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
JOHN W. REYNOLDS, Green Bay ........ from Jan. 5, 1959, to Jan. 7, 1963
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
JAMES E. DOYLE, Madison ................. from Jan. 7, 1991 to
<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
</tr>
</thead>
<tbody>
<tr>
<td>ROBERT M. HUNTER</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>JAMES D. JEFFRIES</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>DONALD P. JOHNS</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>ALAN R. KESNER</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>STEPHEN W. KLEINMAIER</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>JOANNE F. KLOPPENBURG</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>MICHAEL R. KLOS</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>ROY KORTE</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>CHARLES R. LARSEN</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>ROBERT W. LARSEN</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>DONALD V. LATORRACA³</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>JENNIFER SLOAN LATTIS</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>ALAN M. LEE</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>LISA LEVIN²</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>MICHAEL J. LOSSE</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>PAUL G. LUNDSTEN</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>PAMELA MAGEE-HEILPRIN</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>JAMES H. McDERMOTT</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>JAMES C. McKay, JR.</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>MARGUERITE M. MOELLER</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>RICHARD BRILES MORTIARTY</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>LOWELL E. NASS</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>DIANE M. NICKS</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>STEPHEN J. NICKS</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>JOHN D. NIEMISTO</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>DANIEL J. O'BRIEN</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>KEVIN J. O'CONNOR</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>BRUCE A. OLSEN</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>BARBARA L. OSWALD³</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>BARBARA B. PATERICK⁴</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>MICHAEL E. PERINO</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>RICHARD A. PERKINS</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>DAVID PERLMAN</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>P. PHILIP PETERSON</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>GREGORY POSNER-WEBER</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>EILEEN W. PRAY</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>KATHLEEN M. PTACEK³</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>PIERCE T. PURCELL</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>MICHELLE L. RAMIREZ³</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>FRANK D. REMINGTON</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>ROBERT D. REPASKY</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>DAVID C. RICE</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>SHARON K. RUHLY</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>JENNIFER D. RYAN</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>NADIM SAHAR</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>MARY WOOLSEY SCHLAEFER</td>
<td>Assistant Attorney General</td>
</tr>
<tr>
<td>JEROME S. SCHMIDT</td>
<td>Assistant Attorney General</td>
</tr>
</tbody>
</table>
WARREN M. SCHMIDT . . . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
JUDITH SCHULTZ . . . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
JAMES SCHNEIDER1 . . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
DONALD W. SMITH . . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
MARK E. SMITH . . . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
STEPHEN M. SOBOTA . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
LORRAINE C. STOLTZFUS . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
LAURA M. SUTHERLAND . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
LISA P. TAYLOR . . . . . . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
THOMAS H. TAYLOR1 . . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
STEVEN E. TINKER . . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
BARBARA W. TUERKHEIMER . . . . . . . . . . . . . . . . . . . Assistant Attorney General
SUSAN K. ULLMAN3 . . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
RICHARD A. VICTOR . . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
WARREN D. WEINSTEIN . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
SALLY L. WELLMAN . . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
STEVEN B. WICKLAND . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
ARNOLD J. WIGHTMAN . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
GERALD S. WILCOX . . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
WILLIAM H. WILKER4 . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
WILLIAM C. WOLFORD . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
E. GORDON YOUNG . . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General
ANN M. ZIMMERMAN5 . . . . . . . . . . . . . . . . . . . . . . . Assistant Attorney General

1Resigned, 1993
2Resigned, 1994
3Appointed, 1993
4Appointed, 1994
5Retired, 1993
6Retired, 1994
Police; A mayor in a city with a police and fire commission does not, under section 62.09(8)(a), (d) and (13)(a), Stats., have the authority to order the chief of police to reinstate a discharged probationary police officer, in light of the powers and duties of the chief and the police and fire commission under section 62.13(4). OAG 1-93

February 9, 1993

WALTER KUNICKI, Chairperson
Assembly Organization Committee

The Assembly Committee on Organization ("Committee") has asked for my formal opinion on the following question:

[When a chief of police discharges a probationary patrol officer, and the chief is acting under s. 62.13, Stats., the rules of the local board of police and fire commissioners and a labor contract, may the mayor of a city validly order the chief of police to reinstate the discharged patrol officer to a probationary position under s. 62.09(8) and (13), Stats.?}
In my opinion, the mayor may not lawfully order the chief of police to reinstate a discharged probationary police officer.

The committee's question is one of statutory interpretation. Specifically, how does the mayor's authority under section 62.09(8)(a) and (d), Stats., as chief executive officer and head of the police department, with the concomitant duty of the chief, under section 62.09(13)(a), to obey the mayor's lawful written orders, apply to the reinstatement of a discharged probationary police officer?

Section 62.09(8) provides in relevant part that:

(a) The mayor shall be the chief executive officer. The mayor shall take care that city ordinances and state laws are observed and enforced and that all city officers and employes discharge their duties.

(d) Except in cities that have adopted s. 62.13(6), the mayor shall be the head of the fire and police departments, and where there is no board of police and fire commissioners shall appoint all police officers . . . .

Section 62.09(13)(a) provides in part that:

(a) The chief of police shall have command of the police force of the city under the direction of the mayor. The chief shall obey all lawful written orders of the mayor or common council.

Under section 62.13, a city with a population of at least 4,000 must establish a board of police and fire commissioners (PFC). Sec. 62.13(1) and (2)(a), Stats. The PFC, in general, has duties concerning hiring, promoting, disciplining and removing police officers and firefighters. Sec. 62.13(3)-(5), Stats. The PFC does not have authority over the operation of the department unless the electors, by referendum, have granted such powers to the PFC, pursuant to section 62.13(6). The PFC appoints the police and fire chiefs, who are removable only for cause, by the PFC. Sec. 62.13(3), Stats.
With regard to the appointment of police officers and firefighters, other than the chiefs, section 62.13(4)(a) provides that "[t]he chiefs shall appoint subordinates subject to approval by the board. Such appointments shall be made by promotion when this can be done with advantage, otherwise from an eligible list provided by examination and approval by the board and kept on file with the clerk."

The PFC, for the choosing of the eligible list, adopts rules "calculated to secure the best service in the departments." Sec. 62.13(4)(c), Stats. These rules must provide for examinations under the control of the PFC. Sec. 62.13(4)(c) and (d), Stats.

Section 62.13(5) sets forth the procedure for the discipline and removal of police officers and firefighters, and includes the right to a hearing before the PFC.

It is well established that a probationary police officer has no right to a discharge hearing under section 62.13(5). Glendale Prof. Policemen's Asso. v. Glendale, 83 Wis. 2d 90, 107, 264 N.W.2d 594 (1978). Nor can a collective bargaining agreement make the discharge of a probationary police officer arbitrable. Milwaukee Police Assn. v. Milwaukee, 113 Wis. 2d 192, 335 N.W.2d 417 (Ct. App. 1983). The sample collective bargaining agreement and PFC rules accompanying the committee's request, in accordance with these cases, indicate that a probationary police officer does not have a right to a discharge hearing.

The status of a probationary police officer was discussed by the supreme court in Kaiser v. Board of Police & Fire Commrs., 104 Wis. 2d 498, 503-04, 311 N.W.2d 646 (1981):

Sec. 62.13(4)(d), Stats., provides that boards of police shall examine candidates to determine their qualifications. The rules governing examination shall be "calculated to secure the best service in the departments." There is no doubt that the use of a probationary period is an excellent means of examining candidates and is well-suited to securing the best service available. It enables the board to
better evaluate a potential officer's skill and character. Probation is a continuation of the hiring process.

(Footnotes omitted.)

Section 62.09(8)(a), (d) and (13)(a) provides the mayor with general powers over the police chief and police department. Section 62.09(8)(d) specifically authorizes the mayor to "appoint all police officers" but this authority exists only "where there is no board of police and fire commissioners." When there is a PFC, that body examines candidates and establishes a list of eligible candidates. Sec. 62.13(4)(c) and (d), Stats. The chief chooses from the eligible list and appoints subordinates, subject to the approval of the PFC. Sec. 62.13(4)(a), Stats. "If the statutory language is plain and clearly understood, that meaning must be given to the statute." Abraham v. Milwaukee Mutual Insurance Co., 115 Wis. 2d 678, 680, 341 N.W.2d 414 (Ct. App. 1983). Although the mayor has general powers over the police chief and police department, the plain language of section 62.09(8)(d) specifically limits the mayor's powers with regard to the appointment of officers when the city has a PFC. The mayor clearly may not directly appoint police officers when there is a PFC.

The question then becomes whether the mayor, under the exercise of his or her general authority under section 62.09(8)(a), (d) and (13)(a), may indirectly accomplish what may not be directly done, by ordering the police chief to appoint, or not to appoint, a particular officer. Determining the answer to this question involves the construction of sections 62.09(8)(a), (d) and (13)(a) and 62.13(4)(a), (c) and (d). The objective of statutory construction "is to achieve a reasonable construction that will effectuate the statutory purpose." Wanish v. LIRC, 163 Wis. 2d 901, 908, 472 N.W.2d 596 (Ct. App. 1991). When statutes are "contained in the same chapter and assist in implementing a common object or policy, the statutes should be read in pari materia and harmonized." Suburban State Bank v. Squires, 145 Wis. 2d 445, 449, 427 N.W.2d 393 (Ct. App. 1988).
The statutes in question are all found in chapter 62 and relate to the administration of the police department. The police and fire commission law was enacted for the purpose of taking the administration of fire and police departments out of city politics, in order that test of fitness for the position of fireman and policeman might be ability to serve the city, rather than ability to advance the political interests of the administration in power.

*State ex rel. Pieritz v. Hartwig*, 201 Wis. 450, 453, 230 N.W. 42, (1930). It follows that the mayor, whatever the scope of his or her executive powers, may not lawfully order the police chief to appoint, or not to appoint, a particular police officer in a city with a police and fire commission. To conclude otherwise would defeat the purpose of the police and fire commission law. Furthermore, because the probationary period is an extension of the hiring process, *Kaiser*, 104 Wis. 2d at 503-04, it also follows that the mayor may not lawfully order the chief to discharge a probationary officer or to reinstate a discharged probationary officer, since this would be tantamount to directing the chief to appoint, or not appoint, the officer.

*State ex rel. Wilson v. Schocker*, 142 Wis. 2d 179, 418 N.W.2d 8 (Ct. App. 1987) does not require a contrary conclusion. In that case the common council had, by resolution, prohibited the filling of vacancies in city departments, unless authorized by the common council and mayor. The resolution was used to block the promotion of a police officer, by the chief and PFC, to fill a vacancy. The officer challenged the resolution as an infringement on the statutory duties of the chief and PFC.

The court, however, upheld the validity of the resolution, as applied to the filling of a police department vacancy, on the grounds that the resolution, “resulting from budgetary restraints, was a matter primarily related to the exercise of municipal powers and responsibilities and the integrity of the political processes of municipal government. It was a lawful act of management and control of city finances to promote the health,
safety and welfare of the public." *Schocker*, 142 Wis. 2d at 184-85 (footnote omitted). The situation in *Schocker* is easily distinguished from the situation discussed herein. The mayor and council in *Schocker* did not attempt to judge the qualifications of individual police officers, but instead enacted a budget freeze as an act of general fiscal management. In contrast, the facts presented by the committee involve the mayor's attempt to determine the fitness of a particular person to continue to serve as a probationary police officer.

For the above reasons, I concluded that the mayor may not lawfully order the police chief to reinstate the employment of a terminated probationary police officer.

JED:JHS
Court Reporters; Fees: A county must permit its own employees who perform court reporting functions indistinguishable from those performed by court reporters employed by the state to retain all statutory fees which can be retained by state-employed court reporters, including those fees which are the statutory obligation of the county. The salaries of such employees could be structured to account for the payment of those fees. A county may prohibit its employees who perform court reporting functions from typing transcripts during normal county working hours if they receive fees in addition to their normal county salary for furnishing such transcripts, but such a prohibition may not interfere with the ability of those employees to comply with the requirements of statutory provisions or supreme court rules for the preparation of transcripts within specified time periods or with the orderly operation of the judicial system. OAG 2-93

February 24, 1993

KENNETH BUKOWSKI, Corporation Counsel
Brown County

You indicate that your county has hired a number of employees with the job title of "court reporter" at a salary of $11.94 per hour who are assigned to do transcription and related work for your county's court commissioners. You ask two basic questions concerning the establishment of compensation and work rules for such county employees. Your questions may be restated as follows:

(1) Must a county permit its own employees who perform court reporting functions similar to those performed by court reporters employed by the state to retain all statutory fees which can be retained by state-employed court reporters even if such statutory fees are paid by the county?

In my opinion, the answer is yes. The salaries of such county employees could, however, be structured to account for the payment of those fees.
(2) May a county prohibit its employes who perform such court reporting functions from typing transcripts during normal county working hours if they receive fees in addition to their normal county salary for furnishing such transcripts?

In my opinion, the answer is yes, if such a prohibition does not interfere with the ability of those employes to comply with the requirements of statutory provisions or supreme court rules for the preparation of transcripts within specified time periods and does not otherwise interfere with the orderly operation of the judicial system.

Section 757.57(5), Stats., provides:

Except as provided in SCR 71.04(4), every reporter, upon the request of any party to an action or proceeding, shall make a typewritten transcript, and as many copies thereof as the party requests, of the testimony and proceedings reported by him or her in the action or proceeding, or any part thereof specified by the party, the transcript and each copy thereof to be duly certified by him or her to be a correct transcript thereof. For the transcripts the reporter is entitled to receive the fees prescribed in s. 814.69(2).

Section 814.69 provides in part:

Fees of court reporters; transcripts. A court reporter shall collect the following fees:

(1) For a transcript under SCR 71.04, a fee at the rate of $1.50 per 25-line page for the original and 50 cents per 25-line page for the duplicate. Except as provided in s. 967.06, the fee shall be paid by the county treasurer upon the certificate of the clerk of court.

(2) For a transcript under s. 757.57(5), a fee from the party requesting the transcript at the rate of $1.75 per 25-line page for the original and 60 cents per 25-line page for each copy. If the request is by the state or any political
subdivision thereof, the fees of the reporter shall be at the rates provided in sub. (1).

Section 967.06 provides in part:

Determination of indigency; appointment of counsel; preparation of record. . . . In any case in which the state public defender provides representation to an indigent person, the public defender may request that the applicable court reporter or clerk of courts prepare and transmit any transcript or court record. The request shall be complied with. The county treasurer shall compensate the court reporter or clerk of courts for the preparation and transmittal of the documents, upon the written statement of the state public defender that the documents were required in order to provide representation to the indigent person.

Section 970.05 provides:

Testimony at preliminary examination. The testimony at the preliminary examination shall be transcribed if requested by the district attorney or the defendant or ordered by the judge to whom the trial is assigned. The reporter shall file such transcript with the clerk within 10 days after it is requested. When a transcript is requested, the county shall pay the cost of the original and any additional copies shall be paid for at the statutory rate by the party requesting such copies.

Section 753.175 provides:

Fees; where paid. Any fee received by a judge of a court as a court commissioner shall be paid into the county treasury except that any amount payable under s. 814.68(1) to a reporter shall be paid to such reporter.

Section 751.02 provides:

Employees. The supreme court may authorize the employees it considers necessary for the execution of the functions of the supreme court and the court of appeals and the court reporting functions of the circuit courts and may
designate titles, prescribe duties and fix compensation. Compensation and benefits of employes should be consistent with that paid to state employes in the classified service for services involving similar work and responsibility. Each justice and court of appeals judge may appoint and prescribe the duties of a secretary and a law clerk to assist the justice or judge in the performance of his or her duties. Each circuit judge may appoint a court reporter to serve in the court or branch of court to which he or she was elected or appointed if the reporter is certified as qualified by the director of state courts. A person appointed by the supreme court or a justice or court of appeals judge or a circuit judge serves at the pleasure of the court or the justice or judge.

SCR 71.04 provides in part:

Transcripts. (1) Reporters' notes or other verbatim record need not be transcribed unless required by this rule, any statute or court order.

(2) The original transcript of any proceeding, whether complete or partial, shall be filed with the court. The cost of such transcript shall be borne as provided in this rule and in section 814.69 of the statutes.

(4) Reporters' notes or other verbatim record of proceedings under chapters 48 and 767 of the statutes shall be transcribed only upon order of the court.

(5)(a) When a defendant is sentenced to a state prison, the original transcript of any portion of the proceedings relating to the prisoner's sentencing shall be filed with the court and a certified duplicate shall be filed at the institution within 120 days from the date that the sentence is imposed.

(b) The original transcript of all other testimony and proceedings upon order of the court shall be filed with the court and a certified duplicate shall be delivered to the
prisoner within 120 days of the prisoner’s request made to the clerk of court.

(c) The original transcript of all other testimony and proceedings upon order of the court shall be filed with the court and a certified duplicate shall be delivered to the institution within 120 days of its request made to the clerk of court.

. . . .

(6) Except as provided in sub. (4), every reporter, upon the request of any party to an action or proceeding, shall make a typewritten transcript, and as many duplicates thereof as the party requests, of the testimony and proceedings reported by him or her in the action or proceeding, or any part thereof specified by the party, the transcript and duplicate thereof to be duly certified by him or her to be a correct transcript thereof.

. . . .

(9) A reporter may make a special charge, pursuant to arrangement with the party requesting same, for furnishing typewritten transcripts of testimony and proceedings from day to day during the progress of any trial or proceeding.

. . . .

(11) For all transcripts furnished under this rule, the court reporter shall be entitled to receive fees as prescribed in section 814.69 of the statutes.

Section 751.02 authorizes each circuit judge to select a court reporter who serves at the pleasure of that circuit judge. That statute also authorizes the supreme court to establish the number of employees it considers necessary to perform the court reporting functions of the circuit courts, to prescribe their duties and to fix their compensation. My understanding is that the county employees to whom you refer have not been mandated by the supreme court and that the supreme court has not prescribed their salaries or duties.
Among other things, in SCR 71.04, the supreme court exercised the authority granted in section 751.02 to establish fees for transcript preparation by court reporters appointed by circuit judges and for transcript preparation by other employees the court deems necessary to perform those services. The supreme court has, however, established the same fees that are prescribed by the Legislature for transcript preparation by court reporters. Those fees are found in section 814.69 and ordinarily are paid by parties to the proceeding. But, under section 967.06 the county must pay the cost of transcription in specified cases where an indigent person is being represented by the state public defender. Similarly, under section 970.05 the county must pay the cost of the original transcript of the preliminary examination in a criminal case.

All of these statutes either incorporate or ultimately rely upon section 814.69 insofar as the requirement for payment of fees is concerned. Resolution of your first question therefore initially depends upon whether the employees hired by your county are “court reporter[s]” within the meaning of that statute. If so, the prescribed fees, at least in the first instance, must be paid to them. If not, then they cannot collect such fees at all.

Non-technical terms in a statute should be construed according to their ordinary and accepted meaning. Sec. 990.01, Stats. The meaning of such terms can be ascertained by resort to a recognized dictionary. State v. McCoy, 143 Wis. 2d 274, 287, 421 N.W.2d 107 (1988). A later version of the dictionary used in McCoy, Webster’s Third New International Dictionary 523 (1986), defines the term “court reporter” as a “stenographer who records and transcribes a verbatim report of all proceedings in a law court.” Your employees fit within this non-technical definition.

I have considered the possibility that the term “court reporter” should be accorded a more technical meaning so that it would be limited to state employees designated or appointed under section 751.02. If the statute were construed in that fashion, then your
employes could not collect the fees listed in section 814.69 at all. They also presumably would not be subject to SCR 71.04(5) and also might not be subject to statutory provisions such as section 809.16 which contain time limits for the preparation of transcripts after trial or when an appeal is filed.

A statute should be construed so as to avoid unreasonable and absurd results. *Estate of Evans*, 28 Wis. 2d 97, 101, 135 N.W.2d 832 (1965). The judicial system would not function smoothly if your employes were not subject to such requirements. Since there is no evidence to the contrary, I therefore conclude that the term "court reporter" has the same meaning in section 814.69 and in SCR 71.04 and applies to all stenographic reporters who transcribe the record which is made in a judicial proceeding.

Since your employes are "court reporters" who may collect statutory fees, your first question also requires me to determine whether the county may require a salaried court reporter to remit all statutory fees for the preparation of transcripts to the county. I am aware that both elected and appointed county officials ordinarily may not retain statutory fees as part of their own compensation unless specifically authorized to do so by the county board. See sec. 59.15(1)(a) and (b), Stats.; 60 Op. Att’y Gen. 39 (1971); 44 Op. Att’y Gen. 1 (1955). But prior attorney general opinions have construed statutory language indistinguishable from that now found in section 814.69 as meaning that fees paid by parties for the transcription of the record are personal compensation to the court reporter, even if the reporter is a county employe. 51 Op. Att’y Gen. 77, 81-82 (1962); 31 Op. Att’y Gen. 219, 221 (1942); 23 Op. Att’y Gen. 111, 113 (1934). Also see 43 Op. Att’y Gen. 20, 22 (1954); 1912 Op. Att’y Gen. 889, 890 (1911). Were I to conclude otherwise, I would also be forced to conclude that circuit court reporters can be required to remit the fees received pursuant to section 814.69 and SCR 71.04 to the state even though circuit court reporters have always been permitted to retain such fees. In light of this long-standing practice and prior attorney general opinions, I
therefore conclude that a county may not require a court reporter to remit fees collected under SCR 71.04, section 814.69 and other statutes to the county.

Unlike the state, however, a county is not obligated by statute to place its court reporters in a specific pay range resulting in a statutorily-required salary. See OAG 19-79 (February 22, 1979) (unpublished). There are various federal and state statutes assuring fair labor standards which may affect how a court reporter can be compensated. Although the issue is not entirely free from doubt, assuming that there is compliance with such statutes, I see no reason why a county could not establish a salary structure which takes into account fees paid to court reporters, so long as court reporters are permitted to retain those fees. In such circumstances, the fact that county income or salary is "measured by" or with reference to personal income is not equivalent to a requirement that personal income be paid to the county. Cf. Mobil Oil Corp. v. Ley, 142 Wis. 2d 108, 116, 416 N.W.2d 680 (Ct. App. 1987). A county therefore does have some opportunity to make adjustments for fees paid to its salaried court reporters, although that opportunity may be more limited than anticipated by your inquiry.

You also ask whether the county pays transcription fees required of it under a statute by providing a salary to the court reporter. Under section 814.69 and SCR 71.04, mandatory fees are computed on a per-page basis. In addition, section 967.06 provides that "[t]he county treasurer shall compensate the court reporter." Section 970.05 should be interpreted in the same fashion. Further, section 753.175 suggests that the Legislature was fully aware that court reporters for court commissioners would be entitled to collect fees for transcription in certain circumstances. Despite the fact that the county pays the salary of the court reporter, under the logic of the previously-cited attorney general opinions, fees for transcription under these or other statutes must be considered personal income of the court reporter in the absence of a clear legislative statement to the contrary. I
therefore conclude that the county does not pay such fees by paying the salary of the court reporter. The county could, however, structure the salary of its court reporters to account for the payment of those fees in the same fashion as it could account for other fees paid to its reporters.

Your final question is whether the county can prohibit its salaried court reporters from typing transcripts during normal county working hours if they receive personal compensation for such transcripts. Under section 59.15(2)(c), the board “may establish regulations of employment for any person paid from the county treasury.” The limitation you describe is such a regulation and does not appear to be directly prohibited by any other statute.

I am aware that prior attorney general opinions suggest that a county cannot impose such limitations. See 31 Op. Att’y Gen. at 222; 6 Op. Att’y Gen. 248, 249-50 (1917); 3 Op. Att’y Gen. 668, 670 (1914); 1910 Op. Att’y Gen. 597, 598 (1909). But such opinions are based on statutory language granting county judges the authority to prescribe the duties of court reporters. See, e.g., 31 Op. Att’y Gen. at 222. No such statutory language appears to be applicable to the situation you describe.

Courts do, however, possess certain inherent powers to assure their own efficient operation and such powers do extend to court reporters. See State v. Johnston, 133 Wis. 2d 261, 266, 394 N.W.2d 915 (Ct. App. 1986); 31 Op. Att’y Gen. 222, 224 (1942). The exercise of those powers undoubtedly accounts for the fact that SCR 71.04 is broader in scope than expressly permitted by section 751.02. The preparation of transcripts within the time required by a statute or rule is certainly part of the orderly administration of justice. There may also be other situations where such a requirement could interfere with the orderly and efficient operation of the judicial system, although none are readily apparent from your inquiry. I therefore conclude that a regulation prohibiting the preparation of transcripts during normal county working hours if personal compensation is received for such transcripts would be facially valid but would
have to yield in specific fact situations if a determination were made during the course of a court proceeding that such a restriction would unduly interfere with the orderly and efficient operation of the judicial system.

The Legislature never has directly addressed the problems created by the fact that court reporters receive both personal and public compensation for the services they perform. Until it does so, it is my conclusion that a county must permit its own employes who perform court reporting functions indistinguishable from those performed by court reporters employed by the state to retain all statutory fees which can be retained by state-employed court reporters, including those fees which are the statutory obligation of the county. The salaries of such employes could be structured to account for the payment of those fees. A county may prohibit its employes who perform court reporting functions from typing transcripts during normal county working hours if they receive fees in addition to their normal county salary for furnishing such transcripts, but such a prohibition may not interfere with the ability of those employes to comply with the requirements of statutory provisions or supreme court rules for the preparation of transcripts within specified time periods or with the orderly operation of the judicial system.

JED:FTC
Liability; Local Emergency Planning Committee; State Emergency Response Board; State Emergency Response Board (SERB) committee members and Local Emergency Planning Committee (LEPC) subcommittee members appointed by a county board are entitled to indemnity for damage liability under section 895.46(1)(a), Stats., and legal representation by the attorney general under section 165.25(6). OAG 3-93

February 24, 1993

ROBERT THOMPSON, Chair
State Emergency Response Board

You have asked for my opinion as to whether State Emergency Response Board (SERB) committee members and Local Emergency Planning Committee (LEPC) subcommittee members are entitled to indemnity for damage liability and legal representation under the terms of the statute. However, LEPC subcommittee members are entitled to indemnification and legal representation only to the extent that their duties as subcommittee members grow out of and are related to their duties as LEPC members.

In my opinion both board members who sit on SERB committees and committee members who are not board members of SERB are entitled to indemnity for damage liability and legal representation under the terms of the statute. However, LEPC subcommittee members are entitled to indemnification and legal representation only to the extent that their duties as subcommittee members grow out of and are related to their duties as LEPC members.

As background you indicated that in 1986 Congress passed Title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, which created hazardous chemical emergency planning and community right to know

1Although the original inquiry referred to SERB committees operating under SERB as SERB subcommittees, these committees will be referred to as SERB committees in this opinion. Because SERB is a Board it cannot have a subcommittee without having a committee. A subcommittee is by definition a division of a committee.
responsibilities for communities. See sec. 166.20, Stats.; 42 U.S.C.A. § 11001 et seq. (West Supp. 1992). To implement Title III, Congress required each state to appoint a state emergency response commission (SERC). 42 U.S.C.A. § 11001(a). The SERCs, in turn, were required to divide their states into emergency planning districts and name a local emergency planning committee (LEPC) in each district. 42 U.S.C.A. § 11001(b). In Wisconsin, each county is an emergency planning district and the county board is required to create a local emergency planning committee for the county. Sec. 59.07(146)(a)1., Stats. Under section 166.20(2)(a) and (c), the State Emergency Response Board is charged with the overall duty of carrying out the requirements of a SERC under the federal act and overseeing the implementation of the local emergency response plans by committees and providing assistance to committees.

You have advised that SERB committee members are appointed by the SERB chair. Not all SERB committee members are board members. SERB committee members do not receive compensation for their services. SERB committees have certain delegated responsibilities and they make recommendations to the board. The SERB committees include: administrative rules/legislative, compliance, plan review and evaluation, training, and LEPC advisory committees. The non-SERB members of these committees represent county LEPCs, county emergency government, citizens groups, and other state and local agencies.

Turning to your questions, the state’s liability indemnity program extends to any state officer, employe or agent. Section 895.46(1)(a) provides for the indemnity itself for any damage liability to the state officer, employe or agent. An agent, for purposes of this program, excludes independent contractors; only those whose liabilities would be attributed to the principal under the rule of respondeat superior are agents. See Pavalon v. Fishman, 30 Wis. 2d 228, 235, 140 N.W.2d 263 (1966); Cameron v. Milwaukee, 102 Wis. 2d 448, 456-57, 307 N.W.2d
164 (1981); 75 Op. Att’y Gen. 43 (1986); 75 Op. Att’y Gen. 49 (1986). Under the terms of the indemnification statute, the state is an excess indemnitor because it provides for indemnity for judgments “in excess of any insurance applicable.” Section 165.25(6) empowers the attorney general to represent individuals entitled to indemnity. Furthermore, section 893.82 requires that a notice of claim be filed with the attorney general as a condition precedent to commencing an action against such an officer, employe or agent. See generally, Ibrahim v. Samore, 118 Wis. 2d 720, 726-27, 348 N.W.2d 554 (1984); Carlson v. Pepin County, 167 Wis. 2d 345, 357, 481 N.W. 2d 498 (Ct. App. 1992). These statutes operate together in pari materia as a complementary whole. Therefore, if SERB committee members and LEPC subcommittee members are state officers, employes or agents within section 895.46, they are entitled to indemnification for judgments rendered against them for conduct within the scope of their agency as well as to legal representation provided by the state.

It is essential to note that your inquiry concerns four separate categories of committee members. The categories are: 1) board members of SERB who also serve on SERB committees; 2) non-board members who serve on SERB committees; 3) LEPC members who also serve on LEPC subcommittees; and 4) non-LEPC members who serve on LEPC subcommittees.

The answer as to SERB committee members is yes. Board members serving on SERB committees are undoubtedly included within the indemnity and representation provisions. Even if they are uncompensated, the long standing and uninterrupted administration of the law has accorded members of state boards the status of being state officers within the meaning and purpose of the indemnity and representation statutes. Cf. Burton v. State Appeal Board, 38 Wis. 2d 294, 301, 156 N.W.2d 386 (1968) (a public officer exercises some portion of the sovereign power of the state by law) citing Martin v. Smith, 239 Wis. 314, 332, 1 N.W.2d 163 (1941) (an officer is one who is not subordinate
to any authority other than that of law). These members would be equally protected when serving on a related committee inasmuch as these services grow out of their duties as board members. *See Ibrahim*, 118 Wis. 2d at 728; *Doe v. Ellis*, 103 Wis. 2d 581, 590-91, 309 N.W.2d 375 (Ct. App. 1981).

It remains to ascertain whether members of SERB committees who are not also board members are subject to tort indemnification and legal representation under the terms of the statute. In order to make this determination it is necessary to consider whether these committee members are state officers, employes or agents under section 895.46.

Non-SERB committee members are not officers. By definition, an officer exercises some portion of the sovereign power of the state and is not subordinate to any authority other than that of the law. *See Burton*, 38 Wis. 2d at 301; *Martin*, 239 Wis. at 332. You have advised that committee members are subordinate to the board. The committees act only under the direction of the SERB.

However, non-SERB committee members are entitled to indemnity under the terms of the statute because they are state agents. Whether an agency relationship exists turns on such facts as the extent of control over the details of the work, whether the worker is engaged in a distinct occupation or business apart from that of the party desiring the services, the place of work, the time of employment, the method of payment, the right of summary discharge, the nature of the business, which party furnishes the tools, and the intent of the parties. *Pavalon*, 30 Wis. 2d at 236. The single most important factor is the extent of control retained over the details of the work. *Kablitz v. Hoeft*, 25 Wis. 2d 518, 521, 131 N.W.2d 346 (1964).

You have advised that all committee decisions are subject to approval by SERB. The board has full control over the details of work done by its committees. So long as the SERB committee members act to carry out the functions of the board, they will be regarded as agents of the state within the meaning of section 895.46(1)(a). In that capacity they will be entitled to
indemnification for any judgment rendered against them for conduct within the scope of their agency and they will be entitled to legal representation provided by the state.

You also asked whether LEPC subcommittee members are entitled to indemnity for damage liability under section 895.46(1)(a), and legal representation by the attorney general under section 165.25(6). You have advised that LEPC membership is appointed by the county board and approved by the SERB. Members and non-members of the LEPC may sit on its subcommittees. However, non-LEPC subcommittee members are generally appointed by the LEPC and are not presented to the SERB for approval. Typically, LEPC subcommittee members do not receive compensation for their activities. LEPC subcommittee membership may include state and local elected officials; police, fire and health officials; representatives of environmental groups; transportation and media representatives; community groups; representatives of local facilities; and other individuals.

You indicated that LEPC subcommittee members may perform a wide range of tasks, including providing facilities with technical assistance in filing reports required under federal and state hazardous material reporting requirements, serving as an LEPC compliance inspector pursuant to section 166.20(7m), and drafting plans for response to the release of hazardous substances from a specific facility, which are included as a component in the local emergency response plan. You are specifically concerned with the indemnity and legal representation of LEPC subcommittee activities which include reviewing facility emergency response plans for presentation and recommendation for approval by the LEPC.

Members of the LEPC who serve on LEPC subcommittees receive indemnity protection under section 895.46, which states the following:

State and political subdivisions thereof to pay judgments taken against officers. (1)(a) . . . .

. . . .
(e) . . . [A]ny local emergency planning committee appointed by a county board under s. 59.07 (146) (a) and all members of such a committee, are state officers, employes or agents for the purposes of this subsection.

Section 59.07(146) provides:

**LOCAL EMERGENCY PLANNING COMMITTEES.** (a) The board shall do all of the following:

1. Create a local emergency planning committee, with members as specified in 42 USC 11001 (c), which shall have the powers and duties established for such committees under 42 USC 11000 to 11050 and under ss. 166.20 and 166.21.

The statute specifically states that any LEPC committee appointed by a county board under section 59.07(146)(a) and all members of such a committee are entitled to indemnity under section 895.46. Section 895.46 also states that all members of such a committee are state officers, employes or agents for the purposes of that subsection.

Members of a LEPC committee are likewise entitled to legal representation by the attorney general. Section 165.25 provides that the attorney general will represent departments of state government and section 165.25(8m) states the following:

**LOCAL EMERGENCY PLANNING COMMITTEES.** In subs. (1), (6) and (6m), treat any local emergency planning committee appointed by a county board under s. 59.07 (146) (a) as a department of state government and any member of such a committee as a state official, employe or agent.

To the extent that their duties as subcommittee members grow out of and are related to their duties as LEPC members, in my opinion, LEPC committee members who serve as subcommittee members are entitled to indemnification under the statute. However, only subcommittee members who are LEPC members benefit by the indemnification provision of section 895.46(1)(e).
There is, however, no indication that subcommittee members who are not LEPC members are entitled to indemnity and legal representation under the statute. Under the plain language of section 59.07(146)(a), the statute provides for a LEPC for each county. Hence, the statutory scheme and the federal law under 42 U.S.C.A. § 11001(b) (West Supp. 1992) mandate a single LEPC committee for each county. Therefore, LEPC subcommittee members who are not members of the LEPC are not reached by the indemnification provision of section 895.46(1)(e).

For these reasons, it is my opinion that, where the requirements of the statutes have been satisfied, the state would pay the judgment entered, in the course of their agency, against a SERB committee member or a LEPC member to the extent that their duties as subcommittee members grow out of or are related to their duties as LEPC members.

JED:LPT
Law Enforcement; Sheriffs; A sheriff may not unilaterally withdraw most forms of investigative services provided within one urbanized town within a county. OAG 4-93

March 25, 1993

RICHARD L. HAMILTON, Corporation Counsel
Outagamie County

You indicate that an urbanized town within your county has its own police department, including a full-time police administrator, an assistant police administrator and several full and part-time police officers. You also indicate that the town has never provided investigative services, that all such services have been provided by the county sheriff's department and that such services now may consume as much as forty percent of the total time expended by the sheriff's investigative staff. You ask whether the sheriff may discontinue the provision of such investigative services with respect to criminal activity within the town unless a high level of expertise is required in order to investigate a particular crime. My understanding is that no such limitation would be imposed with respect to investigative services provided by the sheriff's department in other, less urbanized towns.

