 4539f, 4539g, Stats. (1906). Criminal penalties were established in 1929 for suppliers of sports betting; section 348.085, Stats. (1929) and in 1947 for gambling device salesmen; section 348.07, Stats. (1947). Several statutes have been enacted prohibiting gambling at particular places. The Legislature prohibited gambling on trains in 1875 and 1880⁴; at race tracks in 1878⁵; at local fairs in 1885⁶; at the state fair in 1913⁷; and in taverns in 1945.^{8, 9}

I have provided the lengthy history above to illustrate the continuing legislative activity on gambling laws and the perpetuation of the legislative differentiation of various types, forms and places of gambling. None of the above referred to enactments pertain to any aspect of conducting or participating in a lottery.

Prior to the recodification of the Wisconsin criminal code in 1953-55, the identification of the various forms and types of gambling remained virtually unchanged. Although the Legislature had not attempted to specifically define the various forms of gambling, it had, as evidenced by those statutes, treated the

⁴Secs. 1817, 4536, Stats. (1878) and 4598a, Stats. (1889).

⁵Sec. 1779, Stats. (1878).

⁶Sec. 1463, Stats. (1889).

⁷Sec. 172.29(1), Stats. (1913).

⁸Sec. 176.90, Stats. (1945).

⁹Farnsley, *Gambling and the Law: The Wisconsin Experience 1848-1980*, 1980 Wis. L. Rev. 811.

various forms of gambling as distinct from one another and dealt with them in separate provisions of a general chapter dealing with offenses against public policy.

The recodification of the criminal code was enacted as chapter 623, Laws of 1953, which revised and recreated Title XXXII of the statutes related to crime. These new criminal provisions first appear as effective legislation in the Wisconsin statutes of 1955, and included, among other provisions, chapter 945, relating to gambling. This was the first time the Legislature defined a "lottery" (section 945.01(5)); a "bet" (section 945.01(1)), specifically excluding a lottery from the definition of a bet (section 945.01(1)(c)); "bookmaking" (section 945.01(2)); a "gambling machine" (section 945.01(3)); and a "gambling place" (section 945.01(4)).

The 1955 recodification and present chapter 945 make specific distinctions between various forms, types and methods of gambling, as has been the case since 1849, and also distinguished between the definitions of lotteries, bets, gambling machines and gambling places as forms and methods of gambling separate and distinct from each other. It is clear that the elements of prize, chance and consideration are all present in varying degrees in all forms, types and methods of gambling. In fact, those three elements must be present, in order for the activity to constitute gambling.

The distinction between lotteries and other forms and types of gambling is emphasized by the language contained in the 1955 recodification and present chapter 945. Both sections 945.01(1), Stats. (1955) and 945.01(1), Stats. (1987-88), which specifically defines "a bet," exclude from that definition "a lottery as defined in this section." Sec. 945.01(1)(c), Stats. If all forms of gambling constitute lotteries then such exclusion would be absolutely meaningless. Sections 945.01(4), Stats. (1955) and 945.01(4), Stats. (1987-88) both define a gambling place, and state in substance, that a gambling place is one in which one of the principal uses is any of the following: "making and settling bets;

receiving, holding, recording or forwarding bets or offers to bet; *conducting lotteries*; or playing gambling machines." If all forms of gambling constitute lotteries, then a gambling place would need to be defined only as one where lotteries are conducted.

In further recognition of the continuing and consistent distinguishing between different forms, types and methods of gambling in our criminal gambling statutes, and after the adoption of the constitutional amendments in 1987, creating article IV, sections 24(5) pari-mutuel on-track betting and (6) state operated lottery, the Legislature appropriately amended chapter 945 to avoid conflict between our gambling laws and newly created enabling legislation. Chs. 562 and 565, Stats. (1987-88). The definition of a bet, section 945.01(1), Stats. (1987-88), was amended to exclude pari-mutuel betting subject to chapter 562 in subsection (1)(d). The definition of gambling machine in section 945.01(3), Stats. (1987-88), was amended in subsection (b)l. to exclude from the definition of gambling machines devices used in conducting the state lottery under chapter 565 and used in conducting a race under chapter 562. These amendments were necessary to distinguish and avoid conflict between the state operated lottery or the conductors of a race utilizing machines or devices which otherwise would be illegal gambling machines or devices. Section 945.01(4), Stats. (1987-88), defining a gambling place, excludes from that definition a place where the state lottery is conducted under chapter 565 or where a race is conducted under chapter 562, again to distinguish the state operated lottery or a legal race from an illegal gambling place. Finally, section 945.01(5), which defines an illegal lottery, was amended in subsection (am) to exclude from the definition of an illegal lottery the state lottery as conducted under chapter 565, Stats. (1987-88).

It is clear then, as illustrated by these comparisons between the 1987-88 statutes and the language of the 1955 statutes, and the exclusions added to the 1987-88 statutes, that the Legislature has consistently and uniformly understood and treated the various

forms of gambling defined in present section 945.01, Stats. (1987-88), as separate forms and types of gambling distinct from one another even though they do, and by definition must, all contain the three elements of prize, chance and consideration in one form or another. To conclude otherwise would be to render much of chapter 945 superfluous. That result must be avoided. *Green Bay Broadcasting v. Green Bay Authority*, 116 Wis. 2d 1, 342 N.W.2d 27 (1983).

Betting, playing gambling machines and operating gambling places are not to be considered as included within the meaning of the term lottery as used in the constitution, and chapters 945 and 565, Stats. (1987-88). Therefore, it is clear, that the meaning of the term lottery as contained in the constitution and both legislative enactments up to the present day does not include and is not meant to embrace all the forms of gambling.

One of the fundamental canons or rules of statutory/constitutional construction is that statutes or provisions on the same subject are to be construed together. *State v. Burkman*, 96 Wis. 2d 630, 292 N.W.2d 641 (1980). These constitutional and statutory provisions are to be construed together and are considered to be in *pari materia* because they relate to the same thing and have the same purpose and object. 2A Singer Sutherland Statutory Construction, § 51.03 (Sands 4th ed. 1984). The terms "lottery" in subsection (1) and subsection (6) of article IV, section 24 of the Wisconsin Constitution have the same meaning, purpose and object. Statutes should be interpreted to make sense. *State v. Pham*, 137 Wis. 2d 31, 403 N.W.2d 35 (1987).

It is apparent to me that during the entire legislative debate, over several years, on the advisability of adopting a resolution providing for a constitutional amendment authorizing a state operated lottery, during the public debate prior to the ratification of such constitutional amendment by statewide referendum in April of 1987, and during the legislative deliberations and debate on the enactment of legislation enabling the lottery constitutional

amendment, chapter 565, there was neither legislative or public discussion or debate nor legislative or public intent to authorize the playing of roulette, blackjack, craps, slot machines, video gambling machines and other types and forms of casino gambling.

It is clear the Legislature and citizens of Wisconsin intended only to authorize a single form of gambling, a lottery, to be operated by the state, with the utilization of tickets. Indeed, the very explanation of the referendum ballot question, that I prepared and appearing with the ballot constitutional question, stated that a citizen's vote on this ballot referendum question related only to this one form of gambling. That explanation, in relevant parts, was as follows:

EXPLANATION

A "yes" vote would permit the Legislature to create a lottery operated by the state A "no" vote would retain the present language of section 24 of article IV of the Wisconsin Constitution, continuing the prohibition on *this form of gambling*.

(Emphasis added.)

I therefore believe it to be clear, and conclude, that both the framers of the constitution and the Legislature in its various enactments, treat lotteries as a form of gambling separate and distinct from the other methods of gambling such as betting, playing gambling machines and the like, and the latter can therefore not be construed as being included within the term lottery as used in either the constitutional provision under consideration or in chapter 945 of the statutes. Therefore I conclude that the games allowed to be conducted by the Wisconsin state lottery do not include any of the betting/banking games, such as roulette, blackjack, craps, baccarat, Chemin de fer and similar casino gambling, and do not include any forms of gambling conducted by the playing of gambling machines such as slot machines, video gambling machines and similar machines and devices.

Contained in your first question is another issue which needs to be addressed, that being the types of games which the state lottery board may legally operate resulting from specific language in article IV, section 24(6) of the Wisconsin Constitution. That provision states that "[a]ny advertising of the state lottery shall indicate the odds of a *specific lottery ticket* to be selected as *the winning ticket* for each prize amount offered." (Emphasis added.) This effect must be analyzed, because it should be determined whether the specific constitutional language has the effect of further limiting the types of games which the state lottery may legally conduct. It appears to me that the very specific language contained in the constitutional provision, quoted above, does limit the types of games which the state lottery can legally conduct to those games utilizing "tickets" in the conduct of the game. The "ticket" requirement again distinguishes the state operated lottery from other types, forms and methods of gambling.

The word "ticket" has been defined as follows: "In contracts, a slip of paper containing a certificate that the person to whom it is issued, or the holder, is entitled to some right or privilege therein mentioned or described; such, for example, are . . . lottery tickets, etc." Black's Law Dictionary 1328 (5th ed. 1979).

From the constitutional language and the definition of the word "ticket," I conclude that a game conducted by the state lottery must utilize some form of "ticket" setting forth the rights or privileges of participation in that lottery game in order to not run afoul of the constitutional language.

Finally, in answering your first question, I wish to emphasize that the forms of gambling encompassed by the definition of bet and gambling machines are prohibited by statute only, and do not come within the purview of prohibited lotteries as described in the constitution of this state. Therefore, the Legislature may allow casino-type gambling in the State of Wisconsin. Should it wish to do so, it need only enact appropriate repeals, or modifications to chapter 945 and 565 to legalize for all citizens in this state the

various forms of casino gambling including betting/banking games and the playing of gambling machines.

The conclusion which I reach concerning your second question is required by my opinion and conclusion regarding your first question. Neither the United States Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), nor the provisions of the Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701–2721 (West Supp. 1989), effective October 17, 1988, authorize Indian gaming activities within Indian country¹⁰ which take the form of betting/banking gambling or the operation of gambling machines contrary to the criminal prohibitions contained in chapter 945 of the statutes for the following reasons.

In the *Cabazon* decision, the United States Supreme Court fashioned and set forth criteria which must be utilized to ascertain whether state law can effectively prohibit gambling activities within Indian country.

The Court determined that the gambling laws and policy of the state in regard to the questioned activity must be analyzed to determine whether or not those laws are in fact criminal-prohibitory, that is, whether in general *all persons* are prohibited from engaging in those activities or whether the activity in

¹⁰The term "Indian country" is defined in 18 U.S.C.A. § 1151 (West 1984). 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 For Tenth Jud. Dist.*, 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).

question has been, through changes in the state's public policy, converted from criminal-prohibitory to civil-regulatory, allowed but regulated activities. If the law of the state concerning an activity under inquiry totally prohibits any person from engaging in that specific activity, then that activity does violate the state's public policy regarding that activity. The statute is therefore prohibitory and the activity is prohibited from being conducted within the state and within Indian country. If, however, the state law in regard to the activity under inquiry allows the activity with regulations or restrictions then, even though violation of the restrictions may result in criminal sanctions, the law and policy is therefore classified as civil-regulatory in nature. The activity can therefore be conducted within Indian country free from state regulation and restrictions.

Applying these principles to the public policy concerning gambling in the State of Wisconsin, it appears that the policy toward lotteries has indeed, at least in regard to bingo, raffles, the state lottery and pari-mutuel on-track betting, become civil-regulatory in nature. It is no longer criminal-prohibitory and therefore such activities can be conducted within Indian country free from any regulation by the state.

However, through similar reasoning, the public policy in the State of Wisconsin concerning all forms of betting, the operation of gambling machines, and other forms of gambling not contained within the meaning of the term lottery, remains criminal-prohibitory in nature, not civil-regulatory. Banking games, such as roulette, blackjack, craps, baccarat, Chemin de fer and similar casino gambling and use of gambling machines and devices such as slot machines, video gambling machines, and similar machines are absolutely prohibited to all persons in the State of Wisconsin. Therefore, under the *Cabazon* analysis, these other forms of gambling may not be conducted anywhere in the State of Wisconsin including within Indian country.

The Indian Gaming Regulatory Act, 25 U.S.C.A. § 2710(d)(1) (West Supp. 1989), allows Class III gaming activities to be

lawfully conducted within Indian country only if such activities are: "(B) located in a State that permits such gaming for any purpose by any person, organization, or entity,"

Class I gaming activities as described in the Indian Gaming Regulatory Act are traditional games conducted by the Indian tribes. Class II are games of chance commonly known as bingo and certain card games. Class III are all forms of gaming which are not Class I or Class II.

Therefore, it is clear that Class III gaming activities encompass at least all those forms of gambling, which I discussed in my opinion on your first question, *i.e.*, the betting/banking games and the operation and playing of gambling machines, which are criminally prohibited by chapter 945 of the statutes. Therefore, *ipso facto*, those gambling activities are not "located in a State that permits such gaming for any purpose by any person, organization, or entity."

It is my opinion, therefore, that the Indian Gaming Regulatory Act does not authorize the operation of casino-type gambling activities within Indian country. This same result is required under the United States Supreme Court decision in *Cabazon*.

I am not unsympathetic to the importance of gaming activities within Indian country in providing jobs and economic development initiatives to Indians and non-Indians in the communities involved, and the importance of the revenues from such activities for tribal government functions, including their use for the health and general welfare of the Indian community. However, it is not my responsibility to establish the public policy on gambling in Wisconsin. My responsibility is to interpret and enforce the policy enacted by the Legislature. That policy as it relates to gambling is within the role, responsibility and ability of the Legislature to address as it did in enacting chapters 945 and 565.

The forms of gambling held illegal both within and without Indian country by this opinion are prohibited by statute only. These include video games of chance, slot machines, blackjack,

poker, roulette, craps and so-called bingo-derivative games such as bingo-let, bingo-jack, etc. Therefore, should it chose to do so, the Legislature may authorize casino-type gambling in the State of Wisconsin and, therefore, within Indian country, or just within Indian country. Should it wish to do so, the Legislature need only enact appropriate repeals or modifications to chapters 945 and 565.

DJH:JCM

Gambling; Lotteries; The operation of video poker games in Wisconsin, which involve the elements of prize, chance and consideration, constitutes the operation of gambling machines, does not constitute the conduct of an illegal lottery and the Legislature may therefore authorize the operation of video poker games by appropriate repeals or amendments to chapter 945, Stats., should it choose to do so. OAG 4-90

February 5, 1990

TOM LOFTUS, *Chairperson*

Committee on Assembly Organization

You have requested my opinion regarding the legal status of video poker machines in Wisconsin. Specifically, you ask, "[I]f authorized by appropriate legislation, would the operation of a video poker game involving consideration, prize and chance constitute a prohibited lottery under Wis. Const. art. IV, s. 24?"

It is my opinion that video poker machines involving prize (something of value), chance and consideration are illegal gambling machines, not illegal lotteries. The operation of such games or machines may violate several provisions of chapter 945, Stats., but does not constitute the conduct of or participation in an illegal lottery. Therefore, should the Legislature choose to legalize such devices and activities, presently prohibited by the criminal code of this state, it may do so by enacting legislation which repeals or modifies the appropriate provisions of chapter 945, since the constitutional prohibition concerning lotteries does not apply to this form of gambling.

The constitutional provision about which you inquire, article IV, section 24(1) of the Wisconsin Constitution, provides, in pertinent part, that "[e]xcept as provided in this section, the legislature shall never authorize any lottery" Neither this constitutional provision nor any laws in effect at the time of the inception of the constitution defined the term lottery.

This constitutional provision remained unchanged from the time of its inception in 1849 until 1965, when the constitution

was amended to create subsection (2), which provided that certain activities would not constitute consideration as an element of a lottery except as otherwise provided by law. Again, no effort was made by the framers of the referendum question and amendment language to define the term lottery as therein used.

This provision was again amended, once in 1973 to legalize and authorize bingo by the creation of subsection (3), and again in 1977 to legalize and authorize raffle games, subsection (4), all of which activities had to be licensed by the state and to be operated only by religious, charitable, service, fraternal or veterans organizations or those to which contributions are deductible for federal or state income tax purposes. As before, the term lottery was not defined within the constitution.

Finally, the constitution was once again amended in 1987, by virtue of the creation of subsections (5) and (6) to except certain on-track pari-mutuel betting from the definition of lottery and to authorize a state operated lottery. While this constitutional amendment specifically utilized the term "lottery," the framers of the amendment made no attempt to define the term lottery itself.

All forms of gambling contain similar elements. They all contain the element of prize or something of value in that something must be wagered, paid, won or lost as part of the activity; they all involve the element of chance functioning as a determinant in whether the person participating in the activity wins or loses; and they all generally involve the concept of consideration whether it take the form of putting up something to wager or bet, payment as means of entry into a gambling activity or some other form of nonmonetary consideration. Therefore, the answer to your question does not lie in determining whether or not the activity about which you inquire involves prize, chance and consideration, which your question presents as a given set of elements, but rather lies in determining whether this type of gambling, operating a video poker machine, is different from, and therefore does not constitute, a lottery.

Prior to the revision of the criminal code in 1953–1955, the Wisconsin statutes did not attempt to define the various forms of gambling. However, they did indeed treat those forms separately, as is discussed in more detail in 79 Op. Att'y Gen. 14, issued today, by treating those forms in separate sections and punishing them criminally in separate sections. *See*, for example, section 348.01, Stats. (1953), prohibiting and criminally punishing the setting up or promoting of a lottery; section 348.07, Stats. (1953), prohibiting and criminally punishing keeping or using gaming devices; and section 348.08, Stats. (1953), prohibiting and criminally punishing betting.

In the 1953–1955 revision of the criminal code, which created chapter 345 which was then renumbered to chapter 945, the Legislature specifically defined, *inter alia*, gambling machines and lotteries.

Section 945.01(3)(a) defines a gambling machine as "a contrivance which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance, even though accompanied by some skill and whether or not the prize is automatically paid by the machine." Section 945.01(3), Stats. (1955), defined gambling machine with the identical language. The original proposal, section 345.01(3), proposed in chapter 623, Laws of 1953, used language which was virtually the same as the present day statute and the 1955 version, except it did not have the language concerning skill and the discussion of whether the prize was automatically paid by the machine was contained in a separate sentence in that subsection.

It was recognized in the creation of the criminal code in 1953–1955 that the various forms of gambling, even though they contain similar elements and may resemble each other, are indeed separate and distinct and ought to therefore be treated as separate forms of gambling. It was specifically recognized that gambling machines are particular devices used in gambling, and while the activity or conduct in the playing of gambling machines may

certainly resemble in some aspects the placing of a bet or the conduct of a lottery, they are not thought of as lotteries and will therefore be treated separately and distinctly. See Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, Volume V, Bill No. 100, A. at 152-53 (1953).

Therefore, I conclude that although the operation of video poker games and the conduct of lotteries have similar characteristics, they are indeed to be treated differently within the constitution and statutes of this state. Therefore, the operation of a video poker game constitutes the playing or operation of a gambling machine and not the conduct of an illegal lottery.

DJH:JCM

Libraries; A public library system may not charge fees for services which are inconsistent with the provisions of section 43.52(2), Stats. OAG 5-90

February 13, 1990

FRED A. RISSER, *Chairperson*
Senate Organization Committee

You have asked, on behalf of the Senate Organization Committee, for my formal opinion on the following questions:

1. May municipal libraries collect fees, on behalf of [a federated library] System for use of the System's video cassettes, where those fees are remitted entirely to the System?
2. May municipal libraries collect fees, on behalf of the System, for other services which, if offered by municipal libraries, would be covered by Section 43.52 (2)?

You have attached a letter from Senator Czarnezki indicating that these questions have been prompted by the Milwaukee County Federated Library System, a public library system formed under section 43.19, Stats. Senator Czarnezki further indicates that the video cassettes in question are a collection of the federated library system which is made available to borrowers through member libraries all of which are municipal libraries.

I recently opined that under section 43.52(2) municipal libraries may only charge fees for video cassettes which are in addition to their permanent library collection. 78 Op. Att'y Gen. 163 (1989). That opinion also covered the computer search of bibliographic materials.

Public library systems are authorized by chapter 43. A public library system is a system established as either a federated public library system under section 43.19 or a consolidated public library system under section 43.21. Sec. 43.01(5), Stats. A federated public library system is a system whose territory lies either within a single county or within two or more counties. A consolidated public library system is a public library system

within a single county. Sec. 43.15(4)(a), Stats. No more than one public library system may be established within a single county. Sec. 43.15(3)(b), Stats. These public library systems must designate at least one resource library. Sec. 43.15(4)(a), Stats.

The county library planning committee, created by section 43.11, has the duty of creating a "plan of library service for a county . . . [which] shall provide for library services to residents of those municipalities in the county not maintaining a public library under this chapter. The services shall include *full access to public libraries* in the county participating in the public library system." Sec. 43.11(3)(c), Stats. To be eligible for state aid, a system shall provide to that end "[c]omplete library service as provided by the system resource library to any resident of the system on the same terms as the service is available to residents of the resource library community as evidenced by an agreement with that library." Sec. 43.24(2)(c), Stats.

Since all of the libraries in the Milwaukee County Federated Library System are municipal libraries subject to section 43.52(2), it is my opinion that the system cannot charge, nor can member libraries collect, for the loan of video cassettes or any other service for which the resource library could not charge. If the system imposed a charge which the resource library could not impose, the charge would violate the mandate of section 43.24(2)(c) in that residents of the system would not be provided complete library service on the same terms as the resource library.

Further, section 43.11(3)(c), which requires the system to include full access to public libraries, would also be violated by such fees. This conclusion is consistent with the legislative purpose expressed in section 43.001(1)(a) which recognizes the importance of free access to knowledge and information by all residents of the state.

Nor would my answer change if the resource library were not a municipal library. Chapter 43 provides for two types of libraries in addition to municipal libraries. Section 43.53 provides for joint

libraries, a library created by two or more contiguous municipalities or by a county and one or more municipalities. The provisions of section 43.52 are specifically applied to those joint libraries. Sec. 43.53(1), Stats. Section 43.57 provides for consolidated county libraries and county library services for counties that wish to maintain library services for those municipalities in their territorial jurisdiction for which no municipal library exists. The provisions of section 43.52(2) apply to consolidated county libraries and county library services. Sec. 43.57(5)(e), Stats.

I am not aware of any other authority in the Wisconsin statutes for establishing public libraries. Thus, the provisions of section 43.52(2) apply to any resource library of any public library system. That being the case, a public library system may not charge fees which would be inconsistent with my recent opinion or the other authorities cited therein.

DJH:WDW

Counties; Ordinances; Register Of Deeds; A register of deeds may not refuse to record instruments that are recordable under state law but are not in compliance with a county subdivision ordinance requiring the preparation of a certified survey map in connection with certain land divisions, even if requested or directed to do so by county ordinance. OAG 6-90

February 14, 1990

EVERETT B. HALE, *Corporation Counsel*
Taylor County

You ask whether a register of deeds may refuse to record instruments that are recordable under state law but that are not in compliance with a county subdivision ordinance requiring the preparation of a certified survey map in connection with certain land divisions, if requested or directed to do so by county ordinance.

In my opinion, the answer is no.

Section 59.51, Stats., provides in part as follows:

Register of deeds; duties. The register of deeds shall:

(1) Record or cause to be recorded in suitable books to be kept in his office, correctly and legibly all deeds, mortgages, maps, instruments and writings authorized by law to be recorded in his office and left with him for that purpose, provided such documents have plainly printed or typewritten thereon the names of the grantors, grantees, witnesses and notary. . . .

. . . .

(15) Perform all other duties required of him by law.

In 77 Op. Att'y Gen. 262, 264 (1988), I recently considered whether a county board possesses statutory authority to direct the register of deeds to refuse to record documents containing restrictive covenants. In that opinion, I made the following statement:

[A]bsent 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).

Based upon this language, I conclude that a register of deeds lacks any independent statutory authority to refuse to record documents that are in compliance with state statutes.¹

The remaining aspect of your inquiry is whether a county ordinance may empower a register of deeds to refuse to record documents that are in compliance with state statutes governing the recordability of documents but that are not in compliance with a county subdivision ordinance requiring the preparation of a certified survey map in connection with certain land divisions.

In 77 Op. Att'y Gen. at 262, I also stated as follows:

¹Given this conclusion, it is not necessary for me to address that portion of your correspondence dealing with potential liability for voluntary compliance by the register of deeds with such a county ordinance. However, I perceive no liability problems if the register of deeds voluntarily alerts county zoning or platting officials that certain legal instruments should be examined for compliance with a county subdivision ordinance, or if the register of deeds voluntarily alerts the presenter of the document that such action is contemplated, provided of course that the register of deeds does not refuse to record those legal instruments.

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.

The phrase "by law" in section 59.51(1) and (15) provides the county board with no authority to enact ordinances imposing additional obligations on the register of deeds "since the statutory phrase 'by law' ordinarily does not encompass county ordinances. 66 Op. Att'y Gen. 149, 153 (1977); 63 Op. Att'y Gen. 108, 112 (1974)." 78 Op. Att'y Gen. 143, 145, (1989). That construction of the phrase "by law" was applied to section 59.51 in 14 Op. Att'y Gen. 590 (1925). I also find no other statute which would authorize a county board to enact an ordinance permitting or requiring a register of deeds to refuse to record legal instruments of the kind you describe.

I therefore conclude that a register of deeds may not refuse to record instruments that are recordable under state law but are not in compliance with a county subdivision ordinance requiring the preparation of a certified survey map in connection with certain land divisions, even if requested or directed to do so by county ordinance.

DJH:FTC

Constitutionality; Legislation; The provisions of the 1983 Budget Act restricting the expenditure of state and federal funds for the construction of additional lanes on I-43 in Milwaukee and Ozaukee Counties do not violate the requirement of Wisconsin Constitution article IV, section 18 that private and local bills must embrace only one subject which must be expressed in the bill's title. OAG 7-90

February 28, 1990

DENNIS E. KENEALY, *Corporation Counsel*
Ozaukee County

You have requested my opinion on the constitutionality of section 84.013(7)(a), Stats., which was created by 1983 Wisconsin Act 27, section 1328m. 1983 Wisconsin Act 27 was an omnibus bill bearing the title "An act to amend and revise chapter 20 of the statutes, and to make diverse other changes in the statutes, relating to state finances and appropriations, constituting the executive budget bill of the 1983 legislature, and making appropriations." Section 84.013(7)(a) reads:

No state or federal funds appropriated for the department [of transportation] may be expended for any highway construction, reconstruction or reconditioning which results in additional lanes on I 43 between Bender road and the north Ozaukee county line in Milwaukee and Ozaukee counties.

The specific question you pose is whether this legislative enactment complies with Wisconsin Constitution article IV, section 18 which provides: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."

Legislative acts enjoy the benefit of a presumption of constitutionality, and persons attacking that presumption must prove the law to be unconstitutional beyond any reasonable doubt. *State v. McCoy*, 143 Wis. 2d 274, 285, 421 N.W.2d 107 (1988). With this standard in mind, I conclude that section 84.013(7)(a) is constitutional.

The Wisconsin Supreme Court has formulated a two-part test for determining whether a legislative enactment is a private or local act coming within the purview of Wisconsin Constitution article IV, section 18. In *Milwaukee Brewers v. DH&SS*, 130 Wis. 2d 79, 115, 387 N.W.2d 254 (1986), Justice Bablitch, speaking for the majority of a divided court, said:

[W]e hold that a legislative provision which is specific to any person, place or thing is a private or local law within the meaning of art. IV, sec. 18, unless: 1) the general subject matter of the provision relates to a state responsibility of statewide dimension; and 2) its enactment will have direct and immediate effect on a specific statewide concern or interest.

The *Brewers* decision concluded that the legislation under consideration, which directed the Department of Health and Social Services to site a prison in the Menomonee Valley in the City of Milwaukee, met both tests. I believe that this legislation prohibiting the construction of a major highway improvement also meets both tests.

The highway, I-43, is the major connecting link between Milwaukee and Green Bay. Building a third lane in the proposed corridor would immediately improve the speed and efficiency of vehicular traffic between Green Bay, Manitowoc, Sheboygan, Port Washington and Milwaukee. The construction of over thirty-two miles of an additional lane, both north and south, would directly affect the major cities on the eastern shore.

The legislative decision not to improve this major highway will have equally significant effects. Increasing traffic volumes and delays in the northern part of the metropolitan Milwaukee area will force different patterns of development in southeastern Wisconsin. Increased volume and delays in the I-43 corridor may also encourage traffic diversion and business development into the Fox Valley along U.S. Highway 41. While specific consequences may be difficult to predict, the effects will clearly be of statewide interest and concern.

I believe that the decision not to build a major highway project in the most heavily populated area of the state has as much, if not more, statewide interest and is of more statewide concern than the location of a prison. In reaching this conclusion I am mindful of the court's decision in *Soo Line R. Co. v. Transportation Dept.*, 101 Wis. 2d 64, 303 N.W.2d 626 (1981). In that case the court found that a budget provision prohibiting the construction of a railroad overpass in Prentice was unconstitutional because it did not have an immediate effect on a statewide concern. In *Brewers* the court pointed out that a general concern for highway safety would be insufficient to justify including a geographically specific piece of legislation in a budget bill. In these two cases the court has made it clear that transportation projects, while clearly a state responsibility of statewide dimension, are somewhat suspect.

In spite of this higher standard I believe that the prohibition of such a major project has the requisite immediate and statewide impact required by the court's decision in *Brewers*. In this regard it is similar to the control of net fishing on Lake Michigan that the court approved in *Monka v. State Conservation Comm.*, 202 Wis. 39, 231 N.W. 273 (1930). The *Monka* decision was cited with authority by the court in *Brewers*. (*Brewers*, at 111.)

The test announced by Justice Bablitch in *Brewers* is fact based. If a local project is large enough and important enough to have statewide impact, it will come to the specific attention of the Legislature, even if it is included in a budget bill. This legislative attention is the basis of the constitutional requirement of specific action on local bills. *Milwaukee County v. Isenring and others*, 109 Wis. 9, 85 N.W. 131 (1901). I believe that the facts in this case, the size and location of the prohibited project, are sufficient to conclude that the Legislature would have been aware of its inclusion in the budget bill. I believe that this statute meets the test that the court established in *Brewers*.

DJH:JLH

Schools And School Districts; Taxation; Pursuant to section 120.12(3), Stats., the school board of a common or union high school district has the ultimate authority to determine the tax levy for the operation and maintenance of the schools in the district.
OAG 8-90

March 8, 1990

TOM LOFTUS, *Chairperson*
Assembly Organization Committee

The Assembly Committee on Organization has requested my opinion regarding the authority of a school board of a common or union high school district to approve a property tax levy for the school district that differs from the annual tax levy approved by electors at the school district annual meeting. Specifically, the committee asks: "[U]nder ss. 120.10 and 120.12, Stats., which body, the annual meeting or the school board, has the ultimate authority to determine the property tax levy for the operation of the schools of the school district?"

The question arises because two statutes appear to give authority to two different entities to approve the property tax levy for the operation of the schools. Section 120.10(8), Stats., authorizes the annual meeting to vote a tax for the operation of the schools while section 120.12(3)(a) authorizes the school board to determine the amount necessary to be raised to operate and maintain the schools.

In its relevant parts, section 120.10 provides:

The annual meeting of a common or union high school district may:

....

(6) TAX FOR SITES, BUILDINGS AND MAINTENANCE. Vote a tax to . . . maintain school district buildings. . . .

....

(8) TAX FOR OPERATION. Vote a tax for the operation of the schools of the school district.

In giving authority to the school board, section 120.12 provides:

The school board of a common or union high school district shall:

.....

(3) TAX FOR OPERATION AND MAINTENANCE.

(a) On or before the 3rd Monday in October, determine the amount necessary to be raised to operate and maintain the schools of the school district and public library facilities operated by the school district under s. 43.52, if the annual meeting has not voted a tax sufficient for such purposes for the school year. On or before the last working day in October, the school district clerk shall certify the appropriate amount so determined to each appropriate municipal clerk who shall assess the amount certified and enter it on the tax rolls as other school district taxes are assessed and entered.

(b) If a tax sufficient to operate and maintain the schools of a school district for the ensuing school year has not been determined, certified and levied prior to the effective date of school district reorganization affecting any territory of the school district, the school board of the reorganized school district shall determine, on or before the 3rd Monday of October following the effective date of the reorganization, the amount of deficiency in operation and maintenance funds on the effective date of the reorganization which should have been paid by the property in the reorganized school district if the tax had been determined, certified and assessed prior to the effective date of the reorganization. On or before the last working day in October, the school district clerk shall certify the appropriate amount to each appropriate municipal clerk who shall assess, enter and collect the amount as a special tax on the property. This paragraph does not affect the apportionment of assets and liabilities under s. 66.03.

(c) If on or before the 3rd Monday in October the school board determines that the annual meeting has voted a tax greater than that needed to operate the schools of the school district for the school year, the school board may lower the tax voted by the annual meeting. On or before the last working day in October, the school district clerk shall certify the appropriate amount so determined to each appropriate municipal clerk who shall assess the amount certified to him or her and enter it on the tax rolls in lieu of the amount previously reported.

The answer to your question is that the school board has the ultimate authority to determine the property tax levy for the operation and maintenance of the school district because section 120.12(3) requires the board to determine the amount necessary to operate and maintain the schools. Prior attorney general opinions concluded that earlier versions of section 120.12(3) gave the board the power "to operate and maintain a school regardless of whether the electors provide sufficient funds for such operation and maintenance." 13 Op. Att'y Gen. 380, 381 (1924), and 25 Op. Att'y Gen. 411, 413 (1936).

Therefore, if the school board determines that the tax voted at the annual meeting is not sufficient to operate and maintain the schools, the board is empowered to determine the amount necessary to be raised to operate and maintain the schools in the school district. *See* sec. 120.12(3)(a), Stats. Also, if the board finds that the annual meeting voted a tax greater than that needed to operate the schools, the board may lower the tax voted by the annual meeting. *See* sec. 120.12(3)(c), Stats.

DJH:SWK

Children; Health And Social Services; Discussion of the responsibility of county departments of social services to investigate allegations of child abuse and neglect. Department staff members may interview the child on public school property, and may exclude school personnel from the interview. School personnel cannot condition on-site interviews on notification of the child's parents. OAG 9-90

March 8, 1990

TIMOTHY A. DUKET, *District Attorney*
Marinette County

ERIC JOHNSON, *District Attorney*
St. Croix County

You request my opinion on questions relating to investigation of suspected child abuse and neglect. Section 48.981(3)(b) and (c) of the Children's Code (chapter 48, Stats.) requires local law enforcement agencies and county departments of social services to investigate reported cases of suspected abuse and neglect. County department investigations are conducted by specially trained staff members. Sec. 48.06(1)(am)3. and 48.981(8)(d), Stats.

Your first question asks:

Under section 48.981, Stats., may county department staff members interview a child on public school property, and without school personnel being present at the interview?

In my opinion, the answer is yes. Section 48.981(3)(c)1. provides as follows:

(c) *Duties of county departments.* 1. Within 24 hours after receiving a report under sub. (3)(a), the county department shall, in accordance with the authority granted it under s. 48.57(1)(a), initiate a diligent investigation to determine if the child is in need of protection or services. The investigation shall be conducted in accordance with standards established by the department for conducting child abuse and neglect investigations and shall include

observation of or an interview with the child, or both, and, if possible, a visit to the child's home or usual living quarters and an interview with the child's parents, guardian or legal custodian. At the initial visit to the child's home or living quarters, the person making the investigation shall identify himself or herself and the county department involved to the child's parents, guardian or legal custodian. The county department may contact, observe or interview the child at any location without permission from the child's parent, guardian or legal custodian if necessary to determine if the child is in need of protection or services, except that the person making the investigation may enter a child's home or living quarters only with permission from the child's parent, guardian or legal custodian or after obtaining a court order to do so.

Under this broad grant of authority, the county department may, in its discretion, interview the child at any location, including the child's school.

I also conclude that the county department's staff member may, in the exercise of professional judgment and in accordance with department standards, exclude school personnel from interviews. Certain school personnel are mandatory reporters of suspected child abuse and neglect. *See* sec. 48.981(2), Stats. However, while there is no statutory provision requiring their presence or participation at the interview, there are statutory provisions permitting their exclusion. At the same time, the presence of school personnel would not violate the confidentiality provision of section 48.981(7). Confidentiality extends only to the reports, notices and records maintained by the state and county department and others involved in the investigation.

Section 48.981(3)(c)1. provides that the county department's investigation shall be conducted "in accordance with the authority granted it under s. 48.57(1)(a)." Section 48.57(1)(a) gives the department legal authority "[t]o investigate the conditions surrounding . . . children . . . in need of protection or services

... and to take every reasonable action within its power to secure for them the full benefit of all laws enacted for their benefit." Your letters describe situations where the presence of school personnel at an interview would inhibit the child, preventing disclosure and frustrating the purpose of the interview. Under such circumstances, the department staff member could insist on a private interview. Insistence on a private interview would be a reasonable action taken by the department to insure receipt of useful, productive information. Sec. 48.57(1)(a), Stats.

I am not, however, suggesting that school personnel be routinely excluded from investigative interviews. The presence of supportive and familiar people may calm a frightened child. See generally Topper and Aldridge, *Sexually Abused Children and Their Families*, at 115-16 (1981). The interviewer may properly request the cooperation of a school teacher, counselor or other person whose presence would aid in the interview process. See sec. 48.57(2), Stats.

It is difficult to overstate the importance of investigative interviews. In cases of suspected child abuse,

the child's story of what happened may become the best available legal testimony and provide the best possible information for effective intervention in the family processes. Therefore, the initial and other early interviews with the child are of paramount importance. The worker who is interviewing a victim of sexual assault may be hearing the child's story before it has become crystalized by repetition, and thus it may be much more revealing than later versions. It may even be possible to determine whether the story being told by the child is true. Body language, descriptive material about the sexual activity, family roles, and so forth, may actually reveal that the child has not been sexually molested but that the family has other problems which may require intense intervention, but not necessarily child protection. Sensitivity to such nuances of language and physical presence, along with an eye and ear for congruence

of affect with emotional status, may not be "hard" court evidence but will certainly give the worker a much more accurate picture of the victim's situation. It may also give many indications about what other questions might be asked.

Sexually Abused Children and Their Families at 115-16.

The interview must be conducted and supervised by the county department staff member. The interviewer gathers information which will ultimately be used in civil Child in Need of Protection and Services (CHIPS) litigation and criminal prosecutions. Inappropriate or ill-timed comments or questions by observers can disrupt the interview and render information received unusable at trial. The interviewer must be able to communicate effectively with the child and must be familiar with the needs of the legal system. A specially trained department social worker is best equipped to conduct a meaningful interview. While monitoring or participation by school personnel may be appropriate—even valuable—in certain cases, it must occur at the discretion of the social worker.

Your second question asks:

Under section 48.981, Stats., may public school personnel require notification of a child's parents before permitting the child to be interviewed on school property?

In my opinion, the answer is no. The county department is not required to notify the child's parents before conducting an investigative interview. *See* sec. 48.981(3)(c)1., Stats. The statute specifically allows the department to interview the child without the parents' permission. *Id.* The department is required to interview, if possible, the child's parents, guardian or legal custodian. Through its statutorily mandated interview process, the department itself provides parental notice of the investigative interview. There is no legal basis for a public school to condition an on-site interview on notification of the parents.

Your remaining questions regarding the scope of departmental authority to conduct investigative interviews of suspected child abuse and neglect are rendered moot since I have determined that the department may conduct the interviews on school property.

