February 14, 2008

OAG—1—08

Mr. Jeffrey B. Fuge
Corporation Counsel
Polk County
1005 West Main Street, Suite 100
Balsam Lake, WI 54810

Dear Mr. Fuge:

You ask whether gifts, grants, and donations to a county human services department created under Wis. Stat. § 46.23 may be accepted only by the county board of supervisors or instead may be accepted by the human services department itself.

In my opinion, because there is no explicit statutory authority for county human services departments to accept such items, the statutory scheme contemplates that gifts, grants, and donations to a county human services department created under Wis. Stat. § 46.23 may be accepted only by the county board of supervisors.

STATUTES INVOLVED

I. POWERS OF COUNTY BOARD OF SUPERVISORS.

Wisconsin Stat. § 51.423 provides in part:

(2) From the appropriations under s. 20.435(7)(b) and (o), the department shall distribute the funding for services provided or purchased by county departments under s. 46.23, 51.42, or 51.437 to such county departments as provided under s. 46.40. County matching funds are required for the distributions under s. 46.40(2) and (9)(b). Each county’s required match for the distributions under s. 46.40(2) for a year equals 9.89% of the total of the county’s distributions under s. 46.40(2) for that year for which matching funds are required plus the amount the county was required by s. 46.26(2)(c), 1985 stats., to spend for juvenile delinquency-related services from its distribution for 1987. Each county’s required match for the distribution under s. 46.40(9)(b) for a year equals 9.89% of that county’s amounts described in s. 46.40(9)(a) (intro.) for that year. Matching funds may be from county tax levies, federal and state revenue sharing funds, or private donations to the counties that meet the requirements specified in sub. (5). Private donations may not exceed 25% of
generate the full amount of state and federal funds distributed for this period, the decrease in the amount of state and federal funds equals the difference between the required and the actual amount of county matching funds.

(5)(a) A private donation to a county may be used to match the state grant-in-aid under s. 46.495(1)(d) or under sub. (2) only if the donation is both of the following:

1. **Donated to a county department under s. 46.215, 46.22, 51.42 or 51.437 and the donation is under the administrative control of such county department.**

2. Donated without restrictions as to use, unless the restrictions specify that the donation be used for a particular service and the donor neither sponsors nor operates the service.

Wisconsin Stat. § 59.52(19) authorizes the county board of supervisors to “[a]ccept donations, gifts or grants for any public governmental purpose within the powers of the county.”

**II. POWERS OF COUNTY HUMAN SERVICES DEPARTMENTS.**

Wisconsin Stat. § 46.22(1)(c)8., provides that a county board may in its discretion grant a county human services department the power:

8. **To administer child welfare services including services to juveniles who are delinquent and to children who are mentally retarded, dependent, neglected or nonmarital, and to other children who are in need of such services.**

In administering child welfare services the county department of social services shall be governed by the following:

a. **The county department of social services may avail itself of the cooperation of any individual or private agency or organization interested in the social welfare of children in the county with a single-county department of social services or in the counties with a multicounty department of social services.**

b. **The county department of social services shall administer and expend such amounts as may be necessary out of any moneys which may be appropriated for child welfare purposes by the county board of supervisors in a county with a single-county department of social services or by the county boards of supervisors**
in counties with a multicounty department of social services or donated by individuals or private organizations.

ANALYSIS

Wisconsin Stat. § 59.52(19) expressly authorizes the county board of supervisors to “accept donations, gifts or grants for any public governmental purpose within the powers of the county.” There is no similar language in Wis. Stat. § 46.22 expressly authorizing county human services departments, boards, or directors to accept gifts, grants, and donations. 73 Op. Att’y Gen. 125 (1984) concluded that the specific language concerning the acceptance of gifts, grants, and donations by the county board in what is now Wis. Stat. § 59.52(19) coupled with the lack of any comparable language in Wis. Stat. § 46.18 requires the county board, rather than the trustees of county institutions operated under Wis. Stat. § 46.18, to accept gifts, grants, and donations to such county institutions. Under the reasoning in 73 Op. Att’y Gen. 125, gifts, grants, and donations to a county human services department may be accepted only by the county board and may not by the county human services department itself.

I recognize that statutes not considered in 73 Op. Att’y Gen. 125 are involved here. Wisconsin Stat. § 51.423(5)(a)1. refers to funds “[d]onated to a county department under s. 46.215, 46.22, 51.42 or 51.437 . . . [provided that] the donation is under the administrative control of such county department” and Wis. Stat. § 46.22(1)(c)8.b. provides that a county board may in its discretion grant the county human services department the power to “administer and expend such amounts as may be necessary out of any moneys which may be appropriated for child welfare purposes by the county board of supervisors . . . or donated by individuals or private organizations.”

Statutes relating to the same subject are to be construed together and harmonized. State v. Robinson, 140 Wis. 2d 673, 677, 412 N.W.2d 535 (Ct. App. 1987). Because there is no language in Wis. Stat. §§ 46.215, 46.22, 51.42 or 51.437 expressly authorizing the departments referred to in those statutes to accept gifts, grants or donations, I view the express language concerning the acceptance of gifts, grants, or donations by the county board in Wis. Stat. § 59.52(19) to be controlling. I therefore construe Wis. Stat. § 51.423(5)(a)1. as recognizing that a restriction by the donor to the effect that a gift, grant, or donation can only be used by one of the specified boards must be honored if the county board decides to accept a donation containing such a restriction. See Nelson v. Madison Lutheran Hospital & Sanatorium, 237 Wis. 518, 523-25, 297 N.W. 424 (1941). Similarly, I construe the language in Wis. Stat. § 46.22(1)(c)8.b. as recognizing that funds donated for child welfare purposes that are accepted by the county board may be expended by the county human services department for such purposes without any appropriation of those donated funds by the county board to the human services department. I do not view Wis. Stat. § 46.22(1)(c)8.b. as expressly authorizing the county human services department to accept monetary donations.
It is the function of the county board of supervisors to establish the budget of the county human services department. See 73 Op. Att'y Gen. 96, 97 (1984); 69 Op. Att'y Gen. 128, 130-31 (1980). When establishing the budget of the county human services department, the county board must decide whether to appropriate the matching amounts that are required in order to obtain state funds under Wis. Stat. § 51.423. In doing so, the county board must decide whether to use private donations to match state funds, must be certain that any such private donations do not exceed twenty-five percent of the total county match under the limitation contained in Wis. Stat. § 51.423(2), and must be certain that any such private donations are sufficiently unrestricted so as to satisfy the requirements for matching funds in Wis. Stat. § 51.423(5)(a)1. and 2. Given the county board's extensive authority over the budget of the county human services department, it makes sense that the county board should decide whether or not to accept gifts, grants, or donations to the county human services department. There may be other, non-budgetary reasons why it would be preferable to authorize county human services departments themselves to accept gifts, grants, or donations. The Legislature could enact language like that in Wis. Stat. § 59.52(19) that would expressly authorize county human services departments to directly accept gifts, grants, or donations if there are valid policy reasons for doing so.

CONCLUSION

I therefore conclude that gifts, grants, and donations to a county human services department created under Wis. Stat. § 46.23 may be accepted only by the county board of supervisors and may not be accepted by the county human services department itself.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:FTC:cla
CAPTION: Gifts, grants, and donations to a county human services department created under Wis. Stat. § 46.23 may be accepted only by the county board of supervisors and may not be accepted by the county human services department itself.
Mr. Frank Volpintesta  
Corporation Counsel  
Kenosha County  
912 - 56th Street  
Kenosha, WI 53140-3747

Dear Mr. Volpintesta:

In your revised letter dated October 18, 2007, you request an opinion concerning four questions:

1. Must the county designate an official newspaper?

In my opinion, the answer is no.

2. Must the county seek bids for the publication of legal notices and if so must the award go to the lowest bidder?

In my opinion, a county is not statutorily required to seek bids for the publication of legal notices.

3. In lieu of bidding the publication of its own proceedings [as provided in Wis. Stat. § 59.14(3)], may the county print its own proceedings or in the alternative post them to its official web site?

In my opinion, even if a county does not competitively bid the publication of its own proceedings as provided in Wis. Stat. § 59.14(3), it may print its own proceedings or post them on its web site.

4. In lieu of publication in a printed newspaper or posting on a physical bulletin board, may the county post its legal notices on its official web site?

In my opinion, the answer is no because placing a legal notice on the county’s web site is not newspaper publication, is not another form of publication, and does not constitute posting in a public place.
Wisconsin Stat. § 59.14 provides:

Publication of ordinances and proceedings. (1) Whenever a board enacts an ordinance under this chapter the clerk shall immediately publish it as a class 1 notice, under ch. 985; and the clerk shall procure and distribute copies of the ordinance to the several town clerks, who shall file it in their respective offices.

(2) The board shall, by ordinance or resolution, provide for publication in one or more newspapers in the county as a class 1 notice, under ch. 985, a certified copy of all its proceedings had at any meeting, regular or special; said publication to be completed within 60 days after the adjournment of each session.

(3) The board may at any meeting, regular or special, provide by resolution for the publication in pamphlet form by the lowest and best bidder therefor, of a sufficient and designated number of copies of its duly certified proceedings, for general distribution.

(4) The board may order public notices relating to tax redemption and other affairs of the county to be published in a newspaper printed in any other than the English language, to be designated in such order, whenever the board considers it necessary for the better information of the inhabitants of the county, and it shall appear from the last previous census that one-fourth or more of the adult population of the county is of a nationality not speaking the English language, and that there shall have been a newspaper published in the county continuously for one year or more in the language spoken by that nationality; but all of the notices shall also be published in a newspaper published in the English language as provided by law. The compensation for all of the publications shall be paid by the county ordering the publications, and shall be the same as that prescribed by law for publication in the English language; and no extra charge shall be allowed for translation in any case. No irregularity, mistake or informality in any such publication shall affect the validity or regularity of any tax redemptions or other legal proceedings.

Wisconsin Stat. § 985.01 provides in part:

Definitions. As used in this chapter, unless the context requires otherwise:

(2) “Legal notice” means every notice required by law or by order of a court to be published in a newspaper or other publication.
(5) A newspaper is “published” at the place from which its mailing permit is issued, except that if the place where the newspaper has its major concentration of circulation has no primary post office, then at the place it shall designate as its place of publication in the affidavit required by s. 985.03(2), but no newspaper shall have more than one place of publication during the same period of time.

Wisconsin Stat. § 985.02 provides in part:

Method of notification. (1) Except as otherwise provided by law, a legal notice shall be published in a newspaper likely to give notice in the area or to the person affected. Whenever the law requires publication in a newspaper published in a designated municipality or area and no newspaper is published therein publication shall be made in a newspaper likely to give notice.

(2) If the governing body of a municipality elects to post under s. 985.05(1) it shall post in the following manner:

(a) The notice must be posted in at least 3 public places likely to give notice to persons affected.

(b) The notice posted before the act or event requiring notice shall be posted no later than the time specified for the first newspaper publication.

(c) The notice posted after the act or event requiring notice shall be posted within one week after the act or event. Actions of governing bodies posted after the act or event shall be effective upon posting.

Wisconsin Stat. § 985.03 provides:

Qualifications of newspapers. (1)(a) No publisher of any newspaper in this state shall be awarded or be entitled to any compensation or fee for the publishing of any legal notice unless, for at least 2 of the 5 years immediately before the date of the notice publication, the newspaper has been published regularly and continuously in the city, village or town where published, and has had a bona fide paid circulation:

1. That has constituted 50% or more of its circulation; and,
2. That has had actual subscribers at each publication of not less than 1,000 copies in 1st and 2nd class cities, or 300 copies if in 3rd and 4th class cities, villages or towns.

(c) A newspaper, under this chapter, is a publication appearing at regular intervals and at least once a week, containing reports of happenings of recent occurrence of a varied character, such as political, social, moral and religious subjects, designed to inform the general reader. The definition includes a daily newspaper published in a county having a population of 500,000 or more, devoted principally to business news and publishing of records, which has been designated by the courts of record of the county for publication of legal notices for a period of 6 months or more.

Wisconsin Stat. § 985.05 provides in part:

Official municipal newspapers. (1) The governing body of every municipality not required to have an official newspaper may designate a newspaper published or having general circulation in the municipality and eligible under s. 985.03 as its official newspaper or utilize the same for specific notices. The governing body of such municipality may, in lieu of newspaper publication, direct other form of publication or posting under s. 985.02(2). Other publication or posting, however, shall not be substituted for newspaper publication in proceedings relating to: tax redemptions or sales of land acquired by the county or city authorized to act under s. 74.87 for delinquent taxes, charges or assessments; civil annexations, detachments, consolidations or incorporations under chs. 59 to 66; or legal notices directed to specific individuals. Posting may not be substituted for publication in school board elections conducted under s. 120.06 or publication under s. 60.80(2) of town ordinances imposing forfeitures. If an eligible newspaper is published in the municipality, other publication or posting shall not be substituted for newspaper publication under s. 61.32 or 61.50.

(2) When any municipality has designated an official newspaper, all legal notices published in a newspaper by such municipality shall be published in such newspaper unless otherwise specifically required by law.

Wisconsin Stat. § 985.065 provides in part:

Publication and printing; counties with population of 250,000 or more. (2)(a) In counties having a population of 250,000 or more, the county board of
supervisors, at its annual meeting shall direct the county clerk to invite proposals from the English newspapers published daily in said county, for the publication and printing of the proceedings of said board . . . .

. . . .

c) The said board may by resolution suspend the publication of proceedings in newspapers and provide for the printing thereof in pamphlet form until the further action of the board in relation thereto. Separate bids may be called for if so ordered by said board, from printers in the county, for the printing of the proceedings of said county board in pamphlet form in such quantities as shall be determined by said board.

. . . .

(f) The said board of supervisors may, in lieu of the foregoing provisions, provide by ordinance, a method of printing and publication of its proceedings and notices, and the method of obtaining bids and contracts therefor.

Your first question is whether your county must designate an official newspaper.

Kenosha County has a population of less than 250,000. Wisconsin Blue Book (2007-08) at 768. Kenosha County therefore is not required to designate an official newspaper or newspapers under Wis. Stat. § 985.065(2)(a).

There is no other statute requiring that a county designate an official newspaper. See 62 Op. Att’y Gen. 81, 84 (1973): “Chapter 985, Wis. Stats., which relates to the publication of legal notices, does not require that your county designate a newspaper as its official newspaper.” Accord 60 Op. Att’y Gen. 95, 96 (1971): “[C]h. 985, Stats., does not require that your county designate any newspaper as its official newspaper.” (Italics in original). There have been no statutory amendments subsequent to the issuance of 62 Op. Att’y Gen. 81 that require a county with a population of under 250,000 to designate an official newspaper.

Your second question is whether your county is statutorily required to seek bids for the publication of legal notices.

Wisconsin Stat. § 59.52(29)(a) requires a county to seek competitive bids for “any contract for the construction, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind where the estimated cost of such work will exceed $25,000[.]” The term “public work” therefore contemplates something of a physical nature that can be constructed, repaired, remodeled, or improved. See Joyce v. County of Dunn, 192 Wis. 2d 699, 706, 531 N.W.2d 628 ( Ct. App. 1995). Publication of legal notices also does
not involve the furnishing of “supplies” that are used or consumed or of “materials” that enter into or form part of a finished structure within the meaning of Wis. Stat. § 59.52(29)(a). See Joyce, 192 Wis. 2d at 706. A contract for newspaper publication involves the provision of a service that is not subject to Wis. Stat. § 59.52(29)(a). Compare 76 Op. Att’y Gen. 182 (1987).

There is no statute requiring that your county seek bids when publishing legal notices. Consequently, competitive bidding is not required. See Cullen v. Rock County, 244 Wis. 2d 237, 240, 12 N.W.2d 38 (1943).

Your third question is whether your county may print its own proceedings or post them on its web site even if it does not seek competitive bids for the publication of its own proceedings as provided in Wis. Stat. § 59.14(3). Wisconsin Stat. § 59.14(3) provides that the county board “may” at any meeting, regular or special, provide by resolution for the publication in pamphlet form by the lowest and best bidder therefor, of a sufficient and designated number of copies of its duly certified proceedings, for general distribution.” In contrast, Wis. Stat. § 59.14(2) provides that “[t]he board shall, by ordinance or resolution, provide for publication in one or more newspapers in the county as a class 1 notice, under ch. 985, a certified copy of all its proceedings had at any meeting . . . .”

“[T]he word ‘shall’ in a statute is presumed to be mandatory, especially where the legislature uses the words ‘shall’ and ‘may’ in the same statutory section.” State v. Stenklyft, 2005 WI 71, ¶ 33, 281 Wis. 2d 484, 697 N.W.2d 769, citing State v. Sprosty, 227 Wis. 2d 316, 324-25, 595 N.W.2d 692 (1999). Wisconsin Stat. § 59.14(3) authorizes a county board to seek outside competitive bids for the publication of its proceedings in pamphlet form if it deems outside publication of such pamphlets to be desirable. Wisconsin Stat. § 59.14(3) does not preclude a county from printing and binding summaries of its own proceedings, nor does it prohibit a county from posting summaries of its proceedings on its official web site.

Your fourth question essentially is whether placing a legal notice on the county’s web site can be considered newspaper publication under Wis. Stat. § 985.05(1), can be considered an “other form of publication” under Wis. Stat. § 985.05(1), or can be considered posting in a public place under Wis. Stat. § 985.02(2).

Wisconsin Stat. § 985.05(1) requires that certain legal notices be published in a newspaper. Wisconsin Stat. § 985.03(1)(c) provides that a “newspaper” is a “publication appearing at regular intervals and at least once a week, containing reports of happenings of recent occurrence of a varied character, such as political, social, moral and religious subjects, designed to inform the general reader.” Counties lack statutory authority to issue publications containing such varied information, and the general reader does not refer to a county web site in order to obtain such information.
Even if counties did possess statutory authority to publish newspapers as defined in Wis. Stat. § 985.03(1)(c), I am not persuaded that such publication could occur solely on a county’s web site. Although you cite Hernandez v. Alcorta, 2003 WL 22391311 (Terr. V.I., October 8, 2003) for the proposition that there are now “internet newspapers” that do not employ the method of sheet publication at all, providing a source of news on the internet is not providing a source of news on paper. Virtually anyone can buy a newspaper, but not everyone has a computer with access to the internet. Placing a legal notice on a county’s web site therefore does not constitute newspaper publication under Wis. Stat. § 985.05(1).

In those situations where newspaper publication of legal notices is not mandatory under Wis. Stat. § 985.05(1), that statute provides that the county board “may, in lieu of newspaper publication, direct other form of publication or posting under s. 985.02(2).” Wisconsin Stat. § 985.03(1)(c) also explicitly states that a newspaper is a “publication.” A dictionary may be used to ascertain the meaning of non-technical terms used in a statute. Garcia v. Mazda Motor of America, 2004 WI 93, ¶ 14, 273 Wis. 2d 612, 682 N.W.2d 365. Webster’s Third New International Dictionary 1836 (1986) defines the noun “publication” as “2 a : the act or process of issuing copies ... for general distribution to the public.”