In my opinion, a sheriff may not unilaterally withdraw most forms of investigative services provided within one urbanized town within a county.

Section 60.56, Stats., provides in part:

Law enforcement. (1) GENERAL AUTHORITY. (a) The town board may provide for law enforcement in the town or any portion of the town in any manner, including:

1. Establishing a town police department.

As you acknowledge, nothing in section 60.56 requires a town to perform investigative services, or even to have a police department at all. See 75 Op. Att'y Gen. 119, 121 (1986).
The statutory duties of sheriffs are described in sections 59.23 and 59.24. They include the duty to "keep and preserve the peace in their respective counties." Sec. 59.24(1), Stats. As you indicate, nothing in section 59.23 or 59.24 requires the sheriff to share the results of an investigation with a town police department or explicitly requires the sheriff to perform investigative services at all.

The common law and statutory duties of the sheriff have been more broadly described in the following fashion:

Within the field of his responsibility for the maintenance of law and order the sheriff today retains his ancient character and is accountable only to the sovereign, the voters of his county, though he may be removed by the governor for cause. No other county official supervises his work or can require a report or accounting from him concerning his performance of duty. He chooses his own ways and means of performing it. He divides his time according to his own judgment of what is necessary and desirable but is always subject to call and is eternally charged with maintaining the peace of the county and the apprehension of those who break it. In the performance of this duty he is detective and patrolman, as well as executive and administrator, and he is emphatically one of those who may serve though they only stand and wait. We recite these qualities and characteristics of the office not because they are novel but because they are so old that they are easily forgotten or unappreciated.

*Manitowoc County v. Local 986B*, 168 Wis. 2d 819, 830, 484 N.W.2d 534 (1992), quoting *Andreski v. Industrial Comm'n*, 261 Wis. 234, 240, 52 N.W.2d 135 (1952).

The overlapping statutory obligations of towns, cities, villages and county sheriffs' departments to provide law enforcement services are summarized in 58 Op. Att'y Gen. 72 (1969). These various provisions "make[ ] unified law enforcement activity more difficult." 60 Op. Att'y Gen. 85, 87 (1971). In limited circumstances, these difficulties may be addressed through formal

The sheriff is the chief law enforcement officer of the entire county, and it is the duty of local law enforcement personnel to cooperate with him. 61 Op. Att’y Gen. 80, 81 (1972); 58 Op. Att’y Gen. at 73. Nevertheless, county-wide law enforcement services provided by the sheriff must be “legally adequate.” 75 Op. Att’y Gen. at 119. “Generally, a sheriff has a duty to keep the peace and enforce state law and county ordinances throughout the county regardless of municipal boundaries, and may take such means as he deems necessary to carry out those duties.” 61 Op. Att’y Gen. 256, 258 (1972). However, “[a]lthough the sheriff possesses some discretion as to the manner in which he may carry out his duty to preserve public order, he must respond when called upon to investigate or aid in the apprehension of law breakers and from this duty springs a duty to assist other law enforcement officers in the apprehension and detention of such persons.” 50 Op. Att’y Gen. 47, 48 (1961). Thus, while the sheriff owes no duty of any kind to a town police department, he does have a duty to investigate crime throughout the county. In most cases, the most efficient means of accomplishing that duty is to coordinate information with local law enforcement agencies.

The sheriff in your county has apparently determined that it is necessary to provide a wide range of investigative services within other towns in order to discharge the sheriff’s common law and statutory obligations to provide law enforcement services within the entire county. The sheriff’s effectiveness in executing his duty to perform such investigative services throughout the county may be constrained “by budgetary and manpower limitations.” 58 Op. Att’y Gen. at 73. As Andreski indicates, he retains broad authority to set priorities in order to deal with such budgetary and manpower limitations. But the sheriff’s underlying duty to
investigate the full range of criminal activity within the boundaries of a particular town may not be abdicated, because such a duty is part and parcel of the “sheriff’s role of law enforcement and preserving the peace.” Manitowoc County, 168 Wis. 2d at 828 (footnote omitted). As you have explained it (i.e., the unilateral withdrawal of critical investigative services), the proposed action by the sheriff is therefore impermissible.

Law enforcement usually suffers when the sheriff and local law enforcement agencies are unable to reach agreement concerning their respective spheres of responsibility. See 58 Op. Att’y Gen. at 75. Voluntary agreement between law enforcement agencies is far preferable to a rigid insistence on doing no more than is legally required. I would urge the parties involved to attempt to achieve a cooperative solution rather than relying upon this opinion. In the event that such a cooperative solution cannot be achieved, it is my conclusion that a sheriff may not unilaterally withdraw most forms of investigative services provided within one urbanized town within a county.

JED:FTC
Constitutionality; Insurance; Retirement Systems; The amendment of section 40.05(4)(bc) by section 276 of 1991 Wisconsin Act 269, after issuance of 80 Op. Att’y Gen. 187 (1992), renders such section not in violation of article IV, section 26 of the Wisconsin Constitution.

Changes to the state health insurance program embodied in sections 40.05(4)(bc) and 40.51(10m) are not in violation of the prohibition of article IV, section 26 of the Wisconsin Constitution, given the presumption of constitutionality and the lack of case law showing that all changes in benefits are subject to the prohibition. OAG 5-93

April 14, 1993

ERIC STANCHFIELD, Secretary
Department of Employe Trust Funds


These amendments provide changes to the state Accumulated Sick Leave Conversion Credit (ASLCC) program. As set forth at 80 Op. Att’y Gen. at 187-88:

The ASLCC program allows state employes to convert accumulated sick leave to health insurance premium coverage during retirement. A state employe’s accumulated sick leave is converted into a credit equal to the employe’s final hourly wage multiplied by the employe’s total hours of unused sick leave. Health insurance premiums are paid from this credit for the employe and surviving dependents until the credit is exhausted. Sec. 40.05(4)(b), Stats. In order to continue under the state health insurance plan, the employe must be eligible for an immediate Wisconsin Retirement
System (WRS) annuity (age 55 for the general, elected and executive employes; age 50 for protective employes). This immediate annuity requirement is waived for state employes with twenty years of creditable service who are eligible for an immediate annuity, but elect to defer application. Sec. 40.02(25)(b)6., Stats. ASLCC premium payments may be delayed “for up to 10 years ... if the employe or surviving insured dependents are covered by a comparable health insurance plan.” Sec. 40.05(4)(b), Stats., as amended by 1991 Wisconsin Act 107.

The changes to the ASLCC program in the 1991 budget bill affect only the group defined as “[a]ny state constitutional officer, member or officer of the legislature, head of a state department or state agency who is appointed by the governor with senate confirmation, or head of a legislative service agency as defined in s. 13.90(1m)(a).” Sec. 40.02(25)(b)6g, Stats., as created by the 1991 budget bill.

The ASLCC program changes we are now concerned with, established by the 1992 budget bill, affect only this section 40.02(25)(b)6g. defined group (public official group) except for the change resulting from section 40.02(25)(b)6m. created by section 4 of 1991 Wisconsin Act 152. Section 40.02(25)(b)6r. newly provides that an insured employe who has 20 years of creditable service but terminates employment prior to attaining normal retirement age is eligible for continued health insurance coverage at his or her own expense.

The first question presented by your predecessor is:

1. Does the amendment effected by 1991 Wis. Act 269, § 276 change your March 18, 1992, opinion that s. 40.05 (4)(bc), Stats., is unconstitutional?

It is my opinion that the amendment of section 40.05(4)(bc) set forth at section 276 of the 1992 budget bill effectively renders the statutory section constitutional.
The primary subject of 80 Op. Att’y Gen. 187, section 40.05(4)(bc) of the statutes as created by section 1154Li of the 1991 budget bill, reads in material part:

The accumulated unused sick leave of an eligible employe under s. 40.02 (25)(b)6g [any state constitutional officer, member or officer of the legislature, head of a department or state agency who is appointed by the governor with senate confirmation or head of a legislative service agency] shall be converted to credits for the payment of health insurance premiums on behalf of the employe on the date on which the department receives the employe’s application for a retirement annuity or for lump sum payment under s. 40.25(1). The employe’s unused sick leave shall be converted at the salary rate that the employe would be receiving on the date of the conversion if the employe had continued to be employed in the position described in s. 40.02(25)(b)6g that the employe held immediately before the employe terminated all creditable service or, if the employe is a state elected official who would have been prohibited by law from receiving an increase in compensation during the official’s term of office, at the salary rate that would have been payable to the employe on the date of the conversion if the employe had not been prohibited by law from receiving an increase in compensation during his or her term of office.

Under this statutory section the ASLCC credit would have been determined by salaries to be paid in the future after the affected employe were no longer employed. I therefore concluded that article IV, section 26 of the Wisconsin Constitution was violated since there was no method provided to determine the amount of such ASLCC credit at the point employment terminated and any increase in such credit would occur after a person was no longer employed. 80 Op. Att’y Gen. at 191-95.
Section 40.05(4)(bc), Stats., in its current form (amended by section 276 of the 1992 budget bill after issuance of 80 Op. Att’y Gen. 187), provides in material part:

The accumulated unused sick leave of an eligible employe under s. 40.02(25)(b)6g [any state constitutional officer, member or officer of the legislature, head of a department or state agency who is appointed by the governor with senate confirmation or head of a legislative service agency] shall be converted to credits for the payment of health insurance premiums on behalf of the employee on the date on which the department receives the employee’s application for a retirement annuity or for lump sum payment under s. 40.25(1). The employee’s unused sick leave shall be converted at the eligible employee’s basic pay rate immediately prior to termination of all creditable service.

Since the present section 40.05(4)(bc) determines the amount of the ASLCC credit by utilizing “the eligible employee’s basic pay rate immediately prior to termination of all creditable service,” such credit is objectively fixed during employment. Therefore, the present section 40.05(4)(bc) does not violate article IV, section 26 of the Wisconsin Constitution. As recognized by your predecessor in his second question, I must now examine other state health insurance plan changes set forth in the 1991 budget bill to ascertain whether they are precluded by the provisions of article IV, section 26 of the Wisconsin Constitution.

Your predecessor’s second question is:

2. Does Wis. Const., art. IV, § 26(2)(intro.), providing “... the compensation of a public officer may not be increased or diminished during his term of office,” bar the application of ss. 40.05(4)(bc) and 40.51(10m), Stats., to incumbents of the offices or positions specified in s. 40.02(25)(b) 6g, Stats., during the term of office when 1991 Wis. Acts 39 and 269 became effective?

Changes in the state health insurance program made by the 1991 budget bill require our scrutiny in relation to the prohibitions of
article IV, section 26 of the Wisconsin Constitution since they provide the public official group with benefits more favorable than those available at the commencement of their terms.

Under section 40.02(25)(b)6g., as created by the 1991 budget bill, a member of the public official group would be entitled to use of ASLCC credits to pay health insurance after reaching age 55 regardless of that person's age at termination of employment. This contrasts with the pre-1991 budget requirement that an employe is eligible for ASLCC payments only if eligible for "an immediate annuity" (has attained normal retirement age). Secs. 40.02(25)(b)4., (38) and 40.05(4)(b), Stats.

Also under section 40.51(10m), as created by the 1991 budget bill, a member of the public official group has an expanded right to re-enroll in the state health insurance program without proof of insurability. As stated by your predecessor in his request:

Under this provision [sec. 40.51(10m)], persons in those positions described in s. 40.02(25)(b)6g, Stats., are entitled to group health insurance coverage without evidence of insurability when they apply for a retirement annuity or lump sum payment under s. 40.25(1), Stats. Under the prior law, all former employes terminating prior to retirement age had a limited right to continuation coverage. Once the continuation insurance ran out, there was no coverage available.

Prior to 1991 Wis. Act 39, only former employes who were insured under the group health insurance plan and who retired on a [sic] "immediate annuity" or a disability annuity under s. 40.63, Stats., were eligible for group health insurance coverage after retirement. Since their coverage was continuous, retirement did not trigger the proof of insurability requirement in s. 40.51(2), Stats.

A further state health insurance plan change, initially numbered section 40.02(25)(b)6m. as created by 1991 Wisconsin Act 152 and then renumbered 40.02(25)(b)6r. by 1991 Wisconsin Act 315, provides that any "insured employe of the state," who
terminates state employment prior to eligibility for an immediate annuity but with 20 years of creditable service, may continue under the state health insurance program. This change is not of interest in this opinion since the public official group already had the right under section 40.51(10m), as created by the 1991 budget bill, to leave employment prior to normal retirement age and re-enroll in the health insurance program at a later date without showing proof of insurability.

Since changes providing health insurance on more favorable terms occurred during the terms of office of various members of the public officer group, I must ascertain whether such changes are prohibited by article IV, section 26 of the Wisconsin Constitution.

Article IV, section 26 states in part:

(1) The legislature may not grant any extra compensation to a public officer, agent, servant or contractor after the services have been rendered or the contract has been entered into.

(2) Except as provided in this subsection, the compensation of a public officer may not be increased or diminished during the term of office.

The Wisconsin courts have not indicated which changes in the state health insurance plan constitute a change in "compensation" that "may not be increased or diminished during the term of office." I stated, 80 Op. Att’y Gen. at 189, that:

It is my opinion that the ASLCC program health insurance premium payments constitute part of compensation and that article IV, section 26, precludes the Legislature from establishing that portion of compensation based on a salary to be determined after the person is no longer employed.

It is not my opinion, however, that all changes in the terms of the ASLCC and state health insurance program are prohibited changes in compensation. I have found no support for such an
interpretation of article IV, section 26 in the courts of Wisconsin or any other state. Nor has the Wisconsin supreme court held that all changes in fringe benefits, during a term of office, that have the effect of increasing compensation are prohibited.

The court in *State ex rel. Dudgeon v. Levitan*, 181 Wis. 326, 193 N.W. 499 (1923) held that provisions of the then Teachers' Retirement Act, which provided for the granting of past-service credits in computing the pension of a teacher still employed at the time of enactment, was not a grant of extra compensation for services already rendered by such teacher prohibited by article IV, section 26 of the Wisconsin Constitution. Such court stated that "the law provides pensions for teachers already in service, the amount of which pension is computed with reference to the entire service of the teacher—the period before the enactment of the law as well as the period thereafter." 181 Wis. at 339. Notwithstanding this finding, the court found no violation of article IV, section 26 of the Wisconsin Constitution stating:

As we view it, the annuity based on past service is not intended to be, or operate as, compensation for past service. It was rather intended to be, and in fact is, an inducement to the seasoned and experienced teacher to remain in the service and give the public the benefit of his experience. *State ex rel. Dudgeon*, 181 Wis. at 343.

In *Columbia County v. Wisconsin Retirement Fund*, 17 Wis. 2d 310, 326-27, 116 N.W.2d 142 (1962) the court was presented with the question as to whether article IV, section 26 of the Wisconsin Constitution was violated by a statute that required counties to make payment to the retirement system for prior-service credits for service already rendered by its employes. Under statutes then in effect the amount of "an employee's pension [was] dependent largely upon the length of his service and the amount of his compensation." 17 Wis. 2d at 315. The court found no violation of article IV, section 26 of the Wisconsin Constitution stating:
The plaintiffs contend ch. 459, Laws of 1961, constitutes a legislative grant of extra compensation to public officers, agents, or servants after their services have been rendered or in some cases after the contract was entered into and furthermore constitutes an increase in compensation of a public officer during his term of office. These contentions of the plaintiffs are grounded upon the proposition that the payment or withholding of state aids or the reimbursement by the state for contributions amounts to extra compensation by the state.

This contention was answered adversely to the plaintiffs in *State ex rel. Dudgeon v. Levitan, supra*. That case held prior-service credits granted to a teacher did not constitute extra compensation for past services but under the plan was to be considered an encouragement and an inducement to teachers to remain in public service. Increased pension benefits are to be distinguished from contributions for funding a pension. The plaintiffs also claim some doubt has been cast on *Dudgeon* because of our decisions in *State ex rel. Thomson v. Giessel* (1952), 262 Wis. 51, 53 N.W. (2d) 726, wherein a statute providing increased benefits for retired teachers was held unconstitutional on the ground it granted extra compensation, and in *State ex rel. Thomson v. Giessel* (1953), 265 Wis. 558, 61 N.W. (2d) 903, wherein a statute providing for increased benefits for retired teachers was valid for those teachers who held themselves available for future emergency service.

The basic answer lies in the concept that contributions made to the pension fund are not compensation, much less extra compensation paid to public officers, agents, or servants.

While the statutes interpreted in these cases concerned prior-service credit as the basis for increased benefits or increased benefits themselves rather than qualification for continuing health insurance, the subject of our inquiry, they do show that the court
has not interpreted the article IV, section 26 of the Wisconsin Constitution prohibition to preclude all improvements in benefits.

The decisions indicate that while an increase or decrease in the amount of the benefit paid (or paid on behalf of) a public official or employe comes within the prohibition of article IV, section 26 of the Wisconsin Constitution, a change in the method of determining the benefit may not come within the prohibition. Since I am unable to find a case in point, it is not clear what benefit changes in the health insurance plan, short of actually increasing the payment on behalf of the public officer, will be held violative of article IV, section 26 of the Wisconsin Constitution. I must, therefore, rely on the presumption of constitutionality of legislative enactments.

A party who challenges the constitutionality of an act carries a heavy burden of persuasion. Our courts have made it clear that “[i]t is not enough that respondent establish doubt as to the act’s constitutionality nor is it sufficient that respondent establish the unconstitutionality of the act as a probability. Unconstitutionality of the act must be demonstrated beyond a reasonable doubt. 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.” State ex rel. Hammermill Paper Co. v. La Plante, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973); County of Portage v. Steinpreis, 104 Wis. 2d 466, 478, 312 N.W.2d 731 (1981).

Treiber v. Knoll, 135 Wis. 2d 58, 64-65, 398 N.W.2d 756 (1987).

It is, therefore, my opinion, in response to the second question, that the changes to the state health insurance program embodied in sections 40.05(4)(bc) and 40.51(10m) do not violate the prohibitions of article IV, section 26 of the Wisconsin Constitution.

JED:WMS
Words And Phrases; Section 19.36(7), Stats., is an exception to the public records law and, therefore, should be narrowly construed. As used in that statute the terms “applicant” and “candidate” are synonymous. Definition of “final candidate” discussed. OAG 6-93

May 6, 1993

PETER A. KASTENHOLZ, Corporation Counsel
Wood County

You have asked for clarification of the terms “applicant,” “candidate” and “final candidate,” as used in section 19.36(7)(a), Stats. Section 19.36(7) provides:

(a) In this section, “final candidate” means each applicant for a position who is seriously considered for appointment or whose name is certified for appointment and whose name is submitted for final consideration to an authority for appointment to any state position, except a position in the classified service, or to any local public office, as defined in s. 19.42(7w). “Final candidate” includes, whenever there are at least 5 candidates for an office or position, each of the 5 candidates who are considered most qualified for the office or position by an authority, and whenever there are less than 5 candidates for an office or position, each such candidate. Whenever an appointment is to be made from a group of more than 5 candidates, “final candidate” also includes each candidate in the group.

(b) Every applicant for a position with any authority may indicate in writing to the authority that the applicant does not wish the authority to reveal his or her identity. Except with respect to an applicant whose name is certified for appointment to a position in the state classified service or a final candidate, if an applicant makes such an indication in writing, the authority shall not provide access to any
record related to the application that may reveal the identity of the applicant.

You suggest there are at least two possible interpretations of section 19.36(7)(a). First, "applicant" and "candidate" could be considered to be synonymous, both meaning a person who has applied for a position irrespective of whether the person is qualified for the position. Alternatively, one could assume that the Legislature meant something different by each term since the Legislature chose different terms. You suggest that an applicant would mean someone who applied for a position and a candidate would be an applicant who was qualified for the position, that is, someone who met the minimum job qualifications for employment set out in the announcement or description of the position. Under this construction of the statute it would be possible to receive applications from ten applicants but determine that only three of those applicants are candidates and only two of those candidates are final candidates.

Section 19.36(7) is hardly a model of clarity. I conclude, however, that "applicant" and "candidate" are synonymous for purposes of the statute. I reach this conclusion for two reasons. First, that definition results in the greatest number of applicants being final candidates, and, therefore, results in providing the greatest information to the public. Section 19.31 requires that sections 19.32 to 19.37 "be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business." Because section 19.36(7) is a partial exception to the public records law, it should be narrowly construed. Hathaway v. Green Bay School Dist., 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984).

This interpretation of subsection (a) is also consistent with subsection (b). Subsection (b) allows an applicant to indicate that he or she does not want the authority to reveal his or her identity. The statute then makes an exception to that general rule for two groups of people: (1) Applicants whose names are certified for appointment to a position in the state classified service or (2)
final candidates. For the latter class there are only two groups in the universe, applicants and final candidates. The law on its face makes no provision for a third group, "candidates." Under the law an applicant may choose not to have his or her identity revealed. If that applicant becomes a final candidate, however, the authority can no longer honor that choice.

You also ask whether the second and third sentences of section 19.36(7)(a) add additional restrictions to the first sentence. As you note, if that were the case, an applicant could never be a final candidate unless that person had been "seriously considered for appointment" or had his or her name certified for appointment and submitted for final consideration.

The second and third sentences of that subsection are not additional restrictions on the definition of "final candidate." Quite the contrary, the second and third sentences assure that the law cannot be evaded by an authority simply declaring that only one or two applicants were "seriously considered for appointment." Therefore, whenever there are at least five candidates for an office or position, at least five of the applicants, the five considered most qualified, must be included within the definition of "final candidate." If there are less than five candidates, all of the applicants are considered to be "final candidates." Finally, if an authority is going to make the appointment from a group of more than five applicants, that is, the authority's final list from which it will make the appointment is greater than five, all of the people on that list are considered to be "final candidates." The statute requires that someone be treated as a final candidate, even if the person is not seriously considered for appointment, if there were fewer than five applicants.

As I have mentioned, section 19.36(7) is an exception to the general policy of public access to public records and, therefore, should not be interpreted as denying access to public records unless clearly applicable. The Legislature has not created a blanket exemption to the public records law. Section 19.36(7) applies only to state "positions," except a position in a classified
service. On its face, therefore, the statute does not apply to state "offices." (For a discussion of the difference between a position and an office, see Martin v. Smith, 239 Wis. 314, 1 N.W.2d 163 (1941).)

That the Legislature was drawing a distinction between "positions" and "offices" is clear from the fact that the statute refers to state "positions" but to "local public offices" as defined in section 19.42(7w). That definition itself is in turn limited; it does not apply to all local public offices. For example, it would not apply to an officer appointed to serve an indefinite term who was also removable for cause, or an officer appointed by a body other than the governing body or the executive or administrative head of the local government. The statute does not apply, for example, to the office of chief of police because chiefs are appointed by the police and fire commission and hold their offices during good behavior, subject to suspension or removal by the board for cause. Sec. 62.13(3), Stats.

JED:AL
Property; Revenue, Department Of; Taxation; The enactment of chapter 20, section 1102c, Laws of 1981, changed the duration of tax liens docketed by the Department of Revenue under section 71.91(5)(b), Stats., from a fixed period of ten years to a period which continues until the tax liability is satisfied.

May 24, 1993

Michael G. Ellis, Chairperson
Senate Organization Committee

On behalf of the Senate Organization Committee, your predecessor asked whether the creation of section 71.13(2m), Stats. (now section 71.91(4)), by virtue of the enactment of chapter 20, section 1102c, Laws of 1981, altered the duration of the Department of Revenue’s (Department) liens resulting from the docketing of tax warrants under what is now section 71.91(5)(b).

In my opinion, the answer is yes. The duration of such liens was changed from a fixed period of ten years to a period which continues until the tax liability is satisfied.

Section 71.91(4) provides:

Unpaid tax is perfected lien on property. If any person liable to pay any income or franchise tax neglects, fails or refuses to pay the tax, the amount, including any interest, addition to tax, penalty or costs, shall be a perfected lien in favor of the department of revenue upon all property and rights to property. The lien is effective at the time taxes are due or at the time an assessment is made and shall continue until the liability for the amount to be paid or for the amount so assessed is satisfied. The perfected lien does not give the department of revenue priority over lienholders, mortgagees, purchasers for value, judgment creditors and pledges whose interests have been recorded before the department’s lien is recorded.
Section 71.91(5)(b) provides in pertinent part: "The clerk shall docket the warrant as required by s. 806.11, and upon docketing the amount of the warrant, together with interest required by s. 71.82(2), shall be considered in all respects as a final judgment."

In 42 Op. Att’y Gen. 115 (1953), one of my predecessors opined that the following language from section 71.13(3)(b), Stats. (1951), meant that the duration of the Department’s lien was ten years:

“(b) *** The clerk shall docket the warrant as required by section 270.745, and thereupon the amount of such warrant, together with interest as provided by section 71.13(1) shall become a lien upon the real property of the taxpayer against whom it is issued in the same manner as a judgment duly docketed in the office of such clerk. ***”

The 1953 opinion reasoned that “[t]here is nothing in the statute that says that the lien of a docketed delinquent tax warrant is given some of the qualities of the lien of a docketed judgment but not all of them.” 42 Op. Att’y Gen. at 117.

As you indicate, chapter 224, section 91, Laws of 1975 amended the language found in section 71.13(3)(b), Stats. (1951), to read as follows:

The clerk shall docket the warrant as required by s. 806.11, and upon docketing the amount of such warrant, together with interest required by sub. (1) shall be considered in all respects as a final judgment creating a perfected lien upon the taxpayer’s right, title and interest in all of the real and personal property of the taxpayer against whom it is issued in the county where the warrant or duplicate copy of the warrant is docketed. Such perfected lien shall not give the state priority over preexisting lienholders.

I agree with your suggestion that nothing in the 1976 amendment to section 71.13(3)(b), Stats. (1973), or in the present version of section 71.91(5)(b), would alter the result reached in 42 Op. Att’y Gen. 115. The question then becomes what effect is to be ascribed to the enactment of the language found in what
is now section 71.91(4), which provides that "[t]he lien is effective at the time taxes are due or at the time an assessment is made and shall continue until the liability for the amount to be paid or for the amount so assessed is satisfied."

In my opinion, applicable canons of statutory construction require a different result than that reached in the 1953 opinion. Clear and unambiguous language found in a statute must be given effect. In Interest of F.E.W., 143 Wis. 2d 856, 861, 422 N.W.2d 893 (Ct. App. 1988). And each part of a statute should be given force so that no language will be rendered superfluous. State ex rel. Taylor v. Linse, 161 Wis. 2d 719, 723, 469 N.W.2d 201 (Ct. App. 1991). The quoted language from section 71.91(4), not only is clear and unambiguous, but also would be rendered surplusage if the period of a tax lien were limited to ten years. If the ten year period were applicable, the lien could not continue until the liability for the tax assessed is satisfied. Given the language contained in section 71.94, it is not possible for me to conclude that a tax lien is no longer valid after a given number of years.¹

I therefore conclude that the enactment of chapter 20, section 1102c, Laws of 1981, changed the duration of tax liens docketed by the Department under section 71.91(5)(b), from a fixed period

¹Bills introduced subsequent to the enactment of what is now section 71.91(4) are consistent with this conclusion. 1991 Senate Bill 362 would have made tax liens docketed under section 71.91(5)(b), effective for a period of ten years and 1993 Senate Bill 98 would do so.

The Legislative Reference Bureau’s analysis of both bills states:

Under current law, if a person fails or refuses to pay an outstanding income or franchise tax liability, the amount due is a perfected lien in favor of the department of revenue. The lien continues in effect until the liability is satisfied.

This bill changes current law by requiring the department of revenue to renew the lien every 10 years. This bill also clarifies current law by making it explicit that the department is required to record tax liens with a county clerk of circuit court.
of ten years to a period which continues until the tax liability is satisfied.\textsuperscript{2}

\textbf{JED:FTC}

\footnote{\textsuperscript{2}Section 893.33, another statute to which you refer in your opinion request, does not, strictly speaking, affect the duration of a lien. It precludes the assertion of an otherwise valid lien against a bona fide purchaser for value of real estate or the purchaser's successor in title after thirty years unless a written instrument or notice is recorded within the thirty year period.}
Copyright; Words And Phrases; Appellate court opinions cannot be protected by copyright and copyright protection applicable to compilations of court opinions is very limited if present at all. OAG 8-93

June 4, 1993

J. DENIS MORAN, Director of State Courts
Supreme Court of Wisconsin

You ask the following questions and provide the following background information:

1. Are Wisconsin Supreme Court and Court of Appeals decisions, both before and after official publication as Callaghan's Wisconsin Reports, in the public domain? Or, are they protected by copyright?

2. Can an individual offer these decisions for sale commercially in other formats; i.e., text retrieval computer software, without copyright infringement or running afoul of the fair use doctrine?

The situation that prompts this request for an opinion is as follows: Several months ago, a legal research software program developed by a private vendor was installed on the CCAP computer system in Dane County. That software program is currently being used on a trial basis by several Dane County judges. Essentially, the software program is a text retrieval program similar in nature to LEXIS or WESTLAW. To the best of my knowledge, it contains only Wisconsin Supreme Court and Court of Appeals decisions from volume 140 Wis 2d to the present and does not include headnotes or page numbers. The vendor would like CCAP to purchase this software program and make it available to all circuit court judges. Obviously, CCAP does not want to purchase computer software that infringes any copyright.

As you note in your request, two basic propositions appear to be well established. The first is that there can be no copyright in
judicial opinions. The second is that there may be copyright in compilations of judicial opinions.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.


The first proposition that there can be no copyright in judicial opinions is well grounded in legal authorities and underlying policy.

Judicial opinions issued by the court are treated as public domain materials ab initio and cannot be protected by copyright. L. Ray Patterson & Craig Joyce, Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations, 36 UCLA L. Rev. 719, 735 (1989). In Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 668 (1834), the United States Supreme Court held "that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right." In Banks v. Manchester, 128 U.S. 244 (1888), the Court ruled that opinions of state court judges are not copyrightable, primarily on public policy grounds:

Judges . . . can themselves have no . . . proprietorship, as against the public at large, in the fruits of their judicial labors . . . . The question is one of public policy, and there has always been a judicial consensus, from the time of the decision in the case of Wheaton v. Peters, 8 Pet. 591, that no copyright could under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and
interpretation of the law, which, binding every citizen, is free for publication to all.

Patterson & Joyce, 36 UCLA L. Rev. at 735.

In short, judicial opinions are to be treated as public domain materials ab initio. Id.

Compilations of judicial opinions are treated as "fact" works and are generally subject to the same standards of originality and expressive content as are applied to compilations of facts. I Paul Goldstein, Copyright: principles, law and practice, sec. 2.16.1.1 (1989 & Supp. 1992).

The second proposition that there may be copyright in compilations of judicial opinions is also accurate, but the availability and scope of the protection is probably not as broad as has been indicated by even a substantial number of legal opinions over the last half century. We learn this from the relatively recent United States Supreme Court decision in Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991). Your request therefore invites a very timely review of the status and protection accorded to compilations of judicial opinions under the copyright law.

Feist refocuses on the fundamental requirement of "originality" under the copyright law. "Originality is a constitutional requirement." Feist, 499 U.S. at 346. Originality is an expressed element of copyrightability under the federal copyright statute: "Copyright protection subsists, in accordance with this title, in original works of authorship . . . ." 17 U.S.C.A. § 102(a) (West Supp. 1993). Originality "is the very 'premise of copyright law.'" Feist, 499 U.S. at 347.

"Originality" is the key to understanding why as a matter of copyright law, facts are not protected and compilations of facts may be. Facts by their very nature are not original; they may be newly discovered by an author, but they are not created by the author. Feist, 499 U.S. at 347. On the other hand, compilations may involve the contribution of original material by the author or may entail enough selection, coordination or arrangement so
that the work as a whole can be properly considered an original work of authorship. *Feist*, 499 U.S. at 345, 347.

Technically, the statutory term "compilation" is reserved for collection of preexisting materials. 17 U.S.C.A. § 101.

The statute identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation: (1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an "original" work of authorship. *Feist*, 499 U.S. at 357.

17 U.S.C.A. § 103(b) (West 1977) expressly states that the scope of protection for compilations "extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material." As stated by the Court in *Feist*, 499 U.S. at 349: "No matter how original the format, however, the facts themselves do not become original through association."

In evaluating the copyright status of a compilation of case reports, I see four categories of material: First, the text of the court's opinions as published by the court. Second, material that is contributed to the compilation by the compiler, *e.g.* headnotes. Third, the selection, coordination and arrangement of materials in the compilation. Fourth, page numbers. I treat page numbers as a separate category because I believe it will facilitate the treatment of the second and third categories and because page numbers warrant special attention in light of the earlier decision in *West Pub. Co. v. Mead Data Cent., Inc.*, 616 F. Supp. 1571 (D. Minn. 1985), aff'd, 799 F.2d 1219 (8th Cir. 1986), *cert.
denied, 479 U.S. 1070 (1987), which you cite in your opinion request.¹

As discussed above, the text of judicial opinions are not protectible by copyright.

As to new material added by a compiler, the Supreme Court has specifically stated that a protectible interest may subsist in “the title-page, table of cases, head-notes, statements of facts, arguments of counsel, and index” to the extent that they are the original work of the reporter. Callaghan v. Myers, 128 U.S. 617, 649 (1888). Patterson & Joyce, 36 UCLA L. Rev. at 737. This appears to continue to be a sound proposition, but in the wake of Feist the need to evaluate the originality of the work has been brought to the forefront. It is my expectation that the kinds of contributions recognized in Myers will continue to be protected under Feist.

The protectibility of the selection, coordination or arrangement of a compilation presents a more difficult question the answer to which will depend on the specific circumstances of the particular case with the principal focus being on whether “the selection, coordination, and arrangement are sufficiently original to merit, protection.” Feist, 499 U.S. at 358. There are two separate questions: How much originality and how much protection?

[O]riginality is not a stringent standard; it does not require that facts be presented in an innovative or surprising way. It is equally true, however, that the selection and arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever. The standard of originality is low, but it does exist. . . . As this Court has explained, the Constitution mandates some minimal degree of creativity; and an author who claims infringement must prove “the

¹There appears to be no dispute in the industry that the numeration of the volumes and the legal citations that are composed of volume numbers and page numbers are not restricted by copyright. West Pub. Co. v. Mead Data Cent., Inc., 799 F.2d 1219, 1222, 1234 (8th Cir. 1986) (Oliver, J. dissenting at 1234).
existence of . . . intellectual production, of thought, and conception.”

*Feist*, 499 U.S. at 362 (citations omitted).

Regarding the scope of protection, 17 U.S.C.A. § 103(b) states as follows:

The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

If there is sufficient originality in selection, coordination or arrangement, then typically copyright protection extends to the work as a whole, not because the whole work has become subject to copyright, but because it is only as a whole that the features of selection, coordination or arrangement are implicated. For example, another is precluded from copying the whole work because to do so would necessarily encompass the entire original selection, coordination and arrangement. On the other hand, another would be entirely free to copy an opinion within the compilation, because the opinion itself is not subject to any copyright interest and the copying of one opinion will not implicate any selection, coordination or arrangement embodied in the work as a whole. Perhaps another way to look at it is that if some aspect of a compilation is subject to copyright, one cannot copy the whole because the copying of the whole would necessarily involve copying the part that is protected. If one copies only a part of work, the questions become focused on whether the part copied is the part protected.

As explained by Eaton S. Drone in his classic treatise on nineteenth century copyright law:

No protection is given to the component parts of a compilation independently of their arrangement and
combination. Of these, the compiler is not the author, and he can have no exclusive property in what is common and open to all. Nor is the arrangement and combination, independently of the materials themselves, a proper subject of copyright. . . . The copyright vests in the materials as combined and arranged; in the union of form and substance. Any one may use the same materials in a different combination, or adopt a similar arrangement for different selections. But no person can copy both the substance and the arrangement of a compilation, and use the same materials in the same form, without committing piracy.

Paterson & Joyce, 36 UCLA L. Rev. at 739.