DJH:GPW

Circuit Court; Clerk Of Courts; The clerk of circuit court has discretion to refuse to docket a large claim money judgment until his statutory fee has been paid for that service; but such discretion is not unlimited. The clerk incurs no liability under section 806.10(3), Stats., where the time of entry recorded in the judgment docket is the time when the clerk has both the judgment and the statutory fee in his custody, provided the clerk has not abused his discretion. OAG 10-90

April 2, 1990

J. DENIS MORAN, *Director of State Courts*

You have requested my opinion concerning whether a clerk of circuit court is required to docket a large claim money judgment pursuant to section 806.10, Stats., where the \$5 docketing fee prescribed in section 814.61(5)(b) is not paid.

It is my opinion that the statutes have given the clerk discretion to refuse to docket such a judgment where statutory fees have not been prepaid. This discretion is not unlimited; nor does such discretion extend to the performance of all the clerk's duties in conjunction with which he is authorized to collect fees.

One of the statutory duties of the clerk of circuit court is to maintain a judgment record and to docket therein all money judgments. Sec. 59.39(7), Stats. Section 806.10(1) provides that the clerk shall enter certain detailed information in the judgment docket at the time of entry of a large claim money judgment. A judgment is entered when it is filed in the office of the clerk of court. Sec. 806.06(1)(b), Stats. *See Bruns v. Muniz*, 97 Wis. 2d 742, 745, 295 N.W.2d 11 (Ct. App. 1980). Section 806.06(2) provides for the entry of judgment as follows:

(2) The judge or the clerk upon written order of the judge may sign the judgment. The judgment shall be entered by the clerk upon rendition.

A judgment is rendered when it is signed. Sec. 806.06(1)(a), Stats.

Although section 806.06(2) provides for entry, *i.e.* filing of a judgment upon rendition, and section 806.10(1) requires the clerk to docket a judgment at the time of entry, the clerk may refuse to docket the judgment in the absence of prepayment of the statutory fee.

I reach this conclusion for a number of reasons. For more than a century the statutes have provided that the clerk of court may require statutory fees in advance for his services. *See* Chapter 166, section 2, Laws of 1887. The most recent expression of the Legislature's intent in this regard is the present section 59.42, created by Chapter 317, section 30gw, Laws of 1981:

59.42 Clerk of court; fees; investment of funds. (1) The clerk of the circuit court shall collect the fees prescribed in ss. 814.60 to 814.63. The clerk may refuse to accept any paper for filing or recording until the fee prescribed in subch. II of ch. 814 or any applicable statute is paid.

The supreme court in commenting on identical language in section 59.43, the precursor to section 59.42, noted:

The clerk of court's duties are basically set forth in secs. 59.39 and 59.395, Stats. These duties included the obligation to file all papers properly before him. However, sec. 59.43, *supra*, provides the clerk *may* refuse to accept any paper for filing until the appropriate fees are paid. The use of the word "may" in the statute gives the clerk discretion to accept and file papers without the payment of the filing fee. The clerk may "extend credit" but is not obliged to do so and when he does it is at his risk.

Hamilton v. ILHR Department, 56 Wis. 2d 673, 681–82, 203 N.W.2d 7 (1973) (emphasis in original; footnotes omitted).

In addition, by 1987 Wisconsin Act 151, section 13, the Legislature created section 806.10(1m), effective March 17, 1988:

806.10(1m) The clerk's fee for making the entry upon a judgment docket, as prescribed in s. 814.61(5)(b), shall be paid to the clerk at the time the judgment is docketed.

1987 Wisconsin Act 151 was requested as remedial legislation by your office, and made "minor substantive changes in the statutes." 1987 Wisconsin Act 151, Law Revision Committee Prefatory Note. The specific problem remedied by section 806.10(1m) was described as follows:

NOTE: Under present s. 814.61(5)(b), a clerk of court is authorized to collect a fee of \$3 for filing and docketing judgments. The statute setting forth the procedure for filing and docketing judgments, s. 806.10, does not reference the filing and docketing fee. Failure to so reference the fee has apparently resulted in confusion and questioning of the clerk's authority to collect the fee.

To prevent future confusion, this bill expressly cross-references s. 806.10 the fee requirement prescribed in s. 814.61(5)(b).

1987 Wisconsin Act 151, section 13, Law Revision Committee Note.

Section 814.61 provides in relevant part as follows:

814.61 Civil actions; fees of the clerk of court. In a civil action, the clerk of court shall collect the fees provided in this section. . . . The clerk shall collect the following fees:

. . . .

(5) JUDGMENTS, WRITS, EXECUTIONS, LIENS, WARRANTS, AWARDS, CERTIFICATES. The clerk shall collect a fee of \$5 for the following:

. . . .

(b) Filing and docketing judgments, transcripts of judgments, liens, warrants and awards, including filing and docketing assignments or satisfactions of judgments, liens or warrants,

Reading sections 806.10(1m) and 814.61(5)(b) together, it is clear that the \$5 fee becomes due and owing at the time of docketing the money judgment. It is also clear that the clerk is authorized and in fact has a duty to collect this fee for the service

of filing and docketing the judgment. Filing the judgment and docketing it, though two separate activities, are to occur at the same time. Secs. 806.10(1) and 806.06(1)(b), Stats.

Although section 806.06(2) provides that the judgment shall be entered by the clerk upon rendition, the word "shall" is not mandatory in the sense that the clerk must enter judgment immediately upon rendition regardless of nonpayment of the statutory fee. It should be noted that sections 806.06(1) and (2) remain unchanged from the adoption of the Rules of Civil Procedure, effective January 1, 1976. It is a well-established rule of statutory construction that where statutes by their terms conflict the later statute prevails over the earlier. *State ex rel. Mitchell v. Superior Court*, 14 Wis. 2d 77, 79, 109 N.W.2d 522 (1961). In addition, the word "shall" can be construed as being directory rather than mandatory if that construction is necessary to carry out legislative intent. *Karow v. Milwaukee County Civil Serv. Comm.*, 82 Wis. 2d 565, 571, 263 N.W.2d 214 (1978).

Subsequent to the adoption of the Rules of Civil Procedure, the Legislature in section 59.42 reenacted in the broadest terms legislation giving the clerk discretion to refuse to perform the services of filing and recording documents until statutory fees are paid. The Legislature is presumed to enact statutory provisions with full knowledge of the existing laws, including the decisions of the supreme court interpreting relevant statutes. *Glinski v. Sheldon*, 88 Wis. 2d 509, 519-20, 276 N.W.2d 815 (1979). Thus the Legislature in reenacting the language of section 59.43, Stats. (1979), in the present section 59.42, is presumed to do so in light of the supreme court's interpretation of that language; *i.e.* that the clerk may refuse to file papers presented to him until appropriate fees are paid. *Hamilton*, 56 Wis. 2d at 681-82.

As pointed out, the Legislature also enacted section 806.10(1m) subsequent to the adoption of the Rules of Civil Procedure, requiring payment of the statutory fee at the time of docketing. In this regard, it is important to note that the adoption of rules regulating practice in the courts of this state is a power shared by

the judicial and legislative branches of government. Court rules regulating such practice are binding on the officers of the court until changed by the supreme court or the Legislature. *Mosing v. Hagen*, 33 Wis. 2d 636, 646-47, 148 N.W.2d 93 (1967).

I am thus led to the conclusion that though section 806.06(2) provides that the clerk shall enter judgment upon rendition, this section simply sets forth the circumstances under which the clerk has authority to enter judgment and does not deprive the clerk of his discretion to collect his statutory fee prior to filing and docketing the judgment.

Further support for this opinion is found in the history of the adoption of the Rules of Civil Procedure. The definitions contained in section 806.06 were designed to bring some precision to the terminology concerning judgments. Section 806.06, Judicial Council Committee's Note, 1974. Harvey, W., Rules of Civil Procedure (West's Wis. Prac. Series 1975) § 6099. Section 806.06(2) replaced section 270.65, Stats. (1973), which provided for the entry of judgment by the clerk where authorized without the direction of the court. This exception allowed the clerk to enter judgment in default actions on a contract for money damages under section 270.62(3), Stats. (1973), and on admitted claims under section 273.63, Stats. (1973). Section 806.06(2) appeared to restrict the authority of the clerk from entering judgment in those circumstances without first having the court sign the judgment or provide a written order authorizing the clerk to sign the judgment. Harvey, W., Rules of Civil Procedure (West's Wis. Prac. Series 1975) § 6100. This power was subsequently restored to the clerk. See section 806.03, Judicial Council Committee's Note, 1976. Thus section 806.06(2) appears to have been designed to define the authority of the clerk to enter judgment, rather than restrict his discretion to require the prepayment of statutory fees for his services.

I must caution you that the clerk's discretion in this regard is not unlimited. *Hamilton*, 56 Wis. 2d at 683. When a judgment is received by the clerk for filing and docketing without the

statutory fee, the clerk may not retain the judgment and fail to perform those services without making the prepayment requirement known to the party submitting the judgment. *Lang v. Menasha Paper Co.*, 119 Wis. 1, 6, 96 N.W. 393 (1903). In that case the court stated:

True, the statute authorized the clerk to "require his fees" for filing such claim "to be paid in advance." Sec. 748, Stats. 1898. But he made no such requirement; and, in the absence of such requirement, his duty was to put his file mark upon the claim and docket the same.

Id., at 6. *See also*, 53 Op. Att'y Gen. 219, 220 (1964). Even in the absence of the receipt of the statutory fee, if the circumstances are such that a person could reasonably believe that he had properly filed a document with the clerk, failure of the clerk to file it would be an abuse of discretion. *Hamilton*, 56 Wis. 2d at 685. In any event, the clerk has a duty to collect the fee if it is not paid at the time the service is rendered. 53 Op. Att'y Gen. at 222. Such an unpaid fee would become a debt collectible in such manner as any other debt created by law. *See*, my discussion at 76 Op. Att'y Gen. 265, 266 (1987), of the clerk's child support distribution fee, collectible pursuant to section 814.61(12)(b). If the clerk retains a document in his custody and still exercises his discretion to refuse to file it without prepayment of the statutory fees, the clerk must make a reasonable effort to notify the party submitting the document for filing so that that party's rights are not arbitrarily prejudiced. *See, Hamilton*, 56 Wis. 2d at 683.

I must also caution you that section 59.42(1) does not confer upon the clerk of circuit court discretion to refuse to file a notice of appeal to the court of appeals when either the docketing fee prescribed by section 809.25(2) or the section 814.61(9) transmittal and postage fees are not paid. *Douglas v. Dewey*, 147 Wis. 2d 328, 341-42, 433 N.W.2d 243 (1989). After filing the notice of appeal, the clerk may refuse to assemble the record for forwarding to the court of appeals and may refuse to forward the

record after it has been assembled until the transmittal fee and postage required by section 814.61(9) have been paid. *Rome v. Betz*, 120 Wis. 2d 528, 530-31, 355 N.W.2d 844 (Ct. App. 1984).

You also express concern that refusal to docket a judgment might subject a clerk to liability under section 806.10(3):

(3) Every clerk who docket a judgment or decree and enters upon the docket a date or time other than that of its actual entry or neglects to docket the same at the proper time shall be liable in treble damages to the party injured.

It is my opinion that where the clerk has refused to file and docket a judgment in the absence of prepayment of the statutory fee, the actual time of entry of judgment, which is the time when the judgment is to be docketed under section 806.10(1), is the time when both the fee and the judgment have been placed in the custody of the clerk. This applies only so long as the clerk has not abused his discretion, as set forth above. The clerk incurs no liability if the time of his possession of both the fee and the judgment is recorded as the time of entry in the judgment docket. If the clerk abuses his discretion, damages are effectively limited inasmuch as "in legal contemplation" the judgment would be entered and docketed when it is presented to the clerk to be filed, even in the absence of prepayment of the fee, where the judgment is retained by the clerk and no payment is required of the person submitting it. *See, Lang*, 119 Wis. at 6; *Hamilton*, 56 Wis. 2d at 685.

The clerk's duty to perform a service in the absence of requiring prepayment of a statutory fee continues the same as though it had been paid in advance. *Williams v. Willock*, 123 Wis. 293, 294, 101 N.W. 927 (1904). The mere improper failure of the clerk to mark the judgment and the papers composing the judgment roll as filed would not prevent such filing from being effectual. *Hart v. Jos. Schlitz B. Co.*, 120 Wis. 553, 556, 98 N.W. 526 (1904).

DJH:DEH

Land; Mineral Rights; Under section 706.057, Stats., owner of the surface of land under which mineral rights have lapsed must record a claim to the lapsed mineral rights in order to foreclose separate mineral rights owner from curing the lapse. OAG 11-90

April 4, 1990

JOHN W. SLABY, *Corporation Counsel*

Price County

You pose the following question: Must the owner of the fee simple interest in the surface of land (surface owner) do anything to acquire the rights to the minerals beneath the surface owner's land when the owner of the lapsed mineral rights, who is not the surface owner, failed to record a statement of claim to or otherwise use the interest in the mineral rights before July 1, 1987?

The answer is that the surface owner should record with the register of deeds a claim to the lapsed mineral rights. (Statutory references in this opinion are to subsections or paragraphs of section 706.057, Stats.)

Subsection (2) specifies what is deemed to be a use of mineral rights. It provides:

[A]n interest in minerals is used if any of the following occur:

- (a) Any minerals are mined in exploitation of the interest in minerals.
- (b) A conveyance of mineral interests is recorded under this chapter.
- (c) Any other conveyance evidencing a transaction by which the interest in minerals is created, aliened, reserved, mortgaged or assigned is recorded under this chapter.
- (d) Property taxes are paid on the interest in minerals by the owner of the interest in minerals.

(e) The owner of the interest in minerals records a statement of claim under sub. (4) or (5) concerning the interest in minerals.

Subsection (3) provides that the separate interest in minerals lapses if such interest was not used during the previous twenty years except that there will not be a lapse if the interest in minerals is used, as defined in subsection (2), during the three year period immediately before July 1, 1987.

Subsection (4) sets forth the requirements for the recording of a statement of claim of the mineral rights.

Subsection (5) provides that the owner of an interest in minerals may cure the lapse provided for in subsection (3) if the owner records a claim pursuant to subsection (4) before the surface owner records a claim under subsection (6)(a) or before a statement of claim takes effect under subsection (6)(b)1., whichever is later.

Paragraph (6)(a) provides that the surface owner may record a statement of claim to the lapsed interest in mineral rights at any time. Subparagraph (6)(b)1. provides that a surface owner's claim, recorded before the lapse of the separate claim of mineral rights, takes effect when the interest in mineral rights lapses, except that under subparagraph (6)(b)2., a surface owner's claim to the mineral rights recorded before the lapse of the mineral rights is void six years after the statement of claim is recorded if the interest in mineral rights does not lapse during that six year period.

From the discussion above, we see that if the owner of the interest in minerals did not use them, as defined in subsection (2), for a period of twenty years prior to July 1, 1984, and failed to use the mineral rights or record a statement of claim prior to July 1, 1987, the separate interest in the minerals automatically lapses by virtue of subsection (3). Nevertheless, under subsection (5), a separate mineral rights owner can cure the lapse by recording a claim to the minerals pursuant to subsection (4) if the

recording is accomplished before the surface owner records a claim pursuant to subsection (6).

Conversely, under subsection (6), if a surface records a claim to the lapsed mineral rights before the separate mineral rights owner records, the surface owner can effectively cut off the mineral rights owner's right to cure the lapsed interest in minerals (except that under subparagraph (6)(b)2. the surface owner's recorded claim is void if the separate ownership in minerals does not lapse within six years after the recording of the surface owner's claim.)

The obvious intent of section 706.057 is to lapse the ownership rights of the separate mineral rights owners who have failed to exercise those rights for twenty years and to merge the lapsed mineral rights with the surface fee owners' rights. The United States Supreme Court held in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), that states constitutionally can impose on property owners reasonable requirements which indicate an intention to retain property rights and that the requirements can be retroactive. The Court upheld an Indiana law that lapsed ownership rights because of lack of use, similar to the law under consideration here, if the law provided for the adequate giving of notice to afford affected owners an opportunity to assert neglected ownership rights.

In enacting section 706.057, the Legislature determined that ownership of lapsed mineral rights would go to whichever of the owners record their claim first. Thus, in my opinion, surface owners would be well advised to record their claims to lapsed mineral rights in order to foreclose the right of separate mineral right owners to cure the lapse. It follows also that a separate mineral rights owner whose claim has lapsed should record the claim to cure the lapse if the surface owner has not already recorded a claim to the mineral rights.

DJH:WHW

Constitutional Law; Municipalities; Property; Taxation;
Municipal service fees on tax-exempt property may violate the uniformity and equal protection clauses of the Wisconsin Constitution. OAG 12-90

April 4, 1990

MARK D. BUGHER, *Secretary*
Department of Revenue

You have requested my opinion as to the constitutionality of a pending legislative proposal authorizing municipalities to impose service fees on certain categories of property exempt from general property taxes. To summarize the essential features of the proposed legislation, municipalities would have the discretion to impose these four classes of fees upon all classes of tax exempt property except those enumerated in the statute. The fee would be based on the value of the services that are provided to the property in question. You point out that Governor Thompson vetoed a similar proposal in the last executive budget bill. Pursuant to the Governor's veto message, your department prepared a report, entitled "Fee on Exempt Property for Municipal Services," studying the fee concept. The Legislature's joint survey committee on tax exemptions has also prepared a report in connection with 1989 Assembly Bill 39, the current embodiment of the municipal service fee concept.¹

Both your department's report and the joint survey committee's report raise questions about the proposal's compliance with article VIII, section 1 of the Wisconsin Constitution (the "Uniformity Clause"). In addition, your department's report raises concerns

¹Actually, 1989 A.B. 39 has been supplanted by Assembly Substitute Amendment 2 to 1989 A.B. 39 (the "Assembly Bill").

regarding the proposal's constitutionality under equal protection principles.²

CONSTITUTIONAL CONCERNS

You have identified three features of the proposed legislation which raise constitutional doubts:

- 1) the fee would be imposed on exempt property only, and exclude taxable property, suggesting that the fee or service charge is actually a tax, and as a tax it is in violation of the uniformity clause;
- 2) municipalities could elect to impose the fee, and it would not have to be imposed on all categories of exempt property, suggesting a denial of equal protection; and
- 3) the fee as implemented would reflect costs of some services such as fire and police protection which do not benefit the exempt property directly and exclusively, further suggesting that the fee is actually a tax.

I am concerned, as are you, about the possibility that the courts would find the proposed service fee to constitute a property tax notwithstanding a contrary characterization in the act itself. I also am concerned that the courts would find a uniformity clause problem. Moreover, it is quite possible that they would find an equal protection problem based on the classifications created in the statute and, where not created in the statute, invited to be made by participating municipalities. I will discuss both issues.

RULES OF CONSTRUCTION

It should be understood that any challenger would be faced with the presumption of constitutionality which all legislative enactments enjoy. *State ex rel. La Follette v. Torphy*, 85 Wis. 2d 94, 100, 270 N.W.2d 187 (1978). In the area of taxation, the

²These documents will be part of the Assembly Bill's legislative history, and, thus, scrutinized by the courts if called upon to review the proposal, should the proposal be enacted into law.

Legislature has wide discretion in making classifications. It is presumed that such classifications are reasonable and proper. Disparate treatment of certain classes of taxpayers is permissible if there is a reasonable basis for that treatment. *State ex rel. La Follette*, 85 Wis. 2d at 100. If there is any reasonable basis upon which legislation may constitutionally rest, the courts will assume that the Legislature had such facts in mind when it passed the act. *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46-47, 205 N.W.2d 784 (1973).

UNIFORMITY CLAUSE ISSUES

You are concerned that the proposed municipal service fee would be construed as a property tax--because it would be imposed on tax-exempt property only and because it would reflect the cost of some services which cannot benefit the exempt property directly and exclusively--and thus be deemed to run afoul of the uniformity clause.

Article VIII, section 1 of the Wisconsin Constitution (the Uniformity Clause) provides: "The rule of taxation shall be uniform" Under the rule of uniformity, for the direct taxation of property there can be but one constitutional class. All property within that class must be taxed on an equal basis, so far as practicable, and all property tax must bear its burden equally and on an *ad valorem* basis. Any property not included in that class must be absolutely exempt from the property tax. *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 424, 147 N.W.2d 633 (1967).

The Uniformity Clause only applies to property taxes. *Jordan v. Menomonee Falls*, 28 Wis. 2d 608, 622, 137 N.W.2d 442 (1965); *accord Barnes v. West Allis*, 275 Wis. 31, 37, 81 N.W.2d 75 (1957) (an excise tax is not subject to the Uniformity Clause); *Plymouth v. Elsner*, 28 Wis. 2d 102, 108, 135 N.W.2d 799 (1965).

It is the effect of a statute, not its form, which determines whether or not the statute is a tax statute subject to uniformity. *State ex rel. La Follette*, 85 Wis. 2d at 108. Thus, the fact that the Legislature refers to the exaction as a fee is not dispositive.

If the fee in question is determined to be a property tax, it may well run afoul of the rule of uniformity. If, however, the fee is a special assessment, it is not subject to the uniformity clause, and the statute could be upheld. With this in mind, I examine whether the fee created by proposed section 70.118 is a property tax or a special assessment.

The definition of a tax is a simple one. Taxes are "the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs." *State ex rel. La Follette*, 85 Wis. 2d at 108. In determining whether or not a statute created a property tax, the court in *State ex rel. La Follette* considered whether or not the operative provisions of the statute were keyed to characteristics of particular property or of the taxpayer; the Legislature's characterization of the exaction and whether administration of the statute in question was part of the property taxing process. *State ex rel. La Follette*, 85 Wis. 2d at 104.

With respect to the first factor, the proposed legislation is keyed to the characteristics of property, not of the taxpayer. The fee is imposed "on . . . property exempted from taxation." Section 1 of Assembly Substitute Amendment 2, 1989 A.B. 39, sec. 70.118(1)(a), Stats. From this perspective, the fee resembles a property tax. However, consideration of the other two factors militates against the finding that this is a property tax. The Legislature does not consider it a tax, but rather has characterized it as a fee. Moreover, in no way is the administration of the municipal service fee a part of the property taxing process. Unfortunately, certain other factors of the proposed legislation point toward its characterization as a tax, and not a fee.

It seems obvious that the municipal service fee is deemed by the Legislature to be a substitute for the general property tax for certain classes of now tax-exempt property. With respect to the classes of services mentioned in the bill, *e.g.*, police and fire protection and garbage collection and disposal, owners of taxable property pay for these municipal services through the property

tax. The effect of the municipal service fee proposal would be that certain owners of tax-exempt property, who receive the same municipal services as taxable property owners, would pay for some of those in the form of a "fee," instead of a tax. Owners of tax-exempt property subject to the municipal service fee would, then, in effect enjoy only a partial tax exemption, a violation of the Uniformity Clause.

In *State ex rel. La Follette*, the court struck down a statute providing property tax credits for certain improvements. The court stated: "The fact that a rebate credit is paid to certain property owners and not to others leads to the indisputable conclusion that taxpayers owning equally valuable property will ultimately be paying disproportionate amounts of real estate taxes. This is not uniformity." *State ex rel. La Follette*, 85 Wis. 2d at 108. The same could be said about the municipal service "fee." Taxpayers owning equally valuable property would be paying disproportionate amounts of real estate taxes depending upon whether they were also subject to the municipal service fee. The courts could find that the municipal service fee is in fact a disguised property tax exacted, not a bona fide way of recouping the costs of providing municipal services.³

The municipal service fee is not a special assessment within the traditional meaning of that term. The special assessment process is a system of special taxation for municipal improvements based upon "supposed special benefits" to particular property. *Weeks v. The City of Milwaukee and others*, 10 Wis. 186 [*242], 203 [*260] (1860). The municipal service

³If it were, why are the owners of taxable property exempt, in effect, from the municipal service fee?

fee may be used for street construction. Section 1 of Assembly Substitute Amendment 2, 1989 A.B. 39, sec. 70.118(2)(c), Stats. But that is the only improvement subject to the fee. The rest of the uses are for ongoing municipal services. For this reason, I do not believe that a municipal service fee would be considered a special assessment within the constitutional rule of *Weeks*, exempting special assessments from the uniformity clause.

Significantly, the statutes already contain authorization for municipalities to impose special assessments. Sec. 66.60(1)(a), Stats. Such assessments are for "special benefits conferred upon . . . property by any municipal work or improvement." It certainly would seem that the Legislature does not consider municipal service fees to be special assessments. If it did, it presumably would have called them special assessments and, perhaps, placed them in section 66.60 and within a number of other statutes relating to the imposition and enforcement of special assessments.

In *De Pere v. Public Service Comm.*, 266 Wis. 319, 326–27, 63 N.W.2d 764 (1954), the court held that a municipal charge for the water utility was not a special assessment because, among other reasons, it was not imposed under the assessment statute.⁴ Thus, it is highly significant that the Legislature has not created the municipal service fee as a special assessment. Other factors militate against the courts' finding that the municipal service fee is a special assessment. Special assessments are for "property in a limited and determinable area." Sec. 66.60(1)(a), Stats. For an assessment to be a valid special assessment, it must provide "tangible" benefits to specific property. *Plymouth*, 28 Wis. 2d at 108–09. Property subject to the assessment must derive special benefits. *Grace Episcopal v. Madison*, 129 Wis. 2d 331, 337, 385

⁴The court was also influenced by the fact that the municipal charge did not become a lien on the property. *De Pere*, 266 Wis. at 326–27. Like the charge in *De Pere*, there is no provision for the municipal service fee imposed by the proposed legislation to become a lien upon any property.

N.W.2d 200 (Ct. App. 1986). The court of appeals has stated that a special benefit means an "uncommon advantage." *Matter of: Goodger v. City of Delavan*, 134 Wis. 2d 348, 352, 396 N.W.2d 778 (Ct. App. 1986). Such an uncommon advantage is in addition to that benefit enjoyed by other property owners in the municipality. *Matter of: Goodger*, 134 Wis. 2d at 352. The court relied on *Petkus v. State Highway Comm.*, 24 Wis. 2d 643, 648, 130 N.W.2d 253 (1964), which stated that: "Special benefits are distinguished from general benefits in that they differ in kind rather than in degree from those which accrue to the public generally." (Emphasis added.)

It has been stated generally that all property benefiting from a particular municipal improvement must be subject to the special assessment. 14 McQuillan *Municipal Corporations* § 38.05 (3d ed. 1987). All property within a municipality is benefited by, for example, police and fire protection. Yet, under the proposed legislation, only certain classes of tax-exempt property would be subject to the assessment. This would seem to violate the just-stated rule of law and militates against a finding that the municipal service fee is a special assessment.

In *Barber v. Commissioner of Revenue*, 674 S.W.2d 18, 21 (Ky. Ct. App. 1984), the court invalidated a "service charge" for fire protection. The court held that the charge was not a special assessment because there was no improvement; rather, the services provided were recurring. The court also concluded that the costs of the service should be shared "equally and equitably by all in the community who own property." Since the charge was not imposed on everyone, the court found the charge inequitable.⁵

⁵The precedential value of this case is limited by the fact that the service charge at issue was found to have no statutory authority. The municipal service fee proposed for Wisconsin, obviously, is a legislative initiative.

In *Emerson College v. City of Boston*, 391 Mass. 415, 462 N.E.2d 1098, 1107 (1984), the city of Boston's charge for "augmented fire service availability" was struck down as not resembling "any constitutionally permissible form of monetary exaction." The court was highly critical of the fee because services provided benefited property other than that which was subject to the fee. *Emerson College*, 462 N.E.2d at 1106. This case, like the Kentucky case, would be authority against the permissibility of the municipal service fee.

There is contrary authority on this issue. In *Charlotte County v. Fiske*, 350 So. 2d 578, 580 (Fla. Dist. Ct. App. 1977), the court analogized a fee for residential garbage pickup as a special assessment. The court defined "improvement" as including the "furnishing of or making available a vital service, e.g., fire protection or . . . garbage disposal." In defense of the municipal service fee proposal, one would, then, argue that the fee is in the nature of a special assessment and urge the broad definition of special assessment upon the court.

With all of this in mind, in my opinion, the courts would almost certainly hold that the property subject to the municipal service fee is not specially benefited and does not receive an uncommon advantage by reason of the services provided. After all, police and fire protection, etc., are services provided to all property within the municipality, not just those "assessed." There is no benefit to tax exempt property that is not already enjoyed by other property owners in the municipality. Nor do the services provided differ in kind (even if for the purpose of argument, they were deemed to differ in degree) from the services provided to the public generally. The municipal service fee, thus, does not resemble special assessments in this important respect.

The courts very likely would find that general, rather than special, benefits are provided by the municipalities with respect to the services for which the municipal service fees may be imposed. General improvements confer "substantially equal benefit and advantage" on the property of the whole community

or benefits to the public at large. Local (or special) improvements are made primarily for the accommodation and convenience of "inhabitants of a particular area" whose property receives a special benefit. With respect to general benefits or improvements, the costs must comply with the rule of uniformity. Special benefits or improvements may be financed with assessments "in proportion to the benefits conferred." *Duncan Develop. Corp. v. Crestview San. Dist.*, 22 Wis. 2d 258, 264, 125 N.W.2d 617 (1964). The municipal service fee, being an exaction to pay for municipal services generally available to the public at large, more closely resembles a tax than a special assessment and therefore could be deemed to require compliance with the uniformity clause.

In summary, the municipal service fee proposal is a novel one, shifting to some degree the cost of certain traditional municipal services provided to all property from the general property taxpayer to the tax-exempt property owner. This would result in a situation whereunder certain property owners pay for the services by one method, the property tax, and other property owners pay for the services in another way, the municipal service fee. This raises a serious Uniformity Clause question.

EQUAL PROTECTION PROBLEMS

Perhaps even more serious than the Uniformity Clause issue is the issue of whether or not the municipal service fee proposal would violate the equal protection requirements of the state and federal constitutions. On this point, I believe that there is a greater possibility that the courts would invalidate the proposal than on uniformity grounds.

As noted at the outset of this opinion, all statutory classifications are subject to equal protection principles. Classifications must be based upon substantial distinctions which make one class really different from another. *See State ex rel. La Follette*, 85 Wis. 2d at 99. The municipal service fee proposal would create at least four classes of property owners: (1) the general property taxpayer whose municipal services are financed

in that fashion; (2) the tax-exempt property owner who would be asked to pay for certain municipal services through the municipal service fee, as opposed to the property tax; (3) the tax-exempt property owner who would continue not to be asked to finance any municipal services, e.g., churches and other religious associations; and (4) the group of tax-exempt property owners who are asked to pay for some but not all of the municipal service fees imposed pursuant to the proposed legislation.

The statute offers no standards or other guidance to municipalities in determining which services would be financed by the municipal service fee or by whom. It also offers no standards or other guidance to suggest under what circumstances it is appropriate to finance a certain service by the property tax versus the municipal service fee. For these reasons, the classifications seem suspect.

In *Rubin v. City of Wauwatosa*, 116 Wis. 2d 305, 342 N.W.2d 451 (Ct. App. 1983), the court considered an equal protection challenge to the city of Wauwatosa's fee for collecting residential refuse. The court upheld the fee finding a substantial basis for distinguishing between commercial and residential garbage. *Rubin*, 116 Wis. 2d at 320-21. It is harder to imagine a basis for distinguishing between those property owners who would finance certain municipal services via the general property tax from those who would finance certain municipal services via the municipal service fee. The only proposed statutory basis for such a distinction is that the Legislature has already determined that certain property should be tax exempt. It is also difficult to conceive of a rational basis upon which to determine that certain services will continue to be provided free of charge to tax-exempt property owners while other services will not. These classifications affect the taxable property owner as well as the tax-exempt property owner in that the total burden of financing certain municipal services will be reallocated.

CONCLUSION

The municipal service fee proposal likely would be found by the courts to violate the uniformity and equal protection clauses of the Wisconsin Constitution.

DJH:ESM

Drunk Driving; Prisons And Prisoners; Sheriffs; A repeat OWI offender serving the mandatory term of imprisonment may be confined in a rehabilitation facility if that facility is a "locked" facility under the control and direct authority of the county sheriff and, at a minimum, that facility must satisfy all other characteristics for a jail set forth in the Wisconsin Administrative Code. OAG 13-90

April 19, 1990

CAL W. KORNSTEDT, *Corporation Counsel*
Dane County

You have requested my opinion on several issues relating to the authority of a circuit court judge to sentence a repeat offender of our intoxicated driver law (operating while intoxicated, hereinafter "OWI") to a rehabilitation facility created under section 59.07(76), Stats., in lieu of part or all of the mandatory imprisonment required by section 346.65(2)(b) and (c). Your request is apparently prompted by the desire of your county board to create a rehabilitation facility, coupled with its concern that such a facility might not be available for the sentencing of repeat OWI offenders. Paraphrasing your questions, you ask:

1. Can a repeat OWI offender be sentenced to a rehabilitation facility created under section 59.07(76) in satisfaction of the mandatory imprisonment required by section 346.65(2)(b) and (c)?
2. If a repeat OWI offender can be sentenced to a rehabilitation facility, must such a rehabilitation facility be a "locked" facility in the sense that inmates would be prevented from leaving the facility by virtue of physical barriers and locks on all of the doors?
3. If a repeat OWI offender can be sentenced to a rehabilitation facility, must such a rehabilitation facility be under the control and direct authority of the county sheriff or a superintendent appointed for the rehabilitation facility?

4. If a repeat OWI offender can be sentenced to a rehabilitation facility, and if such a rehabilitation facility must be under the control and direct authority of the county sheriff or a superintendent appointed for the rehabilitation facility, may the rehabilitation facility be "staffed" or run on a day-to-day basis by "counselors" or other non-law enforcement personnel with the county sheriff, the superintendent, or their designee "on call" and available for immediate contact should any need arise?

In my opinion, the present statutes require a repeat OWI offender to be imprisoned in an institution which "confines" that individual. The requisites of the confinement are required whether an institution is called a jail or a rehabilitation facility. Because the term rehabilitation facility is statutorily undefined, but appears to have been equated with the term jail within certain statutes, I believe a trial court may sentence a repeat OWI offender to a rehabilitation facility. However, your three remaining questions suggest that the rehabilitation facility envisioned for use by your county board would not adequately "confine" repeat OWI offenders. Consequently, in my opinion, the answers to those three remaining questions are of utmost significance. Those answers establish the minimum characteristics of the "confinement" required for repeat OWI offenders.¹

Before addressing your particular questions, I find it useful to consider both the statutory scheme within which "confinement"

¹The above circumstances must be distinguished from the situation where a convicted repeat OWI offender may be transported for daytime rehabilitative treatment to a rehabilitation center. In my opinion, a rehabilitation facility lacking in the characteristics of "confinement" would be available for such daytime treatment. The "confinement" referred to in this opinion only contemplates offenders being "locked in at night." See *State v. Pettis*, 149 Wis. 2d 207, 211, 441 N.W.2d 247 (Ct. App. 1989). However, I do not believe that your inquiry contemplates a rehabilitation facility limited to daytime treatment only.

is required, as well as certain judicial decisions defining the parameters of such confinement, for repeat OWI offenders.

Section 346.65(2)(b) and (c) sets forth the penalties for repeat OWI violations:

(b) Shall be fined . . . and imprisoned not less than 5 days nor more than 6 months . . . where the offense involved the use of a vehicle, equals 2 in a 5-year period

(c) Shall be fined . . . and imprisoned for not less than 30 days nor more than one year in the county jail . . . where the offense involved the use of a vehicle, equals 3 or more in a 5-year period

Both of the preceding statutory subsections clearly require that the offender "shall be imprisoned" for specified periods of time.

The unique nature of this mandatory "imprisonment" provision has long been noted. See *State v. Duffy*, 54 Wis. 2d 61, 65, 194 N.W.2d 624 (1972); accord *State v. Meddaugh*, 148 Wis. 2d 204, 208, 435 N.W.2d 269 (Ct. App. 1988); *State v. McKenzie*, 139 Wis. 2d 171, 176-77, 407 N.W.2d 274 (Ct. App. 1987). In *Duffy*, the defendant objected to the imposition of a mandatory jail sentence upon his conviction for driving after revocation or suspension. His first claim was that the penalty provisions of section 343.44, although cast in terms of "shall be imprisoned," still allowed for a stay of sentence and imposition of probation. The Wisconsin Supreme Court held that while most penal statutes in Wisconsin allow for a sentencing judge to impose and stay sentence in favor of probation, section 343.44, with its unambiguous mandatory language, did not give a trial judge this alternative:

Most of the penal statutes of this state grant the trial court discretion to either impose a sentence of imprisonment within prescribed statutory limitations or to impose a period of probation pursuant to the provisions of sec. 973.09, Stats. This authority is generally indicated by the language "may be imprisoned," which precedes the limitation on the period

of imprisonment in the particular provision. The legislature has enacted but few statutory provisions comparable to the one in the instant case, which expressly provide that a person convicted thereunder "shall be imprisoned." If probation were to be available in either case, the legislature would have no purpose in employing the word "may" in some cases and the word "shall" in others.

Duffy, 54 Wis. 2d at 64-65 (footnote omitted). *Accord Meddaugh*, 148 Wis. 2d at 208-09.² Consequently, *Duffy* long ago established that, when the Legislature provides for mandatory imprisonment, it takes away from trial judges a significant part of the discretion that normally attends the sentencing process. *See also Prue v. State*, 63 Wis. 2d 109, 216 N.W.2d 43 (1974).

The mandatory nature of the imprisonment requirement has also been the focus of several recent decisions reviewing alternative dispositions by trial courts. *E.g.*, *Meddaugh*, 148 Wis. 2d 204; *accord State v. Pettis*, 149 Wis. 2d 207, 441 N.W.2d 247 (Ct. App. 1989); *State v. Cobb*, 135 Wis. 2d 181, 400 N.W.2d 9 (Ct. App. 1986). Faced with the mandatory language, trial courts have attempted various dispositions to both facilitate rehabilitation and to obviate the overcrowding of jails with repeat OWI offenders. However, the trial courts have been severely limited in their efforts. *Id.*

In *Meddaugh*, a case involving a repeat OWI offender, the court of appeals rejected a claim that time spent in a county jail (during non-working hours), as a condition of probation, could be considered "imprisonment" within the meaning of section

²In *McKenzie*, 139 Wis. 2d at 175-76, the court of appeals considered the reverse situation--whether the trial court erred in *not* considering probation in a motor vehicle offense where the statute provided that one convicted of the offense *may be "imprisoned not less than 30 days nor more than one year"* (emphasis in original). The court of appeals held that because imprisonment was *not* mandatory, the trial court erred as a matter of law when it concluded that probation was not available.

346.65(2)(c). *Meddaugh*, 148 Wis. 2d 204. The court concluded that the trial court lacked the authority to withhold or stay the sentence of a repeat OWI offender and instead place such an offender on probation. *Meddaugh*, 148 Wis. 2d at 207. So concluding, the court considered the meaning of the term "imprisoned":

We agree that one of Webster's definitions of the term "imprison" is "to put in prison: confine in a jail." And while it may be true that the word is often used in a broad, general sense, "imprison" is also a legal term and, as such, "should be given its legal meaning when used in the statutes and the law unless there are strong indications the term was used in a general sense." . . .

. . . .

When it provided for "imprisonment" of persons convicted of multiple drunk driving offenses in sec. 346.65(2)(c), Stats., the legislature gave no indication that it intended that word as meaning anything other than its accepted legal definition--incarceration pursuant to the imposition of a sentence.