“[S]tatutory language is interpreted in the context which it is used; not in isolation but as part of a whole[.]” State ex rel. Kalal v. Circuit Court, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. The phrase “other form of publication” in Wis. Stat. § 985.05(1) must be construed in the same sense as the phrase “newspaper publication” in that statute and in contradistinction to “posting” under Wis. Stat. § 985.05(2). Placing a legal notice on a county’s web site does not involve creating copies of the notice for general distribution in a manner similar to newspaper publication. Placing a legal notice on a county’s web site therefore is not an “other form of publication” within the meaning of Wis. Stat. § 985.05(2).

In those situations where posting of a legal notice is authorized in lieu of newspaper publication, Wis. Stat. § 985.02(2)(a) provides that “[t]he notice must be posted in at least 3 public places likely to give notice to persons affected.” Since a county’s web site is not located in more than one place, placing a legal notice on a county’s web site cannot constitute posting in “3 public places” within the meaning of Wis. Stat. § 985.02(2)(a).

The fact that a county’s web site is likely to give notice to persons affected by county proceedings does not mean that such a web site is a “public place” within the meaning of Wis. Stat. § 985.02(2)(a). The amendment to Wis. Stat. § 985.02(2)(a) requiring that posting occur in three public places was enacted in 1965. Ch. 252, sec. 280, Laws of 1965. When that language was enacted, the Legislature undoubtedly was referring to physical locations rather than to virtual public places such as the internet. When Wisconsin statutes use the term “public place,” they do so to connote a physical location. See, e.g., Wis. Stat. § 103.21(6). The annotation “[w]hat is ‘public place’ within requirements as to posting of notices,”
90 A.L.R.2d 1210 (1963) also contains only cases involving the posting of notices in physical locations.

In *Central Puget Sound Regional Transit Authority v. Miller*, 128 P.3d 588, 595 (Wash. 2006), the court noted that “[t]here is very little case law on the subject of the sufficiency of web posting for notice requirements.” *Miller*, 128 P.3d at 594, did uphold web posting under a statute requiring notice that “may include, but not be limited to, written notification to the city’s official newspaper, publication of a notice in the official newspaper, posting of upcoming council meeting agendas, or such other processes as the city determines will satisfy the intent of this requirement.” (Emphasis by the court.) *Miller* did not hold that placing a legal notice on a municipal web site constitutes posting the notice in a public place. A dissenting justice specifically stated that “[w]hen the term ‘posting’ is used in notice statutes, it always refers to posting of notice in a physical public place or affected area (e.g. on the property itself), but does not refer to posting on a website.” *Miller*, 128 P.3d at 604 (J.M. Johnson, J., dissenting).

While placing a legal notice on a county’s web site is certainly a desirable practice and may in certain circumstances reach more members of the public than would placing the notice in a physical location, Wis. Stat. § 985.02(2)(a) contemplates posting of legal notices in three physical locations. Placing a legal notice on the internet therefore does not constitute posting in a public place under Wis. Stat. § 985.02(2).

I therefore conclude that (1) A county with a population of under 250,000 is not required to designate an official newspaper; (2) Such a county is not statutorily required to seek bids for the publication of legal notices; (3) Even if such a county does not competitively bid the publication of its own proceedings as provided in Wis. Stat. § 59.14(3), it may print its own proceedings or post them on its web site; (4) the placement of a legal notice on a county’s web site is not newspaper publication under Wis. Stat. § 985.05(1), is not an “other form of publication” under Wis. Stat. § 985.05(1), and is not posting in a public place under Wis. Stat. § 985.02(2).

Sincerely,

[Signature]

J.B. Van Hollen
Attorney General

JBVH:FTC:cla
CAPTION: A county with a population of under 250,000 is not required to designate an official newspaper and is not statutorily required to seek bids for the publication of legal notices. Even if such a county does not competitively bid the publication of its own proceedings as provided in Wis. Stat. § 59.14(3), it may print its own proceedings or post them on its web site. The placement of a legal notice on a county's web site is not newspaper publication under Wis. Stat. § 985.05(1), is not an “other form of publication” under Wis. Stat. § 985.05(1), and is not posting in a public place under Wis. Stat. § 985.02(2).
February 20, 2008

Mr. A. John Voelker
Director of State Courts
16 East, State Capitol
Madison, WI 53702

Dear Mr. Voelker:

You ask whether Wisconsin law permits a court to deliberately summon a greater number of potential jurors from some geographic areas than from others in an attempt to ensure that the racial and ethnic makeup of the juries that hear cases in the court better reflects a representative cross-section of the community served by the court.

I conclude that Wisconsin law, which requires that all qualified persons have an equal opportunity to be randomly summoned for jury service, does not permit a jury selection system that gives some persons a greater, and other persons a lesser, opportunity to be summoned, depending on the area of the community where they live.

The Wisconsin statutes governing the selection of juries expressly provide that “[a]ll persons selected for jury service shall be selected at random from the population of the area served by the circuit court,” and that “[a]ll qualified persons shall have an equal opportunity to be considered for jury service . . . .” Wis. Stat. § 756.001(4) (2005-06). To this end, courts must use some “method of selection that provides each qualified person with an equal probability of selection for jury service.” Id.

In selecting persons to be summoned for jury service, the clerk of the circuit court “shall compile the list of prospective jurors by selecting names at random” from either a “list of persons residing in the area served by that circuit court” submitted annually by the Department of Transportation or a “master list.” Wis. Stat. § 756.04(3) and (4) (2005-06).

The clerk of circuit court may create a master list using the department list and any of the following:

1. Voter registration lists.
2. Telephone and municipal directories.
3. Utility company lists.
4. Lists of payers of real property taxes.

5. Lists of high school graduates who are 18 years of age or older.

6. Lists of persons who are receiving aid to families with dependent children under subch. III of ch. 49.

Wis. Stat. § 756.04(5)(a).

“To create a master list, the clerk of circuit court shall select randomly a sample of names from each source used. The same percentage of names shall be selected from each source used.” Wis. Stat. § 756.04(5)(b). Duplicate names appearing on more than one list shall be removed. Id. The non-duplicate names from the optional lists used “shall be combined with the names selected from the department list to create the master list.” Id.

After a juror list has been created, “the clerk of circuit court shall provide the court with a sufficient number of names of prospective jurors . . . [by] randomly select[ing] names from the department list or master list.” Wis. Stat. § 756.04(9).

These statutorily prescribed procedures for selecting prospective jurors are mandatory and must be complied with strictly.

Except for the option to create a master list, the jury selection statutes uniformly and repeatedly use the commandment “shall” in establishing the procedures to be followed. “Shall” is presumed to be mandatory, especially where it is used in the same statute as the term “may,” unless a different construction is necessary to carry out the clear legislative intent. State v. Thiel, 2004 WI App 225, ¶ 14, 277 Wis. 2d 698, 691 N.W.2d 388; Fond du Lac County v. Elizabeth M.P., 2003 WI App 232, ¶ 24, 267 Wis. 2d 739, 672 N.W.2d 88.

The clear intent of the prescribed procedures is to guarantee “that all qualified citizens have the opportunity and the obligation to serve as jurors” by “obtaining jurors on the basis of objective qualifications . . . selected at random, and from a broad cross-section of the community,” so that there will “be no discriminatory practices in the selection.” State v. Coble, 100 Wis. 2d 179, 212-13, 301 N.W.2d 221 (1981).

Methods of selection that deviate from the procedures carefully crafted to carry out this intent may “fail[] to insure, as does the statutory procedure, that a jury composed of persons qualified under the statutes is selected at random from a broad cross-section of the community.” Id., 100 Wis. 2d at 212. Therefore, the statutory procedures for selecting jurors are mandatory. See Oliver v. Heritage Mut. Ins. Co., 179 Wis. 2d 1, 9, 505 N.W.2d 452 (Ct. App. 1993).
The Legislature has underscored the mandatory nature of the statutory selection procedures by requiring clerks who draw up a jury list to “certify that the names [of prospective jurors provided to the court] were selected in strict conformity with . . . chapter [756].” Wis. Stat. § 756.04(9). The courts of this state have agreed that the “jury selection procedure must be . . . in strict conformity with statutory requirements.” Coble, 100 Wis. 2d at 206; see Oliver, 179 Wis. 2d at 9-11.

Deliberately summoning a greater number of potential jurors from some geographic areas than from others does not strictly comply with the mandatory statutory requirement that all persons selected for jury service must be selected at random from the population of the area served by the circuit court.

“Random” is a commonly used word whose meaning can be ascertained from a recognized dictionary. See, e.g., Orion Flight Serv. v. Basler Flight Serv., 2006 WI 51, ¶¶ 16, 24, 290 Wis. 2d 421, 714 N.W.2d 130. Something is “random” when it has no regular or specific plan or pattern. The American Heritage Dictionary 1496 (3d ed. 1996); Webster’s Third New International Dictionary 1880 (Unabridged ed. 1986). There must be the same or equal chance of occurrence for each and every member of a group. Id.

Deliberately summoning different numbers of potential jurors from different districts plainly constitutes a plan or pattern that is contrary to the concept of randomness. Randomness is also skewed because the plan or pattern gives residents of some areas a greater chance, while offering others a lesser chance, of being summoned.

Moreover, because some persons have a greater chance of being summoned than others, this plan or pattern does not strictly comply with the statutory requirement that the method of selecting potential jurors must provide each qualified person with an equal probability of selection for jury service.

While increasing the proportional representation of minority groups on juries might be a desirable goal, it cannot be accomplished by means that conflict with the statutes which are designed to guarantee equality of individual, not group, participation on juries. This goal cannot be accomplished at the expense of individuals who are not members of minority groups by decreasing the chances that they will be summoned for jury service by sending fewer summonses to persons who live in areas predominantly populated by groups that are not considered minorities.

A federal court recently invalidated a similar jury selection plan in In re United States, 426 F.3d 1 (1st Cir. 2005). In that case, to compensate for misdeliveries and nonresponses that occurred proportionally more in minority areas, a district judge ordered the jury administrator to draw an additional name from the same zip code for each person to whom a summons could not be delivered or who did not return a summons. Id., 426 F.3d at 4. This procedure drew
proportionally more supplemental names from areas that had larger than average populations of minorities. *Id.*

The Court of Appeals for the First Circuit held that this plan violated the statutory requirement that persons considered for jury service must be selected at random to insure that the odds of any individual name being selected are substantially the same. *Id.* at 6. The court held that a plan which gave preference to those in certain areas failed to provide equal odds of selection to every person on the jury list. *Id.*

In *United States v. Ovalle*, 136 F.3d 1092 (6th Cir. 1998), the Sixth Circuit invalidated a jury selection plan that tried to achieve racial balance by removing the names of non-minority persons from the jury wheel, thereby increasing the proportion of minorities represented on the wheel.

The court held that this plan also violated the statute that required all citizens to have an equal opportunity to be considered for service as jurors. *Id.*, 136 F.3d at 1099-100. The court said that although the government had a strong interest in increasing the representation of minorities on juries, it could not do so by means that denied non-minorities an equal opportunity to serve on juries. *Id.* at 1105-06. The court said that the government's goal should be achieved by supplementing driver and voter lists with names from alternative sources to avoid discriminating against individuals. *Id.* at 1106.

Although dealing with a different situation, the Wisconsin Court of Appeals has expressed similar reasoning. In *Oliver*, the court held that ordering the clerk to place on the array and the jury panel an African-American whose name had not been chosen at random violated Wis. Stat. §§ 756.001(2) and 756.096(2)(a). *Oliver*, 179 Wis. 2d at 10-11. The court stated that “the ethos of our system is a jury picked at random. That much is codified in sec. 756.001(2), Stats. It is also apparent from our case law.” *Id.* at 11. The court ruled that deliberately “‘salting’” the jury with a minority member who had not been chosen at random violated this ideal. *Id.*

Deliberately “salting” the jury list with minority members who have been selected by preference rather than at random is no less violative of the fundamental principle that requires juries to be chosen totally at random without discriminating for or against any person on account of their race, or on account of the place where they live as a surrogate for race.

Conversely, the Wisconsin Supreme Court has stated that apportioning the array “among wards, villages, and towns on a per capita equality standard ... assures each person in the county of an equal opportunity to serve upon a jury regardless of where he may reside within the county.” *State v. Nutley*, 24 Wis. 2d 527, 539, 129 N.W.2d 155 (1964), *cert. denied*, 380 U.S. 918 (1965).
Random selection of individual jurors might result in underrepresentation of some groups on juries. But the mere lack of proportional racial representation, absent intentional and systematic exclusion, is not discrimination or otherwise constitutionally deficient. *Wilson v. State*, 59 Wis. 2d 269, 281-82, 208 N.W.2d 134 (1973). “The jury pool need not be a statistical mirror of the community. . . . Absolute proportional representation is not required. The fair-cross-section requirement is met if substantial representation of a distinctive group exists.” *State v. Pruitt*, 95 Wis. 2d 69, 78, 289 N.W.2d 343 (Ct. App. 1980) (emphasis in original) (citations omitted).

If greater representation of minorities on juries is sought, it must be by means that maintain a non-discriminatory random selection procedure, such as the suggestion of the federal court of appeals to supplement the lists from which the names of prospective jurors are obtained with other lists that are more likely to include the names of those minority individuals which do not appear in the most commonly used sources.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:TJB:ajw
You ask whether a person who has previously been elected as a judge but who has resigned before completing the term to which the person was elected may serve as a member of the Government Accountability Board ("Board"), even if the term for which the person was elected as a judge has not yet expired.

In my opinion, Wisconsin law does not allow a person who has resigned from the office of judge to serve as a member of the Board for the duration of the term to which the person was elected as a judge.

The Wisconsin Constitution provides that "[n]o justice of the supreme court or judge of any court of record shall hold any other office of public trust, except a judicial office, during the term for which elected." Wis. Const. art. VII, § 10. This prohibition is echoed by Wis. Stat. § 757.02(2),1 which provides that "[t]he judge of any court of record in this state shall be ineligible to hold any office of public trust, except a judicial office, during the term for which he or she was elected or appointed."

In Wagner v. Milwaukee County Election Com'n, 2003 WI 103, ¶ 85, 263 Wis. 2d 709, 666 N.W.2d 816, the Wisconsin Supreme Court construed these provisions to mean that a person who was elected or appointed judge cannot hold any other office of public trust, except a judicial office, during the entire term the person would be legally entitled to serve as a judge by reason of the person’s election or appointment, even if the person resigns from the bench before completing that term. Whether a former judge with an unexpired term would be eligible to serve on the Board thus depends on whether Board membership is an "office of public trust," and if so, whether it is a "judicial office," as those terms are used in Wis. Const. art. VII, § 10 and Wis. Stat. § 757.02(2).

1Except as otherwise specified, all statutory references are to the 2005-06 edition of the Wisconsin statutes.
1. **Is Board Membership an Office of Public Trust?**

Your opinion request takes the position that, for purposes of restricting the conduct of a judge under Wis. Const. art. VII, § 10, the phrase "office of public trust" refers only to an elective office. According to your analysis, the constitutional history of the provision establishes that it was intended to bar a judge, during the judge’s term of office, from using a judicial position as a stepping-stone to an elective political office. I conclude, to the contrary, that membership on the Board is an office of public trust, within the meaning of Wis. Const. art. VII, § 10.

When interpreting the Wisconsin Constitution, the courts seek to give effect to the intent of the framers and of the people who adopted the constitution by examining three sources: the plain meaning of the words in their context; the practices as they existed at the time the constitution was written; and the earliest interpretations of the constitutional provision under consideration. *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 85, 301 Wis. 2d 266, 732 N.W.2d 828.

The term “office of public trust” is not defined in either the constitution or statutes of this state. The history of the adoption of Wis. Const. art. VII, § 10, also provides little specific direction regarding the meaning of the term. It does not appear that any question was ever raised in the state constitutional conventions about what constitutes an office of public trust so as to trigger any reported discussion about the matter.

An important historical clue can nonetheless be gleaned from a phrase that existed in Wis. Const. art. VII, § 10, from the time of its adoption until its elimination in a 1977 amendment. After stating the rule that a judge could not hold another “office of public trust,” the provision immediately went on to state that “all votes for [judges] . . . for any office, except a judicial office, given by the legislature or the people, shall be void.” The fact that the provision voided “votes” for “any office” immediately after prohibiting judges from holding an “office of public trust”—without mentioning votes—implies that the authors of the constitution thought that an office of public trust included, but was not necessarily limited to, any office for which an incumbent would receive votes—i.e., an elective office.

The broader constitutional history of the period also supports the view that the framers of Wis. Const. art. VII, § 10, were concerned about the potential threats to judicial independence posed by the pursuit of appointive office, as well as elective office. Between 1846 and 1860, numerous states, in addition to Wisconsin, provided in their constitutions for popular election of judges. See Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 The Historian 337 (1983). Proponents of popular election...
of judges saw that practice as enhancing, rather than subverting, the independence, prestige, and power of the judicial branch of government. *Id.* at 343-45 and 349-50. In their view, the appointment of judges by governors or legislatures had led to the distribution of judgeships based on political service, rather than legal skill or judicial temperament. *Id.* at 347. Appointment of judges, they believed, was itself dangerous to judicial independence because it denied the judiciary its own claim to direct support from the sovereign people. *Id.* at 350. The elective system was thus meant to insulate the judiciary from the control of the other branches of government by providing for direct popular support of judges. Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 American Journal of Legal History 190, 205-06 (1993). This view of the purpose of judicial elections was articulated in the constitutional debates in Wisconsin. *See Wagner, 263 Wis. 2d 709, ¶ 26* (quoting Milo Quaife, *The Convention of 1846* (1919) at 287-88).

At the same time, fears that elected judges might be too dependent on the popular will were calmed by including constitutional devices that staggered judicial elections, provided for district rather than state-wide judicial elections, gave judges fixed terms of office during good behavior, and made elected judges ineligible for other offices during the term for which they were elected. Hall, *The Judiciary on Trial*, 45 The Historian at 352. The provision at issue here, Wis. Const. art. VII, § 10, is an example of the latter kind of constitutional safeguard, designed to insulate elected judges from the sway of popular politics. *See Wagner, 263 Wis. 2d 709, ¶¶ 27-28.* It is reasonable to conclude that the very same framers who required judges to be elected in order to protect them from the perceived evils of political patronage that were seen to be inherent in the appointment system would not have assumed that a sitting judge was immune to being influenced by the prospect of appointment to a non-judicial office, as well as by the prospect of election to such an office. In this historical context, it is apparent that the use of the broad phrase “office of public trust” in Wis. Const. art. VII, § 10—without any qualifier related to the elective or appointive nature of such office—was intended to shield sitting judges against possible political influences deriving either from election or appointment to a non-judicial office.