In Feist, the Supreme Court decided that even extensive copying of another's telephone directory white pages did not implicate copyright protection. The raw data consisting of names, towns and telephone numbers were uncopyrightable facts. There was no "selection" involving originality because it was basically automatic that subscribers to the plaintiff's telephone service would be listed in its telephone directory. Although the names were arranged alphabetically, there "is nothing remotely creative about arranging names alphabetically in a white pages directory." Feist, 499 U.S. at 363.

In the course of its decision in Feist, the Court repudiated the notions of "industrious collection" and "sweat of the brow" that had been developed by and extensively accepted by the courts as a basis for protecting the hard (as opposed to original) work of compilers of facts. The Court also corrected the mistaken notion that compilations were copyrightable per se due to the way they were specifically mentioned in the earlier 1909 copyright act. Feist, 499 U.S. at 351-56.

Turning to the question at hand, a dispositive decision would have to await a full factual development of just what the compiler of judicial opinions does in a particular case in the way of selection, coordination or arrangement. However, there are good reasons to question whether the typical compiler's work, as
generally understood, will qualify. Patterson & Joyce, 36 UCLA L. Rev. at 763-72. It is our understanding that all Wisconsin Supreme Court decisions are selected for publication by the court and that court of appeals decisions are selected for publication by the court’s publication committee. Thus selection is made by the courts not the compilers. We are not aware of any evidence of originality in the coordination or arrangement of opinions within volumes. As stated in Patterson & Joyce:

[N]othing in the majority opinion suggests anything to contradict the conclusions one can reach simply by examining individual volumes of West’s reports. West may or may not “select” cases for inclusion in a volume. But clearly it does not “coordinate” cases within the volume, except in ways dictated by its subminimally original categorization system. Nor does it “arrange” cases in any discernible fashion within the volume, but instead prints them in an order completely lacking expressive character or even utility—an order presumably determined by date of decision or receipt, subject to the printer’s convenience (and any necessary intervening communications with the deciding courts).

Patterson & Joyce, 36 UCLA L. Rev. at 771 (footnote omitted).

The final category to consider is pagination within the compiler’s volumes. This is treated as a special subject because the pagination of a compilation of judicial opinions was held to be protected by copyright in West Pub. Co. However, the validity of that opinion is in serious doubt in the wake of the United States Supreme Court’s decision in Feist. This is so because of the substance of the Feist decision and its renewed emphasis on the constitutional requirement of originality. But there is a further less obvious reason. A reader will find that throughout the Feist decision, the Court embraces the work of Patterson & Joyce. See, Feist, 499 U.S. at 347-49, 361-62. The mission of that nearly 100-page article is to discredit the decision in West Pub. Co.
my opinion they succeed, and I believe the United States Supreme Court agrees. In the words of these commentators:

As to page numbers in law reports, one strains mightily to identify anything therein which expresses the “unique personal reaction” of the compilation author upon the subject matter—that is, anything which contributes “some substantial, not merely trivial, originality” to the preexisting matter which the compilation author has taken from the public domain. Authorship originates not on a piece of paper or a computer disk but in the author’s mind, whereas generally pagination is an element added mechanically by the printer long after the author has departed the scene. Not surprisingly, the traditional view has been that providing pagination, particularly for a public domain work, is too minimal a contribution to sustain a copyright, and that taking only the pagination in such a work does not infringe the compilation author’s just rights.

Patterson & Joyce, 36 UCLA L. Rev. at 764-65, 772 (footnotes omitted).

To state the matter succinctly, West’s paging of any given volume of reports is not an extension of copyrightable case arrangement. Pagination is, rather, “a purely mechanical process dictated entirely by the format” of the volume. Thus, West’s page numbers, systematically added in the composition (rather than the editorial) process, are, like its arrangements, incapable of protection.

With this background, I return to the specific questions that you have posed:

1. Are Wisconsin Supreme Court and Court of Appeals decisions, both before and after official publication as Callaghan’s Wisconsin Reports, in the public domain? Or, are they protected by copyright?
It appears quite clear that the appellate court decisions per se are not copyrightable as issued by the court and no subsequent inclusion in a compilation will change that status. The opinion itself is in the public domain wherever it is found.

2. Can an individual offer these decisions for sale commercially in other formats; i.e., text retrieval computer software, without copyright infringement or running afoul of the fair use doctrine?

There is no question that a business may take appellate court opinions per se and sell them, and a business may take appellate court opinions per se and convert them to a computerized format and sell them.

If the business is working not from the appellate court decisions per se but from a compilation developed, for example by Callaghan's, it continues to be true that the opinions per se may be copied freely. The question becomes whether the compiler has contributed something sufficiently original so that the compiler has some protectible copyright interest that must be honored by the subsequent business user.

From the discussion above, it is my opinion that a compiler of judicial opinions probably will be able to establish copyright interests in original material added to the compilation such as those recognized in Callaghan v. Myers. Theoretically, a compiler could have protection against copying of the entire compiled work if there is sufficient originality in the selection, coordination or arrangement of the opinions. However, in the wake of Feist and its embrace of the work of Patterson and Joyce, it is my opinion there is serious doubt whether there is copyright protection for the standard compilation of judicial opinions and this doubt extends to the pagination of those compilations. To be any more definite, I will need to have more details as to exactly what the private vendor is using from preexisting sources.
Finally, you mention the "fair use doctrine" which is codified as follows in 17 U.S.C.A. § 107 (West Supp. 1993):

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

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

It is very unlikely that the fair use doctrine will be available under the circumstances you pose. It is likely that consideration of all factors under 17 U.S.C.A. § 107 will work against allowance as fair use. Summarily, as to the first and fourth factors, the use is commercial and will probably be in competition with other businesses offering access to judicial opinions. As the second and third factors, if there is any copyrightable interest in a preexisting compilation, it is probable that the copyrightable aspect (e.g. headnotes as new material or original arrangement) will be copied in their entirety if they are copied at all. It would probably not be efficacious for a commercial copier to limit copying to an extent that would arguably qualify for fair use treatment. Again, a more definite answer would depend on the details.

JED:RWL
Natural Resources, Department Of; Navigable Waters; State; Zoning; The Department of Natural Resources (DNR) is not subject to local zoning ordinances with respect to its construction of any building, structure or facility whose purpose is to assure the general public access to outdoor recreational areas, rather than to facilitate the internal operations of DNR as a state agency. OAG 9-93

June 30, 1993

GEORGE E. MEYER, Secretary
Department of Natural Resources

You indicate that the Department of Natural Resources ("DNR"), in the exercise of its statutory authority, acquires, maintains and develops certain public access sites to state lands and waters for hunting, fishing and other outdoor recreational activities in order to benefit the general public, rather than to facilitate the internal operations of DNR as a state agency. You are primarily concerned about facilities constructed by DNR in order to afford the general public access to navigable lakes and streams. You ask whether construction by DNR at such sites is subject to local zoning requirements.

In my opinion, DNR is not subject to local zoning ordinances with respect to its construction of any building, structure or facility whose purpose is to assure the general public access to outdoor recreational areas, rather than to facilitate the internal operations of DNR as a state agency.

Construction of state buildings and facilities is a matter wholly of state concern and not subject to municipal regulation except as expressly provided by statute. See Milwaukee v. McGregor, 140 Wis. 35, 121 N.W.2d 642 (1909); Green County v. Monroe, 3 Wis. 2d 196, 87 N.W.2d 827 (1958). Section 13.48(13), Stats., subjects state construction to municipal regulation only under the following circumstances:

APPLICATION OF LAWS, RULES, CODES, ORDINANCES AND REGULATIONS. (a) Except as provided in par. (c), every
building, structure or facility that is constructed for the
benefit of or use of the state or any state agency, board,
commission or department shall be in compliance with all
applicable state laws, rules, codes and regulations but the
construction is not subject to the ordinances or regulations
of the municipality in which the construction takes place
except zoning, including without limitation because of
enumeration ordinances or regulations relating to materials
used, permits, supervision of construction or installation,
payment of permit fees, or other restrictions.

Non-technical terms in section 13.48(13) must be construed
according to their ordinary and accepted meaning. Sec. 990.01,
Stats. But the term "state" has a technical meaning and should be
ascertained by reference to section 990.01(40). Under the
principle of noscitur a sociis, the meaning of the term "state"
may also be ascertained by reference to the surrounding terms
"state agency," "board," "commission" and "department.
Midtown Church of Christ v. City of Racine, 83 Wis. 2d 72, 75
n.4, 264 N.W.2d 281 (1978). I therefore construe the terms
"state," "state agency" and "department" in section 13.48(13) as
referring to the state as a unit of government, as opposed to its
inhabitants. This construction comports with the provisions of
section 990.01(40).

The phrase "for the benefit of" accordingly must be construed
with reference to the state as a unit of government. The fact that
the state or one of its agencies may receive some incidental
benefit from the construction of a facility is not determinative.
Cf. State ex rel. Warren v. Nusbaum, 64 Wis. 2d 314, 328, 219
N.W.2d 577 (1974). Construction of the nature you describe is
for the use of the general public, rather than for the use of DNR
as a state agency. DNR has extensive statutory authority to
acquire and develop all forms of property for public enjoyment.
Sections 23.09(2)(d) and (10), 23.11(2) and 31.14(3)(c) permit
DNR to acquire, develop and create access to property for such
purposes as public recreation, the preservation of historic values
and natural wonders, hunting, trapping, fishing, public trails, forests, parks and waterways.

In addition, prior to 1973, the statute restated the common law principle that the state was not subject to local zoning and related requirements. See 67 Op. Att'y Gen. 251, 252 (1978). In 1973, the Legislature deviated from the common law by simply inserting the phrase "except zoning" into the preexisting statute. Ch. 90, sec. 2, Laws of 1973. The state therefore is still not subject to "without limitation because of enumeration, ordinances or regulations relating to materials used, permits, supervision of construction or installation, payment of permit fees, or other restrictions" of any nature whatsoever. Sec. 13.48(13), Stats.

To the extent that it confers power upon a municipality and removes power from the state, the statute is in derogation of the common law and is therefore subject to a strict construction. See Kranzush v. Badger State Mut. Cas. Co., 103 Wis. 2d 56, 307 N.W.2d 256 (1981). Statutes are not to be extended so as to impose any duty beyond that imposed by the common law unless the statute clearly and beyond any reasonable doubt expresses such a purpose by language that is clear, unambiguous and peremptory. Grube v. Moths, 56 Wis. 2d 424, 437, 202 N.W.2d 261 (1972). This rule of strict construction has its strongest force when the state would be included in a law to its detriment so as to restrain or diminish any of the state's sovereign rights or interests. Wis. Vet. Home v. Div. Nurs. Forfeit. Appeals, 104 Wis. 2d 106, 310 N.W.2d 646 (Ct. App. 1981).

Because the language contained in section 13.48(13) must be construed very narrowly, it is my opinion that the Legislature has never surrendered the state's common law immunity from zoning with respect to state construction of recreational facilities for the use and benefit of the general public, since such construction is not clearly "for the benefit or use of the state or any state agency, board, commission or department" within the meaning of that statute.
Even if state construction of recreational facilities for the use and benefit of the general public would otherwise be subject to municipal regulation under section 13.48(13), it is my opinion that municipal regulation of facilities constructed by DNR in order to afford the general public access to navigable lakes and streams is preempted due to the existence of a comprehensive regulatory scheme established by the Legislature and by DNR in furtherance of its administration of the public trust. Under the public trust doctrine, the state owns the beds of its navigable lakes and streams in fee and in trust for the benefit of all the people, who as beneficiaries of that trust enjoy the rights of boating, hunting, fishing, swimming, skating and appreciation of scenic beauty. *Muench v. Public Service Comm.*, 261 Wis. 492, 53 N.W.2d 514, on reh., 55 N.W.2d 40 (1952); *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983). DNR acts as the delegate of the state in its capacity as owner of navigable lake beds and trustee of navigable waters. It has promulgated administrative rules in furtherance of its administration of the public trust. Wisconsin Administrative Code section NR 1.90(1) mandates that “[t]he public interest in the waters of this state and access to them shall be protected to the fullest extent authorized by the law.”

Wisconsin Administrative Code section NR 1.90(2)(a) provides in part:

“Adequate access” exists when the general public has been provided with entry to a body of water to enjoy quality uses at a reasonable fee, if one is charged, considering the character and uses of the water. The following criteria must also be met:

1. The public should be able to park within a reasonable walking distance of the body of water, given the character and use of the access, but in no case more than 1/4 of a mile from the water.

2. For a body of water having uses involving boating, adequate car-trailer unit parking must be provided to ensure
that the existing or potential users are given an opportunity
to park their vehicles within 1/4 of a mile from the water.
Wisconsin Administrative Code section NR 1.92 provides in
part:

_Providing vehicular access to lakes and streams....

(2) PUBLIC ACCESS. Public access to navigable waters
is defined as a way to such waters, publicly owned or under
public control, reasonably direct and available to all by
means of water, road, trail or otherwise through the privilege
of crossing public or private lands without involving
trespass.

(3) LAND ACQUISITION. Subject to approval of the
natural resources board, the department shall:

(a) Acquire boat launching access to important stream
systems.

(b) Actively pursue acquisition on lakes having more
than 1,000 acres of surface water.

(c) Pursue acquisition on smaller lakes when the
importance for recreational activities to the general public
are such that the board determines it is desirable for the state
to take action.

.......

(6) GUIDELINES FOR PUBLIC ACCESS. In state
acquisition for access . . . the following guidelines shall
apply.

(a) Each project, whether an aid project or state
development, shall have a demonstrable public interest and
need.

.......

(c) For lakes of 50 or more acres and rivers, the
parking capacity of an access site shall be in accord with the
size of the lake or river. The general rule to be applied for
lakes shall be not more than one parking unit for each 10 acres of water.

(e) The primary objective of the state access aid program is to provide public access where needed and none exists. Where access exists but is inadequate, improvement will be considered as a lower priority.

Under these regulations, approval of the Natural Resources Board is required before public access can be granted. Wis. Admin. Code § NR 1.92(1). These administrative code provisions have the force and effect of law. *State ex rel. Staples v. DHSS*, 115 Wis. 2d 363, 367, 340 N.W.2d 194 (1983); *Law Enforce. Stds. Bd. v. Lyndon Station*, 101 Wis. 2d 472, 488, 305 N.W.2d 89 (1981).

In *Oneida County v. Converse*, 173 Wis. 2d 78, 85, 496 N.W.2d 124 (Ct. App. 1992), the court of appeals recently held that:

A local ordinance is invalid if either (1) express statutory language has withdrawn, revoked or restricted the municipality's power to issue such ordinance, (2) the challenged ordinance is logically inconsistent with state legislation, or (3) the challenged ordinance infringes the spirit of a state law or general policy of the state.

The same three part test employed in *Oneida County* was applied by the supreme court to strike down a municipal ordinance which effectively prohibited DNR from authorizing chemical treatment of aquatic weeds. *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 534-35, 271 N.W.2d 69 (1978). Under these cases, a municipality may not zone so as to frustrate a comprehensive regulatory policy established by the Legislature.

Any infringement by a local unit of government upon a comprehensive regulatory scheme resulting in a determination by DNR that recreational access to lakes and streams should be granted to the general public would conflict with state law or
policy. The free and unobstructed management and use of the waters of the state is a matter of statewide concern. State v. Jackman, 60 Wis. 2d 700, 711, 211 N.W.2d 480 (1973); Madison v. Tolzmann, 7 Wis. 2d 570, 575, 97 N.W.2d 513 (1959). The supreme court long ago stated that DNR "must maintain pre-eminence in the control of navigable waters in this state." Dept. of Natural Resources v. Clintonville, 53 Wis. 2d 1, 4, 191 N.W.2d 866 (1971). There is a "clear legislative pattern of vesting increasingly centralized authority over waters of the state in the DNR." Wis. Environmental Decade, Inc., 85 Wis. 2d at 537.

Fond du Lac v. Empire, 273 Wis. 333, 77 N.W.2d 699 (1956) illustrates why the Legislature has preempted local zoning ordinances in those circumstances where DNR has determined that public access should occur. There, the town of Empire passed a series of ordinances requiring a permit from the town board before drilling a water well greater than six inches in diameter. The city of Fond du Lac purchased a tract within the town in order to drill twelve inch wells to augment its water supply and then brought a declaratory judgment action challenging the town's ordinances. Empire claimed that its ordinances were validly adopted to protect the area's water supply—a problem of peculiarly local concern. The court noted the existence of section 144.03, Stats. (1953), which granted the State Board of Health "general supervision and control over the waters of the state" and which also declared that "the public health, comfort, welfare and safety requires the regulation by the state of the use of subterranean waters of the state in the manner provided in this section." The court held that the legislative determination that water resources management required statewide regulation and control was entitled to "great weight" and that the primacy of statewide interests made the town ordinances invalid. Empire, 273 Wis. at 338. The court reached this conclusion even though it acknowledged that local concerns were also involved and even though the Legislature had neither
expressly preempted local regulation nor caused comprehensive regulations to be enacted at the state level.

In my opinion, a similar analysis would be applied where DNR is acting in its capacity as trustee of navigable waters. A municipal zoning ordinance cannot "deprive the public of equal and uniform use" of public waterways. See *Wussow v. Gaida*, 251 Wis. 328, 331, 29 N.W.2d 42 (1947). Such an ordinance would "defeat[] the clear legislative purpose to establish the department as 'the central unit of state government' with 'general supervision and control over the waters of the state.'" *Wis. Environmental Decade, Inc.*, 85 Wis. 2d at 535-36 (citations omitted).

I am aware that a zoning ordinance "is not rendered invalid and constitutionally defective merely because it deals with a matter of state-wide concern." *Wis. Environmental Decade, Inc.*, 85 Wis. 2d at 533. Cf. *State ex rel. Michalek v. LeGrand*, 77 Wis. 2d 520, 527-28, 253 N.W.2d 505 (1977). I also recognize that, under the public trust doctrine, some kinds of municipal regulation are permissible. See *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 601-02, 412 N.W.2d 505 (Ct. App. 1987); *Capt. Soma Boat Line, Inc. v. Wisconsin Dells*, 56 Wis. 2d 838, 847, 203 N.W.2d 369 (1973). But "[t]he law is well established that where a state act fully covers a subject or the state otherwise manifests a purpose to establish a uniform state rule pertaining to it, conflicting local ordinances on the same subject are invalid to the extent of the conflict." *Volunteers of America v. Village of Brown Deer*, 97 Wis. 2d 619, 622, 294 N.W.2d 44 (Ct. App. 1980) (footnote omitted). A local regulation can be permitted to stand only where "there is nothing contradictory between the provisions of the statute and of the ordinance." *Fox v. Racine*, 225 Wis. 542, 547, 275 N.W. 513 (1937).

In some circumstances, a municipality which has enacted an ordinance for a valid statutory purpose might be able to establish that it is "mov[ing] in the same direction . . . farther but not
counter to” DNR with respect to its administration of navigable waterways in trust for the public. *Caeredes v. Platteville*, 213 Wis. 344, 350, 251 N.W. 245 (1933). That issue was most recently discussed in *Oneida County*. There, the court of appeals acknowledged the authority delegated to municipalities under section 144.26 to enact shoreland zoning regulations, but nevertheless held that “municipalities may not disallow what the legislature has expressly licensed or authorized.” *Oneida County*, 173 Wis. 2d at 87. It then struck down a municipal ordinance which effectively prohibited the rebuilding of a boathouse because the ordinance was in conflict with an administrative rule enacted by DNR:

In the instant matter, through NR 325.065, the legislature has expressly authorized an exemption for structures damaged by wind from the 50% requirement for rebuilding nonconforming structures. The county ordinance runs contrary to this. Denying the wind, vandalism or fire exemption is not merely going further than the state, but is acting counter to the state. The state regulation and the local ordinance are diametrically opposed within the narrow issue of rebuilding boat houses damaged by wind, vandalism or fire. The local ordinance is disallowing what the legislature has expressly licensed or authorized. We feel that it is crucial in this instance that the state, through the DNR, has affirmatively acted to exempt boathouses damaged by wind. That action made the ordinance and the state law in conflict and the two rules’ relationship distinct from one where local governments have merely enacted stricter standards than the state. The Oneida County ordinance is therefore invalid to the extent that it denies the wind, vandalism or fire exemption.

*Oneida County*, 173 Wis. 2d at 87.

I therefore conclude that DNR is not subject to local zoning ordinances with respect to its construction of any building, structure or facility whose purpose is to assure the general public
access to outdoor recreational areas, rather than to facilitate the internal operations of DNR as a state agency.

JED:FTC
Children; Confidential Reports; District Attorney: A district attorney or corporation counsel may reveal the contents of a report made under section 48.981 in the course of a criminal prosecution or one of the civil proceedings enumerated under section 48.981(7)(a)10. OAG 10-93

August 3, 1993

MICHAEL E. O'BRIEN, District Attorney
Rock County

You have stated that your office has an open file policy that gives defendants access to all portions of your files except work product. You have asked whether section 48.981(7)(a)1., Stats., requires that a district attorney prevent a defendant from obtaining information about the identity of a mandatory reporter in child abuse cases.

Your question can best be answered as two more specific questions. First, how do the confidentiality provisions of section 48.981(7) operate with regard to the civil litigation proceedings specified by section 48.981(7)(a)10.? Second, do the confidentiality provisions of section 48.981(7) apply when criminal prosecutions are commenced in cases referred to the district attorney pursuant to section 48.981(3)(b)3.? My opinion is that the provisions of section 48.981(7) do not require that either the report or the identity of the reporter remain confidential when either of these types of proceedings are pending and, therefore, the district attorney is not required to conceal information that would identify the reporter or otherwise keep the information in the report confidential in these circumstances. Moreover, in some cases the law may require disclosure of the reporter's identity if the child is to be a witness in a court proceeding and the child has given a statement to the reporter about the incident which causes the reporter to act. See sec. 971.24, Stats. However, it is also my opinion that a district attorney or corporation counsel will further the policies embodied in section 48.981(7) if the district attorney or corporation counsel
protects the identity of a reporter whenever that can be done without impairing either the district attorney's ability to present the state's case or the constitutional or statutory duty to disclose evidence.

The language of the relevant statutory sections and the common rules of statutory construction support these conclusions.

Section 48.981(7) provides in pertinent part:

CONFIDENTIALITY. (a) All reports made under this section . . . shall be confidential. Reports and records may be disclosed only to the following persons:

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

8. A law enforcement officer or agency for purposes of investigation or prosecution.

10. A court conducting proceedings relating to a petition under s. 48.13 or a court conducting dispositional proceedings under subch. VI in which abuse or neglect of the child . . . is the subject of the report or record is an issue.

11. The county corporation counsel or district attorney representing the interests of the public in proceedings under subd. 10.

(e) A person to whom a report or record is disclosed under this subsection may not further disclose it, except to the persons and for the purposes specified in this section.

Initially, I note that the confidentiality provisions of section 48.981(7) apply to the entire report, not just to the identity of the reporter or of the mandatory reporter. The exceptions enumerated
in section 48.981(7) arguably cover the gamut of civil and criminal investigative activities and civil court proceedings. Read *in pari materia*, they require that the entire report be treated as confidential by a district attorney or corporation counsel unless the district attorney or corporation counsel is representing the public interests in a CHIPS proceeding under section 48.13 or a dispositional proceeding under subchapter VI in which abuse or neglect of the child who is the subject of the report or record is at issue. Where the district attorney or corporation counsel is representing the public interest in one of the proceedings specified in section 48.981(7)(a)10., all of the information in the report can be revealed to the court. The plain language of section 48.981(7)(a)10. says this. *See State v. Hopkins*, 168 Wis. 2d 802, 814, 484 N.W.2d 549 (1992). It follows naturally that this same information will be given to all of the parties to the action in the course of the court proceedings or before the proceedings as discovery.

Although section 48.981(7) refers to law enforcement, prosecution and the district attorney in various subsections, it does not directly address the issue of the release of the case report to the district attorney for criminal prosecution. That action is governed by section 48.981(3)(b)3. which provides: "[i]f the police or other law enforcement officials determine that criminal action is necessary, they shall refer the case to the district attorney for criminal prosecution."

Section 48.981(3)(b)3. does not restrict the district attorney’s use of the case information in any way. Obviously, the district attorney could not bring criminal charges unless the statutes exempted this activity from the confidentiality requirements in section 48.981(7) because all criminal prosecutions are public record. The statutes must be construed to avoid absurd results. *State v. Wilks*, 165 Wis. 2d 102, 111, 477 N.W.2d 632 (Ct. App. 1991). The argument that the Legislature intended to tie the hands of the prosecution by forcing them to prosecute without using all of the evidence is absurd. Further, the limiting language
in section 48.981(7)(e) makes it clear that the confidentiality provisions of section 48.981(7) do not apply to a case revealed to the district attorney pursuant to section 48.981(3)(b)3. Section 48.981(7)(e) provides: "[a] person to whom a report or record is disclosed under this subsection may not further disclose it, except to the persons and for the purposes specified in this section." Thus, I conclude that in criminal cases as in civil cases the district attorney litigating a child abuse case is not required to keep information in the investigative file confidential.

When a district attorney or corporation counsel finds that the information received from the reporter is both unnecessary to the effective presentation of the case and not exculpatory, he or she should further the policy in chapter 48 of encouraging reporting by protecting the reporter's identity. I would encourage a district attorney to adopt a practice that conceals the identity of the reporter, using any procedure that has proven effective in the past, whenever this does not undermine the district attorney's ability to carry out the previously described overriding statutory and constitutional duties. However, it is my opinion that such action is discretionary. See State ex rel. Richards v. Foust, 165 Wis. 2d 429, 477 N.W.2d 608 (1991) (public records law does not provide access to prosecutor's files).

Your question also referred to the duty of law enforcement agencies. The language of section 48.981(7) applies to law enforcement agencies with regard to their handling of child abuse reports. If they reveal the information in the reports to any of the persons or agencies listed in section 48.981(7), they must conceal the identity of the reporter wherever the statute requires this, as when the report is given to a subject under section 48.981(7)(a)1. It is only when the report is revealed pursuant to section 48.981(3)(b)3. that the law enforcement agencies are relieved of the confidentiality provisions of section 48.981(7).

JED:DMN
Counties; Regional Planning: The boundaries of existing multicounty regional planning commissions may only be altered following their dissolution under the procedure set out in section 66.945(15), Stats. OAG 11-93

August 19, 1993

WALTER KUNICKI, Chair
Assembly Organization Committee

On behalf of the Assembly Organization Committee, you ask the following three questions concerning withdrawal by a county from a multicounty regional planning commission under section 66.945(16), Stats.:

1. May a county withdraw from one [multicounty] regional planning commission under s. 66.945(16), Stats., and ask for the creation of a new regional planning commission under s. 66.945(2)(a), Stats., that would consist of the county and an [existing] adjacent [multicounty] regional planning commission?

2. Could a county, using the procedure described in question 1 attach itself to an adjacent regional planning commission while some or all of the local governmental units within the jurisdiction of the county remain with the first regional planning commission?

3. If the answer to question 2 is “no,” then may a local unit in a county block the county’s transfer from one regional planning commission by refusing to withdraw from the first body?

In my opinion, the boundaries of existing multicounty regional planning commissions may only be altered following their dissolution under the procedure set out in section 66.945(15). Withdrawal under the procedure established in section 66.945(16) by a local unit of government which is currently included within an existing multicounty regional planning commission, therefore, does not facilitate the transfer of that local unit of government to another existing regional planning commission, unless both
existing regional planning commissions are dissolved at the request of a majority of the local units of government within their respective boundaries under section 66.945(15) and new regional planning commissions for each area are then established by the Governor pursuant to section 66.945(2).

Section 66.945 provides in part:

Creation, organization, powers and duties of regional planning commissions. (1) DEFINITIONS. In this section:

(a) "Governing body" means the town, village or county board or the legislative body of a city.

(b) "Local governmental units" or "local units" means cities, villages, towns and counties.

(c) "Population" means the population of a local unit as shown by the last federal census or by any subsequent population estimate under s. 16.96.

(2) CREATION OF REGIONAL PLANNING COMMISSIONS. (a) A regional planning commission may be created by the governor, or such state agency or official as the governor designates, upon petition in the form of a resolution by the governing body of a local governmental unit and the holding of a public hearing on such petition. If the petition is joined in by the governing bodies of all the local units in the proposed region, including the county board of any county, part or all of which is in the proposed region, the governor may dispense with the hearing. Notice of any public hearing shall be given by the governor by mail at least 10 days in advance to the clerk of each local unit in the proposed region.

(b) If the governor finds that there is a need for a regional planning commission, and if the governing bodies of local units within the proposed region which include over 50% of the population and equalized assessed valuation of the region as determined by the last previous equalization of assessments, consent to the formation of such regional
planning commission, the governor may create the regional planning commission by order and designate the area and boundaries of the commission's jurisdiction taking into account the elements of homogeneity based upon, but not limited to, such considerations as topographic and geographic conformations, extent of urban development, the existence of special or acute agricultural, forestry, conservation or other rural problems, uniformity of social or economic interests and values, park and recreational needs, civil defense, or the existence of physical, social and economic problems of a regional character.

(c) Territory included within a regional planning commission that consists of one county or less in area also may be included in the creation of a multicounty regional planning commission. Such creation does not require that the existing regional planning commission consisting of one county or less in area be terminated or altered, but upon creation of the multicounty commission, the existing commission shall cease to have authority to make charges upon participating local governmental units pursuant to sub. (14) and shall adopt a name other than "regional planning commission".

(14) BUDGET AND SERVICE CHARGES. (a) For the purpose of providing funds to meet the expenses of a regional planning commission, the commission shall annually on or before October 1 prepare and approve a budget reflecting the cost of its operation and services to the local governmental units within the region. The amount of the budget charged to any local governmental unit shall be in the proportion of the equalized value for tax purposes of the land, buildings and other improvements thereon of such local governmental unit, within the region, to the total such equalized value within the region. The amount charged to a local governmental unit shall not exceed .003 per cent of
such equalized value under its jurisdiction and within the region, unless the governing body of such unit expressly approves the amount in excess of such percentage. All tax or other revenues raised for a regional planning commission shall be forwarded by the treasurer of the local unit to the treasurer of the commission on written order of the treasurer of the commission.

(b) Where one-half or more of the land within a county is within a region, the chairman of the regional planning commission shall certify to the county clerk, prior to August 1 of each year, the proportionate amount of the budget charged to the county for the services of the regional planning commission. Unless the county board finds such charges unreasonable, and institutes the procedures set forth below for such a contingency, it shall take such necessary legislative action as to provide the funds called for in the certified statement.

(c) Where less than one-half of the land within a county is within a region, the chairman of the regional planning commission shall before August 1 of each year certify to the clerk of the local governmental unit involved a statement of the proportionate charges assessed to that local governmental unit. Such clerk shall extend the amount shown in such statement as a charge on the tax roll under s. 144.07(2).

(15) **Dissolution of Regional Planning Commissions.** Upon receipt of certified copies of resolutions recommending the dissolution of a regional planning commission adopted by the governing bodies of a majority of the local units in the region, including the county board of any county, part or all of which is within the region, and upon a finding that all outstanding indebtedness of the commission has been paid and all unexpended funds returned to the local units which supplied them, or that
adequate provision has been made therefor, the governor shall issue a certificate of dissolution of the commission which shall thereupon cease to exist.

(16) Withdrawal. Within 90 days of the issuance by the governor of an order creating a regional planning commission, any local unit of government within the boundaries of such region may withdraw from the jurisdiction of such commission by a two-thirds vote of the members-elect of the governing body after a public hearing. Notice thereof shall be given to the commission by registered mail not more than 3 nor less than 2 weeks prior thereto and by publication of a class 2 notice, under ch. 985. A local unit may withdraw from a regional planning commission at the end of any fiscal year by a two-thirds vote of the members-elect of the governing body taken at least 6 months prior to the effective date of such withdrawal. However, such unit shall be responsible for its allocated share of the contractual obligations of the regional planning commission continuing beyond the effective date of its withdrawal.

The boundaries of regional planning commissions are established by the Governor under section 66.945(2) upon petition by local units of government within each "proposed region." My understanding is that there are currently nine regional planning commissions, that their boundaries are contiguous, that their total area encompasses the entire state and that only one of them consists of one county or less in area. The "consent" of "the governing bodies of local units within the proposed region which include over 50% of the population and equalized assessed valuation of the region" was required in order to form each of these regional planning commissions. Sec. 66.945(2)(b), Stats. Meaningful consent could not have been given unless the approximate boundaries of a proposed region were known at the time each commission was formed.
Although any local unit of government within the boundaries of a regional planning commission established by the Governor after the necessary consents have been obtained under section 66.945(2) may subsequently withdraw from that commission under the procedures established in section 66.945(16), nothing in the latter subsection suggests that withdrawal by a local unit of government from an existing regional planning commission automatically alters the boundaries of that commission or even permits the Governor to do so at his discretion. Even if one or more local units withdraw, a commission still continues to plan for the entire area within the region established by the Governor under section 66.945(2)(b) pursuant to the authority which it exercises under section 66.945(8), (9) and (10).

In *Tanck v. Dane County Regional Plan. Comm.*, 81 Wis. 2d 76, 260 N.W.2d 18 (1977), a majority of the towns and villages within a single county regional planning commission had withdrawn from that commission, but the county itself had not done so. In *Tanck*, 81 Wis. 2d at 84, the court rejected the argument that "the withdrawal provisions of subsection 66.945(16), indicate[] a legislative intent to enable a participating local government unit to withdraw from the purview of the Commission both politically as well as financially" (emphasis supplied). The court reasoned:

The withdrawal provision of sec. 66.945(16) provides withdrawal "from the jurisdiction of such commission" if two-thirds of the voters of the local unit so vote within 90 days of the Commission’s creation. Thereafter, the statute provides merely withdrawal "from a regional planning commission." Even assuming that the withdrawal of a local unit from the Commission absolves the unit of its obligations to submit proposed facilities as required by sec. 66.945(11) and direct fiscal support under sec. 66.945(14), to hold that this withdrawal affects the participation of a county would render ineffective all those provisions permitting its participation in the Commission.
Here, the county is still participating as a representative of the entire area within its boundaries. Until it too withdraws from the Commission, or until the Commission is dissolved pursuant to sec. 66.945(15), Stats., it is empowered to seek from the Commission services which will be in its best interests to obtain. In doing so, it acts as the county and for the county. The relationship between the county and the town . . . remains the same regardless of their participating or non-participation with the Commission. Tanck, 81 Wis. 2d at 88 (emphasis supplied).

Under the fact situation you describe, the county did not withdraw from the regional planning commission of which it is currently a member within ninety days of the formation of that commission. Like the court in Tanck, I therefore need not decide whether withdrawal at that time would have altered the jurisdictional boundaries of the existing commission at the time it was formed. But the language the court employed certainly lends support to the premise that the statute should be construed so as to make dissolution under section 66.945(15) a prerequisite to the alteration of the boundaries of an existing multicounty commission once those boundaries become established.

Although the court did not reach the issue in Tanck, the conclusion that dissolution is necessary is reinforced by the symmetry between subsection (2) and subsection (15) of section 66.945. Subsection (2) permits formation of a regional planning commission only upon either the unanimous consent of all local units of government within a proposed region or upon the consent of those local units within the proposed region which encompass a majority of the population and a majority of the equalized assessed valuation of the region. Subsection (15), in turn, permits dissolution of a regional planning commission only upon the consent of the majority of local units of government within the existing region. To the extent that two statutes deal with the same subject matter, they must not be interpreted in such a manner as to indicate contradictory legislative intent. St. ex rel.
Teunas v. Kenosha County, 142 Wis. 2d 498, 509, 418 N.W.2d 833 (1988). A construction of section 66.945, which would permit a local unit of government to "jump" from one existing regional planning commission to another would entirely ignore the similarity between the majority requirements of subsections (2) and (15) of section 66.945.

I therefore conclude that the boundaries of existing multicounty regional planning commissions may only be altered following their dissolution under the procedure set out in section 66.945(15).