Meddaugh, 148 Wis. 2d at 209-10 (citations omitted). I wish to add, however, that although constrained by the relevant statute and previous case law, the three-member panel all expressed their dissatisfaction with the result. *Meddaugh*, 148 Wis. 2d at 211, 214-18.

Two other recent decisions of the court of appeals, although not involving repeat OWI offenders, are relevant to your inquiry. *Pettis*, 149 Wis. 2d 207; *Cobb*, 135 Wis. 2d 181. Both involved the review of innovative dispositions by the trial courts. In *Pettis*, the court of appeals concluded that a defendant who was required to remain in his home as a condition of meeting his cash bond was not entitled to sentence credit for time spent under home detention. In *Cobb*, the court concluded that a defendant was not entitled to sentence credit for time spent in a drug treatment facility as a condition of probation because he was not in custody

within the meaning of section 973.155(1)(a) while at the facility.³ In both instances, the rationale employed by the court of appeals involved the determination of whether the time at issue could be measured under the escape statute--section 946.42.

While the sentence credit statute, and the two decisions, refer to the term "custody," that term, in my opinion, is interchangeable with "imprisoned" for the purpose of your inquiry. In *Cobb*, the court equated the terms "custody," "confined" and "locked-in," and further noted that all involved a limitation by "either imprisonment or physical detention." *Cobb*, 135 Wis. 2d at 184-85. Further, in an earlier decision, the Wisconsin Supreme Court recognized the following dictionary definitions of custody:

Webster's Third New International Dictionary (1966) at 559, defines "custody" as: "guarding, keeping . . . 2: judicial or penal safekeeping: control of a thing or person with such actual or constructive possession as fulfills the purpose of the law or duty requiring it: imprisonment or durance [restraint by or as if by physical force: confinement, imprisonment . . .] of persons . . ." The Random House Dictionary of the English language (1966) at 357, defines

³In *Cobb*, the court held that the defendant was not in custody because he was not physically detained. *Cobb*, 135 Wis. 2d at 185. The holding is of further interest since placement at the drug treatment center was a condition of probation, leaving the premises could be grounds for revocation. By equating custody with physical detention, the court implicitly rejected the theory that restrictions on movement constitute custody simply because negative consequences can result from failure to obey the restrictions.

In *Cobb* the court also adopted the Wisconsin Criminal Jury Instructions Committee's definition of custody. *Cobb*, 135 Wis. 2d at 183. In relying on the reasoning of the Wisconsin Criminal Jury Instructions Committee, the court of appeals acted in accord with the approach of the Wisconsin Supreme Court in *State v. Gilbert*, 115 Wis. 2d 371, 340 N.W.2d 511 (1983).

"custody" as: "2. the keeping or charge of officers of the law . . . 3. imprisonment; legal restraint."

State v. Gilbert, 115 Wis. 2d 371, 378, 340 N.W.2d 511 (1983).⁴

Having set forth the preliminary background necessary to render the opinion, I now turn to the analysis of your specific questions.

Your first question requires me to address the availability of a proposed rehabilitation facility for the disposition of repeat OWI offenders. As you correctly note, certain statutory provisions seem to suggest that a county jail and a rehabilitation facility may be equated for purpose of mandatory imprisonment. For example, section 53.30 states that a "jail" includes . . . rehabilitation facilities" for certain purposes in chapter 53. Similarly, section 59.07(76) provides that a rehabilitation facility may serve as an "extension of the jail" and may be used "to provide any person sentenced to the county jail with a program of rehabilitation for such part of the person's sentence or commitment as the court determines will be of rehabilitative value to the prisoner." Likewise, section 59.68(1) refers to a rehabilitation facility as an extension of the jail and section 53.36(1), again speaking of extension of the jail, refers to cells as being part of the rehabilitation facility. However, as you also correctly note, the real question is whether those provisions, and in particular section 59.07(76), are in any manner "limited in [their] application by other statutory provisions, in particular the provisions in sec. 346.65(2)(b) and (c) which require a mandatory

⁴Earlier, in *State v. Schaller*, 70 Wis. 2d 107, 233 N.W.2d 416 (1975), the Wisconsin Supreme Court held that a probationer confined in the county jail as a condition of probation could be charged and convicted of escape if he escaped from the confines of the jail, but he could not be so charged and convicted if he failed to timely return to the jail after being released for a few hours for a legitimate purpose. *Schaller*, 70 Wis. 2d at 109, 113-14. The court refused to view the defendant as being in "constructive custody" during his release.

term of imprisonment for OWI repeat offenders." In my opinion, the limits expressed by the Wisconsin appellate courts in all the preceding decisions are applicable to any facility to be used for the disposition of repeat OWI offenders. Consequently, while any such facility may be called a rehabilitation facility, one must look at its characteristics rather than its name. In other words, any institution housing repeat OWI offenders must satisfy certain requisite characteristics of "confinement."

The previous observations now lead to my response to your most significant inquiries in questions two, three and four—the parameters required of any institution intended to "imprison" repeat OWI offenders. The following parameters would be applicable whether the institution would be designated a jail or a rehabilitation facility. These responses establish the minimum characteristics of the "imprisonment" required for repeat OWI offenders.

In question two you ask, if a repeat OWI offender can be sentenced to a rehabilitation facility, must such a rehabilitation facility be a "locked" facility in the sense that inmates would be prevented from leaving the facility by virtue of physical barriers and door locks. In my opinion, physical barriers and door locks are necessary requisites for any institution to be utilized for the "imprisonment" of repeat OWI offenders. The Wisconsin appellate courts have consistently held that confinement requires an inmate to be "locked in at night." See *Pettis*, 149 Wis. 2d at 211–12; *Cobb*, 135 Wis. 2d at 182.

My review of the relevant statutes validates the preceding response. Wisconsin trial courts must sentence a repeat OWI offender to the county jail.⁵ Section 46.17 mandates the

⁵Subsection (c) of section 346.65 expressly provides that third offense repeat OWI offenders shall be imprisoned "in the county jail." Subsection (b) of section 346.65 does not specify a place of imprisonment. However, section 973.02 provides that when a statute is silent on the place of imprisonment "a sentence of less than

(continued...)

Wisconsin Department of Health and Social Services, Division of Corrections, now the Department of Corrections ("Department"), to "fix reasonable standards" for several types of facilities including jails, extensions of jails, Huber facilities⁶ and rehabilitation facilities. The characteristics of a jail (or the extension of a jail), including the requirements of physical barriers and locks, have been set by the Department. *See* Wis. Admin. Code § HSS 350 (1990). Likewise, the characteristics of a Huber facility, including the requirement of a lock, but only to prevent unauthorized entry, have been set by the Department. *See* Wis. Admin. Code § HSS 348.05(8) (1987). However, the Department has not similarly created a rule for the standards required for a rehabilitation facility. In the absence of such a rule, I am required to determine which of the existing rules (for jails or Huber facilities) might be more appropriate. For all of the reasons previously set forth in this opinion, in particular the statutory equivalence of jails and rehabilitation facilities, I believe the characteristics of a jail must apply to a rehabilitation facility. Consequently, physical barriers and locks should be in compliance with the requirements for a jail as set forth in the Wisconsin Administrative Code. *See* Wis. Admin. Code § HSS 350 (1990).⁷

⁵(...continued)

one year shall be to the county jail." The section applies to violations of subsection (b), because no term of imprisonment for such violations may exceed six months. In effect, violators of either subsection must be imprisoned in the "county jail."

⁶Section 56.08, commonly known as the "Huber Law," permits several types of offenders, including repeat OWI offenders, sentenced to a county jail to be "granted the privilege of leaving the jail during necessary and reasonable hours" for specified purposes. The ability to permit such offenders to serve in a "Huber facility," where such a facility exists pursuant to section 56.09, is not granted to the Wisconsin trial courts, but only to the county sheriffs. Sec. 56.08(1) and (2m), Stats.

⁷I urge the Department to create rules governing rehabilitation facilities to clarify the requirements of such a facility. Dane County, and any other county contemplating a rehabilitation facility, must obtain approval of the Department.

In question three you ask, if a repeat OWI offender can be sentenced to a rehabilitation facility, must such a rehabilitation facility be under the control and direct authority of the county sheriff or a superintendent appointed for the rehabilitation facility. In my opinion, any facility confining repeat OWI offenders must be under the control and direct authority of the county sheriff. Section 59.23(1) 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." See also *Professional Police Ass'n v. Dane County*, 106 Wis. 2d 303, 310, 316 N.W.2d 656 (1982); *State ex rel. Kennedy v. Brunst*, 26 Wis. 412 (1870). Consequently, either the county sheriff or an appointed deputy must be responsible for the administration of any facility housing repeat OWI offenders. Recently, while opining that neither the sheriff nor the county board may "privatize" the jailer function of the office of sheriff under section 59.23(1), I reaffirmed the importance of this historic function remaining with the sheriff:

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."

77 Op. Att'y Gen. 94 (1988).⁸

Your fourth question inquires regarding the possibility of staffing a facility on a day-to-day basis by "counselors" with the county sheriff, a superintendent or the designee "on call" and available for immediate contact should any need arise. My previous response to question three demonstrates that I believe that the important function of operating such a facility may not be delegated to "counselors" on a day-to-day basis.⁹ As I have previously stated, section 59.23(1) is very explicit in directing that the jail and prisoners must be kept by the sheriff "himself personally, or by his deputy or jailer." Moreover, section 53.42, providing that "[t]here shall be a keeper or custodian or attendant present at every jail while there is a prisoner therein," also contemplates control on a day-to-day basis by the sheriff and his or her deputies. Finally, in my opinion, persons duly qualified as "jail officers," as authorized by section 165.85(2)(bn), must supervise, control or maintain the facility on a day-to-day basis.
DJH:JSS

⁸My opinion is not inconsistent with the language of section 59.07(76), which provides a county the alternative of establishing a rehabilitation facility under the exclusive control of a superintendent. A county may choose to operate part or all of a rehabilitation facility that does not provide for overnight confinement. See n.1. Individuals from either a separate Huber facility or on probation could use such a rehabilitation facility without the requirement that the sheriff be in control. In effect, this would be no different than permitting these individuals to regularly obtain medical treatment at a facility not under the control of a sheriff.

⁹Again, I am only referring to an overnight rehabilitation facility. I do not suggest that a county sheriff should be given ultimate control of the daytime rehabilitation program offered to repeat OWI offenders.

Counties; Public Works; A county has no statutory authority to award contracts only to unionized contractors. Federal preemption rules probably foreclose the exercise of such authority in any event. Further, federal preemption rules foreclose denying contracts to employers engaged in labor disputes. OAG 14-90

April 24, 1990

CAL W. KORNSTEDT, *Corporation Counsel*

Dane County

You have asked for my opinion as to whether a county may award public works contracts for \$20,000 or less only to companies employing union labor and only to companies which are not involved in labor disputes.

As worded, the question contains ambiguities. Even a nonunion employer can have in its employ some who are union members, and the phrase "labor dispute" can include even the simplest grievance pending before an arbitrator. To avoid this ambiguity, therefore, I will construe your question to be whether a county can award public works contracts only to companies which have recognized a labor organization as the representative of its employes in an appropriate collective bargaining unit, commonly referred to as a unionized employer, and only to employers that are not engaged in a strike or lockout because of a dispute with such a labor organization.

In my opinion a county cannot deny contracts to employers engaged in labor disputes. Virtually this same question was decided by the United States Supreme Court in *Golden State Transit v. City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*). There, a city conditioned an employer's franchise renewal on settlement of a labor dispute. The Court held that the city's action was preempted by the National Labor Relations Act (NLRA), 29 U.S.C. § 151, *et seq.*, under the principle that forbids state and local government from "intrud[ing] into the collective bargaining process." 475 U.S. at 619. Even the governmental interest in ensuring "uninterrupted service to the public" does not

permit limiting strike activity made permissible under the NLRA. *Id.* at 618. Conversely, a governmental unit may not restrict an employer's ability to resist a strike. *Id.*

Under this holding, therefore, it matters not whether the county wishes to help the employer, help the union or help the public. The dispositive fact is that Congress has declared certain aspects of the collective bargaining process to be beyond the control of state and local government. In a sequel to *Golden State I*, the Supreme Court held that a city is liable for the attorney's fees of a party that successfully sues the city for intruding into the collective bargaining process contrary to the NLRA preemption rules. The NLRA preemption rules create an "interest in being free of governmental regulation[,] . . . a right specifically conferred on employers and employees by the NLRA." *Golden State Transit Corp. v. City of Los Angeles*, ___ U.S. ___, 110 S. Ct. 444, 452 (1989) (*Golden State II*; footnote omitted).

Your second question, whether a county can favor unionized employers in the award of contracts, also must be answered no. First, the Legislature has not enabled counties to make such a choice. As you have correctly pointed out, counties have only such powers as the Legislature has conferred on them expressly or by clear implication. *Maier v. Racine County*, 1 Wis. 2d 384, 385, 84 N.W.2d 76 (1957). Section 59.08(1), Stats., provides that counties must let contracts exceeding \$20,000 to the lowest responsible bidder. The duty to award to the lowest responsible bidder applies even if the lowest responsible bidder is nonunion. See McQuillan, *Municipal Corporations*, section 29.48 (3rd ed. 1990). I believe the result must be the same even for contracts of \$20,000 or less. For public bodies must employ the most advantageous contract terms possible even when competitive bidding is not required. Cf. *Akin v. Kewaskum Community Schools*, 64 Wis. 2d 154, 162, 218 N.W.2d 494 (1974) (governmental body must exercise reasonable business judgment). Thus, it is generally held that favoring unionized employers conflicts with a municipality's duty to make the most advantageous contract for the taxpayers. McQuillan, *op. cit.*

But even if the county had authority to favor unionized companies to the exclusion of the nonunionized companies, such an exclusion probably would violate the NLRA preemption doctrine. I am aware, of course, that a federal appeals court has held that NLRA preemption principles are not violated by such favoritism. See *Image Carrier Corp. v. Beame*, 567 F.2d 1197, 1202 (2nd Cir. 1977), *cert. denied*, 440 U.S. 979 (1979). Further, I am aware that another federal appeals court has had an opportunity to disagree with that holding but chose to distinguish it instead. See *Gould, Inc. v. Wisconsin Dept. of Industry, Labor*, 750 F.2d 608, 613 (7th Cir. 1984), *aff'd.*, 475 U.S. 282 (1986). But both those decisions predate *Golden State I* and *Golden State II*. Whereas *Image Carrier Corp.* rested on the absence of evidence of actual interference with protected NLRA rights, the *Golden State* cases found preemption without evidence of such actual interference. Instead, adverting to an earlier preemption decision in *Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Rel. Com'n*, 427 U.S. 132 (1976), the Court held that there exists an area of conduct, or a zone of activity, which Congress meant to be free from all state regulation. "The *Machinists* rule creates a free zone from which all regulation . . . is excluded." *Golden State II*, 110 S. Ct. at 451 (footnote omitted). The NLRA gives employes the free choice whether to exercise collective bargaining rights. NLRA, section 7. Hence, whether an employer is unionized remains free from all state regulation.

Accordingly, in my opinion the answer to both your questions is no.

DJH:CDH

Employer And Employee; Sheriffs; Wisconsin Fair Employment Act; When evaluating an individual for the position of reserve officer, a sheriff's department may consider information in its possession concerning the individual's juvenile record, subject to the prohibitions against arrest record and conviction record discrimination contained in the Wisconsin Fair Employment Act. OAG 15-90

April 24, 1990

DARWIN L. ZWIEG, *District Attorney*
Clark County

You ask whether the Clark County Sheriff's Department may, when evaluating an individual for the position of reserve officer, consider information in the possession of the sheriff's department concerning the individual's "juvenile record." Your question is answered by the Wisconsin Fair Employment Act (the "WFEA").

The WFEA prohibits an employer from requesting an applicant to provide information regarding the applicant's "arrest record," except a record of a pending charge. Sec. 111.335(1)(a), Stats. The WFEA also prohibits an employer from refusing to employ an individual because of an arrest record, unless the circumstances of a pending charge against the individual substantially relate to the circumstances of the particular job. Secs. 111.322(1) and 111.335(1)(b), Stats. The term "arrest record" includes, but is not limited to, "information indicating that an individual has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement . . . authority." Sec. 111.32(1), Stats. The term "arrest record" does not distinguish between juvenile and adult individuals. *Id.*

The WFEA prohibits an employer from refusing to employ an individual because of a conviction record unless the circumstances of the offense substantially relate to the circumstances of the job. Secs. 111.322(1) and 111.335(1)(c)1., Stats. The term "conviction record" specifically includes

information that an individual "has been adjudicated delinquent." Sec. 111.32(3), Stats.

Considering the prohibition against arrest record discrimination first, and assuming that the sheriff's department refuses to employ an individual because of information in the possession of the sheriff's department concerning the individual's "juvenile record," the initial inquiry is whether the individual has been denied employment because of an "arrest record." Although the term "arrest record" does not expressly apply to juveniles, the requirement that the WFEA be "liberally construed," section 111.31(3), suggests that juveniles receive the same protection as adults. If the sheriff's department would refuse to employ an individual because of information in its possession which indicates that the individual "has been questioned, apprehended, taken into custody or detention, held for investigation, [or] arrested . . . for any . . . offense," then the sheriff's department would commit an act of unlawful arrest record discrimination. On the other hand, if the sheriff's department refuses to employ the individual because it concludes from its own investigation and questioning of the individual or others that the individual has committed an offense, *City of Onalaska v. LIRC*, 120 Wis. 2d 363, 367, 354 N.W.2d 223 (Ct. App. 1984), and *not* merely because of the fact of the individual's "arrest record," then the sheriff's department does not act unlawfully.

In *City of Onalaska*, the court of appeals reasoned that because a discharge based on information that an individual has been arrested by a law enforcement agency relies upon an assertion by another person or entity, an employer does not rely on information that the individual has been arrested (and therefore does not act unlawfully) when it discharges the individual because the employer concludes from its own investigation and questioning of the individual that he or she has committed an offense. Although *City of Onalaska* may be read narrowly as protecting an employer from a finding of arrest record discrimination only where the employer conducts its own investigation of an individual's conduct and only where it

questions the individual about such conduct, it is my opinion that the employer is protected if it bases its employment decision on the individual's conduct (as opposed to the individual's status as an arrested person), even if the employer bases its conclusion concerning the individual's conduct upon information which the employer receives from others (even including law enforcement agencies). The purpose of the WFEA prohibition against arrest record discrimination is to protect individuals from employment discrimination based upon the stigma of an arrest record *per se*, *cf. Miller Brewing Co. v. ILHR Department*, 103 Wis. 2d 496, 504, 308 N.W.2d 922 (Ct. App. 1981); it was not intended to prevent an employer from reaching its own conclusion as to whether the employe engaged in the conduct underlying the charge and from basing employment decisions upon such conclusion. Thus, my opinion that the sheriff's department acts unlawfully if it refuses to employ an individual because of that individual's "arrest record" status, and that it does not act unlawfully if its refusal is based on the underlying conduct, applies equally to the situation where the information in the possession of the sheriff's department concerning the individual's "juvenile record" results from the sheriff's department's own investigation or from records obtained from another law enforcement agency pursuant to section 48.396(1).

Where the "arrest record" involves a pending charge, the sheriff's department may inquire about the charge and may refuse to employ an individual if the circumstances of the pending charge substantially relate to the circumstances of the particular job. Sec. 111.335(1)(b), Stats. I note, parenthetically, that law enforcement agencies have access to juvenile records under section 48.396 which is unavailable to most other employers, and that law enforcement agencies (as employers) therefore may determine the existence and circumstances of pending charges (and, for that matter, adjudications of delinquency) where other employers would be barred from acquiring the same information. Although the Legislature, in the Wisconsin Fair Employment Act, envisioned an employer's right to inquire about pending charges

(and convictions), *Miller Brewing Co.*, 103 Wis. 2d at 504, this inequality between law enforcement agencies and other employers undoubtedly reflects a balancing of employers' rights and the necessity of confidentiality in the administration of the juvenile justice system. *State ex rel. Herget v. Waukesha Co. Cir. Ct.*, 84 Wis. 2d 435, 451, 267 N.W.2d 309 (1978). An individual, however, who falsely denies the existence of a pending charge (or an adjudication of delinquency) on an employment application or other pre-employment inquiry may be terminated lawfully for the falsification and may even be denied unemployment compensation. *Miller Brewing Co.*, 103 Wis. 2d at 504-05.

Turning to the prohibition against conviction record discrimination, the term "conviction record" was amended by ch. 334, Laws of 1981, to specifically include information that an individual "has been adjudicated delinquent." Sec. 111.32(3), Stats. In an opinion issued prior to that amendment, my predecessor concluded that an employer could not inquire whether an individual had been adjudicated delinquent because it would be contrary to the legislative policy of protecting juvenile records. 67 Op. Att'y Gen. 328, 331 (1978). Such conclusion is no longer valid since the Legislature specifically amended the WFEA to include adjudications of delinquency in the definition of the term "criminal record," and since the WFEA presupposes that an employer may ask questions about an individual's criminal record. *Miller Brewing Co.*, 103 Wis. 2d at 504.

Applying the WFEA, therefore, the sheriff's department may not refuse to hire an individual for the position of reserve officer because the individual has been adjudicated delinquent, unless the circumstances of the offense substantially relate to the circumstances of the job. Secs. 111.322(1) and 111.335(1)(c)1., Stats. Whether the circumstances of the offense substantially relate to the circumstances of the job requires "[a]ssessing whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed." *County of Milwaukee v.*

LIRC, 139 Wis. 2d 805, 824, 407 N.W.2d 908 (1987). Moreover, as noted earlier in this opinion, an employer does not act unlawfully where it bases an employment decision on an individual's underlying conduct and not on the individual's conviction record *per se*.

In summary, the sheriff's department may, when evaluating an individual for the position of reserve officer, consider information in its possession concerning the individual's juvenile record, subject to the prohibitions against arrest record and conviction record discrimination contained in the WFEA.

DJH:DCR

Circuit Court; County Jail; Minors; Prisons And Prisoners;
The exclusive grant of jurisdiction to circuit courts for enumerated traffic offenses under section 48.17(1), Stats., involving juvenile offenders, sixteen years of age or older, includes the authority to sentence juveniles to the adult section of the county jail where the penalty is prescribed by the substantive traffic statute. OAG 16-90

May 7, 1990

MARK JANIUK, *Corporation Counsel*
Racine County

You have asked for my opinion as to the authority of circuit courts, under the jurisdiction conferred by section 48.17, Stats., to sentence a juvenile sixteen years of age or older to a county jail for a violation of a traffic statute. As a corollary question, you inquire whether juveniles sentenced by a circuit court for a traffic violation can be placed in the adult section of the county jail or whether they must be held in segregated facilities?

Section 48.12(1) grants exclusive jurisdiction to the juvenile courts of any child over twelve years of age who is alleged to be delinquent, "except as provided in ss. 48.17 and 48.18" Section 48.17 grants circuit courts exclusive jurisdiction in proceedings against juveniles sixteen years of age or older for violations of enumerated traffic statutes. Section 48.18 establishes a procedure which allows juveniles to be waived from the juvenile court to the exclusive jurisdiction of the circuit court for criminal prosecution.

Your question is directed to section 48.17(1) which provides:

TRAFFIC VIOLATIONS. Except for ss. 342.06(2) and 344.48(1), and s. 346.67 when death or injury occurs, *courts of criminal and civil jurisdiction shall have exclusive jurisdiction* in proceedings against children 16 or older for violations of ss. 30.50 to 30.80, of chs. 341 to 351, and of traffic regulations as defined in s. 345.20 and nonmoving traffic violations as defined in s. 345.28(1). A child

convicted of a traffic or boating offense in a court of criminal or civil jurisdiction *shall be treated as an adult for sentencing purposes* except that the court may disregard any minimum period of incarceration specified for the offense.

You point out in your letter that a traffic offender may be imprisoned for a period of not more than six months for a second violation of driving after revocation or suspension of a driver's license, sections 343.345 and 343.44. In addition, a circuit court has authority under section 345.47 to imprison a traffic offender who has failed to pay a forfeiture for a period not to exceed ninety days. The clear and unambiguous language of section 48.17(1) would make juveniles age sixteen years or older subject to these penalty provisions. *See State v. Lossman*, 118 Wis. 2d 526, 535, 348 N.W.2d 159 (1984).

Section 48.209 of the Children's Code establishes detailed criteria which must be met before a child may be held in a county jail. This section also provides that a child must be "held in a room separated and removed from incarcerated adults." Sec. 48.209(1)(b), Stats. You ask whether these provisions of the Children's Code limit a circuit court's authority to sentence a juvenile offender to a county jail for a traffic violation under the grant of exclusive jurisdiction conferred by section 48.17(1)? My answer is no.

Section 48.209 is part of subchapter IV of the Children's Code which defines procedures and criteria for holding a child in custody. Section 48.205(1) states that a "child may be held under s. 48.207, 48.208 or 48.209" if there is "probable cause to believe the child is within the jurisdiction of the court" The court referred to in this statute is the juvenile court. Sec. 48.02(2m), Stats. The jurisdiction of juvenile courts is defined and limited by statute. *See In Matter of D.V.*, 100 Wis. 2d 363, 366, 302 N.W.2d 64 (Ct. App. 1981). The exclusive jurisdiction granted to circuit courts to adjudicate enumerated traffic cases involving juveniles sixteen years of age or older is not limited by section

48.209 or any other provision of the Children's Code which defines or limits the exercise of authority by juvenile courts.

Your letter also, at least inferentially, raises the issue of whether the placement of juveniles in a county jail for traffic violations as authorized in section 48.17(1) is consistent with the legislative intent expressed in section 48.01(2). This section provides that the "best interests of the child shall always be of paramount consideration" but not to the exclusion of the "interests of the public."

The legislative purpose in the enactment of section 48.17(1) was considered by the Wisconsin Supreme Court in *State v. Hart*, 89 Wis. 2d 58, 277 N.W.2d 843 (1979). The appellant argued in *Hart* that section 48.17 unconstitutionally denied juveniles equal protection of the law. The appellant argued that the legislative classification distinguishing between children over sixteen who are accused of Motor Vehicle Code offenses and those who are accused of other crimes was arbitrary and unreasonable. The appellant also argued that the legislative classification was contrary to the purposes of the Children's Code.

The supreme court initially observed that there was no relevant legislative history which explained the legislative purpose in divesting juvenile courts of jurisdiction of proceedings against children sixteen years of age or older for violations of the Motor Vehicle Code. *Id.*, 89 Wis. 2d at 66. The supreme court, however, was obliged to construct, if possible, a rationale to sustain the legislative determination. The supreme court stated that the Children's Code was, in part, to be construed with the "interests of the public" in mind, section 48.01(2), and that the Legislature could reasonably conclude that the interests of the public, including youthful drivers, was best served by granting exclusive jurisdiction of enumerated traffic offenses to the circuit courts. *Id.*, 89 Wis. 2d at 69. The legislative purpose in the enactment of section 48.17 was explained by the supreme court as follows:

We further know that a substantial number of children over sixteen drive and cause a significant number of accidents involving death, personal injury and property damage. The legislature might reasonably believe that by requiring criminal court jurisdiction over sixteen and seventeen-year-olds charged with violations of the Motor Vehicle Code, it would make enforcement of the Code uniform and more effective and thereby decrease danger on the highways. As Hart notes, criminal court jurisdiction carries with it publicity and the possibility of a criminal record and a criminal sanction. We conclude that the legislature might reasonably believe that mandatory criminal court jurisdiction, rather than juvenile court jurisdiction, over Motor Vehicle Code offenses by sixteen and seventeen-year-olds is more likely to deter children from Code violations.

Id., 89 Wis. 2d at 68 (footnote omitted).

The conclusion reached in this opinion is confirmed by an earlier attorney general's opinion concerning the placement of juveniles in county jails. 72 Op. Att'y Gen. 104 (1983). In the earlier opinion, the Department of Health and Social Services asked whether a juvenile probation violator, following the waiver of juvenile jurisdiction and a criminal adjudication, could be held in the adult section of a county jail? *Id.* at 106. The opinion correctly noted that, as soon as juvenile jurisdiction is waived, a child who is held in custody must be transferred to an adult facility. Sec. 48.18(8), Stats. Moreover, the provisions of section 48.209(1)(b), which prohibit a child from being held in the adult section of the county jail, are not applicable to children waived to an adult court. Section 48.209(3) expressly provides: "The restrictions of this section do not apply to the use of jail for a child waived to adult court." The waiver of juvenile jurisdiction means that the child is to be treated as a criminal offender and there is no impediment to the child's placement in an unsegregated adult facility. *Id.* at 107.

The rationale applied in the earlier opinion to the use of a county jail for juveniles waived from juvenile court to adult court, section 48.18, applies with equal logic to juveniles convicted of traffic violations under the grant of exclusive jurisdiction to circuit courts, section 48.17. In both cases, the juvenile court is divested of jurisdiction by the express terms of the statute. Sec. 48.12(1), Stats. *See In Matter of D.V.*, 100 Wis. 2d at 366. The provisions of the Children's Code do not define or limit the authority exercised by the circuit court.

In conclusion, the restrictions imposed by the Children's Code on the use of county jail for juveniles, section 48.209, do not apply to adjudications made by the circuit court under section 48.17(1). Juveniles sixteen years of age or older convicted of a traffic offense enumerated in section 48.17(1) may be placed in an unsegregated portion of a county jail in those cases where a penalty of imprisonment is authorized by the substantive traffic statute.

I would add, parenthetically, that this opinion simply concludes that section 48.209 of the Children's Code does not place a legal obligation on the county to segregate juveniles placed in jail following an adjudication authorized under section 48.17(1). The segregation of juvenile offenders would, however, be consistent with the objectives of the Children's Code and would, in my view, constitute reasonable management of jail facilities.

DJH:MRK

Board On Aging And Long-Term Care; If individuals who have an interest in or are affiliated with long-term care facilities such as nursing homes are appointed to the Board on Aging and Long-Term Care under section 15.105, Stats., it is strongly recommended in light of recent federal conflict of interest legislation that they be precluded from participating in the appointment of the nursing home ombudsman or the head of any subdivision of the Board and that they refrain from reviewing those ombudsman activities described in 42 U.S.C. § 3027(a)(12) (1989). OAG 17-90

May 14, 1990

TOM LOFTUS, *Chairperson*

Assembly Organization Committee

You ask whether the appointment of individuals to the Board on Aging and Long-Term Care under section 15.105, Stats., who have an interest in or affiliation with long-term care facilities such as nursing homes renders the State of Wisconsin ineligible for certain federal funding under the Older Americans Act Amendments of 1987, Pub. L. No. 100-175, 101 Stat. 926 (1987).

Although any determination of eligibility for federal funding rests exclusively within the province of the United States Department of Health and Human Services ("HHS"), it is my recommendation that statutory, regulatory or contractual language be promulgated to preclude such individuals from participating in the appointment or reviewing the activities of those individuals performing ombudsman activities under 42 U.S.C. § 3027(a)(12) (1989).

42 U.S.C. § 3027(a)(12) (1989), as amended by Pub. L. No. 100-175, provides in part as follows:

(12) . . .

(A) The State agency will establish and operate, either directly or by contract or other arrangement with any public agency or other appropriate private nonprofit organization,

other than an agency or organization which is responsible for licensing or certifying long-term care services in the State or which is an association (or an affiliate of such an association) of long-term care facilities (including any other residential facility for older individuals), an Office of the State Long-Term Care Ombudsman . . . and shall carry out through the Office a long-term care ombudsman program which provides an individual who will, on a full-time basis [perform certain specified activities]--

. . . .

(F) The State agency will--

(i) ensure that no individual involved in the designation of the long-term care ombudsman (whether by appointment or otherwise) or the designation of the head of any subdivision of the Office is subject to a conflict of interest;

(ii) ensure that no officer, employee, or other representative of the Office is subject to a conflict of interest; and

(iii) ensure that mechanisms are in place to identify and remedy any such or other similar conflicts.

You indicate that the Wisconsin Department of Health and Social Services ("Department"), through its Bureau on Aging, contracts with the Board on Aging and Long-Term Care ("Board") for the receipt of such ombudsman services. The Board is appointed pursuant to section 15.105(10), which provides as follows:

BOARD ON AGING AND LONG-TERM CARE. There is created a board on aging and long-term care, attached to the department of administration under s. 15.03. The board shall consist of 7 members appointed for staggered 5-year terms. Members shall have demonstrated a continuing interest in the problems of providing long-term care for the aged or disabled. At least 4 members shall be public members with no interest in or affiliation with any nursing home.

The Board's duties are described in section 16.009(2). They include items which, in whole or in part, encompass aspects of ombudsman activities performed under 42 U.S.C. § 3027(a)(12) (1989). *Compare* sec. 16.009(2)(a) – (i), Stats., *with* 45 C.F.R. §§ 1321.11 and 1321.13 (1988).

Even though a state statute provides that the Board is the unit of state government that supervises the performance of ombudsman services, the Governor is nevertheless required to assure HHS that Wisconsin is in compliance with 42 U.S.C. § 3027(a) (1989):

If a State statute establishes a State ombudsman program which will perform the functions of section 307(a)(12) of the Act, the State agency continues to be responsible to assure that all of the requirements of the Act for this program are met regardless of the State legislation or source of funds. In such cases, the Governor shall confirm this through an assurance in the State plan.

45 C.F.R. § 1321.9(d) (1989).

Since section 15.105(10) does not require that individuals with an interest in or affiliation with long-term care facilities be appointed to the Board, the statute itself does not violate the provisions of 42 U.S.C. § 3027(a)(12)(F) (1989). If such individuals are appointed to the Board, however, the Department must "ensure that mechanisms are in place to identify and remedy any . . . conflicts [of interest]." 42 U.S.C. § 3027(a)(12)(F)(iii) (1989). Although various mechanisms such as amendment of the statute or rulemaking under chapter 227 are presumably available to the Department and/or the Board, the most facile mechanism to identify and remedy such conflicts would appear to be through explicit language in the contract between the Department and the Board.

I have recently advised the executive director of the Board that the Board is the ombudsman office under 42 U.S.C. § 3027(a)(12)(A) (1989) and that, in the absence of some other express designation by the Board, it is reasonable to consider the

Board's executive director to be the ombudsman under that statute. Since the ombudsman is not the Board itself, the Department must ensure that "no individual involved in the designation of the long-term care ombudsman (whether by appointment or otherwise) or the designation of the head of any subdivision of the Office" has such a conflict of interest. 42 U.S.C. § 3027(a)(12)(F)(i) (1989).

The difficult question is exactly what constitutes a conflict of interest. Neither 42 U.S.C. § 3027(a) nor its implementing regulations explicitly define the term "conflict of interest." 42 U.S.C. § 3027(a)(12)(A) does prohibit the Department from contracting with any entity that licenses or certifies long-term care services as well as any entity or association of long-term care facilities or an affiliate of such an association. But this is an express prohibition which is not violated by contracting with the Board. In addition, if the Department did not contract with the Board, it could operate the ombudsman program itself (assuming that it had statutory authority to do so) without violating this express prohibition. *See* 53 Fed. Reg. 10107, 10109 (1988); 53 Fed. Reg. 33758, 33760 (1988).

In his remarks to the House of Representatives, 133 Cong. Rec. E1380 (daily ed. April 9, 1987), Congressman Bonker of Washington indicated that the conflict of interest provisions contained in the House Bill, H.R. 1451, were designed "[t]o ensure that those who operate ombudsman programs are not 'foxes guarding the henhouse,'"

The Senate Bill, S. 959, 100th Cong., 1st Sess. Sec. 341 (1987), which was more explicit with respect to the ombudsman office itself, provided in part as follows:

(c)(2) Only an individual who--

(A) is the head of the public agency or organization operating the Office, or reports directly to the head of such public agency or such organization;

(B) has no pecuniary interest in an entity described in subsection (d); and

(C) has demonstrated knowledge relating to long term care matters involving older individuals;

May be eligible to be appointed or employed as State Long-Term Ombudsman.

. . . .

(d) No State may establish or operate an Office of the Long-Term Care Ombudsman under subsection (a)(1) by contract or other arrangement with--

(1) an agency or organization that is responsible for licensing or certifying--

(A) long-term care facilities,

(B) health care professionals, or

(C) other individuals providing institutional or noninstitutional long-term care services, in the State, or

(2) any--

(A) long-term care facility, or

(B) association (or an affiliate of such an association) of long-term care facilities (including any other residential facility for older individuals).

133 Cong. Rec. S4866-67 (daily ed. April 8, 1987).

In their joint remarks to the Senate, 132 Cong. Rec. S15,523 (daily ed. October 7, 1986), Senators Glenn and Heinz described the intent of the conflict of interest language contained in the Senate Bill as follows: "We must prohibit organizations and individuals with an interest in long term care facilities from influencing the work of the ombudsman program"

The House Bill was passed in lieu of the Senate Bill after amending its language to contain much of the language of the Senate Bill. See 1987 U.S. Code Cong. & Admin. News 866. There is no indication whether the Senate felt that the less explicit conflict of interest language contained in Pub. L. No.

100–175 addressed all of the concerns contained in the more specific language of the Senate Bill.

Under the circumstances, I cannot predict with absolute certainty whether HHS would deny funding under 42 U.S.C. § 3027(d) (1989) or attempt to impose other fiscal sanctions against the state if any individuals within the category you describe were to vote on or otherwise participate in the selection of the ombudsman or the selection of the head of any subdivision of the Board. However, in order to avoid any possibility of fiscal sanction by HHS, if such individuals are going to continue serving on the board, I strongly recommend that they be precluded by contractual, regulatory or statutory language from participating in the selection of the ombudsman or the head of any subdivision of the Board and that they refrain from reviewing those ombudsman activities described in 42 U.S.C. § 3027(a)(12) (1989).

DJH:FTC

Children; Schools And School Districts; Parents who unilaterally remove a child from an exceptional educational needs placement violate the compulsory education statute. OAG 18-90

May 30, 1990

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

You have asked for my opinion concerning the relationship between the special education laws, sections 115.82 and 115.85, Stats., and the truancy and compulsory education laws, sections 118.15 and 118.16.

The case in question concerns a seventh-grade child, identified as having exceptional educational needs. As required by law, the school district evaluated the child via a multidisciplinary team (M-team), section 115.80(3), developed an individualized education program (IEP) for the child, section 115.80(4), and made available to the child a full-time educational placement in the public school, section 115.80(4m). The parents participated at the evaluation and IEP development stage and consented to the offered public school placement.

After the parents consented to the public school placement, the parents began to remove the child from the school one day a week for placement in a private education service at their expense. The parents did not appeal any portion of the IEP or the offered placement as was their right under section 115.81(1)(a). The private placement has not been approved by either the school district or the Department of Public Instruction.

Given these facts, you have asked the following three questions:

1. When parents remove a child from the public school one full day each week to receive services in an unapproved private educational setting, is the child in compliance with the compulsory attendance law under section 118.15(1)(a)?

2. If the child is not in compliance, is the school attendance officer obligated to pursue procedures for habitual truancy under section 118.16(2), (5) and (6)?

3. If the district condones this practice of allowing parents to provide alternative services, is the district in effect approving of this change in the child's placement and, therefore, possibly obligating itself to pay for the private services?

In answer to your first question, when a child is removed from an approved placement and placed, without the district's permission, in a private setting, the compulsory education law is violated. Section 118.15(1)(a) provides: "[A]ny person having under control a child who is between the ages of 6 and 18 years *shall* cause the child to attend school regularly during the full period and hours."