Moreover, it makes sense to construe “office of public trust” to be consistent with the term “public office,” which clearly encompasses both elective and non-elective positions. Some sixty years after the adoption of the 1848 constitution, the Supreme Court suggested that the term “office of public trust” as used in Wis. Const. art. VII, § 10, was synonymous with “public office.” *In re Appointment of Revisor*, 141 Wis. 592, 124 N.W. 670 (1910). In that case the Court considered the argument that being a trustee of the state law library “endows the justices with another public office not judicial . . . in violation of the constitution, which says that they shall hold no office of public trust during their term except a judicial office.” *Id.*, 141 Wis. at 608. The Court went on to discuss whether the trustees held “an office” as “‘public officers.’” *Id.*
One of my predecessors suggested essentially the same thing in a 1925 opinion, 14 Op. Att’y Gen. 332 (1925). There, it was stated that the “terms ‘office’ and ‘public trust’ in the constitution are nearly synonymous.” Id. at 333. That opinion quoted a case which indicated that an office of public trust is in effect a public office because the words “public trust” include every agency to which the public appoints persons to perform some duty or service. Id.

In Law Enforce. Stds. Bd. v. Lyndon Station, 98 Wis. 2d 229, 238, 295 N.W.2d 818 (Ct. App. 1980), aff’d, 101 Wis. 2d 472, 305 N.W.2d 89 (1981), the Court of Appeals indicated by analogy that an office of public trust is a public office. In discussing the parallel constitutional provision that a person convicted of an infamous crime was not eligible to any “‘office of trust, profit or honor,’” the court stated that the “term ‘office’ as used in art. XIII, sec. 3 of the Wisconsin Constitution, means ‘public office.’” Id.

Another of my predecessors provided an unequivocal definition of the term in a 1988 opinion, 77 Op. Att’y Gen. 256, 258 (1988), plainly stating that, in Wis. Const. art. VII, § 10, the “term ‘office of public trust’ is used synonymously with ‘public office.’”

The Legislative Reference Bureau (“LRB”) appears to hold the same view. In discussing changes to the constitution proposed in 1995, the LRB titled its discussion of a proposed change in Wis. Const. art. VII, § 10, “Removing Restriction on Judges Holding Nonjudicial Public Office after Resignation During the Judicial Term.” Wisconsin Briefs, Constitutional Amendments to be Considered by the Wisconsin Voters April 4, 1995, LRB-95-WB-6 (March 1995).

The few cases from other jurisdictions that have attempted to define a term that, paradoxically, is widely used in legislation have agreed that an office of public trust is the same as a public office. See, e.g., State ex rel. Gilson v. Monahan, 84 P. 130, 133 (Kan. 1905); Smith v. Moore, 90 Ind. 294, *3 (1883), 1883 WL 5621.

A “public office” is one that is created by legislative act, possesses a delegation of a portion of the sovereign power of the state to be exercised independently without the control of a superior power, and is held by virtue of written authority. Martin v. Smith, 239 Wis. 314, 330-32, 1 N.W.2d 163 (1941).

Whether a position in government is a public office is not determined by the manner in which the incumbent is chosen. Id., 239 Wis. at 333. A person may be “a public officer, however chosen, [if] there is devolved upon him by law the exercise of some portion of the sovereign power of the state in the exercise of which the public has a concern.” Id. at 332. Public offices thus include those filled by either election or appointment. See id. at 330-33. Indeed, the Legislature has expressly defined “local public office” and “state public office” to include both elective and appointive offices, specifically including offices to which the incumbent is appointed by the Governor. Wis. Stat. §§ 19.42(7w) and 19.42(13).
Another of my predecessors has stated that the position of notary public, an appointive position, Wis. Stat. § 137.01(1)(a), is an "office of trust, profit or honor," as that term is used in Wis. Const. art. XIII, § 3. 63 Op. Att'y Gen. 74, 75 (1974). As noted above, the term "office of trust, profit or honor" in Wis. Const. art. XIII, § 3, has also been construed to be synonymous with "public office." *Wis. Law Enforce. Stds. Bd.*, 98 Wis. 2d at 238. Thus, Attorneys General have recognized, in essence, that public offices include those filled by appointment.

This means, among other things, that a judge may not hold the appointive public office of notary public. The Legislature has apparently acknowledged this disqualification by providing that judges, although not notaries public, are authorized to perform notarial acts. Wis. Stat. § 706.07(3)(a)2. This authorization does not violate Wis. Const. art. VII, § 10, which only prohibits judges from holding another public office, not from performing functions that may also be performed by those who hold another public office.

Under the established definition of "public office" discussed above, Board membership is a public office. Wis. Stat. § 15.60(1) (2007). The Board independently exercises the power to enforce the elections, ethics, and lobbying laws of the state. Wis. Stat. § 5.05(1) (2007). And the members of the Board are appointed by the Governor for fixed six-year terms. Wis. Stat. § 15.60(1) and (2) (2007).

Because Board membership is a public office, members of the Board also hold an office of public trust within the contemplation of Wis. Const. art. VII, § 10. Indeed, they hold an office in which the public has placed considerable trust to oversee the conduct of elections, and of elected and appointed officers. Therefore, under the restriction of Wis. Const. art. VII, § 10, a former judge whose term of office as a judge has not expired can be a member of the Board only if Board membership is a "judicial office" within the meaning of that constitutional provision.

2. Is Board Membership a Judicial Office?

Your opinion request also takes the position that Board membership is a "judicial office" because statutory eligibility for such membership is entirely dependent on having held a judgeship, because the statutes require the active participation of the judiciary in the selection of Board members, and because much of the work of the Board is judicial in character. I conclude that Board membership cannot be considered a "judicial office," within the meaning of Wis. Const. art. VII, § 10.

Under the established methodology for construing the meaning of a constitutional provision, courts give priority to the plain meaning of the words of the provision in the context in which those words were used at the time the provision was adopted, taking into account other provisions of the constitution. *See Dairyland Greyhound Park v. Doyle*, 2006 WI 107, ¶ 117, 295 Wis. 2d 1, 719 N.W.2d 408 (Prosser, J., concurring in part and dissenting in part) (citing *Buse v. Smith*, 74 Wis. 2d 550, 568, 247 N.W.2d 141 (1976) and *State ex rel. Bare v. Schinz*, ...
194 Wis. 397, 403-04, 216 N.W. 509 (1927)). Therefore, in attempting to determine whether Board membership can be considered a “judicial office” within the meaning of Wis. Const. art. VII, § 10, primary attention should be given to the meaning that the phrase “judicial office” would have had to the framers of the constitution in 1848, rather than any meanings derived from contemporary English usage. And in determining that historical meaning, it is helpful, in particular, to examine how that term or closely related terms were used in other contemporaneous provisions of the Wisconsin Constitution.

The specific phrase “judicial office” appears not to be used anywhere in the 1848 Wisconsin Constitution other than in Wis. Const. art. VII, § 10. The component word “judicial,” however, is used in several other sections of the Judiciary article. See Wis. Const. art. VII, § 1 (“No judicial officer shall exercise his office after he shall have been impeached . . .”); § 2 (“The judicial power of this state . . . shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace.”); §§ 4-5 (organization of “judicial circuits”); § 12 (court clerks for “each county organized for judicial purposes”); § 21 (publication of certain “judicial decisions made within the state”); and § 23 (Legislature may vest in certain persons “such judicial powers as shall be prescribed by law”) (1848). It is desirable, if possible, to harmonize the meaning of these various uses of the word “judicial” within Wis. Const. art. VII, including its use in the phrase “judicial office” in Wis. Const. art. VII, § 10.

In order to harmonize these meanings, it is necessary to look to the overall purpose of the Judiciary article of the Constitution in light of general principles of the separation of powers. The Wisconsin Constitution implicitly provides for the separation of powers by separately vesting the state’s legislative power in a bicameral legislature, Wis. Const. art. IV, § 1, its executive power in a governor, Wis. Const. art. V, § 1, and its judicial power in a unified court system, Wis. Const. art. VII, § 2. This constitutional structure creates three separate coordinate branches of government that may share certain powers but that are unable either to control the other branches or to exercise the core powers committed to the other branches by the constitution. See State v. Holmes, 106 Wis. 2d 31, 42-43, 315 N.W.2d 703 (1982); see also Wis. Stat. § 15.001(1) (“It is a traditional concept of American government that the 3 branches are to function separately, without intermingling of authority, except as specifically provided by law.”).

In light of this structure, the overall purpose of Wis. Const. art. VII is plainly to establish an independent judicial branch of state government. This is accomplished not only, as has been shown, by vesting the judicial power of the state in a unified court system, but also by expressly providing that the supreme court shall have superintending and administrative authority over all courts. Wis. Const. art. VII, § 3. Furthermore, the Wisconsin Constitution declares that the chief justice of the supreme court shall be the administrative head of the judicial system and shall exercise that administrative authority pursuant to procedures adopted by the supreme court. Wis. Const. art. VII, § 4. In addition, as previously noted, the specific purpose of Wis. Const. art. VII, § 10 was to protect the independence of the judiciary from political influence. See Wagner, 263 Wis. 2d 709, ¶¶ 25-29. The framers nonetheless chose to allow a judge to hold another
"judicial office"—but not "any other office of public trust"—prior to the end of the term to which the judge had been previously elected. The most reasonable inference is that the framers believed it was acceptable to allow a judge to assume another "judicial office" because, like the judge's previous office, the new "judicial office" would be similarly insulated from political influence.

It follows that the phrase "judicial office," as used in the Judiciary article of the Constitution, should be construed as referring to an office that is located within the judicial branch of government created by that article. The Legislature has, in another context, provided a good definition of those agencies that are in the judicial branch. See Wis. Stat. § 16.70(5): "'Judicial branch agency' means an agency created under ch. 757 or 758 or an agency created by order of the supreme court." Compare Wis. Stat. § 16.70(4) ("'Executive branch agency' means an agency in the executive branch but does not include the building commission."). The Board, however, is not a judicial branch agency in this sense, for it is not created under Wis. Stat. ch. 757 or 758, nor is it an agency created by order of the supreme court. On the contrary, the Board has been created by the Legislature under Wis. Stat. ch. 15, the title of which refers to the "Executive Branch." The Board thus is an executive branch agency that is not under the supervisory authority or superintending control of the Wisconsin Supreme Court or the judiciary. Accordingly, membership on the Board cannot be deemed a "judicial office" in the constitutional sense.

Your opinion request noted that it has been the longstanding, continual practice of the Legislature to statutorily require judges to serve as members of certain agencies, such as the Judicial Commission, the Sentencing Commission, the Council on Uniformity of Traffic Citations and Complaints, and the Crime Victims Council. In my opinion, however, those examples do not establish a practice of allowing "judicial offices" to exist outside the judicial branch of government.

The example of the Judicial Commission does not support your position for the simple reason that the Judicial Commission is not an executive branch agency. It is created under Wis. Stat. § 757.83 and, as already shown, an agency created under Wis. Stat. ch. 757 is a judicial branch agency. Furthermore, Wis. Stat. § 757.83 has been enacted pursuant to Wis. Const. art. VII, § 11, which authorizes the Legislature to establish procedures for implementing the supreme court's inherent superintending and administrative authority over judges. Accordingly, the Judicial Commission, unlike an executive branch agency, is subject to the supervisory authority and superintending control of the supreme court. See State ex rel. Lynch v. Dancey, 71 Wis. 2d 287, 293-95, 238 N.W.2d 81 (1976).

The other three examples cited in your letter do involve executive branch agencies or entities: the Sentencing Commission (Wis. Stat. § 15.105(27) (now repealed)); the Crime Victims Council (Wis. Stat. § 15.257); and the Council on Uniformity of Traffic Citations and Complaints (Wis. Stat. § 15.467(4)). It is not at all clear, however, that membership on any of
those entities amounts to an “office” in the constitutional sense. The Wisconsin Supreme Court has said that “the principal consideration determining whether a position is an office and one holding it is an officer is the type of power that is wielded.” *Burton v. State Appeal Board*, 38 Wis. 2d 294, 300, 156 N.W.2d 386 (1968). Moreover, as noted earlier in this opinion, the characteristics of a public office include the possession of some delegated portion of the sovereign power of government to be exercised for the benefit of the public without the control of a superior power. *Martin v. Smith*, 239 Wis. at 332.

Each of the three executive branch entities referenced above is an advisory body. There is authority for the proposition that advisory bodies do not exercise a delegated portion of the sovereign power of government. In *Harmer v. Superior Court In and For Sacramento County*, 79 Cal. Rptr. 855, 857 (Cal. App. 1969) and in *Parker v. Riley*, 113 P.2d 873, 875-76 (Cal. 1941), the California courts indicated that a California constitutional provision prohibiting legislators from holding any office, trust, or employment other than an elective office did not preclude California legislators from serving on advisory committees. *See Parker*, 113 P.2d at 876 (“Such tasks do not require the exercise of a part of the sovereign power of the state.”); *see also* 83 Cal. Op. Att’y Gen. 50, *2 (2000), 2000 WL 223305. *Cf. Harvey v. Ridgeway*, 450 S.W.2d 281, 284 (Ark. 1970) (examining the interpretation of a since-repealed Illinois constitutional provision that was similar to Wis. Const. art. VII, § 10(1)). If advisory bodies do not exercise a delegated portion of the sovereign power of government, then membership on them does not constitute service in a public “office” and, *ipso facto*, also does not constitute service in a “judicial office” within the meaning of Wis. Const. art. VII, § 10.

Nor do I agree with the suggestion that Board membership is a “judicial office” because only former judges are statutorily eligible for such membership. In my opinion, it is logically circular to reason that an office is judicial, in the constitutional sense, merely because the Legislature has decreed that it must be occupied by a judge—whether current or former. If that were true, then Wis. Const. art. VII, § 10 would place no limits at all on the ability of the Legislature, at its own pleasure, to create additional public offices for judges to occupy by the simple expedient of not allowing anyone other than a judge to hold those offices. Such an outcome would be inconsistent with the evident intent of the framers of Wis. Const. art. VII, § 10 to insulate judges from the influence of the political branches of government.

Likewise, the fact that the statutes give designated members of the judiciary a role in the nomination of candidates for Board membership is also insufficient to make such membership a “judicial office.” At most, such nomination procedures allow the designated members of the judiciary to decide which judges might be subjected to the potential influence of the political branches. The purpose of Wis. Const. art. VII, § 10, however, is to ensure that no judges are subject to such influence.

Finally, I also disagree with the contention that Board membership can be considered a “judicial office” because some of the work of the Board—such as issuing legal opinions and
adjudicating certain controversies—is judicial in character. The Wisconsin Supreme Court has recognized that the delegation of some adjudicative authority to executive branch agencies does not violate separation-of-powers principles as long as that authority is sufficiently limited to what is reasonably necessary for carrying out the agency’s administrative responsibilities. See *Layton School of Art & Design v. WERC*, 82 Wis. 2d 324, 348-50 and n.26, 262 N.W.2d 218 (1978). It does not follow, however, that the adjudicative authority delegated to executive branch agencies can properly be characterized as judicial in character. On the contrary, the Supreme Court said in *Layton*: “This court has recognized that *not all adjudication is judicial* and that courts are not the exclusive instrumentalities for adjudication.” *Id.* at 348 (emphasis added). The Court then approvingly cited an earlier decision that upheld worker’s compensation statutes which authorized the Industrial Commission to decide certain controversies on the ground that the statutes did not “‘vest[] in the Commission judicial powers within the meaning of the constitution.’” *Id.* at 348 n.26 (quoting *Borgnis v. Falk Co.*, 147 Wis. 327, 358, 359, 133 N.W. 209 (1911)). Although the Commission may act quasi-judicially by ascertaining some questions of fact and applying the law thereto, the Court noted, “*it is not thereby vested with judicial power in the constitutional sense.*” *Id.* (emphasis added by the Court in *Layton*).

In other words, the *Layton* decision reasoned that separation-of-powers principles are not violated by delegations of limited adjudicative power to executive branch agencies because that adjudicative power is not “judicial” power within the meaning of Wis. Const. art. VII, § 2, which vests the judicial power of the state in the courts. See *id.* at 347 and n.24. Your opinion request has suggested, however, that precisely such a delegation of limited adjudicative power to the Board makes membership on that body a “judicial office” under Wis. Const. art. VII, § 10. But if that were true, it would follow that the word “judicial” would have a different meaning in Wis. Const. art. VII, § 2, than it has in Wis. Const. art. VII, § 10. In my opinion, a court would be reluctant to construe the Judiciary article of the constitution in such a fashion. Accordingly, I conclude that an office vested with adjudicative authority that is not “judicial power” in the constitutional sense cannot thereby be deemed a “judicial office” within the meaning of Wis. Const. art. VII, § 10.

A review of the language of successive draft versions of Wis. Const. art. VII, § 10 supports the same conclusion. The version of that provision in the proposed 1846 constitution included, among other things, a clause that would have voided all votes given by the Legislature or the people for the purpose of electing a sitting judge to “any office except that of judge of the supreme or circuit court.” *Wagner*, 263 Wis. 2d 709, ¶¶ 23-24 (quoting Milo Quaife, *The Convention of 1846* (1919) at 293; Tenney, *Journal of the Convention to Form a Constitution*
Similarly, the version of Wis. Const. art. VII, § 10 reported out of committee at the second constitutional convention in 1847 provided, in pertinent part, as follows:

They shall hold no other office of public trust, and all votes for either of them for any office, except that of judge of the supreme or circuit court, given by the legislature or the people shall be void.

Wagner, 263 Wis. 2d 709, ¶ 29 (quoting Tenney, Journal of the Convention to Form a Constitution at 67). The convention subsequently voted to amend the above provision as follows:

[B]y striking out . . . the word ‘other’ before the word ‘office’ and inserting after the word ‘trust’ the words ‘except a judicial office during the term for which they are respectively elected’; also by striking out . . . the words ‘judge of the supreme and circuit court’ and inserting ‘a judicial office.’

Milo Quaife, The Attainment of Statehood (1928) at 691.

The phrase “judicial office,” as ultimately used in the 1848 version of Wis. Const. art. VII, § 10, thus originated as a substitute for earlier phrases that had specifically identified the offices of supreme court judge and circuit court judge. This strongly suggests that, in the framers’ understanding, the phrase “judicial office” did not signify every office that might involve some adjudicative functions, including offices within the political branches of government, but rather was closely associated with a traditional view of the kinds of courts that compose the judicial branch of government.