JED: FTC
Drugs; Law Enforcement; Railroads; Federal legislation has explicitly preempted the field of rail safety and not conferred authority on state or local law enforcement officials to conduct drug tests of locomotive engineers involved in grade crossing accidents in Wisconsin. However, this legislation does not preempt state regulation of drugs and narcotics. Thus, state or local law enforcement officials acting pursuant to their authority to enforce the state’s general criminal statutes may conduct drug tests of locomotive engineers provided that the testing comports with the fourth amendment. OAG 12-93

October 26, 1993

MICHAEL G. ELLIS, Chairperson
Senate Committee on Organization

The Senate Committee on Organization asks whether state or local law enforcement officials may conduct drug testing of locomotive engineers who are involved in grade crossing accidents in Wisconsin. This question requires an analysis of three issues:

1. Whether state or local authorities may adopt regulations that would specifically confer authority on law enforcement officials to conduct drug testing of locomotive engineers who are involved in grade crossing accidents in Wisconsin.

2. Whether state or local law enforcement officials may enforce the state’s drug testing provisions embodied in the federal legislation governing railroad safety.

3. Whether state or local law enforcement officials may conduct drug testing of locomotive engineers under their authority to enforce the state’s general criminal law imposing sanctions for reckless or negligent conduct.

It is my opinion that the Federal Railroad Safety Act of 1970, 45 U.S.C.A. § 421 et seq. (West 1986), has explicitly preempted the field of rail safety and not conferred authority on state or local law enforcement officials to conduct drug tests of locomotive engineers involved in grade crossing accidents. It is
further my opinion that the Federal Railroad Safety Act did not intend to preempt the state’s enforcement of its general criminal laws imposing sanctions for reckless or negligent conduct. Thus, state or local law enforcement officials enforcing the general criminal statutes may conduct drug tests of locomotive engineers provided that the testing comports with the strictures of the fourth amendment. I will address each of these issues in turn.

1. May state or local authorities adopt regulations that would specifically confer authority on law enforcement officials to conduct drug testing of locomotive engineers who are involved in grade crossing accidents in Wisconsin?

In 1970, the United States Congress enacted the Federal Railroad Safety Act, which authorized the United States Secretary of Transportation (hereafter “Secretary”) to adopt railroad safety regulations. Congress included in the act broad preemption provisions under the Supremacy Clause of the United States Constitution article VI, clause 2, excluding the states from legislating in any area of railroad safety addressed by the Secretary. 45 U.S.C.A. § 434 (West 1986) provides:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.
The federal courts have interpreted these statutory provisions to evince a "total preemptive intent." *Nat. Ass’n of Regulatory Util. Com’rs v. Coleman*, 542 F.2d 11, 13 (3d Cir. 1976).

The conclusion that the Federal Railroad Safety Act was intended to preempt the field of rail safety is confirmed by an examination of the Act’s legislative history. The House Committee on Interstate and Foreign Commerce, to which the bill was referred, concluded that the safety of the nation’s railroads would not be advanced by subjecting the national rail system to conflicting requirements and varied enforcement in fifty different jurisdictions. H.R. Rep. No. 1194, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109. Thus, the committee clearly stated that once the United States Department of Transportation (hereafter “Department of Transportation”) had prescribed a uniform, national standard, the states would no longer have authority to establish statewide regulations with respect to rail safety. *Id.* at 4116-17.

That federal government preemption of state or local regulation in the field of rail safety extends to post-accident drug testing is further evidenced by the Department of Transportation’s regulations for the “Control of Alcohol and Drug Use” in railroad operations found at 49 C.F.R. pt. 219 (1992). Pursuant to the rulemaking authority delegated in the Federal Railroad Safety Act, the Department of Transportation promulgated regulations designating the circumstances that permit, or require, drug testing. It is well-settled that a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation. *Louisiana Public Service Com’n v. F.C.C.*, 476 U.S. 355, 369 (1986). Regulations adopted within the scope of such delegated authority have the same preemptive effect as the statute itself. *Fidelity Federal Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141 (1982). 49 C.F.R. § 219.201(b) (1992) explicitly addresses the administration of drug tests following accidents at grade crossings. It therefore precludes states from establishing standards with respect to drug testing in these circumstances, as
uniform national standards have already been prescribed under federal law. See CSX Transp., Inc. v. Easterwood, ___ U.S. ___, 113 S. Ct. 1732 (1993).

In addition, the Department of Transportation’s regulations, like the authorizing legislation found in the Federal Railroad Safety Act, contain an explicit preemption provision:

Preemptive effect.

(a) Under section 205 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 434), issuance of these regulations preempts any State law, rule, regulation, order or standard covering the same subject matter, except a provision directed at a local hazard that is consistent with this part and that does not impose an undue burden on interstate commerce. 49 C.F.R. § 219.13 (1992).

Invocation of the “local hazard” exception would not provide a permissible basis for state or local regulation of drug testing in the railroad industry. As Congress has announced, the “local hazard” savings clause is not intended “to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter.” Coleman, 542 F.2d at 14. Rather, “[t]he exception was designed instead to enable the states to respond to local situations which are not statewide in character and not capable of being adequately encompassed within uniform national standards.” Id. at 14-15. See H.R. Rep. No. 1194, reprinted in 1970 U.S.C.C.A.N. at 4116-17. Post-accident drug testing does not fall within the ambit of a local situation that is not capable of being addressed by national standards because it is of statewide concern.

Because federal legislation has occupied the field of rail safety, including the drug testing of locomotive engineers who are involved in grade crossing accidents, it is my opinion that state and local officials may not adopt specific regulations that confer authority on state or local law enforcement officials to conduct such tests.
2. May state or local law enforcement officials enforce the drug testing provisions embodied in the federal legislation governing railroad safety?

Although the Secretary possesses "the exclusive authority to assess and compromise penalties" for violations of the Federal Railroad Safety Act, the act contemplates a limited state role in enforcement of its regulations. 45 U.S.C.A. § 435 (West 1986 & Supp. 1993). A state may participate in "investigation and surveillance" in connection with the rules or standards prescribed by the Secretary provided that the certification provisions contained in the statute are satisfied. 45 U.S.C.A. § 435. It is the Secretary, however, who is expressly authorized to delegate to qualified persons the functions of examining, inspecting and testing. 45 U.S.C.A. § 437(a) (West Supp. 1993).

The regulations promulgated by the Secretary do not provide a role for the states or local authorities in drug testing of locomotive engineers. Throughout the administrative rules regarding the control of alcohol and drug use among railroad employees, only the railroads are explicitly given authority to order drug tests. See 49 C.F.R. pt. 219. Thus, state and local law enforcement authorities lack the authority to order testing pursuant to the Federal Railroad Safety Act.

3. May state or local law enforcement officials, acting under their authority to enforce state criminal statutes, conduct drug testing of locomotive engineers?

While the Federal Railroad Safety Act was intended to preempt regulation in the field of rail safety, the regulations and the legislative history of the act evince no intent to preempt state criminal law imposing sanctions for reckless or negligent conduct.

49 C.F.R. § 219.13(b) (1992) provides:

FRA does not intend by issuance of these regulations to preempt provisions of State criminal law that impose sanctions for reckless conduct that leads to actual loss of life, injury or damage to property, whether such provisions
apply specifically to railroad employees or generally to the public at large.

Under the applicable standard governing preemption, state law is preempted only when it is an obstacle in the accomplishment and execution of the full purposes and objectives of federal law. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 78-79 (1987). 49 C.F.R. § 219.13(b) is evidence that enforcement of state criminal law directed toward sanctions for reckless or negligent conduct is not an obstacle in accomplishing and executing the full purposes and objectives of the Railroad Safety Act.

Two fundamental tenets of preemption doctrine further support this conclusion. There is a strong presumption of validity when a state exercises its legitimate police powers. *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 U.S. 440, 442 (1960). Moreover, when preemption is found, state law is invalid only to the extent of the preempted field’s natural boundaries. *People of State of Ill. v. Kerr-McGee Chem. Corp.*, 677 F.2d 571, 578-79. As evidenced by 49 C.F.R. § 219.13(b), the boundary of railroad safety does not necessarily extend to enforcement of criminal penalties for reckless or negligent conduct. If law enforcement officers establish probable cause that these criminal statutes may have been violated, they may pursue the violation as they would with any other citizen. Locomotive engineers are not exempt from the state’s criminal laws.

Pursuant to their authority to enforce general statutes criminalizing reckless or negligent conduct, law enforcement officers may require locomotive engineers to submit to drug tests following accidents at grade crossings. The intent of their search, however, must be to enforce these criminal statutes rather than railroad safety laws. As with any other drug test they administer, these searches must also comport with the fourth amendment’s prohibition against unreasonable searches and seizures. While special safety needs may give the Federal Railroad Administration authority to require some routine drug testing
without a warrant or probable cause, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989), local law enforcement may only test pursuant to probable cause of a violation of a criminal statute.

In summary, I conclude that state or local law enforcement officials do not have the authority to enforce federal statutes governing testing incident to railroad accidents. Additionally, state or local governments cannot confer such authority on law enforcement officials to conduct drug tests, as this field has been explicitly preempted by federal legislation. However, I also conclude that state or local law enforcement officials would not be prohibited by the Federal Railroad Safety Act from prescribing drug tests under their authority to enforce the state’s general criminal statutes.

JED:WDW
Elections; Ethics, State Board Of; Public Officials; The Ethics Board cannot extend the date by which a candidate for state public office must file a statement of economic interests and cannot waive the filing requirement. OAG 13-93

November 3, 1993

R. ROTH JUDD, Executive Director
Ethics Board

On behalf of the Ethics Board (Board) you have asked whether the Board has the authority to extend the date by which a candidate for state public office must file a statement of economic interests so that the candidate’s name may be certified for placement on a ballot. I conclude that the Board does not have that authority.

Section 19.43(4) of the Wisconsin statutes requires that a candidate for state public office file with the Board a statement of economic interests “no later than 4:30 p.m. on the 3rd day following the deadline for filing nomination papers for the office which the candidate seeks.” That statute also requires election officials to ascertain whether a candidate has complied with that law and further provides that if the candidate has not complied the election official “may not certify the candidate’s name for ballot placement.”

Section 19.43(8) gives the Board the authority to “extend the time for filing or waive any filing requirement if the board determines that the literal application of the filing requirements of this subchapter would work an unreasonable hardship on that individual or that the extension of the time for filing or waiver is in the public interest.”

Section 8.10(5) provides:

Nomination papers shall be accompanied by a declaration of candidacy under s. 8.21. If a candidate has not filed a registration statement under s. 11.05 at the time he or she files nomination papers, the candidate shall file the statement with the papers. A candidate for state office or municipal
judge shall also file a statement of economic interests with the ethics board under s. 19.43(4) no later than 4:30 p.m. on the 3rd day following the last day for filing nomination papers under sub. (2)(a).

The statutes governing nominations for the fall elections and special elections have similar requirements. Secs. 8.15(4)(b) and 8.50(3), Stats.

Section 8.30(3) provides: "The official or agency with whom declarations of candidacy are required to be filed may not place a candidate's name on the ballot if the official or agency is prohibited from doing so under s. 19.43(4) or an ordinance adopted under s. 19.59(3)(b)."

The Legislature has vested exclusive jurisdiction over the election laws in the Elections Board. Sec. 5.05(1), Stats. Section 19.43(8) permits the Board to extend the time for filing or waive the filings of statement of economic interests "of this subchapter." That grant of authority on its face only applies to statements of economic interests filed under the requirements of the ethics law; the statute does not purport to govern statements required by the elections law.

Various election statutes require the filing of statements of economic interests. Some reference section 19.43(4), e.g., sections 8.10(5), 8.16(2) and 8.35(2)(c); others do not, e.g., sections 8.15(4)(b), 8.20(6) and 8.50(3)(a). Construing section 19.43(8) as allowing the Board to waive the filing of statements of economic interests would result in the anomalous situation where the Board could waive a mandatory requirement of the elections law, a law administered by a different, independent agency. Interpreting section 19.43(8) as allowing the Board to grant extensions of time to file statements of economic interests under the elections law would mean that the Board, contrary to specific legislative direction in the election statutes, could allow certain candidates to file their statements after the election, thereby depriving the voters of the information on those statements. That interpretation would also mean that the Board would be able to grant waivers
or extensions of time to file documents required by the elections law even if the Elections Board disagreed with the Board’s decisions.

The reference in some election statutes to section 19.43(4) can hardly be construed as necessarily incorporating the waiver provisions of section 19.43(8). As noted, only some of the election statutes which require filing a statement of economic interest actually refer to section 19.43(4). To conclude that the reference in some statutes to section 19.43(4) necessarily includes the waiver provisions of section 19.43(8) is to conclude that the Legislature intended to allow the Board to waive the requirements for filing a statement of economic interests in some elections but decided to withhold that authority for other elections. There is no reason to make that assumption.

Applying the well-known canon of statutory construction that the specific governs the general also compels the conclusion that the Board’s authority to grant waivers or extensions of time under section 19.43(8) does not apply to the filing requirements under the elections law. The command to the election officials in both sections 19.43(4) and 8.30(3) is specific. The election officials must determine whether the candidate has complied with the filing requirements; “[i]f not, the elections board, municipal clerk or board of election commissioners may not certify the candidate’s name for ballot placement.” Sec. 19.43(4), Stats. Section 19.43(4) requires that the candidate comply with “this subsection” i.e., section 19.43(4) which, like section 8.10(5), requires filings no later than 4:30 p.m. on the third day following the deadline for nomination papers for the office which the candidate seeks.

Filing deadlines involving elections have “consistently been treated as mandatory.” State ex rel. Ahlgrimm v. State Elections Bd., 82 Wis. 2d 585, 592, 263 N.W.2d 152 (1978). In that case Judge Ahlgrimm, “[b]ased on the information given him by the County Clerk and based upon his own reading of the statutes governing nomination papers,” concluded that he should file his
nomination papers with the Racine County Clerk. *Ahlgrimm*, 82 Wis. 2d at 588. Judge Ahlgrimm and the clerk were wrong; he should have filed his nomination papers with the Elections Board. Although the nomination papers were timely filed, the supreme court held that Judge Ahlgrimm’s name could not be placed on the ballot because he had not filed with the correct officer. In *Ahlgrimm* the court was applying section 8.10(6) which determines the place for filing nomination papers. Section 8.10(5) is even more specific than the statute applied in *Ahlgrimm*.

In *Ahlgrimm* the court also interpreted section 8.30(1) which states that election officials “may refuse to place the candidate’s name on the ballot” under certain circumstances including “[i]f the nomination papers are not prepared, signed and executed, as required under this chapter.” The court held that filing was not included within the meaning of “prepared, signed and executed” because “[f]iling is something that is done with the nomination papers, whereas, preparing, signing and executing are things that are done to nomination papers.” *Ahlgrimm*, 82 Wis. 2d at 596.

The subsection of section 8.30 interpreted in *Ahlgrimm* granted election officials the discretion to place a candidate’s name on the ballot in certain circumstances because the statute provided that the officials “may refuse to place the candidate’s name on the ballot.” Section 8.30(3), in contrast, unmistakably provides that the election officials “may not place a candidate’s name on the ballot” if a statement of economic interests is not timely filed. Other election statutes have similar provisions. For example, section 8.16(2) provides that a person who receives only write-in votes cannot appear on the ballot unless certain conditions are met including the filing of a statement of economic interest.

Election officials cannot waive the mandatory filing requirements of the elections law. It would be anomalous to conclude that the Board could waive the filing requirements of the elections law. Section 19.43(8) gives the Board the authority to extend the time for filing or waive the requirements of filing statements of economic interests under chapter 19. It does not
give the Board the authority to waive the separate and independent requirements of chapter 8.

Section 19.43(8) cannot be read as ousting the Election Board's exclusive jurisdiction over election matters. It cannot be read as giving the Board the discretion to waive what otherwise would be a mandatory filing requirement under the election laws. Interpreting section 19.43(8) as allowing the Board to waive the filing of statements of economic interests would frustrate the law's purpose of providing timely information to the voters concerning candidates' economic interests.

JED:AL
Compatibility; The office of member of a county planning and zoning commission is incompatible with the position of executive director of the county housing authority. OAG 14-93

November 4, 1993

WALTER KUNICKI, Assembly Speaker
Assembly Committee on Organization

On behalf of the Assembly Committee on Organization, you have asked whether the position of county housing director is a position of public employment and, if it is, whether holding that position is compatible with holding the office of county planning and zoning commissioner.

The doctrine of incompatibility applies when one office is superior in some respect to another, so that the duties exercised under each might conflict to the public detriment, State v. Jones, 130 Wis. 572, 575-76, 110 N.W. 431 (1907), and also applies "where the nature and duties of two offices [are] such as to render it improper from considerations of public policy for one person to discharge the duties of both." Martin v. Smith, 239 Wis. 314, 326, 1 N.W.2d 163 (1941). The doctrine applies not only to public offices but to positions of public employment. Otradovec v. City of Green Bay, 118 Wis. 2d 393, 395, 347 N.W.2d 614 (Ct. App. 1984). Incompatibility of office or position requires the involvement of two governmental offices or positions. 63A Am. Jur. 2d Public Officers and Employees § 79 (1984). Therefore, if the executive director of the county housing authority is not a public employe, the doctrine does not apply.

A county housing authority is a "public body and a body corporate and politic, exercising public powers." Sec. 66.40(9), Stats. The powers of the authority are vested in the commissioners of the authority. Sec. 66.40(5)(a), Stats. The commissioners serve a term of office of five years, section 66.40(5)(b), Stats., and employ the executive director. Sec. 66.40(5)(c), Stats. Section 66.40(8) provides that commissioners may be removed for inefficiency, neglect of duty or misconduct
in office and that removal is subject to the provisions of section 17.16 which governs removals from various public offices. I conclude that a housing authority is a public body and the commissioners of the authority are public officers.

Because the executive director and other employees of a housing authority are subordinate to the commissioners, they hold positions of employment, not offices. Martin, 239 Wis. at 332-33. The employees of a housing authority are not employees of the municipality which created the authority, 64 Op. Att'y Gen. 106 (1975) and 45 Op. Att'y Gen. 180 (1956), but they are nevertheless public employees and the executive director of a housing authority holds a position of public employment. See also 35 Op. Att'y Gen. 58 (1946) (funds of municipal housing authorities are subject to the public deposits law).

A planning and zoning commission is authorized to act in all matters pertaining to county planning and zoning. It makes policy for the county in those areas. Sec. 59.97(2)(bm), Stats. If the county has a county executive, the county executive appoints the commissioners for staggered three year terms. Sec. 59.97(2)(a)3., Stats. If there is no county executive, the commissioners are designated as such by the county board and may or may not be members of the county board. Sec. 59.97(2)(a), Stats. The commission "possess[es] a delegation . . . of the sovereign power of government to be exercised for the benefit of the public." Martin, 239 Wis. at 332, quoting State ex rel. Barney v. Hawkins, 79 Mont. 506, 257 Pac. 411, 53 A.L.R. 583 (1927). The members of a planning and zoning commission are, therefore, public officers.

Unlike the situation in Otradovec, where employment in a position in the assessor's office was incompatible with holding the office of member of the common council because the position was essentially subordinate to the office, the planning and zoning commission and the housing authority exist independently of each other; neither is subordinate to or superior to the other. But incompatibility also exists when sound public policy renders it
improper for one person to attempt to discharge the duties of both offices or positions. *Otradovec*, 118 Wis. 2d at 396. “An incompatibility exists whenever the statutory functions and duties of the offices conflict or require the officer to choose one obligation over another. If this is the governmental scheme, incompatibility must be found even though in practice a conflict of duty might never arise.” 63A Am. Jur. 2d *Public Officers and Employees* § 78 (1984).

It is possible that a housing authority would ask the county planning and zoning commission to change a zoning designation or waive zoning requirements for a housing authority project. In that situation, the authority’s executive director would be in the position of voting as a member of the planning and zoning commission on his or her employer’s application. In 77 Op. Att’y Gen. 150 (1988), this office held that the office of administrator of a county health care center was incompatible with the office of member of the county community programs board, because a board member would be “called upon to deal with the same board of trustees which functions as his superior in another context [on] issues affecting the very institution of which he or she is principal responsible operating officer.” 77 Op. Att’y Gen. at 152. The same reasoning leads to the same conclusion here; the position and office are incompatible. It does not matter whether conflicts exist in all or a greater part of the function of the office and position. *Otradovec*, 118 Wis. 2d at 397; *Jones*, 130 Wis. at 575-76. Incompatibility may exist even if the duties of the offices would conflict only on rare occasions. 63A Am. Jur. 2d *Public Officers and Employees* § 78.

An employee of the housing authority who served as a member of the planning and zoning commission might very well be required to choose between his or her obligation as an employee of the housing authority and his or her obligation as a commissioner if the housing authority had a matter pending before the commission. Although it could be argued that the mere possibility that the housing authority’s business may require
planning and zoning commission action should not lead to a finding of incompatibility, Wisconsin precedent, and sound public policy, persuade me that the better conclusion is that an executive director of a housing authority may not also serve as a member of a planning and zoning commission.

Under the common law a person who accepts an incompatible office vacates or by implication resigns, the first office or position. The conclusion that there is incompatibility, therefore, is also the most prudent advice to any individual considering holding both the office and the position.

JED:AL
Constitutional Law; Property; A Wisconsin law patterned on Illinois' law which provides that improvements to real property would be assessed on the date of the completion of the improvements would be unconstitutional under article VIII, section 1 of the Wisconsin Constitution. OAG 15-93

December 15, 1993

WALTER KUNICKI, Chairperson
Assembly Organization Committee

You ask whether a change in Wisconsin law which would provide a different assessment date for newly constructed property would be constitutional under the Uniformity Clause. As an example of that kind of law you refer to 35 Illinois Compiled Statutes 205/27a (West 1993). That law provides:

[T]he owner of real property on January 1 shall be liable, on a proportionate basis, for the increased taxes occasioned by the construction of new or added buildings, structures or other improvements on such property from the date when such improvement was substantially completed and initially occupied or initially used, to December 31, of such year. The owner of such improved real estate shall notify the assessor, within 30 days of completion of the improvements, on a form prescribed by such official, of any such construction and request that the real estate be reassessed. Such notice shall be sent by certified mail, return receipt requested and shall include the legal description of the real estate.

The Illinois law also provides that an assessment may be reduced during any year in which buildings, structures or improvements are destroyed or become uninhabitable. In my opinion, such a statute would not be consistent with the requirements of Wisconsin's Uniformity Clause.

The pertinent part of Wisconsin Constitution article VIII, section 1 provides: "The rule of taxation shall be uniform . . . .
[t]axes shall be levied upon such property . . . as the legislature shall prescribe.”

Our supreme court construed the Uniformity Clause soon after Wisconsin became a state. The court held that the constitution required that:

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

Knowlton v. Supervisors of Rock County, 9 Wis. 378 (*410), 389 (*420-21) (1859). The Uniformity Clause requires that property either be taxed or be absolutely exempt. Partial exemptions from property tax, valuation based on classes of property and property tax rates based on classifications of property are all unconstitutional. Knowlton; Chicago & N.W.R. Co. v. The State, 128 Wis. 553, 108 N.W. 557 (1906); State ex rel. Baker Mfg. Co. v. Evansville, 261 Wis. 599, 53 N.W.2d 795 (1952); Gottlieb v. Milwaukee, 33 Wis. 2d 408, 147 N.W.2d 633 (1967).

Section 70.10, Stats., provides: “The assessor shall assess all real and personal property as of the close of January 1 of each year.” Manufacturing property, which is assessed by the Department of Revenue, must also be assessed as of the close of January 1. Sec. 70.995(5), Stats.

One of the principles of uniformity provides that in general “[t]here can be variations in the mechanics of property assessment or tax imposition so long as the resulting taxation shall be borne with as nearly as practicable equality on an ad valorem basis with other taxable property.” Gottlieb, 33 Wis. 2d at 424. The law, therefore, may provide for different methods of valuing personal and real property, but if those different methods result in materially different values, the law violates the

Unlike Wisconsin’s Uniformity Clause, which requires uniformity of taxation for all property both real and personal, the Illinois constitution only requires uniformity of taxation for real property. Ill. Const. of 1970, art. IX, § 4(a). A Wisconsin law which followed the Illinois statute would be unconstitutional under Wisconsin’s Uniformity Clause because it would result in the value of personal property being assessed at its value on January 1 of each year but would provide a different method of valuation for real property, a method that made allowances for changes in valuation during the year. That would violate Wisconsin’s constitutional requirement of uniformity of taxation of real and personal property without distinction. *Baker*, 261 Wis. at 608-10.

My conclusion that the Illinois system of assessing real property would not be constitutional under Wisconsin’s Uniformity Clause, because it creates unequal assessments between personal and real property, makes it unnecessary to consider whether the law would be unconstitutional for other reasons. I would point out, however, that the law makes allowances for changes in value if the value of the land is changed because of the addition of improvements or damage to improvements, but makes no provision for other factors which could cause a radical change in valuation during the year, for example, the construction of a commercial building next to a residence or the addition or abandonment of a road. Since the law would only recognize changes in valuation caused by changes in improvements, there is serious question whether the law would be constitutional under Wisconsin’s constitution even if the law somehow treated personal property uniformly.

Of course, any statute would be presumed to be constitutional and would have to be found unconstitutional beyond a reasonable doubt. *Village of Oregon v. Waldofsky*, 177 Wis. 2d 412, 418, 501 N.W.2d 912 (Ct. App. 1993). The requirements of the
Uniformity Clause are strict, however, and this office has found state statutes, e.g., 77 Op. Att’y Gen. 128 (1988), and proposed legislation, 68 Op. Att’y Gen. 76 (1979), to be inconsistent with those requirements. I conclude that a law patterned on the Illinois statute would be found to be unconstitutional under Wisconsin’s Uniformity Clause.

JED:AL
Counties; County Board; Zoning: An amendment to a county zoning ordinance which adds a new zoning district to that ordinance does not necessarily constitute a comprehensive revision requiring town board approval of the entire county zoning ordinance under the provisions of section 59.97(5)(d), Stats. OAG 1-94

January 26, 1994

BENJAMIN SOUTHWICK, Corporation Counsel
Richland County
You ask, in effect, whether an amendment to a county zoning ordinance which "adds one new zoning district" to that ordinance necessarily constitutes a comprehensive revision requiring town board approval of the entire county zoning ordinance under the provisions of section 59.97(5)(d), Stats.

In my opinion, the answer is no.

Section 59.97 provides in part:

(5) FORMATION OF ZONING ORDINANCE; PROCEDURE.
(a) When the county zoning agency has completed a draft of a proposed zoning ordinance, it shall hold a public hearing thereon, following publication in the county of a class 2 notice, under ch. 985. After such hearing the agency may make such revisions in the draft as it shall deem necessary, or it may submit the draft without revision to the county board with recommendations for adoption. Proof of publication of the notice of the public hearing held by such agency shall be attached to its report to the county board.

(b) When the draft of such ordinance, recommended for adoption by the zoning agency, is received by the county board, it may adopt the ordinance as submitted, or reject it, or return it to the agency with such recommendations as the county board may see fit to make. In the event of such return subsequent procedure by the agency shall be as if the agency were acting under the original directions. When adopted, duplicate copies of the ordinance shall be submitted
by the county clerk by registered mail to each town clerk for consideration by the town board.

(c) A county ordinance adopted as provided by this section shall not be effective in any town until it has been approved by the town board. If the town board approves an ordinance adopted by the county board, as provided by this section, a certified copy of the approving resolution attached to one of the copies of such ordinance submitted to the town board shall promptly be filed with the county clerk by the town clerk. Such ordinance shall become effective in such town as of the date of such filing, which filing shall be recorded by the county clerk in the clerk's office, reported to the town board and the county board, and printed in the proceedings of the county board. Such ordinance shall supersede any prior town ordinance in conflict therewith or which is concerned with zoning, except as provided by s. 60.62.

(d) The county board may by a single ordinance repeal an existing county zoning ordinance and reenact a comprehensive revision thereto in accordance with this section. "Comprehensive revision" as used herein means a complete rewriting of an existing zoning ordinance which changes numerous zoning provisions and alters or adds zoning districts. The comprehensive revision may provide that the existing ordinance shall remain in effect in a town for a period of up to one year or until the comprehensive revision is approved by the town board, whichever period is shorter. If the town board fails to approve the comprehensive revision within a year neither the existing ordinance nor the comprehensive revision shall be in force in that town. Any repeal and reenactment prior to November 12, 1965 which would be valid under this paragraph is hereby validated.

(e) The county board may amend the regulations of an ordinance or change the district boundaries. The procedure
with reference to such amendments or changes shall be as follows:

1. A petition for amendment of any county zoning ordinance may be made by any property owner in the area to be affected by the amendment, by the town board of any town wherein the ordinance is in effect; by any member of the county board or by the agency designated by the county board to consider county zoning matters as provided in sub. (2)(a). The petition shall be filed with the county clerk who shall immediately refer it to the county zoning agency for its consideration, report and recommendations. Immediate notice of the petition shall be sent to the county supervisor of any affected district. A reporting of all petitions referred under this paragraph shall be made to the county board at its next succeeding meeting.

2. Upon receipt of such petition by such agency it shall call a public hearing thereon. Notice of the time and place of such hearing shall be given by publication in the county of a class 2 notice, under ch. 985. A copy of such notice shall be mailed by registered mail to the town clerk of each town affected by the proposed amendment at least 10 days prior to the date of such hearing.

3. Except as provided under subd. 3m, if a town affected by the proposed amendment disapproves of the proposed amendment, the town board of such town may file a certified copy of the resolution adopted by such board disapproving of the petition with the agency prior to, at or within 10 days after the public hearing. If the town board of the town affected in the case of an ordinance relating to the location of boundaries of districts files such a resolution, or the town boards of a majority of the towns affected in the case of all other amendatory ordinances file such resolutions, the agency may not recommend approval of the petition without change, but may only recommend approval with change or recommend disapproval.
It is unclear from your inquiry exactly what you mean by the phrase "adds one new zoning district." In your opinion to the zoning committee determining that the provisions of section 59.97(5)(d) would be applicable, you state that "[t]he addition of a new zoning district to the County's current Zoning Ordinance would necessitate both the changing of at least one zoning district by the deletion of certain permitted uses from that district and the transfer of those permitted uses into the newly-created district." You then conclude that the provisions of section 59.97(5)(d) are triggered because at least "two districts would be affected" by a contemplated amendment which "adds one new zoning district." A proposed amendment which simply "change[s] the district boundaries" within the meaning of section 59.97(5)(e) would not require town board approval of the entire ordinance even though that kind of amendment also would likely affect more than one zoning district. I therefore assume from your inquiry that the proposed amendment creates a new zoning classification and that one or more unincorporated areas within the county will be rezoned from existing classifications to that new classification. See sec. 59.97(4), Stats.

A statute should be construed so as to give effect to its leading idea. State v. Olson, 106 Wis. 2d 572, 585, 317 N.W.2d 448 (1982). The entire section and related sections are to be considered in its construction or interpretation. State v. Clausen, 105 Wis. 2d 231, 244, 313 N.W.2d 819 (1982). It should be construed in such a fashion that each part of the statute meshes with every other part so as to produce a harmonious whole. In re Marriage of Levy v. Levy, 130 Wis. 2d 523, 530, 388 N.W.2d 170 (1986).

When read together, the leading idea of section 59.97(5)(d) and (e) is that some form of town board approval is central to the county zoning process. Nevertheless, the requirement of town board approval of an entire county zoning ordinance is rare. Once initial town board approval of an entire county zoning ordinance is obtained under section 59.97(5)(c), subsequent approval of an
entire county zoning ordinance is required only in connection with a "comprehensive revision" of an existing county zoning ordinance. The first sentence of section 59.97(5)(d) indicates that such a complete rewriting occurs in conjunction with the "repeal [of] an existing county zoning ordinance." Although I do not construe this sentence to mean that the entirety of a county zoning ordinance must be repealed in order for a comprehensive revision to occur, all or a substantial portion of a county's zoning ordinance would have to be repealed or amended in order to constitute a comprehensive revision. Compare Athey v. City of Peru, 22 Ill. App. 3d 363, 317 N.E.2d 294, 298 (1974): "A subsequent statute [or ordinance] revising the whole subject matter of a former statute [or ordinance] and intended as a substitute for it, although it contains no express words to that effect, operates as a repeal of the former act."

The second sentence of section 59.97(5)(d) specifically defines a "comprehensive revision" as a "complete rewriting of an existing zoning ordinance which changes numerous zoning provisions and alters or adds zoning districts." The use of the word "and" in that sentence indicates that a substantial number of zoning provisions may be changed or zoning districts altered or added without constituting a complete rewriting of a county zoning ordinance. While changes in numerous zoning provisions and the alteration or addition of zoning districts are consequences of a complete rewriting, the determinative factor under section 59.97(5)(d) is whether a complete rewriting has, in fact, occurred.

Whether an amendment to a county zoning ordinance which adds a new zoning district to that ordinance constitutes a comprehensive revision requiring town board approval of the entire county zoning ordinance depends upon the scope and effect of the amendment to the existing county zoning ordinance. If implementation of the new zoning district has the effect of amending or repealing all or substantial portions of the existing county zoning ordinance, it is conceivable that the addition of such a district might constitute a comprehensive revision of an
existing county ordinance. But if such an amendment requires little alteration of the existing ordinance, such an amendment is unlikely to be found to be a comprehensive revision. Where any particular ordinance amendment would fit within this continuum is an issue to be decided under the facts of each case. Such determinations are best made at the local level by the county board with the assistance of the corporation counsel.

I therefore conclude that an amendment to a county zoning ordinance which adds a new zoning district to that ordinance does not necessarily constitute a comprehensive revision requiring town board approval of the entire county zoning ordinance under the provisions of section 59.97(5)(d).

JED:FTC
Land; Property; Original conveyance of land by federal land patent does not consequentially affect the state's jurisdiction over the land. OAG 2-94

February 18, 1994

MICHAEL ELLIS, Chairperson
Senate Committee on Organization

You have asked for a formal attorney general opinion on behalf of the Senate Committee on Organization which in turn seeks the opinion on behalf of a constituent at your request.

The issue presented by the constituent is whether the State of Wisconsin has jurisdiction over property that was initially conveyed from the United States government by land patent. The constituent offers the following proposition: "If the patent issued contained no reservations by government, that land is in fact and law outside of the United States and its' [sic] jurisdiction. Government can not [sic] control anything that is outside of its jurisdiction."

As a fundamental matter, the proposition displays a basic misunderstanding not only of our federal form of government but also of the difference between property rights and governmental powers. First, under our constitution, the federal and state governments have separate and independent sovereignty. As stated in Coyle v. Smith, 221 U.S. 559, 567 (1911), "'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."

When the federal government conveys land to a private individual, it cannot convey the state's powers with respect to the land. Summa Corp. v. California ex rel. State Lands Com'n, 466 U.S. 198, 205 (1984). Neither, when the federal government conveys land to a private individual, does it convey federal governmental power. It conveys title to the property, with or without restrictions or conditions. But any such restrictions or
limitations would be burdens on the private property interest, not on the state's coincident sovereign power.

Secondly, as discussed by the United States Supreme Court in *United States v. State of Texas*, 339 U.S. 707, 712, 719 (1950), the concepts of "dominium (ownership or proprietary rights) and imperium (governmental powers of regulation and control)" are "normally separable and separate." As a general rule, the transfer of dominium does not carry with it imperium. Therefore, the conveyance of dominium to a private party by federal land patent does not convey any sovereign powers of the federal government nor does it work a relinquishment of any such powers.

Of significance to the question at hand, there is a special qualification to the above rule where the transfer of navigable waters and land thereunder are involved:

"Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself. For that reason, upon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce."

*United States v. State of Texas*, 339 U.S. at 717 (citation omitted).

This proposition is put in further perspective in the more recent case of *Summa Corp.*, wherein the court stated:

The Federal Government, of course, cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution. Thus, an ordinary federal patent purporting to convey tidelands located within a State
to a private individual is invalid, since the United States holds such tidelands only in trust for the State. 466 U.S. at 205 (citation omitted).

In summary, in exercising its constitutional power to convey federal land to anyone, including private individuals, the federal government generally conveys only its proprietary rights. The federal government cannot convey a state's proprietary or sovereign rights, and in the case of navigable waters, the federal government cannot convey proprietary rights which are essentially tied to a state's sovereign rights in such waters. Your constituent does not provide any legal authority to support his views to the contrary.