If the child is not attending the specified school during the full period and hours, the compulsory education law is violated. School attendance is compulsory by statute for both nonhandicapped and handicapped children. *Panitch v. State of Wis.*, 444 F. Supp. 320, 322 (E.D. Wis. 1977).

Section 115.82 provides:

Compulsory attendance. The provisions of s. 118.15 relating to compulsory school attendance apply during the school term to children with exceptional educational needs and may be satisfied by attendance at special education programs operated by a school district, county handicapped children's education board, board of control of a cooperative educational service agency, state or county residential facility or private special education service.

Section 118.15(3) provides that children may be excused from an educational program under section 115.85(2) in the same manner and for the same reasons as they may be excused from ordinary school programs. The implication is that compulsory education applies to any education program under that section just as it does to ordinary programs. Therefore, it is my opinion that the inclusion of "private special education service" in section 115.82

contemplates a private placement which conforms to section 115.85(2).

School districts through the M-team are charged with analyzing and diagnosing special education problems and offering appropriate placement in conformity with the state's public policy. The statutory preference is for public placement, preferably within the school district. The school district specially designed an IEP for this child and offered a public school placement. Parents cannot simply ignore the statutes. If they do not believe the offered placement is in the best interest of their child, they must exercise the appeal rights provided under section 115.81. Your letter states that the parents in this case have chosen not to appeal the placement. This is their remedy if they believe the offered placement is inappropriate. By removing the child from the program they not only violate the compulsory attendance law, but estop themselves from judicial remedies. See *Timms v. Metro. Sch. Dist. of Wabash County, Ind.*, 722 F.2d 1310, 1316 (7th Cir. 1983).

Due to the lack of compliance, it logically follows that the school attendance officer is obligated by law to pursue procedures for habitual truancy under section 118.16(2) and (5). While commencing a truancy proceeding under section 118.16(6) may be optional, *Secor v. Richmond Sch. Joint Dist. No. 2*, 689 F. Supp. 869 (E.D. Wis. 1988), the use of the word "shall" in section 118.16(2) and (5) suggests that the notification and investigation must proceed. Although this statutory requirement may place undue hardship on the family and increased demand on the school attendance officer, such concerns are legislative ones which this office is unable to address.

Your final question concerns whether the school district is required to pay for the services rendered by the private organization if the determination is to allow the present situation to continue. The answer to this question is no. Since the district has offered an appropriate placement at public expense, it has complied with both Wisconsin and federal requirements for

special or handicapped children. The state need not provide the optimum education. *See Board of Educ., etc. v. Rowley*, 458 U.S. 176 (1982).

DJH:WDW

Arrest; Criminal Law; University; Words And Phrases; The provisions of section 968.075, Stats., apply to roommates living in university residence halls, whether privately or state owned. If the criteria requiring arrest under section 968.075(2) exist, the law enforcement officer must make a custodial arrest.
OAG 19-90

June 15, 1990

JUDITH A. TEMBY, *Secretary*
Board of Regents of the
University of Wisconsin System

You have requested my opinion as to whether the provisions regarding mandatory arrest in section 968.075, Stats., apply to roommates living in university residence halls or privately owned residence halls serving students at the University of Wisconsin campuses. Secondly, you ask, if section 968.075 applies to such roommates, what discretion may law enforcement officers utilize in applying the mandatory arrest provision of that statute?

I conclude that the provisions of section 968.075 do apply to roommates living in residence halls regardless of whether the halls are owned by the university or private persons. Section 968.075 was created by 1987 Wisconsin Act 346. Section 968.075(2) creates a mandatory custodial arrest situation whenever an officer has probable cause to believe a suspect has committed a crime which meets the statutory definition of domestic abuse and when one or both of two further conditions are met. One must therefore look to the definition of domestic abuse to determine whether or not this statute comes into play in the dormitory roommate circumstance. Section 968.075(1)(a), as amended by 1989 Wisconsin Act 293, defines "domestic abuse" as follows:

"Domestic abuse" means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has created a child:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225(1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1, 2 or 3.

Whether section 968.075 applies to roommates in residence halls turns on whether they fit in one of the categories of persons listed above. I will assume that the roommates are not married, have never been married to each other, and do not have a child in common. The issue, therefore, is whether the adult perpetrator (one roommate) commits an act covered by the statute against "an adult with whom the person resides or formerly resided." In short, the question is whether university residence hall roommates are "residing together" within the meaning of the statute. This requires an interpretation of the meaning of the term "resides together" as used in this statute.

The courts have clearly set forth the procedures for statutory interpretation. As stated in *State v. Larson*, 133 Wis. 2d 320, 324, 395 N.W.2d 608 (Ct. App. 1986):

Any statutory analysis must begin with the language of the statute itself. *State ex rel. Melentowich v. Klink*, 108 Wis.2d 374, 379, 321 N.W.2d 272, 274 (1982). The initial inquiry of the court in construing a statute is whether the statutory language is clear or ambiguous. *In re I.V.*, 109 Wis.2d at 409, 326 N.W.2d at 128–29. A statute is ambiguous if reasonably well-informed persons could differ as to its meaning. *Kollasch v. Adamany*, 104 Wis.2d 552, 561, 313 N.W.2d 47, 51–52 (1981). Once the statute is determined to be ambiguous, it is the court's task to "achieve a reasonable construction which will effectuate the statute's purpose." *Melentowich*, 108 Wis.2d at 380, 321 N.W.2d at 275. In this regard, extrinsic materials, particularly the statute's legislative intent, can be valuable interpretive aids.

Milwaukee County v. DILHR, 80 Wis.2d at 452, 259 N.W.2d at 121.

Two interpretations of the term "resides" could be offered. First, it could be argued that "resides together" means that this is the person's permanent residence or legal domicile. Since many college students maintain a permanent residence or legal domicile with their parents, one might conclude that they are not "residing together" within the meaning of this statute. It can be argued that this interpretation is sensible in light of the fact that students are frequently assigned roommates and do not voluntarily choose a particular roommate.

On the other hand, it can be argued that "resides together" means merely a current dwelling situation, that the persons are living together in a day-to-day relationship, regardless of where their permanent residence or legal domicile may be located. It may be argued that since the pressures attendant to a day-to-day household relationship will exist in any living arrangement regardless of its voluntary nature, this interpretation addresses precisely the evil the domestic abuse statute is designed to reach and correct.

I believe, therefore, that the term "resides" is ambiguous as used in the statute. As stated in *In re National Discount Corporation*, 196 F. Supp. 766, 769 (1961):

In statutory construction, it is settled that "reside" is an elastic term to be interpreted in the light of the purpose of the statute in which such term is used; "reside" is a term whose statutory meaning depends upon the context and purpose of the statute in which it occurs. (Cites omitted.) . . . [W]hile a person may be said to have but one domicile, he may have several residences. (Cite omitted.)

Where "resides" or "residence" is interpreted by the courts to mean something akin to domicile the statutes are generally dealing with entitlement to legal rights or obligations: right of election against a will, *Estate of Daniels*, 53 Wis. 2d 611, 193 N.W.2d 847 (1972); entitlement to employment, *Eastman v. City*

of Madison, 117 Wis. 2d 106, 342 N.W.2d 764 (Ct. App. 1983). Similarly where our Legislature has defined residence, specifically for purposes of a particular section, to mean something akin to domicile the section is dealing with entitlement to a legal right or obligation: campground registration fees, section 27.01(10); fish and game licenses, section 29.01(12); risk sharing plans, section 619.10(9); public assistance, section 49.01(8g); Mental Health Act, section 51.01(14); student grants, section 39.30(1)(e); and student loans, section 39.32(1)(b).

In fact, domicile and residence are distinct, though similar, concepts. As stated in *Estate of Daniels*, 53 Wis. 2d at 614-15,

It might be said that "domicile" includes residence but "residence" does not necessarily include domicile. Domicile is generally regarded as the place where a man has his fixed and permanent home or residence to which he intends to return whenever he is absent therefrom. It is not a residence for any special or temporary purpose but one intended to be permanent for an unlimited or indefinite period.

Black's Law Dictionary 1176 (5th Ed. 1979) explains: "Residence simply requires bodily presence as an inhabitant in a given place, while domicile requires bodily presence in that place and also an intention to make it one's domicile." It is the fixed and permanent nature of the "domicile" that makes domicile the relevant interpretation of "residency" for purposes of determining certain legal rights or obligations.

By contrast, however, section 968.075 is not concerned with determining legal rights or obligations. Instead, the Legislature was concerned that in the past, those in certain relationship situations were not being protected by the criminal justice system in the same fashion as the rest of society. Section 968.075 attempts to ensure that those in particular relationships receive the protection of the criminal laws.

In 1987 Wisconsin Act 346 the Legislature stated its intent in creating section 968.075, in part, as being:

(1) The legislature finds that societal attitudes have been reflected in policies and practices of law enforcement agencies, prosecutors and courts. Under these policies and practices, the treatment of a crime may vary widely depending on the relationship between the criminal offender and the victim of the crime. Only recently has public perception of the serious consequences of domestic violence to society and to individual victims led to the recognition of the necessity for early intervention by the criminal justice system.

(2) The legislature intends, by passage of this act that:

(a) The official response to cases of domestic violence stress the enforcement of the laws, protect the victim and communicate the attitude that violent behavior is neither excused nor tolerated.

(b) Criminal laws be enforced without regard to the relationship of the persons involved.

. . . .

(3) The purpose of this act is to recognize domestic violence as involving serious criminal offenses and to provide increased protection for the victims of domestic violence.

It is those in domestic situations that are to receive the benefit of this statute. Domestic as defined in Webster's Ninth New Collegiate Dictionary 374 (1984) means "of or relating to the household or the family." It is clear in looking at the statute that the Legislature intended to deal with more than violence in the family but rather took the more expansive view of including those in a household relationship. The statute's protection applies to family relationships, *e.g.*, spouse or former spouse *and*

relationships where adults are living together regardless of familial ties.¹

It, therefore, appears clear that this statute is aimed at providing equal protection and enforcement of the laws to those involved in certain relationships, either familial or household, irrespective of the permanency or duration of the relationship. The statute does not turn on whether the parties are living in a permanent legal domicile but rather whether there exists a familial or household relationship with all the attendant stresses.

I conclude, therefore, that "resides together" for purposes of section 968.075 includes college dormitory roommates regardless of their place of legal domicile. It also is irrelevant whether the roommates were assigned or voluntarily chosen or whether the dormitories are publicly or privately owned. In fact, in situations where two adults are living together, having been assigned as roommates, the pressures and tensions of the relationship may be even greater and therefore more needing of protection than situations where roommates are voluntarily chosen.

In light of the fact that the provisions of section 968.075 apply to college dormitory roommates, you question what discretionary authority law enforcement officers have in applying the mandatory arrest provision of that statute. The officer's obligation under the mandatory arrest provision is set forth in section 968.075(2), Stats. That provision requires that an officer shall

¹Former section 968.075(1), Stats. (1987-88), included the family relationship of any "adult relative." The Legislature, however, recently passed 1989 Wisconsin Act 293 which deleted this provision. Act 293 also added a category "against an adult with whom the person has created a child" to those included in the definition of domestic abuse. These changes emphasize that, where there is not a marital relationship or a relationship created due to a child, it is the living together nature of the relationship, regardless of family ties, which is important.

arrest and take a person into custody in the following circumstances:²

- (1) The officer has probable cause to believe the person is committing or has committed domestic abuse (as defined above), *and*
- (2) The officer has probable cause to believe that those acts constitute the commission of a crime, *and*
- (3) either (or both exist)
 - a) the officer has a reasonable basis to believe continued domestic abuse against the alleged victim is likely, *or*
 - b) there is evidence of physical injury to the alleged victim. (This does not require that the injury be visible).

The responding officer, therefore, in conducting his or her investigation must determine, under the totality of the circumstances, whether all three of the above criteria are met. If the answer is yes, the officer must place the person under arrest and take that person into custody.

If the officer concludes that the first two criteria are met (a domestic abuse-type crime has occurred) but the third criteria is missing, the officer must apply the agency's pro-arrest policy required by section 968.075(3)(a)1.a.³ In other words, in this

²Section 968.075(2)(b) also provides that the *mandatory* arrest provisions apply "only if the report is received, within 28 days after the day the incident is alleged to have occurred, by the officer or the law enforcement agency that employs the officer."

³Section 968.075(3) states in part:

(a) Each law enforcement agency shall develop, adopt and implement written policies regarding arrest procedures for domestic abuse incidents. The policies shall include, but not be limited to, the following:

1. Statements emphasizing that:

(continued...)

latter circumstance the officer should strongly consider making an arrest but may exercise discretion under all the circumstances. It should be noted that if the officer does not make an arrest in this situation, he or she must forward a report to the district attorney immediately after the investigation is completed stating why an arrest was not made. Sec. 968.075(4), Stats.

DJH:RB

³(...continued)

a. In most circumstances, other than those under sub. (2), a law enforcement officer should arrest and take a person into custody if the officer has reasonable grounds to believe that the person is committing or has committed domestic abuse and that the person's actions constitute the commission of a crime.

County Board; Ordinances; Towns; Judicial review of a county board's legislative decision concerning approval or disapproval of town zoning ordinances submitted to the county board under section 60.62(3), Stats., is limited to cases of abuse of discretion, excess of power or error of law. OAG 20-90

July 30, 1990

GREGORY A. TIMMERMAN, *Corporation Counsel*
St. Croix County

You inquire as to the standard of review with respect to county board proceedings concerning review of town ordinances under section 60.62(3), Stats.

In my opinion, judicial review of such legislative actions is limited to cases of abuse of discretion, excess of power or error of law.

Section 60.62 provides as follows:

Zoning authority if exercising village powers. (1) Subject to subs. (2) and (3), if a town board has been granted authority to exercise village powers under s. 60.10(2)(c), the board may adopt zoning ordinances under s. 61.35.

(2) If the county in which the town is located has adopted a zoning ordinance under s. 59.97, the exercise of the authority under sub. (1) is subject to approval by the town meeting or by a referendum vote of the electors of the town held at the time of any regular or special election.

(3) In counties having a county zoning ordinance, no zoning ordinance or amendment of a zoning ordinance may be adopted under this section unless approved by the county board.

In *Buhler v. Racine County*, 33 Wis. 2d 137, 146-47, 146 N.W.2d 403 (1966), the Wisconsin Supreme Court held as follows:

However, since zoning is a legislative function, judicial review is limited and judicial interference restricted to cases of abuse of discretion, excess of power, or error of law.

Consequently, although a court may differ with the wisdom, or lack thereof, or the desirability of the zoning, the court, because of the fundamental nature of its power, cannot substitute its judgment for that of the zoning authority in the absence of statutory authorization. This rule applies not only to the necessity and extent of zoning but also to rezoning, classification, establishment of districts, boundaries, uses, and to the determination of whether or not there has been such a change of conditions as to warrant rezoning.

(Emphasis added.)

In *Quinn v. Town of Dodgeville*, 122 Wis. 2d 570, 580, 364 N.W.2d 149 (1985), the court applied the underscored language from *Buhler* to approval or disapproval by a town board of a county ordinance under section 59.97(5)(c). That language refers to two applicable standards of review. At the county board level, review of an ordinance submitted by a town is clearly a *legislative* and not a judicial or quasi-judicial act. See *M&I Marshall Bank v. Town of Somers*, 141 Wis. 2d 271, 282–83, 414 N.W.2d 824 (1987). Unless otherwise required by statute, such legislative determinations need not involve a formal or court-type hearing nor the issuance of formalized findings of fact. See *State ex rel. La Crosse v. Rothwell*, 25 Wis. 2d 228, 237, 130 N.W.2d 806, 131 N.W.2d 699 (1964).

Quinn also indicates that *judicial* review of the county board's legislative decision is restricted to cases of abuse of discretion, excess of power or error of law. Therefore, as long as the county board "acts within the sphere of legislative authority, its discretion is controlling; a court cannot substitute its opinion for that of a legislative body." *Cushman v. Racine*, 39 Wis. 2d 303, 307, 159 N.W.2d 67 (1968).

In your correspondence, you suggest various plausible reasons that your county board might advance for refusing to approve specific zoning ordinances submitted for county board approval by individual towns. Although I agree with your suggestion that considerations of "public health, safety, convenience and general

welfare" under section 59.97(1) are relevant in reviewing such ordinances, it would be inappropriate for me to comment on whether any particular county board action would withstand judicial review. *See* 77 Op. Att'y Gen. Preface, Nos. 3.D. and 3.E. (1988).

I therefore conclude that judicial review of a county board's legislative decision concerning approval or disapproval of town zoning ordinances submitted to the county board under section 60.62(3) is limited to cases of abuse of discretion, excess of power or error of law.

DJH:FTC

Accidents; Ambulances; Emergency Medical Technician; Wisconsin statutes do not prohibit the transportation of dead human bodies from an accident scene to a hospital by ambulance or rescue personnel. OAG 21-90

August 2, 1990

PATRICK J. FARAGHER, *Corporation Counsel*
Washington County

You have asked whether there are any legal restrictions on the transportation of dead bodies by ambulance or rescue personnel.

By "legal restrictions," you refer to whether state statutes prohibit ambulance or rescue personnel from transporting dead bodies. You indicate that some rescue personnel believe that the provisions of chapter 445, Stats., especially section 445.12(5), prevent them from doing so. You find no such restrictions in chapter 445 or elsewhere, and therefore disagree with this conclusion. I concur.

Chapter 445 regulates funeral directors. Section 445.12(5) prohibits funeral directors from knowingly permitting any person not licensed as a funeral director from removing "any dead human body from any home, hospital or institution for preparation." This statute controls the movement of dead bodies for purposes of final disposition; it does not refer to the removal of bodies from accident scenes or other death sites to a hospital.

Section 69.18(1)(a) enumerates those persons who may move a corpse "for the purpose of final disposition." Funeral directors are named, but ambulance and rescue personnel are not. Section 69.01(12) defines "final disposition," however, to mean "the disposition of a corpse or stillbirth by burial, interment, entombment, cremation, delivery to a university or school under s. 157.02(3) or delivery to a medical or dental school anatomy department under s. 157.06." Final disposition thus does not refer to the removal of dead bodies from accident scenes to a hospital, and section 69.18(1)(a) therefore does not prohibit emergency medical and rescue squad personnel from doing so.

The only other pertinent statutory provision dealing with the movement of corpses is section 157.01. It authorizes the Department of Health and Social Services to issue rules for the "transportation and disposition of dead human bodies." The regulations issued pursuant to this authorization impose certain standards on funeral directors and common carriers who transport dead human bodies for preparation for burial or other final disposition. See Wis. Admin. Code §§ HSS 135.04(1) and 135.05 (1988), and Wis. Admin. Code § FDE 2.10(3)(e) (1988). No regulation issued by the department prohibits emergency medical or rescue personnel from transporting dead bodies from the site of death to a hospital.

Turning finally to the statutes regulating emergency medical and rescue squad personnel, I find nothing in the provisions relating to emergency medical technicians (section 146.35) or ambulance service providers and ambulance attendants (section 146.50) that would prevent an emergency responder from transporting a dead body from an accident scene to a hospital for proper disposition. In short, I find no statutory restrictions prohibiting ambulance or rescue personnel from transporting dead bodies to a hospital, and no suggestion that funeral directors must instead be called to do so.

DJH:BLB

County Board; Public Officials; Except in self-organized counties, a county board may not establish multiple per diem compensation for attendance at more than one committee meeting on the same day on days when the county board is not in session. OAG 22-90

August 2, 1990

BENJAMIN SOUTHWICK, *Corporation Counsel*
Richland County

BRYAN J. FISCHER, *Corporation Counsel*
Adams County

You each ask whether there are any circumstances under which multiple per diem compensation can be paid to a county board supervisor for attendance at more than one committee meeting on the same day on days when the county board is not in session.

In my opinion, the answer is no unless the county is a self-organized county under section 59.03(1), Stats.

Section 59.06 provides in part as follows:

(2) Except as provided under sub. (3), committee members shall receive such compensation for their services as the board allows, not exceeding the per diem and mileage allowed to members of the board and such committee members shall receive such compensation, mileage and reimbursement for other expenses as the board allows for their attendance at any school, institute or meeting which the board directs them to attend. No supervisor shall be allowed pay for committee service while the board is in session, nor for mileage except in connection with services performed within the time herein limited.

Although prior attorney general opinions are not in complete harmony in circumstances where a member of a county board committee seeks additional per diem compensation for service on a committee for some other unit of government or for service on an entity that is not a committee of the county board, prior attorney general opinions have uniformly concluded that multiple

per diems for committee meetings are not permissible in counties that are not self-organized under section 59.03(1). See 68 Op. Att'y Gen. 73 (1979); 50 Op. Att'y Gen. 187 (1961); 42 Op. Att'y Gen. 326 (1953). As stated in 68 Op. Att'y Gen. at 75, "[t]his question has been answered in the negative by several attorneys general, and I am in agreement." Such contemporaneous opinions of the attorney general are entitled to considerable weight in construing the statute. *Town of Vernon v. Waukesha County*, 99 Wis. 2d 472, 479, 299 N.W.2d 593 (Ct. App. 1980), *aff'd*, 102 Wis. 2d 686, 307 N.W.2d 227 (1981). I therefore continue to adhere to them.

In self-organized counties, however, section 59.03 provides in part as follows:

The boards of the several counties shall be composed of representatives from within the county elected and compensated as provided in this section. Each county board shall act under sub. (2), (3) or (5), unless the county board adopts an ordinance, by a majority vote of the entire membership, to act under sub. (1). If a county board adopts such ordinance, a certified copy shall be filed with the secretary of state.

(1) SELF-ORGANIZED COUNTIES. . . .

. . . .

(c) *Compensation*. The method of compensation for supervisors shall be determined by the county board.

(d) *Vacancies*. A county board may determine the procedure for filling a vacancy.

In 65 Op. Att'y Gen. 16 (1976), section 59.03(1)(d) was construed as vesting broad discretion in county boards of supervisors in self-organized counties to determine how supervisory vacancies will be filled. Under the rationale of that opinion, section 59.03(1)(c) must similarly be construed to vest broad discretion in county boards of supervisors in self-organized counties to determine how supervisors in such counties will be compensated.

The history of the statute also indicates that the Legislature intended to vest broad discretion in county boards by enacting section 59.03(1)(c): "NOTE: This new paragraph gives a county board acting under this subsection complete discretion to establish a method for compensating supervisors." Legislative Reference Bureau Analysis of 1973 Senate Bill 27, section 4, which was enacted as chapter 118, section 4, Laws of 1973.

I therefore conclude that, except in self-organized counties, a county board may not establish multiple per diems for attendance at more than one committee meeting on the same day on days when the county board is not in session.

DJH:FTC

Constitutionality; Teachers; Wisconsin Retirement System; Constitutionality of 1989 Assembly Bill 565, providing military service credit for State Teachers Retirement System and Milwaukee Teachers Retirement System teachers who retired in 1981, discussed. OAG 23-90

August 2, 1990

FRED A. RISSER, *Chairperson*
Senate Organization Committee

You have requested my opinion regarding the constitutionality of 1989 Assembly Bill 565. 1989 A.B. 565 grants Wisconsin Retirement System (WRS) credit for military service, which was not a break in public employment, to participants of the old Milwaukee Teachers Retirement System and State Teachers Retirement System who retired during calendar year 1981. Members of these two systems who retired before merger of the systems into the WRS on January 1, 1982, are not eligible under present statutes for this military service credit. *See sec. 40.02(15)(c)5., Stats.*

The materials forwarded with your opinion request indicate, as the basis for the requested opinion, that "there have been differing opinions about the constitutionality of granting military credit for Wisconsin Retirement System participants who retired prior to 1982." *See* January 17, 1990, letter of Senator Andrea. I am not aware of the basis for such "differing opinions." The most likely constitutional challenges would, however, be under article IV, section 26 and article I, section 1 of the Wisconsin Constitution.

Article IV, section 26 of the Wisconsin Constitution, which relates to increased compensation, states in material part:

The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; . . . *This section shall not apply to increased benefits for persons who have been or shall be granted benefits of*

any kind under a retirement system when such increased benefits are provided by a legislative act passed on a call of ayes and noes by a three-fourths vote of all the members elected to both houses of the legislature, which act shall provide for sufficient state funds to cover the costs of the increased benefits.

I find no inherent violation of this provision.

1989 A.B. 565 funds the increased benefits out of state general purpose revenues. See 1989 A.B. 565 at sec. 1. If such bill is enacted "on a call of ayes and noes by a three-fourths vote of all the members elected to both houses of the legislature," there appears to be no impediment under article IV, section 26 of the Wisconsin Constitution.

The fourteenth amendment to the United States Constitution and article I, section 1 of the Wisconsin Constitution guarantee equal protection of the laws.

In Wisconsin, when legislation is constitutionally challenged on equal protection grounds, the first step in the analysis of a particular statute or ordinance is to establish beyond a reasonable doubt that the legislation is unconstitutional. "Every presumption must be indulged to sustain the law if at all possible and, wherever doubt exists as to a legislative enactment's constitutionality, it must be resolved in favor of constitutionality." *Equal protection is denied where legislation is "administered with an unequal hand so as to make an illegal discrimination between persons similarly situated."* There is no denial of equal protection as long as there is a reasonable basis for the classification. If the classification does not involve a suspect class, such denial comes about only if the legislature has made an irrational or arbitrary classification. The appellate standard of review for a statutory classification is the rational basis test, unless the challenged statute affects a "fundamental right" or creates a classification based on a "suspect class." If there is a fundamental right or suspect

class involved, the challenged legislation must pass "strict scrutiny." *Under the rational basis test, if there is any reasonable basis to justify the classification, we must uphold the law.* The courts are obliged to locate or construct, if possible, a rationale that might have influenced the legislative determination. It is to be noted that the equal protection guarantee under the United States and the Wisconsin Constitutions are substantially equivalent, and thus, the same legal analysis for constitutionality is employed.

We hold that the statute and the ordinance in this case must be reviewed under a rational relationship test because they address social and economic policy. This legislation does not involve a suspect class or fundamental right; therefore, the strict scrutiny test need not be applied.

Shannon & Riordan v. Zoning Board, 153 Wis. 2d 713, 728–29, 451 N.W.2d 479 (Ct. App. 1989) (emphasis provided). Since 1989 A.B. 565 "is economic legislation, judicial review does not reach the higher scrutiny required for fundamental constitutional rights" *State ex rel. Cannon v. Moran*, 107 Wis. 2d 669, 689, 321 N.W.2d 550 (Ct. App. 1982), *reversed on other grounds*, 111 Wis. 2d 544, 331 N.W.2d 369 (1983).

1989 A.B. 565 grants credit for military service for only those participants of the old Milwaukee Teachers Retirement System and State Teachers Retirement System *who retired during calendar year 1981*. This proposed legislation thus distinguishes between participants of the old systems who retired prior to 1981 and those that retired during 1981. No express statement regarding the basis for the legislation is contained in the bill.

All enacted laws are, however, presumed to be constitutional. I therefore consider it inappropriate to speculate as to the reasonable basis of the Legislature. This proposal is still in the legislative process and the intended basis has not been fully developed. The Legislature could insert an express statement of its purpose or enact the bill in an amended form that would

provide further indication as to the intended basis for its classification. It is my view that such a determination of the reasonableness of the basis for classification must focus on the bill as enacted and not on its transitory status.

As the Wisconsin Supreme court stated in *North Side Bank v. Gentile*, 129 Wis. 2d 208, 220, 385 N.W.2d 133 (1986):

This court's review of a legislative enactment is limited in scope. All statutes are presumed to be constitutional, and the party attacking a statute must prove it unconstitutional beyond a reasonable doubt. [Case cites omitted.] "The cardinal rule of statutory construction is to preserve a statute and find it constitutional if it is at all possible to do so." [Case cite omitted.] We must uphold the constitutionality of a statute if there is any reasonable basis for it.

I therefore conclude that, if enacted, 1989 A.B. 565 would not violate the above-discussed clauses of the United States or Wisconsin Constitutions.

DJH:WMS

Corporation Counsel; Duties and obligations of the corporation counsel in involuntary civil commitment proceedings under chapter 51, Stats., discussed. OAG 24-90

August 7, 1990

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

You ask five questions related to the conduct of involuntary civil commitment proceedings by the corporation counsel under chapter 51, Stats.

Your first question is as follows: "Who does the Corporation Counsel represent in the conduct of all proceedings under Chapter 51 of the Wisconsin Statutes, when he represents ' . . . the interests of the public. . . ?'"

In my opinion, the overriding obligation of the corporation counsel is to represent the interest of the public at large, as opposed to the interest of any governmental entity.

Section 51.20(4) provides as follows:

PUBLIC REPRESENTATION. Except as provided in ss. 51.42(3) (ar) 1 and 51.437 (4m) (f) . . . the corporation counsel . . . shall represent the interests of the public in the conduct of all proceedings under this chapter, including the drafting of all necessary papers related to the action.

68 Op. Att'y Gen. 97, 97-98 (1979), contains the following statement:

I am of the opinion that the provisions of sec. 55.06(1)(c) [regarding protective placement proceedings], Stats., do not impose a duty on such officers to represent the petitioners. The duty imposed is to assist the court, if requested, and such duty could involve assistance in presentation of evidence, limited investigation and the drafting of certain necessary papers relating to the proceeding. The duties are similar to those required under former sec. 51.02(3), Stats., which in 1968 provided that "[i]f requested by the judge, the

district attorney shall assist in conducting proceedings under this chapter."

The duties of the corporation counsel under the involuntary commitment statute referred to in 68 Op. Att'y Gen. at 97 are summarized in 57 Op. Att'y Gen. 122, 124 (1968). The "interests of the public" referred to in section 51.20(4) were first described in 25 Op. Att'y Gen. 549, 553 (1936):

[I]t is of public interest that all the facts in the case be presented and considered by someone who is not prejudiced. If the district attorney, after investigation into the matter, believes that it would be error to find the individual insane, he should present these facts to the court. On the other hand, if he believes from the facts that commitment of the individual is better for the general public it is his duty to so inform the court.

Many of these authorities suggest that the state or county may also have an interest in involuntary civil commitment proceedings. 57 Op. Att'y Gen. at 125-26 (collecting authorities). That may be particularly true where a county or state official acting in his or her official capacity petitions for involuntary commitment. 68 Op. Att'y Gen. at 98. *Compare* 70 Op. Att'y Gen. 148, 153 (1981).

In most cases, the corporation counsel will have determined the interests of the county, the state and the public to be the same. If not, it was stated in 68 Op. Att'y Gen. at 98 as follows:

[I]f a situation arises where there is a conflict between the duty of such officer to assist the court and a duty to represent state or county petitioners or the general interests of the county, such officer should apprise the court of such conflict and request to be relieved from duties of assisting the court.

Your second question is "which agency, if any, of the County of Dodge, has supervisory authority over the Corporation Counsel in the conduct of all proceedings under Chapter 51?"

In my opinion, such conduct is subject to review by the county board and by the county executive or county administrator, if one exists in your county.

Section 59.07(44) empowers the county board "in counties not having a population of 500,000 or more, [to] employ a corporation counsel, and fix his salary." In addition, section 59.457 provides as follows:

Corporation counsel; attorney designee. In lieu of employing a corporation counsel under s. 59.07(44) or in addition to employing a corporation counsel under s. 59.07(44) or 59.455, a county board shall designate an attorney to perform the duties of a corporation counsel as the need arises. Two or more counties may jointly designate an attorney to perform the duties of a corporation counsel. If an attorney has been designated to perform the duties of a corporation counsel, that person may exercise any powers and perform any duties of the corporation counsel.

In 72 Op. Att'y Gen. 161 (1983), the appointment, supervision and removal of the corporation counsel was discussed. That opinion indicates that the power of supervision concerning administrative and management functions exercised by the corporation counsel rests with the county executive or county administrator, while the power of supervision concerning any legislative and policy-making functions exercised by the corporation counsel rests with the county board. 72 Op. Att'y Gen. at 164-65.

If your county has no county executive or county administrator, then all powers of supervision over the corporation counsel are vested in the county board. However, in connection with chapter 51, the activity that is usually subject to supervision is the representation of the public interest.

Your third question is "which agency, if any, of the State of Wisconsin, has supervisory authority over the Corporation Counsel in the conduct of all proceedings under Chapter 51?"

In my opinion, no state agency exercises continual supervision over the county corporation counsel in connection with those activities conducted under chapter 51, since the corporation counsel is employed by the county rather than the state or any of its agencies. A corporation counsel may, however, have an obligation to consult with and advise state officials, such as those in the Wisconsin Department of Health and Social Services, in particular involuntary commitment proceedings in the course of the performance of those duties required under sections 51.20(4) and 59.07(44).

The department also has a contractual relationship with your county under section 46.031(2g)(a). *See* 79 Op. Att'y Gen. 8, 10 (1990). A corporation counsel's actions under chapter 51 should not be inconsistent with the provisions of that contract.

Your fourth question is "[t]o what extent, if at all, does the Corporation Counsel have prosecutorial discretion with respect to the manner in which his duty to represent the interests of the public in Chapter 51 . . . [is] performed?"

In my opinion, the corporation counsel has broad discretion as to how involuntary civil commitment proceedings will be conducted, but such discretion has been circumscribed by the Legislature in certain respects and remains subject to review by the county board and by the county executive or county administrator, if one exists in your county.

The discretion of the district attorney or corporation counsel in various kinds of civil proceedings was discussed in 78 Op. Att'y Gen. 171 (1989) (wage claims), 78 Op. Att'y Gen. 166 (1989) (town forfeiture actions) and 70 Op. Att'y Gen. 148 (1981) (child support and paternity; CHIPS; involuntary commitment; guardianship).

While "the district attorney [generally] is not answerable to any other officer of the state in respect to the manner in which he exercises those powers," *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 378, 166 N.W.2d 255 (1969), a county board electing to have the corporation counsel exercise such powers

pursuant to section 59.07(44) obtains a greater measure of control over those activities, since the corporation counsel is not a constitutional officer. In all other respects, the discretion exercised by the corporation counsel in connection with the conduct of those activities is equivalent to the discretion exercised by the district attorney had he or she performed such activities.

In 70 Op. Att'y Gen. at 150, it was stated that the district attorney or corporation counsel "has discretion with respect to the prosecution of civil matters in which the county and the state are interested." However, "it is equally clear that the legislature may, if it desires, spell out the limits of the district attorney's discretion and can define the situations that will compel him to act in the performance of his legislatively prescribed duties." *Kurkierewicz*, 42 Wis. 2d at 380.

Section 51.20(4) provides that "the corporation counsel . . . shall represent the interests of the public." A corporation counsel has no discretion to refuse to represent the public interest unless other counsel has been appointed to represent that interest. Similarly, section 51.20(8)(bg) authorizes the corporation counsel to enter into settlement agreements under certain circumstances, but they "shall be in writing, shall be approved by the court and shall include a treatment plan that provides for treatment in the least restrictive manner consistent with the needs of the subject individual." A corporation counsel has no discretion to refuse to comply with these statutory requirements, but apparently has broad discretion to enter into such settlement agreements, provided that they are in the public interest. In most other respects, the Legislature appears to have placed few limitations on the conduct of the corporation counsel in connection with involuntary civil commitment proceedings.

Your fifth question is "[t]o what extent, if at all, does the Corporation Counsel have prosecutorial immunity in carrying out his duty to represent the interests of the public in Chapter 51 . . .?"

In my opinion, a corporation counsel generally possesses immunity from state law damage claims involving the exercise of discretionary activities and immunity from federal civil rights damage claims involving the performance of quasi-judicial functions.

A detailed discussion of prosecutorial immunity appears in 75 Op. Att'y Gen. 49, 54 (1986). Governmental officials in Wisconsin are generally immune from state law claims involving discretionary acts, unless such conduct is "malicious, willful and intentional." *Ibrahim v. Samore*, 118 Wis. 2d 720, 728, 348 N.W.2d 554 (1984).

In addition, governmental officials, especially those acting in a prosecutorial capacity, are absolutely immune from both state and federal damage claims involving quasi-judicial activities. Sec. 893.80(4), Stats.; *Riedy v. Sperry*, 83 Wis. 2d 158, 168, 265 N.W.2d 475 (1978). While administrative and investigatory activities are not quasi-judicial in nature, commencing an action that is prosecutorial in nature as well as arranging and presenting evidence in such an action are activities afforded absolute immunity. 75 Op. Att'y Gen. at 54. Thus, "the commencement and handling of a paternity action by a county attorney is sufficiently analogous to the prosecution of criminal cases so as to justify the granting of absolute immunity." *Duerscherl v. Foley*, 681 F. Supp. 1364, 1368 (D. Minn. 1987).

For immunity purposes, I perceive no meaningful distinction between the quasi-judicial process of the commencement and subsequent conduct of a paternity action and the quasi-judicial process of the commencement and subsequent conduct of an involuntary civil commitment proceeding. I therefore conclude that a corporation counsel is absolutely immune from suit in connection with the performance of those involuntary civil commitment activities that are quasi-judicial in nature.

DJH:FTC

Automobiles And Motor Vehicles; Constitutional Law; Taxation; A motor vehicle registration fee which varies with the value of the motor vehicle or which is based upon the manufacturer's suggested retail price and the age of the motor vehicle would not violate article VIII, section 1 of the Wisconsin Constitution because the vehicle registration fee is a privilege tax, not a property tax. OAG 25-90

August 20, 1990

TOM LOFTUS, *Chairperson*

Assembly Organization Committee

On behalf of the Assembly Committee on Organization, you have asked whether a value-based motor vehicle registration fee would violate the uniformity clause, article VIII, section 1 of the Wisconsin Constitution. As you describe it, the statute would designate the registration fee as a tax imposed on the privilege of using a motor vehicle on Wisconsin highways and would apply only to vehicles used on the highways. You specifically ask whether a system under which the registration fee varies directly with the value of the motor vehicle would violate the uniformity clause and whether a fee based on the manufacturer's suggested retail price and the age of the motor vehicle would violate the uniformity clause.

Article VIII, section 1 of the Wisconsin Constitution requires that "[t]he rule of taxation shall be uniform Taxes shall be levied upon such property . . . as the legislature shall prescribe." The uniformity clause, however, applies only to *ad valorem*, direct taxes on property. *Mobil Oil Corp. v. Ley*, 142 Wis. 2d 108, 416 N.W.2d 680 (Ct. App. 1987), *review denied*, 144 Wis. 2d 956, 428 N.W.2d 554 (1988). *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 147 N.W.2d 633 (1967).

Article VIII, section 1 of the Wisconsin Constitution provides that "[t]axes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided." Our supreme court has held that the taxing of an automobile used for strictly private

purposes is a tax upon the privilege of using the highways of the state. *State ex rel. Transportation Asso. v. Zimmerman*, 181 Wis. 552, 559, 196 N.W. 848 (1924). In *Zimmerman*, the court upheld a registration fee which was based in part on a vehicle's weight but which provided for a reduction in the fee if the automobile had been operated for more than five years. The fee in *Zimmerman*, and the present fee imposed in section 341.04(1), Stats., are clearly taxes imposed on the privilege of operating a vehicle upon state highways, not taxes imposed on automobiles. Section 341.04(1) makes it unlawful to operate on the highway without paying the fee; vehicles not operated on the highway, vehicles stored by the owner or vehicles that are part of a dealers' inventory are not subject to the registration fees.