Recent scholarship has likewise shown that, in the 19th century, specifically judicial power was understood as the power to conclusively dispose of an individual’s legal claim to the core private rights to life, liberty, and property that government was instituted to safeguard. Caleb Nelson, Adjudication in the Political Branches, 107 Columbia L. Rev. 559, 562 (2007). Under traditional separation-of-powers doctrine, such judicial power is vested exclusively in the courts of the judicial branch of government. Id. at 564-65. In contrast, the political branches of government were understood as being capable, in proper circumstances, of authoritatively adjudicating other legal interests—including interests held by the public as a whole—without thereby exercising specifically judicial power. Id. at 565; cf. Layton, 82 Wis. 2d at 348 (adjudicative authority exercised by executive branch agency is not judicial power).

With regard to the present inquiry, the Board is statutorily authorized to investigate complaints alleging certain violations of election laws, to conduct administrative hearings on such complaints in appropriate cases, and to order appropriate injunctive relief. Wis. Stat. §§ 5.06 and 5.061 (2007). In adjudicating such complaints, it appears that the Board would not be determining any private individual’s rights to life, liberty, or property, but rather would be
vindicating the legal interests of the public as a whole in the integrity of the electoral and governmental processes. According to the understanding described above, the adjudication of such public rights does not involve the exercise of specifically judicial power, in the 19th century sense of the term. This historical analysis, too, thus supports the conclusion that, when the Wisconsin Constitution was created in 1848, the term "judicial office" was not understood in a way that would include an office like Board membership.

In conclusion, for all of the above reasons, it is my opinion that membership on the Board is an office of public trust but is not a judicial office within the meaning of Wis. Const. art. VII, § 10, and therefore, in conformity with that constitutional provision, an individual who has resigned from the office of judge may not serve as a member of the Board for the duration of the term to which the individual was elected to serve as a judge.

Finally, it is my understanding that one or more current Board members were elected to terms for judicial office that have not yet expired. However, please be advised that Wisconsin law follows the "de facto officer" doctrine. A "de facto officer" is a person who is in possession of an office, performs the duty of the office, and claims the office under color of an election or appointment. Walberg v. Deisler, 73 Wis. 2d 448, 463-64, 243 N.W.2d 190 (1976). As stated by the Wisconsin Supreme Court: "It is generally recognized that the acts of a de facto officer are valid as to the public and third parties and cannot be attacked collaterally." Id. at 463. Therefore, unless and until information to the contrary is presented, the Board should assume that the Board members who are not entitled to hold the office of a Board member are de facto officers and that their prior actions, and the prior actions of the Board, are valid, legal, and binding.

Sincerely,

J.B. Van Hollen
Attorney General
Mr. Anthony Evers  
Deputy State Superintendent  
Department of Public Instruction  
125 South Webster Street  
Madison, WI 53707

Dear Mr. Evers:

You have requested my opinion on three questions relating to the applicability of section 120.13(1)(f) of the Wisconsin Statutes to student expulsions that are ordered by an out-of-state public school or by a private school either inside or outside of Wisconsin. The statute in question provides as follows:

Sec. 120.13(1)(f), Wis. Stats. According to your letter, the Department of Public Instruction ("DPI") has consistently construed the above statute as authorizing a school board to deny enrollment only to a pupil who has been expelled from another Wisconsin public school district and as not authorizing a school board to deny enrollment to a pupil who has been expelled from an out-of-state public school district or from a private school.

You indicate that a major metropolitan school district in Wisconsin is now challenging DPI's interpretation and contending that section 120.13(1)(f) allows a school board to deny enrollment to a pupil who has been expelled from an out-of-state public school district or from a private school, as long as the school board determines that the conduct for which the pupil was expelled would also be a valid ground for expulsion from a Wisconsin public school district and that there is prima facie evidence that the expelled pupil was afforded the same procedural rights that would have been required in a public school expulsion proceeding in Wisconsin.
Accordingly, you ask the following three questions:

1. May a Wisconsin school district rely upon Wis. Stat. § 120.13(1)(f) to deny enrollment to a pupil who is currently expelled from an out-of-state public school?

2. May a Wisconsin school district rely upon Wis. Stat. § 120.13(1)(f) to deny enrollment to a pupil who is currently expelled from an out-of-state public school because the pupil has been found to have violated the Gun Free Schools Act, 20 USC 7151?

3. May a Wisconsin school district rely upon Wis. Stat. § 120.13(1)(f) to deny enrollment to a pupil who is currently expelled from a private school?

For the reasons that follow, it is my opinion that DPI’s interpretation is correct and that section 120.13(1)(f) does not allow a school board to deny enrollment to a pupil who is currently expelled either from an out-of-state public school district or from a private school. The answer to each of the above questions, therefore, is no.

1. May a Wisconsin school district rely upon Wis. Stat. § 120.13(1)(f) to deny enrollment to a pupil who is currently expelled from an out-of-state public school?

In order to answer this question, it is necessary to determine whether the phrase “another school district,” as used in section 120.13(1)(f), can be read as including public school districts in other states, in addition to those in Wisconsin. When addressing such questions of statutory interpretation, the language of the statute must be construed according to its plain meaning, giving terms their common, ordinary, and accepted definitions, with the exception of technical or specially-defined words and phrases. State ex rel. Kalal v. Circuit Court, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. In addition, statutory language is to be understood not in isolation, but with an eye to the structure of the statute as a whole and to the language of surrounding or closely-related statutes. Id., ¶46. Here, both the applicable statutory definition of the term “school district” and the plain language of section 120.13(1)(f), when viewed in relation to its statutory structure and other related statutes, support the conclusion that, when the Legislature used that term in that statute, it was referring only to the individual territorial units that administer the public educational system of the State of Wisconsin.

Although section 120.13(1)(f) does not itself expressly define the term “school district,” that term is defined in section 115.01(3), which provides that, throughout chapters 115 through 121 of the Wisconsin Statutes, “[t]he school district is the territorial unit for school administration.” Because the Wisconsin Statutes cannot define the territorial units for school administration in any state other than Wisconsin, this suggests that the term “school district,” as
used in those chapters, is geographically limited to Wisconsin. The same statutory provision also classifies school districts as "common, union high, unified and 1st class city school districts." Because that particular classification structure is unique to Wisconsin, it, too, suggests the same geographic limitation. I conclude, accordingly, that the statutory definition of "school district" applicable to section 120.13(1)(f) includes only Wisconsin school districts.

In addition to that statutory definition, the plain language of section 120.13(1)(f), when viewed with an eye to the overall structure of that statute and to the language of related statutes, likewise supports the same conclusion. First, the second sentence of section 120.13(1)(f) requires "the former school district"—i.e., the other district that has already expelled the pupil—to provide records and information related to the expulsion to "the latter school district"—i.e., the district currently being asked to enroll the pupil. Because the Wisconsin Legislature has no jurisdiction to impose such a requirement on out-of-state school districts, it is clear that the Legislature intended section 120.13(1)(f) to apply only to situations involving pupils who have been expelled from a Wisconsin public school district.

Second, as your letter rightly notes, the term "school district" is frequently used, throughout chapters 115 to 121, in ways that only make sense when viewed as referring to districts within this state. See, e.g., sec. 115.28(13), Wis. Stats. (requiring the state superintendent of public instruction to prescribe a uniform accounting system applicable to "all school districts"); sec. 115.366, Wis. Stats. (requiring DPI to award grants for alternative education programs "to school districts"); sec. 120.05(1), Wis. Stats. (defining the officers of a school district); ch. 117, Wis. Stats. (governing the reorganization of school districts); and ch. 121, Wis. Stats. (providing for state financial aid to school districts).

Third, the Wisconsin Constitution expressly requires the Legislature to provide a system of public education for the state through "the establishment of district schools." Wis. Const. art. X, § 3. Accordingly, the Wisconsin Supreme Court has repeatedly recognized that a school district "is an agent of the state for the purpose of administering the state's system of public education." Green Bay Met. S. Dist. v. Voc. T. & A. Ed. Dist. 13, 58 Wis. 2d 628, 638, 207 N.W.2d 623 (1973) (quoting Zawerschnik v. Joint County School Comm., 271 Wis. 416, 429, 73 N.W.2d 566 (1955)). The Legislature has likewise declared, as a state policy, that "education is a state function." Sec. 121.01, Wis. Stats. The constitutional basis of the school district system in Wisconsin and the status of school districts as agents of the state also support the conclusion that the term "school district," as used in the Wisconsin Statutes, is meant to refer only to public school districts within this state.

Public policy reasons also support the same conclusion. As your letter correctly notes, the statutorily mandated procedures for a public school expulsion proceeding in Wisconsin under section 120.13(1)(a)-(e) afford pupils greater procedural protections than are mandated in such proceedings by the due process clause of the federal constitution, as construed in Goss v. Lopez, 419 U.S. 565 (1975). If section 120.13(1)(f) is construed as applying to a pupil expelled by a
school district in another state, then it could authorize a Wisconsin school board to deny public-school enrollment to a pupil who had been expelled in another state without having received all of the procedural protections that would have been mandated in a Wisconsin expulsion proceeding under subsections (a) through (e) of the same statute. The Legislature cannot be presumed to have intended such a counter-intuitive result.

Nor can such a result be avoided by reading into section 120.13(1)(f) an unwritten requirement that a school board wishing to deny enrollment under that statute to an expelled pupil from another state must first determine that the pupil was afforded the same procedural rights in the out-of-state expulsion proceeding that would have been available under section 120.13(1)(a)-(e). In order to make such a determination, the Wisconsin school board would have to conduct an inquiry into the nature of the other state’s expulsion proceeding. As already noted, however, there is no requirement that an out-of-state school district provide any factual information about its expulsion proceedings to a Wisconsin school board. The Legislature cannot have intended to require school boards to make factual determinations about matters that they lack sufficient power to adequately investigate. Furthermore, it is axiomatic that school districts in Wisconsin have only such powers as are conferred upon them expressly or by necessary implication. *Buse v. Smith*, 74 Wis. 2d 550, 601, 247 N.W.2d 141 (1976). Nothing in section 120.13(1)(f) expressly or by necessary implication gives Wisconsin school districts the power to investigate the adequacy of expulsion proceedings in other states.

Finally, I note that, to the extent that DPI has been charged by the Legislature with the duty of itself administering or enforcing section 120.13(1)(f), DPI’s own long-standing interpretation of that statute could be entitled to judicial deference. *See UFE Inc. v. LIRC*, 201 Wis. 2d 274, 284-87, 548 N.W.2d 57 (1996); *Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 659-60, 539 N.W.2d 98 (1995). It is unclear from your letter whether DPI performs administrative or enforcement functions under section 120.13(1)(f). To the extent that it does so, however, a court would give DPI’s view of that statute either “great weight” or “due weight,” depending on the extent, if any, to which that view is based on specialized knowledge or expertise that places DPI in a better position than a court to make judgments about the statute’s meaning. *Id.*

For all of the above reasons, it is my opinion that a Wisconsin school district may not rely upon section 120.13(1)(f) to deny enrollment to a pupil who is currently expelled from an out-of-state public school.
2. May a Wisconsin school district rely upon Wis. Stat. § 120.13(1)(f) to deny enrollment to a pupil who is currently expelled from an out-of-state public school because the pupil has been found to have violated the Gun Free Schools Act, 20 USC 7151?

The federal Gun-Free Schools Act, 20 U.S.C. § 7151, provides, in part, as follows:

Each State receiving Federal funds under any subchapter of this chapter shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than 1 year a student who is determined to have brought a firearm to a school, or to have possessed a firearm at a school, under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administering officer of a local educational agency to modify such expulsion requirement for a student on a case-by-case basis if such modification is in writing.


The State of Wisconsin has complied with the above requirement by enacting section 120.13(1)(c)2m., which requires a school board to commence expulsion proceedings against and to expel for at least one year any pupil found to have possessed a firearm while at school or under the supervision of a school authority. Furthermore, if a pupil who has been expelled from a Wisconsin school district under section 120.13(1)(c)2m., seeks to enroll in another Wisconsin school district during the term of the expulsion, then section 120.13(1)(f) allows the latter school district to deny the pupil’s enrollment request, thereby ensuring that the pupil remains expelled for one year, consistent with the federal law.

The federal law does not, however, require Wisconsin school districts to give effect to school expulsions from other states. On the contrary, the plain language of 20 U.S.C. § 7151(b)(1) expressly applies only to a student who has brought a firearm to, or possessed a firearm in, a school that is “under the jurisdiction of local educational agencies in that State” (emphasis added). It is, thus, clear that Congress did not intend the Gun-Free Schools Act to require states to expel (or recognize expulsions of) students based on the conduct of those students at schools in other states.

For these reasons, in addition to those already given in response to your first question, it is my opinion that a Wisconsin school district may not rely upon section 120.13(1)(f) to deny enrollment to a pupil who is currently expelled from an out-of-state public school because the pupil has been found to have violated the Gun-Free Schools Act.
3. May a Wisconsin school district rely upon Wis. Stat. § 120.13(1)(f) to deny enrollment to a pupil who is currently expelled from a private school?

The statutes of the State of Wisconsin do not provide for public regulation of pupil expulsions from private schools within this state. As I have already shown in response to your first question, however, the phrase “another school district,” as used in section 120.13(1)(f), must be understood as referring only to the individual territorial units that administer the public educational system of the State of Wisconsin. The same reasoning equally supports the conclusion that “another school district” also cannot be construed as including a private school.

Moreover, a pupil who has been expelled from a private school clearly has not been expelled from a “school district,” within the meaning of section 120.13(1)(f), for the simple reason that an individual “school” is not the same as a “school district.” Furthermore, because a “school district,” under Wisconsin law, is an agent of the state for the purpose of administering the state’s system of public education, it is an inherently public, rather than private, entity. If section 120.13(1)(f) were intended to apply to pupils expelled from private schools, it would expressly refer to “expulsion from another school,” rather than to “expulsion from another school district.”

Finally, the Missouri court of appeals, in *Hamrick v. Affton School Dist. Bd. of Educ.*, 13 S.W.3d 678 (Mo. App. E.D. 2000), construed a similar Missouri statute which allowed a school district in that state, under specified conditions, to give effect to “a suspension or expulsion from another school district.” *Id.* at 680 (emphasis in original) (quoting Mo. Rev. Stat. § 167.171.4 (1998)). The court held, for reasons similar to those given in this opinion, that the statute did not apply to a parochial, non-public school. *Id.* at 681. Following that court decision, the Missouri Legislature amended the statute in question to expressly authorize school districts in that state to give effect to expulsions from out-of-state school districts or private schools. *See* Mo. Rev. Stat. § 167.171.4 (2007); 2000 Mo. Laws S.B. No. 944, § A. Both the *Hamrick* decision and the legislative response to it reinforce my conclusion that section 120.13(1)(f), which does not contain the kind of express authorization that was added to the Missouri statute, does not allow a Wisconsin school board to deny enrollment to a pupil who is currently expelled from a private school.

Sincerely,

J.B. Van Hollen
Attorney General
August 7, 2008

Mr. Jeffrey B. Fuge
Corporation Counsel
Polk County
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Balsam Lake, WI 54810

Dear Mr. Fuge:

You indicate that Polk County, which does not have a county executive or a county administrator, is considering the establishment of an office of county auditor. You ask two questions with respect to the possible hiring of a county auditor. I have paraphrased the questions and discuss each in turn.

QUESTIONS PRESENTED AND BRIEF ANSWERS

1. May the county board in a county that does not have a county executive or a county administrator delegate the authority to appoint and remove the county auditor to an entity other than the county board?

The answer to the question as stated is that the county board chair appoints the county auditor under civil service procedures. The appointment and removal of the county auditor is therefore subject to the county ordinance or resolution establishing such procedures. The county board could, however, establish a department of administration and assign audit functions to that department. The appointment and removal of the person in the department of administration who performs audit functions could be delegated to an appropriate county official such as the county administrative services coordinator or the head of the department of administration, who would then have the authority to remove the person who is assigned those audit functions absent any contractual provision or county personnel ordinance to the contrary.

2. To what extent may the statutory duties of the county clerk under Wis. Stat. ch. 70 and specifically under Wis. Stat. § 70.63 be transferred to the office of county auditor or to a person in the department of administration who performs audit functions?

In my opinion, the statutory duties of the county clerk under Wis. Stat. ch. 70 may not be transferred to the county auditor, but the county auditor may be granted supervisory authority over the manner in which such duties are exercised.
PRINCIPAL STATUTES INVOLVED

I. APPOINTMENT AND REMOVAL STATUTES.

Wisconsin Stat. § 17.10 provides in part:

Removal of appointive county officers . . .

(2) APPOINTED BY COUNTY BOARD. County officers appointed by the county board may be removed by the county board for cause. All removals may be made by an affirmative vote of two-thirds of the supervisors entitled to seats on the county board.

(3) APPOINTED BY CHAIRPERSON OF COUNTY BOARD. County officers appointed by the chairperson of the county board may be removed by the chairperson for cause . . . .

. . . .

(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.

. . . .

(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.

Wisconsin Stat. § 59.47 provides:

(1) In every county the clerk shall act as auditor, unless a separate office of county auditor is created as provided in sub. (2), and, when directed by resolution of the board, shall examine the books and accounts of any county officer, board, commission, committee, trustees or other officer or employee entrusted with the receipt, custody or expenditure of money, or by or on whose certificate any funds appropriated by the board are authorized to be expended, whether compensated for services by fees or by salary, and all original bills and vouchers on which moneys have been paid out and all receipts of moneys received by them. The clerk shall have free access to such books, accounts, bills,
vouchers and receipts as often as may be necessary to perform the duties required under this subsection and he or she shall report in writing the results of the examinations to the board.

(2) The board by resolution may create a separate office of county auditor and may fix the compensation of the auditor. The auditor shall perform the duties and have all of the powers conferred upon the clerk as auditor by sub. (1), and shall perform such additional duties and shall have such additional powers as are imposed and conferred upon him or her from time to time by resolution adopted by the board.

(3) If a county auditor’s office is created under sub. (2), the chairperson of the board shall appoint a person known to be skilled in matters of public finance and accounting to act as county auditor. The appointment shall be made under ss. 63.01 to 63.17 and shall be subject to confirmation by the board. The auditor shall direct the keeping of all of the accounts of the county, in all of its offices, departments and institutions, and shall keep books of account necessary to properly perform the duties of the office. The auditor’s salary and the amount of the official bond shall be fixed by the board. The auditor shall perform all duties pertaining to the office, have all of the powers and perform the duties in sub. (1) and perform other duties imposed by the board.

II. STATUTES INVOLVING TRANSFER OF FUNCTIONS.

Wisconsin Stat. § 59.03 provides in part as follows:

(1) ADMINISTRATIVE HOME RULE. Every county may exercise any organizational or administrative power, subject only to the constitution and to any enactment of the legislature which is of statewide concern and which uniformly affects every county.