Turning now to states' rights, article IV, section 3 of the United States Constitution provides among other things that "[n]ew states may be admitted by the Congress into this union" and "[t]he Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." As stated by the U.S. Supreme Court:

The plain deduction . . . is that when a new State is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission. Coyle, 221 U.S. at 573.

In the Coyle case, the court effectively nullified a provision in the Act of Congress which admitted Oklahoma as a new state. The provision purported to designate the capital city for the new state and placed restrictions on redesignation. The Supreme Court stated that although Congress clearly has the authority to govern territories, that "[u]pon the admission of a State it becomes
entitled to and possesses all the rights of dominion and sovereignty which belonged to the original States.” 221 U.S. at 577. The Court held that since Congress would not have the power to regulate the designation of a state capital by exercise of any of its constitutional powers after admission of the state to the Union, the provision purporting to do the same thing in the act of admission was not enforceable. The Coyle case stands, therefore, as an acknowledgment of the separate and independent sovereignty of each of the states, including Wisconsin.

Because the constituent apparently relies on the relatively recent United States Supreme Court decision in Summa Corp., a brief review of that case may also be useful. In that case, Summa Corp. held fee title to the Ballona Lagoon, a narrow body of water connecting the Pacific Ocean and a manmade harbor in Los Angeles. Summa Corp. traced its title back to federal patent confirmation proceedings pursuant to an 1851 Act intended to implement the Treaty of Guadalupe Hidalgo in 1848. The treaty ended a war with Mexico, and the purpose of the Act was to settle claims of property ownership by Mexican landowners. Summa Corp., 466 U.S. at 202. The city alleged that it had a public trust easement in the Ballona Lagoon which enabled it to dredge the lagoon and make other improvements without having to exercise its power of eminent domain over petitioner’s property. Summa Corp., 466 U.S. at 200. The public trust easement claimed by the state was described as follows:

Through this easement, the State has an overriding power to enter upon the property and possess it, to make physical changes in the property, and to control how the property is used. Although the landowner retains legal title to the property, he controls little more than the naked fee, for any proposed private use remains subject to the right of the State or any member of the public to assert the State’s public trust easement.

Summa Corp., 466 U.S. at 205 (citations omitted).
The United States Supreme Court held that the overriding purpose of the 1851 Act and the land patent confirmation proceedings thereunder was to provide “repose to land titles that originated with Mexican grants.” *Summa Corp.*, 466 U.S. at 206. The Court went on to hold that the “property interest” asserted by the state was so substantially in derogation of the fee interest patented to the initial grantees that the failure to assert it in the patent confirmation proceedings constituted waiver. *Summa Corp.*, 466 U.S. at 205, 209.

It is important that your constituent is not making any arguments based on the same 1851 Act or treaty with Mexico or analogous circumstances. *Summa Corp.*, 466 U.S. at 205-06. It is also important that there is no mention in the facts before us that the State of Wisconsin is asserting anything in the nature of a property interest in derogation of the constituent’s asserted fee title. Rather the State of Wisconsin has apparently exercised its police power with respect to navigable waters and natural resources by way of subchapter IV of chapter 30, Stats., relating to the Lower Wisconsin State Riverway. This is presumably a reasonable exercise of the State’s autonomous sovereign police power in this regard, and your constituent’s chain of title is irrelevant under these circumstances. See *Just v. Marinette County*, 56 Wis. 2d 7, 18, 20, 26, 201 N.W.2d 761 (1972).

Finally, to provide yet further perspective, it is established that the state’s police power may apply even to lands that are presently owned by the federal government. As discussed in *California Coastal Com’n v. Granite Rock Co.*, 480 U.S. 572, 580-81 (1987):

Granite Rock suggests that the Property Clause not only invests unlimited power in Congress over the use of federally owned lands, but also exempts federal lands from state regulation whether or not those regulations conflict with federal law. In *Kleppe*, 426 U.S., at 543, 96 S.Ct., at 2293, we considered “totally unfounded” the assertion that the Secretary of the Interior had even proposed such an
interpretation of the Property Clause. We made clear that "the State is free to enforce its criminal and civil laws" on federal land so long as those laws do not conflict with federal law. *Ibid.* The Property Clause itself does not automatically conflict with all state regulation of federal land. Rather, as we explained in *Kleppe*:

"Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. *And when Congress so acts,* the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause." *Ibid.* (citations omitted) (emphasis supplied).

Given that the state has jurisdiction to regulate lands that continue to be held by the federal government, it cannot logically be argued that the state has less jurisdiction over lands that the federal government has conveyed to private individuals. It is my opinion that your constituent does not enjoy greater legal stature than the federal government from which his title descends.

JED:RWL
Emergency Detention; Law Enforcement; It remains the obligation of the law enforcement officer who has placed an individual under emergency detention under section 51.15, Stats., to transport that individual to one of the four categories of facilities listed in section 51.15(2) until custody of the individual is transferred to such a facility. OAG 3-94

March 10, 1994

DENNIS D. COSTELLO, Corporation Counsel
Door County

You indicate that problems have arisen in your area because local law enforcement agencies within your county have taken the position that the law enforcement officer who has placed an individual under emergency detention under section 51.15, Stats., need only transport that individual to a hospital which is not within one of the four categories of facilities listed in section 51.15(2). You state that the purpose of transporting such individuals to a hospital is to determine whether they are medically able to withstand transport to one of those four categories of facilities, which are usually a considerable distance away from the hospital. You ask, in effect, whether it remains the obligation of the law enforcement officer who has placed an individual under emergency detention under section 51.15, to transport that individual to one of the four categories of facilities listed in section 51.15(2) until such time as custody of the individual is transferred to such a facility.

In my opinion, the answer is yes.

Section 51.15 provides in part:

Emergency detention. (1) BASIS FOR DETENTION. (a) A law enforcement officer or other person authorized to take a child into custody under ch. 48 may take an individual into custody if the officer or person has cause to believe that such individual is mentally ill, drug dependent or developmentally disabled, and that the individual evidences any of the following [specified circumstances]:

110 OPINIONS OF THE ATTORNEY GENERAL Vol. 81
(2) FACILITIES FOR DETENTION. The law enforcement officer shall transport the individual, or cause him or her to be transported for detention and for treatment if permitted under sub. (8) to any of the following facilities:

(a) A hospital which is approved by the department as a detention facility or under contract with a county department under s. 51.42 or 51.437, or an approved public treatment facility;

(b) A center for the developmentally disabled;

(c) A state treatment facility; or

(d) An approved private treatment facility, if the facility agrees to detain the individual.

(3) CUSTODY. Upon arrival at the facility, the individual is deemed to be in the custody of the facility.

(5) DETENTION PROCEDURE; OTHER COUNTIES. In counties having a population of less than 500,000, the law enforcement officer shall sign a statement of emergency detention which shall provide detailed specific information concerning the recent overt act, attempt or threat to act or omission on which the belief under sub. (1) is based and the names of persons observing or reporting the recent overt act, attempt or threat to act or omission. The law enforcement officer is not required to designate in the statement whether the subject individual is mentally ill, developmentally disabled or drug dependent, but shall allege that he or she has cause to believe that the individual evidences one or more of these conditions. The statement of emergency detention shall be filed by the officer with the detention facility at the time of admission, and with the court immediately thereafter. The filing of the statement has the same effect as a petition for commitment under s. 51.20. When upon the advice of the treatment staff, the director of
a facility specified in sub. (2) determines that the grounds for detention no longer exist, he or she shall discharge the individual detained under this section.

Section 51.20 provides in part:

(14) TRANSPORTATION; EXPENSES. . . . The director of the county department under s. 51.42 or 51.437 may request the sheriff to provide transportation for a subject individual or may arrange any other method of transportation which is feasible. The county department may provide reimbursement for the transportation costs from its budgeted operating funds.

Upon arrival at any of the facilities listed in section 51.15(2)(a), (b) and (c), and upon acceptance by an approved private treatment facility under section 51.15(2)(d), custody of the individual is transferred from the sheriff or other law enforcement officer that detained the individual to the facility itself. Sec. 51.15(3), Stats. Once custody is transferred to such a facility, it is the responsibility of the facility to secure transportation for the individual. See 80 Op. Att'y Gen. 299 (1992). As I indicated in 80 Op. Att'y Gen. at 306, once custody is transferred, the "director of the county department . . . [may] make a request for transportation and . . . direct that request to the sheriff." If the request does not relate to a court proceeding, it then becomes the obligation of the sheriff to "transport the individual to another facility within a reasonable time under the facts and circumstances." 80 Op. Att'y Gen. at 307. "It is therefore important that the law enforcement officer who detains an individual make a good faith effort to transport him or her to a facility that provides the type of treatment that the individual apparently needs." See 80 Op. Att'y Gen. at 303.

Pursuant to section 51.15(5), "[t]he statement of emergency detention shall be filed by the officer with the detention facility at the time of admission." Under section 51.15(1), the law enforcement officer who detains the individual must prepare such a statement. Reading these two sections of the statute together,
custody remains with the law enforcement officer who detained that individual until the individual is admitted to one of the facilities enumerated in section 51.15(2). The statute permits transfer of custody from the law enforcement officer only to one of the four categories of facilities enumerated in that statute. In the situation you describe, custody is not transferred from the detaining law enforcement officer to the hospital because the hospital is not within one of the four categories of facilities listed in section 51.15(2). Section 51.15(2) contains mandatory language: "The law enforcement officer shall transport the individual . . . for detention and for treatment . . . to any of the following facilities." The law enforcement officer's statutory obligation is not discharged until a transfer of custody to one of those four categories of facilities occurs.

I, therefore, conclude that it remains the obligation of the law enforcement officer who has placed an individual under emergency detention under section 51.15 to transport that individual to one of the four categories of facilities listed in section 51.15(2) until custody of the individual is transferred to such a facility.

JED:FTC
Bonds; Funds; Pollution; Words And Phrases; The state may use the proceeds from general obligation bonds to fund an expansion of the Petroleum Environmental Cleanup Fund Award Program. OAG 4-94

March 14, 1994

WALTER KUNICKI, Co-Chairperson
Joint Committee on Legislative Organization

BRIAN D. RUDE, Co-Chairperson
Joint Committee on Legislative Organization

You ask whether the state could use general obligation or revenue bonds to fund an expansion of the Petroleum Environmental Cleanup Fund Award (PECFA) program. PECFA is a state-operated program that reimburses owners for a portion of the cleanup costs of discharges from petroleum products storage systems and home heating oil systems. Sec. 101.143, Stats. Revenue for the program comes from a portion of the three cent per gallon petroleum inspection fee. Secs. 168.12(1) and 25.47, Stats.

PECFA provides reimbursement to tank owners or operators for the costs of cleaning up contamination and discharges from eligible petroleum product tank systems. PECFA provides awards for federally-regulated underground tanks that are equivalent to the federal financial responsibility requirements. It also provides awards for the costs of cleaning up contamination from above ground tanks and home heating oil tanks. Under the current law the maximum award for underground tanks is $500,000 or $1,000,000 (depending on the type and number of tanks owned by an owner) for costs incurred beginning August 1, 1987. Owners of above ground tanks may receive a maximum award of $190,000. Owners of home heating oil tanks can receive up to $7,500. Although the maximum award was originally scheduled to decrease to $190,000 on July 1, 1995, 1993 Wisconsin Act 16 (the 1993-94 biennial budget) changed the date to July 1, 1998.
That law also made provisions for denying eligibility under certain circumstances.

PECFA awards have grown from $312,000 in 1988-89 to a budgeted level of $75.5 million in 1994-95. In 1991 the Department of Industry, Labor and Human Relations (DILHR) and the Department of Natural Resources, the two departments responsible for administering the program, estimated that the total cost of the PECFA program would be approximately $935 million. As of November 30, 1993, DILHR has paid $124.3 million in PECFA claims.

The special PECFA study committee of the joint committee on finance is considering various changes in the PECFA program including the use of bonding to reduce an anticipated PECFA claim backlog in the late 1990's. Whether this use of the state's bonding authority is permissible involves analysis of three separate constitutional provisions. We must determine whether the PECFA program would be an authorized use of the state's bonding authority, whether such a use would violate the internal improvements clause and, finally, whether funding the program would violate the constitution's prohibition against lending the state's credit in aid of any individual, association or corporation.

In determining the constitutionality of a legislative enactment, we begin with the well-established presumption of constitutionality that is generated by all legislative enactments. This court will find a legislative enactment unconstitutional only in the event that violation of a specific constitutional provision can be shown beyond a reasonable doubt, with all doubts to be resolved in favor of constitutionality. Moreover, the validity of the legislation in light of specific provisions of the constitution, rather than its wisdom, is the only concern of this court.

CONSTITUTIONAL AUTHORIZATION

Article VIII, section 7(2)(a)1. of the Wisconsin Constitution authorizes the state to contract public debt "[t]o acquire, construct, develop, extend, enlarge or improve land, waters, property, highways, railways, buildings, equipment or facilities for public purposes." If the use of public debt does not fall within this grant of authority, it is prohibited under article VIII, section 4 of the Wisconsin Constitution which provides: "The state shall never contract any public debt except in the cases and manner herein provided."

The analysis of article VIII, section 7(2)(a)1. of the Wisconsin Constitution poses two questions. First, do the words "[t]o improve land, waters," etc. encompass the contemplated indebtedness in furtherance of PECFA? Second, would the contemplated indebtedness be "for public purposes" within the meaning of the debt authorization provision?

The Wisconsin Supreme Court has not construed the word "improve" in article VIII, section 7 of the Wisconsin Constitution. 78 Op. Att’y Gen. 100, 103-06 (1989) discussed the word "improve" and concluded that the word "improvement" in article VIII, section 7 of the Wisconsin Constitution should be defined the same as the word "improvements" in article VIII, section 10 of the Wisconsin Constitution, the internal improvements clause. The effect of this conclusion was to restrict the borrowing authority under article VIII, section 7 of the Wisconsin Constitution, to the types of projects that have historically been considered to be works of internal improvements. The opinion went on to explain that works of internal improvements usually involve "physical structures." 78 Op. Att’y Gen. at 104.

The opinion also considered the significance of including the word "waters" in the borrowing authorization provisions of article VIII, section 7 of the Wisconsin Constitution. Although there were materials in the drafting records indicating that the word "waters" was included to make clear that public debt could be used to finance the entirety of water pollution programs, not just
their physical aspects, it was concluded that this evidence of legislative intent was of "marginal significance." 78 Op. Att’y Gen. at 105. I have reviewed the legislative history and related constitutional law and I am compelled to reach a different conclusion which supersedes 78 Op. Att’y Gen. 100 (1989) to the extent it is inconsistent.

Wisconsin Constitution article VIII, section 7, reads as follows in pertinent part:

(2) Any other provision of this constitution to the contrary notwithstanding:

(a) The state may contract public debt and pledges to the payment thereof its full faith, credit and taxing power:

1. To acquire, construct, develop, extend, enlarge or improve land, waters, property, highways, railways, buildings, equipment or facilities for public purposes.

As discussed further below, this provision is relatively recent, having been approved by the electorate in April 1969.

As a general rule, the meaning of constitutional provisions is derived from the ordinary and common meaning of the words used to express them. This is considered especially appropriate for constitutional amendments since they are dependent on ratification by the people. Payne v. Racine, 217 Wis. 550, 555, 259 N.W. 437 (1935). In the issue before us, the focus is on the words "[t]o . . . improve land, waters, [etc.] for public purposes." A dictionary contemporaneous with the adoption of the constitutional amendment provided the following definitions for the verb "to improve":

1a: to make greater in amount or degree: INCREASE, AUGMENT, ENLARGE, INTENSIFY . . . 2a: to enhance in value or quality: make more profitable, excellent, or desirable . . . 4a: to turn to profit or to good account: employ to good purpose: use to advantage. . . .

Webster’s Third New International Dictionary (1986).
It is clear to me that the verb "to improve" applies to a broader range of activity than simply construction. And if the term "to improve" is limited to mean "to construct," then it is superfluous since the verb "to construct" is also expressly mentioned in the authorizing language of article VIII, section 7 of the Wisconsin Constitution. As stated long ago in Harrington v. Smith, 28 Wis. 43, 67 (1871): "a statute ought, upon the whole, to be so construed that, if possible, no clause, sentence, or word, shall be superfluous, void or insignificant" and "every clause and word of a statute shall be presumed to have been intended to have some force and effect." The same principle applies to constitutional provisions. State ex rel. Williams v. Samuelson, 131 Wis. 499, 510, 111 N.W. 712 (1907).

Likewise, the full phrases "to improve land" and "to improve waters" would denote the same capacity "to raise to a better quality or condition" of the land or waters. Although there is a requirement that any such undertaking clearly improves the quality or condition of the land or waters, there is no imperative that physical structures be involved.

Contrary to the opinion in 78 Op. Att'y Gen. 100 (1989), I see no reason to encumber the debt authorization language of the 1969 constitutional amendment with the same meaning as the internal improvements clause in article VIII, section 10 of the Wisconsin Constitution. It is my opinion that the meaning of article VIII, section 7 of the Wisconsin Constitution, is most properly derived from its own terms and history and that the internal improvement clause continues on its own course as an independent constitutional limitation which needs to be addressed, but as a separate issue.

It is my opinion that the import of article VIII, section 7 of the Wisconsin Constitution is clear in evincing an intent to authorize the use of public debt to improve the conditions of land and waters without regard to whether the effort will involve physical structures. However, given that my predecessor arrived at a different conclusion, it would be fair to conclude that reasonable
persons may differ as to the constitutional intent and thus it is proper to look to the legislative history for enlightenment. *State ex rel. Martin v. Heil*, 242 Wis. 41, 55, 7 N.W.2d 375 (1942).

Contrary to the treatment and conclusions in 78 Op. Att’y Gen. 100 (1989), it is my opinion that the “letter from a Wisconsin law firm” referred to at page 105 is, in context with the other information in the drafting file, very strong evidence of legislative intent to expand the constitutional debt authorization provision to include funding for counter-pollution measures beyond those involving only physical structures.

First, the letter is from a law firm known for its expertise and reputation as bond counsel, including years of providing bond counsel services to the state.

Second, as stated in 78 Op. Att’y Gen. at 105, the letter “was in explicit response to the attorney general’s opinion” which was described as arising and advising as follows:

As originally proposed, 1967 Assembly Joint Resolution 1 would have permitted the issuance of public debt for “purchase and improvement of real property, for the construction and improvement of buildings, structures, improvements, facilities and highways.” An informal opinion of the attorney general, included in the above-referenced drafting record, stated that this language “would not permit borrowing for such things as pollution abatement studies, salaries, planning and the like.” The opinion stated that the language would allow the construction of the pollution abatement facilities themselves.

78 Op. Att’y Gen. at 104-05. Clearly, the effort by the law firm was intended to change the situation.

Third, the letter has additional significance because it is addressed to the Speaker of the Assembly and states prefatorily that it is accompanied by a revised draft of Assembly Joint Resolution No. 1 “to implement the suggestions made at the meeting in Madison with certain legislative leaders on April 10.”
According to the "cc:," copies were provided to lists of legislative leaders.

In order of presentation in the letter, the primary revision was to add the word "waters" to the proposed constitutional amendment. According to the letter: "This change was made in order to obviate any possibility that the amendment would not permit financing by state debt of a water pollution program . . . . [I]t would permit the state to incur debt to finance the whole of such a program and not merely the physical aspects of it." Note that it was the draft proposals offered by the law firm that took the approach of using the verb "to improve" instead of the "improvement" terminology used in 1967 Assembly Joint Resolution 1.

The conclusion in the 1989 opinion that the letter is of marginal significance because there is no linkage with legislative redrafting is clearly mistaken. On the top of the letter are handwritten the following:

"Drafting request" "4/20/67 "4312"
Sub to Sub in compliance with this letter
GK Anderson"

"Sub to Sub" apparently means this is a substitute for an earlier draft substitute amendment to Assembly Joint Resolution 1. The number "4312" is a Legislative Reference Bureau drafting number written on the front of the firm’s letter. Legislative Reference Bureau number 4312 was in fact introduced as Assembly Substitute Amendment 1, to Assembly Joint Resolution 1 on April 27, 1967, by Assemblyman G.K. Anderson. It was the version adopted by the Legislature in two consecutive sessions and approved by the voters on April 27, 1969.

In light of this legislative history, it is my opinion that the Legislature did intend to adopt and submit to the people a constitutional amendment that would enable the state to use public debt to fund the entirety of water and land pollution
abatement programs, not just the physical aspects of these programs. Based on the natural and popular meaning of the terminology used, it is my opinion that this too is what the people approved at the referendum.

I conclude that the cleanup of petroleum products under PECFA would constitute a program "to improve land [or] waters" within the meaning of the constitutional debt authorization provision.

The second issue under the terms of article VIII, section 7 of the Wisconsin Constitution, is whether the proposed indebtedness is "for public purposes."

[I]t should be recognized that the Public Purpose Doctrine is not a static doctrine; it evolves to meet the needs of the public. The supreme court has recognized that "[t]he trend of both legislative enactments and judicial decisions is to extend the concept of public purposes . . . ." Hammermilly, 58 Wis. 2d at 55. Moreover, the court has stated that "the legislature is not restricted to the concept of public purpose as it had been understood in years gone by." State ex rel. Bowman v. Barczak, 34 Wis. 2d 57, 64, 148 N.W.2d 683 (1967).

Although there can be little doubt that counter-pollution programs are in general "for public purposes," the question lingers in this case because the mechanics of the contemplated PECFA program would have the state funds going to private individuals to reimburse them for cleanup projects conducted on their own property.

In State ex rel. Warren v. Nusbaum, 59 Wis. 2d 391, 208 N.W.2d 780 (1973), the court found that legislation creating a housing authority which would make loans to private developers at reduced rates to promote low and moderate income housing served a public purpose even though it obviously benefited private individuals. The court explained:
In the instant case, whatever benefit is derived by private individuals and specific localities is necessary and incidental to the promotion of public health, safety, education, morals, welfare and comfort of the people of this state. The advantage to the public of increasing the supply of adequate housing and eliminating the by-products of substandard housing is direct and not indirect and remote.

Warren v. Nusbaum, 59 Wis. 2d at 423.

In my opinion, the abatement and prevention of petroleum pollution which is the purpose of PECFA would promote "public health, safety, education, morals, welfare and comfort of the people of this state" as much if not more than the housing subsidy at issue in Warren v. Nusbaum. It seems to me shortsighted to look only at the fact that the program would help current property owners remediate existing petroleum pollution problems. In many cases, we can assume that the pollution problems go back many years, perhaps generations, to times when our environment was less understood. Furthermore, the threat posed will only increase with the passage of time, especially as underground storage tanks deteriorate. The essential character of the PECFA program is to mitigate now and for the future the environmental threats caused by unfortunate practices of the past. That we as a society should take responsibility to fix this situation now is in my opinion clearly an undertaking for public purposes.

There may be concerns in some quarters regarding the use of public debt to finance pollution cleanup or other projects intended to improve the quality of our land or waters, because public debt has historically been associated with physical structures that have a long-term useful life. The policy and historical rationale is that it is proper to spread the cost over the useful life of the structure. See Wade S. Smith, The Appraisal of Municipal Credit Risk 195 (1979); Stewart E. Sterk & Elizabeth S. Goldman, Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations, 1991 Wis. L. Rev. 1301, 1367. A special facet
of the policy is the notion of intergenerational equity which is concerned with the fairness of incurring debt in the present and leaving the payments to taxpayers in the future. See Richard A. Musgrave, et al., Public Finance in Theory and Practice 603 (2d ed. 1976). Under this rationale it seems perfectly appropriate to finance counter-pollution efforts with public debt, because we have come to learn that the quality of our environment is a concern of enormous magnitude which will outlast mere “bricks and mortar.”

INTERNAL IMPROVEMENTS CLAUSE

Article VIII, section 10 of the Wisconsin Constitution provides that unless specifically authorized “the state may never contract debt for works of internal improvement, or be a party in carrying on such works.” Just as I concluded above that the meaning of the “to improve” phraseology in the debt authorization provisions in article VIII, section 7 of the Wisconsin Constitution, is not encumbered with the meaning of the internal improvements clause, it is my opinion that the meaning of the internal improvements clause is unaffected by the meaning of the debt authorization clause. The internal improvements clause has historically been construed to be a limitation on state involvement in the construction of physical structures. 78 Op. Att’y Gen. at 104.

It is my understanding that PECFA would not involve the construction of physical structures and therefore could not run afoul of the internal improvements clause.

Even if the internal improvements clause were implicated, it is probable that the “governmental function” exception would apply. In State ex rel. La Follette v. Reuter, 33 Wis. 2d 384, 403, 147 N.W.2d 304 (1967), the court held as follows: “We conclude that matters pertaining to the abatement of water pollution are governmental functions of the state of Wisconsin and that water pollution prevention and abatement facilities are not works of internal improvement within the prohibition of sec. 10, art. VIII, Const.”
Therefore, it is my opinion that it is within the constitutional power of the Legislature to use public indebtedness to finance the PECFA pollution abatement program. More information will be needed to determine whether revenue bonding as well as general obligation bonding will be available. If revenue bonding is used, we recommend that be made clear in the legislation.

LENDING OF CREDIT

Under article VIII, section 3 of the Wisconsin Constitution, the credit of the state cannot be given or loaned in aid of any individual association or corporation. Because the proceeds of the bonds would not be used to assure the performance of private entities and their obligations, there would be no lending of credit in violation of that provision of the constitution. See State ex. rel. Wisconsin Dev. Authority v. Dammann, 228 Wis. 147, 197, 277 N.W. 278, 280 N.W. 698 (1938).

In conclusion and in light of the fact that legislation is still at the formative stage, I return to the presumption in favor of constitutionality. Although there is a general favorable presumption, there is a historical undercurrent against legislative debt. 1991 Wis. L. Rev. 1301. In the end, the courts play a very significant role in determining what debt will be sustained. 1991 Wis. L. Rev. at 1340. In applying the presumption, it is very important to have the benefit of full and clear statements by the Legislature describing the problems to be addressed and the reasons for the approach chosen. See Wisconsin Solid Waste Recycling Auth., 70 Wis. 2d at 493 and Warren v. Nusbaum, 59 Wis. 2d at 434. Therefore, if legislation is drafted to use bond financing to support PECFA, I strongly recommend that the legislation clearly set out the specific reasons for PECFA and the specific reasons why bond financing is deemed an appropriate method of financing for the program. I must also caution that this opinion is limited to the single question of the use of bonding to finance the PECFA pollution abatement program. The propriety
of the use of bonding for any other endeavor must be considered on a case-by-case basis.

JED:RWL
Law Enforcement; Police; Schools. And School Districts; School boards have authority to enforce policies which mandate the manner, conditions, and content of police interviews with students on school premises during school hours, although they should exercise considerable restraint in doing so. The preferable course is for school boards and local law enforcement to work together to jointly develop policies that will best serve the legitimate needs of each government arm, without unnecessarily intruding on those of the other. OAG 5-94

March 28, 1994

GARY J. SCHUSTER, District Attorney
Door County

You request my opinion as to whether school boards and school administrators may adopt and enforce various policies that restrict the circumstances under which a law enforcement (police) officer may interview a student at the school. Specifically, you mention policies which mandate some or all of the following: (1) that before a police officer can interview a student at the school, the student's parent or guardian must be notified, (2) that questioning cannot take place until the parent or guardian is present or waives the right to be present, (3) that the police officer must give the student certain warnings, regardless of whether the child is in custody, and (4) that a member of the school staff or administration must be present at the interview.

You indicate that the policies about which you are concerned contain some emergency exceptions to these requirements, but do not define emergency and that the policies do not distinguish between situations in which the student is a potential perpetrator, victim or witness or between situations in which the parents or school authorities or teachers are themselves potential suspects. You also indicate that you have purposely excluded from your opinion request questions regarding the ultimate admissibility of any statements obtained from the student on, for example, voluntariness grounds. You have also purposely excluded from
your opinion request situations in which the student is a suspected victim of physical or sexual abuse because that situation is specifically addressed in the statutes.

First, as you no doubt realize, the relationship between the public schools and law enforcement is an area that primarily should be characterized by cooperation and mutual respect. School officials, not unlike the general citizenry, often rely upon law enforcement to aid them in maintaining good order, protecting and ensuring the safety of all students and staff, and maintaining an environment in which education and learning can take place. Law enforcement officers, likewise, rely upon school officials, as they do the general citizenry, to cooperate and aid them in performing their duties and responsibilities.

Both the public schools and law enforcement are arms of the government, with broad responsibility and general power in their respective areas. School attendance is mandatory and the government regulation of the schools is pervasive. See generally chs. 115-118, Stats. Indeed, section 118.01, Stats., provides:

Educational goals and expectations. (1) PURPOSE. Public education is a fundamental responsibility of the state. The constitution vests in the state superintendent the supervision of public instruction and directs the legislature to provide for the establishment of district schools. The effective operation of the public schools is dependent upon a common understanding of what public schools should be and do. Establishing such goals and expectations is a necessary and proper complement to the state’s financial contribution to education. Each school board should provide curriculum, course requirements and instruction consistent with the goals and expectations established under sub. (2). Parents and guardians of pupils enrolled in the school district share with the state and school board the responsibility for pupils meeting the goals and expectations under sub. (2).

Included among the educational goals defined by the Wisconsin Legislature in subsection (2) of section 118.01 is the following:
“(c) Citizenship. Each school board shall provide an instructional program designed to give pupils: 1. An understanding of the basic workings of all levels of government, including the duties and responsibilities of citizenship.” The Wisconsin Legislature has also recognized that victims and witnesses of crime have a civic and moral duty to fully and voluntarily cooperate with law enforcement and prosecutorial agencies and that such citizen cooperation is important to state and local law enforcement efforts and the general effectiveness of the well being of the criminal justice system in the state. See sec. 950.01, Stats. Within this broader context, and subject to specific statutory limitations, the school board has “the possession, care, control and management of the property and affairs of the school district.” Sec. 120.12(1), Stats. Section 120.13(1)(a) provides the school board may “[m]ake rules for the organization, gradation and government of the schools of the school district.”

These statutes have been held to impose upon the school board the “general duties of supervision, management and control over the operation of the school system . . . [and] empowers the board to exercise ‘general supervision over [the] schools’ . . . .” State ex rel. Waldeck v. Goedken, 84 Wis. 2d 408, 414-15, 267 N.W.2d 362 (1978). It is well settled that a school may adopt policies that are reasonable and bear a rational relationship to the school’s role in providing a public education, including policies for the advancement of education, discipline and the orderly operation of the schools. Smith v. School City of Hobart, 811 F. Supp. 391, 396 (N.D. Ind. 1993). See, e.g., State ex rel. Bowe v. Board of Education of the City of Fond du Lac, 63 Wis. 234, 23 N.W. 102 (1885); 8 Op. Att’y Gen. 110 (1919); 27 Op. Att’y Gen. 446 (1938).

1Sections 120.12(1) and 120.13(1) apply to common and union school districts. Section 120.44 gives school boards of a unified school district the powers and duties of both a common school board and the annual meeting. Thus all school boards possess the powers to control access to school property.
Law enforcement officers have similarly broad duties and responsibilities within constitutional and statutory limits. Law enforcement officers may investigate claims of crime that are not sufficient to justify arrest and may investigate for the purpose of gathering information sufficient to arrest. Browne v. State, 24 Wis. 2d 491, 507, 129 N.W.2d 175, 131 N.W.2d 169 (1964). It is not unreasonable for law enforcement officers to seek to interview suspects and witnesses, for without that ability they cannot effectively perform their functions to prevent crime and apprehend those reasonably suspected of crime. The police also have the authority to request citizens to cooperate, although citizens certainly are not compelled to do so when asked. State v. Tsukiyama, 525 P.2d 1099, 1104 (Haw. 1974).

You appear to accept the proposition that schools have authority to regulate the time in which police officers will be allowed to interview students on school property during the school day in order to minimize disruption in the school so that the school can focus on its primary educational responsibilities. I agree with your view. Whether that concern extends to requiring prior notice and opportunity to parents to be present at the interview, requiring that certain warnings be given, or requiring the presence of a member of the school staff or administration is a more difficult question to answer.

Arguably, a school board could conclude that allowing police to interview students absent parental consent or presence, absent certain warnings, or absent the presence of a staff person would identify the school, school officials, and teachers too closely with the juvenile justice and criminal law system, which would be counterproductive to the school’s mission of providing a learning environment such that the state’s children receive an adequate education. At the same time, however, an alternative solution to that problem might be to inform students, in the school handbook or through other means, that the school will permit police to interview students on the premises during school hours when the police deem it necessary to do so, that by so doing the school is
not expressing an opinion on whether or not a student should agree to be interviewed and that the student is not required by the school to participate or cooperate in such an interview.

Alternatively, an argument could be made that the school is operating within its in loco parentis relationship to the students when it seeks to protect students from police interviews. In situations concerning discipline and conduct of students, the school stands in loco parentis to the children in their charge. See Interest of L.L. v. Washington County Cir. Ct., 90 Wis. 2d 585, 597, 280 N.W.2d 343 (Ct. App. 1979). That relationship may not extend to protect teachers or schools, however, or to permit teachers or schools to operate in areas outside of conduct and discipline. For example, in Guerrieri v. Tyson, 24 A.2d 468, 147 Pa. Super. 239 (1942), the court explained that teachers who took it upon themselves to perform a procedure on a student designed to cure an infected finger were not exempt from liability for the physical injuries they caused under the in loco parentis doctrine. The court explained that doctrine is usually limited to areas of conduct and discipline and it does not delegate to the teacher or school authority to exercise lay judgment as a parent might.

Application of the in loco parentis doctrine here would also appear to be premised on an assumption that a parent has a right to be notified of a police interview with a student and has the right to refuse to permit such an interview to occur. Although the student certainly is free to decline to be interviewed, it is not clear that a parent has the right to make the choice for the student. The Children's Code in the Wisconsin Statutes does not provide that police must get permission from a parent before talking with a minor. In assessing the constitutional admissibility of a confession, the Wisconsin Supreme Court and the United States Supreme Court have recognized that the presence of a minor's parent during questioning is not a prerequisite to a voluntary confession or to the voluntariness of a waiver of Miranda rights; it is only one factor to be considered under the totality of the circumstances. See Fare v. Michael C., 442 U.S.
This at least suggests that there is no *per se* bar to police interviewing a minor student without parental notification or permission, based on the parent-child relationship.

Although parental authority and responsibility to direct the upbringing, conduct, and education of a child is generally recognized, such authority is not unlimited. For example, in *Arnold v. Board of Educ. of Escambia County Ala.*, 880 F.2d 305 (11th Cir. 1989), the court held that although a parent might have a federal constitutional cause of action if a school counselor coerced her child into obtaining an abortion and coerced the child into refraining from discussing the abortion with the parent, there was no constitutional mandate that school counselors notify parents of a minor who receives counseling regarding pregnancy. The court explained that parental authority does not give a parent the right to demand that their child’s educational program be tailored to the preferences of the parents. Rather:

[A] reasonable accommodation must be found by balancing the traditional rights of parents in the rearing of their children and the interest of the state in controlling public schools. While counseling intrudes somewhat on parental control over a child, we acknowledge the important role a guidance counselor plays as a trusted confidant of many students.

*Arnold*, 880 F.2d at 314. See also *Bergren v. City of Milwaukee*, 811 F.2d 1139, 1143-44 (7th Cir. 1987) (although a parent’s right to custody of his minor child is constitutionally protected, the state can take a child into custody, if it has probable cause to believe he has committed a crime, and, acting in its role as *parens patriae*, it may interfere with the parent-child relationship to detain a child prior to trial to protect both the child and society from risk of pretrial crime).

Similarly, a police interview with a minor may intrude somewhat on the parent’s control over the child, but law enforcement has a legitimate need to be able to seek the
cooperation of minors in investigating crime and in seeking to protect the community from further crime. This is especially evident when the student is believed to be a victim or witness. It may likewise be in the long term best interest of a child who is a suspect to be interviewed by police, even if that means that juvenile justice or criminal proceedings are ultimately brought against the child. Cf. In Interest of R.W.S., 156 Wis. 2d 526, 457 N.W.2d 498 (Ct. App. 1990).