A registration fee based on the value of the motor vehicle, or based upon the suggested retail price and age of the motor vehicle, would not change the fee from a privilege tax to a property tax. The change affects only the measure of the tax, not the activity which is being taxed. As noted, in *Zimmerman* the court upheld a fee system in which the measurement of the tax included the weight of the vehicle. The proposed system simply changes the measure of the tax. *See Mobil Oil Corporation*.

DJH:AL

Constitutionality; Public Officials; Railroads; Article XIII, section 11 of the Wisconsin Constitution does not prohibit bona fide tours of railroad facilities conducted by rail. OAG 26-90

August 20, 1990

FRED A. RISSE, *Chairperson*
Senate Organization Committee

The Committee on Senate Organization has asked whether article XIII, section 11 of the Wisconsin Constitution bars a railroad from offering, or a public official from accepting, a ride on a train when the purpose of the ride is to inspect specific rail activities, such as the progress of a rehabilitation project for the installation of a new rail relay system or simply to tour railroad facilities.

Commonly called the Free Pass Amendment, article XIII, section 11 of the Wisconsin Constitution prohibits the giving of any free pass, frank or privilege involving traveling accommodations, or transportation of any person or property, or the transmission of any message or communication to state and local officials and employes, candidates for state or local offices, political committees, or any member or employe of a political committee. I discussed the amendment's history and scope in 77 Op. Att'y Gen. 237 (1988). The facts you describe would not constitute a violation of article XIII, section 11 of the Wisconsin Constitution.

As explained in this office's earlier opinion, the constitution prohibits any person, business or corporation from offering or giving anything involving traveling accommodations or transportation for which it usually would charge. Therefore, a railroad pass given to a legislator at a discount would violate the constitutional prohibition, as would the right to travel first class at tourist fares. A tour of a railroad's facilities, or a trip by railcar to inspect certain railroad improvements, does not involve transportation for which the railroad usually would charge a fare. Assuming that the railroad involved provides passenger service

at all, the railroad's business is transporting passengers from one destination to another. The railroad does not usually charge for tours of its facilities since it is not in the business of providing tours of its facilities.

As the request for the opinion indicates, the transportation provided in this instance is akin to a tour of an industrial plant; transportation might be provided as part of that tour but is incidental to the tour. In the context of article XIII, section 11 of the Wisconsin Constitution, "transportation" means the business of carrying people or property from one place to another. As noted in my earlier opinion, the intent of the prohibition was to prohibit bribery of public officials through gifts of transportation and traveling accommodation services. Nothing in the section's language or history suggests that it was intended to prohibit bona fide tours of railroad facilities conducted by rail.

Section 11.40, Stats., is also applicable. That section prohibits a public utility, which includes a railroad, from offering or giving any special privilege to any candidate for public office, among other people. A special privilege is defined as any thing of value not available to the general public. Quite clearly, a tour of the railroad facilities is not available to the general public. I would also conclude, however, that a tour of the facilities alone was not something of value. Unlike a meal, refreshments or gifts, the tour of the facilities has no intrinsic value; its only value is in conjunction with the tour because it facilitates that tour. The providing of transportation for the tour, whether by rail or golf cart, is not prohibited under section 11.40. If, however, the company offers a meal, refreshments or a gift memorializing the opening of new facilities, it cannot offer those things to anyone included within the ambit of section 11.40.

DJH:AL

Employe Trust Funds Board; Teachers; Teachers Retirement Board; Trust Funds; Wisconsin Retirement Board; Authority of the Employe Trust Funds Board, the Teachers Retirement Board and the Wisconsin Retirement Board in contested cases discussed.
OAG 27-90

August 30, 1990

KENNETH F. STELZIG, *Chair*
Employe Trust Funds Board
Teachers Retirement Board

You have requested my opinion on eight questions relating to the scope of the powers of the Employe Trust Funds (ETF) Board, the Teachers Retirement (TR) Board and the Wisconsin Retirement (WR) Board in contested cases which come before them.

The TR Board and the WR Board hear timely appeals from determinations by the Department of Employe Trust Funds (Department) regarding disability annuities for teacher and non-teacher participants, respectively, under section 40.63(5) and (9)(d), Stats. Secs. 40.03(7)(f) and 40.03(8)(f), Stats. "Timely appeal" is defined as a written request for review of a determination that is filed within ninety days after the determination is mailed to the person aggrieved by the determination. Sec. 40.02(55m), Stats., created by 1989 Wisconsin Act 166, sec. 1.

The ETF Board hears timely appeals, as defined by section 40.02(55m), from all Department determinations except those disability appeals heard by the TR and WR Board and those matters heard by the Group Insurance Board. Sec. 40.03(1)(j), (6), (7), and (8), Stats. Section 40.03(1)(j) provides that the ETF Board "shall review the relevant facts and may hold a hearing." Pursuant to section 40.08(12), any action, decision or determination of the ETF Board may be reviewed only by certiorari, "[n]otwithstanding s. 227.52."

Chapter 227 sets forth detailed procedures for administrative decision making in contested cases. It is clear that these procedures apply to cases before the TR and WR Boards. The threshold question, numbered seven in your request, is whether the ETF Board's exemption from chapter 227 judicial review procedures also exempts the ETF Board from the pre-review decision making procedures of chapter 227.

Section 227.42 (formerly section 227.064) creates a residual hearing right to those who meet its conditions and are not granted a specific right to a hearing by other statutory provisions or administrative rules. *Milwaukee Met. Sewerage Dist. v. DNR*, 126 Wis. 2d 63, 73, 375 N.W.2d 649 (1985). Section 227.42(3) creates an exception to the residual hearing right created by section 227.42(1). The right does not apply to "actions where hearings at the discretion of the agency are expressly authorized by law." Section 40.03(1)(j) is such a statute. Thus, chapter 227's detailed procedures for administrative decision making in contested cases do not apply to contested cases before the ETF Board.

Nonetheless, where the Department's determination is unfavorable to the employe, due process requires the ETF Board to provide the employe with a hearing on reasonable notice and an opportunity to present evidence, testimony and argument. *Ruhmer v. Wisconsin State Teachers Retirement Bd.*, 48 Wis. 2d 419, 428, 180 N.W.2d 542 (1970). Although the details of the administrative hearing cannot be defined mechanically or precisely, the opportunity to be heard encompasses the following elements:

- (1) Timely and adequate notice detailing the reasons for a proposed termination;
- (2) an effective opportunity [for the recipient] to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally;
- (3) retained counsel, if desired;
- (4) an impartial decision maker;
- (5) a decision resting solely on the legal rules and evidence adduced at the hearing; and
- (6) a

statement of reason for the decision and the evidence relied on.

State ex rel. Michalek v. LeGrand, 77 Wis. 2d 520, 533–34, 253 N.W.2d 505 (1977).

Your first question is:

When reviewing a Department determination, what limits are there on the [ETF, TR and WR] Board's power to order a different determination?

Generally speaking, the only restrictions on the board's power are that it may not exceed its jurisdictional authority, may not act in an arbitrary or capricious manner and may not order determinations which are contrary to law. *Hennekens v. River Falls Pol. & Fire Comm.*, 124 Wis. 2d 413, 419, 369 N.W.2d 670 (1985). If the board rejects the facts found by the hearing examiner, it may substitute its own findings after it consults with the examiner who heard and saw the witnesses and after it states on the record its reasons for modifying the examiner's findings. *Transamerica Ins. Co. v. ILHR Department*, 54 Wis. 2d 272, 284, 195 N.W.2d 656 (1972). Findings of fact made by the board must be based on evidence which the board believes proves the findings to a reasonable certainty by the greater weight of the credible evidence. *Reinke v. Personnel Board*, 53 Wis. 2d 123, 137–38, 191 N.W.2d 833 (1971).

Your second question is:

Is the [ETF] Board limited in its equity powers to only the specific authority found under s. 40.03(1)(a), Wisconsin Statutes? Are there any powers of equity afforded to the [ETF, TR or WR] Board under other law?

Section 40.03(1) provides, in relevant part:

The board:

(a) Shall authorize and terminate the payment of all annuities and death benefits, except disability annuities, in accordance with this chapter and may adjust the computation of the amount, as provided by this chapter, as necessary to

prevent any inequity which might otherwise exist if a participant has a combination of full-time and part-time service, a change in annual earnings period during the high years of earnings or has previously received an annuity which was terminated.

As a general matter, an administrative agency created by the Legislature has only those powers which are expressly conferred or necessarily implied by the statutes under which the agency operates. *Kimberly-Clark Corp. v. Public Service Comm.*, 110 Wis. 2d 455, 461-62, 329 N.W.2d 143 (1983). Any reasonable doubt as to the existence of an implied power should be resolved against the exercise of that authority. 110 Wis. 2d at 462.

Under these rules of construction, the ETF Board's equity powers are limited to the circumstances and extent defined by section 40.03(1)(a). I have located no other statute which, in my opinion, expressly or impliedly gives the ETF Board additional equity powers. The legislatively defined powers of the TR and WR Boards, in my opinion, also contain no express equity powers and no language from which equity powers could be inferred.

Your third question is:

When exercising the [ETF, TR or WR] Board's powers in a case where the Board reviews a Department determination and finds the Department has acted within its statutory authority, obeyed statutory directives and limitations, such as time limits, but Board members feel the result is not equitable, may the [ETF, TR or WR] Board order a different determination? May the different determination exceed express statutory authority or contradict statutory directives or limitations, such as time limits?

Because your question refers to time limits only as an example, my answers will not be limited to circumstances involving time limits. If the "inequitable" result were based on the Department's interpretation of an ambiguous statute susceptible of multiple interpretations, the boards could adopt a less "inequitable"

interpretation of the ambiguous statute. Similarly, if the Department's decision depends on an "inequitable" resolution of disputed factual issues, the boards can substitute their own findings of fact, if consistent with a preponderance of the evidence, subject to the consultation required by the *Transamerica Ins. Co.* case, 54 Wis. 2d at 284. However, in no circumstance could the boards adopt interpretations which are directly contrary to the facts or exceed express statutory authority or contradict statutory directives or limitations. Moreover, an agency charged with administering the law may not substitute its own policy for that of the legislature. *Niagara of Wis. Paper Corp. v. DNR*, 84 Wis. 2d 32, 48, 268 N.W.2d 153 (1978).

Your fourth question is:

Do the provisions found under Sections 40.01(1) & (2) provide discretion to the [ETF, TR or WR] Board to take actions which it deems consistent with the purposes of the trust but not specifically authorized under Chapter 40? Do these provisions [s. 40.01(1) and (2), Stats.] give the [ETF, TR or WR] Board discretion to take actions consistent with the stated purposes of the Trust rather than a specific provision of Ch. 40?

Section 40.01(1) creates the Public Employe Trust Fund and describes the public policies to be furthered by the fund. The section does not by its terms or by implication invest the ETF, TR or WR Boards with any powers or duties not otherwise granted to the boards under separate statutory authority.

Section 40.01(2) defines the purposes of the Public Employe Trust Fund. In relevant part, that section provides:

The public employe trust fund is a public trust and shall be managed, administered, invested and otherwise dealt with solely for the purpose of ensuring the fulfillment at the lowest possible cost of the benefit commitments to participants, as set forth in this chapter, and shall not be used for any other purpose. . . . All statutes relating to the

fund shall be construed liberally in furtherance of the purposes set forth in this section.

There is potential tension between the directive to liberally construe the Public Employe Trust Fund statutes in furtherance with the purposes of the fund and the purpose of the fund to ensure low cost and fulfillment of benefit commitments "as set forth in this chapter." The general rule followed by the courts is that the policy of liberal construction may not create rights by repealing or changing the obvious meaning of the statutes. *State v. LIRC*, 136 Wis. 2d 281, 288, 401 N.W.2d 585 (1987). Thus, neither the ETF Board nor the TR or WR Boards can take action based on the purposes of the fund, stated in section 40.01(2), if the proposed action is not specifically authorized by another provision of chapter 40. *See Grogan v. Public Service Commission*, 109 Wis. 2d 75, 81, 325 N.W.2d 82 (Ct. App. 1982).

Your fifth question is:

When the [ETF, TR or WR] Board believes that the facts of a case are consistent with a previous case which has been adjudicated by a court, may the Board decide to apply the same judicial doctrines as applied by the court in such earlier case (e.g. equitable estoppel)?

The broad scope of your question necessitates a somewhat general answer. The tenor of your question appears to inquire about the application of certain judicial doctrines designed to limit relitigation by a party of claims or issues which have been determined against the party in previous litigation. The first doctrine, *res judicata*, provides that a prior judgment on the merits between two parties bars subsequent litigation between those parties on the same cause of action. *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis. 2d 306, 311, 334 N.W.2d 883 (1983). Under the hypothesis of your question, the individual in the subsequent case is different from the person involved in the prior judicial case. The element of identity of parties is absent. Thus, the doctrine would not be applicable.

A related doctrine, claim preclusion, bars relitigation by a party of an issue of fact conclusively determined against the party in a prior proceeding after a fair opportunity to litigate the issue. *Crowall v. Heritage Mut. Ins. Co.*, 118 Wis. 2d 120, 126, 346 N.W.2d 327 (Ct. App. 1984). In the hypothesis of your question, only the Department could meet even the threshold for application, since only it was involved in the prior proceeding. Thus, the boards could not use the prior judicial determination to deprive the individual of his or her right to litigate the issue. On the other hand, if the ETF, TR or WR Board has before it the same issue of fact previously determined by a court adversely to the Department, the doctrine could bar the Department from relitigating the fact if the other preclusion elements are met. See *Acharya v. AFSCME, Council 24, WSEU*, 146 Wis. 2d 693, 432 N.W.2d 140 (Ct. App. 1988); *Schaeffer v. State Personnel Comm.*, 150 Wis. 2d 132, 441 N.W.2d 292 (Ct. App. 1989). The boards must exercise caution when considering the application of preclusion doctrines, however. In the question's hypothesis, for example, a fact situation which is merely "consistent with [the facts of] a previous case" will require careful legal analysis before it can be determined whether the issues are identical in both the prior and subsequent proceedings and whether a statute of limitations precludes relief.

The specific doctrine you mention in the question (equitable estoppel) requires special treatment. Equitable estoppel is a judicial doctrine which prevents a party from asserting its legal rights where it acted or failed to act in circumstances that reasonably induced reliance by another party to the latter party's detriment. *Advance Pipe & Supply v. Revenue Dept.*, 128 Wis. 2d 431, 439, 383 N.W.2d 502 (Ct. App. 1986). The doctrine is rarely applied to action or inaction by the government. *Id.* at 439-40. To estop the government, the party must demonstrate that it would be unconscionable to allow the state to revise an earlier position. *Id.* at 440. Without additional facts, it is very difficult to conclude that the ETF Board's limited equity powers under section 40.03(1)(a) would permit the application of this

doctrine to situations under section 40.03(1)(a). Since the TR and WR Boards have no equity powers, the doctrine is completely inapplicable to these boards.

Your sixth question is:

If an "administrative error" made by an agent of the Department (e.g., an employer or an outside contractor employed by the Department) caused a participant to take an action which, but for the error, would not have been taken, does the [ETF, TR or WR] Board have the authority to consider the "adverse reliance" and order appropriate action? Is the answer the same if the agent's error caused the participant to fail to take an action which would have otherwise been taken? What if the error was caused by a third party with no official relationship with the department (e.g., an insurance agent, union official, etc.)?

In the absence of a concrete fact situation, only the most general answer to your question can be given. First, the law in this area makes no distinction between action and inaction. *Advance Pipe & Supply*, 128 Wis. 2d at 439. Second, a participant who relies solely on erroneous advice of another with no official relationship to the Department cannot establish that he relied on the Department's action or inaction. Thus, the ETF Board could not equitably estop the Department from asserting its position based on advice given by that third party. Neither could the TR or WR Boards estop the Department from asserting its position, since both of these boards completely lack equity powers.

Your question does not provide enough detail to answer the question whether the ETF Board can bind the Department to erroneous advice given by the Department's agents, in the narrow circumstances where the board has equity powers. In general, however, the courts are highly resistant to tying the government's hands because of the conduct of particular officials in their relations with particular individuals. *Department of Revenue v. Moebius Printing Co.*, 89 Wis. 2d 610, 638, 279 N.W.2d 213

(1979). *See also Heckler v. Community Health Services*, 467 U.S. 51, 60–61 (1984). To the extent that the individual relies on the advice of an agent contrary to promulgated statutes and regulations, the individual's reliance will almost never be considered reasonable. *Heckler*, 467 U.S. at 64–65; *Flamm v. Ribicoff*, 203 F. Supp. 507, 510 (S.D.N.Y. 1961).

Your final question is:

Does the Department Secretary have the power under s.40.03(2)(m) to take action which the [ETF, TR or WR] board may not have direct power to take, to correct errors, if directed by the Board?

Section 40.03(2) provides, in relevant part:

The secretary:

. . . .

(m) Shall have all other powers necessary to carry out the purposes and provisions of this chapter, except as otherwise specifically provided by this chapter.

Section 40.03 divides authority over the Public Employee Trust Fund between the ETF Board, the secretary of the Department of Employee Trust Funds, the Department of Justice, the State Treasurer, the Actuary, and the Group Insurance, Teachers Retirement and Wisconsin Retirement Boards. The secretary has powers, including error-correcting powers, distinct from the powers given to the other entities defined in section 40.03. *See, e.g., sec. 40.08(5), (6), (10), Stats.* In addition, the secretary may be given the ETF Board's equity power under section 40.03(1)(a) if the board chooses to delegate that power to the secretary. Secs. 40.03(1)(1), 40.03(2)(n), Stats. The TR and WR Boards are not a potential source of the secretary's delegated authority, since those boards lack authority to delegate their powers. The ETF, TR and WR Boards all have appeal jurisdiction over certain departmental decisions. Secs. 40.03(1)(j), (7)(f), and (8)(f), Stats. If on appeal the TR or WR Board concludes that the secretary failed to correct an error which the secretary had statutory authority to correct, the board hearing the appeal may direct the

secretary to correct the error under the general authority of chapter 227. If on appeal the ETF Board concludes that the secretary failed to correct an error which the secretary had statutory authority to correct, the board may direct the secretary to correct the error under the appellate authority given by section 40.03(1)(j).

A more difficult question is whether the secretary's power under section 40.03(2)(m) to "carry out the purposes and provisions of [chapter 40]" is limited by or supplemental to the specific statutory provisions of chapter 40. If that grant of authority were supplemental to the express authority granted by statutes, the secretary could correct certain errors even in the absence of specific authority to do so, based on a determination that correction of the error would be consistent with the purposes of the chapter. In the absence of greater descriptive detail about the "errors" referred to in your question, it is my opinion based on the general language of sections 40.01(2) and 40.03(2)(m) that the secretary's implied general powers in section 40.03(2)(m) to act in furtherance of the purposes of the trust fund are limited by the specific statutory sections in chapter 40. *See Grogan*, 109 Wis. 2d at 81. If the statutes do not expressly grant or necessarily imply an error-correcting power to the secretary, the secretary is without such power. The ETF Board may not direct the secretary to correct errors which the secretary is powerless to correct.

DJH:BAO

District Attorney; Public Officials; Salaries And Wages; Words And Phrases; District attorneys are not "public officer[s]" within the meaning of that term in article IV, section 26 of the Wisconsin Constitution, and the Legislature may, therefore, increase or diminish the salaries of district attorneys during their terms of office. OAG 28-90

August 30, 1990

ERIC G. JOHNSON, *District Attorney*
St. Croix County

You have requested my opinion whether the salary of a district attorney may be increased during his or her term of office. You raise this question because, since January 1, 1990, district attorneys have had their salaries set and paid by the State of Wisconsin. See 1989 Wisconsin Act 31. Your concern arises from the provisions of article IV, section 26 of the Wisconsin Constitution, which provides that "the compensation of any public officer [shall not] be increased or diminished during his term of office."

I conclude that although district attorneys now derive their salaries from the state treasury, district attorneys are not "public officer[s]" within the meaning of article IV, section 26. Consequently, the Legislature may increase or decrease district attorneys' salaries during their terms of office without offending the Wisconsin Constitution.

The constitutional restriction on increasing or decreasing the compensation of public officers has deep roots in Wisconsin. The Constitution of 1848 included the following provisions:

The legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor, after the services shall have been rendered or the contract entered into. *Nor shall the compensation of any public officer be increased or diminished during his term of office.*

Wis. Const. art. IV, sec. 26 (1848). Identical language appears in the present constitution:

The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into; *nor shall the compensation of any public officer be increased or diminished during his term of office* except that when any increase or decrease provided by the legislature in the compensation of the justices of the supreme court or judges of any court of record shall become effective as to any such justice or judge, it shall be effective from such date as to each of such justices or judges.

Wis. Const. art. IV, sec. 26 (1990).

The Wisconsin Supreme Court has considered several times the restriction in article IV, section 26 of the Wisconsin Constitution (hereafter section 26). In *Board of Supervisors v. Hackett and others*, 21 Wis. 620 [*613] (1867), the court defined the term "compensation" in the section, holding that

the word "compensation" as used in sec. 26, art. IV of the constitution, signifies the return for the services of such officers as receive a fixed salary payable out of the public treasury of the state; . . . it does not, and was not intended to apply to the remuneration of that large class of officers, such as sheriffs, constables, clerks of courts and others, who receive specific fees for specific services as they are from time to time required to render them. . . . [I]t was not the intention to restrict the power of the legislature as to the compensation of officers of this class

Id. at 625 [*617-18]. The court further decided that "the limitation [in section 26] applies only to those salaried officers paid by the state, and not to those minor ones who, according to the usual course of public business, are paid by fees taxed or allowed for each item of service as it is rendered." *Id.* at 625 [*618].

In *State ex rel. Martin v. Kalb*, 50 Wis. 178, 6 N.W. 557 (1880), the court interpreted the term "public officer." In 1875, the Legislature created a county court in Brown County, provided

for the election of a judge, initially fixed the judge's salary at \$3,000 (with a scheduled increase to \$3,500), and required the county treasurer to pay the salary out of county funds. *Martin*, 50 Wis. at 179. In 1879, the Legislature changed the court's jurisdiction and reduced the judge's salary to \$1,500 during the term of his office. The judge brought suit for payment of \$3,500, contending that section 26 prohibited the reduction in his salary. Applying *Hackett*, the supreme court concluded that because county judges "come within the class of officers whose compensation is not paid out of the state treasury," *id.* at 184, section 26 did not prohibit the reduction.

Thus, the restriction in section 26 applied if an official received a fixed salary from the state treasury. The supreme court affirmed that view of section 26 in other decisions. *See, e.g., Sieb v. Racine*, 176 Wis. 617, 625, 187 N.W. 989 (1922) (section 26 "applies only to public officers whose salaries are paid out of the state treasury"); *State ex rel. Sommer v. Erickson*, 120 Wis. 435, 98 N.W. 253 (1904) (county board's reduction of sheriff's compensation did not violate section 26 because salary was not paid out of state treasury).

In *State ex rel. Sachtjen v. Festge*, 25 Wis. 2d 128, 130 N.W.2d 457 (1964), however, the supreme court shifted its interpretative focus. *Sachtjen* arose following a statewide court reorganization in the early 1960's. As part of that reorganization, the state set a minimum salary for county judges and assumed responsibility for paying the major portion of those salaries. Counties were required to pay the balance and authorized to pay, in each county's discretion, a salary supplement as well. *Sachtjen*, 25 Wis. 2d at 147-48. Under court decisions linking the status of "public officer" with the source of the official's salary, county judges apparently became "public officer[s]" within the meaning of section 26.

In Dane County, the county board authorized an increase in the county portion of the county judges' salaries, effective on a specified date regardless of when their terms began. The Dane

County clerk, advised that the increase violated section 26, refused to pay the increase to Judge Sachtjen, who brought suit to compel payment.

The Wisconsin Supreme Court characterized the situation as follows:

The primary question posed in this case is whether a judge of a county court, with the powers and attributes enjoyed since court reorganization, is the type of "public officer" to which sec. 26, art. IV, Wis. Const., applies. If he be such type, the question would follow whether the section applies to his compensation out of county funds as well as state funds.

It is clear that in many contexts "public officer" would include a judge of a county court as well as a justice of the supreme court, a judge of a circuit court, or a justice of the peace. Any one of them would fulfil the broad definition of "public officer" approved by this court in a different context. So would a number of county and municipal officers.

It will be seen, however, that the term "public officer" as used in sec. 26, art. IV, Wis. Const., has not been deemed to include every officer who fulfils the broad definition of the term, and that by consistent exclusion of officers of primarily local responsibility, "public officer" in sec. 26 has been interpreted virtually as if it read "state public officer." Indeed this court has, in three decisions on the subject, used the term "state officer."

Id. at 133-34 (footnotes omitted). In a lengthy opinion, the court concluded that a county judge was not a "public officer" within the meaning of section 26. Notably, the court backed away from its earlier emphasis on the source of salary as defining whether an official held the status of a "public officer" subject to the restrictions of section 26:

It is true that this court, in *State ex rel. Martin v. Kalb*, in holding that the county judge was not a (state) public officer subject to sec. 26 of art. IV, Wis. Const., laid stress

upon the fact that the county judge then drew his salary from the county and not the state. Under court reorganization, the payment of the basic salary of the county judge is shared by state and county. *We do not view this change in the source of compensation as controlling. The fact that in 1880, and up to court reorganization, the salary of a county judge came from the county treasury demonstrated conclusively that he was primarily a local rather than a state officer. His status remains very much the same, although some of his compensation now originates with the state.*

Sachtjen, 25 Wis. 2d at 148–49 (footnotes omitted) (emphasis added).

We conclude that notwithstanding the contribution by the state of a share of the basic salary of county judges, their office has not sufficiently changed in character from a local to a state office to bring county judges within the class of public officer to which sec. 26 of art. IV, Wis. Const., applies. It follows that the legislature is free to raise or lower the salary of county judges during their terms and to authorize the county boards to raise or lower, midterm, the supplemental salary paid by the county.

Id. at 150.

Sachtjen thus demonstrates that receipt of a salary from the state treasury is, by itself, not sufficient to confer the status of "public officer" within the meaning of section 26. The recipient of that salary must also hold a position having the character of a state rather than local office.

In light of *Sachtjen*, I conclude that district attorneys are not "public officer[s]" within the meaning of section 26. District attorneys have always been regarded as elective county officials. *See, e.g.*, 45 Op. Att'y Gen. 166 (1956) (relating to salary changes of county officers, including the district attorney). Each is elected by the voters of his or her county (or counties, in the case of Shawano and Menominee Counties). Except when

appointed as a special prosecutor in another county, the prosecutorial authority of each district attorney extends only to boundaries of the county in which he or she was elected.

I recognize that 1989 Wisconsin Act 31 also made numerous other changes in statutory provisions affecting the office of district attorney. One of these amendments, for instance, relabels the office as a "state agency." See 1989 Wisconsin Act 31, sec. 109. Other amendments recharacterize the office as an elective state office instead of an elective county office. *Id.* at secs. 168, 169.

These statutory revisions do not affect my conclusion. Whatever their statutory classification, district attorneys remain county officers as a matter of state constitutional law. Wis. Const. art. VI, § 4(1). For purposes of interpreting section 26, the constitutional rather than statutory classification controls.

Moreover, for purposes of interpreting section 26 in this situation, the touchstone under *Sachtjen* remains an assessment of changes in the character of the affected office, with a special focus on changes in the character of the officer's duties. As with the court reorganization that affected the county judges in *Sachtjen*, the transfer of responsibility for the district attorneys' salaries from the counties' treasuries to the state's treasury has not significantly changed the character of the office of district attorney. If anything, a comparison of the effects of the court reorganization that resulted in the litigation in *Sachtjen* and the effects of prosecutorial reorganization that caused you to request this opinion reinforce my conclusion that the character of the office has not changed sufficiently to bring district attorneys within the scope of section 26.

In 1959, the Legislature enacted chapter 315, Laws of 1959, which took effect on January 1, 1962. This legislation effected substantial changes in Wisconsin's county courts. (Another enactment, chapter 495, Laws of 1961, implemented further revisions.) Before these changes took effect, the county courts had limited jurisdiction, extending principally "to the probate of

wills and granting letters testamentary . . . ; to the appointment of guardians to minors . . . ; and to hearing objections to the granting of licenses to marry." Sec. 253.03, Stats. (1961).

After January 1, 1962, however, county courts had greatly expanded jurisdiction extending to what can be viewed as matters of statewide rather than local interest. After court reorganization, county courts had not only probate jurisdiction (section 253.10, Stats. (1963)), but broad civil jurisdiction (section 253.11, Stats. (1963)), criminal jurisdiction concurrent with the circuit court except for treason (section 253.12, Stats. (1963)), and exclusive jurisdiction of children and adoptions under chapters 48 and 322 (section 253.13, Stats. (1963)). Before the court reform legislation, circuit courts had exercised the jurisdiction newly conferred on county courts. *See* sec. 252.03, Stats. (1961).

Despite these changes, the supreme court in *Sachtjen* concluded that county judges were not "public officer[s]" within the meaning of section 26. The court reached this conclusion even though the shift to the state of part of the county judges' compensation was accompanied by a significant expansion of duties that included adding jurisdiction of the county courts over matters having strong statewide characteristics (such as criminal prosecutions).

In my view, if the substantial changes in the county judges' duties effected by the court reform legislation did not justify treating county judges as "public officer[s]" under section 26, the minimal changes in the district attorneys' duties effected by 1989 Wisconsin Act 31 cannot justify treating district attorneys as "public officer[s]" under that constitutional provision: except for the removal of child support enforcement responsibilities and some county corporation counsel duties--which were not always assigned to district attorneys anyway, *see* section 59.07(44), Stats. (1987-88) (authorizing county boards to employ corporation counsel)--the district attorney's duties remain almost unchanged by 1989 Wisconsin Act 31. *Compare* sec. 59.47, Stats. (1987-88)

with 1989 Wisconsin Act 31, sec. 2900 (creating sec. 978.05, Stats.).

In summary, I conclude that, despite the new source of their salaries, and despite statutory characterization of the office as a state agency, district attorneys are not state "public officer[s]" subject to the restrictions of section 26. Their responsibilities remain essentially the same as those in effect before the enactment of 1989 Wisconsin Act 31, and those responsibilities are not significantly different in character from the duties conferred on county judges in 1962. Under *Sachtjen*, therefore, the restrictions of section 26 do not apply to district attorneys. The Legislature may therefore increase or diminish the salary of any or all district attorneys during their terms of office.

You have also asked whether district attorneys, who are classified for pay purposes in executive group 6, can obtain the benefit of any increase in the executive group 6 pay range that might take effect between 1991 and 1992. In light of my answer to your first question, my answer to this question is yes.

DJH:CGW

Court Reporters; Public Records; Counties are not required to provide free copy machine services for court reporters who collect fees under section 814.69(2), Stats., for furnishing transcripts to parties. OAG 29-90

September 28, 1990

KENNETH J. BUKOWSKI, *Corporation Counsel*

Brown County

You have asked for my opinion as to whether under section 753.19, Stats., a county must "provide free copy machine services for state-employed court reporters when those court reporters make copies of transcripts for non-indigent litigants when the court reporters are being paid by the litigant for the transcript copies?"

In my opinion, the answer is no.

You state that court reporters charge the recipients of the transcripts for copies while at the same time refusing to reimburse the county for the use of the copying facilities.

Section 753.19 provides, in relevant part, that "[t]he cost of operation of the circuit court for each county . . . shall be paid by the county."

The Wisconsin Supreme Court interpreted section 753.19 in *Contempt in State v. Lehman*, 137 Wis. 2d 65, 403 N.W.2d 438 (1987). In *Lehman*, the court considered whether the county was required to pay the reasonable attorney fees of counsel appointed by the court to assist an indigent criminal defendant. The court concluded that the county was required to pay the attorney fees under section 753.19 because the trial court had determined that the appointment of the stand-by counsel was essential and that payment of the fees was not mandated by other provisions of the statutes. *Lehman*, 137 Wis. 2d at 83.

Likewise, in *Romasko v. Milwaukee*, 108 Wis. 2d 32, 36-37, 321 N.W.2d 123 (1982), the supreme court held that where a guardian ad litem is appointed by a court to represent an indigent minor and no specific provision for payment of fees appears in

the statute, the county of venue must pay those fees under section 753.19. The court concluded that the guardian ad litem fee is a necessary cost of the operation of the court because the guardian ad litem's services enable the court to perform its duty of providing protection to the minor. *Romasko*, 108 Wis. 2d at 42.

In contrast, in 74 Op. Att'y Gen. 164, 168 (1985), the attorney general concluded that the bar dues of circuit court judges are not a cost of operation of the circuit court but rather are personal professional costs. The attorney general reasoned that the bar dues of individuals licensed as attorneys to serve as circuit judges are not a court's necessities which would permit a court to utilize its inherent power to compel the county to pay such dues under section 753.19.

In my opinion, the copying costs of a court reporter are not a cost of operation of a circuit court when the reporter is providing copies of transcripts to non-indigent parties who have requested the transcript and/or copies of the transcript pursuant to section 757.57(5). Section 757.57(5) allows any party to a proceeding to request the reporter to make a typewritten transcript. Under section 814.69(2) the reporter receives a fee from the party requesting the transcript of \$1.75 per twenty-five line page for the original and sixty cents per twenty-five line page for each copy. If the state is the requestor, the reporter receives \$1.50 per twenty-five line page for the original and fifty cents per page for each copy. *See also* SCR 71.04(6) and (11).

Thus, the reporters are reimbursed for their expenses in preparing a transcript by the party who requests the transcript. The transcripts are prepared for the benefit of the parties who request them, not for the benefit of the court. Therefore, under section 753.19 counties are not required to provide free copy machine services for court reporters who collect fees under section 814.69(2) for furnishing transcripts to parties.

DJH:LS

Counties; District Attorney; Counties are not required to pay the bar dues of district attorneys and assistant district attorneys serving the county. However, a district attorney or assistant district attorney may elect under section 978.12(6), Stats., to retain a county fringe benefits package that includes payment of bar dues. OAG 30-90

October 8, 1990

DENNIS E. KENEALY, *Corporation Counsel*

Ozaukee County

You have asked for my opinion as to whether Ozaukee County is required to pay, or whether it may pay, the bar dues of the Ozaukee County District Attorney and Assistant District Attorneys in light of an earlier opinion issued at 74 Op. Att'y Gen. 165 (1985).

In my opinion, the county is not required to pay the bar dues of the district attorney and her assistants. However, a district attorney or assistant district attorney may elect under section 978.12(6)(a), Stats., to retain a county fringe benefits package that includes payment of bar dues.

In 74 Op. Att'y Gen. at 166, the attorney general concluded that there was no Wisconsin statute expressly conferring on county boards the power to pay state bar dues of circuit judges. You indicate that the opinion might not be applicable to district attorneys because of sections 978.13 and 59.15(3).

Section 978.13(1)(a) requires the state to assume financial responsibility for payment of salaries and fringe benefits for district attorneys, deputy district attorneys and assistant district attorneys. Except as provided for in section 978.13(1), counties have the financial responsibility for the operation of the district attorney's office, including, but not limited to all of the following: adequate office space, upkeep and repair of the office, utilities, a sufficient law library, adequate investigators, clerical and support staff and office equipment and supplies. Sec. 978.13(2)(a)-(f), Stats. District attorney bar dues are not one

of the expenses enumerated in section 978.13(2) to be paid for by the county and thus the county is not required to pay the bar dues under this statute.

The other statute to which you refer, section 59.15(3), provides that:

The [county] board may provide for reimbursement to any elective officer, deputy officer, appointive officer or employe of any expense out-of-pocket incurred in the discharge of his [or her] duty in addition to his [or her] salary . . . including without limitation because of enumeration, traveling expenses within or without the county or state [and] tuition costs incurred in attending courses of instruction clearly related to his [or her] employment

In my opinion, the district attorney and assistant district attorneys no longer fall under the provisions of section 59.15. As a result of legislation effective January 1, 1990, the office of district attorney was changed from a county office to a state office for statutory purposes.

Under section 5.02(23), a state office is now defined to include the office of district attorney. Under section 59.12 the district attorney is no longer listed as a county officer. Indeed, the Legislature has completely removed from chapter 59 the description of the district attorney's duties by repealing section 59.47. Also, the salaries of district attorneys and assistant district attorneys are paid for by the state. Sec. 978.12, Stats. Along with the many other changes brought about by the district attorney legislation, candidates for district attorney are required to file nomination papers and campaign finance registrations and reports with the state elections board rather than county clerks. Sec. 8.10(6)(a), Stats. In addition, district attorneys are subject to the code of ethics for state public officials. Secs. 19.42(10)(c) and 20.923(2)(j), Stats.

Similar statutory changes affecting circuit court judges led the court to conclude in *Committee to Retain Byers v. Elections Board*, 95 Wis. 2d 632, 634, 291 N.W.2d 616 (Ct. App. 1980),

that the office of circuit judge is a state rather than a county office. The court noted that circuit court judges are compensated as state employes; candidates for circuit court judge file nomination papers with the state election boards; winners of circuit court elections are certified by a state agency; and circuit court judges are subject to the code of ethics for state public officials. *Byers*, 95 Wis. 2d at 635. These statutes and others led the court to conclude that the "statutory scheme governing elections clearly indicates that the office of circuit court judge is a state and not a county office." *Byers*, 95 Wis. 2d at 634.

Based on the significant statutory changes in the office of district attorney and the court's decision in *Byers*, I conclude that section 59.15(3) does not apply to district attorneys and assistant district attorneys because, under the statutes, they are not county "elective officer[s], deputy officer[s], appointive officer[s] or employe[s]."

I have also considered and rejected the proposition that language in article VI, section 4(1) of the Wisconsin Constitution brings district attorneys and their assistants within the purview of section 59.15(3). Article VI, section 4(1) of the Wisconsin Constitution provides, however, that "[s]heriffs . . . district attorneys, and all other elected county officers . . . shall be chosen by the electors of the respective counties . . ." Notwithstanding the inclusion of sheriffs as county officers:

[T]he Wisconsin Supreme Court has determined that the sheriff "represents the sovereignty of the State" and is "accountable only to the sovereign . . ." Although we might question the Wisconsin Supreme Court's classification of the county sheriff as an officer of the state, that court's determination based as it is on an interpretation of the Wisconsin Constitution is not subject to revision by . . . [others than the Wisconsin Supreme Court].

Soderbeck v. Burnett County, Wis., 821 F.2d 446, 451 (7th Cir. 1987). Hence, article VI, section 4(1) of the Wisconsin Constitution does not affect the statutory classification of district

attorneys as state officers. It requires only that the district attorney be chosen by the electors of specific counties. Counties do not, therefore, have the authority under section 59.15(3) to pay the bar dues of the district attorney and assistant district attorneys.

You mention in your request that the district attorney has chosen to maintain her benefits under the county benefit program pursuant to section 978.12(6) and that the two assistant district attorneys have joined the state benefit program. Section 978.12(6)(a) provides in part that:

A district attorney or other employe of the office of district attorney who was employed in that office as a county employe on December 31, 1989, and who received any form of fringe benefits other than a retirement, deferred compensation or employe-funded reimbursement account plan as a county employe, as defined by that county pursuant to the county's personnel policies, or pursuant to a collective bargaining agreement in effect on January 1, 1990 . . . may elect to continue to be covered under all such fringe benefit plans provided by the county after becoming a state employe.