Wisconsin Stat. § 59.04 provides as follows:

Construction of powers. To give counties the largest measure of self-government under the administrative home rule authority granted to counties in s. 59.03(1), this chapter shall be liberally construed in favor of the rights, powers and privileges of counties to exercise any organizational or administrative power.
Wisconsin Stat. § 59.51(1) provides as follows:

Board powers. (1) ORGANIZATIONAL OR ADMINISTRATIVE POWERS. 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 subchapter shall be in addition to all other grants. A county board may exercise any organizational or administrative power under this subchapter without limitation because of enumeration, and these powers shall be broadly and liberally construed and limited only by express language.

Wisconsin Stat. § 59.52(1)(b) provides in part:

Any county with a population of less than 500,000 may create a department of administration and assign any administrative function to the department as it considers appropriate, except that no administrative function may be assigned to the department if any other provision of state law requires the performance of the function by any other county office, department or commission unless the administrative function is under the jurisdiction of the . . . county auditor, in which case, the function may be assigned to the department notwithstanding sub. (8) and ss. 59.47, 59.60 and 63.01 to 63.17. Except as provided under par. (a), in any county with a county executive or county administrator, the county executive or county administrator shall have the authority to appoint and supervise the head of a department of administration; and except as provided under par. (a), the appointment is subject to confirmation by the county board unless the appointment is made under a civil service system competitive examination procedure established under sub. (8) or ch. 63.

ANALYSIS

I. DELEGATION OF AUTHORITY TO APPOINT AND REMOVE COUNTY AUDITOR.

The first question is whether the county board in a county that does not have a county executive or a county administrator may delegate the authority to appoint and remove the county auditor to an entity other than the county board. Wisconsin Stat. § 59.47(2) provides that the "board by resolution may create a separate office of county auditor[]." If the county board creates the office of county auditor, Wis. Stat. § 59.47(3) provides that "the chairperson of the
board shall appoint a person known to be skilled in matters of public finance and accounting to act as county auditor.” Ordinarily, when the county board chair appoints a county officer, that officer may be removed only by the county board chair and only for cause. Wis. Stat. § 17.10(3). Here, Wis. Stat. § 59.47(3) contains an additional requirement that “[t]he appointment [of the county auditor] shall be made under ss. 63.01 to 63.17[.]” The procedures described in Wis. Stat. §§ 63.01 to 63.17 are civil service procedures. When appointing the county auditor, the county board chair must therefore comply with the county ordinance or resolution establishing such procedures. Wisconsin Stat. § 17.10(7) provides that a county officer whose appointment is governed by civil service procedures is subject to removal according to such civil service procedures. The removal of the county auditor is therefore subject to the specific provisions established by ordinance or resolution of the county board under Wis. Stat. §§ 63.01 to 63.17 and is not governed by the more general removal provision contained in Wis. Stat. § 17.10(3).

Rather than creating the separate office of county auditor pursuant to Wis. Stat. § 59.47(2), a county board could create a department of administration pursuant to Wis. Stat. § 59.52(1)(b) and assign administrative audit functions to that department under that statute. If “the administrative function is under the jurisdiction of the ... county auditor ... the function may be assigned to the department notwithstanding sub. (8) and ss. 59.47, 59.60 and 63.01 to 63.17.” Wis. Stat. § 59.52(1)(b). A person in the department of administration who performs audit functions therefore need not be appointed using civil service procedures. A county ordinance or resolution could provide for the appointment of a person in the department of administration who performs audit functions by an appropriate county official such as the county administrative services coordinator or the head of the department of administration. Absent any contractual provision or county personnel ordinance to the contrary, the county administrative services coordinator or the head of the department of administration whoappoints the person performing audit functions would then also have the authority to remove that person pursuant to Wis. Stat. § 17.10(6)(a).

II. TRANSFER OF CERTAIN FUNCTIONS OF COUNTY CLERK TO COUNTY AUDITOR.

Wis. Stat. § 59.47 was also examined in Harbick v. Marinette County, 138 Wis. 2d 172, 405 N.W.2d 724 (Ct. App. 1987).

Harbick, 138 Wis. 2d at 181, involved the transfer of “account keeping duties not specifically identified and vested with the clerk by statute.” The court of appeals affirmed the trial court’s “determin[ation] that the clerk was solely responsible for those account keeping duties identified in sec. 59.17(3) through (7), Stats. [now Wis. Stat. § 59.23(2)(a)-(g)], and those identified elsewhere by statute, or that were performed by the clerk on an immemorial basis.” Harbick, 138 Wis. 2d at 175. Harbick endorsed the reasoning in 65 Op. Att’y Gen. at 136-37, which concluded that the county board could “transfer duties of keeping certain accounts and books of account from the county clerk to some other officer where an express statute did not require the county clerk to perform the duties.” As to statutory functions expressly given to the county clerk, that opinion of the Attorney General concluded that “the county board could authorize the finance officer to exercise only indirect supervision through the county clerk” with respect to accounts and books of account. 65 Op. Att’y Gen. at 137. In 67 Op. Att’y Gen. at 249, the authority granted the office of county auditor once that office is created by the county board under what is now Wis. Stat. § 59.47(3) was further described by the Attorney General as follows:

I construe this as power to direct the manner in which such books of account are kept, where the manner is not prescribed by statute, and that such power extends to accounts kept by the county clerk by reason of express statute or at the direction of the county board as authorized by sec. 59.17(8), Stats. A county auditor in counties over 300,000 population possessed such power under former sec. 59.72(3), Stats. It should be noted, moreover, that “directing the manner” of keeping the books implies or is the same thing as “supervising” the process.

(Italics in original).

Harbick, 138 Wis. 2d at 176-77, also briefly discussed the county home rule statutes, now Wis. Stat. §§ 59.03, 59.04, and 59.51(1), stating as follows:

In light of this explicit statement of legislative intent, sec. 59.17(8) [now Wis. Stat. § 59.23(2)(h)] must be broadly interpreted when a county is exercising its organizational and administrative powers. Determining which official will perform a county’s account keeping duties is an organizational and administrative task. Permitting a county board to make this determination comports with the legislature’s intent.

(Citations omitted). In response to a series of questions from the Senate Organization Committee concerning the authority of the county executive as it relates to the statutory administrative and management functions exercised by other elected county officials such as the
[I]t is my opinion that the substantive statutory scheme established for elective county officers by the Legislature constitutes legislative enactments “of statewide concern and which uniformly affects every county,” within the meaning of sections 59.025 and 59.07(intro.). Under such a view, neither the various elective county offices nor their constitutional or statutory duties, functions and authority can be abolished, consolidated or altered under the newly enacted provisions of chapter 59 here being considered. Rather, I view these new enactments as authorizing counties to expand upon and “fill the gaps” in the organizational and administrative structure which is already in place in such a fashion as not to conflict with the performance of such elected officers’ mandated functions.

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

(Citation omitted).

It is not possible to analyze every duty related to property tax administration that might conceivably be transferred by the county board. See 67 Op. Att’y Gen. at 4. Harbick and the opinions of the Attorney General previously discussed do provide a framework for determining the extent to which the statutory functions of the county clerk concerning property tax administration generally under Wis. Stat. ch. 70 and specifically under Wis. Stat. § 70.63 may be transferred to the county auditor or to a person in the department of administration who performs audit functions. There are three limitations upon the county board’s authority to transfer the duties of the county clerk.

First, the county board’s ability to transfer duties by using the statutory authority granted under Wis. Stat. §§ 59.47(2) and 59.52(1)(b) is generally limited to the duties of the county clerk as auditor. See 63 Op. Att’y Gen. at 199. Those statutes do not permit the transfer of statutory duties expressly assigned to the county clerk by statute. See Harbick, 138 Wis. 2d at 179.
Second, the county board’s ability to transfer duties by using its statutory administrative home rule authority under Wis. Stat. §§ 59.03, 59.04, and 59.51(1) generally does not extend to duties expressly assigned by statute to the clerk and other county elective officials because such statutes normally involve matters of statewide concern that uniformly affect every county. See 77 Op. Att’y Gen. at 115-16.

Third, the county board is constitutionally prohibited from transferring “[i]mmemorial duties performed by a constitutional officer . . .” including any immemorial duties of the county clerk that relate to property taxation. Harbick, 138 Wis. 2d at 179. Immemorial duties are important duties that characterized and distinguished the office of clerk at common law when the constitution was adopted. Compare Kocken v. Wisconsin Council 40, 2007 WI 72, ¶¶ 43-44, 301 Wis. 2d 266, 732 N.W.2d 828; State ex rel. Kennedy v. Brunst, 26 Wis. 412, 415 (1870). A general idea of the functions performed by the clerk at approximately the time when the constitution was adopted can be gleaned from the Revised Statutes of 1858. See 24 Op. Att’y Gen. at 793. The functions performed by the clerk at that time do encompass a number of items related to property tax administration, including functions related to the apportionment and equalization of property taxes about which you specifically inquire. See Rev. Stat. ch. 18, sec. 56 (1858):

The clerk of the board of supervisors shall, immediately after such apportionments [of property taxes by the county board] make out two certificates of the several amounts apportioned to be assessed upon the taxable property of each town and ward, for state, county, and school purposes, one of which he shall deliver, or cause to be delivered, to the county treasurer and the other to the clerk of the proper town, or city, as the case may be; and the county treasurer shall charge the amount of state and county taxes specified in each certificate, to the proper town or city.

When the constitution was adopted, the clerk did have at least ministerial computation and notification duties. The transfer of such duties by the county board is therefore constitutionally prohibited.¹

To the extent the Polk County Board may be considering the transfer of immemorial duties of the county clerk or duties expressly assigned by statute by the Legislature to the county clerk, your fact situation is unlike that presented in Harbick. Harbick permitted the duties of keeping accounts to be transferred to a county auditor where such duties clearly did not involve matters of statewide concern that uniformly affect every county because they were not expressly

¹The Legislature continued to expand the duties of the clerk with respect to apportionment. See, e.g., ch. 130, sec. 111, Laws of 1868; Rev. Stat. ch. 48, sec. 1076 (1878). Additional duties of the county clerk that were mandated by the Legislature subsequent to the adoption of the constitution did not characterize and distinguish the office of clerk at common law at the time when the constitution was adopted. See 24 Op. Att’y Gen. at 793.
assigned by the Legislature to the elective office of county clerk and where such duties also were not immemorial duties of the county clerk. Despite the above-described limitations upon the county board’s authority, however, even with respect to property tax administration the county board’s statutory authority under Wis. Stat. §§ 59.03, 59.04, and 59.51(1) in combination with Wis. Stat. §§ 59.47(2) and 59.52(1)(b) does permit the board to “transfer duties of keeping . . . accounts and books of account from the county clerk to some other officer where an express statute d[oes] not require the county clerk to perform the duties” and to “authorize the . . . exercise . . . [of] indirect supervision” by the county auditor or by another appropriate county official in lieu of the county auditor where an express statute does require the county clerk to perform the function. See 65 Op. Att’y Gen. at 136-37. Consequently, although the statutory duties assigned by the Legislature to the county clerk under Wis. Stat. ch. 70 may not be transferred to the county auditor or another appropriate county official in lieu of the county auditor, supervisory authority over the manner in which such duties are exercised may be granted to the county auditor or another appropriate county official in lieu of the county auditor.

CONCLUSION

I therefore conclude that (a) although the county board chair appoints the county auditor under civil service procedures, the county board could instead establish a department of administration and assign audit functions to that department in which case the appointment and removal of the person in the Department of Administration who performs audit functions could be delegated to an appropriate county official such as the county administrative services coordinator or the head of the Department of Administration and (b) the statutory duties assigned by the Legislature to the county clerk under Wis. Stat. ch. 70 may not be transferred to the county auditor or another appropriate county official in lieu of the county auditor, but supervisory authority over the manner in which such duties are exercised may be granted to the county auditor or another appropriate county official in lieu of the county auditor.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:FTC:cla
September 4, 2008

Mr. Michael J. McKenna
Corporation Counsel
Portage County
1516 Church Street
Stevens Point, WI 54481

Dear Mr. McKenna:

You indicate that Portage County created the position of county executive in 2005. Since at least 2005, Portage County has had a single county health department as provided in Wis. Stat. § 251.02(1). You advise that, both before and after the election of the county executive, the county health department has been “co-located and combined as the Portage County Department of Health and Human Services, with legislative oversight by the Health and Human Services Board.” Prior to the election of the county executive in 2005, the Portage County Health Officer was supervised in all respects by the Portage County Director of Health and Human Services. Following the election of the county executive in 2005, the director of health and human services has been supervised by the county executive, and the health and human services director has continued to supervise the county health officer.

You ask, in effect, whether Wis. Stat. § 251.06(4)(b) requires that Portage County create a stand-alone county health department supervised in all respects by the county health officer and whether that statute precludes the county human services director (referred to in your county as the “health and human services director”) from exercising any managerial authority over the county health officer.

It is my opinion that Wis. Stat. § 251.06(4)(b) does not require that a county create a stand-alone county health department and that Wis. Stat. § 251.06(4)(b) does not preclude the county human services director (referred to in your county as the “health and human services director”) from exercising any managerial authority over the county health officer with respect to the operation of county health department programs.

Wisconsin Stat. § 46.23(3)(b) provides in part:

Transfer of other county powers and duties. 1. If a county department of human services is established under par. (a), the county board of supervisors in a county with a single-county department of human services . . . shall transfer the powers and duties of the county departments under ss. 46.22 and 51.42 to the
county department of human services. The county board of supervisors in a county with a single-county department of human services . . . may transfer the powers and duties of the following to the county department of human services established under par. (a):

b. A local board of health for a local health department, as defined in s. 250.01(4)(a)1. or 2. or (c).

bm. A local health officer for a local health department, as defined in s. 250.01(4)(a)1. or 2. or (c).

c. A local health department, as defined in s. 250.01(4)(a)1. or 2. or (c).

Wisconsin Stat. § 46.23(6)(a), which applies to counties without a county executive or county administrator, provides in part: “A county human services director appointed under sub. (5)(f) shall have all of the administrative and executive powers and duties of managing, operating, maintaining and improving the programs of the county department of human services . . . .”

Wisconsin Stat. § 46.23(6m), which applies to counties with a county executive or county administrator, provides in part:

[T]he county executive . . . shall appoint a county human services director . . . . The appointment is subject to confirmation by the county board of supervisors unless the county board of supervisors, by ordinance, elects to waive confirmation or unless the appointment is made under a civil service system competitive examination procedure established under s. 59.52(8) or ch. 63. The county human services director, subject only to the supervision of the county executive . . . shall:

(a) Supervise and administer any program for which supervision and administration is authorized under this section.

Wisconsin Stat. § 59.17(2)(a) provides that the county executive shall “[c]oordinate and direct all administrative and management functions of the county government not otherwise vested by law in other elected officers.”
Wisconsin Stat. § 250.01(4) provides in part:

“Local health department” means any of the following:

(a) In a county with a population of less than 500,000, any of the following:

1. A county health department established under s. 251.02(1), including a county health department whose powers and duties are transferred to a county department of human services under s. 46.23(3)(b)1.c.

Wisconsin Stat. § 251.001 provides: “The legislature finds that the provision of public health services in this state is a matter of statewide concern.”

Wisconsin Stat. § 251.01(3) provides in part: “County health officer’ means the position of a local health officer in a single county health department . . . .”

Wisconsin Stat. § 251.02(1) provides in part: “In counties with a population of less than 500,000 . . . the county board shall establish a single county health department, which shall meet the requirements of this chapter.”

Wisconsin Stat. § 251.06(4)(b) provides:

In any county with a county executive that has a single county health department, the county executive shall appoint and supervise the county health officer. The appointment is subject to confirmation by the county board unless the county board, by ordinance, elects to waive confirmation or unless the appointment is made under a civil service system competitive examination procedure established under s. 59.52(8) or ch. 63. The county health officer appointed under this paragraph is subject only to the supervision of the county executive. In a county with such a county health officer, the local board of health shall be only a policy-making body determining the broad outlines and principles governing the administration of the county health department.

Prior to the election of the county executive, the Portage County Board apparently had transferred the duties of the county health officer and the county health department to the county human services department, as authorized by Wis. Stat. § 46.23(3)(b)1.bm. and Wis. Stat. § 46.23(3)(b)1.c. Nothing in Wis. Stat. § 46.23(3)(b)1.bm. or Wis. Stat. § 46.23(3)(b)1.c. would have prevented the county board from transferring the duties of the county health officer and the county health department to the county human services department even after the county executive was elected in 2005. Because the transfer of such functions is expressly authorized
under Wis. Stat. §§ 46.23(3)(b)1.bm. and 46.23(3)(b)1.c., it is my opinion that a county that has a county executive is not required to create a stand alone county health department.

The county executive "coordinate[s] and direct[s] all administrative and management functions of the county government not otherwise vested by law in other elected officers." Wis. Stat. § 59.17(2)(a). Neither the county human services director nor the county health officer is an elected officer. The authority of the county executive therefore extends not only to overseeing the manner in which the county health officer performs his duties, but also to overseeing the manner in which the county human services director administers and manages the functions of the county health department and interacts with the county health officer. The county executive also possesses exclusive authority to hire and, in the absence of a civil service ordinance, to fire both the county human services director and the county health officer. Wis. Stat. §§ 17.10(6)(a), 46.23(6m), and 251.06(4)(b).

When your county executive was elected, the organization of the county human services department did not change. By operation of Wis. Stat. § 46.23(6m), however, the county human services director became "subject only to the supervision of the county executive." Under Wis. Stat. § 251.06(4)(b), the county health officer similarly became "subject only to the supervision of the county executive." Statutes such as Wis. Stat. §§ 46.23(6m) and 251.06(4)(b) were enacted so as to remove all supervisory authority over county department heads from county boards, from committees of the county board, and from boards such as the human services board that consist of both county board supervisors and citizen members. See, e.g., 68 Op. Att’y Gen. 92 (1979). Wisconsin Stat. § 251.06(4)(b) therefore addresses only the relationship between the county health officer, the county board, and the elected county executive. That statute does not address the relationship between the county health officer and the county human services director.

The meaning of terms such as "supervise" and "supervision" is dependent upon the statutory context and those terms should be interpreted so as to further the statutory scheme in which they are employed. Wis. Environmental Decade, Inc. v. DNR, 85 Wis. 2d 518, 528-29, 271 N.W.2d 69 (1978). The county health officer is subject “only to the supervision of the county executive” within the meaning of Wis. Stat. § 251.06(4)(b) because ultimately only the county executive possesses statutory authority to determine whether the county health officer’s performance is satisfactory.