You raise the possibility that policies adopted by school districts which postpone questioning of a student until a parent or guardian is present, or waives the right to be present, may constitute obstruction of an officer, a violation of section 946.41, or perhaps refusing to aid an officer, a violation of section 946.40. I do not believe a conviction under either section 946.41 or section 946.40 is a likely result.

A charge under section 946.41 will not lie unless the defendant subjectively intended to obstruct an investigation. "[T]he defendant's subjective intent must be ascertained, based on the totality of the circumstances, including what the defendant said or did, what the officer said or did, and any objective evidence which is available." State v. Lossman, 118 Wis. 2d 526, 543, 348 N.W.2d 159 (1984). I do not believe that the existence of school board policies which delay questioning until a parent is present, or waives that right, would per se violate section 946.41.

A charge under section 946.40 will not lie unless the defendant fails to give aid to a police officer without reasonable excuse. See 74 Op. Att'y Gen. 123, 129 (1985). School board policies enacted in good faith seem to provide a reasonable excuse.

In summary, I find no statutory or common law authority which would necessarily prohibit school boards from adopting policies regarding access to schools and students on school grounds during school hours. Because I can find nothing which prohibits the adoption of such policies, I must conclude that school boards have discretion to adopt policies regarding how police interviews of students may be conducted, in order to
minimize the disruption of the student's normal school day, in order to minimize disruption to the normal functioning of the school, and in order to minimize the extent to which students may become distracted from their school work and classes. In designing such policies, the school board may consider that a police interview of a young child in the absence of the child's parents may be disruptive to that child whereas the interview of an older student in the absence of the student's parent would not. The school board may also consider that different policies may be appropriate depending on the purpose and subject matter of the interview. Although I realize that reasonable people could disagree over the wisdom of such policies, I am unable to conclude that they are per se prohibited or that school boards are wholly without authority to enact them.

Certainly, the preferable course is for school boards and local law enforcement to work together to jointly develop policies that will best serve the legitimate needs of both government arms, without unnecessarily intruding on those of the other. At a minimum, law enforcement should seek ways to perform their duties in a manner that does not routinely require them to interrupt a student's school day and risk disrupting school activities. And, at a minimum, school boards should recognize that it is part of their statutory charge to teach the responsibilities of good citizenship and their policies ought not to foster an uncooperative attitude toward law enforcement.

School boards and school administrators should not be deaf to the legitimate needs of law enforcement. Especially in situations where the parent or guardian is suspected of a crime and the student has information as a witness, where the student is a victim of a particularly sensitive crime such as sexual assault, or where a delay may result in flight of the suspect, destruction of evidence, the opportunity to cover up the crime, or an unnecessary threat to the community, school officials should be reluctant to adopt restrictive policies. In these cases the presence of a parent or guardian may make it more difficult to relate the
information necessary for efficient and effective investigation of the crime.

School officials have at least a moral responsibility to aid law enforcement in bringing criminals to justice. School officials should work with law enforcement officers to ensure that ongoing criminal investigations can be efficiently and effectively carried out despite these policies. In general, school officials should cooperate in making students available for interviews. On the other hand, law enforcement officers should be sensitive to a parent's concerns and the school board's policies.

JED:SLW
Civil Service; Elections; Words And Phrases; Meaning of the phrase “declares an intention to run for office” in section 230.40(2), Stats., discussed. OAG 6-94

June 2, 1994

JON E. LITSCHER, Secretary
Department of Employment Relations

You have asked at what point a person should be considered to have declared an intention to run for partisan political office under section 230.40(2), Stats.

Section 230.40(2) provides:

If a person in the classified service declares an intention to run for partisan political office the person shall be given a leave of absence for the duration of the election campaign and if elected shall separate from the classified service on assuming the duties and responsibilities of such office.

In the absence of ambiguity, the words of a statute must be given their obvious and ordinary meaning. Grosskopf Oil, Inc. v. Winter, 156 Wis. 2d 575, 582, 457 N.W.2d 514 (Ct. App. 1990). The common and ordinary meaning of a word can be determined by using a recognized dictionary. The ordinary meaning of declare is “to make known publicly, formally, or explicitly esp. by language . . . : to make evident or give evidence of: serve as a means of revealing: MANIFEST.” Webster’s Third New International Dictionary 586 (1986). This definition is consistent with the definition adopted by our supreme court in State ex rel. McIntyre v. Board of Election Comm., 273 Wis. 395, 401, 78 N.W.2d 752 (1956). In that case the court held that to declare “‘means primarily to make known, to make manifest, to make clear.” Id. (citations omitted).

The federal equivalent of section 230.40, 5 U.S.C.A. § 1501, et seq. (West 1977), the Hatch Act, provides that a person covered by the act may not “be a candidate for elective office.” 5 U.S.C.A. § 1502(a)(3) (West 1977). A federal court has held that a person does not become a candidate even though he or she
“had formed an intention to become a candidate . . . or at most was seriously considering the possibility.” Simmons v. Stanton, 502 F. Supp. 932, 938 (W.D. Mich. 1980). In that case the court noted that the person had not made a public announcement of his candidacy; that the general election was more than a year away; and that the person had not circulated or filed nominating petitions. The court held that the person was not a candidate under the Hatch Act because there were no objective indications of candidacy.

Wisconsin’s law requires that the person make manifest or make clear or make evident that he or she is a candidate. It is not enough, therefore, that a person has formed an intention to become a candidate or is seriously considering the possibility of running for partisan political office; there must be some objective indication that the person is a candidate.

A person filing the declaration of candidacy required by section 8.21 would certainly be considered to have declared an intention to run. That statute requires the filing of a declaration of candidacy no later than the latest time provided for filing nomination papers. The declaration must be under oath and must state that the signer is a candidate for the named office. If the office is a partisan political office the signer has certainly brought himself or herself within the ambit of section 230.40. A formal declaration of candidacy, however, is not the only means by which a person could be considered to have declared an intention to run for partisan political office.

If the state employe takes out and circulates nomination papers, the employing state agency could conclude that the person is declaring an intention to run for that office, since there is no reason to circulate nomination papers on one’s own behalf unless one intends to run for the office. On the other hand, if the state employe’s supporters take out and circulate nomination papers without the employe’s participation, and are not acting under the employe’s direction and control, the circulation of the papers would not amount to a declaration of an intention to run for the
office. The question of whether supporters are acting at the behest of, or under the direction and control of, the state employe is an issue which must be decided on a case-by-case basis. The question would be whether an objective, reasonable person looking at all the facts would conclude that the supporters are acting independently of the state employe. See Simmons, 502 F. Supp. 932.

Section 11.01(1) defines candidate to mean "every person for whom it is contemplated or desired that votes be cast at any election held within this state . . . whether or not the person is elected or nominated, and who either tacitly or expressly consents to be so considered." If a state employe, therefore, files a candidate campaign registration statement under section 11.05(2g), the employe has declared himself or herself to be a candidate. If the registration statement for the personal campaign committee reveals that the employe is running for partisan political office, the employe has "declared" within the meaning of section 230.40.

Although a person who is a candidate for office would have to file a registration statement either as an individual or through a personal campaign committee, it is possible that other persons could form a support committee and file as such under section 11.05. Section 11.05(3)(p), however, provides that when a support committee files a registration statement the statement must be signed "by the individual on whose behalf the committee intends to operate affirming that the committee is the only committee authorized to operate on his or her behalf, unless the committee files a statement under s. 11.06(7)." Section 11.06(7) allows a support committee to file an oath affirming that the committee is acting independently of any candidate, is not acting in cooperation with, consultation with, in concert with or at the request or suggestion of, the candidate. If a support committee files such an oath, therefore, the fact that a support committee is actively campaigning on behalf of a state employe for a partisan
political office, by itself, would not mean that the state employe has declared an intention to run for that office.

The preceding discussion makes two important points apparent. First, it is the state employe's, the putative candidate's, actions which must be scrutinized. If other individuals are acting independently of the state employe, encouraging that employe to run for partisan political office, raising money on the employe's behalf, and otherwise campaigning for that employe, the employe still has not declared himself or herself to be a candidate. Second, the agency seeking to determine whether an employe has declared an intention to run for partisan political office must look at all of the available evidence. Although certain actions, such as filing a declaration of candidacy under section 8.21, declaring publicly that the person is a candidate or telling the agency that the employe is a candidate, would be sufficient by themselves to trigger the statute, actions short of such a declaration may well have the same result. For example, if a support committee which has filed the oath provided for in section 11.06(7) holds a fund-raiser, the employe’s mere attendance at such a fund-raiser would not, by itself, be considered to be a declaration of candidacy. If, however, the employe attends that fund-raiser and makes statements such as “I expect to win in November” or “I can’t formally declare yet, but you all know I’m running,” or it is learned that the support committee is acting at the employe’s request or under his or her direction, the employing agency reasonably could conclude that the employe had made manifest his or her intention to be a candidate, had declared an intention to run for the office.

JED:AL
Don B. McNamara, Board of Education
Menomonee Falls School District

You have asked for my opinion on whether section 19.85(3) of the Wisconsin statutes requires a governmental body to conduct discussions and deliberations regarding the final ratification of a collective bargaining agreement in open session. Your question came up during a meeting of the Menomonee Falls Board of Education ("Board"). You report that towards the end of 1993, the Board had been negotiating changes in three collective bargaining agreements. The public notice for the Board’s December 13, 1993, meeting stated that it would convene in closed session under section 19.85(1)(e) “for discussion of negotiations.” You further report that when the members of the Board arrived at the meeting, they were told that tentative agreements had been reached with the three bargaining units and that all three units had ratified their agreements. The Board convened in closed session under section 19.85(1)(e) to discuss the events leading up to the bargaining units ratifying their agreements. The Board then reconvened in open session and voted to ratify the agreements, without conducting any discussion in open session.

You ask whether section 19.85(3) required that the Board conduct its December 13, 1993, discussions leading up to final ratification of the agreements in open rather than closed session. In my opinion, the answer is yes.

The open meetings law provides that a governmental body must meet in open session unless one of the exemptions in section 19.85(1) permits a closed session. Sec. 19.83, Stats. The
definition of “governmental body” in section 19.82(1) excludes a body “formed for or meeting for the purpose of collective bargaining” under chapter 111. Arguably, meetings to discuss collective bargaining strategies fit within that exclusion and thus are not subject to the open meetings law. My predecessor has, however, advised that when a body is meeting to discuss collective bargaining as well as other business, the body should notice all subjects of the meeting in accordance with section 19.84. 66 Op. Att’y Gen. 93, 96-97 (1977). Accordingly, in this case, the Board gave notice that it would convene in closed session under section 19.85(1)(e) for “discussion of negotiations.” Section 19.85(1)(e) permits a closed session for the purpose of “[d]eliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.” The breadth of that exemption, as well as the exclusion in section 19.82(1), is limited by section 19.85(3) which provides: “Nothing in this subchapter shall be construed to authorize a governmental body to consider at a meeting in closed session the final ratification or approval of a collective bargaining agreement under subch. IV or V of ch. 111 which has been negotiated by such body or on its behalf.”

I interpret section 19.85(1)(e) to permit a governmental body to convene in closed session to formulate strategy while engaged in negotiations with a collective bargaining unit. I interpret section 19.85(3) to require that once a governmental body has reached a tentative agreement with a collective bargaining unit, the body must conduct its deliberations leading up to ratification of the agreement in open session.

Section 19.85(1)(e) only permits a closed session when “competitive or bargaining” reasons require closure. The obvious purpose of section 19.85(1)(e) is to permit a governmental body to meet in closed session where to do otherwise would compromise the governmental body’s bargaining position by revealing its negotiating strategy. The exemption has therefore
been interpreted to authorize a governmental body to convene in closed session to formulate negotiating strategy while engaged in collective bargaining. 66 Op. Att’y Gen. at 96-97. Once a governmental body and bargaining unit have reached a tentative agreement, however, bargaining ceases. The question before the governmental body is no longer what strategy the body should adopt in order to obtain an agreement with favorable terms. The question is whether it is in the public’s interest to ratify the terms as tentatively agreed to by the parties. Given that the governmental body is not actually engaged in negotiations at that point, it does not appear that “competitive or bargaining reasons” as that phrase is used in section 19.85(1)(e) exist to warrant discussing the agreement in closed session.

Moreover, the limitation in section 19.85(3) against considering the final ratification of a collective bargaining agreement in closed session is absolute in its terms. That section provides that “nothing” in the open meetings law shall be construed to permit a closed session to consider final ratification of an agreement. If the language of a statute is unambiguous, the court must give the words of the statute their obvious and ordinary meaning, without resorting to legislative history or canons of construction. Dept. of Transp. v. Transp. Comm., 111 Wis. 2d 80, 87-88, 330 N.W.2d 159 (1983). The language of section 19.85(3) is not ambiguous. By its plain terms, section 19.85(3) prohibits a governmental body from considering final ratification of a collective bargaining agreement in closed session, regardless of the provisions in sections 19.82(1) and 19.85(1)(e). Section 19.85(3) thereby unambiguously prohibits a body from considering final ratification in closed session, even if there are competitive or bargaining reasons for doing so.

In this case, the Board learned at its December 13, 1993, meeting that its bargaining team had reached tentative agreements with the bargaining units. After learning that, the Board convened in closed session to discuss the agreements and then reconvened in open session to vote on final ratification of them. The Board
apparently interpreted section 19.85(3) to require only that the Board conduct its vote on final ratification of the agreements in open session.

That is too narrow a reading of section 19.85(3), which states that nothing in the open meetings law shall be construed to authorize a governmental body to "consider" final ratification of a collective bargaining agreement in closed session. A commonly accepted definition of "consider" is "1: to reflect on: think about with a degree of care or caution ... 8: to give thought to with a view to purchasing, accepting, or adopting ... 2: REFLECT, DELIBERATE, PONDER ... ." Webster's Third New International Dictionary 483 (1986). The plain language of section 19.85(3) thereby requires that the deliberations as well as the final vote on ratification of a collective bargaining agreement be conducted in open session. To the extent my predecessor's opinion in 66 Op. Att'y Gen. 94 suggests otherwise, I must disagree.

Based on the plain language of section 19.85(3), I conclude that once a governmental body has entered into a tentative agreement with a bargaining unit, the governmental body must conduct its vote, as well as its deliberations leading up to the vote on final ratification of the agreement in open session. At that point, a governmental body can no longer rely on the competitive or bargaining reasons exemption in section 19.85(1)(e) to discuss the agreement in closed session.

My predecessor reached the same conclusion when interpreting the exemption under the state's old Anti-Secrecy Law that permitted a closed session for "conducting ... public business which for competitive or bargaining reasons require closed sessions." Sec. 14.90(3)(d), Stats. (1965). In 54 Op. Att'y Gen. Introduction (1965), my predecessor applied that provision to wage negotiations between a school board and its teachers and concluded that:

"Whether the teacher salary proposals submitted by the teachers' committee and the counter proposals made by the
school board are preliminary in nature and for bargaining reasons need to be discussed in a closed session is basically a question of fact to be decided by the school board. If the board finds that the bargaining process can best be carried on in private, the meeting may be closed. If the board finds no necessity for bargaining in private, the meeting should be open to the public. **In any event, when the bargaining period is past, no final action should be taken on the teachers' salary schedule until they are made public and discussed in an open public meeting.**

*Id.* at vi (emphasis added). The supreme court cited that opinion with approval stating that:

An attorney general’s opinion (54 Op. Atty. Gen. (1965), Introduction, vi) found one of the exceptions sufficiently broad to cover the negotiations between a municipality and a labor organization. However, **it is clear that the formal introduction, deliberation and adoption by the elected body of the bargaining recommendations must be at open meetings.**

The open meeting is the necessary and final step in the “negotiation” process between the school board and the majority teachers’ union.

The proposed agreement submitted by the school board’s bargaining committee does not have to be accepted by the school board. If the recommendations of the committee automatically were approved by the school board, then the anti-secrecy law has been violated and the open meeting is nothing but a sham.

*Board of Sch. Directors of Milwaukee v. WERC*, 42 Wis. 2d 637, 653, 168 N.W.2d 92 (1969) (emphasis added).

The purpose of the open meetings law is to provide the public with the fullest and most complete information regarding governmental affairs as is compatible with the conduct of
governmental business. The Legislature explicitly provided that the provisions of the law must be liberally construed to promote that purpose. Sec. 19.81(4), Stats. Interpreting the law to require a governmental body to conduct its discussions and deliberations leading up to its vote on final ratification of a collective bargaining agreement in open session helps insure that the public not only has information about how the members of their local governing board voted but also the reasons they gave for doing so. That information is essential to enable citizens to make informed decisions about their elected officials.

For all of these reasons, I conclude that the open meetings law requires that once a governmental body has reached a tentative agreement with a bargaining unit, the body must conduct its vote, as well as its discussions and deliberations leading up to the vote on final ratification of the agreement in open session. Based on the facts that you have given, it appears that the Board should have conducted its December 13, 1993, discussions and deliberations regarding the three tentative agreements in open session.

JED:MWS
Counties; County Board; In a county which does not have a county executive or county administrator, the personnel committee of a county board does not possess the statutory authority to remove the county social services director. The county board in such a county may not, under section 59.025, Stats., transfer the authority to appoint, supervise and remove the social services director from the social services board to a committee of the county board because the statutes concerning the exercise of such authority are enactments primarily of statewide concern. OAG 8-94

September 9, 1994

LARRY E. NELSON, Corporation Counsel
Iowa County

You indicate that your county board desires that its personnel committee, which is a committee of the county board, have the authority to remove the director of social services. Your letter raises two separate but related questions concerning the appointment, supervision and removal of a county social services director in a county which does not have a county executive or county administrator.

The first question is whether the personnel committee currently possesses the statutory authority to remove the social services director. In my opinion, the answer is no.

The second question is whether a county board in a county which does not have a county executive or county administrator may, under section 59.025, Stats., transfer the authority to appoint, supervise and remove the social services director from the social services board to a committee of the county board. In my opinion, the answer to that question is also no.

Section 17.10 provides in part:

Removal of appointive county officers.

....
(6) OTHERS. (a) Except as provided under par. (b), all other appointive county officers may be removed at pleasure by the officer or body that appointed them. Removals by a body, other than the county board, consisting of 3 or more members may be made by an affirmative vote of two-thirds of all the members thereof.

(b) The following appointive county officers may be removed for cause only:

2. Any person appointed to administer services under s. 46.22, 46.23, 51.42 or 51.437.

(7) GENERAL EXCEPTION. County officers appointed according to merit and fitness under and subject to a civil service law, or whose removal is governed by such a law, shall be removed only as therein provided.

Section 46.22(1) provides in part:

(b) Powers and duties. The county department of social services shall have the following functions, duties and powers in accordance with the rules promulgated by the department of health and social services and subject to the supervision of the department of health and social services:

(d) Merit system; records. The county department of social services is subject to s. 49.50(2) to (5). The county department of social services and all county officers and employees performing any duties in connection with the administration of aid to the blind, old-age assistance, aid to families with dependent children and aid to totally and permanently disabled persons shall observe all rules promulgated by the department of health and social services under s. 49.50(2) and shall keep records and furnish reports as the department of health and social services requires in relation to their performance of such duties.
Section 46.22(1m)(b)2. provides:

In any county with a county executive or county administrator which has established a single-county department of social services, the county executive or county administrator shall appoint, subject to confirmation by the county board of supervisors, the county social services board, which shall be only a policy-making body determining the broad outlines and principles governing the administration of programs under this section.

Section 46.22(2) provides in part:

POWERS AND DUTIES OF COUNTY SOCIAL SERVICES BOARD IN CERTAIN COUNTIES. A county social services board elected or appointed under sub. (1m)(b)1 [counties without a county executive or county administrator] and 3 shall:

(b) Appoint the county social services director under sub. (3) subject to s. 49.50(2) to (5) and the rules promulgated thereunder and subject to the approval of the county board of supervisors in a county with a single-county department of social services or the county boards of supervisors in counties with a multicounty department of social services.

(c) Supervise the working of the county department of social services and shall be a policy-making body determining the broad outlines and principles governing the administration of the functions, duties and powers assigned to the county department of social services under sub. (1)(b) and (c).

(n) Assume the powers and duties of the county department of social services under sub. (1)(b) to (e).
Section 46.22(3m)(a) provides in part:
In any county with a county executive or a county administrator which has established a single-county department of social services, the county executive or county administrator, subject to s. 49.50(2) to (5) and the rules promulgated thereunder, shall appoint and supervise the county social services director.
Section 49.50 provides in part:

(2) RULES; MERIT SYSTEM. The department shall promulgate rules for the efficient administration of aid to families with dependent children in agreement with the requirement for federal aid, including the establishment and maintenance of personnel standards on a merit basis. The provisions of this section relating to personnel standards on a merit basis supersede any inconsistent provisions of any law relating to county personnel. This subsection shall not be construed to invalidate the provisions of s. 46.22(1)(d).

(5) COUNTY PERSONNEL SYSTEMS. Pursuant to rules promulgated under sub. (2), the department where requested by the county shall delegate to that county, without restriction because of enumeration, any or all of the department’s authority under sub. (2) to establish and maintain personnel standards including salary levels.

Wisconsin Administrative Code § HSS 5.06(2)(b) (1987) provides: “Employes who have completed a fixed probationary period shall not be discharged except for good cause. Grounds for discharge include, but are not limited to, inefficiency, neglect of duty, official misconduct or malfeasance in office.”

With respect to both questions presented, under section 17.10(6)(b)2., the social services director may be removed only for cause. Under Wisconsin Administrative Code § HSS 5.06(2)(b), a social services director hired on the basis of merit who has completed a fixed probationary period may be removed
only for "good cause" which includes conduct such as "inefficiency, neglect of duty, official misconduct or malfeasance in office." My understanding is that the county board is not proposing to alter the applicable standard of removal for the position of social services director.

As to your first question, under section 17.10(6), the authority to remove appointive county officers is vested in the officer or body which appoints them. Section 46.22(2)(b) provides that, in a county which does not have a county executive or county administrator, the social services board is vested with the authority to "[a]ppoint the county social services director under sub. (3) subject to s. 49.50(2) to (5) . . . ." In such a county, neither the county board itself nor any of its committees possesses the statutory authority to appoint or remove the social services director. See 65 Op. Att'y Gen. 163 (1976); 62 Op. Att'y Gen. 114 (1973); 46 Op. Att'y Gen. 137 (1957); 44 Op. Att'y Gen. 262 (1955). The answer to your first question therefore is that the personnel committee does not currently possess the statutory authority to remove the social services director.

Your second question requires interpretation of the scope of sections 59.025 and 59.07(intro). Section 59.025 provides: "Administrative home rule. Every county may exercise any organizational or administrative power, subject only to the constitution and any enactment of the legislature which is of statewide concern and which uniformly affects every county." Section 59.07(intro) provides:

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

These provisions, like all other provisions in chapter 59, are to "be liberally construed in favor of the rights, powers and privileges of counties to exercise any organizational or administrative power." Sec. 59.026, Stats. Although a liberal construction is required under section 59.026, section 59.025 contains explicit limitations on the exercise of home rule powers by counties.

The language contained in sections 59.025 and 59.07(intro) is "modeled after municipal home-rule language used in the constitution and statutes." 77 Op. Att’y Gen. 113, 114 (1988). Cases interpreting these municipal home rule provisions indicate that administrative home rule may not be exercised to elect against any enactment of the Legislature which is primarily a matter of statewide concern or against any enactment of the Legislature which is a matter of primarily local rather than statewide concern, if such a local enactment uniformly affects every municipality:

In determining whether or not a municipality may elect against a statute, the statute must first be classified as one which is exclusively of statewide concern, one which is entirely of local character or one which cannot be fit exclusively into one of these categories.

If the provisions of the statute are of statewide concern . . . home rule . . . grants no power . . . to deal with it. If the provisions concern a purely local affair, a municipality may elect not to be bound. If the statute is in the third, "mixed bag," category, the test is whether the statute is "primarily or paramountly a matter of 'local affairs and
government’ under . . . home rule . . . or of ‘state-wide concern.”


In *West Allis v. Milwaukee County*, 39 Wis. 2d 356, 366, 159 N.W.2d 36 (1968), the Wisconsin Supreme Court rejected the claim that where certain statutes “apply only to Milwaukee County” the state “must yield to the constitutional right of municipalities to determine their local affairs and government.” Instead, the court held that such municipal home rule powers may be exercised in such circumstances only if the statutory scheme involving Milwaukee County is an enactment primarily of local concern:

The home-rule amendment does not limit the right of the legislature to deal with matters of statewide concern, even if, in so dealing, some cities and not others are affected. If, however, the matter enacted by the legislature is primarily of local concern, a municipality can escape the strictures of the legislative enactment unless the enactment applies with uniformity to every city and village.

*West Allis*, 39 Wis. 2d at 366. Also see *Thompson v. Kenosha County*, 64 Wis. 2d 673, 687, 221 N.W.2d 845 (1974) (“Where a statute confers equal legal powers, that would seem sufficient to satisfy the uniformity requirement”).

Sections 59.025 and 59.07(intro) “reflect a legislative intent to allow county governments to act on matters of local concern in any manner they deem appropriate.” *Hart v. Ament*, 176 Wis. 2d 694, 702, 500 N.W.2d 312 (1993). In every county which has a social services director, however, the administrative authority to appoint, supervise and remove the director rests in the same officer or entity. See secs. 17.10(6), 46.22(2)(b) and 46.22(3m)(a), Stats. That is apparently why the county board has proposed to you that its personnel committee assume the
authority not only to remove, but also to appoint and supervise the social services director.\(^1\) Whether or not they uniformly affect every county, I therefore must determine if these statutory provisions concerning the appointment, supervision and removal of the social services director are enactments which are primarily of statewide concern. If so, such authority may not be transferred under section 59.025.

It must be recognized that there are certain difficulties in affording broad administrative home rule powers to counties, since "[a] county . . . is created almost exclusively in the view of the policy of the state at large for purposes of political organization and civil administration in matters of state concern." Columbia County v. Wisconsin Retirement Fund, 17 Wis. 2d 310, 317, 116 N.W.2d 142 (1962) (emphasis supplied). In State ex rel. Bare v. Schinz, 194 Wis. 397, 400-01, 216 N.W. 509 (1927), the court held that a county

is a governmental agency of the state, performing primarily the functions of the state locally. It so acts for the state in the administration of justice; \textit{in the establishment of almshouses and other charitable institutions}; in maintaining insane asylums and penal institutions. It is not created for the local convenience of the inhabitants as in the case of cities and villages. It exists not by virtue of its own will or consent, but as a result of the superimposed will of the state. (Emphasis supplied). See Dane County v. H&SS Dept., 79 Wis. 2d 323, 330, 255 N.W.2d 539 (1977). In addition, neither the court of appeals nor the supreme court has ever had occasion to determine, in any published decision, the scope to be accorded to sections 59.025 and 59.07(intro) in connection with any claim

\(^1\)Although you refer to the county board's plan as a proposed delegation of authority, it is more properly characterized as a proposed transfer of authority. Since the county board itself does not currently possess the authority to terminate the social services director, it lacks the ability to delegate such authority to one of its committees. See 80 Op. Att'y Gen. 258 (1992).
that a county has elected against an enactment of statewide concern. See Hart, 176 Wis. 2d 694, and Harbick v. Marinette County, 138 Wis. 2d 172, 405 N.W.2d 724 (Ct. App. 1987).

Although the Legislature sometimes explicitly states that a particular enactment involves a matter of statewide concern, in the majority of cases such a determination is made by the court itself. See, e.g., Gloudeman, 143 Wis. 2d at 789-90, and Van Gilder v. Madison, 222 Wis. 58, 73, 267 N.W. 25, on reh., 268 N.W. 108 (1936). In general, enactments concerning public health, safety, welfare and education are matters of statewide concern. See Wisconsin Solid Waste Recycling Auth. v. Earl, 70 Wis. 2d 464, 481, 235 N.W.2d 648 (1975); State ex rel. Warren v. Nusbaum, 59 Wis. 2d 391, 422, 208 N.W.2d 780 (1973); West Milwaukee v. Area Bd. Vocational, T. & A. Ed., 51 Wis. 2d 356, 376, 187 N.W.2d 387 (1971); State ex rel. La Follette v. Reuter, 33 Wis. 2d 384, 397, 147 N.W.2d 304 (1967); State ex rel. Martin v. Juneau, 238 Wis. 564, 570-71, 300 N.W. 187 (1941); Van Gilder, 222 Wis. at 84. However, in a different but related context, the Wisconsin Supreme Court has indicated that “most legislation is enacted under the state’s relatively generic police power to protect or preserve the state’s concern in the safety, health, welfare, morals, and security of the state’s citizens.” Milwaukee Brewers v. DH&SS, 130 Wis. 2d 79, 113, 387 N.W.2d 254 (1986). Although different policy considerations were involved in that case than are involved here, Brewers, 130 Wis. 2d at 113, does suggest that not every enactment dealing with each of these topics is a matter of statewide concern, that “[sole] reliance on the relatively generic nature of the statewide concern [i]s insufficient” and that each enactment must be examined with some degree of particularity.

In Van Gilder, 222 Wis. at 81-82, the court expressed its concern that no test had been established for determining whether a matter is primarily of statewide or local concern. But various opinions of the attorney general have repeatedly concluded that the organizational structures of county social services and human
services boards and departments are matters exclusively or primarily of statewide concern. See 65 Op. Att’y Gen. 40, 41 (1976); OAG 33-75 (September 4, 1975) (unpublished); 63 Op. Att’y Gen. 580, 583 (1974) and the opinions cited in response to your first question. While the reasoning in these opinions does not contain the degree of analysis employed in the court’s later decision in Brewers, in my opinion their conclusion that the organizational structures of such entities are matters primarily of statewide concern is correct.

Such organizational statutes involve county performance of a state function. Cf. 70 Op. Att’y Gen. 226, 227 (1981). That function, the provision of welfare, is itself indisputably a matter of statewide concern. Schinz, 194 Wis. at 401. That function is performed under extensive state supervision. Sec. 46.22(1)(b), Stats. See Kenosha County C.H. Local v. Kenosha County, 30 Wis. 2d 279, 283, 140 N.W.2d 277 (1966) (“[state’s] overall plan to coordinate the administration of welfare aids”); 59 Op. Att’y Gen. 126 (1970); and 39 Op. Att’y Gen. 403 (1950). The existence of active state supervision is an important factor in determining whether a statutory enactment of an organizational nature is a matter of statewide concern. See Thompson, 64 Wis. 2d at 685.

It is true that, even though the social services director is supervised by the social services board, “the county board of public welfare [now social services] is under the general budgetary control of the county board of supervisors and that the members of the county board of public welfare [now social services] are chosen by the county board of supervisors.” Kenosha County, 30 Wis. 2d at 283. But it is equally true that the detail and complexity of the statutes relating to the organization of social services and human services boards and departments are indicative of legislative intent to prescribe the precise organizational structure of the chain of command between the Department and county agencies. In my opinion, that
organizational structure is therefore a matter of statewide concern.

In addition, in the vast majority of states, there is no county administration of federal categorical aids programs. If the combined authority to appoint, supervise and remove the social services director is a matter primarily of local concern, then the general authority and control of the state would have no bearing on which county officer or entity such authority could be transferred to under section 59.025. See Van Gilder, 222 Wis. at 82. Such authority could be transferred to any board or commission which performs any other county function, even if that function has no logical connection whatsoever with the delivery of social services. I am of the opinion that the Legislature did not intend to relinquish to county boards the authority to specify that any county officer or entity whatsoever may appoint, supervise and remove the social services director. The answer to your second question therefore is that the county board may not transfer the authority to appoint, supervise and remove the social services director from the social services board to a committee of the county board.

I therefore conclude that, in a county which does not have a county executive or county administrator, the personnel committee of a county board does not possess the statutory authority to remove the county social services director and that the county board in such a county may not, under section 59.025, transfer the authority to appoint, supervise and remove the social services director from the social services board to a committee of the county board because the statutes concerning the exercise of such authority are enactments primarily of statewide concern.

JED:FTC
Corrections, Department Of; Prisons And Prisoners; Except as provided in section 301.048(7), Stats., counties are financially responsible under sections 49.02 and 51.42 for the provision of medical and dental services, including psychiatric and AODA services, to persons in the community residential confinement program and to persons in the intensive sanctions program. DOC is under no statutory obligation to furnish treatment for inpatient or outpatient mental health and AODA services to persons in the intensive sanctions program unless they are in Type 1 prisons other than the community residential confinement program, but it is required to provide reimbursement for the actual cost of health care treatment furnished to persons in the intensive sanctions program who are placed by DOC in a facility or program pursuant to section 301.048(3)(a)1. and 6. when the cost of the treatment is authorized by DOC. DOC also possesses discretionary authority to provide inpatient and outpatient mental health services and outpatient AODA services to persons in the intensive sanctions program. OAG 9-94

December 21, 1994

JOSEPH P. GUIDOTE, JR., Corporation Counsel
Outagamie County

Your predecessor asked a number of questions concerning the obligation of the Department of Corrections ("DOC") to provide health care services to persons in the intensive sanctions program and the community residential confinement program. One set of questions concerned the nature of the obligation of any entity other than the state to provide "medical and dental services" to persons in the community residential confinement program and to persons in the intensive sanctions program who are not in Type 1 prisons, in light of the fact that section 302.386(5), Stats., indicates that the state is not required to provide such services.
In my opinion, except as otherwise expressly provided in section 301.048(7), counties are required to provide for the health care needs of such persons under sections 49.02 and 51.42.

Section 301.01 provides in part:

In this chapter and chs. 302 to 304:

(2) "Prisoner" means any person who is either arrested, incarcerated, imprisoned or otherwise detained in excess of 12 hours by any law enforcement agency of this state, except when detention is pursuant to s. 51.15, 51.20, 51.45(11)(b) or 55.06(11)(a).

(4) "State correctional institution" means a state prison under s. 302.01.

(5) "Type 1 prison" means a state prison under s. 302.01, but excludes any institution that meets the criteria under s. 302.01 solely because of its status under s. 301.048(4)(b) [intensive sanctions program].

(6) "Type 2 prison" means a state prison under s. 302.01 that meets the criteria under s. 302.01 solely because of its status under s. 301.048(4)(b).

Section 301.046 provides in part:

Community residential confinement. (1) INSTITUTION STATUS. The department shall establish and operate a community residential confinement program as a correctional institution under the charge of a superintendent. Under the program, the department shall confine prisoners in their places of residence or other places designated by the department. The secretary may allocate and reallocate existing and future facilities as part of the institution. The institution is subject to s. 301.02 and is a state prison as defined in s. 302.01.

(2) INMATE, OFFICER AND EMPLOYEE STATUS. Inmates confined under sub. (1) are under the care and control of the
institution, subject to its rules and discipline and subject to all laws pertaining to inmates of other correctional institutions.

....

(3m) INTENSIVE SANCTIONS PROGRAM PARTICIPANTS. The department may confine any intensive sanctions program participant under sub. (1).

....

(5) ELECTRONIC SURVEILLANCE. The department shall monitor any prisoner's confinement under sub. (1) by the use of an electronic device worn continuously on the prisoner's person or by the confinement of the prisoner in supervised places designated by the department. The department may permit the prisoner to leave confinement for employment, education or other rehabilitative activities.

Section 302.01 provides in part:

The institutions named in this section, the correctional institution authorized under s. 301.16(1o), correctional institution authorized under s. 301.046(1), correctional institution authorized under s. 301.048(4)(b), minimum security correctional institutions authorized under s. 301.13, and state-local shared correctional facilities when established under s. 301.14, are state prisons.

Section 302.385 provides:

The standards for delivery of health services in state correctional institutions governed under s. 301.02 shall be based on the essential standards of the American medical association standards for health services in prisons, published in July 1979 and standards for health services in juvenile correctional facilities, published in August 1979.

Section 302.386 provides in part:

Medical and dental services for prisoners and forensic patients. (1) Except as provided in sub. (5), liability for medical and dental services furnished to residents housed in
prisons identified in s. 302.01 or in a secured correctional facility as defined in s. 48.02(15m) or to forensic patients in state institutions for those services which are not provided by employees of the department shall be limited to the amounts payable under ss. 49.43 to 49.47, except s. 49.468, for similar services.