Hence, a district attorney or assistant district attorney may opt for the county fringe benefit plan if he or she was employed by the county in the district attorney's office on December 31, 1989, and received any form of fringe benefits as a county employe as defined by the county's personnel policies or pursuant to a collective bargaining agreement. Payment of bar dues could reasonably be considered a fringe benefit that the county could choose to provide. To the extent that the cost of the county benefit program exceeds the cost of participation in the state program under chapter 40 the county picks up the cost. Sec. 978.12(6)(a), Stats. Thus, the county is specifically authorized to pick up the excess costs of county fringe benefits for district attorneys and their assistants under certain limited circumstances. No statute requires the county to supply bar dues

as a fringe benefit. It is a matter of county personnel policy and/or collective bargaining prior to the state's assumption of the compensation of district attorneys and their assistants.

DJH:LS

Burial; Cemeteries; For the purpose of payment of expenses under section 49.30, Stats., a cement grave liner will be considered a funeral and burial expense or a cemetery expense depending upon who provides the liner. Therefore, a cement grave liner provided by a funeral home constitutes a funeral and burial expense subject to the statutory limit for payment. OAG 31-90

November 5, 1990

FRANK R. VAZQUEZ, *Corporation Counsel*
Clark County

You have asked for my opinion on two questions regarding the provision of a cement grave liner by a funeral home in a county burial pursuant to section 49.30, Stats. First, you ask whether cement grave liners are properly classified as funeral and burial expenses or as cemetery expenses. Second, you ask if "actual cemetery expenses" includes a manufacturer/supplier's or funeral director's markup or profit on the original invoice bill.

The answer to your first question is that the characterization of a good or service as a funeral and burial expense or as a cemetery expense will depend upon who is providing that good or service. Thus, as here, a cement grave liner provided by a funeral home will be classified as a funeral and burial expense, whereas a cement grave liner provided by a cemetery will be considered a cemetery expense. This answer is necessitated by the difficulty in defining funeral and burial expenses and cemetery expenses and also determining the exact boundary between them. Both categories defy precise definition because the statutory language is couched in broad terms. Section 49.30 does not define funeral, burial or cemetery expenses. A prior opinion addressed this definitional problem and discussed the question of whether an expenditure constituted a funeral expense: "The latter question has caused considerable difficulty for courts of law, since it is usually held that what may be classed as a funeral expense varies with the official and financial standing of the decedent, his religious beliefs and the usages prevailing in his community." 34 Op. Att'y Gen. 191, 193 (1945). Also, on the

federal level, the rules of the Federal Trade Commission regulating funeral industry practices contain neither a precise definition nor a distinction between both funeral and burial expenses and cemetery expenses. *See* 16 C.F.R. § 453.1 (1990).

In addition, these categories overlap to a certain extent, further complicating the attempt to define them. For example, in the Department of Health and Social Services' Economic Assistance Manual and Handbook, Volume 7, chapter 7 (Funeral and Cemetery Charges), a "burial plot," "perpetual care" and "a minimum grave marker" are all considered "cemetery charges." However, these goods and services have also been characterized as "funeral expenses." In chapter 157, relating to the disposition of human remains, a provision involving the improvement and care of cemeteries states:

The board or any organization having a cemetery under its control may fix and determine the sum reasonably necessary for perpetual care of the grave or lot in reasonable and uniform amounts, which amounts shall be subject to the approval of the court, and may collect the same as part of the funeral expenses.

Sec. 157.11(7)(b), Stats.

A prior opinion based on this statutory provision concluded that under section 49.26(5), Stats. (1947), a sum reasonably necessary for perpetual care of a grave or lot is part of the funeral expenses as that term is used in section 49.26(5) where the cemetery lot deed provided for such care. 38 Op. Att'y Gen. 248, 249 (1949). Also, "[m]any and varied items have been classed as funeral expenses . . . including cemetery plots, perpetual care of such plots, headstones, markers and monuments . . ." 34 Op. Att'y Gen. at 193. *See also In re McDonald's Estate*, 139 N.Y.S.2d 386, 387 (1955) (term "funeral expenses" includes, *inter alia*, "a burial lot and suitable monumental work erected thereon"); *Chase v. Martin*, 14 N.J. Misc. 157, 183 A. 726, 727 (1936) (expense for burial plot, monument and perpetual care is properly included within "funeral

expenses," within statute allowing deduction of reasonable sum for funeral expenses in determining value of estate for taxation purposes. Thus, because of the lack of precise definitions and overlapping nature of certain goods and services in both categories, the most plausible construction of section 49.30 is to characterize a good or service a funeral and burial expense if provided by a funeral home and a cemetery expense if provided by a cemetery.

Next, you ask if "actual cemetery expenses" includes markup or profit. Section 49.30 contains two limits on the expense categories. First, section 49.30(1)(b), as amended by 1989 Wisconsin Act 239, limits the amount the county shall pay for funeral and burial expenses to the lesser of \$650 (in state fiscal year 1989-90 and \$1,000 thereafter) or those funeral and burial expenses not paid by the estate.

Second, section 49.30(1)(a) limits the amount the county shall pay for cemetery expenses to "actual cemetery expenses." An "actual" cost or expense is normally the actual price paid for goods by a party including such items as freight and handling but excluding profit. *See Cassel v. Newark Ins. Co.*, 274 Wis. 25, 34, 79 N.W.2d 101 (1956) (a retailer's "actual cost" of merchandise is more than the wholesaler's charge; it includes such further items as freight and handling and thus its "actual cash value" in hands of retailer, within terms of fire policy limiting coverage to actual cash value of property at time of loss, is its replacement value); *Bailey v. Defenbaugh & Co. of Cleveland Inc.*, 513 F. Supp. 232, 242 (N.D. Miss. 1981) (under Mississippi Small Loan Regulatory Act, which permits a licensed moneylender to charge borrowers the "actual cost of any premium paid" for property, credit life or credit disability insurance by receiving commissions on the insurance sales in connection with loan made to borrowers, "actual cost" means the cost of insurance to moneylender exclusive of whatever profit moneylender realizes from sale of insurance policies); Black's Law Dictionary 33 (5th ed. 1979). Thus, section 49.30 contains a \$650/\$1,000 statutory limit for funeral and burial expenses and it limits cemetery

expenses to "actual" cemetery expenses, which includes such items as freight and handling but excludes profit.

In conclusion, it is my opinion that a cement grave liner provided by a funeral home constitutes a funeral and burial expense and is therefore subject to the \$650/\$1,000 statutory limit.

DJH:SWK

Deferred Compensation Board; Employee Trust Funds, Department Of; Words And Phrases; Section 40.80(2m), Stats. (as created by 1989 Wisconsin Act 31), requires the Deferred Compensation Board to establish administrative rules for alternative or supplemental deferred compensation plans but does not require that any such plans be offered. OAG 32-90

November 20, 1990

GARY I. GATES, *Secretary*

Department of Employee Trust Funds

On behalf of the Deferred Compensation Board (DCB), you request my opinion on the following question:

Does s. 40.80(2m), Stats., created by 1989 Wis. Act 31, *require* the Deferred Compensation Board to establish alternative deferred compensation plans in addition to the deferred compensation plan offered by deferred compensation providers selected and contracted with under s. 40.80(2), Stats., or, does the Deferred Compensation Board have the discretion to continue with the present single-administrator deferred compensation system?

It is my opinion that section 40.80, Stats., requires the DCB to promulgate administrative rules for offering deferred compensation plans in addition to the plan or plans required to be selected and contracted for under subsection (2). These required administrative rules would establish the matrix of procedures, requirements and qualifications for alternative plans. Subsection (2m) does not require that an alternative plan be offered if the DCB does not consider an additional plan necessary or if none meets the specifications set forth in the rules nor does such subsection allow an alternative plan or plans to supplant the plan or plans required to be contracted for by the DCB under subsection (2).

Section 40.80 provides, as amended by 1989 Wisconsin Acts 31 and 336:

STATE DEFERRED COMPENSATION PLAN. (1) The deferred compensation board shall select and contract with deferred compensation plan providers to be used by state agencies.

(2) The deferred compensation board shall:

(a) Determine the requirements for and the qualifications of the deferred compensation plan providers.

(b) Approve the terms and conditions of the proposed contracts for administrative and investment services.

(c) Determine the procedure for the selection of the deferred compensation plan providers.

(d) Approve the terms and conditions of model salary reduction agreements which shall be used by each state agency.

(e) Require as a condition of the contractual agreements entered into under this section that approved deferred compensation plan providers shall provide service to state agencies only as approved by the deferred compensation board.

(f) Require as a condition of the contractual agreements entered into under this section that the deferred compensation plan providers shall reimburse the department, to be credited to the administrative account of the public employe trust fund in s. 40.04(2), for any costs incurred directly or indirectly by the department in soliciting, evaluating, monitoring and servicing deferred compensation plans.

(2m) The deferred compensation board shall promulgate rules establishing procedures, requirements and qualifications for offering deferred compensation plans to state employes in addition to the deferred compensation plans offered by deferred compensation providers selected and contracted with under sub. (2).

(3) Any action taken under this section shall apply to employes covered by a collective bargaining agreement under subch. V of ch. 111.

"Deferred compensation plan" is defined as:

a plan which is in accordance with section 457 of the federal internal revenue code, under which an employer executes an agreement by which an employe voluntarily agrees to defer a part of gross compensation for payment at a later date.

Sec. 40.02(18g), Stats.

"Deferred compensation plan provider" is defined as:

a person who provides administrative or investment services related to deferred compensation plans.

Sec. 40.02(18s), Stats.

The deferred compensation plan is implemented through a request by a state officer or employe to his employing agency. As stated in section 20.921(1)(bm), Stats.:

Any state officer or employe may request in writing that a specified part of his or her salary be deferred under a deferred compensation plan of a deferred compensation plan provider selected under s. 40.80. The request shall be made to the state agency in the form and manner prescribed in the deferred compensation plan and may be withdrawn as prescribed in that plan.

The state deferred compensation system was established effective April 21, 1982, by chapter 187, Laws of 1981. At its inception the authority to contract with the required provider or providers was in the Employe Trust Funds Board (ETFB). In accordance with the requirement to "select and contract" with deferred compensation providers, section 40.80(1), the ETFB selected and contracted with an administrator and each individual investment option offered. As stated in your request letter:

The Board [formerly ETFB, now DCB] selects each individual investment option to be offered and contracts

directly with the investment company offering that investment vehicle. The entire package of options is administered, under the oversight of the Board, by a single administrator who provides all marketing, enrollment and recordkeeping services for the program. Administrative costs are paid directly by the participating employees.

....

The administrator of this present single-administrator system is selected by a competitive request for proposal process which considers program design, level of service to participants and the state, and the level of fees to be paid by participants. The State of Wisconsin Deferred Compensation Program is currently administered by Public Employees Benefit Services Corporation (PEBSCO).

1989 Wisconsin Act 31 prospectively transferred the ETFB deferred compensation duties to the therein created DCB and set forth the additional-plan language of subsection (2m). Such newly-created subsection (2m) statutory language provides that the DCB "*shall promulgate rules* establishing procedures, requirements and qualifications *for offering* deferred compensation plans to state employees *in addition to* the deferred compensation plans offered by deferred compensation providers selected and contracted with under sub (2)."

The first question that arises is whether "shall" was intended to be mandatory or directory. "Strict compliance with a directory statute is not required." *Appeal From Recount in Election Contest*, 105 Wis. 2d 468, 483, 313 N.W.2d 869 (Ct. App. 1981).

It is my view that the Legislature intended this use of the word "shall" to be mandatory. As the court of appeals stated in *In Interest of F.T.*, 150 Wis. 2d 216, 224, 441 N.W.2d 322 (Ct. App. 1989):

Use of the word "shall" creates a presumption that the statute is mandatory. *Karow v. Milwaukee County Civil Service Commission*, 82 Wis. 2d 565, 570, 263 N.W.2d 214, 217 (1978). The presumption is strengthened where the

legislature uses "may" in the same or related statutory sections. Such use demonstrates recognition of the differences in the meanings of the two words and implies purposeful use of each. *Id.* at 571, 263 N.W.2d at 217.

While the word "shall" is used throughout section 40.80, section 40.81, concerning use of the deferred compensation plan by local employes, uses both "shall" and "may" as follows:

DEFERRED COMPENSATION PLAN AUTHORIZATION. (1) An employer other than the state *may* provide for its employes the deferred compensation plan established by the board under s. 40.80. Any employer, including this state, who makes the plan under s. 40.80 available to any of its employes *shall* make it available to all of its employes under procedures established by the department under this subchapter.

(2) Any local government employer, or 2 or more employers acting jointly, *may* also elect under procedures established by the employer or employers to contract directly with a deferred compensation plan provider to administer a deferred compensation plan or to manage any compensation deferred under the plan and *may* also provide a plan under section 403(b) of the internal revenue code under procedures established by the local government employer or employers.

(3) Any action taken under this section *shall* apply to employes covered by a collective bargaining agreement under subch. IV of ch. 111.

Similarly, the Legislature used both terms, "shall" and "may," in section 40.82 which deals with the definition of earnings and with investment of deferred compensation funds.

As stated in *Town of Nasewaupee v. Sturgeon Bay*, 146 Wis. 2d 492, 496, 431 N.W.2d 699 (Ct. App. 1988):

In determining whether a statutory provision is directory or mandatory, we examine factors such as the objectives sought to be accomplished by the statute and the

consequences that would follow from alternative interpretations. (Case cite omitted.)

The apparent objective sought to be accomplished by subsection (2m) is to require the DCB to establish "procedures, requirements and qualifications" for offering additional deferred compensation plans under the public scrutiny and legislative oversight provided by sections 227.18 and 227.19. Section 40.80 at subsection (2) similarly authorizes and requires the DCB to determine procedures, requirements and qualifications of providers but does not require establishing them as rules. The specific areas set forth at subsection (2)(a) thru (f) encompass and exceed the elements contained in "procedures, requirements and qualifications." Since DCB is specifically granted such authority to select and contract under subsections (1) and (2), subsection (2m) must have the objective of requiring and expanding such required "procedures, requirements and qualifications" under the legislative oversight and public scrutiny contained in the administrative rule procedure.

A discretionary interpretation of "shall" as used in subsection (2m) would cause such subsection to be surplus. As the supreme court states in *St. ex rel. Teunas v. Kenosha County*, 142 Wis. 2d 498, 511, 418 N.W.2d 833 (1988): "We have consistently avoided adopting a construction of statutes which would result in rendering a part of a statute surplusage" (case cites omitted). The authority granted under subsection (2) to determine the requirements, qualifications and procedure (subsections (2)(a) and (c)) could have been implemented by rule. *See* sec. 227.11(2)(a), (b), Stats. Since DCB (and predecessor DETF) already had authority to promulgate rules in this area, it was not necessary to grant similar authority in subsection (2m). It therefore appears that the Legislature intended the word "shall" as used in subsection (2m) to be mandatory. This conclusion is supported by the presumption that the Legislature did not intend to legislate in vain and that it had a specific purpose in mind. *Haas v. Welch*, 207 Wis. 84, 86, 240 N.W. 789 (1932).

The next question to be considered is whether the mandatory language of subsection (2m) requires the DCB to establish and offer alternative plans. This requires interpretation of the language "shall promulgate rules establishing procedures, requirements and qualifications *for offering* deferred compensation plans." I do not interpret the intent of the term "for offering" to be a requirement that the DCB provide one or more additional plans. "Offering" and "offered by," as used in the next line of subsection (2m), relate to action of the "deferred compensation providers" not the DCB. The Legislature recognized by use of the words "in addition to the deferred compensation *plans*" that the authority granted under subsection (2) included that of providing multiple plans. Had the Legislature intended to require offering of one or more additional plans it could have simply indicated such a requirement in wording the subject statutory subsection. See *Kopacka v. ILHR Department*, 49 Wis. 2d 255, 259, 181 N.W.2d 487 (1970); *Sperbeck v. ILHR Department*, 46 Wis. 2d 282, 290, 174 N.W.2d 546 (1970). It did not do so.

For example, in section 846 of 1989 Wisconsin Act 31, in close proximity to the creation of subsection (2m) by section 841 of Act 31, the Legislature used the language "[p]romulgate by rule procedures, standards and forms necessary to certify, and *shall certify*." Similarly at section 847am, again in close proximity, the Legislature created a statute using the words "promulgate rules identifying historically significant material *and obtain* historically significant surplus materials." So also could the Legislature, if such was the intent, have included language in subsection (2m) to direct the DCB to cause such alternative plans or plans to be offered. I, therefore, read the intent of the Legislature to be directory rather than mandatory to the extent that the DCB need implement, by selecting and contracting under subsection (1), the offering of additional plans which satisfy the matrix it establishes in the rules required by subsection (2m). This is consistent with the clear legislative indication of intent in

(2m) that any alternative plan or plans are "in addition to" plans offered by providers selected under subsection (2).

I therefore conclude that subsection (2m) of section 40.80 (as created by 1989 Wisconsin Act 31) is properly interpreted to mandatorily require only the establishment of rules for alternative or supplemental plans but not to require that any such plans need be offered.

DJH:WMS

Public Officials; Towns; No additional compensation of any kind may be paid to town supervisors who serve on the town board of review. Compensation may be increased to a town clerk for service on the board of review if the clerk has previously been designated part time by the town meeting pursuant to section 60.305(1)(b), Stats. OAG 33-90

November 21, 1990

H. G. NORDLING, *District Attorney*
Bayfield County Courthouse

You ask whether an increase in compensation for members of a town board of review under section 70.46(1), Stats., is permissible under the following set of circumstances:

[T]he town board supervisors and the town clerk are part-time officers, who receive annual salaries plus expenses, as set by the annual town meeting pursuant to Section 60.10(1)(b) and Section 60.32(1)(a), Wis. Stats. At the annual town meeting . . . a motion was made to approve wage increases for town officials for the term [immediately ensuing]. . . . That motion was defeated. At the [next] regular town board meeting . . . [during that ensuing term], the town board adopted a motion to compensate members of the town board of review at the rate of \$25.00 for each meeting attended, effective immediately, which represented an increase over the compensation received by board of review members in [the prior calendar year]. The board of review . . . is composed of the town board supervisors and the town clerk, pursuant to Section 70.46(1), Wis. Stats.

In my opinion, no additional compensation of any kind may be paid to town board supervisors for service on the board of review, but compensation may be increased to a town clerk for service on the board of review if the clerk has previously been designated part time by the town meeting pursuant to section 60.305(1)(b).

Since at least 1878, the Legislature had provided that "no town officer shall be entitled to pay for acting in more than one official capacity or office, at the same time." Ch. 39, sec. 850, Revised Statutes of 1878. That provision was substantially unchanged until 1980 when section 60.60, Stats. (1977), was amended in the following fashion:

(1)(b) *Except as provided under sub. (2)(b), no town officer may be compensated by the town for acting in more than one official capacity or office at the same time.*

(2)

(b) Any annual town meeting may combine the offices of town clerk and town treasurer or designate the office of town clerk, the office of town treasurer or the combined office of town clerk and town treasurer part-time. . . . Under sub. (1), the annual town meeting may provide for compensation for any office combined or designated part-time under this paragraph.

Ch. 130, secs. 3 and 4, and ch. 355, sec. 81, Laws of 1979.

In 1984, the statutes concerning town government were recodified and revised. At that time, section 60.305(1)(b), Stats. (1983), was created to permit the town meeting to "[d]esignate as part time the office of town clerk, the office of town treasurer or the combined office of town clerk and town treasurer." 1983 Wisconsin Act 532, subch. V. The notes of the legislative council's special committee on revision of town laws indicate that no change in existing law was intended.

Section 60.323, Stats. (1983), was similarly recodified to read as follows: "Except for offices combined under s. 60.305, no town may compensate a town officer for acting in more than one official capacity or office of the town at the same time." 1983 Wisconsin Act 532, subch. V. The special committee's note states as follows: "Restates s. 60.60(1)(b), clarifying that the provision prohibits the town from compensating a town officer for acting in more than one official 'town' capacity or 'town' office at the same time." Thus, the town meeting may designate the office of

town clerk to be part time, under section 60.305(1)(b), but that statute has no application to members of the town board.

Section 70.46 is a statute generally applicable to all municipal boards of review. Municipal boards of review were first established in 1868. Ch. 130, sec. 24, Laws of 1868. Initially, there was no provision for compensation of board members. Ch. 48, sec. 1060, Revised Statutes of 1878. However, at various times the statute has provided for specific amounts of compensation to such members. *See, e.g.*, sec. 1060, Stats. (1889) ("allowed by law to assessors"); sec. 70.46, Stats. (1921) ("not exceeding . . . three dollars per day").

Section 70.46 now provides in part as follows:

Boards of review; members; organization. (1) Except as provided in s. 70.99, the supervisors and clerk of each town . . . shall constitute a board of review for the town In all . . . towns . . . the board of review may by ordinance in lieu of the foregoing consist of any number of town . . . residents and may include public officers and public employes. The ordinance shall specify the manner of appointment. The town board . . . shall fix, by ordinance, the salaries of the members of the board of review.

. . . .

(3) The members of such board, *except members who are full time employes or officers of the town . . .* shall receive such compensation as shall be fixed by resolution or ordinance of the town board

The italicized language was inserted in chapter 97, Laws of 1941. Because the bill was not prepared by the Legislative Reference Bureau, no drafting file exists.

As the focus of your inquiry indicates, a violation of section 60.323 could result in prosecution for misconduct in public office under section 946.12(2). *See* 23 Op. Att'y Gen. 770, 771-72 (1934). It is, therefore, critical that the language contained in section 70.46 be reconciled with that contained in section 60.323.

The phrase "full time employes or officers" is ambiguous. At the time that language was adopted, however, there undoubtedly were few if any statutory provisions that would characterize an elected officer as being other than full time. Rather, it was generally accepted that, regardless of the time it takes to perform his or her duties, every elected official "is an officer during every hour of his term." 61 Op. Att'y Gen. 443, 445 (1972). *Also see* 65 Op. Att'y Gen. 62, 65-66 (1976) *quoting* 63 Am. Jur. 2d *Public Officers and Employees* § 399 (1984) (now 63A Am. Jur. 2d *Public Officers and Employees* § 467).

There still is no exception to this general principle with respect to the office of town supervisor. *Cf.* 23 Op. Att'y Gen. 770, 771 (1934). Prior to the enactment of section 60.60, Stats. (1979), town supervisors could not receive additional compensation for acting in any other capacity for the town. 26 Op. Att'y Gen. 136 (1937). The notes of the special committee indicate that no change in this prior law was intended as a result of the enactment of section 60.323.

Although it may have once been a "fairly debatable question," *see Leuch v. Berger*, 161 Wis. 564, 572, 155 N.W. 148 (1915), it is also clear that compensation provisions such as those contained in section 60.323 are controlling over those in section 70.46(3). *See Milwaukee v. Reiff*, 157 Wis. 226, 146 N.W. 1130 (1914); 25 Op. Att'y Gen. 615 (1936); 4 Op. Att'y Gen. 877 (1915). Since there is no statutory provision permitting the designation of a town supervisor as "part time," I conclude that a town supervisor may not receive *any* additional compensation under section 70.46(3) whether or not the phrase "full time" was intended to modify the word "officer" in that statute. I, therefore, have no occasion to examine the question of whether an increase in per diem compensation, which clearly is a form of salary, *see* 62 Op. Att'y Gen. 303, 305 (1973), awarded by members of the town board to positions in which they themselves serve *ex officio* also violates section 66.196, which provides in part as follows:

An elected official of any . . . town . . . who by virtue of his office is entitled to participate in the establishment of the salary attending his office, shall not during the term of such office collect salary in excess of the salary provided at the time of his taking office. . . .

Section 66.196 is wholly inapplicable to the town clerk, since the clerk does not participate in the establishment of compensation for members of the board of review. Unlike the circumstance involving town supervisors, section 60.305(1)(b) also does permit the town meeting to designate the town clerk as a part-time officer. The clear inference is that, unless such a designation has been made, the town clerk remains a full-time officer. Although the Legislature probably did not contemplate that elected officers could serve on a part-time basis when chapter 97, Laws of 1941, was enacted, it would be a strained construction to conclude that an elected officer expressly designated as part time by statute could not receive additional compensation under section 70.46(3) simply because he or she has not attained legal status equivalent to that of a part-time "employee" under that statute. Since section 70.46(3) must be construed as authorizing additional compensation and since no other statute appears to preclude an increase in compensation to a part-time clerk, it is my opinion that compensation may be increased to a part-time clerk for service on the board of review.

I therefore conclude that, while no additional compensation of any kind may be paid town supervisors who serve on the town board of review, compensation may be increased to a town clerk for service on the board of review if the clerk has previously been designated part time pursuant to section 60.305(1)(b) of the statutes.

DJH:FTC

Counties; Residence, Domicile And Legal Settlement; Counties are financially responsible for providing mental health services to residents conditionally released under section 971.17, Stats. OAG 34-90

November 26, 1990

T. N. FREDERICK, *Corporation Counsel*
Juneau County

You ask whether Juneau County is financially responsible for providing mental health services through its human services agency to residents conditionally released under section 971.17, Stats.

In my opinion, the answer is yes.

Your county department of human services is established pursuant to section 46.23(3)(a). Under sections 46.23(3)(b) and 51.42(3)(b), its financial obligations are specified in section 51.42(1)(b), which provides in part as follows:

County liability. The county board of supervisors has the primary responsibility for the well-being, treatment and care of the mentally ill, developmentally disabled, alcoholic and other drug dependent citizens residing within its county and for ensuring that those individuals in need of such emergency services found within its county receive immediate emergency services. County liability for care and services purchased through or provided by a county department of . . . [human services] shall be based upon the client's county of residence except for emergency services for which liability shall be placed with the county in which the individual is found.

Section 971.17¹, which is applicable to individuals found not guilty by reason of mental disease or defect, provides in part as follows:

¹1989 Wisconsin Act 334, effective January 1, 1991, repeals and recreates section 971.17. Since your question concerns financial responsibility under existing statutes, references in this opinion are to the current statutory scheme.

(1) If a defendant is found not guilty by reason of mental disease or defect, the court shall order the defendant to be committed to the department to be placed in an appropriate institution for custody, care and treatment until discharged as provided in this section.

(2) A reexamination of a defendant's mental condition may be had as provided in s. 51.20(16), except that the reexamination shall be before the committing court and notice shall be given to the district attorney. . . . If the court is satisfied that the defendant may be safely discharged or released without danger to himself or herself or to others, it shall order the discharge of the defendant or order his or her release on such conditions as the court determines to be necessary. If it is not so satisfied, it shall recommit him or her to the custody of the department.

An individual conditionally released under section 971.17(2) becomes a legal resident of the county of release if s/he is physically present in that county on a voluntary basis and has the requisite "intent to remain in a place of fixed habitation" within that county. Sec. 49.01(8g), Stats. Absent any other statute, the county human services or other designated county agency would therefore be liable for the cost of his or her care under section 51.42(1)(b). *See* 76 Op. Att'y Gen. 103 (1987).

Resolution of your inquiry turns upon whether language contained in section 971.17 changes this result. I am of the opinion that it does not, for two independent reasons.

First, neither the Department of Health and Social Services nor the Department of Corrections has the authority to supervise defendants released under section 971.17(2) unless "the court determines such supervision is a necessary condition of release." 73 Op. Att'y Gen. 76, 80 (1984). Consequently, defendants on conditional release under section 971.17(2) "are not regarded as

being in the [former] Department's custody." 73 Op. Att'y Gen. at 80 n.1.²

Second, "[t]he legislative pattern appears to be to make the Department responsible for direct delivery of services only in state institutions and for nonresidents; and to make counties responsible for delivery of services to their residents under state supervision." 66 Op. Att'y Gen. 249, 252 (1977).³

An individual's legal residence does not change when s/he is involuntarily committed under section 971.17(1). *See generally* 25 Am. Jur. 2d *Domicil* §§ 41, 78 (1966). The county's statutory obligation to pay for his or her care is simply eliminated during the period of institutionalization:

A county department of community programs may not reimburse any state institution or receive credit for collections for care received therein by nonresidents of this state, interstate compact clients, transfers under s. 51.35(3), and transfers from Wisconsin state prisons under s. 51.37(5)(a), commitments under s. 971.14, 971.17, 975.01, 1977 stats., 975.02, 1977 stats., 975.06 or admissions under s. 975.17, 1977 stats., or children placed in the guardianship or legal custody of the department of health and social services under s. 48.355, 48.427 or 48.43.

Sec. 51.42(3)(as)1., Stats. While the more specific provisions of section 51.42(3)(as)1. are controlling over the general provisions of section 51.42(1)(b) concerning liability for care provided in a state institution under section 971.17(1), there is no language in section 51.42(3)(as)1. that absolves a county from its financial

²Under section 971.17(3)(e), effective January 1, 1991, with respect to offenses committed on or after that date, defendants on conditional release are in the custody of the Department of Health and Social Services. This first reason is therefore inapplicable to those situations.

³Section 971.17, effective January 1, 1991, does not alter this legislative pattern.

responsibility for providing mental health services to its residents who have been conditionally released under section 971.17(2).⁴

I therefore conclude that a county is financially responsible for providing mental health services to residents conditionally released under section 971.17.

DJH:FTC

⁴I am aware that, under section 971.17(2), a court may "impose conditions," including conditions of supervision, upon an individual who is released rather than discharged. However, such conditions are imposed on the defendant, not the Department of Health and Social Services or the Department of Corrections. In *Grobarchik v. State*, 102 Wis. 2d 461, 467, 307 N.W.2d 170 (1981), the court held as follows: "The fashioning of a criminal disposition is not an exercise of broad, inherent court powers. . . . If the authority to fashion a particular criminal disposition exists, it must derive from the statutes." Conditions imposed under section 971.17(2) therefore may not deviate from the statutory scheme contained in chapter 51 of the statutes.

Boats; Lakes; Navigable Waters; Words And Phrases; The delegation of authority to local governments to collect boater fees for miscellaneous "recreational boating services," under sections 30.77(3)(e)1.c. and 33.475, Stats., is unconstitutional. OAG 35-90

December 11, 1990

CARROLL D. BESADNY, *Secretary*

Department of Natural Resources

You ask whether parts of 1989 Wisconsin Acts 159 and 324, which delegate authority to municipalities and public inland lake protection and rehabilitation districts to charge boating fees, violate the provision in Wisconsin Constitution article IX, section 1 that navigable waters "shall be common highways and forever free . . . without any tax, impost or duty therefor."

New section 30.77(3)(e)1., Stats., as repealed and recreated by 1989 Wisconsin Act 159, effective April 19, 1990, provides:

30.77(3)(e) Notwithstanding the prohibition in sub. (1) against local regulations that exclude any boat from the free use of the waters of the state:

1. A municipality or a public inland lake protection and rehabilitation district that has in effect a local regulation adopted under par. (am) may charge boat operators reasonable fees for any of the following:

a. Use of a public boat launching facility that the municipality or lake district owns or operates.

b. The municipality's or lake district's costs for operating or maintaining a water safety patrol unit, as defined in s. 30.79(1)(b)2.

c. The municipality's or lake district's costs for providing other recreational boating services.

Similarly, new section 33.475, as created by 1989 Wisconsin Act 324 and effective May 11, 1990, provides:

33.475 Boating fees. Notwithstanding the prohibition in s. 30.77 (1) against local regulations that exclude any boat from the free use of the waters of the state, and in addition to the powers granted the county under ss. 30.77 (3) (e) and 59.07 (42), the county may charge boat operators reasonable fees for the costs of providing other recreational boating services not specified in ss. 30.77 (3) (e) and 59.07 (42).

Under prior law, section 30.77(3)(e) allowed a municipality to "charge reasonable fees for the use of public boatlaunching facilities owned . . . by it." Thus, the 1990 legislation expanded preexisting authority by granting municipalities, counties and public inland lake protection and rehabilitation districts the added power to charge boat operators "reasonable fees" for the costs of operating and maintaining a water safety patrol unit and for "other recreational boating services."

Although there is no commonly accepted meaning for the term "other recreational boating services," you note that local communities have interpreted it to mean dredging, shoreline maintenance and improvements, weed control and similar activities. You also point out, by separate correspondence, that some municipalities have proposed or enacted fees as high as \$25 per boat per day and have created separate fee structures for resident and non-resident boaters. A three-day weekend boater could thus incur costs up to \$75 just for the privilege of being on the water. Moreover, multiple fees could be assessed when a boater navigates separate but connected lakes. The presence of such fees could also increase boating congestion on the "free" lakes.

For the reasons which follow, I conclude that the Legislature may, consistent with Wisconsin Constitution article IX, section 1, delegate to local governments the power to charge boaters reasonable fees to offset the costs of operating and maintaining a water safety patrol unit, and the power to charge users of boat launching facilities reasonable fees associated with that use, as long as the fees bear a reasonable relationship to the costs of

operation actually incurred. The Legislature may not delegate the power to charge boaters for unspecified "other recreational boating services" because to do so would violate the constitutional command that navigable waters be "forever free . . . without any tax, impost or duty therefor."

With the Wisconsin Constitution's evocative "forever free" clause as the starting point of this analysis, I observe that both new and former sections 30.77(3)(e) establish exceptions to the "free use of the waters of the state," and as such, the exceptions should be narrowly construed. As the supreme court stated in *Busé v. Smith*, 74 Wis. 2d 550, 564, 247 N.W.2d 141 (1976), "it is a fundamental rule that when dealing with the state constitution . . . , the search is not for a grant of power to the legislature, but for a restriction thereon."

The question, then, is whether the delegated authority to collect fees associated with boater usage of navigable waters is an impermissible "tax, impost or duty." In *State v. Jackman*, 60 Wis. 2d 700, 708, 211 N.W.2d 480 (1973), the supreme court saw no distinction between the terms tax, impost and duty for purposes of Wisconsin Constitution article IX, section 1. The court, in upholding the state's boat licensing statutes,¹ distinguished taxes from license fees as follows: "[a] tax is one whose primary purpose is to obtain revenue, while a license fee is one made primarily for regulation and whatever fee is provided is to cover the cost and the expense of supervision or regulation." *Jackman*, 60 Wis. 2d at 707. The court held that "a requirement to pay money for general revenue purposes for the use of a navigable waterway would constitute a tax and violate the constitution." 60 Wis. 2d at 709. In *Jackman*, however, the court held that the fee for boat licensing was not for general revenue purposes, but to

¹Sections 30.51 and 30.52 require boat owners to register their boats and, upon payment of a fee, to receive a certificate of number prior to operation of any boat on Wisconsin waters.

support the state's specific programs for boat safety enforcement and safety patrol aids, an exercise of the state's police power.

The court in *Jackman* established a narrow regulatory exception to the constitutional principle requiring free use of the waters of the state. As reaffirmed in *State v. Big John*, 146 Wis. 2d 741, 751, 432 N.W.2d 576 (1988), the statutory system of numbering and requiring a fee for registration of boats is reasonably related to boating safety and thus a valid exercise of the state's police power. *Jackman* affirmatively resolves the question whether, as provided in new section 30.77(3)(e)1.b., municipalities or lake districts may charge reasonable fees to cover the costs of "operating or maintaining a water safety patrol unit, as defined in s. 30.79 (1) (b) 2."

It can be argued that the rationale of *Jackman* could be extended to allow broader local power to impose lake user fees for police power services beyond boating safety. The supreme court has not yet extended *Jackman*, however, and I am not at liberty to decide the constitutional issue you pose based on what kinds of local regulation the court might uphold in the future. Moreover, our supreme court has steadfastly interpreted the "forever free" clause to open up, not restrict, access to navigable waters. As stated in *Diana Shooting Club v. Husting*, 156 Wis. 261, 267, 271, 145 N.W. 816 (1914), the right to free use of the navigable waters of the state has been "jealously reserved It should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits."

The other two sources of boater fees, use of boat launching facilities and costs of "other recreational boating services," present more difficult questions. Section 30.77(3)(e)1.a. allows the recovery of "reasonable fees" for the "[u]se of a public boat launching facility that the municipality or lake district owns or

operates.ⁿ² The ownership and operation of a boat launching facility is an activity the municipality carries out in its proprietary, not governmental, capacity, and the fees for use of the facility are thus not taxes, but fees for services. See *Bargo Foods North v. Rev. Dept.*, 141 Wis. 2d 589, 596-98, 415 N.W.2d 581 (Ct. App. 1987). In *Bargo*, the court held that a municipality's operation of an airport is a proprietary function, just as is the municipal operation of a hospital and fees for use of these facilities are not "taxes." By analogous reasoning, our supreme court in early public trust cases approved the practice of charging fees for the use of locks, dams, wharves and piers constructed to allow or improve navigation. *The Wisconsin River Improvement Company v. Manson*, 43 Wis. 255, 262-63 (1877); *J. S. Keator Lumber Co. and others v. The St. Croix Boom Corp.*, 72 Wis. 62, 92, 38 N.W. 529 (1888). In *Keator*, the court cautioned: "Such exaction, however, must be confined to a reasonable compensation for such use, but can not be legally imposed as a tax or burden upon interstate commerce."

I conclude, consistent with the distinction between proprietary and governmental functions, that reasonable fees directly associated with use of a municipality's or lake district's boat launching facilities are not a "tax, impost or duty" within the meaning of Wisconsin Constitution article IX, section 1. I fully recognize that the imposition of such a fee creates, in some instances, a condition of access to public waters. As the attorney general noted when asked a similar question in 1979, however:

A locally imposed user or access fee designed to help local residents bear the cost of access facilities that are also used by the public at large undeniably burdens the right of the general citizenry to enjoy the body of water whose access is thus regulated. Nevertheless, the Wisconsin

²If boatlaunching facilities are located on uplands (above the ordinary high water mark of the waterway), the constitutional issue need not be addressed because the uplands are not public trust properties.

Supreme Court has held that the trust doctrine does not prevent minor accommodations between the interests of the public at large and a more limited set of public or private interests where the purposes of the trust are not thereby substantially affected.

In my opinion, a reasonable fee represents a permissible accommodation between the competing interests involved. A high fee, however, might discourage or severely restrict members of the general public in their use of the resource for fishing, boating, or other recreational or scenic purposes. Such a result would obviously contravene the purposes of the public trust policy, *i.e.*, to ensure that the state's public waters are available for all to enjoy. . . .

68 Op. Att'y Gen. 233, 237 (1979) (citations omitted). You have not asked, for purposes of this opinion, what a "reasonable fee" might be. As such questions arise, I would look for guidance to Wisconsin Administrative Code sections NR 1.92(6)(f) and 1.93 (1989), which define reasonable boat launching fees, for purposes of section 30.77, as "those currently charged for daily entrance to state parks and forest areas." It goes without saying that any fee enacted for the purpose of excluding users, even if marginally justified by the cost of services provided, is impermissible.

The assessment of boating fees for "other recreational boating services," as provided in sections 30.77(3)(e)1.c. and 33.475, cannot be sustained under either the *Jackman* exception or as a user fee for a proprietary function. Rather, the assessment for "other recreational boating services" can only be interpreted as a revenue-producing measure, and thus a "tax, impost or duty" in contravention of Wisconsin Constitution article IX, section 1.