The relationship between the county human services director and the county health officer derives from Wis. Stat. § 46.23(6m)(a), which directs the county human services director to “[s]upervise and administer any program for which supervision and administration is authorized under this section.” As a result of the transfer of functions that had previously occurred under Wis. Stat. § 46.23(3)(b)1.bm. and Wis. Stat. § 46.23(3)(b)1.c., the supervisory and administrative authority of the county human services director under Wis. Stat. § 46.23(6m)(a) extends to all programs within the county health department. I am “obligated to
read the statutes to avoid absurd results.” Petition to Incorporate Powers Lake Village, 171 Wis. 2d 659, 663, 492 N.W.2d 342 (Ct. App. 1992). Interpreting Wis. Stat. § 251.06(4)(b) to preclude the county human services director from exercising any managerial authority over the county health officer would severely constrain and even potentially eliminate the county human services director’s statutory authority to supervise and administer county health department programs under Wis. Stat. § 46.23(6m)(a). Wisconsin Stat. § 251.06(4)(b) should therefore be construed so as to avoid that result. When the Portage County Board made the transfer of duties authorized by Wis. Stat. §§ 46.23(3)(b)1.bm. and 46.23(3)(b)1.c., the county health officer was placed under the supervision of the county human services director, as provided in Wis. Stat. § 46.23(6)(a). He remained under that same statutory supervision following the election of the county executive. The county executive oversees the manner in which the county human services director supervises the county health officer and the performance of the county human services director’s duties, thus harmonizing the system of supervision contemplated by these statutes.

I therefore conclude that Wis. Stat. § 251.06(4)(b) does not require that a county create a stand-alone county health department and that Wis. Stat. § 251.06(4)(b) does not preclude the county human services director from exercising managerial authority over the county health officer with respect to the operation of county health department programs.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:FTC:cla
Mr. Thomas D. Wiensch  
Assistant Corporation Counsel  
Oneida County  
Post Office Box 400  
Rhineland, WI 54501-0400  

Dear Mr. Wiensch:

You have submitted a letter and enclosures requesting my opinion on several questions related to mutual assistance requests between a law enforcement agency operated by a Wisconsin Indian tribe and a law enforcement agency operated by the State of Wisconsin or a political subdivision of the state.

According to the materials that have been submitted, on September 18, 2006, you sent a memorandum to the Oneida County Sheriff’s Department expressing the view that tribal law enforcement agencies are not included within the coverage of Wis. Stat. § 66.0313, which governs mutual assistance requests among law enforcement agencies. On January 9, 2007, attorney Barry LeSieur of the Lac du Flambeau Band of Lake Superior Chippewa Indians (“Band”) sent you a letter expressing the view that tribal law enforcement agencies are covered by Wis. Stat. § 66.0313. A copy of that letter was also sent to my office, with a request for an opinion on the disputed question. You replied to attorney Barry LeSieur’s letter on January 28, 2008, and raised several additional issues. You also sent a copy of that letter to my office, with a request for an opinion on the various issues under discussion. Finally, you confirmed that opinion request in your letter to me of February 20, 2008.

The first and main question to be considered is whether tribal law enforcement agencies are included within the coverage of Wis. Stat. § 66.0313. That statute provides as follows:

Law enforcement; mutual assistance. (1) In this section, “law enforcement agency” has the meaning given in s. 165.83(1)(b).

(2) Upon the request of any law enforcement agency, including county law enforcement agencies as provided in s. 59.28(2), the law enforcement personnel of any other law enforcement agency may assist the requesting agency within the latter’s jurisdiction, notwithstanding any other jurisdictional provision. For purposes of ss. 895.35 and 895.46, law enforcement personnel, while acting in response to a request for assistance, shall be deemed employees of the requesting agency.
The language of the above provisions, when construed together, compels the conclusion that a tribal law enforcement agency is not a “law enforcement agency” for mutual assistance purposes under Wis. Stat. § 66.0313. An Indian tribe is neither a state nor a political subdivision of a state. See Nevada v. Hicks, 533 U.S. 353, 383-84 (2001) (quoting F. Cohen, Handbook of Federal Indian Law 664-65 (1982)) (“Indian tribes are not states of the union within the meaning of the Constitution . . .”); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 189 (1982) (distinguishing Indian tribes from states and their subdivisions); Oklahoma Tax Com’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991) (“Indian tribes are ‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories.”). Accordingly, a tribal law enforcement agency is not an agency of “the state or a political subdivision of the state” within the meaning of Wis. Stat. § 165.83(1)(b) and thus cannot be deemed a “law enforcement agency” for purposes of Wis. Stat. § 66.0313.

This conclusion is reinforced by the fact that subsection (1)(e) of Wis. Stat. § 165.83 contains an express definition of a “[t]ribal law enforcement agency” that is separate from the definition of “[l]aw enforcement agency” in subsection (1)(b) of the same statute. The existence of that separate definition shows conclusively that tribal law enforcement agencies were not intended to be implicitly included within the definition of “[l]aw enforcement agency” in Wis. Stat. § 165.83(1)(b). When the Legislature, in 1999 Wisconsin Act 150, sec. 81, expressly incorporated the definition of “[l]aw enforcement agency” from Wis. Stat. § 165.83(1)(b) into Wis. Stat. § 66.0313, it did not similarly incorporate the existing, separate definition of “[t]ribal law enforcement agency” from Wis. Stat. § 165.83(1)(e). This provides compelling evidence that the Legislature did not intend for a tribal law enforcement agency to be considered a “law enforcement agency” for mutual assistance purposes under Wis. Stat. § 66.0313.

In contrast to the above view, the Band’s attorney has taken the position that Wis. Stat. § 66.0313 does apply to tribal law enforcement agencies whose officers exercise state law enforcement powers on their reservations pursuant to Wis. Stat. § 165.92(2)(a) and (b). Under the latter statute, a tribal law enforcement officer who meets the state’s certification requirements for law enforcement officers under Wis. Stat. § 165.85(4)(b)1., (bn)1., and (c) “shall have the same powers to enforce the laws of the state and to make arrests for violations of such laws that
sheriffs have, including powers granted to sheriffs under ss. 59.27 and 59.28 and under the
common law[.]” Wis. Stat. § 165.92(2)(a). Wisconsin Stat. § 59.28, in turn, provides as follows:

Peace maintenance; powers and duties of peace officers, cooperation.
(1) Sheriffs and their undersheriffs and deputies shall keep and preserve the
peace in their respective counties and quiet and suppress all affrays, routs, riots,
unlawful assemblies and insurrections; for which purpose, and for the service of
processes in civil or criminal cases and in the apprehending or securing any
person for felony or breach of the peace they and every coroner and constable
may call to their aid such persons or power of their county as they consider
necessary.

(2) County law enforcement agencies may request the assistance of law
enforcement personnel or may assist other law enforcement agencies as provided
in ss. 66.0313 and 66.0513.

Wis. Stat. § 59.28. According to the Band’s attorney, the power under Wis. Stat. § 59.28(2) to
assist or request assistance from another law enforcement agency as provided in Wis. Stat.
§ 66.0313 is thus included in the powers that are granted to a qualified tribal law enforcement
officer under Wis. Stat. § 165.92(2)(a).

I respectfully disagree with that conclusion. Wisconsin Stat. § 66.0313 purports to
authorize a “law enforcement agency,” within the meaning of that statute, to act outside the
boundaries of its usual territorial jurisdiction when responding to a request for assistance from
another law enforcement agency. In contrast, the powers granted to qualified tribal law
enforcement officers under Wis. Stat. § 165.92(2)(a) are expressly limited to being exercised
“only on the reservation of the tribe or on trust lands held for the tribe or for a member of the
tribe that employs the officer.” Wis. Stat. § 165.92(2)(b). The grant of power under Wis. Stat.
§ 165.92(2)(a) and (b) thus is not broad enough to allow a tribal law enforcement agency to assist
a non-tribal law enforcement agency within the latter’s territory, as contemplated by Wis. Stat.
§ 66.0313. It follows that the Legislature cannot have intended Wis. Stat. § 66.0313 to apply to a
tribal law enforcement agency—even when that tribal agency is empowered to act pursuant to
Wis. Stat. § 165.92(2)(a) and (b).

Furthermore, it would be contradictory to maintain that tribal law enforcement officers
have the power to assist or request assistance from another law enforcement agency as provided
in Wis. Stat. § 66.0313 when, as already shown, tribal law enforcement agencies have been
specifically omitted from the definition of “law enforcement agency” that the Legislature chose
to use in Wis. Stat. § 66.0313. It is a well-established principle of statutory construction that,
where one statute deals with a subject in general terms and another statute deals with a part of the
same subject in a more specific way, the two statutes should be harmonized, if possible, and if
there is any conflict between them, the more specific statute will prevail. State v. Amato,
126 Wis. 2d 212, 217, 375 N.W.2d 75 (Ct. App. 1985) (citing 2A Sutherland, Statutory Construction § 51.05 (4th ed. 1973)). Applying that principle here, the more specific definition of “law enforcement agency” for purposes of mutual assistance in Wis. Stat. § 66.0313 must prevail over the more general grant of law enforcement and arrest powers to tribal law enforcement officers in Wis. Stat. § 165.92(2)(a).

Likewise, the language of Wis. Stat. § 59.28(2) only purports to give county law enforcement agencies the power to assist or request assistance “as provided in” Wis. Stat. § 66.0313. In other words, Wis. Stat. § 59.28(2) cannot be read as granting any power that is not contained in Wis. Stat. § 66.0313. It follows, once again, that any potential conflict must be resolved in favor of Wis. Stat. § 66.0313 which, for the reasons already given, does not apply to tribal law enforcement agencies.

For all of the above reasons, it is my opinion that tribal law enforcement agencies are not included within the coverage of Wis. Stat. § 66.0313.

The second issue raised in your letter is whether there is any tension between the various statutes discussed above and Wis. Stat. § 165.90, which provides for written agreements establishing cooperative law enforcement programs between tribal and county law enforcement agencies. I see no such tension. There is nothing in the language of Wis. Stat. § 165.90 that would preclude a county and a tribe that has a reservation located wholly or partially within that county from including terms related to mutual assistance requests in a written agreement under that statute. More generally, Wis. Stat. § 66.0301, allows any municipality in the state (including a county) to “contract with other municipalities and with federally recognized Indian tribes and bands in this state, for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law.” Wis. Stat. § 66.0301(2).

The permissible terms of such an intergovernmental agreement are limited, however, by the statutory provision that “[i]f municipal or tribal parties to a contract have varying powers or duties under the law, each may act under the contract to the extent of its lawful powers and duties.” Id. In other words, an intergovernmental agreement between a tribe and a Wisconsin municipality cannot authorize a tribal or municipal agency to act outside the limits of its usual jurisdiction. In my opinion, the same jurisdictional principle would apply to agreements establishing tribal-county law enforcement programs under Wis. Stat. § 165.90. Accordingly, in any intergovernmental agreement entered under either Wis. Stat. §§ 66.0301 or 165.90, tribal and county law enforcement agencies could agree to provide mutual assistance only in circumstances in which the assisting law enforcement officers would have legal authority to act deriving from some source other than the intergovernmental agreement itself.

For example, Public Law No. 280, 67 Stat. 588-89 (1953), codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360, allows Wisconsin law enforcement agencies (including county and other municipal agencies) to exercise jurisdiction over all crimes committed in Indian country within...
this state (except the Menominee reservation). 18 U.S.C. § 1162(a); State v. Webster, 114 Wis. 2d 418, 436-37, 338 N.W.2d 474 (1983). Accordingly, county law enforcement officers in Wisconsin have jurisdiction to assist tribal law enforcement officers with criminal law matters in reservation territory located within their own county. In addition, Wis. Stat. § 175.40 authorizes any peace officer to act anywhere in the state under the specific, limited circumstances enumerated in that statute—e.g., when in fresh pursuit, on border highways, and when responding to certain dangerous emergency situations or a felony in progress.

Tribal law enforcement officers do not have an equally broad grant of jurisdiction to act outside tribal territory. As previously noted, Wis. Stat. § 165.92 generally authorizes qualified tribal officers to exercise state law enforcement powers only within their reservation. A tribal officer who is empowered to act under Wis. Stat. § 165.92, however, is a “peace officer” within the meaning of Wis. Stat. § 175.40 and thus may act outside his or her reservation under the specific, limited circumstances enumerated in that statute. See Wis. Stat. § 175.40(1)(c). In addition, sheriffs may call to their aid such persons or powers of their respective counties as they consider necessary for the purpose of preserving the peace therein. Wis. Stat. § 59.28(1). Sheriffs also have statutory authority to appoint deputies, consistent with any other applicable legal requirements. See Wis. Stat. § 59.26(1)-(2). Accordingly, a sheriff could, in appropriate circumstances, call for the aid of tribal officers within the county or cross-deputize tribal officers, thereby vesting them with county jurisdiction.

The third issue raised in your letter is whether the provision of assistance under Wis. Stat. § 59.28 is mandatory. The repeated use of the word “may” in Wis. Stat. § 59.28(2) indicates that decisions to request or provide law enforcement assistance under that statute are discretionary, and not mandatory, in nature. As noted in response to your first question, however, it is my opinion that the mutual assistance power granted to county law enforcement agencies by Wis. Stat. § 59.28(2) is not one of the powers conferred upon tribal law enforcement officers under Wis. Stat. § 165.92(2)(a). This does not mean that tribal law enforcement officers never have the power to provide assistance to county officers, but it does mean, as already noted, that such assistance may be provided only in circumstances in which the assisting tribal officers have legal authority to act derived from some source in addition to the county’s request for assistance itself. Tribal and county agencies with a history of cooperating consistent with their respective jurisdictions are encouraged to continue their established practices. I am unaware of any provision of law, however, that would make county-tribal mutual assistance legally mandatory.

The fourth issue raised in your letter is whether, if Wis. Stat. § 66.0313 does not apply to tribal law enforcement agencies, there are other means for county and tribal law enforcement agencies to engage in mutual assistance, either by establishing a county-tribal law enforcement program under Wis. Stat. § 165.90 or in some other way. As I have already discussed in response to the second issue above, an intergovernmental agreement under Wis. Stat. § 66.0301 or a county-tribal cooperative law enforcement agreement under Wis. Stat. § 165.90 may include provisions for mutual assistance in circumstances in which the assisting law enforcement officers
have legal authority to act deriving from some source other than the agreement itself—e.g., state officers acting pursuant to Public Law No. 280 or state or tribal officers acting pursuant to Wis. Stat. § 175.40 or to a call for assistance or cross-deputization by a sheriff.

The fifth issue raised in your letter is whether the provisions in Wis. Stat. § 66.0313 related to the payment of defense costs or judgments against a law enforcement officer under Wis. Stat. §§ 895.35 and 895.46 also apply to tribal law enforcement agencies and their officers. The answer given above to your first question requires that this question be answered in the negative. Because Wis. Stat. § 66.0313 does not apply to tribal law enforcement agencies, it follows that the portions of that statute dealing with the payment of defense costs or judgments under Wis. Stat. §§ 895.35 and 895.46 also do not apply to those agencies.

In addition, the plain language of Wis. Stat. § 895.35(1) itself expressly applies only to officers of a city, town, village, school district, or county. Likewise, the plain language of Wis. Stat. § 895.46(1) applies only to public officers or employees of “the state or [a] political subdivision [of the state].” Tribal law enforcement officers, as such, are not officers of a city, town, village, school district, or county. Nor are they officers or employees of the state or a political subdivision of the state. By their own terms, therefore, Wis. Stat. §§ 895.35 and 895.46 do not apply to tribal law enforcement agencies and their officers. Accordingly, it would be advisable for any mutual assistance agreement between tribal and non-tribal law enforcement agencies to include provisions expressly addressing the payment of defense costs or judgments against tribal and non-tribal law enforcement officers who act pursuant to that agreement.

The sixth issue raised in your letter is whether Public Law No. 280 gives a county sheriff in Wisconsin the power to enforce county and municipal ordinances, in addition to state statutes, on a tribal reservation. It is unclear whether you are asking only about criminal law enforcement jurisdiction, which is governed by 18 U.S.C. § 1162, or whether you are also asking about civil jurisdiction, which is governed by 28 U.S.C. § 1360. Such a request should ordinarily include relevant facts on which a legal analysis may rest. More generally, questions submitted to the Attorney General’s Office from district attorneys or county corporation counsel should include the requester’s own conclusion on the question presented and should set forth the reasoning upon which that conclusion is based, including an analysis of all relevant authorities that support or oppose that conclusion. See 77 Op. Att’y Gen. Preface (1988). Absent relevant facts and your
preliminary analysis and conclusions, I cannot address this issue but will be happy to do so should this information be part of a follow-up request.

Sincerely,

J.B. Van Hollen
Attorney General
Mr. A. John Voelker  
Director of State Courts  
16 East, State Capitol  
Madison, WI 53702  

Dear Mr. Voelker:

You have asked whether the recently amended Wis. Stat. § 885.38(3), providing for court interpreters at public expense, permits the state courts to tax interpreter costs upon parties to litigation. It is my opinion that, by amending the statute, the Legislature intended for the courts to provide necessary interpreters for both the hearing impaired and for those of limited English proficiency regardless of their ability to pay, and that courts may not tax the parties for these costs.

RELEVANT STATUTES

Wis. Stat. § 885.38(3)(a):  

If the court determines that the person has limited English proficiency and that an interpreter is necessary, the court shall advise the person that he or she has the right to a qualified interpreter at the public’s expense if the person is one of the following [party, witness, alleged victim, parent of a minor party, legal guardian, a person affected by the proceedings if determined appropriate by the court.]

Wis. Stat. § 885.38(8)(a):  

Except as provided in par. (b), the necessary expenses of providing qualified interpreters to persons with limited English proficiency under this section shall be paid as follows:

1. The county in which the circuit court is located shall pay the expenses in all proceedings before a circuit court and when the clerk of circuit court uses a

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1As amended by 2007 Wisconsin Act 20, sec. 3773.  
2As amended by 2007 Wisconsin Act 20, sec. 3774.
qualified interpreter under sub. (3)(d). The county shall be reimbursed as provided in s. 758.19(8) for expenses paid under this subdivision.

2. The court of appeals shall pay the expenses in all proceedings before the court of appeals.

3. The supreme court shall pay the expenses in all proceedings before the supreme court.

(b) The state public defender shall pay the expenses for interpreters assisting the state public defender in representing an indigent person in preparing for court proceedings.

Wis. Stat. § 885.38(1)(b):

“Limited English proficiency” means any of the following:

1. The inability, because of the use of a language other than English, to adequately understand or communicate effectively in English in a court proceeding.

2. The inability, due to a speech impairment, hearing loss, deafness, deaf-blindness, or other disability, to adequately hear, understand, or communicate effectively in English in a court proceeding.