(2) The liability of the state for medical and dental services under sub. (1) does not extend to that part of the medical or dental services of a resident housed in a prison identified in s. 302.01 or in a secured correctional facility as defined in s. 48.02(15m) for which any of the following applies:

(a) The resident has the financial ability to pay.

(b) The service is payable under any of the following:

1. A disability insurance policy under subch. VI of ch. 632.

2. Worker's compensation under ch. 102.

3. Benefits from the state department of veterans affairs or the federal department of veterans affairs.

4. Hill-Burton benefits under 42 USC 291c (e).

5. Medicare benefits under 42 USC 1395 to 1395ccc, as limited by 42 USC 402 (x).

6. Third-party liability other than that in subds. 1 to 5.

(5) The state is not required to provide medical or dental services to any of the following:

(a) Any prisoner who is confined in the institution authorized in s. 301.046(1).

(b) Any participant in the intensive sanctions program under s. 301.048 unless he or she is imprisoned in a Type 1 prison other than the institution authorized in s. 301.046(1).

Under section 301.01(5), a Type 1 prison is any prison other than the intensive sanctions program. The community residential
confinement program described in section 301.046 is therefore a Type 1 prison. See secs. 302.01 and 302.386(5)(b), Stats. Pursuant to sections 301.01(6) and 301.048(4)(b), the intensive sanctions program under section 301.048 is itself a Type 2 state prison. A person in the intensive sanctions program may, however, be placed in a Type 1 prison under that program. See sec. 301.048(3)(a)1., Stats. To the extent that this inquiry relates to persons who have no financial ability to make payment or obtain reimbursement through any of the methods described in section 302.386(2)(a) or (b), section 301.386(5) clearly provides that the state is not required to provide "medical and dental services" to persons in the community residential confinement program (including those placed in that program as part of the intensive sanctions program) or to persons in the intensive sanctions program, unless they have been imprisoned in a Type 1 prison other than the community residential confinement program.

The term "medical and dental services" encompasses all forms of health care services reasonably required by persons in any type of state prison. Similar terminology appears in section 301.21(1)(b), authorizing DOC to contract with the State of Minnesota for the confinement of Wisconsin prisoners and in section 302.25(3)(a)2., authorizing DOC to enter into interstate corrections compacts with any other state. Other states would almost certainly insist that DOC pay for all forms of health care under such contracts or compacts.

Section 302.386(2) is clearly intended to eliminate state liability for the provision of any kind of health care service whenever funding for the service is available from any other source. As used in connection with persons in state prisons, the term "medical and dental services" therefore generally includes mental health and related services. Psychiatric services are covered services under the categorical aids programs referred to in section 302.386(1). See, e.g., sec. 49.46(2)(b)6.f. and L., Stats. Although persons who are inmates of public institutions are not
eligible to receive Medicaid, see 42 C.F.R. § 435.1008(a) (1993), the United States Department of Health and Human Services, Region V, has advised the Wisconsin Department of Health and Social Services that persons confined to a home or other residence under the community residential confinement program are eligible for such assistance. The AMA standards for health services in prisons (July 1979), which are referred to in section 302.385 and were subsequently revised in 1987, also indicate that mental health services are to be provided in prisons.

The obligation of counties to provide health care services is statutory. Section 49.02(1m) requires every county to furnish general relief to all eligible dependent persons within the county. Section 49.01(2) defines a "'[d]ependent person'" as "an individual without . . . presently available money, income, property . . . credit . . . or other means . . . sufficient to provide . . . necessary commodities and services." Section 49.01(5m), in turn, defines such commodities and services to include "medicine, medical, dental, and surgical treatment (including hospital care), optometrical services, [and] nursing[]."

Section 51.42(1)(b) provides in part:

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 community programs . . . shall be based upon the client's county of residence . . .

Section 51.42(3)(ar)4.c. obligates counties to provide "[i]npatient and outpatient care and treatment, residential facilities, partial hospitalization, emergency care and supportive transitional services."
Since DOC has no obligation to provide medical and dental services under section 301.586(5),1 counties must do so under sections 49.02 and 51.42.

Your predecessor also inquired as to whether DOC is statutorily obligated to furnish treatment or to provide reimbursement for inpatient or outpatient mental health and alcohol and other drug abuse ("AODA") services for persons in the intensive sanctions program under section 301.048 who are not in Type 1 prisons.

In my opinion, DOC is not required to furnish direct treatment, but is required to provide reimbursement to persons placed by DOC in a facility or program listed in section 301.048(3) when such treatment is authorized by DOC. DOC also possesses general discretionary authority to provide inpatient and outpatient mental health services and outpatient AODA services to persons in the intensive sanctions program.

Section 301.03 provides in part:

The department shall:

... . . .

(2) Supervise the custody and discipline of all prisoners and the maintenance of state correctional institutions and the industries therein.

---

1In Rolo v. Goers, 174 Wis. 2d 709, 717, 497 N.W.2d 724 (1993), the court held that DHSS was financially responsible for furnishing mental health services to persons on conditional release from involuntary criminal commitments. Although the primary purpose of criminal commitment is to provide care and treatment, the primary purpose of imprisonment is to prevent crime and rehabilitate offenders. See sec. 301.001, Stats. In Rolo, the court was also of the view that the provisions of section 51.42(3)(as)1. were not sufficiently clear so as to absolve DHSS from the obligation to provide mental health services to persons conditionally released into the community. The statutory language concerning the state's obligation in section 302.386(5)(a) and (b), is clearer and more specific than that contained in section 51.42(3)(as)1. It does not relate to financial reimbursement, but to the obligation to provide care in the first instance.
(2g) Provide alcohol or other drug abuse assessments so that a prisoner can receive such an assessment either during his or her initial assessment and evaluation period in the state prison system or at the prison where he or she is placed after the initial assessment and evaluation period.

(2m) Provide alcohol or other drug abuse treatment at each state prison except a Type 2 prison, the correctional institution authorized under s. 301.046, a minimum security correctional institution authorized under s. 301.13 or a state-local shared correctional facility established under s. 301.14.

(6) Direct the correctional psychiatric service in all state correctional institutions.

Section 301.048, as amended by 1993 Wisconsin Acts 79 and 437, provides:

Intensive sanctions program. (1) PROGRAM ADMINISTRATION AND DESIGN. The department shall administer an intensive sanctions program. The department shall design the program to provide all of the following:

(a) Punishment that is less costly than ordinary imprisonment and more restrictive than ordinary probation or parole supervision.

(b) Component phases that are intensive and highly structured.

(c) A series of component phases for each participant that is based on public safety considerations and the participant’s needs for punishment and treatment.

(3) COMPONENT PHASES. (a) The department shall provide each participant with one or more of the following sanctions:

1. Placement in a Type 1 prison or a jail, county reforestation camp, residential treatment facility or
community-based residential facility. The department may not place a participant under this paragraph for more than one year or, if applicable, the period specified by the court under s. 973.032(3)(b), whichever is shorter, except as provided in s. 973.032(4).

2. Intensive or other field supervision.
3. Electronic monitoring.
4. Alcohol or other drug abuse outpatient treatment and services.

5. Mental health treatment and services.
4. Community service.
5. Restitution.
6. Other programs as prescribed by the department.

(b) ... A participant is not entitled to a hearing regarding the department's exercise of authority under this subsection unless the department provides for a hearing by rule.

(c) The department may provide a participant with alcohol and other drug abuse outpatient treatment and services or mental health treatment and services.

.......

(4) Status. (a) A participant is in the custody and under the control of the department, subject to its rules and discipline.

.......

(b) The department shall operate the program as a correctional institution. The secretary may allocate and reallocate existing and future facilities as part of the institution. The institution is subject to s. 301.02 and is a state prison as defined in s. 302.01.
(6) **Discharge.** The department may discharge a participant from participation in the program and from departmental custody and control at any time.

(7) **Reimbursement.** The department shall provide reimbursement to counties and others for the actual costs incurred under sub. (3), as authorized by the department, from the appropriations under s. 20.410(1)(ab) and (ai) and (dt).

Section 302.27, as amended by 1993 Wisconsin Act 437, provides:

Contracts for temporary housing for or detention of prisoners. The department may contract with local governments for temporary housing or detention in county jails or county houses of correction for persons sentenced to imprisonment in state prisons or the intensive sanctions program. The rate under any such contract may not exceed $60 per person per day. Nothing in this section limits the authority of the department to place persons in jails under s. 301.048(3)(a)1.

Under section 301.03(2m), DOC is statutorily obligated to provide AODA services only at Type 1 prisons. That statute specifically relieves DOC of any responsibility for providing such services to persons in the intensive sanctions program or to persons in the community residential confinement program. DOC also is not required to provide mental health services to persons in the intensive sanctions program who are not in Type 1 prisons. Pursuant to section 301.03(6), DOC has statutory authority to "[d]irect the correctional psychiatric service in all state correctional institutions." Under the definition of "[s]tate correctional institution" contained in section 301.01(4), that authority extends to persons in the intensive sanctions program under section 301.048. See sec. 302.01, Stats. Although section 301.03(6) does not specifically mandate that DOC provide any particular form of psychiatric service in any state prison, section 302.386 does require DOC to provide medical and dental services
to persons housed in prisons identified in s. 302.01 according to the standards prescribed in section 302.385. Section 302.386(5)(a) and (b) then provides that the state is not required to furnish any medical and dental services to persons in the community residential confinement program or to persons in the intensive sanctions program who are not in other Type 1 prisons.

In my opinion, sections 301.03(2m) and 302.386(5) were controlling as to the provision of mental health and AODA services even prior to the deletion of those services by 1993 Wisconsin Act 79 from section 301.048(3)(a), because the term "shall" in the latter statute simply obligated DOC to provide a person in the intensive sanctions program with at least one of the items formerly enumerated as "sanctions." The Legislative Reference Bureau's analysis of 1993 Assembly Bill 373 provides in part:

Under current law, DOC provides each intensive sanctions program participant with a series of component phases based on public safety considerations and the participant's need for punishment and treatment. The law lists a series of sanctions that may be provided as component phases, including alcohol and other drug abuse outpatient treatment services and mental health treatment and services. This bill retains DOC's authority to provide these kinds of treatment and services but no longer counts them as sanctions.

(Emphasis supplied). 1993 Assembly Bill 373 resulted in the passage of 1993 Wisconsin Act 79. Section 6 of the Act created section 301.048(3)(c) to clarify that mental health services and outpatient AODA services should not be considered "sanctions": "The department may provide a participant with alcohol or other drug abuse outpatient treatment and services or mental health treatment and services." The word "shall" is generally construed as mandatory and the word "may" is generally construed as permissive, especially where those terms appear in close proximity in different parts of the same statute. In Matter of
Estate of Warner, 161 Wis. 2d 644, 652, 468 N.W.2d 736 (Ct. App. 1991). DOC never was statutorily required to provide inpatient and outpatient mental health and outpatient AODA services to all persons in the intensive sanctions program, but has always had discretionary authority to provide such services on a case-by-case basis. That discretionary authority is now found in section 301.048(3)(c).²

The requirements for the provision of all forms of health care services by DOC to persons in each type of state correctional institution are therefore the same. DOC is obligated to provide all forms of health care services, including psychiatric services and AODA services, to persons in Type I prisons other than the community residential confinement program. DOC is not required to provide any form of health care services to persons in the community residential confinement program or to persons in the intensive sanctions program who are not in other Type 1 prisons. Under section 301.048(3)(c), DOC does, however, possess discretionary authority to provide inpatient and outpatient mental health services and outpatient AODA services to persons in the intensive sanctions program.

Section 301.048(7) also imposes a mandatory obligation upon DOC “to provide financial reimbursement to counties and others for the actual costs incurred under sub. (3), as authorized by the department, from the appropriations under s. 20.410(1)(ab) and (ai).” That obligation is limited by the fact that both appropriations are sum certain appropriations for specific purposes. The appropriation under section 20.410(1)(ab) authorizes DOC to pay not more than sixty dollars per person per day for “temporary housing or detention in county jails or houses of correction.” The appropriation under section 20.410(1)(ai) authorizes expenditures by DOC to “administer the intensive

²Although the facts contained in your predecessor’s inquiry are very limited, it is apparent that they did not involve health care services authorized by DOC under section 301.048(3)(c).
sanctions program under s. 301.048, the community residential confinement program under s. 301.046 and intensive supervision programs.” Other appropriations are available to DOC in connection with its discretionary authority to provide health care services. Section 20.410(1)(dd) authorizes DOC to “purchase . . . services, authorized under s. 301.08(1)(b)1, for community based residential facilities designated for correctional clients.” In addition, section 20.410(1)(d) authorizes DOC to purchase care and services, other than services purchased from community based residential facilities under section 20.410(1)(dd), “for probationers, parolees and other offenders.”

Under section 302.386(5)(b), DOC ordinarily is not required to provide medical and dental services to persons in the intensive sanctions program who are not in Type 1 prisons. That provision would be meaningless if section 301.048(7) were construed to require reimbursement for all such services. Section 301.048(7), contemplates that all actual costs be reimbursed by DOC only when it has authorized the expenditures for which reimbursement is claimed. In my opinion, those circumstances ordinarily do not include situations involving intensive or other field supervision, electronic monitoring, community service or restitution under section 301.048(3)(a)2. through 5., since such activities usually do not involve health care placements or programs prescribed or selected by DOC.

Under section 301.048(3)(a)1., DOC may choose to place persons who are in the intensive sanctions program in specific facilities, “jail[s], county reforestation camp[s], residential treatment facilit[ies] or community-based residential facilit[ies],” for a period not to exceed one year. Under section 301.048(3)(a)6., such persons may also be placed in “[o]ther programs as prescribed by the department.” When such placements are made by DOC, section 301.048(7) requires reimbursement, within the purposes and limits of available appropriations, for all actual costs incurred by such facilities or programs, provided that the costs for which reimbursement is
sought have been authorized by DOC. In most cases, authorization to incur such costs will be in the form of a contract or agreement between DOC and the county or the operator of the treatment or residential facility or program. In other situations, section 301.048(7) appears to permit DOC to require prior authorization before costs are incurred, if it chooses to do so. When the circumstances contained in section 301.048(7) are satisfied, DOC is required to make reimbursement for health care services, despite the limitations on state provision of medical and dental services contained in section 302.386(5).

I therefore conclude that, except as provided in section 301.048(7), counties are financially responsible under sections 49.02 and 51.42 for the provision of medical and dental services, including psychiatric and AODA services, to persons in the community residential confinement program and to persons in the intensive sanctions program. DOC is under no statutory obligation to furnish treatment for inpatient or outpatient mental health and AODA services to persons in the intensive sanctions program unless they are in Type 1 prisons other than the community residential confinement program, but it is required to provide reimbursement for the actual cost of health care treatment furnished to persons in the intensive sanctions program who are placed by DOC in a facility or program pursuant to section 301.048(3)(a)1. and 6. when the cost of the treatment is authorized by DOC. DOC also possesses discretionary authority to provide inpatient and outpatient mental health services and outpatient AODA services to persons in the intensive sanctions program.

JED:FTC
### U.S. Code

<table>
<thead>
<tr>
<th>Code</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>17 U.S.C. 101 (West 1977)</td>
<td>46</td>
</tr>
<tr>
<td>17 U.S.C. 102(a) (West Supp. 1993)</td>
<td>47</td>
</tr>
<tr>
<td>17 U.S.C. 103(b) (West 1977)</td>
<td>48</td>
</tr>
<tr>
<td>42 U.S.C. 11001 <em>et seq.</em> (West 1992)</td>
<td>18</td>
</tr>
<tr>
<td>42 U.S.C. 11001(a)</td>
<td>18</td>
</tr>
<tr>
<td>42 U.S.C. 11001(b)</td>
<td>18</td>
</tr>
<tr>
<td>45 U.S.C. 421 <em>et seq.</em> (West 1986)</td>
<td>78</td>
</tr>
<tr>
<td>45 U.S.C. 434 (West 1986)</td>
<td>79</td>
</tr>
<tr>
<td>45 U.S.C. 435 (West 1986)</td>
<td>79</td>
</tr>
<tr>
<td>&amp; Supp. 1993</td>
<td>82</td>
</tr>
<tr>
<td>45 U.S.C. 437(a) (West Supp. 1993)</td>
<td>82</td>
</tr>
</tbody>
</table>

### Assembly Bills

<table>
<thead>
<tr>
<th>Bill</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1993, No. 373</td>
<td>166</td>
</tr>
</tbody>
</table>

### Session Laws

<table>
<thead>
<tr>
<th>Year, Act, Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1973, Ch. 90, sec. 2</td>
<td>58</td>
</tr>
<tr>
<td>1975, Ch. 224, sec. 91</td>
<td>42</td>
</tr>
<tr>
<td>1981, Ch. 20, sec. 1102c</td>
<td>41</td>
</tr>
<tr>
<td>1991, Act 39, sec. 1154Li</td>
<td>28</td>
</tr>
<tr>
<td>1991, Act 152, sec. 4</td>
<td>29</td>
</tr>
<tr>
<td>1991, Act 269, sec. 276</td>
<td>28</td>
</tr>
<tr>
<td>1991, Act 315</td>
<td>32</td>
</tr>
<tr>
<td>1993 Act 79</td>
<td>163</td>
</tr>
<tr>
<td>1993 Act 437</td>
<td>163</td>
</tr>
</tbody>
</table>

### Opinions

<table>
<thead>
<tr>
<th>Year, OAG Number</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1910 OAG 597 (1909)</td>
<td>15</td>
</tr>
<tr>
<td>1912 OAG 889 (1911)</td>
<td>13</td>
</tr>
<tr>
<td>3 OAG 668 (1914)</td>
<td>15</td>
</tr>
<tr>
<td>6 OAG 248 (1917)</td>
<td>15</td>
</tr>
<tr>
<td>8 OAG 110 (1919)</td>
<td>128</td>
</tr>
<tr>
<td>23 OAG 111 (1934)</td>
<td>13</td>
</tr>
<tr>
<td>27 OAG 446 (1938)</td>
<td>128</td>
</tr>
<tr>
<td>31 OAG 219 (1942)</td>
<td>13</td>
</tr>
<tr>
<td>35 OAG 58 (1946)</td>
<td>91</td>
</tr>
<tr>
<td>39 OAG 403 (1950)</td>
<td>154</td>
</tr>
<tr>
<td>42 OAG 115 (1953)</td>
<td>42</td>
</tr>
<tr>
<td>43 OAG 20 (1954)</td>
<td>13</td>
</tr>
<tr>
<td>44 OAG 1 (1955)</td>
<td>13</td>
</tr>
<tr>
<td>44 OAG 262 (1955)</td>
<td>149</td>
</tr>
<tr>
<td>45 OAG 180 (1956)</td>
<td>91</td>
</tr>
<tr>
<td>46 OAG 137 (1957)</td>
<td>149</td>
</tr>
<tr>
<td>50 OAG 47 (1961)</td>
<td>26</td>
</tr>
<tr>
<td>51 OAG 77 (1962)</td>
<td>13</td>
</tr>
<tr>
<td>54 OAG Introduction (1965)</td>
<td>142</td>
</tr>
<tr>
<td>58 OAG 72 (1969)</td>
<td>25</td>
</tr>
<tr>
<td>59 OAG 126 (1970)</td>
<td>154</td>
</tr>
</tbody>
</table>

### Senate Bills

<table>
<thead>
<tr>
<th>Year, No.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991, No. 362</td>
<td>43</td>
</tr>
<tr>
<td>1993, No. 98</td>
<td>43</td>
</tr>
</tbody>
</table>

### Wisconsin Constitution

<table>
<thead>
<tr>
<th>Article, Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. IV, sec. 3</td>
<td>106</td>
</tr>
<tr>
<td>Art. VI, cl. 2</td>
<td>79</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article, Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. IV, sec. 26</td>
<td>28</td>
</tr>
<tr>
<td>Art. VIII, sec. 1</td>
<td>94</td>
</tr>
<tr>
<td>Art. VIII, sec. 3</td>
<td>124</td>
</tr>
<tr>
<td>Art. VIII, sec. 4</td>
<td>116</td>
</tr>
<tr>
<td>Art. VIII, sec. 7</td>
<td>116</td>
</tr>
<tr>
<td>Art. VIII, sec. 7(2)(a)</td>
<td>116</td>
</tr>
<tr>
<td>Art. VIII, sec. 10</td>
<td>116</td>
</tr>
</tbody>
</table>

### Senate Bills

<table>
<thead>
<tr>
<th>Year, No.</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991, No. 362</td>
<td>43</td>
</tr>
<tr>
<td>1993, No. 98</td>
<td>43</td>
</tr>
</tbody>
</table>
STATUTES CITED

<table>
<thead>
<tr>
<th>Statute</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>60 OAG 39 (1971)</td>
<td>13</td>
</tr>
<tr>
<td>60 OAG 85 (1971)</td>
<td>25</td>
</tr>
<tr>
<td>61 OAG 80 (1972)</td>
<td>26</td>
</tr>
<tr>
<td>61 OAG 256 (1972)</td>
<td>26</td>
</tr>
<tr>
<td>62 OAG 114 (1973)</td>
<td>149</td>
</tr>
<tr>
<td>63 OAG 580 (1974)</td>
<td>154</td>
</tr>
<tr>
<td>64 OAG 106 (1975)</td>
<td>91</td>
</tr>
<tr>
<td>65 OAG 40 (1976)</td>
<td>154</td>
</tr>
<tr>
<td>65 OAG 47 (1976)</td>
<td>26</td>
</tr>
<tr>
<td>65 OAG 163 (1976)</td>
<td>149</td>
</tr>
<tr>
<td>66 OAG 93 (1977)</td>
<td>140</td>
</tr>
<tr>
<td>67 OAG 251 (1978)</td>
<td>58</td>
</tr>
<tr>
<td>68 OAG 76 (1979)</td>
<td>97</td>
</tr>
<tr>
<td>70 OAG 226 (1981)</td>
<td>154</td>
</tr>
<tr>
<td>74 OAG 26 (1985)</td>
<td>121</td>
</tr>
<tr>
<td>74 OAG 123 (1985)</td>
<td>132</td>
</tr>
<tr>
<td>75 OAG 43 (1986)</td>
<td>19</td>
</tr>
<tr>
<td>75 OAG 49 (1986)</td>
<td>19</td>
</tr>
<tr>
<td>75 OAG 119 (1986)</td>
<td>24</td>
</tr>
<tr>
<td>77 OAG 113 (1988)</td>
<td>150</td>
</tr>
<tr>
<td>77 OAG 128 (1988)</td>
<td>97</td>
</tr>
<tr>
<td>77 OAG 150 (1988)</td>
<td>92</td>
</tr>
<tr>
<td>78 OAG 100 (1989)</td>
<td>116</td>
</tr>
<tr>
<td>80 OAG 187 (1992)</td>
<td>28</td>
</tr>
<tr>
<td>80 OAG 258 (1992)</td>
<td>152</td>
</tr>
<tr>
<td>80 OAG 299 (1992)</td>
<td>112</td>
</tr>
<tr>
<td>19-79 (unpublished)</td>
<td>14</td>
</tr>
<tr>
<td>33-75 (unpublished)</td>
<td>154</td>
</tr>
</tbody>
</table>

STATUTES

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>8</td>
<td>89</td>
</tr>
<tr>
<td>19</td>
<td>48</td>
<td>69</td>
</tr>
<tr>
<td>30, subch. IV</td>
<td>59</td>
<td>150</td>
</tr>
<tr>
<td>62</td>
<td>111</td>
<td>140</td>
</tr>
<tr>
<td>115</td>
<td>116</td>
<td>127</td>
</tr>
<tr>
<td>117</td>
<td>118</td>
<td>127</td>
</tr>
<tr>
<td>302</td>
<td>304</td>
<td>157</td>
</tr>
<tr>
<td>305</td>
<td>5.05(1)</td>
<td>86</td>
</tr>
<tr>
<td>8.10(5)</td>
<td>8.10(6)</td>
<td>88</td>
</tr>
<tr>
<td>8.15(4)(b)</td>
<td>816(2)</td>
<td>86</td>
</tr>
<tr>
<td>8.20(6)</td>
<td>8.21</td>
<td>136</td>
</tr>
<tr>
<td></td>
<td>8.30</td>
<td>88</td>
</tr>
<tr>
<td></td>
<td>8.30(1)</td>
<td>88</td>
</tr>
<tr>
<td></td>
<td>8.30(3)</td>
<td>86</td>
</tr>
<tr>
<td></td>
<td>8.35(2)(c)</td>
<td>86</td>
</tr>
<tr>
<td></td>
<td>8.50(3)</td>
<td>86</td>
</tr>
<tr>
<td></td>
<td>11.01(1)</td>
<td>137</td>
</tr>
<tr>
<td></td>
<td>11.05</td>
<td>137</td>
</tr>
<tr>
<td></td>
<td>11.05(2g)</td>
<td>137</td>
</tr>
<tr>
<td></td>
<td>11.05(3)(p)</td>
<td>137</td>
</tr>
<tr>
<td></td>
<td>11.06(7)</td>
<td>137</td>
</tr>
<tr>
<td></td>
<td>13.48(13)</td>
<td>57</td>
</tr>
<tr>
<td></td>
<td>14.90(3)(d)</td>
<td>142</td>
</tr>
<tr>
<td></td>
<td>17.10</td>
<td>145</td>
</tr>
<tr>
<td></td>
<td>17.10(6)</td>
<td>149</td>
</tr>
<tr>
<td></td>
<td>17.10(6)(b)</td>
<td>148</td>
</tr>
<tr>
<td></td>
<td>17.16</td>
<td>91</td>
</tr>
<tr>
<td></td>
<td>19.31</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>19.32</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>19.33</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>19.34</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>19.35</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>19.36</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>19.36(7)</td>
<td>37</td>
</tr>
<tr>
<td></td>
<td>19.36(7)(a)</td>
<td>37</td>
</tr>
<tr>
<td></td>
<td>19.37</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>19.42(7w)</td>
<td>40</td>
</tr>
<tr>
<td></td>
<td>19.43(4)</td>
<td>85</td>
</tr>
<tr>
<td></td>
<td>19.43(8)</td>
<td>85</td>
</tr>
<tr>
<td></td>
<td>19.81(4)</td>
<td>144</td>
</tr>
<tr>
<td></td>
<td>19.82(1)</td>
<td>140</td>
</tr>
<tr>
<td></td>
<td>19.83</td>
<td>139</td>
</tr>
<tr>
<td></td>
<td>19.84</td>
<td>140</td>
</tr>
<tr>
<td></td>
<td>19.85(1)</td>
<td>139</td>
</tr>
<tr>
<td></td>
<td>19.85(1)(c)</td>
<td>139</td>
</tr>
<tr>
<td></td>
<td>19.85(3)</td>
<td>139</td>
</tr>
<tr>
<td></td>
<td>20.410(1)(ab)</td>
<td>167</td>
</tr>
<tr>
<td></td>
<td>20.410(1)(ai)</td>
<td>167</td>
</tr>
<tr>
<td></td>
<td>20.410(1)(d)</td>
<td>168</td>
</tr>
<tr>
<td></td>
<td>20.410(1)(dd)</td>
<td>168</td>
</tr>
<tr>
<td></td>
<td>23.09(2)(d)</td>
<td>57</td>
</tr>
<tr>
<td></td>
<td>23.09(10)</td>
<td>57</td>
</tr>
<tr>
<td></td>
<td>23.11(2)</td>
<td>57</td>
</tr>
<tr>
<td></td>
<td>25.47</td>
<td>114</td>
</tr>
<tr>
<td></td>
<td>31.14(3)(c)</td>
<td>57</td>
</tr>
<tr>
<td></td>
<td>40.02(25)(b)4</td>
<td>32</td>
</tr>
<tr>
<td></td>
<td>40.02(25)(b)6g</td>
<td>29</td>
</tr>
<tr>
<td></td>
<td>40.02(25)(b)6m</td>
<td>29</td>
</tr>
<tr>
<td></td>
<td>40.02(25)(b)6r</td>
<td>29</td>
</tr>
<tr>
<td>Section</td>
<td>Page</td>
<td></td>
</tr>
<tr>
<td>---------</td>
<td>------</td>
<td></td>
</tr>
<tr>
<td>40.02(38)</td>
<td>32</td>
<td></td>
</tr>
<tr>
<td>40.05(4)(b)</td>
<td>32</td>
<td></td>
</tr>
<tr>
<td>40.05(4)(bc)</td>
<td>28</td>
<td></td>
</tr>
<tr>
<td>40.11(10m)</td>
<td>28</td>
<td></td>
</tr>
<tr>
<td>46.22(1)</td>
<td>146</td>
<td></td>
</tr>
<tr>
<td>46.22(1)(b)</td>
<td>154</td>
<td></td>
</tr>
<tr>
<td>46.22(1m)(b)2.</td>
<td>147</td>
<td></td>
</tr>
<tr>
<td>46.22(2)</td>
<td>147</td>
<td></td>
</tr>
<tr>
<td>46.22(2)(b)</td>
<td>149</td>
<td></td>
</tr>
<tr>
<td>46.22(3m)(a)</td>
<td>148</td>
<td></td>
</tr>
<tr>
<td>48.13</td>
<td>68</td>
<td></td>
</tr>
<tr>
<td>48.981</td>
<td>66</td>
<td></td>
</tr>
<tr>
<td>48.981(3)(b)3.</td>
<td>66</td>
<td></td>
</tr>
<tr>
<td>48.981(7)</td>
<td>66</td>
<td></td>
</tr>
<tr>
<td>48.981(7)(a)1.</td>
<td>66</td>
<td></td>
</tr>
<tr>
<td>48.981(7)(a)10</td>
<td>66</td>
<td></td>
</tr>
<tr>
<td>48.981(7)(e)</td>
<td>69</td>
<td></td>
</tr>
<tr>
<td>49.01(2)</td>
<td>161</td>
<td></td>
</tr>
<tr>
<td>49.01(5m)</td>
<td>161</td>
<td></td>
</tr>
<tr>
<td>49.02</td>
<td>156</td>
<td></td>
</tr>
<tr>
<td>49.02(1m)</td>
<td>161</td>
<td></td>
</tr>
<tr>
<td>49.46(2)(b)6.f.</td>
<td>160</td>
<td></td>
</tr>
<tr>
<td>49.46(2)(b)6.L</td>
<td>160</td>
<td></td>
</tr>
<tr>
<td>49.50</td>
<td>148</td>
<td></td>
</tr>
<tr>
<td>51.15</td>
<td>110</td>
<td></td>
</tr>
<tr>
<td>51.15(1)</td>
<td>112</td>
<td></td>
</tr>
<tr>
<td>51.15(2)</td>
<td>110</td>
<td></td>
</tr>
<tr>
<td>51.15(2)(a)</td>
<td>112</td>
<td></td>
</tr>
<tr>
<td>51.15(2)(b)</td>
<td>112</td>
<td></td>
</tr>
<tr>
<td>51.15(2)(c)</td>
<td>112</td>
<td></td>
</tr>
<tr>
<td>51.15(2)(d)</td>
<td>112</td>
<td></td>
</tr>
<tr>
<td>51.15(3)</td>
<td>112</td>
<td></td>
</tr>
<tr>
<td>51.15(5)</td>
<td>112</td>
<td></td>
</tr>
<tr>
<td>51.20</td>
<td>112</td>
<td></td>
</tr>
<tr>
<td>51.42</td>
<td>156</td>
<td></td>
</tr>
<tr>
<td>51.42(1)(b)</td>
<td>161</td>
<td></td>
</tr>
<tr>
<td>51.42(3)(ar)4.c.</td>
<td>161</td>
<td></td>
</tr>
<tr>
<td>51.42(3)(as)1.</td>
<td>162</td>
<td></td>
</tr>
<tr>
<td>59.025</td>
<td>145</td>
<td></td>
</tr>
<tr>
<td>59.026</td>
<td>150</td>
<td></td>
</tr>
<tr>
<td>59.07(intro)</td>
<td>149</td>
<td></td>
</tr>
<tr>
<td>59.07(146)</td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>59.07(146)(a)</td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>59.07(146)(a)1</td>
<td>18</td>
<td></td>
</tr>
<tr>
<td>59.15(1)(a)</td>
<td>13</td>
<td></td>
</tr>
<tr>
<td>59.15(1)(b)</td>
<td>13</td>
<td></td>
</tr>
<tr>
<td>59.15(2)(c)</td>
<td>15</td>
<td></td>
</tr>
<tr>
<td>59.23</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>59.24</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>59.24(1)</td>
<td>25</td>
<td></td>
</tr>
<tr>
<td>59.97</td>
<td>98</td>
<td></td>
</tr>
<tr>
<td>59.97(2)(a)</td>
<td>91</td>
<td></td>
</tr>
<tr>
<td>59.97(2)(a)3.</td>
<td>91</td>
<td></td>
</tr>
<tr>
<td>59.97(2)(bm)</td>
<td>91</td>
<td></td>
</tr>
<tr>
<td>59.97(4)</td>
<td>101</td>
<td></td>
</tr>
<tr>
<td>59.97(5)(c)</td>
<td>101</td>
<td></td>
</tr>
<tr>
<td>59.97(5)(d)</td>
<td>98</td>
<td></td>
</tr>
<tr>
<td>59.97(5)(e)</td>
<td>101</td>
<td></td>
</tr>
<tr>
<td>60.56</td>
<td>24</td>
<td></td>
</tr>
<tr>
<td>62.09(8)</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>62.09(8)(a)</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>62.09(8)(d)</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>62.09(13)(a)</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>62.13</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>62.13(1)</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>62.13(2)(a)</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>62.13(3)</td>
<td>2,40</td>
<td></td>
</tr>
<tr>
<td>62.13(4)</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>62.13(4)(a)</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>62.13(4)(c)</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>62.13(4)(d)</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>62.13(5)</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>62.13(6)</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>66.40(5)(a)</td>
<td>90</td>
<td></td>
</tr>
<tr>
<td>66.40(5)(b)</td>
<td>90</td>
<td></td>
</tr>
<tr>
<td>66.40(5)(c)</td>
<td>90</td>
<td></td>
</tr>
<tr>
<td>66.40(8)</td>
<td>90</td>
<td></td>
</tr>
<tr>
<td>66.40(9)</td>
<td>90</td>
<td></td>
</tr>
<tr>
<td>66.945</td>
<td>71</td>
<td></td>
</tr>
<tr>
<td>66.945(2)</td>
<td>71</td>
<td></td>
</tr>
<tr>
<td>66.945(2)(b)</td>
<td>74</td>
<td></td>
</tr>
<tr>
<td>66.945(8)</td>
<td>75</td>
<td></td>
</tr>
<tr>
<td>66.945(9)</td>
<td>75</td>
<td></td>
</tr>
<tr>
<td>66.945(10)</td>
<td>75</td>
<td></td>
</tr>
<tr>
<td>66.945(15)</td>
<td>70</td>
<td></td>
</tr>
<tr>
<td>66.945(16)</td>
<td>70</td>
<td></td>
</tr>
<tr>
<td>70.10</td>
<td>95</td>
<td></td>
</tr>
<tr>
<td>70.995(5)</td>
<td>95</td>
<td></td>
</tr>
<tr>
<td>71.13(2m)</td>
<td>41</td>
<td></td>
</tr>
<tr>
<td>71.13(3)(b) (1951)</td>
<td>42</td>
<td></td>
</tr>
<tr>
<td>71.13(3)(b) (1973)</td>
<td>42</td>
<td></td>
</tr>
<tr>
<td>71.91(4)</td>
<td>41</td>
<td></td>
</tr>
<tr>
<td>71.91(5)(b)</td>
<td>41</td>
<td></td>
</tr>
<tr>
<td>101.143</td>
<td>114</td>
<td></td>
</tr>
<tr>
<td>118.01</td>
<td>127</td>
<td></td>
</tr>
<tr>
<td>118.01(2)</td>
<td>127</td>
<td></td>
</tr>
<tr>
<td>120.12(1)</td>
<td>128</td>
<td></td>
</tr>
<tr>
<td>120.13(1)</td>
<td>128</td>
<td></td>
</tr>
<tr>
<td>120.13(1)(a)</td>
<td>128</td>
<td></td>
</tr>
<tr>
<td>120.44</td>
<td>128</td>
<td></td>
</tr>
<tr>
<td>STATUTES CITED</td>
<td>173</td>
<td></td>
</tr>
<tr>
<td>----------------</td>
<td>-----</td>
<td></td>
</tr>
<tr>
<td>144.03 (1953)</td>
<td>62</td>
<td></td>
</tr>
<tr>
<td>144.26</td>
<td>64</td>
<td></td>
</tr>
<tr>
<td>165.25</td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>165.25(6)</td>
<td>17</td>
<td></td>
</tr>
<tr>
<td>165.25(8m)</td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>166.20</td>
<td>18</td>
<td></td>
</tr>
<tr>
<td>166.20(2)(a)</td>
<td>18</td>
<td></td>
</tr>
<tr>
<td>166.20(2)(c)</td>
<td>18</td>
<td></td>
</tr>
<tr>
<td>166.20(7m)</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td>168.12(1)</td>
<td>114</td>
<td></td>
</tr>
<tr>
<td>230.40</td>
<td>135</td>
<td></td>
</tr>
<tr>
<td>230.40(2)</td>
<td>135</td>
<td></td>
</tr>
<tr>
<td>301.001</td>
<td>162</td>
<td></td>
</tr>
<tr>
<td>301.01</td>
<td>157</td>
<td></td>
</tr>
<tr>
<td>301.01(4)</td>
<td>165</td>
<td></td>
</tr>
<tr>
<td>301.01(5)</td>
<td>159</td>
<td></td>
</tr>
<tr>
<td>301.01(6)</td>
<td>160</td>
<td></td>
</tr>
<tr>
<td>301.03</td>
<td>162</td>
<td></td>
</tr>
<tr>
<td>301.03(2m)</td>
<td>165</td>
<td></td>
</tr>
<tr>
<td>301.03(6)</td>
<td>165</td>
<td></td>
</tr>
<tr>
<td>301.046</td>
<td>157</td>
<td></td>
</tr>
<tr>
<td>301.048</td>
<td>160</td>
<td></td>
</tr>
<tr>
<td>301.048(3)</td>
<td>162</td>
<td></td>
</tr>
<tr>
<td>301.048(3)(a)</td>
<td>166</td>
<td></td>
</tr>
<tr>
<td>301.048(3)(a)1.</td>
<td>156</td>
<td></td>
</tr>
<tr>
<td>301.048(3)(a)2.</td>
<td>168</td>
<td></td>
</tr>
<tr>
<td>301.048(3)(a)3.</td>
<td>168</td>
<td></td>
</tr>
<tr>
<td>301.048(3)(a)4.</td>
<td>168</td>
<td></td>
</tr>
<tr>
<td>301.048(3)(a)5.</td>
<td>168</td>
<td></td>
</tr>
<tr>
<td>301.048(3)(a)6.</td>
<td>156</td>
<td></td>
</tr>
<tr>
<td>301.048(3)(c)</td>
<td>166</td>
<td></td>
</tr>
<tr>
<td>301.048(4)(b)</td>
<td>160</td>
<td></td>
</tr>
<tr>
<td>301.048(7)</td>
<td>156</td>
<td></td>
</tr>
<tr>
<td>301.21(1)(B)</td>
<td>160</td>
<td></td>
</tr>
<tr>
<td>301.386(5)</td>
<td>160</td>
<td></td>
</tr>
<tr>
<td>301.586(5)</td>
<td>162</td>
<td></td>
</tr>
<tr>
<td>302.01</td>
<td>158</td>
<td></td>
</tr>
<tr>
<td>302.25(3)(a)2.</td>
<td>160</td>
<td></td>
</tr>
<tr>
<td>302.27</td>
<td>165</td>
<td></td>
</tr>
<tr>
<td>302.385</td>
<td>158</td>
<td></td>
</tr>
<tr>
<td>302.386</td>
<td>158</td>
<td></td>
</tr>
<tr>
<td>302.386(1)</td>
<td>160</td>
<td></td>
</tr>
<tr>
<td>302.386(2)</td>
<td>160</td>
<td></td>
</tr>
<tr>
<td>302.386(2)(a)</td>
<td>160</td>
<td></td>
</tr>
<tr>
<td>302.386(2)(b)</td>
<td>160</td>
<td></td>
</tr>
<tr>
<td>302.386(5)</td>
<td>156</td>
<td></td>
</tr>
<tr>
<td>302.386(5)(a)</td>
<td>162</td>
<td></td>
</tr>
<tr>
<td>302.386(5)(b)</td>
<td>160</td>
<td></td>
</tr>
<tr>
<td>751.02</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>753.175</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>757.57(5)</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>809.16</td>
<td>13</td>
<td></td>
</tr>
<tr>
<td>814.69</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>893.33</td>
<td>44</td>
<td></td>
</tr>
<tr>
<td>893.82</td>
<td>19</td>
<td></td>
</tr>
<tr>
<td>895.46</td>
<td>19</td>
<td></td>
</tr>
<tr>
<td>895.46(1)(a)</td>
<td>17</td>
<td></td>
</tr>
<tr>
<td>895.46(1)(e)</td>
<td>22</td>
<td></td>
</tr>
<tr>
<td>946.40</td>
<td>132</td>
<td></td>
</tr>
<tr>
<td>946.41</td>
<td>132</td>
<td></td>
</tr>
<tr>
<td>950.01</td>
<td>128</td>
<td></td>
</tr>
<tr>
<td>957.06</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>970.05</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>971.24</td>
<td>66</td>
<td></td>
</tr>
<tr>
<td>990.01</td>
<td>12, 57</td>
<td></td>
</tr>
<tr>
<td>990.01(40)</td>
<td>57</td>
<td></td>
</tr>
</tbody>
</table>
N.B. The texts of Unpublished Opinions appearing in this Index without page references are available on request from the Office of the Attorney General.
COMPATIBILITY (continued)
Planning and zoning commission member
The office of member of a county planning and zoning commission is incompatible with the position of executive director of the county housing authority. OAG 14-93 ............................ 90