In *Milwaukee v. Milwaukee & S. T. Corp.*, 6 Wis. 2d 299, 94 N.W.2d 584 (1959), the supreme court struck down a Milwaukee city ordinance which imposed on the city bus company a \$10 per passenger-seat annual license fee. The purpose of the city's fee was to recover its costs in substituting "trackless trolley" service for streetcar service; the city argued

that the fee was valid as a police-power regulatory measure. The supreme court disagreed, noting that "courts will look into ordinances with a view of determining whether they are passed for the purpose of revenue, although sought to be upheld as police regulations." *Milwaukee v. Milwaukee & S. T. Corp.*, 6 Wis. 2d at 303. The court held that "[t]he distinction between taxation for revenue and for regulation is determined by the relationship between the cost to, or services provided by, the city and the charge imposed." 6 Wis. 2d at 305-06. In the *Milwaukee & S. T. Corp.* case the court held the ordinance invalid as a tax for revenue.³

Milwaukee v. Milwaukee & S. T. Corp. provides an apt analogy for the boating fees assessed for "other recreational boating services." As the services to be provided lose their clear delineation (unlike the costs of maintaining the water safety patrol unit or the boat-launch user fee), the boater fee looks more like a revenue measure. In *Milwaukee & S. T. Corp.*, the court considered three primary factors in determining that the bus fee was an impermissible revenue measure: the fact that the city could have imposed a direct tax, but chose not to do so in the guise of a "regulatory fee"; the large amount of the fee; and the city's failure to show any relationship between the fee charged and the actual cost of services provided. 6 Wis. 2d at 308. If these or similar standards were applied to justify miscellaneous "recreational boating services," the fee would be exceedingly difficult to sustain.

Moreover, the term "other recreational boating services" does not describe a proprietary function of government; rather, services such as weed cutting, dredging and shoreline improvements describe activities which municipalities normally undertake in the

³The court in *Milwaukee & S. T. Corp.* was not bound by a constitutional prohibition, as in our case, but by section 76.54, which banned "license taxes" on entities providing urban mass transportation. A constitutional prohibition on a tax gives even greater cause for close scrutiny of the charge imposed.

exercise of their governmental functions. Just as providing sewage services is a governmental, not proprietary, function, *Town of Hallie v. City of Chippewa Falls*, 105 Wis. 2d 533, 542, 314 N.W.2d 321 (1982), the provision of "other recreational boating services" is a governmental function.

The invalidity of the legislative delegation in sections 30.77(3)(e)1.c. and 33.475 is also demonstrated by the vagueness of the terms chosen. Our supreme court has held that when the Legislature delegates its Wisconsin Constitution article IX, section 1 public trust responsibilities, "[c]lear limits as well as definite standards must be provided along with a purpose consistent with advancing the trust." *Menzer v. Elkhart Lake*, 51 Wis. 2d 70, 83, 186 N.W.2d 290 (1971). The amorphous phrase "other recreational boating services" provides no standards for determining the extent of the delegation. In *Menzer*, the court cautioned that "[w]hile some degree of flexibility to meet changing conditions is to be maintained, vagueness is no virtue when it comes to the spelling out of areas for state and local action in a particular field." 51 Wis. 2d at 84-85.

Accordingly, I conclude that the delegation of authority to collect boater fees for "other recreational boating services" is a revenue measure inconsistent with Wisconsin Constitution article IX, section 1. Unlike fees for the operation and maintenance of a water safety patrol unit or use of boat launching facilities, fees for other recreational boating services cannot be justified as costs of providing safety services, as in *Jackman*, or fees for a proprietary service. Most significantly, boater fees for vague "recreational boating services" impose an impermissible condition on the right of access held by each Wisconsin citizen to our state's lakes. As the supreme court stated in *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 534, 271 N.W.2d 69 (1978), "the legislature may legitimately delegate authority to local units of government to act in matters involving the state's 'public trust' duties--provided that the delegation is in furtherance of the trust and will not block the advancement of paramount interests." By allowing a significant, and perhaps

prohibitively expensive, condition on access to Wisconsin lakes and imposing it on one group of users, the boaters, the Legislature has blocked the advancement of our citizens' paramount interests in the use and enjoyment of navigable waters.

While I recognize the presumption of constitutionality of statutes, the delegation of authority to collect boater fees for recreational boating services abdicates the state's constitutional public trust responsibilities and is therefore void. *See Muench v. Public Service Comm.*, 261 Wis. 492, 515m, 53 N.W.2d 514, 55 N.W.2d 40 (1952). I am also mindful of the adverse shoreline and waterway conditions which led to the enactment of sections 30.77(3)(e)1. and 33.475 and the need to reverse the deterioration of our lakes. *See* secs. 33.001, 33.45, 33.455, and 33.457, Stats., as created by 1989 Wisconsin Act 324. I therefore urge the Legislature to revisit this topic with a view toward providing a more equitable distribution of the costs of these necessary governmental services. I also urge the Legislature, or the Department of Natural Resources by rule, to clarify boaters' responsibility for multiple fees on separate but connected lakes for support of water safety patrol units, under section 30.77(3)(e)1.b.

DJH:MS

Emergency Medical Technician; Medical Aid; National Ski Patrol; Incidental benefits received by volunteer members of National Ski Patrol in exchange for rendering emergency care to disabled skiers may result in loss of civil liability immunity under Good Samaritan Law. OAG 36-90

December 11, 1990

FRED A. RISSER, *Chairperson*
Senate Organization Committee

The Senate Organization Committee has requested an opinion on whether members of the National Ski Patrol, a voluntary organization, are exempt from civil liability under section 895.48(1), Stats. (the "Good Samaritan Law"), when rendering assistance in good faith to disabled skiers at the scene of an accident.

National Ski Patrol members donate their time and equipment to organized patrols at both public and private ski hills and areas. While the ski hill operators do not consider these voluntary members to be employees, the operators generally furnish to them free lift tickets and discounts on ski equipment in pro shops operated by the ski hill. These discounts are similar to those received by members of the ski team, who are uncompensated, non-employees of the ski hills. However, the opinion request furnishes no information concerning the degree of control exercised by ski hill operators over patrol members. Nor is it indicated whether patrol members become entitled to free lift tickets and equipment discounts simply because of their membership, or if they must actually patrol the hills, or even first render aid before lift tickets and discounts become available.

Because I am unable to assume that all ski hill operators conduct their business the same way, I cannot definitively conclude whether members of the National Ski Patrol are immune from civil liability under section 895.48(1). A dispositive opinion in this regard would require me to resolve facts, a task contrary to my policy on such matters. *See 77 Op. Att'y Gen.*

Preface at para. 3.C. The most this opinion seeks to accomplish, therefore, is to identify factors important to an analysis of a specific fact situation.

Turning first to the statutory language, section 895.48(1) provides as follows:

Any person who renders emergency care at the scene of any emergency or accident in good faith shall be immune from civil liability for his or her acts or omissions in rendering such emergency care. This immunity does not extend when employes trained in health care or health care professionals render emergency care for compensation and within the scope of their usual and customary employment or practice at a hospital or other institution equipped with hospital facilities, at the scene of any emergency or accident, enroute to a hospital or other institution equipped with hospital facilities or at a physician's office.

Thus, the general rule erects a barrier to civil liability for anyone who in good faith renders aid in an emergency. However, the statutory exception must be examined in order to determine whether members of the National Ski Patrol qualify for this immunity.

The exception to immunity under section 895.48(1) may be broken down into its component parts, and exists when:

- (1) employes trained in health care or health care professionals;
- (2) render emergency care;
- (3) for compensation; and
- (4) within the scope of their usual and customary employment or practice.

Although the term "health care professional" is not defined in the statute, it is clear, based upon a prior opinion of this office, that members of the National Ski Patrol are not health care professionals within the meaning of the statute. 67 Op. Att'y Gen. 218, 219-22 (1978). Thus, if these members do not constitute

"employees trained in health care," they are immune from civil liability under the statute.

As noted in that earlier opinion, the term "employees trained in health care" is susceptible of two interpretations. On the one hand, the statutory language could be understood to include any person who is employed by another, in any capacity whatsoever, who has some training in health care. Under this construction, the availability of immunity would turn on whether the person trained in the health care was employed at the time emergency care was rendered. In the present context, that would effectively immunize members of the ski patrol who were out of work while arguably excepting from such immunity any member who, at the time emergency care is rendered, had a full- or part-time job. The unreasonableness of this construction is manifest.

Rather, as suggested by the earlier opinion, the term reasonably refers to "health care trained employees whose specific, paid duties include the rendering of emergency aid." *Id.* at 224. This construction advances the underlying purpose of the Good Samaritan Law--namely, to encourage persons to come to the aid of another without fear of civil liability. Unfortunately, adoption of this more reasonable interpretation does not end, but rather begins, the analysis.

It is assumed that patrol members receive specialized training, such as first aid courses and Red Cross certification, which enables them to carry out their duties. Thus, I believe they would be considered "health care trained" personnel. The question whether they fall outside the protection of section 895.48(1) thus depends upon whether the free lift tickets and equipment discounts constitute compensation in exchange for rendering emergency care and, if so, whether they are employees.

The term "compensation" is not defined in section 895.48. Nowhere in the statutes is found a definition of "compensation" which has general applicability. *Cf.* secs. 102.01(2)(am), 441.11(1), 453.02(6) and 454.01(7), Stats. Thus, it is proper to refer to a dictionary to determine its common and approved

usage. Sec. 990.01(1), Stats. In the present context, "compensation" includes payment or wages. *Webster's Seventh New Collegiate Dictionary* at 169 (G. & C. Merriam Co. 1970). "Compensation" may also be broadly construed to mean "something given or received as an equivalent for services." *Random House Dictionary of the English Language* at 300 (Random House, Inc. 1967).

It must be acknowledged that free lift tickets and equipment discounts are "compensation" in the broad sense of the word. Yet the exception to immunity from civil liability refers to "render[ing] emergency care *for* compensation." Sec. 895.48(1), Stats. It might be argued that receiving compensation for merely patrolling ski hills, without regard to whether emergency care is in fact rendered, would be sufficient to take one outside the civil liability exemption imposed by section 895.48(1). Yet, the plain language of the statute refers to compensation as the *quid pro quo* for emergency care. Similarly, the first sentence of the statute contemplates the acts of "[a]ny person who renders emergency care at the scene," and not someone merely waiting to do so. *Id.* It would seem, therefore, that the act of rendering such care triggers application of the statute and its exception.

Thus, free lift tickets, equipment discounts or any other sort of remuneration constitute "compensation" as that term is used in the Good Samaritan Law if their receipt is at all dependent upon the actual rendering of emergency care. For example, if free lift tickets are available only to patrol members who rendered emergency care in fact, it is compensation under the statute. Alternatively, if the same quantity of lift tickets is available to any member of the patrol, whether or not that member has occasion to administer emergency care, it is not compensation under the statute because there is no *quid pro quo*.

Even if one is compensated for furnishing emergency care, however, he or she may still enjoy immunity from civil liability unless also determined to be an "employee" who is "trained in health care." Surely, a passer-by who receives unsolicited money

as a form of gratitude from the person aided has been compensated in exchange for emergency care. As will be seen, however, the mere receipt of compensation does not by itself transform the care provider into an employe.

Like "compensation," the term "employe" is not defined in section 895.48. There are at least eight definitions of the word, different from each other to various degrees, throughout the statutes. The Legislature, had it chosen to do so, could have incorporated any one of these into the Good Samaritan Law. The fact it did not gives reason for pause in attempting to justify the selection of one definition over another. It seems more useful to note that the employment relationship represents but one form of agency, and thus to refer to that body of law in determining whether a particular individual is an employe.

In general, the law of agency distinguishes between two mutually exclusive groups, servants and independent contractors. Restatement (Second) of Agency, Title B. Torts of Servants, Introductory Note at 480 (1957), as quoted in *Arsand v. City of Franklin*, 83 Wis. 2d 40, 53, 264 N.W.2d 579, 585 (1978). On the one hand, an independent contractor refers to:

[O]ne who is employed to do a piece of work without restriction as to the means to be employed, and who employs his own labor and undertakes to do the work in accordance with his own ideas or under plans furnished by the person for whom the work is done, to produce certain results required by such person.

Weber v. Hurley, 13 Wis. 2d 560, 568, 109 N.W.2d 65, 69-70 (1961), quoting approvingly from 18 McQuillin, Mun. Corp. (3d ed.) sec. 53.75. A servant, on the other hand, is an employe "whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." Restatement (Second) of Agency § 2 (1958).

What distinguishes the two from each other is the presence or absence of physical control. *Saunders v. DEC International, Inc.*, 85 Wis. 2d 70, 77, 270 N.W.2d 176, 179 (1978). Control, in turn,

is manifested in a variety of ways. The Restatement (Second) of Agency seeks to identify those things which, if present or absent in a given case, bear upon the question. These I have set forth in the margin.*

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Restatement (Second) of Agency § 220(2)(a)–(j) (1958), *quoted in Arsand*, 83 Wis. 2d at 46 n.4. *See also Ryan v. Department of Taxation*, 242 Wis. 491, 498–99, 8 N.W.2d 393 (1943).

As should be evident, whether a member of the National Ski Patrol is an employe of the ski hill which he or she patrols, depending as it does upon an analysis of facts which shall certainly change from ski hill to ski hill, is incapable of a dispositive answer. Even the facts as laid out by the committee are insufficient to enable me to render a conclusive opinion. The most that can be said is each circumstance must be considered in light of the factors identified above.

If it is concluded that a patrol member is both an employe of the ski hill and also compensated as a *quid pro quo* for emergency services, then it must be concluded as well that the patrol member is engaged "within the scope of [his or her] usual and customary employment or practice." Sec. 895.48(1), Stats. If these conditions exist, "the fact that one were so employed only on a part-time basis, or additionally employed elsewhere, would make no difference." 67 Op. Att'y Gen. at 225. Thus, just as volunteer ambulance personnel paid by the call are no different from other employes, such that they are not immune from civil liability, volunteer patrol members paid "by the call" by ski hill operators who oversee their activities likewise fall outside the protection of the Good Samaritan Law.

DJH:PLB

Schools And School Districts; A school board of a union or common school may incur debt to erect suitable buildings or additions to them without a referendum if such debt is incurred under section 67.05(6a)(b) or 67.12(12)(e)2g., Stats. However, the electorate through an annual or special meeting must independently approve the building or addition under section 120.10(5) and (5m) unless that requirement is relieved by the language of section 67.05(7)(d) or 67.12(12)(c)3. OAG 37-90 (Revised)

April 10, 1991

WALTER KUNICKI, *Chairperson*
Assembly Organization Committee

The Assembly Organization Committee has requested my opinion concerning the interplay between sections 67.05 and 67.12, Stats., and section 120.10(5) and (5m).

Sections 67.05 and 67.12 concern the means by which Wisconsin school districts can borrow money. Section 67.05 authorizes school districts to issue bonds while section 67.12 authorizes borrowing on promissory notes. In the 1989-90 budget, 1989 Wisconsin Act 31, those sections were amended to affect the procedure for borrowing by school districts in two significant ways. First, the act permitted school districts to borrow up to an aggregate of \$1,000,000 upon approval of the school board without any involvement of the electorate. Secs. 67.12(12)(e)2g. and 67.05(6a)(b), Stats. Second, if the conditions of section 67.05(6a)(b) are met, the act requires a referendum only in those cases where a sufficient number of electors petition for a referendum. Sec. 67.05(6a)(b), Stats.

Section 120.10 provides:

The annual meeting of a common or union high school district may:

....

(5) BUILDING SITES. Designate sites for school district buildings and provide for the erection of suitable buildings or for the lease of suitable buildings for a period

not exceeding 20 years with annual rentals fixed by the lease.

(5m) REAL ESTATE. Authorize the school board to acquire, by purchase or condemnation under ch. 32, real estate and structures and facilities appurtenant to such real estate necessary for school district purposes.

Where debt is incurred for the acquisition of real estate or the erection of suitable buildings and such borrowing is authorized by a referendum under chapter 67, sections 67.05(7)(d) and 67.12(12)(e)3. provide that if a referendum is held and the issuance of bonds or temporary borrowing is approved, that referendum also constitutes approval for the express purpose for which the referendum is held. Section 120.10(5) and (5m) is satisfied by these statutes.

Since 1989 Wisconsin Act 31 does not address the authority for approval of the underlying purposes of borrowing, your first question is: Under what circumstances must a school district independently obtain approval of the electorate through the annual¹ meeting for the purpose of borrowing the money if such approval is required by section 120.10 and the school district utilizes section 67.12(12)(e)2g. or 67.05(6a)(b) where a referendum is not required or a petition for referendum is not filed under section 67.05(6a)(b) or 67.12(12)(e)2.?

Your second and related question is whether the school board of a common school district may provide for the construction of an addition to an existing school building without the approval of the school district electors under section 120.10(5) or (5m).

The state has delegated its power to accomplish the governmental function of establishing and operating public schools to school districts. In exercising that delegated power the school districts act as state agencies. *Buse v. Smith*, 74 Wis. 2d

¹A special meeting has the powers of an annual meeting. Sec. 120.08(2)(c), Stats. The opinion will refer to annual meetings; however, anything required to be done by the electorate at an annual meeting may be done at a special meeting also.

550, 563, 247 N.W.2d 141 (1976). As state agencies, the school districts "have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds." *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 352, 299 N.W.2d 259 (Ct. App. 1980), quoting from *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 357, 190 N.W.2d 529 (1971).

Section 120.10 enumerates eighteen specific powers given to the electorate of a school district through the annual meeting. Sections 120.12 and 120.13 list the powers and duties of the district school board. Section 120.10(5) and (5m) gives the annual meeting the power to acquire real estate for buildings through lease or purchase, designate sites for buildings and erect suitable buildings. Section 120.12(1) provides "[s]ubject to the authority vested in the annual meeting and to the authority and possession specifically given to other school district officers [the school board shall] have the possession, care, control and management of the property and affairs of the school district"

This division of power between the school board and the annual meeting has characterized the Wisconsin school system from the beginning. *State ex rel. Waldeck v. Goedken*, 84 Wis. 2d 408, 415, 267 N.W.2d 362 (1978). Our courts have held that section 120.10 is a grant of a series of powers to school districts "under circumstances which suggest that the grant is exclusive." *Waldeck*, 84 Wis. 2d at 420. Thus, section 120.10 has been "strictly constru[ed] . . . 'to preclude the exercise of a power which is not expressly granted.'" *Neis v. Educ. Bd. of Randolph School*, 128 Wis. 2d 309, 315, 381 N.W.2d 614 (Ct. App. 1985).

Section 120.12, on the other hand, "empowers the board to exercise 'general supervision over [the] schools.'" *Waldeck*, 84 Wis. 2d at 415.

School boards, exercising the authority granted in sections 67.05(6a) and 67.12(12)(e)2g., may incur debt which may occur

without authorization of the electorate pursuant to those sections. However, the power to designate sites for school district schoolhouses and for the erection of suitable buildings lies exclusively with the annual meeting. Amendments by implication are not favored. Since the school board's general authority over the care, control and management of the property of the school district is subject to the powers of the annual meeting, chapter 67 must expressly exempt the board from obtaining approval of the annual meeting if the board wishes to spend money for any purpose enumerated in section 120.10. I do not imply any amendment to section 120.10 from 1989 Wisconsin Act 31.

As to bonds for building suitable buildings or acquiring land as a site, the only exemption I find in chapter 67 is section 67.05(7)(d). If the school district holds a referendum and the initial resolution to borrow the money for such building or any other purpose enumerated in section 120.10 is approved, that section relieves the board of obtaining approval of the annual meeting. It follows that if section 67.05(6a)(b) is used or no petition for referendum is filed under section 67.05(6a)(am)1., the board must obtain approval of the annual meeting for any such spending to meet the requirements of section 120.10.

As to promissory notes for building or site acquisition, section 67.12(12)(e)3. provides if "a sufficient petition for referendum is not filed . . . or if such petition is filed and the question is approved at referendum, then the power of the board to borrow the sum and expend the sum for the purpose stated shall be deemed approved by the school district electors." Section 67.12(12)(e)3. relieves the board of obtaining annual meeting approval for any section 120.10 spending if there is a favorable vote by referendum or the time for filing a petition for referendum passes without a sufficient petition having been filed. When the board proceeds under section 67.12(12)(e)2g., the approval of the annual meeting is required.

This opinion is consistent with the earlier opinions of my predecessors holding that the school board's authority over the

possession, care, control and management of property and affairs of the school district must be narrowly construed so as not to infringe on the powers of the annual meeting. 38 Op. Att'y Gen. 561 (1949); 10 Op. Att'y Gen. 115 (1921); 20 Op. Att'y Gen. 850 (1931).

Your second question is whether a school board of a common school district may construct an addition to an existing school building without approval of the school district electors. The answer to your question is no. The annual meeting has the power to "provide for the erection of suitable buildings." The power to provide an addition to an existing school building is, in my opinion, inseparable from the power to erect a suitable building in the first instance. While there may be some projects which necessitate close factual analysis to determine whether the project is the erection of a suitable building or maintenance or repair of current structures, it is my opinion that erection of additions are required to be approved by an annual meeting of the school district electors under section 120.10(5) because the general authority of the school board under section 120.12(1) is subject to the powers vested in the annual meeting.

The questions presented in this opinion did not raise and I do not address the specificity the resolution must contain to satisfy the requirement of section 120.10. A school board would be wise to avoid any question by formulating any resolution for site selection or building erection as specific as is practical.

JED:WDW

Gambling; Jurisdiction; Wisconsin prohibits gambling on the Wisconsin portion of the Mississippi River. An Iowa licensed river boat equipped with casino-type gambling games may be in violation of chapter 945 if it enters Wisconsin water. OAG 38-90

December 28, 1990

TOM LOFTUS, *Chairperson*
Assembly Organization Committee

You have sought my opinion on the legality of Iowa licensed riverboat gambling in Wisconsin waterways. The answers to the questions posed depend upon the authority of the State of Wisconsin to regulate activity on the Wisconsin portion of the Mississippi River and upon the application of chapter 945, Stats., to the gambling hypotheticals you posit. I have concluded that the State of Wisconsin is authorized to prohibit casino-type gambling on the Wisconsin portion of the Mississippi River and the types of activities you have posed may constitute violations of chapter 945.

The State of Wisconsin has authority to exercise criminal jurisdiction over portions of the Mississippi River which border it. The Act of Congress admitting Wisconsin into the Union, Act of August 6, 1846, ch. 89, 9 Stat. 57, provides in part as follows:

[T]he said State of Wisconsin shall have concurrent jurisdiction on the Mississippi, and all other rivers and waters bordering on the said State of Wisconsin, so far as the same shall form a common boundary to said State and any other State or States now or hereafter to be formed or bounded by the same.

Article IX, section 1 of the Wisconsin Constitution provides in part: "The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state."

The Wisconsin Legislature has acted on the federal grant of concurrent jurisdiction affirmed in article IX, section 1 of the Wisconsin Constitution by expressly extending its criminal

jurisdiction to include the rivers and lakes bordering the state. Section 939.03(1)(a) provides: "[j]urisdiction of state over crime. (1) A person is subject to prosecution and punishment under the law of this state if: (a) He commits a crime, any of the constituent elements of which takes place in this state."

Section 939.03(2) defines "state": (2) "[i]n this section 'state' includes area within the boundaries of the state, and area over which the state exercises concurrent jurisdiction under article IX, section 1, of the constitution." Section 971.19(7) provides the place of trial for a criminal offense committed on boundary waters. Thus, the criminal code, including its gambling provisions, extend at least to the main channel of the Mississippi River.

The United States and Wisconsin Supreme Courts have interpreted the grant of "concurrent jurisdiction" between states to include the authority to regulate, through the criminal law, activities on their water borders. *Nielsen v. Oregon*, 212 U.S. 315 (1909); *Miller v. McLaughlin*, 281 U.S. 261 (1930); *The State v. Cameron*, 2 Pin. 490 (Wis. 1850); *The State v. McDonald*, 109 Wis. 506, 85 N.W. 502 (1901); *Roberts v. Fullerton*, 117 Wis. 222, 93 N.W. 1111 (1903). The holding of these cases and the current state of the law is succinctly stated in an opinion by one of my predecessors:

The opinion in the *Nielsen* case provides authority for the following conclusions:

(1) Jurisdiction of both states over acts *mala in se* (acts "bad" in themselves and therefore prohibited) extends the full width of a boundary water. In this situation, the state first commencing the prosecution obtains primary jurisdiction;

(2) In the case of acts which are merely *mala prohibita* (not inherently "bad" but prohibited by law for a variety of purposes), and are illegal in only one of the two adjoining states, jurisdiction of the "prohibiting" state

extends only to the territorial limits thereof—e.g., to the thread or center of the main channel of the boundary water;

(3) Even if an act is only by nature *malum prohibitum*, if it is made illegal by the law of both adjoining states, the principles of No. (1), above, apply, and each state's jurisdictional arm extends the full width of the boundary water. The state first asserting jurisdiction over a given act similarly obtains priority, and, as in the first-described situation, its judgment is final in both states. See 37 OAG 570, 572 (1948).

....

Violations *mala in se* comprise generally those acts which are immoral or wrong in themselves, or naturally "evil", such as murder, arson, burglary, breach of the peace, forgery, drunken driving, etc. *State v. Kelison*, (1943) 233 Iowa 1274, 11 N.W.2d 371; *State v. Darchuck*, (1945) 117 Mont. 15, 156 P.2d 173. The term *malum prohibitum*, on the other hand, embraces those things which are not inherently "evil", but which are prohibited by statute because they infringe upon the rights of others. They are crimes only because they are so prohibited. Violation of licensing laws, automobile speed restrictions, *gambling*, etc., are examples of acts considered to be merely *mala prohibita*.

(Citations omitted, emphasis added.) 56 Op. Att'y Gen. 278, 280–81 (1967).

The hypotheticals you pose would fall into the second category of jurisdiction. Gambling is *malum prohibitum* in Wisconsin but legalized in Iowa and you have limited your facts to operation within Wisconsin waters.

Since Wisconsin's gambling laws are enforceable on the Mississippi River in Wisconsin water, I now address each of your hypotheticals.

1. May an Iowa riverboat, designed for gambling, enter Wisconsin waterways with gambling apparatus on board?

Iowa Code § 99F (Supp. 1989), provides for the licensing and operation of excursion boat gambling in the State of Iowa. Section 99F.3 authorizes gambling games when properly licensed. Section 99F.1 10. defines "gambling games" as "twenty-one, dice, slot machine, video game of chance or roulette wheel." All of these contrivances would fall within the Wisconsin definition of "gambling machine" in section 945.01(3)(a). Should an Iowa licensed riverboat enter Wisconsin water while its "gambling games" are in play, this would constitute a violation of chapter 945 by the operator as well as the employes and patrons of the riverboat. Secs. 945.03 and 945.02, Stats.

Should the riverboat stop its games when it enters Wisconsin waters, it may still be in violation of chapter 945 as a gambling place if its entry is to facilitate its principal function of gambling. Several provisions of chapter 945 prohibit "gambling places." Section 945.01(4) provides:

GAMBLING PLACE. (a) A gambling place is any building or tent, any vehicle (whether self-propelled or not) or any room within any of them, one of whose principal uses is any of the following: making and settling bets; receiving, holding, recording or forwarding bets or offers to bet; conducting lotteries; or playing gambling machines.

Section 939.22(44) provides: "[v]ehicle' means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air." Thus, if an Iowa licensed riverboat enters Wisconsin water it would be considered a "gambling place" whether or not the gaming has stopped.

Section 945.03(1) prohibits the operation of a gambling place: "[c]ommerical gambling. Whoever intentionally does any of the following is engaged in commercial gambling and is guilty of a Class E felony: (1) Participates in the earnings of or for gain operates or permits the operation of a gambling place"

The Legislature has not defined "operation" for purposes of section 945.03(1). The Wisconsin Jury Instructions—Criminal

1601 (1985), *Commercial Gambling: Operating A Gambling Place For Gain*, states: "[t]o 'operate' means that one directs and manages the day to day activities that occur on the premises." Section 945.03(1) may be violated by an Iowa riverboat that intentionally enters Wisconsin water for any purpose in furtherance of its gaming business. By pursuing its gaming mission, it is operating as a gambling place whether or not gaming is taking place.

2. May an Iowa riverboat, designed for gambling, dock at a Wisconsin port for the purpose of loading passengers intending to gamble?

The riverboat in entering Wisconsin water and docking at a Wisconsin port for the purpose of loading passengers would be operating as a gambling place and in violation of chapter 945. The docking and embarking of passengers is an integral function to the operation of the riverboat and its gambling purpose. The docking phase of the gambling operation is so material that Iowa only allows docking where the Iowa State Racing and Gaming Commission has authorized it. Iowa Code § 99F.3.

3. May an Iowa riverboat, designed for gambling, dock at Wisconsin ports, pick up passengers and return to Iowa waters to engage in gambling?

As discussed in response to the last question, I believe it would be a violation of chapter 945 for a gambling machine-equipped riverboat to dock at a Wisconsin port, whether or not gaming takes place at the Wisconsin dock or waters. Section 945.02(2) may also be implicated when the boat embarks passengers at a Wisconsin dock or water. Section 945.02(2) provides: "[g]ambling. Whoever does any of the following is guilty of a Class B misdemeanor: . . . (2) Enters or remains in a gambling place with intent to make a bet, to participate in a lottery, or to play a gambling machine" The gambler that boards the riverboat is entering a gambling place with intent to make a bet or play a gambling machine. This is a *prima facie* violation of section 945.02(2).

4. May an Iowa riverboat, designed for gambling, enter Wisconsin waterways, remain offshore and transport persons from a Wisconsin dock to the riverboat, which then will return to Iowa jurisdiction for gambling purposes?

My opinion on this hypothetical remains the same as the previous. Once the riverboat has entered Wisconsin water it may be engaged in illegal commercial gambling by operating as a gambling place. Sec. 945.03, Stats. The transporting of gamblers from a Wisconsin dock to the riverboat in Wisconsin water may constitute additional counts of illegal gambling. Secs. 945.02 and 945.03, Stats.

My opinion has reviewed your gambling hypotheticals in light of the Wisconsin Criminal Code. I would note that federal gambling law may also prohibit the type of activity you posit. 15 U.S.C.A. § 1172 (1982) provides that it would be unlawful to knowingly transport any gambling device into one state from a place outside of that state unless that state has specifically exempted itself from this provision, or unless the device is being transported to a gambling establishment where betting is legal under applicable state law, or where the gambling device is specifically enumerated as being lawful in that state's statutes. The penalties for violation of this provision include a fine of not more than \$5,000 or imprisonment of not more than two years, or both, and possible seizure and forfeiture of the vessel and gambling machines. 15 U.S.C.A. § 1176, 1177 (1982).

DJH:SET

Confidential Reports; Counties; Public Records; Members of a social services board in a county with a county executive or a county administrator may be granted access to child abuse and neglect files pursuant to section 48.981(7)(a)2. of the statutes if such access is necessary to allow them to perform their statutory duties. OAG 39-90

December 28, 1990

THOMAS SCHROEDER, *Corporation Counsel*

Rock County

You ask whether members of a social services board in a county with a county executive or a county administrator may be granted access to child abuse and neglect files.

In my opinion, the answer is yes if such access is necessary to permit the board to perform its statutory duties.

Section 48.981, Stats., was amended and recreated in substantially its present form in 1983 Wisconsin Act 172. That legislation and subsequent amendments are required "to conform with federal regulations." *Compare Freed v. Worcester County*, 69 Md. App. 447, 518 A.2d 159, 162 (1986). Those regulations now appear in 45 C.F.R. § 1340.14(i)(2) (1989), which provides in part:

If a State chooses to, it may authorize by statute disclosure to any or all of the following persons and agencies, under limitations and procedures the State determines:

(i) The agency (agencies) or organizations (including its designated multi-disciplinary case consultation team) legally mandated by any Federal or State law to receive and investigate reports of known and suspected child abuse and neglect;

. . . .

(x) An appropriate State or local official responsible for administration of the child protective service or for oversight

of the enabling or appropriating legislation, carrying out his or her official functions;

Section 48.981(7), in turn provides in part:

CONFIDENTIALITY. (a) All reports made under this section, notices provided under sub. (3) (bm) and records 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:

. . . .

2. Appropriate staff of the department, a county department or licensed child welfare agency under contract with the county departments, or a tribal social services department.

. . . .

7. Another county department, or licensed child welfare agency under contract with that county department, or a tribal social services department that is currently investigating a report of suspected or threatened child abuse or neglect involving a subject of the record or report.

The state statute must be construed in a manner consistent with federal legislation and attendant regulations. *See* 69 Op. Att'y Gen. 95, 100 (1980). 45 C.F.R. § 1340.14(i)(2)(i) (1989) refers to "agencies" and "organizations." A social services department is an "agency." Under section 46.22(1)(a), "[t]he county department of social services shall consist of a county social services board, a county social services director and necessary personnel." County social services boards are therefore "part and parcel of county [social services] departments." 59 Op. Att'y Gen. 240, 248 (1970).

In 59 Op. Att'y Gen. at 248, my predecessor concluded that, given the language contained in section 46.22(1)(a), county welfare boards may obtain access to records that are confidential

under section 48.78. As to committees appointed by the welfare board, however, that opinion concluded as follows:

Committees appointed by the county welfare board are purely advisory in character. They are not enumerated in secs. 48.78 or 48.56, Stats., as an exempted agency. Hence, they are completely barred to child welfare files as provided by the confidentiality statute. Moreover, it is extremely doubtful that they have sufficient standing to obtain a court order which would permit an inspection of such records. On the other hand, there can be no objection to supplying such committees with statistical data which does not identify individuals for purposes of advising the board as to policy matters. The confidentiality statute was designed to protect individuals from humiliation and embarrassment. It was not meant to stifle all degrees of inquiry.

59 Op. Att'y Gen. at 248.

Section 48.981(7) is a specific statute governing access to records concerning child abuse and neglect. Its provisions are controlling over the more general provisions of section 48.78 concerning records generally maintained by county social services agencies. See e.g., *Employees Local 1901 v. Brown County*, 146 Wis. 2d 728, 735, 432 N.W.2d 571 (1988). 59 Op. Att'y Gen. 240 therefore is not dispositive with respect to your inquiry, since it does not and could not have analyzed the more specific provisions in section 48.981.

You indicate that, in section 48.981(7)(a)2., the Legislature chose to employ the term "appropriate staff," while no such terminology appears in section 48.78. You therefore suggest that the language of the former statute is more stringent and that members of the welfare board are not "staff."

While I agree that the phrase "appropriate staff" may connote a degree of confidentiality more stringent than the term "agency" in section 48.78, I am unwilling to conclude that members of a social services board are not "staff." To reach such a result would also require me to conclude that members of multi-county social

services boards and members of social services boards in counties without a county executive and a county administrator are not "staff" even though such boards "[s]upervise the working of the county department of social services and shall be . . . policy-making bod[ies] determining the broad outlines and principles governing the administration of the functions, duties and powers assigned to the county department of social services . . ." Sec. 46.22(2)(c), Stats.

Statutes should be construed to avoid results which are "unrealistic and unreasonable." *Maxey v. Racine Redevelopment Authority*, 120 Wis. 2d 13, 20, 353 N.W.2d 812 (Ct. App. 1984). It would be both unrealistic and unreasonable to impede a social services board from performing its statutory duties under section 46.22(2)(c) on the theory that members of the board are not "staff." I therefore reject that construction of the term "staff" and conclude that, under section 46.22(1)(a), members of the social services board, the county social services director and personnel in the county social services department are all "staff." Board members therefore cannot be denied access on the basis that "[t]hey are not enumerated in . . . [the confidentiality statute] as an exempted agency." *Compare* 59 Op. Att'y Gen. at 248.

Finally, you suggest, in effect, that even if members of a county social services board in a county with a county executive or a county administrator are staff, social services boards in such counties function in a manner analogous to the advisory committees described in 59 Op. Att'y Gen. at 248.

Section 46.22(2g) provides as follows:

POWERS AND DUTIES OF COUNTY SOCIAL SERVICES BOARD IN CERTAIN COUNTIES WITH A COUNTY EXECUTIVE OR COUNTY ADMINISTRATOR.
A county social services board appointed under sub.(1m)(b)2 shall:

. . . .

(b) Appoint committees consisting of residents of the county to advise the county social services board as it deems

necessary. Members of such committees shall serve without compensation.

(c) Recommend program priorities, identify unmet service needs and prepare short-term and long-term plans and budgets for meeting such priorities and needs.

(d) Prepare, with the assistance of the county social services director under sub. (3m)(b)5, a proposed budget for submission to the county executive or county administrator and to the department of health and social services in accordance with s. 46.031(1) for authorized services.

(e) Advise the county social services director under sub. (3m)(b)3 regarding purchasing and providing services and the selection of purchase of service vendors, and make recommendations to the county executive or county administrator regarding modifications in such purchasing, providing and selection.

(f) Develop county social services board operating procedures.

(g) Comply with state requirements.

(h) Assist in arranging cooperative working agreements with persons providing health, education, vocational or welfare services related to services provided under this section.

When compared with other county social services boards, social services boards in counties with a county executive or a county administrator undoubtedly have relatively few powers. *See* sec. 46.22(2), Stats. But they are not the functional equivalent of advisory committees such as those described in 59 Op. Att'y Gen. at 248, since they still retain the power to appoint such committees. Sec. 46.22(2g)(b), Stats. I recognize that, in counties such as yours, many of the functions now exercised by members of the social services board are advisory in nature. Nevertheless, some relevant, non-advisory functions, notably identification of unmet service needs and preparation of departmental plans and budgets, do remain. Sec. 46.22(2g)(c) and (d), Stats.

As with any other county social services department personnel, the question is whether board members require access to such records to perform one or more of their statutory duties. If so, they are "appropriate staff" within the meaning of section 48.981(7)(a)2. That determination must be made by the county social services director on a case-by-case basis in the exercise of his or her supervisory authority. *See* sec. 46.22(3m)(b)1. and *lm.*, Stats.

I therefore conclude that members of a social services board in a county with a county executive or a county administrator may be granted access to child abuse and neglect files pursuant to section 48.981(7)(a)2. of the statutes if such access is necessary to allow them to perform their statutory duties.