Wis. Stat. § 814.04:

Except as provided ... when allowed costs shall be as follows ... (2) Disbursements. All the necessary disbursements and fees allowed by law; the compensation of referees; a reasonable disbursement for the service of process ... amounts actually paid out for certified and other copies of papers and records in any public office; postage, photocopying, telephoning, electronic communications, facsimile transmissions, and express or overnight delivery; depositions including copies; plats and photographs ... an expert witness fee not exceeding $300 for each expert who testifies, exclusive of the standard witness fee and mileage which shall also be taxed for each expert; and ... an abstract of title to the lands. Guardian ad litem fees shall not be taxed as a cost or disbursement.
DISCUSSION

The obligation to provide in-court interpreters at public expense for criminal defendants originated in State v. Neave, 117 Wis. 2d 359, 375, 344 N.W.2d 181 (1984). This obligation was codified in the statutes shortly thereafter in 1985 Wisconsin Act 266. See Appointment of an Interpreter in State v. Tai V. Le, 184 Wis. 2d 860, 868, 517 N.W.2d 144 (1994). But there was little explicit guidance then as to who would ultimately bear the costs and in what circumstances. Nor was the obligation extended to non-criminal cases.

As you note in your opinion request, the Wisconsin Supreme Court subsequently asked the Legislature to amend the interpreter statute to provide interpreters at public expense, beginning with budget submissions in 2001, for individuals with limited English proficiency in both criminal and civil matters. The request specifically asked that all necessary interpreters be provided at public expense “without requiring that the participant be indigent as part of a basic right to court access.” See Report to the Director of State Courts, Improving Interpretation in Wisconsin’s Courts (October 2000), at 6. See also Director of State Court’s memorandum, Statutory Change Requests for the Courts’ 2007-2009 Biennial Budget Submission. Interpretations by an agency that sponsors or is charged with implementing legislation may be considered as persuasive authority. Appointment of an Interpreter, 184 Wis. 2d at 868-69.

Because it is clear that the Legislature acted as the Court itself requested, it is my opinion that necessary interpreters must be provided at public expense as a matter of Wisconsin law.

The relevant portion of the amendment to Wis. Stat. § 885.38(3)(a) reads as follows:

In criminal proceedings and in proceedings under ch.48, 51, 55, or 938, if the court determines that the person has limited English proficiency and that an interpreter is necessary, the court shall advise the person that he or she has the right to a qualified interpreter and that, if the person cannot afford one, an interpreter will be provided at the public’s expense if the person is one of the following [party, witness, alleged victim, parent of a minor party, legal guardian, a person affected by the proceedings if determined appropriate by the court.]

2007 Wisconsin Act 20, sec. 3773.

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3The report may be found at http://wicourts.gov/services/interpreter/docs/newsreport00.pdf (last visited 9/18/2008).

4Deb Brescoll, Budget and Policy Officer, Director of State Court’s Office to Robert Nelson, Senior Attorney, Legislative Reference Bureau (August 22, 2006), at 2 (“The Circuit Courts requests [sic] the following statutory language modifications in order to require the appointment of court interpreters in all cases regardless of indigency and to authorize state reimbursement for county interpreter costs related to non-indigents.”). The report is part of the drafting record for 2007 Wisconsin Act 20, sec. 3773.
When the Legislature amends a statute, it is presumed to have full knowledge of existing statutes. *Murphy v. LIRC*, 183 Wis. 2d 205, 218, 515 N.W.2d 487 (Ct. App. 1994). Here, the Legislature removed prior language that had limited publicly paid and provided interpreters to indigent persons in criminal, juvenile, mental health, and protective services proceedings. The term "indigent" was also deleted from Wis. Stat. § 885.38(8)(a). The Legislature’s action in striking this limiting language indicates its intention to provide for publicly financed court interpreters whenever the court determines that one is necessary.

This interpretation is consistent with federal law protecting the rights of the hearing impaired. As you know, the Americans With Disabilities Act requires reasonable accommodations to qualified individuals in the provision of government services, and that those accommodations be provided at public expense. See 42 U.S.C. § 12101-13 and 28 C.F.R. § 35.130(f) (2007). Courts cannot require that hearing impaired individuals bear the cost of necessary interpretation. See id.

Likewise, the United States Department of Justice ("USDOJ") has opined that courts (as recipients of federal funding) are responsible to provide language services for those of limited English proficiency at public expense in courtroom proceedings where significant liberties are at stake. The USDOJ reasons that charging persons of limited English proficiency for necessary court interpretation services would have the effect of discriminating against them because of their national origin in violation of Title VI of the Civil Rights Act.

Provision of necessary courtroom interpreters, at public expense, is thus required by Wis. Stat. § 885.38(3) and this interpretation is consistent with federal law. A trial judge does have considerable discretion in implementing the statutory requirements, because the judge determines whether an interpreter is necessary in a given case. For a criminal defendant, it is likely that interpreter services will be considered necessary. There may be many other cases, however, where interpreter services are not necessary either because of the nature of the suit or because there are reasonable, less expensive alternatives available.

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RESPONSE TO ENUMERATED QUESTIONS

1. For a criminal case, can the difference [between the actual cost of interpretation and the state reimbursement rate] be taxed to the defendant as a cost under §973.06(1)(c)?

Wisconsin Stat. § 885.38(8) provides that counties shall pay the expenses of qualified interpreters appointed by the court, and Wis. Stat. § 758.19(8) provides that county interpreter expenses shall be reimbursed by the state at set hourly rates ($40 per hour for a certified interpreter and $30 per hour for non-certified). Because the hourly amount counties must actually pay to qualified interpreters often exceeds the statutory reimbursement rate, counties are left to absorb the costs unless they can pass on the costs to litigants. Nevertheless, I am unable to find support in Wisconsin law for shifting the additional costs to criminal defendants.

No Wisconsin case has discussed imposing interpreter costs on criminal defendants. The Wisconsin Supreme Court has held, however, that “costs are regulated exclusively by statute as a matter of legislative discretion.” State v. Dismuke, 2001 WI 75, ¶ 19, 244 Wis. 2d 457, 628 N.W.2d 791. “[C]osts taxable against a criminal defendant are limited to those specifically enumerated in Wis. Stat. § 973.06.” Id., citing State v. Ferguson, 202 Wis. 2d 233, 238, 549 N.W.2d 718 (1996). Wisconsin Stat. § 973.06 provides as follows:

Except as provided in s. 93.20 [enforcement fees of the Department of Agriculture, Trade and Consumer Protection], the costs, fees, and surcharges taxable against the defendant shall consist of the following items and no others [disbursements and fees of officers allowed by law, drug buy money, costs incurred due to threats to release chemical, biological or radioactive substances, fees and travel of state witnesses at preliminary hearing and trial, fees and disbursements allowed by the court to expert witnesses, and fees and travel of defense witnesses at preliminary hearing and trial].

In Ferguson, the Supreme Court found no statutory support for the state’s argument that crime laboratory testing could be taxed as an expert witness fee or disbursement under Wis. Stat. § 973.06(1)(c), and therefore disallowed shifting such costs to the defendant. Specifically, the court held that, “[t]o constitute a fee under § 973.06(1)(c) [related to expert witnesses], the cost of performing a service must be more than an internal operating expense of a governmental unit which has been prorated or costed out; it must be chargeable to and payable by another.” Ferguson, 202 Wis. 2d at 242, cited in Dismuke, 244 Wis. 2d 457, ¶ 20. Applying the reasoning of Dismuke and Ferguson here, unless there exists a statute that provides for the costs of necessary interpreters to be shifted to the litigants or defendants, such shifting is prohibited.

“By its plain language, then, the costs taxable against a defendant under Wis. Stat. § 973.06(1)(c) are limited to the items enumerated therein.” Ferguson, 202 Wis. 2d at 238. The
only enumerated section that would seem to be potentially relevant to necessary interpreters would be that provision permitting the charging of defendants for expert witness fees. But interpreters, by their nature, are not normally considered to be expert witnesses, nor indeed are they witnesses of any kind, and we know of no case law or statute that would suggest that interpreters should be treated as expert witnesses for cost purposes. The clear language of the new interpreter statute, coupled with the rules enunciated in Ferguson and Dismuke, is controlling, and prevents the shifting of interpreter costs to defendants in a criminal proceeding.

2. For a civil case, can the unreimbursed amount be taxed as a cost under §907.06 or §814.04(2)? Can it be taxed to another party?

As noted above, the Legislature specifically amended Wis. Stat. § 885.38(3)(a) to provide for public funding of necessary interpretation services in all court proceedings. Absent any clear language elsewhere, the plain language of the amended statute evidences a blanket prohibition on the taxing of such costs.

Wisconsin Stat. § 907.06(2) provides that the parties to civil cases may be taxed with compensating court appointed expert witnesses as the judge directs. There is some authority suggesting that, in the past, interpreters could have been treated as expert witnesses in civil cases for cost-shifting purposes. When adopting the Wisconsin Rules of Evidence in 1973, the Judicial Council comment noted: “As an expert, an interpreter will be qualified pursuant to s. 907.02 and can be supplied pursuant to s. 907.06.” 59 Wis. 2d R1, R163 (1973) (emphasis supplied). Then, as now, the expert witness provisions of Wis. Stat. § 907.06(2) provided that: “In civil cases the compensation shall be paid by the parties in such proportion and at such time as the judge directs, and thereafter charged in like manner as other costs but without the limitation upon expert witness fees prescribed by [the statutory predecessor of s. 814.04(23)].” The Judicial Council comment might have served as support for charging civil suit parties with interpreter fees (as expert witness costs) in civil cases before 2007 Wisconsin Act 20 amended Wis. Stat. § 885.38. Today, however, the language of Wis. Stat. § 885.38 as amended coupled with the legislative history cited infra mandates the conclusion that, whenever interpreters are deemed necessary, they should be provided at public expense.

Nor does Wis. Stat. § 814.04 have any language contradicting Wis. Stat. § 885.38(3) which provides for the taxation of certain costs of the prevailing party against the losing party and nowhere includes court appointed interpreters.

The term “costs” in the two statutes discussed and in Wisconsin law in general has a special meaning in the context of litigation. See State v. Foster, 100 Wis. 2d 103, 106, 301 N.W.2d 192 (1981). “[A]ny award of a ‘cost’ which is not specifically authorized by a Wisconsin statute constitutes an error of law that must be reversed.” Kleinke v. Farmers Coop. Supply & Shipping, 202 Wis. 2d 138, 147, 549 N.W.2d 714 (1996). Where the Legislature has chosen to give the courts authority to tax a party with the court’s costs it has done so, for
example, in the case of a court appointed expert witness discussed above. Neither Wis. Stat. § 907.06 nor Wis. Stat. § 814.04 provide authorization for a court taxing any party or litigant with necessary courtroom proceeding interpretation services.

3. For a civil forfeiture, can the unreimbursed amount be taxed under § 778.06?

Wisconsin Stat. § 778.06 provides as follows:

When a forfeiture is imposed . . . the action may be brought for the highest sum specified, plus costs, fees, and surcharges imposed under ch. 814; and judgment may be rendered for such sum as the court or jury shall assess or determine to be proportionate to the offense.

As discussed above, there does not appear to be any authority within Wis. Stat. ch. 814 to impose courtroom interpreter compensation as a cost, fee, or surcharge upon any party to litigation including a defendant in a civil forfeiture action.

4. In a municipal court, can the cost of an interpreter be taxed as a cost under § 800.09?

Wisconsin Stat. § 800.09(1), like Wis. Stat. § 778.06, permits the taxation of “costs, fees, and surcharges imposed under ch. 814” on a defendant found guilty in a municipal court. As before, the lack of any clear language in Wis. Stat. ch. 814 classifying interpreter costs as a cost, fee, or surcharge, coupled with the public expense language of Wis. Stat. § 885.83(3) renders Wis. Stat. § 800.09 unavailable as a method for charging back the costs of necessary courtroom interpreters.

5. Can the court tax unreimbursed interpreter travel costs?

and

6. Can the court tax the amount that is reimbursed by the state – the first $30 or $40 per hour?

Wisconsin Stat. § 885.83(3) as amended provides that, when a person has limited English proficiency and an interpreter is necessary, the court is to advise the qualified individual that he or she has a right to an interpreter at the public’s expense. This language, coupled with the fact that no other statutory language exists providing taxation of the costs for necessary interpreters,

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7Wisconsin Stat. § 800.09(1): “If a municipal court finds a defendant guilty, it may render judgment by ordering restitution . . . plus costs, fees, and surcharges imposed under ch. 814.”
precludes courts from taxing unreimbursed or reimbursed interpreter costs whether for travel or compensation.

7. For any of these questions, does it matter if the defendant is indigent or not?

As noted above, the prior version of Wis. Stat. § 885.38(8), provided for the provision of necessary interpreters only where the qualified individual was indigent or could not afford one. These clauses were deleted from the statute, demonstrating the Legislature’s intent to provide this service at public expense regardless of ability to pay. Federal civil rights laws also do not make such a distinction. Thus, for any of the questions you have posed, it does not matter if the defendant is indigent or not. If a court interpreter is necessary, then the county must assume the expense.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:JSL:ajw:rk
Mr. Todd P. Wolf  
District Attorney  
Wood County  
Post Office Box 8095  
Wisconsin Rapids, WI 54495-8095

Dear Mr. Wolf:

In your letter dated September 2, 2008, you ask which agency or agencies are responsible for administering the provisions of Wis. Stat. chs. 5 to 12 (election laws), Wis. Stat. ch. 13, subch. III (lobby laws), and Wis. Stat. ch. 19, subch. III (ethics laws) and for prosecuting alleged violations of those provisions following the passage of 2007 Wisconsin Act 1, which created the Government Accountability Board (“Board”).

QUESTIONS PRESENTED AND BRIEF ANSWERS

I have changed the order of your questions, which are as follows:

[1.] Are there provisions of chapters 5-12, 13 and 19 that can be enforced by a District Attorney independently of the Government Accountability Board? What is the applicability of Wis. Stat. s 5.05(2m)(c)15.-18. to cases independently initiated by a district attorney?

In my opinion, unless otherwise stated in a specific statutory provision, criminal provisions and civil forfeiture provisions of the election laws, lobby laws, and ethics laws can be enforced by a district attorney independently of the Board. A referral following an investigation by the Board is not required. Wisconsin Stat. § 5.05(2m)(c)15.-18. has no application to cases independently initiated by a district attorney without a referral by the Board under Wis. Stat. § 5.05(2m)(c)11., 14., or 15.

[2.] Can a District Attorney request assistance from the Attorney General with any duty a District Attorney may have under chapters 5-12, 13 and 19? If so, what type of assistance?

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1All statutory citations herein are to the Wisconsin Statutes following the amendments contained in 2007 Wisconsin Act 1.
In my opinion, a district attorney may request legal advice and prosecutorial assistance from the Attorney General or investigative assistance from the Department of Justice in connection with any duty of the district attorney under the election laws, lobby laws, or ethics laws. Where a matter has been referred to the district attorney by the Board under Wis. Stat. § 5.05(2m)(c)11., 14., or 15., the district attorney must retain ultimate supervisory authority over that matter until the Board makes a subsequent referral unless a special prosecutor is appointed to serve in lieu of the district attorney.

[3.] What is the scope of the Attorney General’s prosecutorial authority in regard to violations of chapters 5-12, 13, and 19?

In my opinion, the Attorney General may prosecute violations of the election laws, lobby laws, or ethics laws where there has been a request from the Governor or either house of the Legislature under Wis. Stat. § 165.25(1m); where there has been a referral to the Attorney General by the Board under Wis. Stat. § 5.05(2m)(c)16.; where the Attorney General or an assistant attorney general has been appointed as special prosecutor to serve in lieu of the district attorney to whom a matter has been referred by the Board; or where there is a statutory provision authorizing the Attorney General to independently initiate the prosecution of specific kinds of civil or criminal actions involving violations of those laws.

[4.] What is the division of authority between the Government Accountability Board and District Attorneys to enforce chapters 5-12, lobbying under chapter 13, and state ethics violations under chapter 19 of the Wisconsin Statutes? Does the Government Accountability Board have primary . . . authority to enforce those provisions?

In my opinion, the Board and district attorneys possess joint and co-equal authority to investigate possible violations of those statutory provisions and to prosecute civil forfeiture actions under those statutory provisions. Unless otherwise stated in a specific statutory provision, the district attorney possesses the authority to prosecute criminal proceedings under those statutory provisions. The Board has no statutory authority to prosecute criminal proceedings under those provisions except as stated in Wis. Stat. § 5.05(2m)(i).

PRINCIPAL STATUTORY PROVISIONS INVOLVED

I. DUTIES OF THE GOVERNMENT ACCOUNTABILITY BOARD.

Wisconsin Stat. § 5.05, as amended by 2007 Wisconsin Act 1, provides in part (amendatory material underscored):

Government accountability board; powers and duties. (1) GENERAL AUTHORITY. The government accountability board shall have the
responsibility for the administration of chs. 5 to 12, other laws relating to elections and election campaigns, subch. III of ch. 13, and subch. III of ch. 19. Pursuant to such responsibility, the board may:

... ...

(c) Bring civil actions to require a forfeiture for any violation of chs. 5 to 12, subch. III of ch. 13, and subch. III of ch. 19 or a license revocation for any violation of subch. III of ch. 13 for which the offender is subject to a revocation...

... ...

(2m) ENFORCEMENT. (a) The board shall investigate violations of laws administered by the board and may prosecute alleged civil violations of those laws, directly or through its agents under this subsection, pursuant to all statutes granting or assigning that authority or responsibility to the board. Prosecution of alleged criminal violations investigated by the board may be brought only as provided in par. (c)11., 14., 15., and 16. and s. 978.05(1).

... ...

(c) 2.a. Any person may file a complaint with the board alleging a violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19...

4. ... If the board believes there is reasonable suspicion that a violation under subd. 2. has occurred or is occurring, the board may by resolution authorize the commencement of an investigation. The resolution shall specifically set forth any matter that is authorized to be investigated...

... ...

11. If the board finds that there is probable cause to believe that a violation under subd. 2. has occurred or is occurring, the board may, in lieu of civil prosecution of any matter by the board, refer the matter to the district attorney for the county in which the alleged violator resides, or if the alleged violator is a nonresident, to the district attorney for the county where the matter arises, or if par. (i) applies, to the attorney general or a special prosecutor. For purposes of this subdivision, a person other than a natural person resides within a county if the person's principal place of operation is located within that county.
14. If a special investigator or the administrator of the ethics and accountability division of the board, in the course of an investigation authorized by the board, discovers evidence of a potential violation of a law that is not administered by the board arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation, the special investigator or the administrator may present that evidence to the board. The board may thereupon refer the matter to the appropriate district attorney specified in subd. 11.