CONFIDENTIAL REPORTS
Child abuse
A district attorney or corporation counsel may reveal the contents of a report made under section 48.981 in the course of a criminal prosecution or one of the civil proceedings enumerated under section 48.981(7)(a)10. OAG 10-93 ............................ 66

District attorney files
A district attorney or corporation counsel may reveal the contents of a report made under section 48.981 in the course of a criminal prosecution or one of the civil proceedings enumerated under section 48.981(7)(a)10. OAG 10-93 ............................ 66

CONSTITUTIONAL LAW
Article VIII, Section 1 of the Wisconsin Constitution discussed
A Wisconsin law patterned on Illinois' law which provides that improvements to real property would be assessed on the date of the completion of the improvements would be unconstitutional under article VIII, section 1 of the Wisconsin Constitution. OAG 15-93 ............................ 94

Uniformity clause
A Wisconsin law patterned on Illinois' law which provides that improvements to real property would be assessed on the date of the completion of the improvements would be unconstitutional under article VIII, section 1 of the Wisconsin Constitution. OAG 15-93 ............................ 94

CONSTITUTIONALITY
Health insurance program, state
The amendment of section 40.05(4)(bc) by section 276 of 1991 Wisconsin Act 269, after issuance of OAG 7-92, renders such section not in violation of article IV, section 26 of the Wisconsin Constitution.
Changes to the state health insurance program embodied in sections 40.05(4)(bc) and 40.51(10m) are not in violation of the prohibition of article IV, section 26 of the Wisconsin Constitution, given the presumption of constitutionality and the lack of case law showing that all changes in benefits are subject to the prohibition. OAG 5-93 ............................ 28

COPYRIGHT
Compilations of court opinions
Appellate court opinions cannot be protected by copyright and copyright protection applicable to compilations of court opinions is very limited if present at all. OAG 8-93 ............................ 45
COPYRIGHT (continued)

Court decisions
Appellate court opinions cannot be protected by copyright and copyright protection applicable to compilations of court opinions is very limited if present at all. OAG 8-93 45

Judicial opinions
Appellate court opinions cannot be protected by copyright and copyright protection applicable to compilations of court opinions is very limited if present at all. OAG 8-93 45

CORRECTIONS, DEPARTMENT OF

AODA services
Except as provided in section 301.048(7), Stats., counties are financially responsible under sections 49.02 and 51.42 for the provision of medical and dental services, including psychiatric and AODA services, to persons in the community residential confinement program and to persons in the intensive sanctions program. DOC is under no statutory obligation to furnish treatment for inpatient or outpatient mental health and AODA services to persons in the intensive sanctions program unless they are in Type 1 prisons other than the community residential confinement program, but it is required to provide reimbursement for the actual cost of health care treatment furnished to persons in the intensive sanctions program who are placed by DOC in a facility or program pursuant to section 301.048(3)(a)1. and 6. when the cost of the treatment is authorized by DOC. DOC also possesses discretionary authority to provide inpatient and outpatient mental health services and outpatient AODA services to persons in the intensive sanctions program. OAG 9-94 156

Health benefits to prisoners
Except as provided in section 301.048(7), Stats., counties are financially responsible under sections 49.02 and 51.42 for the provision of medical and dental services, including psychiatric and AODA services, to persons in the community residential confinement program and to persons in the intensive sanctions program. DOC is under no statutory obligation to furnish treatment for inpatient or outpatient mental health and AODA services to persons in the intensive sanctions program unless they are in Type 1 prisons other than the community residential confinement program, but it is required to provide reimbursement for the actual cost of health care treatment furnished to persons in the intensive sanctions program who are placed by DOC in a facility or program pursuant to section 301.048(3)(a)1. and 6. when the cost of the treatment is authorized by DOC. DOC also possesses discretionary authority to provide inpatient and outpatient mental health services and outpatient AODA services to persons in the intensive sanctions program. OAG 9-94 156
CORRECTIONS, DEPARTMENT OF (continued)

Medical and dental services to prisoners

Except as provided in section 301.048(7), Stats., counties are financially responsible under sections 49.02 and 51.42 for the provision of medical and dental services, including psychiatric and AODA services, to persons in the community residential confinement program and to persons in the intensive sanctions program. DOC is under no statutory obligation to furnish treatment for inpatient or outpatient mental health and AODA services to persons in the intensive sanctions program unless they are in Type 1 prisons other than the community residential confinement program, but it is required to provide reimbursement for the actual cost of health care treatment furnished to persons in the intensive sanctions program who are placed by DOC in a facility or program pursuant to section 301.048(3)(a)1. and 6. when the cost of the treatment is authorized by DOC. DOC also possesses discretionary authority to provide inpatient and outpatient mental health services and outpatient AODA services to persons in the intensive sanctions program. OAG 9-94 ................................. 156

COUNTIES

Personnel committee

In a county which does not have a county executive or county administrator, the personnel committee of a county board does not possess the statutory authority to remove the county social services director. The county board in such a county may not, under section 59.025, Stats., transfer the authority to appoint, supervise and remove the social services director from the social services board to a committee of the county board because the statutes concerning the exercise of such authority are enactments primarily of statewide concern. OAG 8-94 ................................. 145

Regional Planning Commission

The boundaries of existing multicounty regional planning commissions may only be altered following their dissolution under the procedure set out in section 66.945(15), Stats. OAG 11-93 .................. 70

Social services director

In a county which does not have a county executive or county administrator, the personnel committee of a county board does not possess the statutory authority to remove the county social services director. The county board in such a county may not, under section 59.025, Stats., transfer the authority to appoint, supervise and remove the social services director from the social services board to a committee of the county board because the statutes concerning the exercise of such authority are enactments primarily of statewide concern. OAG 8-94 ................................. 145
COUNTIES (continued)

Zoning
An amendment to a county zoning ordinance which adds a new zoning district to that ordinance does not necessarily constitute a comprehensive revision requiring town board approval of the entire county zoning ordinance under the provisions of section 59.97(5)(d), Stats. OAG 1-94 98

COUNTY BOARD

Personnel committee
In a county which does not have a county executive or county administrator, the personnel committee of a county board does not possess the statutory authority to remove the county social services director. The county board in such a county may not, under section 59.025, Stats., transfer the authority to appoint, supervise and remove the social services director from the social services board to a committee of the county board because the statutes concerning the exercise of such authority are enactments primarily of statewide concern. OAG 8-94 145

Social services director
In a county which does not have a county executive or county administrator, the personnel committee of a county board does not possess the statutory authority to remove the county social services director. The county board in such a county may not, under section 59.025, Stats., transfer the authority to appoint, supervise and remove the social services director from the social services board to a committee of the county board because the statutes concerning the exercise of such authority are enactments primarily of statewide concern. OAG 8-94 145

Zoning
An amendment to a county zoning ordinance which adds a new zoning district to that ordinance does not necessarily constitute a comprehensive revision requiring town board approval of the entire county zoning ordinance under the provisions of section 59.97(5)(d), Stats. OAG 1-94 98

COURT REPORTERS

Compensation and work rules
A county must permit its own employees who perform court reporting functions indistinguishable from those performed by court reporters employed by the state to retain all statutory fees which can be retained by state-employed court reporters, including those fees which are the statutory obligation of the county. The salaries of such employees could be structured to account for the payment of those fees. A county may prohibit its employees who perform court reporting functions from typing transcripts during normal county working hours if they receive fees in addition to their normal county salary for furnishing such transcripts,
COURT REPORTERS (continued)
Compensation and work rules (continued)

but such a prohibition may not interfere with the ability of those employees to comply with the requirements of statutory provisions or supreme court rules for the preparation of transcripts within specified time periods or with the orderly operation of the judicial system. OAG 2-93

Salaries
A county must permit its own employees who perform court reporting functions indistinguishable from those performed by court reporters employed by the state to retain all statutory fees which can be retained by state-employed court reporters, including those fees which are the statutory obligation of the county. The salaries of such employees could be structured to account for the payment of those fees. A county may prohibit its employees who perform court reporting functions from typing transcripts during normal county working hours if they receive fees in addition to their normal county salary for furnishing such transcripts, but such a prohibition may not interfere with the ability of those employees to comply with the requirements of statutory provisions or supreme court rules for the preparation of transcripts within specified time periods or with the orderly operation of the judicial system. OAG 2-93

DISTRICT ATTORNEY
Confidential reports
A district attorney or corporation counsel may reveal the contents of a report made under section 48.981 in the course of a criminal prosecution or one of the civil proceedings enumerated under section 48.981(7)(a)10. OAG 10-93

Open file policy
A district attorney or corporation counsel may reveal the contents of a report made under section 48.981 in the course of a criminal prosecution or one of the civil proceedings enumerated under section 48.981(7)(a)10. OAG 10-93

DRUGS
Locomotive engineers
Federal legislation has explicitly preempted the field of rail safety and not conferred authority on state or local law enforcement officials to conduct drug tests of locomotive engineers involved in grade crossing accidents in Wisconsin. However, this legislation does not preempt state regulation of drugs and narcotics. Thus, state or local law enforcement officials acting pursuant to their authority to enforce the state's general criminal statutes may conduct drug tests of locomotive engineers provided that the testing comports with the fourth amendment. OAG 12-93
DRUGS (continued)

Rail safety

Federal legislation has explicitly preempted the field of rail safety and not conferred authority on state or local law enforcement officials to conduct drug tests of locomotive engineers involved in grade crossing accidents in Wisconsin. However, this legislation does not preempt state regulation of drugs and narcotics. Thus, state or local law enforcement officials acting pursuant to their authority to enforce the state's general criminal statutes may conduct drug tests of locomotive engineers provided that the testing comports with the fourth amendment. OAG 12-93 78

Testing locomotive engineers

Federal legislation has explicitly preempted the field of rail safety and not conferred authority on state or local law enforcement officials to conduct drug tests of locomotive engineers involved in grade crossing accidents in Wisconsin. However, this legislation does not preempt state regulation of drugs and narcotics. Thus, state or local law enforcement officials acting pursuant to their authority to enforce the state's general criminal statutes may conduct drug tests of locomotive engineers provided that the testing comports with the fourth amendment. OAG 12-93 78

EDUCATION, BOARD OF

Collective bargaining

Section 19.85(3), Stats., requires that a governmental body conduct its discussions and deliberations regarding final ratification of a collective bargaining agreement in open session. OAG 7-94 139

Open meeting

Section 19.85(3), Stats., requires that a governmental body conduct its discussions and deliberations regarding final ratification of a collective bargaining agreement in open session. OAG 7-94 139

ELECTIONS

Civil Service

Meaning of the phrase "declares an intention to run for office" in section 230.40(2), Stats., discussed. OAG 6-94 135

Economic interests statement

The Ethics Board cannot extend the date by which a candidate for state public office must file a statement of economic interests and cannot waive the filing requirement. OAG 13-93 85

Ethics Board

The Ethics Board cannot extend the date by which a candidate for state public office must file a statement of economic interests and cannot waive the filing requirement. OAG 13-93 85
ELECTIONS (continued)

Mandatory filing requirements

The Ethics Board cannot extend the date by which a candidate for state public office must file a statement of economic interests and cannot waive the filing requirement. OAG 13-93 85

EMERGENCY DETENTION

Law enforcement

It remains the obligation of the law enforcement officer who has placed an individual under emergency detention under section 51.15, Stats., to transport that individual to one of the four categories of facilities listed in section 51.15(2) until custody of the individual is transferred to such a facility. OAG 3-94 110

ETHICS, STATE BOARD OF

Candidates filing economic interests statement

The Ethics Board cannot extend the date by which a candidate for state public office must file a statement of economic interests and cannot waive the filing requirement. OAG 13-93 85

FEES

Court reporters

A county must permit its own employes who perform court reporting functions indistinguishable from those performed by court reporters employed by the state to retain all statutory fees which can be retained by state-employed court reporters, including those fees which are the statutory obligation of the county. The salaries of such employes could be structured to account for the payment of those fees. A county may prohibit its employes who perform court reporting functions from typing transcripts during normal county working hours if they receive fees in addition to their normal county salary for furnishing such transcripts, but such a prohibition may not interfere with the ability of those employes to comply with the requirements of statutory provisions or supreme court rules for the preparation of transcripts within specified time periods or with the orderly operation of the judicial system. OAG 2-93 7

FUNDS

General obligation bonds

The state may use the proceeds from general obligation bonds to fund an expansion of the Petroleum Environmental Cleanup Fund Award Program. OAG 4-94 114

Revenue bonds

The state may use the proceeds from general obligation bonds to fund an expansion of the Petroleum Environmental Cleanup Fund Award Program. OAG 4-94 114
INSURANCE

Health insurance

The amendment of section 40.05(4)(bc) by section 276 of 1991 Wisconsin Act 269, after issuance of OAG 7-92, renders such section not in violation of article IV, section 26 of the Wisconsin Constitution. Changes to the state health insurance program embodied in sections 40.05(4)(bc) and 40.51(10m) are not in violation of the prohibition of article IV, section 26 of the Wisconsin Constitution, given the presumption of constitutionality and the lack of case law showing that all changes in benefits are subject to the prohibition. OAG 5-93

State health insurance program

The amendment of section 40.05(4)(bc) by section 276 of 1991 Wisconsin Act 269, after issuance of OAG 7-92, renders such section not in violation of article IV, section 26 of the Wisconsin Constitution. Changes to the state health insurance program embodied in sections 40.05(4)(bc) and 40.51(10m) are not in violation of the prohibition of article IV, section 26 of the Wisconsin Constitution, given the presumption of constitutionality and the lack of case law showing that all changes in benefits are subject to the prohibition. OAG 5-93

LAND

Federal land patent

Original conveyance of land by federal land patent does not consequentially affect the state's jurisdiction over the land. OAG 2-94

Jurisdiction over

Original conveyance of land by federal land patent does not consequentially affect the state's jurisdiction over the land. OAG 2-94

LAW ENFORCEMENT

Drug testing of locomotive engineers

Federal legislation has explicitly preempted the field of rail safety and not conferred authority on state or local law enforcement officials to conduct drug tests of locomotive engineers involved in grade crossing accidents in Wisconsin. However, this legislation does not preempt state regulation of drugs and narcotics. Thus, state or local law enforcement officials acting pursuant to their authority to enforce the state's general criminal statutes may conduct drug tests of locomotive engineers provided that the testing comports with the fourth amendment. OAG 12-93

Emergency detention

It remains the obligation of the law enforcement officer who has placed an individual under emergency detention under section 51.15, Stats., to transport that individual to one of the four categories of facilities listed in section 51.15(2) until custody of the individual is transferred to such a facility. OAG 3-94
LAW ENFORCEMENT (continued)

Locomotive engineers

Federal legislation has explicitly preempted the field of rail safety and not conferred authority on state or local law enforcement officials to conduct drug tests of locomotive engineers involved in grade crossing accidents in Wisconsin. However, this legislation does not preempt state regulation of drugs and narcotics. Thus, state or local law enforcement officials acting pursuant to their authority to enforce the state’s general criminal statutes may conduct drug tests of locomotive engineers provided that the testing comports with the fourth amendment.

OAG 12-93 .................................................. 78

Municipalities

A sheriff may not unilaterally withdraw most forms of investigative services provided within one urbanized town within a county.

OAG 4-93 .................................................. 24

Police interviewing students at school

School boards have authority to enforce policies which mandate the manner, conditions, and content of police interviews with students on school premises during school hours, although they should exercise considerable restraint in doing so. The preferable course is for school boards and local law enforcement to work together to jointly develop policies that will best serve the legitimate needs of each government arm, without unnecessarily intruding on those of the other.

OAG 5-94 .................................................. 126

Rail safety

Federal legislation has explicitly preempted the field of rail safety and not conferred authority on state or local law enforcement officials to conduct drug tests of locomotive engineers involved in grade crossing accidents in Wisconsin. However, this legislation does not preempt state regulation of drugs and narcotics. Thus, state or local law enforcement officials acting pursuant to their authority to enforce the state’s general criminal statutes may conduct drug tests of locomotive engineers provided that the testing comports with the fourth amendment.

OAG 12-93 .................................................. 78

Schools and School Districts

School boards have authority to enforce policies which mandate the manner, conditions, and content of police interviews with students on school premises during school hours, although they should exercise considerable restraint in doing so. The preferable course is for school boards and local law enforcement to work together to jointly develop policies that will best serve the legitimate needs of each government arm, without unnecessarily intruding on those of the other.

OAG 5-94 .................................................. 126
LAW ENFORCEMENT (continued)

Sheriffs
A sheriff may not unilaterally withdraw most forms of investigative services provided within one urbanized town within a county.
OAG 4-93 .............................. 24

Students interviewed at schools
School boards have authority to enforce policies which mandate the manner, conditions, and content of police interviews with students on school premises during school hours, although they should exercise considerable restraint in doing so. The preferable course is for school boards and local law enforcement to work together to jointly develop policies that will best serve the legitimate needs of each government arm, without unnecessarily intrusion on those of the other.
OAG 5-94 .............................. 126

LIABILITY

Local Emergency Planning Committee
State Emergency Response Board (SERB) committee members and Local Emergency Planning Committee (LEPC) subcommittee members appointed by a county board are entitled to indemnity for damage liability under section 895.46(1)(a), Stats., and legal representation by the attorney general under section 165.25(6). OAG 3-93  ........ 17

State Emergency Response Board
State Emergency Response Board (SERB) committee members and Local Emergency Planning Committee (LEPC) subcommittee members appointed by a county board are entitled to indemnity for damage liability under section 895.46(1)(a), Stats., and legal representation by the attorney general under section 165.25(6). OAG 3-93  ........ 17

LOCAL EMERGENCY PLANNING COMMITTEE

Liability
State Emergency Response Board (SERB) committee members and Local Emergency Planning Committee (LEPC) subcommittee members appointed by a county board are entitled to indemnity for damage liability under section 895.46(1)(a), Stats., and legal representation by the attorney general under section 165.25(6). OAG 3-93  ........ 17

NATURAL RESOURCES, DEPARTMENT OF

Zoning ordinances
The Department of Natural Resources (DNR) is not subject to local zoning ordinances with respect to its construction of any building, structure or facility whose purpose is to assure the general public access to outdoor recreational areas, rather than to facilitate the internal operations of DNR as a state agency. OAG 9-93  ........ 56
NAVIGABLE WATERS
Zoning ordinances, local
The Department of Natural Resources (DNR) is not subject to local zoning ordinances with respect to its construction of any building, structure or facility whose purpose is to assure the general public access to outdoor recreational areas, rather than to facilitate the internal operations of DNR as a state agency. OAG 9-93 ................. 56

OPEN MEETING
Bargaining
See Collective bargaining

Collective bargaining
Section 19.85(3), Stats., requires that a governmental body conduct its discussions and deliberations regarding final ratification of a collective bargaining agreement in open session. OAG 7-94 ................. 139

POLICE
Mayor reinstating discharged officer
A mayor in a city with a police and fire commission does not, under section 62.09(8)(a), (d) and (13)(a), Stats., have the authority to order the chief of police to reinstate a discharged probationary police officer, in light of the powers and duties of the chief and the police and fire commission under section 62.13(4). OAG 1-93 ................. 1

Police and Fire Commission
A mayor in a city with a police and fire commission does not, under section 62.09(8)(a), (d) and (13)(a), Stats., have the authority to order the chief of police to reinstate a discharged probationary police officer, in light of the powers and duties of the chief and the police and fire commission under section 62.13(4). OAG 1-93 ................. 1

Public schools
School boards have authority to enforce policies which mandate the manner, conditions, and content of police interviews with students on school premises during school hours, although they should exercise considerable restraint in doing so. The preferable course is for school boards and local law enforcement to work together to jointly develop policies that will best serve the legitimate needs of each government arm, without unnecessarily intruding on those of the other. OAG 5-94 ....................................................... 126

Reinstatement of discharged officer
A mayor in a city with a police and fire commission does not, under section 62.09(8)(a), (d) and (13)(a), Stats., have the authority to order the chief of police to reinstate a discharged probationary police officer, in light of the powers and duties of the chief and the police and fire commission under section 62.13(4). OAG 1-93 ................. 1
POLICE (continued)

Student interviews at school

School boards have authority to enforce policies which mandate the manner, conditions, and content of police interviews with students on school premises during school hours, although they should exercise considerable restraint in doing so. The preferable course is for school boards and local law enforcement to work together to jointly develop policies that will best serve the legitimate needs of each government arm, without unnecessarily intruding on those of the other.

OAG 5-94 126

POLLUTION

Petroleum Environmental Cleanup Fund Award

The state may use the proceeds from general obligation bonds to fund an expansion of the Petroleum Environmental Cleanup Fund Award Program. OAG 4-94 114

PRISONS AND PRISONERS

AODA services

Except as provided in section 301.048(7), Stats., counties are financially responsible under sections 49.02 and 51.42 for the provision of medical and dental services, including psychiatric and AODA services, to persons in the community residential confinement program and to persons in the intensive sanctions program. DOC is under no statutory obligation to furnish treatment for inpatient or outpatient mental health and AODA services to persons in the intensive sanctions program unless they are in Type I prisons other than the community residential confinement program, but it is required to provide reimbursement for the actual cost of health care treatment furnished to persons in the intensive sanctions program who are placed by DOC in a facility or program pursuant to section 301.048(3)(a)1. and 6. when the cost of the treatment is authorized by DOC. DOC also possesses discretionary authority to provide inpatient and outpatient mental health services and outpatient AODA services to persons in the intensive sanctions program. OAG 9-94 156

Corrections, Department of

Except as provided in section 301.048(7), Stats., counties are financially responsible under sections 49.02 and 51.42 for the provision of medical and dental services, including psychiatric and AODA services, to persons in the community residential confinement program and to persons in the intensive sanctions program. DOC is under no statutory obligation to furnish treatment for inpatient or outpatient mental health and AODA services to persons in the intensive sanctions program unless they are in Type I prisons other than the community residential confinement program, but it is required to provide reimbursement for the actual cost of health care treatment furnished to persons in the intensive sanctions program who are placed by DOC in a facility or program pursuant to section 301.048(3)(a)1. and 6. when the cost of the
PRISONS AND PRISONERS (continued)

Corrections, Department of (continued)

Treatment is authorized by DOC. DOC also possesses discretionary authority to provide inpatient and outpatient mental health services and outpatient AODA services to persons in the intensive sanctions program. OAG 9-94 .................................................. 156

Medical care

Except as provided in section 301.048(7), Stats., counties are financially responsible under sections 49.02 and 51.42 for the provision of medical and dental services, including psychiatric and AODA services, to persons in the community residential confinement program and to persons in the intensive sanctions program. DOC is under no statutory obligation to furnish treatment for inpatient or outpatient mental health and AODA services to persons in the intensive sanctions program unless they are in Type 1 prisons other than the community residential confinement program, but it is required to provide reimbursement for the actual cost of health care treatment furnished to persons in the intensive sanctions program who are placed by DOC in a facility or program pursuant to section 301.048(3)(a)1. and 6. when the cost of the treatment is authorized by DOC. DOC also possesses discretionary authority to provide inpatient and outpatient mental health services and outpatient AODA services to persons in the intensive sanctions program. OAG 9-94 .................................................. 156

Psychiatric services

Except as provided in section 301.048(7), Stats., counties are financially responsible under sections 49.02 and 51.42 for the provision of medical and dental services, including psychiatric and AODA services, to persons in the community residential confinement program and to persons in the intensive sanctions program. DOC is under no statutory obligation to furnish treatment for inpatient or outpatient mental health and AODA services to persons in the intensive sanctions program unless they are in Type 1 prisons other than the community residential confinement program, but it is required to provide reimbursement for the actual cost of health care treatment furnished to persons in the intensive sanctions program who are placed by DOC in a facility or program pursuant to section 301.048(3)(a)1. and 6. when the cost of the treatment is authorized by DOC. DOC also possesses discretionary authority to provide inpatient and outpatient mental health services and outpatient AODA services to persons in the intensive sanctions program. OAG 9-94 .................................................. 156

PROPERTY

Federal land patent

Original conveyance of land by federal land patent does not consequentially affect the state’s jurisdiction over the land. OAG 2-94 .................................................. 104
PROPERTY (continued)

Jurisdiction over
Original conveyance of land by federal land patent does not consequentially affect the state's jurisdiction over the land. OAG 2-94

Tax liens, duration of
The enactment of chapter 20, section 1102c, Laws of 1981, changed the duration of tax liens docketed by the Department of Revenue under section 71.91(5)(b), Stats., from a fixed period of ten years to a period which continues until the tax liability is satisfied. OAG 7-93

Taxation
A Wisconsin law patterned on Illinois' law which provides that improvements to real property would be assessed on the date of the completion of the improvements would be unconstitutional under article VIII, section 1 of the Wisconsin Constitution. OAG 15-93

Uniformity clause
A Wisconsin law patterned on Illinois' law which provides that improvements to real property would be assessed on the date of the completion of the improvements would be unconstitutional under article VIII, section 1 of the Wisconsin Constitution. OAG 15-93

PUBLIC OFFICIALS

Elections
The Ethics Board cannot extend the date by which a candidate for state public office must file a statement of economic interests and cannot waive the filing requirement. OAG 13-93

Financial disclosure
The Ethics Board cannot extend the date by which a candidate for state public office must file a statement of economic interests and cannot waive the filing requirement. OAG 13-93

RAILROADS

Drug testing of engineers
Federal legislation has explicitly preempted the field of rail safety and not conferred authority on state or local law enforcement officials to conduct drug tests of locomotive engineers involved in grade crossing accidents in Wisconsin. However, this legislation does not preempt state regulation of drugs and narcotics. Thus, state or local law enforcement officials acting pursuant to their authority to enforce the state's general criminal statutes may conduct drug tests of locomotive engineers provided that the testing comports with the fourth amendment. OAG 12-93
REGIONAL PLANNING

Multicounty commission

The boundaries of existing multicounty regional planning commissions may only be altered following their dissolution under the procedure set out in section 66.945(15), Stats. OAG 11-93 ......................... 70

RETIREMENT SYSTEMS

Accumulated Sick Leave Conversion Credit

The amendment of section 40.05(4)(bc) by section 276 of 1991 Wisconsin Act 269, after issuance of OAG 7-92, renders such section not in violation of article IV, section 26 of the Wisconsin Constitution. Changes to the state health insurance program embodied in sections 40.05(4)(bc) and 40.51(10m) are not in violation of the prohibition of article IV, section 26 of the Wisconsin Constitution, given the presumption of constitutionality and the lack of case law showing that all changes in benefits are subject to the prohibition. OAG 5-93 ... 28

REVENUE, DEPARTMENT OF

Tax liens, duration of

The enactment of chapter 20, section 1102c, Laws of 1981, changed the duration of tax liens docketed by the Department of Revenue under section 71.91(5)(b), Stats., from a fixed period of ten years to a period which continues until the tax liability is satisfied. OAG 7-93 ...... 41

SCHOOLS AND SCHOOL DISTRICTS

Law enforcement officials interviewing students

School boards have authority to enforce policies which mandate the manner, conditions, and content of police interviews with students on school premises during school hours, although they should exercise considerable restraint in doing so. The preferable course is for school boards and local law enforcement to work together to jointly develop policies that will best serve the legitimate needs of each government arm, without unnecessarily intruding on those of the other. OAG 5-94 ......................................................... 126

Police interviews with students at school

School boards have authority to enforce policies which mandate the manner, conditions, and content of police interviews with students on school premises during school hours, although they should exercise considerable restraint in doing so. The preferable course is for school boards and local law enforcement to work together to jointly develop policies that will best serve the legitimate needs of each government arm, without unnecessarily intruding on those of the other. OAG 5-94 ......................................................... 126
SHERIFFS

Investigative Services

A sheriff may not unilaterally withdraw most forms of investigative services provided within one urbanized town within a county.

OAG 4-93 ........................................ 24

Responsibilities to urbanized areas

A sheriff may not unilaterally withdraw most forms of investigative services provided within one urbanized town within a county.

OAG 4-93 ........................................ 24

STATE

Zoning ordinances, local

The Department of Natural Resources (DNR) is not subject to local zoning ordinances with respect to its construction of any building, structure or facility whose purpose is to assure the general public access to outdoor recreational areas, rather than to facilitate the internal operations of DNR as a state agency. OAG 9-93 ............... 56

STATE EMERGENCY RESPONSE BOARD

Liability

State Emergency Response Board (SERB) committee members and Local Emergency Planning Committee (LEPC) subcommittee members appointed by a county board are entitled to indemnity for damage liability under section 895.46(1)(a), Stats., and legal representation by the attorney general under section 165.25(6). OAG 3-93 ............... 17

TAXATION

Property tax liens

The enactment of chapter 20, section 1102c, Laws of 1981, changed the duration of tax liens docketed by the Department of Revenue under section 71.91(5)(b), Stats., from a fixed period of ten years to a period which continues until the tax liability is satisfied. OAG 7-93 ............... 41

ZONING

County ordinances

An amendment to a county zoning ordinance which adds a new zoning district to that ordinance does not necessarily constitute a comprehensive revision requiring town board approval of the entire county zoning ordinance under the provisions of section 59.97(5)(d), Stats.

OAG 1-94 ........................................ 98

Local ordinances

The Department of Natural Resources (DNR) is not subject to local zoning ordinances with respect to its construction of any building, structure or facility whose purpose is to assure the general public access to outdoor recreational areas, rather than to facilitate the internal operations of DNR as a state agency. OAG 9-93 ............... 56
ZONING (continued)

The Department of Natural Resources (DNR) is not subject to local zoning ordinances with respect to its construction of any building, structure or facility whose purpose is to assure the general public access to outdoor recreational areas, rather than to facilitate the internal operations of DNR as a state agency. OAG 9-93 ........................... 56

WORDS AND PHRASES

"Applicant" .................................................. 37
"Candidate" .................................................. 37
"Compilation" ................................................. 45
"Consider" ................................................... 139
"Declares an intention to run for office" .................. 135
"Final candidate" .............................................. 37
"For public purposes" ....................................... 114
"Improve" ..................................................... 114
"Marginal significance" .................................... 114
"Office" ......................................................... 37
"Originality" .................................................. 45
"Position" ..................................................... 37
"Public purposes" .......................................... 114
"To improve" ................................................. 114
"Waters" ....................................................... 114