DJH:FTC

**STATUTES AND CONSTITUTIONAL PROVISIONS,
SESSION LAWS, LEGISLATIVE BILLS,
OPINIONS OF THE ATTORNEY GENERAL, AND
RESOLUTIONS REFERRED TO AND CONSTRUED**

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Wisconsin statutes do not prohibit the transportation of dead human bodies from an accident scene to a hospital by ambulance or rescue personnel. OAG 21-90 120

Dead bodies

see Corpses

AGING AND LONG-TERM CARE

See BOARD ON AGING AND LONG-TERM CARE

AMBULANCES

Corpses

Wisconsin statutes do not prohibit the transportation of dead human bodies from an accident scene to a hospital by ambulance or rescue personnel. OAG 21-90 120

Dead bodies

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ARREST

Mandatory

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Registration fee

A motor vehicle registration fee which varies with the value of the motor vehicle or which is based upon the manufacturer's suggested retail price and the age of the motor vehicle would not violate article VIII, section 1 of the Wisconsin Constitution because the vehicle registration fee is a privilege tax, not a property tax. OAG 25-90 135

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A motor vehicle registration fee which varies with the value of the motor vehicle or which is based upon the manufacturer's suggested retail price and the age of the motor vehicle would not violate article VIII, section 1 of the Wisconsin Constitution because the vehicle registration fee is a privilege tax, not a property tax. OAG 25-90 135

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If individuals who have an interest in or are affiliated with long-term care facilities such as nursing homes are appointed to the Board on Aging and Long-Term Care under section 15.105, Stats., it is strongly recommended in light of recent federal conflict of interest legislation that they be precluded from participating in the appointment of the nursing home ombudsman or the head of any subdivision of the Board and that they refrain from reviewing those ombudsman activities described in 42 U.S.C. § 3027(a)(12) (1989). OAG 17-90 99

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Cement grave liner

For the purpose of payment of expenses under section 49.30, Stats., a cement grave liner will be considered a funeral and burial expense or a cemetery expense depending upon who provides the liner. Therefore, a cement grave liner provided by a funeral home constitutes a funeral and burial expense subject to the statutory limit for payment. OAG 31-90 164

Expenses

For the purpose of payment of expenses under section 49.30, Stats., a cement grave liner will be considered a funeral and burial expense or a cemetery expense depending upon who provides the liner. Therefore, a cement grave liner provided by a funeral home constitutes a funeral and burial expense subject to the statutory limit for payment. OAG 31-90 164

CEMETERIES

Cement grave liner

For the purpose of payment of expenses under section 49.30, Stats., a cement grave liner will be considered a funeral and burial expense or a cemetery expense depending upon who provides the liner. Therefore, a cement grave liner provided by a funeral home constitutes a funeral and burial expense subject to the statutory limit for payment. OAG 31-90 164

Expenses

For the purpose of payment of expenses under section 49.30, Stats., a cement grave liner will be considered a funeral and burial expense or a cemetery expense depending upon who provides the liner. Therefore, a cement grave liner provided by a funeral home constitutes a funeral and burial expense subject to the statutory limit for payment. OAG 31-90 164

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Parents who unilaterally remove a child from an exceptional educational needs placement violate the compulsory education statute. OAG 18-90 105

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CLERK OF COURTS

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The clerk of circuit court has discretion to refuse to docket a large claim money judgment until his statutory fee has been paid for that service; but such discretion is not unlimited. The clerk incurs no liability under section 806.10(3), Stats., where the time of entry recorded in the

CLERK OF COURTS *(continued)*

Docketing duties *(continued)*

judgment docket is the time when the clerk has both the judgment and the statutory fee in his custody, provided the clerk has not abused his discretion. OAG 10-90 54

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The clerk of circuit court has discretion to refuse to docket a large claim money judgment until his statutory fee has been paid for that service; but such discretion is not unlimited. The clerk incurs no liability under section 806.10(3), Stats., where the time of entry recorded in the judgment docket is the time when the clerk has both the judgment and the statutory fee in his custody, provided the clerk has not abused his discretion. OAG 10-90 54

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CONSTITUTIONAL LAW

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Municipal service fees on tax-exempt property may violate the uniformity and equal protection clauses of the Wisconsin Constitution. OAG 12-90 64

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A motor vehicle registration fee which varies with the value of the motor vehicle or which is based upon the manufacturer's suggested retail price and the age of the motor vehicle would not violate article VIII, section 1 of the Wisconsin Constitution because the vehicle registration fee is a privilege tax, not a property tax. OAG 25-90 135

Municipal service fees on tax-exempt property may violate the uniformity and equal protection clauses of the Wisconsin Constitution. OAG 12-90 64

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A county has no statutory authority to award contracts only to unionized contractors. Federal preemption rules probably foreclose the exercise of such authority in any event. Further, federal preemption rules foreclose denying contracts to employers engaged in labor disputes. OAG 14-90 86

District Attorney

Counties are not required to pay the bar dues of district attorneys and assistant district attorneys serving the county. However, a district attorney or assistant district attorney may elect under section 978.12(6), Stats., to retain a county fringe benefits package that includes payment of bar dues. OAG 30-90 159

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Counties are financially responsible for providing mental health services to residents conditionally released under section 971.17, Stats. OAG 34-90 181

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Members of a social services board in a county with a county executive or a county administrator may be granted access to child abuse and neglect files pursuant to section 48.981(7)(a)2. of the statutes if such access is necessary to allow them to perform their statutory duties. OAG 39-90 212

Union or non-union contractors

A county has no statutory authority to award contracts only to unionized contractors. Federal preemption rules probably foreclose the exercise of such authority in any event. Further, federal preemption rules foreclose denying contracts to employers engaged in labor disputes. OAG 14-90 86

COUNTY BOARD

Costs of juvenile detention

A county board is not statutorily obligated to charge costs incurred as a result of court-ordered placement in a secure juvenile detention facility to the budget of the county social service department rather than to the budget of the sheriff's department. A sheriff is statutorily obligated to comply with an order of the juvenile court commanding the sheriff to transport a juvenile to or from a secure detention facility. Section 302.34, Stats., is not applicable to a county that has both a county jail and a cooperative agreement with another county for the provision of secure juvenile detention facilities. OAG 2-90 8

Judicial review of legislative decision

Judicial review of a county board's legislative decision concerning approval or disapproval of town zoning ordinances submitted to the county board under section 60.62(3), Stats., is limited to cases of abuse of discretion, excess of power or error of law. OAG 20-90 117

Juvenile detention costs

A county board is not statutorily obligated to charge costs incurred as a result of court-ordered placement in a secure juvenile detention facility to the budget of the county social service department rather than to the budget of the sheriff's department. A sheriff is statutorily obligated to comply with an order of the juvenile court commanding the sheriff to transport a juvenile to or from a secure detention facility. Section 302.34, Stats., is not applicable to a county that has both a county jail and a cooperative agreement with another county for the provision of secure juvenile detention facilities. OAG 2-90 8

Per diems

see Supervisor, per diems

Supervisor, per diems

Except in self-organized counties, a county board may not establish multiple per diem compensation for attendance at more than one committee meeting on the same day on days when the county board is not in session. OAG 22-90 122

Zoning

Judicial review of a county board's legislative decision concerning approval or disapproval of town zoning ordinances submitted to the county board under section 60.62(3), Stats., is limited to cases of abuse of discretion, excess of power or error of law. OAG 20-90 117

COUNTY JAIL

Juvenile

The exclusive grant of jurisdiction to circuit courts for enumerated traffic offenses under section 48.17(1), Stats., involving juvenile offenders, sixteen years of age or older, includes the authority to sentence juveniles to the adult section of the county jail where the penalty is prescribed by the substantive traffic statute. OAG 16-90 94

COURT REPORTERS

Free copy machine services

Counties are not required to provide free copy machine services for court reporters who collect fees under section 814.69(2), Stats., for furnishing transcripts to parties. OAG 29-90 157

CRIMINAL LAW

Domestic abuse

The provisions of section 968.075, Stats., apply to roommates living in university residence halls, whether privately or state owned. If the criteria requiring arrest under section 968.075(2) exist, the law enforcement officer must make a custodial arrest. OAG 19-90 . . . 109

Mandatory arrest, sec. 968.075, Stats.

The provisions of section 968.075, Stats., apply to roommates living in university residence halls, whether privately or state owned. If the criteria requiring arrest under section 968.075(2) exist, the law enforcement officer must make a custodial arrest. OAG 19-90 . . . 109

University residence halls

The provisions of section 968.075, Stats., apply to roommates living in university residence halls, whether privately or state owned. If the criteria requiring arrest under section 968.075(2) exist, the law enforcement officer must make a custodial arrest. OAG 19-90 . . . 109

Victims

The requirement in section 950.04(1), Stats., of notice to the victim of a defendant's release from custody applies to all felonies charged under chapter 948. Notice is to be given to the victims of all crimes charged under chapter 940, whether misdemeanors or felonies. The notice requirements of the statute apply to individual persons, not business enterprises or corporations. OAG 1-90 1

Witnesses

The requirement in section 950.04(1), Stats., of notice to the victim of a defendant's release from custody applies to all felonies charged under chapter 948. Notice is to be given to the victims of all crimes charged under chapter 940, whether misdemeanors or felonies. The notice requirements of the statute apply to individual persons, not business enterprises or corporations. OAG 1-90 1

DEFERRED COMPENSATION BOARD

Alternative or supplemental plans

Section 40.80(2m), Stats. (as created by 1989 Wisconsin Act 31), requires the Deferred Compensation Board to establish administrative rules for alternative or supplemental deferred compensation plans but does not require that any such plans be offered. OAG 32-90 168

DISTRICT ATTORNEY

Bar dues

Counties are not required to pay the bar dues of district attorneys and assistant district attorneys serving the county. However, a district attorney or assistant district attorney may elect under section 978.12(6), Stats., to retain a county fringe benefits package that includes payment of bar dues. OAG 30-90 159

Salaries

District attorneys are not "public officer[s]" within the meaning of that term in article IV, section 26 of the Wisconsin Constitution, and the Legislature may, therefore, increase or diminish the salaries of district attorneys during their terms of office. OAG 28-90 149

DRUNK DRIVING

Confinement to rehabilitation facility

A repeat OWI offender serving the mandatory term of imprisonment may be confined in a rehabilitation facility if that facility is a "locked" facility under the control and direct authority of the county sheriff and, at a minimum, that facility must satisfy all other characteristics for a jail set forth in the Wisconsin Administrative Code. OAG 13-90 75

OWI; rehabilitation facility

A repeat OWI offender serving the mandatory term of imprisonment may be confined in a rehabilitation facility if that facility is a "locked" facility under the control and direct authority of the county sheriff and, at a minimum, that facility must satisfy all other characteristics for a jail set forth in the Wisconsin Administrative Code. OAG 13-90 75

Repeat offenders

A repeat OWI offender serving the mandatory term of imprisonment may be confined in a rehabilitation facility if that facility is a "locked" facility under the control and direct authority of the county sheriff and, at a minimum, that facility must satisfy all other characteristics for a jail set forth in the Wisconsin Administrative Code. OAG 13-90 75

EMERGENCY MEDICAL TECHNICIAN

Corpses

Wisconsin statutes do not prohibit the transportation of dead human bodies from an accident scene to a hospital by ambulance or rescue personnel. OAG 21-90 120

EMERGENCY MEDICAL TECHNICIAN (continued)

Liability

Incidental benefits received by volunteer members of National Ski Patrol in exchange for rendering emergency care to disabled skiers may result in loss of civil liability immunity under Good Samaritan Law. OAG 36-90 194

EMPLOYEE TRUST FUNDS BOARD

Powers discussed

Authority of the Employee Trust Funds Board, the Teachers Retirement Board and the Wisconsin Retirement Board in contested cases discussed. OAG 27-90 139

EMPLOYEE TRUST FUNDS, DEPARTMENT OF

Deferred compensation plans

Section 40.80(2m), Stats. (as created by 1989 Wisconsin Act 31), requires the Deferred Compensation Board to establish administrative rules for alternative or supplemental deferred compensation plans but does not require that any such plans be offered. OAG 32-90 168

EMPLOYER AND EMPLOYEE

Conviction records

When evaluating an individual for the position of reserve officer, a sheriff's department may consider information in its possession concerning the individual's juvenile record, subject to the prohibitions against arrest record and conviction record discrimination contained in the Wisconsin Fair Employment Act. OAG 15-90 89

GAMBLING

Indians

Under article IV, section 24 of the Wisconsin Constitution, and chapter 565, Stats., the state lottery board may conduct any lottery game which complies with the ticket language in the constitution and chapter 565. The term "lottery" in the constitution and statutes does not include any other forms of betting, the playing or operation of gambling machines and devices and other forms of gambling defined in chapter 945. The Legislature can statutorily authorize other non-lottery gambling including casino-type games. Under the Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 (West Supp. 1989), gambling activities as defined and prohibited in chapter 945, other than lotteries and pari-mutuel on-track wagering, are not permitted by any person within or without Indian country in the State of Wisconsin. This prohibition includes all non-lottery gambling such as casino-type games, gambling machines and other devices. The Legislature can statutorily authorize non-lottery gambling within Indian country. OAG 3-90 14

GAMBLING (continued)

Lottery

Under article IV, section 24 of the Wisconsin Constitution, and chapter 565, Stats., the state lottery board may conduct any lottery game which complies with the ticket language in the constitution and chapter 565. The term "lottery" in the constitution and statutes does not include any other forms of betting, the playing or operation of gambling machines and devices and other forms of gambling defined in chapter 945. The Legislature can statutorily authorize other non-lottery gambling including casino-type games. Under the Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 (West Supp. 1989), gambling activities as defined and prohibited in chapter 945, other than lotteries and pari-mutuel on-track wagering, are not permitted by any person within or without Indian country in the State of Wisconsin. This prohibition includes all non-lottery gambling such as casino-type games, gambling machines and other devices. The Legislature can statutorily authorize non-lottery gambling within Indian country. OAG 3-90 14

Mississippi River

Wisconsin prohibits gambling on the Wisconsin portion of the Mississippi River. An Iowa licensed river boat equipped with casino-type gambling games may be in violation of chapter 945 if it enters Wisconsin water. OAG 38-90 206

Riverboats

Wisconsin prohibits gambling on the Wisconsin portion of the Mississippi River. An Iowa licensed river boat equipped with casino-type gambling games may be in violation of chapter 945 if it enters Wisconsin water. OAG 38-90 206

Video poker machines

The operation of video poker games in Wisconsin, which involve the elements of prize, chance and consideration, constitutes the operation of gambling machines, does not constitute the conduct of an illegal lottery and the Legislature may therefore authorize the operation of video poker games by appropriate repeals or amendments to chapter 945, Stats., should it choose to do so. OAG 4-90 33

GOOD SAMARITAN

See **MEDICAL AID; NATIONAL SKI PATROL**

HEALTH AND SOCIAL SERVICES, DEPARTMENT OF

Child abuse and neglect investigations

Discussion of the responsibility of county departments of social services to investigate allegations of child abuse and neglect. Department staff members may interview the child on public school property, and may exclude school personnel from the interview. School personnel cannot condition on-site interviews on notification of the child's parents. OAG 9-90 49

INDIANS

Gambling

Under article IV, section 24 of the Wisconsin Constitution, and chapter 565, Stats., the state lottery board may conduct any lottery game which complies with the ticket language in the constitution and chapter 565. The term "lottery" in the constitution and statutes does not include any other forms of betting, the playing or operation of gambling machines and devices and other forms of gambling defined in chapter 945. The Legislature can statutorily authorize other non-lottery gambling including casino-type games. Under the Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 (West Supp. 1989), gambling activities as defined and prohibited in chapter 945, other than lotteries and pari-mutuel on-track wagering, are not permitted by any person within or without Indian country in the State of Wisconsin. This prohibition includes all non-lottery gambling such as casino-type games, gambling machines and other devices. The Legislature can statutorily authorize non-lottery gambling within Indian country. OAG 3-90 14

INDIANS GAMING REGULATOR'S ACT

Gambling activities discussed

Under article IV, section 24 of the Wisconsin Constitution, and chapter 565, Stats., the state lottery board may conduct any lottery game which complies with the ticket language in the constitution and chapter 565. The term "lottery" in the constitution and statutes does not include any other forms of betting, the playing or operation of gambling machines and devices and other forms of gambling defined in chapter 945. The Legislature can statutorily authorize other non-lottery gambling including casino-type games. Under the Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 (West Supp. 1989), gambling activities as defined and prohibited in chapter 945, other than lotteries and pari-mutuel on-track wagering, are not permitted by any person within or without Indian country in the State of Wisconsin. This prohibition includes all non-lottery gambling such as casino-type games, gambling machines and other devices. The Legislature can statutorily authorize non-lottery gambling within Indian country. OAG 3-90 14

JURISDICTION

Gambling

Wisconsin prohibits gambling on the Wisconsin portion of the Mississippi River. An Iowa licensed river boat equipped with casino-type gambling games may be in violation of chapter 945 if it enters Wisconsin water. OAG 38-90 206

Mississippi riverboat

Wisconsin prohibits gambling on the Wisconsin portion of the Mississippi River. An Iowa licensed river boat equipped with casino-type gambling games may be in violation of chapter 945 if it enters Wisconsin water. OAG 38-90 206

LAKES

Boating fees

The delegation of authority to local governments to collect boater fees for miscellaneous "recreational boating services," under sections 30.77(3)(e)l.c. and 33.475, Stats., is unconstitutional. OAG 35-90 185

LAND

Mineral rights

Under section 706.057, Stats., owner of the surface of land under which mineral rights have lapsed must record a claim to the lapsed mineral rights in order to foreclose separate mineral rights owner from curing the lapse. OAG 11-90 61

Surface owner

Under section 706.057, Stats., owner of the surface of land under which mineral rights have lapsed must record a claim to the lapsed mineral rights in order to foreclose separate mineral rights owner from curing the lapse. OAG 11-90 61

LEGISLATION

Budget Act for 1983

The provisions of the 1983 Budget Act restricting the expenditure of state and federal funds for the construction of additional lanes on I-43 in Milwaukee and Ozaukee Counties do not violate the requirement of Wisconsin Constitution article IV, section 18 that private and local bills must embrace only one subject which must be expressed in the bill's title. OAG 7-90 43

Local highway construction of statewide concern

The provisions of the 1983 Budget Act restricting the expenditure of state and federal funds for the construction of additional lanes on I-43 in Milwaukee and Ozaukee Counties do not violate the requirement of Wisconsin Constitution article IV, section 18 that private and local bills must embrace only one subject which must be expressed in the bill's title. OAG 7-90 43

Private or local act test

The provisions of the 1983 Budget Act restricting the expenditure of state and federal funds for the construction of additional lanes on I-43 in Milwaukee and Ozaukee Counties do not violate the requirement of Wisconsin Constitution article IV, section 18 that private and local bills must embrace only one subject which must be expressed in the bill's title. OAG 7-90 43

LIBRARIES

Federated public library system

A public library system may not charge fees for services which are inconsistent with the provisions of section 43.52(2), Stats. OAG 5-90 37

LIBRARIES *(continued)*

Fees for users

A public library system may not charge fees for services which are inconsistent with the provisions of section 43.52(2), Stats. OAG 5-90 37

Fees for video cassettes

A public library system may not charge fees for services which are inconsistent with the provisions of section 43.52(2), Stats. OAG 5-90 37

LOTTERIES

Indian reservations

Under article IV, section 24 of the Wisconsin Constitution, and chapter 565, Stats., the state lottery board may conduct any lottery game which complies with the ticket language in the constitution and chapter 565. The term "lottery" in the constitution and statutes does not include any other forms of betting, the playing or operation of gambling machines and devices and other forms of gambling defined in chapter 945. The Legislature can statutorily authorize other non-lottery gambling including casino-type games. Under the Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 (West Supp. 1989), gambling activities as defined and prohibited in chapter 945, other than lotteries and pari-mutuel on-track wagering, are not permitted by any person within or without Indian country in the State of Wisconsin. This prohibition includes all non-lottery gambling such as casino-type games, gambling machines and other devices. The Legislature can statutorily authorize non-lottery gambling within Indian country. OAG 3-90 14

Video poker machines

The operation of video poker games in Wisconsin, which involve the elements of prize, chance and consideration, constitutes the operation of gambling machines, does not constitute the conduct of an illegal lottery and the Legislature may therefore authorize the operation of video poker games by appropriate repeals or amendments to chapter 945, Stats., should it choose to do so. OAG 4-90 33

MANDATORY ARREST

See ARREST

MEDICAL AID

Liability

Incidental benefits received by volunteer members of National Ski Patrol in exchange for rendering emergency care to disabled skiers may result in loss of civil liability immunity under Good Samaritan Law. OAG 36-90 194

National Ski Patrol

Incidental benefits received by volunteer members of National Ski Patrol in exchange for rendering emergency care to disabled skiers may result in loss of civil liability immunity under Good Samaritan Law. OAG 36-90 194

MINERAL RIGHTS

Lapsed mineral rights

Under section 706.057, Stats., owner of the surface of land under which mineral rights have lapsed must record a claim to the lapsed mineral rights in order to foreclose separate mineral rights owner from curing the lapse. OAG 11-90 61

Surface owner of land

Under section 706.057, Stats., owner of the surface of land under which mineral rights have lapsed must record a claim to the lapsed mineral rights in order to foreclose separate mineral rights owner from curing the lapse. OAG 11-90 61

MINORS

Sentenced to county jail

The exclusive grant of jurisdiction to circuit courts for enumerated traffic offenses under section 48.17(1), Stats., involving juvenile offenders, sixteen years of age or older, includes the authority to sentence juveniles to the adult section of the county jail where the penalty is prescribed by the substantive traffic statute. OAG 16-90 94

Traffic violations

The exclusive grant of jurisdiction to circuit courts for enumerated traffic offenses under section 48.17(1), Stats., involving juvenile offenders, sixteen years of age or older, includes the authority to sentence juveniles to the adult section of the county jail where the penalty is prescribed by the substantive traffic statute. OAG 16-90 94

MUNICIPALITIES

Service fees on tax exempt property

Municipal service fees on tax-exempt property may violate the uniformity and equal protection clauses of the Wisconsin Constitution. OAG 12-90 64

NATIONAL SKI PATROL

Good Samaritan Law

Incidental benefits received by volunteer members of National Ski Patrol in exchange for rendering emergency care to disabled skiers may result in loss of civil liability immunity under Good Samaritan Law. OAG 36-90 194

Liability when rendering assistance

Incidental benefits received by volunteer members of National Ski Patrol in exchange for rendering emergency care to disabled skiers may result in loss of civil liability immunity under Good Samaritan Law. OAG 36-90 194

NAVIGABLE WATERS

Fees for boat use; constitutional and unconstitutional

The delegation of authority to local governments to collect boater fees for miscellaneous "recreational boating services," under sections 30.77(3)(e)1.c. and 33.475, Stats., is unconstitutional. OAG 35-90 185

Tax, impost or duty impermissible

The delegation of authority to local governments to collect boater fees for miscellaneous "recreational boating services," under sections 30.77(3)(e)1.c. and 33.475, Stats., is unconstitutional. OAG 35-90 185

OPERATING WHILE INTOXICATED LAW

See **DRUNK DRIVING**

ORDINANCES

Judicial review

Judicial review of a county board's legislative decision concerning approval or disapproval of town zoning ordinances submitted to the county board under section 60.62(3), Stats., is limited to cases of abuse of discretion, excess of power or error of law. OAG 20-90 117

Register of Deeds

A register of deeds may not refuse to record instruments that are recordable under state law but are not in compliance with a county subdivision ordinance requiring the preparation of a certified survey map in connection with certain land divisions, even if requested or directed to do so by county ordinance. OAG 6-90 40

Zoning

Judicial review of a county board's legislative decision concerning approval or disapproval of town zoning ordinances submitted to the county board under section 60.62(3), Stats., is limited to cases of abuse of discretion, excess of power or error of law. OAG 20-90 117

PRISONS AND PRISONERS

County jail

The exclusive grant of jurisdiction to circuit courts for enumerated traffic offenses under section 48.17(1), Stats., involving juvenile offenders, sixteen years of age or older, includes the authority to sentence juveniles to the adult section of the county jail where the penalty is prescribed by the substantive traffic statute. OAG 16-90 94

Drunk driving; rehabilitation facility

A repeat OWI offender serving the mandatory term of imprisonment may be confined in a rehabilitation facility if that facility is a "locked" facility under the control and direct authority of the county sheriff and, at a minimum, that facility must satisfy all other characteristics for a jail set forth in the Wisconsin Administrative Code. OAG 13-90 75

PRISONS AND PRISONERS (continued)

Juvenile detention costs

A county board is not statutorily obligated to charge costs incurred as a result of court-ordered placement in a secure juvenile detention facility to the budget of the county social service department rather than to the budget of the sheriff's department. A sheriff is statutorily obligated to comply with an order of the juvenile court commanding the sheriff to transport a juvenile to or from a secure detention facility. Section 302.34, Stats., is not applicable to a county that has both a county jail and a cooperative agreement with another county for the provision of secure juvenile detention facilities. OAG 2-90 8

Juvenile sentenced to county jail

The exclusive grant of jurisdiction to circuit courts for enumerated traffic offenses under section 48.17(1), Stats., involving juvenile offenders, sixteen years of age or older, includes the authority to sentence juveniles to the adult section of the county jail where the penalty is prescribed by the substantive traffic statute. OAG 16-90 94

PROPERTY

Municipal service fees on tax exempt property

Municipal service fees on tax-exempt property may violate the uniformity and equal protection clauses of the Wisconsin Constitution. OAG 12-90 64

PUBLIC OFFICIALS

Compensation, increase in

No additional compensation of any kind may be paid to town supervisors who serve on the town board of review. Compensation may be increased to a town clerk for service on the board of review if the clerk has previously been designated part time by the town meeting pursuant to section 60.305(1)(b), Stats. OAG 33-90 176

Free pass

Article XIII, section 11 of the Wisconsin Constitution does not prohibit bona fide tours of railroad facilities conducted by rail. OAG 26-90 137

Per diems

Except in self-organized counties, a county board may not establish multiple per diem compensation for attendance at more than one committee meeting on the same day on days when the county board is not in session. OAG 22-90 122

Railroads

Article XIII, section 11 of the Wisconsin Constitution does not prohibit bona fide tours of railroad facilities conducted by rail. OAG 26-90 137

PUBLIC OFFICIALS *(continued)*

Salaries and wages

District attorneys are not "public officer[s]" within the meaning of that term in article IV, section 26 of the Wisconsin Constitution, and the Legislature may, therefore, increase or diminish the salaries of district attorneys during their terms of office. OAG 28-90 149

Town supervisors

No additional compensation of any kind may be paid to town supervisors who serve on the town board of review. Compensation may be increased to a town clerk for service on the board of review if the clerk has previously been designated part time by the town meeting pursuant to section 60.305(1)(b), Stats. OAG 33-90 176

PUBLIC RECORDS

Child abuse

Members of a social services board in a county with a county executive or a county administrator may be granted access to child abuse and neglect files pursuant to section 48.981(7)(a)2. of the statutes if such access is necessary to allow them to perform their statutory duties. OAG 39-90 212

Court transcript

Counties are not required to provide free copy machine services for court reporters who collect fees under section 814.69(2), Stats., for furnishing transcripts to parties. OAG 29-90 157

Fees

Counties are not required to provide free copy machine services for court reporters who collect fees under section 814.69(2), Stats., for furnishing transcripts to parties. OAG 29-90 157

PUBLIC WORKS

Contracts

A county has no statutory authority to award contracts only to unionized contractors. Federal preemption rules probably foreclose the exercise of such authority in any event. Further, federal preemption rules foreclose denying contracts to employers engaged in labor disputes. OAG 14-90 86

Union or non-union labor

A county has no statutory authority to award contracts only to unionized contractors. Federal preemption rules probably foreclose the exercise of such authority in any event. Further, federal preemption rules foreclose denying contracts to employers engaged in labor disputes. OAG 14-90 86

RAILROADS

Public officials

Article XIII, section 11 of the Wisconsin Constitution does not prohibit bona fide tours of railroad facilities conducted by rail. OAG 26-90 137

REFERENDUM

Schools and school districts

A school board of a union or common school may incur debt to erect suitable buildings or additions to them without a referendum if such debt is incurred under section 67.05(6a)(b) or 67.12(12)(e)2g., Stats. However, the electorate through an annual or special meeting must independently approve the building or addition under section 120.10(5) and (5m) unless that requirement is relieved by the language of section 67.05(7)(d) or 67.12(12)(e)3. OAG 37-90 (Revised) 201

REGISTER OF DEEDS

Duties

A register of deeds may not refuse to record instruments that are recordable under state law but are not in compliance with a county subdivision ordinance requiring the preparation of a certified survey map in connection with certain land divisions, even if requested or directed to do so by county ordinance. OAG 6-90 40

RESIDENCE, DOMICILE AND LEGAL SETTLEMENT

Involuntary commitment

Counties are financially responsible for providing mental health services to residents conditionally released under section 971.17, Stats. OAG 34-90 181

SALARIES AND WAGES

District attorney

District attorneys are not "public officer[s]" within the meaning of that term in article IV, section 26 of the Wisconsin Constitution, and the Legislature may, therefore, increase or diminish the salaries of district attorneys during their terms of office. OAG 28-90 149

SCHOOLS AND SCHOOL DISTRICTS

Borrowing

A school board of a union or common school may incur debt to erect suitable buildings or additions to them without a referendum if such debt is incurred under section 67.05(6a)(b) or 67.12(12)(e)2g., Stats. However, the electorate through an annual or special meeting must independently approve the building or addition under section 120.10(5) and (5m) unless that requirement is relieved by the language of section 67.05(7)(d) or 67.12(12)(e)3. OAG 37-90 (Revised) 201

SCHOOLS AND SCHOOL DISTRICTS *(continued)*

Building construction

A school board of a union or common school may incur debt to erect suitable buildings or additions to them without a referendum if such debt is incurred under section 67.05(6a)(b) or 67.12(12)(e)2g., Stats. However, the electorate through an annual or special meeting must independently approve the building or addition under section 120.10(5) and (5m) unless that requirement is relieved by the language of section 67.05(7)(d) or 67.12(12)(e)3. OAG 37-90 (Revised) 201

Compulsory education statute

Parents who unilaterally remove a child from an exceptional educational needs placement violate the compulsory education statute. OAG 18-90 105

Parochial and private schools

Parents who unilaterally remove a child from an exceptional educational needs placement violate the compulsory education statute. OAG 18-90 105

Taxation

Pursuant to section 120.12(3), Stats., the school board of a common or union high school district has the ultimate authority to determine the tax levy for the operation and maintenance of the schools in the district. OAG 8-90 46

Truancy

Parents who unilaterally remove a child from an exceptional educational needs placement violate the compulsory education statute. OAG 18-90 105

SHERIFFS

Costs of juvenile detention

A county board is not statutorily obligated to charge costs incurred as a result of court-ordered placement in a secure juvenile detention facility to the budget of the county social service department rather than to the budget of the sheriff's department. A sheriff is statutorily obligated to comply with an order of the juvenile court commanding the sheriff to transport a juvenile to or from a secure detention facility. Section 302.34, Stats., is not applicable to a county that has both a county jail and a cooperative agreement with another county for the provision of secure juvenile detention facilities. OAG 2-90 8

Drunk driving; rehabilitation facility

A repeat OWI offender serving the mandatory term of imprisonment may be confined in a rehabilitation facility if that facility is a "locked" facility under the control and direct authority of the county sheriff and, at a minimum, that facility must satisfy all other characteristics for a jail set forth in the Wisconsin Administrative Code. OAG 13-90 75

SHERIFFS *(continued)*

Employment; juvenile record

When evaluating an individual for the position of reserve officer, a sheriff's department may consider information in its possession concerning the individual's juvenile record, subject to the prohibitions against arrest record and conviction record discrimination contained in the Wisconsin Fair Employment Act. OAG 15-90 89

Juveniles, out-of-detention

A county board is not statutorily obligated to charge costs incurred as a result of court-ordered placement in a secure juvenile detention facility to the budget of the county social service department rather than to the budget of the sheriff's department. A sheriff is statutorily obligated to comply with an order of the juvenile court commanding the sheriff to transport a juvenile to or from a secure detention facility. Section 302.34, Stats., is not applicable to a county that has both a county jail and a cooperative agreement with another county for the provision of secure juvenile detention facilities. OAG 2-90 8

SKI PATROL

See NATIONAL SKI PATROL

TAXATION

Automobiles and motor vehicles

A motor vehicle registration fee which varies with the value of the motor vehicle or which is based upon the manufacturer's suggested retail price and the age of the motor vehicle would not violate article VIII, section 1 of the Wisconsin Constitution because the vehicle registration fee is a privilege tax, not a property tax. OAG 25-90 135

Privilege tax

A motor vehicle registration fee which varies with the value of the motor vehicle or which is based upon the manufacturer's suggested retail price and the age of the motor vehicle would not violate article VIII, section 1 of the Wisconsin Constitution because the vehicle registration fee is a privilege tax, not a property tax. OAG 25-90 135

Schools and School Districts

Pursuant to section 120.12(3), Stats., the school board of a common or union high school district has the ultimate authority to determine the tax levy for the operation and maintenance of the schools in the district. OAG 8-90 46

Tax exempt property

Municipal service fees on tax-exempt property may violate the uniformity and equal protection clauses of the Wisconsin Constitution. OAG 12-90 64

TEACHERS

Retirement

Constitutionality of 1989 Assembly Bill 565, providing military service credit for State Teachers Retirement System and Milwaukee Teachers Retirement System teachers who retired in 1981, discussed. OAG 23-90 125

Retirement Board powers discussed

Authority of the Employe Trust Funds Board, the Teachers Retirement Board and the Wisconsin Retirement Board in contested cases discussed. OAG 27-90 139

TEACHERS RETIREMENT BOARD

Powers discussed

Authority of the Employe Trust Funds Board, the Teachers Retirement Board and the Wisconsin Retirement Board in contested cases discussed. OAG 27-90 139

TOWNS

Board of review

No additional compensation of any kind may be paid to town supervisors who serve on the town board of review. Compensation may be increased to a town clerk for service on the board of review if the clerk has previously been designated part time by the town meeting pursuant to section 60.305(1)(b), Stats. OAG 33-90 176

Clerk

No additional compensation of any kind may be paid to town supervisors who serve on the town board of review. Compensation may be increased to a town clerk for service on the board of review if the clerk has previously been designated part time by the town meeting pursuant to section 60.305(1)(b), Stats. OAG 33-90 176

Compensation, additional

No additional compensation of any kind may be paid to town supervisors who serve on the town board of review. Compensation may be increased to a town clerk for service on the board of review if the clerk has previously been designated part time by the town meeting pursuant to section 60.305(1)(b), Stats. OAG 33-90 176

Supervisors

No additional compensation of any kind may be paid to town supervisors who serve on the town board of review. Compensation may be increased to a town clerk for service on the board of review if the clerk has previously been designated part time by the town meeting pursuant to section 60.305(1)(b), Stats. OAG 33-90 176

TOWNS (continued)

Zoning

Judicial review of a county board's legislative decision concerning approval or disapproval of town zoning ordinances submitted to the county board under section 60.62(3), Stats., is limited to cases of abuse of discretion, excess of power or error of law. OAG 20-90 117

TRUST FUNDS

Employe Trust Funds Board powers discussed

Authority of the Employe Trust Funds Board, the Teachers Retirement Board and the Wisconsin Retirement Board in contested cases discussed. OAG 27-90 139

UNIVERSITY

Domestic abuse

The provisions of section 968.075, Stats., apply to roommates living in university residence halls, whether privately or state owned. If the criteria requiring arrest under section 968.075(2) exist, the law enforcement officer must make a custodial arrest. OAG 19-90 . . . 109

Residence halls

The provisions of section 968.075, Stats., apply to roommates living in university residence halls, whether privately or state owned. If the criteria requiring arrest under section 968.075(2) exist, the law enforcement officer must make a custodial arrest. OAG 19-90 . . . 109

WISCONSIN FAIR EMPLOYMENT ACT

Arrest records

When evaluating an individual for the position of reserve officer, a sheriff's department may consider information in its possession concerning the individual's juvenile record, subject to the prohibitions against arrest record and conviction record discrimination contained in the Wisconsin Fair Employment Act. OAG 15-90 89

Conviction records

When evaluating an individual for the position of reserve officer, a sheriff's department may consider information in its possession concerning the individual's juvenile record, subject to the prohibitions against arrest record and conviction record discrimination contained in the Wisconsin Fair Employment Act. OAG 15-90 89

WISCONSIN RETIREMENT BOARD

Powers discussed

Authority of the Employe Trust Funds Board, the Teachers Retirement Board and the Wisconsin Retirement Board in contested cases discussed. OAG 27-90 139

WISCONSIN RETIREMENT SYSTEM

Military service credit

Constitutionality of 1989 Assembly Bill 565, providing military service credit for State Teachers Retirement System and Milwaukee Teachers Retirement System teachers who retired in 1981, discussed. OAG 23-90 125

Teachers

Constitutionality of 1989 Assembly Bill 565, providing military service credit for State Teachers Retirement System and Milwaukee Teachers Retirement System teachers who retired in 1981, discussed. OAG 23-90 125

WORDS AND PHRASES

"deferred compensation plan"

Section 40.80(2m), Stats. (as created by 1989 Wisconsin Act 31), requires the Deferred Compensation Board to establish administrative rules for alternative or supplemental deferred compensation plans but does not require that any such plans be offered. OAG 32-90 168

domicile

The provisions of section 968.075, Stats., apply to roommates living in university residence halls, whether privately or state owned. If the criteria requiring arrest under section 968.075(2) exist, the law enforcement officer must make a custodial arrest. OAG 19-90 . . . 109

lottery

Under article IV, section 24 of the Wisconsin Constitution, and chapter 565, Stats., the state lottery board may conduct any lottery game which complies with the ticket language in the constitution and chapter 565. The term "lottery" in the constitution and statutes does not include any other forms of betting, the playing or operation of gambling machines and devices and other forms of gambling defined in chapter 945. The Legislature can statutorily authorize other non-lottery gambling including casino-type games. Under the Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 (West Supp. 1989), gambling activities as defined and prohibited in chapter 945, other than lotteries and pari-mutuel on-track wagering, are not permitted by any person within or without Indian country in the State of Wisconsin. This prohibition includes all non-lottery gambling such as casino-type games, gambling machines and other devices. The Legislature can statutorily authorize non-lottery gambling within Indian country. OAG 3-90 14

may

Section 40.80(2m), Stats. (as created by 1989 Wisconsin Act 31), requires the Deferred Compensation Board to establish administrative rules for alternative or supplemental deferred compensation plans but does not require that any such plans be offered. OAG 32-90 168

WORDS AND PHRASES (continued)

"person"

The requirement in section 950.04(1), Stats., of notice to the victim of a defendant's release from custody applies to all felonies charged under chapter 948. Notice is to be given to the victims of all crimes charged under chapter 940, whether misdemeanors or felonies. The notice requirements of the statute apply to individual persons, not business enterprises or corporations. OAG 1-90 1

Public officer

District attorneys are not "public officer[s]" within the meaning of that term in article IV, section 26 of the Wisconsin Constitution, and the Legislature may, therefore, increase or diminish the salaries of district attorneys during their terms of office. OAG 28-90 149

"reasonable fee"

The delegation of authority to local governments to collect boater fees for miscellaneous "recreational boating services," under sections 30.77(3)(e)1.c. and 33.475, Stats., is unconstitutional. OAG 35-90 185

"recreational boating services"

The delegation of authority to local governments to collect boater fees for miscellaneous "recreational boating services," under sections 30.77(3)(e)1.c. and 33.475, Stats., is unconstitutional. OAG 35-90 185

residence

The provisions of section 968.075, Stats., apply to roommates living in university residence halls, whether privately or state owned. If the criteria requiring arrest under section 968.075(2) exist, the law enforcement officer must make a custodial arrest. OAG 19-90 . . . 109

"resides together"

The provisions of section 968.075, Stats., apply to roommates living in university residence halls, whether privately or state owned. If the criteria requiring arrest under section 968.075(2) exist, the law enforcement officer must make a custodial arrest. OAG 19-90 . . . 109

shall

Section 40.80(2m), Stats. (as created by 1989 Wisconsin Act 31), requires the Deferred Compensation Board to establish administrative rules for alternative or supplemental deferred compensation plans but does not require that any such plans be offered. OAG 32-90 168

WORDS AND PHRASES (*continued*)**ticket**

Under article IV, section 24 of the Wisconsin Constitution, and chapter 565, Stats., the state lottery board may conduct any lottery game which complies with the ticket language in the constitution and chapter 565. The term "lottery" in the constitution and statutes does not include any other forms of betting, the playing or operation of gambling machines and devices and other forms of gambling defined in chapter 945. The Legislature can statutorily authorize other non-lottery gambling including casino-type games. Under the Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701-2721 (West Supp. 1989), gambling activities as defined and prohibited in chapter 945, other than lotteries and pari-mutuel on-track wagering, are not permitted by any person within or without Indian country in the State of Wisconsin. This prohibition includes all non-lottery gambling such as casino-type games, gambling machines and other devices. The Legislature can statutorily authorize non-lottery gambling within Indian country. OAG 3-90 14