15. Except as provided in subd. 17., if the board refers a matter to the district attorney specified in subd. 11. for prosecution of a potential violation under subd. 2. or 14. and the district attorney informs the board that he or she declines to prosecute any alleged civil or criminal violation related to any matter referred to the district attorney by the board, or the district attorney fails to commence a prosecution of any civil or criminal violation related to any matter referred to the district attorney by the board within 60 days of the date of the board’s referral, the board may refer the matter to the district attorney for another prosecutorial unit that is contiguous to the prosecutorial unit of the district attorney to whom the matter was originally referred. If there is more than one such prosecutorial unit, the chairperson of the board shall determine the district attorney to whom the matter shall be referred by publicly drawing lots at a meeting of the board. The district attorney may then commence a civil or criminal prosecution relating to the matter.

16. Except as provided in subd. 17., if the board refers a matter to a district attorney under subd. 15. for prosecution of a potential violation under subd. 2. or 14. and the district attorney informs the board that he or she declines to prosecute any alleged civil or criminal violation related to any matter referred to the district attorney by the board, or the district attorney fails to commence a prosecution of any civil or criminal violation related to any matter referred to the district attorney by the board within 60 days of the date of the board’s referral, the board may refer the matter to the attorney general. The attorney general may then commence a civil or criminal prosecution relating to the matter.

17. The board is not authorized to act under subd. 15. or 16. if a special prosecutor is appointed under s. 978.045 in lieu of the district attorney specified in subd. 11.

18. Whenever the board refers a matter to special counsel or to a district attorney or to the attorney general under this subsection, the special counsel, district attorney, or attorney general shall report to the board concerning any action taken regarding the matter. The report shall be transmitted no later than
40 days after the date of the referral. If the matter is not disposed of during that period, the special counsel, district attorney, or attorney general shall file a subsequent report at the end of each 30-day period following the filing of the initial report until final disposition of the matter.

(h) If the defendant in an action for a civil violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 is a district attorney or a circuit judge or a candidate for either such office, the action shall be brought by the board. If the defendant in an action for a civil violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 is the attorney general or a candidate for that office, the board may appoint special counsel to bring suit on behalf of the state.

(i) If the defendant in an action for a criminal violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 is a district attorney or a circuit judge or a candidate for either such office, the action shall be brought by the attorney general. If the defendant in an action for a criminal violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 is the attorney general or a candidate for that office, the board may appoint a special prosecutor to conduct the prosecution on behalf of the state.

(j) Any special counsel or prosecutor who is appointed under par. (h) or (i) shall be independent of the attorney general and need not be a state employee at the time of his or her appointment.

II. DUTIES OF THE DISTRICT ATTORNEY.

Wisconsin Stat. § 978.05, as amended by 2007 Wisconsin Act 1, provides (amendatory material underscored):

Duties of the district attorney. The district attorney shall:

(1) CRIMINAL ACTIONS. Except as otherwise provided by law, prosecute all criminal actions before any court within his or her prosecutorial unit and have sole responsibility for prosecution of all criminal actions arising from violations of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 and from violations of other laws arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19, that are alleged to be committed by a resident of his or her prosecutorial unit, or if alleged to be committed by a nonresident of this state, that are alleged to occur in
his or her prosecutorial unit unless another prosecutor is substituted under s. 5.05(2m)(i) or this chapter or by referral of the government accountability board under s. 5.05(2m)(c)15. or 16. For purposes of this subsection, a person other than a natural person is a resident of a prosecutorial unit if the person's principal place of operation is located in that prosecutorial unit.

(2) FORFEITURES. Except as otherwise provided by law, prosecute all state forfeiture actions, county traffic actions and actions concerning violations of county ordinances which are in conformity with state criminal laws in the courts within his or her prosecutorial unit and have joint responsibility, together with the government accountability board, for prosecution of all forfeiture actions arising from violations of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 and from violations of other laws arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 that are alleged to be committed by a resident of his or her prosecutorial unit, or if alleged to be committed by a nonresident of this state, that are alleged to occur within his or her prosecutorial unit unless another prosecutor is substituted under s. 5.05(2m)(h) or this chapter or by referral of the government accountability board under s. 5.05(2m)(c)15. or 16. For purposes of this subsection, a person other than a natural person is a resident of a prosecutorial unit if the person's principal place of operation is located in that prosecutorial unit.

(8) ADMINISTRATION.

(b) . . . The district attorney may request the assistance of district attorneys, deputy district attorneys, or assistant district attorneys from other prosecutorial units or assistant attorneys general who then may appear and assist in the investigation and prosecution of any matter for which a district attorney is responsible under this chapter in like manner as assistants in the prosecutorial unit and with the same authority as the district attorney in the unit in which the action is brought.
III. DUTIES OF THE ATTORNEY GENERAL AND DEPARTMENT OF JUSTICE.

Wisconsin Stat. § 165.25, as amended by 2007 Wisconsin Act 1, provides in part (amendatory material underscored):

Duties of department of justice. The department of justice shall:

1. REPRESENT STATE IN APPEALS AND ON REMAND. Except as provided in ss. 5.05(2m)(a) and 978.05(5), appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party. Nothing in this subsection deprives or relieves the attorney general or the department of justice of any authority or duty under this chapter.

1m. REPRESENT STATE IN OTHER MATTERS. If requested by the governor or either house of the legislature, appear for and represent the state, any state department, agency, official, employee or agent, whether required to appear as a party or witness in any civil or criminal matter, and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested.

3. ADVISE DISTRICT ATTORNEYS. Consult and advise with the district attorneys when requested by them in all duties pertaining to the duties of their office.

Wisconsin Stat. § 165.50 provides in part:

Criminal investigation. (1) The department of justice shall perform the following criminal investigatory functions for the state:

(a) Investigate crime that is statewide in nature, importance or influence.

Wisconsin Stat. § 165.70 provides in part:

Investigation of statewide crime. (1) The department of justice shall do all of the following:

(a) Investigate crime that is statewide in nature, importance or influence.
IV. JUDICIAL APPOINTMENT OF SPECIAL PROSECUTORS.

Wisconsin Stat. § 978.045 provides in part:

Special prosecutors.  (1g) A court on its own motion may appoint a special prosecutor under sub. (1r) or a district attorney may request a court to appoint a special prosecutor under that subsection. Before a court appoints a special prosecutor on its own motion or at the request of a district attorney for an appointment that exceeds 6 hours per case, the court or district attorney shall request assistance from a district attorney, deputy district attorney or assistant district attorney from other prosecutorial units or an assistant attorney general. A district attorney requesting the appointment of a special prosecutor, or a court if the court is appointing a special prosecutor on its own motion, shall notify the department of administration, on a form provided by that department, of the district attorney’s or the court’s inability to obtain assistance from another prosecutorial unit or from an assistant attorney general.

(1r) Any judge of a court of record, by an order entered in the record stating the cause for it, may appoint an attorney as a special prosecutor to perform, for the time being, or for the trial of the accused person, the duties of the district attorney. An attorney appointed under this subsection shall have all of the powers of the district attorney. The judge may appoint an attorney as a special prosecutor at the request of a district attorney to assist the district attorney in the prosecution of persons charged with a crime, in grand jury or John Doe proceedings, in proceedings under ch. 980, or in investigations. The judge may appoint an attorney as a special prosecutor if any of the following conditions exists:

(h) The district attorney determines that a conflict of interest exists regarding the district attorney or the district attorney staff.

INTRODUCTION

The Legislature engrafted the provisions of 2007 Wisconsin Act 1 upon preexisting statutes setting forth the statutory duties of district attorneys, the Attorney General, the Elections Board, and the Ethics Board. “It is presumed that the legislature has in mind previous statutes dealing with the same subject matter when it enacts a new provision.” State v. Temby, 108 Wis. 2d 521, 530, 322 N.W.2d 522 (Ct. App. 1982). Courts disfavor the implied repeal of longstanding statutory power or authority. State v. Zawistowski, 95 Wis. 2d 250, 264,
290 N.W.2d 303 (1980). "'[I]n the absence of any express repeal or amendment therein, the new provision [is] enacted in accord with the legislative policy embodied in the prior statutes, and they should all be construed together.'” *Temby*, 108 Wis. 2d at 530 (quoted authority omitted). It is also axiomatic that an amendment to a statute changes its meaning only to the extent expressly stated or necessarily implied by the amendatory language. *Jaeger Baking Co. v. Kretschmann*, 96 Wis. 2d 590, 598, 292 N.W.2d 622 (1980). *See Milw. Fed. of Teachers, Local No. 252 v. WERC*, 83 Wis. 2d 588, 599, 266 N.W.2d 314 (1978), quoting 1A Sutherland, *Statutory Construction* § 22.30 (4th ed., Sands, 1972), at 179:

"[A]s to changing statutory law, there is a presumption against the implied repeal or amendment of any existing statutory provision. In accord with this conservative attitude, an amendatory act is not to be construed to change the original act or section further than expressly declared or necessarily implied."

Prior to the passage of 2007 Wisconsin Act 1: (1) Unless otherwise specifically provided district attorneys could enforce criminal provisions and civil forfeiture provisions independently of the Elections Board and the Ethics Board; (2) With respect to items arising under the election laws, lobby laws, and ethics laws, district attorneys were under no statutory restriction as to their ability to seek advice from the Department of Justice under Wis. Stat. § 165.25(3), to request the assistance of assistant attorneys general as provided in Wis. Stat. § 978.05(8)(b), or to seek investigatory assistance from the Department of Justice under Wis. Stat. § 165.50(1)(a) or Wis. Stat. § 165.70(1)(a); and (3) The Attorney General or an assistant attorney general could be appointed as special prosecutor to serve in lieu of the district attorney with respect to items arising under the election laws, lobby laws, and ethics laws. For the reasons that follow, it is my opinion that 2007 Wisconsin Act 1 effected no material change in these provisions and procedures.

**ANALYSIS**

The first question is whether there are provisions of Wis. Stat. chs. 5 to 12 (election laws), Wis. Stat. ch. 13, subch. III (lobby laws), and Wis. Stat. ch. 19, subch. III (ethics laws) that can be enforced by a district attorney independently of the Board. As amended, Wis. Stat. § 978.05(1) provides that district attorneys possess “sole responsibility for prosecution of all criminal actions” arising from violations of those provisions as well as sole responsibility for prosecution of criminal actions “arising . . . from violations of other laws arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19[.]” 2007 Wisconsin Act 1 effects a significant change in that the criminal violations of the election laws, lobby laws, and ethics laws over which a district attorney now has jurisdiction are those “that are alleged to be committed by a resident of his or her prosecutorial unit, or if alleged to be committed by a nonresident of this state, that are alleged to occur in his or her prosecutorial unit[.]” Wis. Stat. § 978.05(1). Where the alleged violator meets one of these residency
requirements establishing the appropriate prosecutorial venue, unless otherwise statutorily provided the district attorney has plenary authority to investigate criminal violations of election laws, lobby laws, and ethics laws and to commence criminal proceedings alleging violations of such laws.

Wisconsin Stat. § 978.05(2) provides that district attorneys possess “joint responsibility, together with the government accountability board, for prosecution of all forfeiture actions arising from violations of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19” as well as joint responsibility for prosecution of forfeiture actions in connection with alleged “violations of other laws arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19[.]” 2007 Wisconsin Act 1 effects the same significant change in residency requirements for prosecutorial venue in civil forfeiture actions that applies to the prosecution of criminal actions under the election laws, lobby laws, and ethics laws.

The responsibility of the Board and district attorneys to commence civil forfeiture actions alleging violations of election laws, lobby laws, and ethics laws is “joint.” Wis. Stat. § 978.05(2). The Legislature has enacted no requirement that the district attorney await action by the Board prior to commencing a civil forfeiture action. The Legislature also has enacted no requirement that the Board await action by the district attorney prior to commencing a civil forfeiture action.

Wisconsin Stat. § 5.05(1) does provide that the Board “shall have the responsibility for the administration of chs. 5 to 12, other laws relating to elections and election campaigns, subch. III of ch. 13, and subch. III of ch. 19.” More specifically, Wis. Stat. § 5.05(2m)(a) provides that in exercising that responsibility “[t]he board shall investigate violations of laws administered by the board and may prosecute alleged civil violations of those laws . . . pursuant to all statutes granting or assigning that authority or responsibility to the board.” Despite the fact that both “shall” and “may” are used in Wis. Stat. § 5.05(2m)(a), the Board clearly is not required to investigate all alleged violations of election laws, lobby laws, and ethics laws. Under Wis. Stat. § 5.05(2m)(c)4., the Board may conduct an investigation only (1) if it “believes there is reasonable suspicion that a violation . . . has occurred or is occurring,” (2) the Board has passed a resolution “authoriz[ing] the commencement of an investigation,” and (3) the Board’s resolution “specifically set[s] forth any matter that is authorized to be investigated.” There is no statutory requirement that the district attorney first determine whether the Board will investigate a matter that might lead to the commencement of a civil forfeiture action or that might lead to commencement of a criminal action, nor is there any statutory requirement that the district attorney await the outcome of an investigation by the Board that might lead to the commencement of a civil forfeiture action or that might lead to commencement of a criminal action.
It follows that the provisions of Wis. Stat. § 5.05(2m)(c)15.-18. have no application to investigations, criminal proceedings, or civil forfeiture actions independently initiated by a district attorney in the absence of a referral by the Board under Wis. Stat. § 5.05(2m)(c)11., 14., or 15. Wisconsin Stat. § 5.05(2m)(c)11. contemplates that the Board first have conducted an investigation authorized under Wis. Stat. § 5.05(2m)(c)4. If the Board has authorized such an investigation and determined that probable cause exists, then the Board “may . . . refer the matter to the district attorney for the county in which the alleged violator resides, or if the alleged violator is a nonresident, to the district attorney for the county where the matter arises[.]” Wis. Stat. § 5.05(2m)(c)11. If the Board has authorized the investigation of specific matters and during the course of the investigation discovers evidence of a potential violation of a law that is not administered by the Board but involves the official functions of the subject of the investigation or if the Board has authorized the investigation of specific matters and during the course of the investigation discovers evidence of a potential violation of other election laws, lobby laws, or ethics laws, the Board may refer such other matters to the district attorney. Wis. Stat. § 5.05(2m)(c)14. Wisconsin Stat. § 5.05(2m)(c)14., 15., 16., and 18. each specifically requires a referral by the Board. Wisconsin Stat. § 5.05(2m)(c)17. references Wis. Stat. § 5.05(2m)(c)11., which also requires a referral by the Board. The provisions of Wis. Stat. § 5.05(2m)(c)15.-18. therefore have no application to criminal actions or civil forfeiture actions independently initiated by a district attorney in the absence of a referral following a finding of probable cause by the Board under Wis. Stat. § 5.05(2m)(c)11., 14., or 15.

It is conceivable that, following its own investigation, the Board could refer certain matters to the district attorney with respect to which the district attorney has already commenced an investigation. Wisconsin Stat. § 5.05(2m)(c)18. contains no exception for matters with respect to which the district attorney has initiated an investigation prior to receiving a referral from the Board. With respect to all matters referred by the Board, the district attorney is therefore subject to the reporting requirements in Wis. Stat. § 5.05(2m)(c)18. Wisconsin Stat. § 5.05(2m)(c)16. also contains no exception for matters with respect to which the district attorney has initiated an investigation prior to receiving a referral from the Board. Even where matters referred by the Board overlap matters with respect to which the district attorney has already initiated an investigation, the Board therefore could transfer the matter to another district attorney if prosecution is not commenced within 60 days of the date of the Board’s referral. The Board has no statutory authority to transfer any matter to another district attorney with respect to which a prosecution has already been commenced.

The second question is whether and to what extent a district attorney can request assistance from the Attorney General in connection with any duty that a district attorney may have under the election laws, lobby laws, and ethics laws. 2007 Wisconsin Act 1 amended Wis. Stat. § 165.25(1) as follows (amendatory material underscored):

(1) REPRESENT STATE IN APPEALS AND ON REMAND. Except as provided in ss. 5.05(2m)(a) and 978.05(5), appear for the state and prosecute or
defend all actions and proceedings, civil or criminal, in the court of appeals and
the supreme court, in which the state is interested or a party, and attend to and
prosecute or defend all civil cases sent or remanded to any circuit court in which
the state is a party. Nothing in this subsection deprives or relieves the attorney
general or the department of justice of any authority or duty under this chapter.

I interpret the Legislature’s insertion of the reference to Wis. Stat. § 5.05(2m)(a) in the
first sentence of this amendment to mean that, with respect to matters investigated by the Board
under that provision, the sequential provisions of Wis. Stat. § 5.05(2m)(c)11.-16. must be
followed. The last sentence of this amendment therefore establishes that, in all other respects,
the Attorney General’s authority to provide assistance to district attorneys generally remains
unchanged.

As amended, Wis. Stat. § 978.05(1) provides that district attorneys possess “sole
responsibility for prosecution of all criminal actions arising from violations” of election laws,
lobby laws, and ethics laws. Wisconsin Stat. § 978.05(2) provides that district attorneys possess
“joint responsibility, together with the government accountability board, for prosecution of all
forfeiture actions arising from violations” of election laws, lobby laws, and ethics laws. In
exercising his or her responsibility under Wis. Stat. § 978.05(1) or (2), the district attorney
continues to be able to seek advice from the Department of Justice under Wis. Stat. § 165.25(3)
and to request the assistance of assistant attorneys general as provided in Wis. Stat.
§ 978.05(8)(b). Where appropriate, the district attorney may also seek investigatory assistance
from the Department of Justice. See Wis. Stat. §§ 165.50(1)(a); 165.70(1)(a).

As to matters referred to the district attorney by the Board under Wis. Stat.
§ 5.05(2m)(c)11., 14., or 15., the sequential provisions of Wis. Stat. § 5.05(2m)(c)11.-16. must
be followed. Those provisions establish an ordered, time-sensitive process once a matter has
been referred to the district attorney by the Board under Wis. Stat. § 5.05(2m)(c)11., 14., or 15.
Under Wis. Stat. § 5.05(2m)(c)11.-16., one statutorily-designated prosecutor is responsible for
the matter referred and is required to report to the Board. See Wis. Stat. § 5.05(2m)(c)18. The
district attorney must retain ultimate control over the matter referred unless a special prosecutor
is appointed to serve in lieu of the district attorney or a referral to another district attorney or to
the Attorney General is subsequently made by the Board. See Wis. Stat. § 5.05(2m)(c)14.-16.

The third question asks for delineation of the scope of the Attorney General’s
prosecutorial authority with respect to alleged violations of the election laws, lobby laws, and
ethics laws.

The Attorney General’s powers are purely statutory. State v. City of Oak Creek,
2000 WI 9, ¶¶ 19-24, 232 Wis. 2d 612, 605 N.W.2d 526. Wisconsin Stat. § 165.25(1m) contains
a general grant of authority for the Attorney General, upon the request of the Governor or either
house of the Legislature, to “prosecute . . . in any court or before any officer, any cause or
matter, civil or criminal, in which the state or the people of this state may be interested.” The Attorney General may also prosecute violations of the election laws, lobby laws, or ethics laws where there has been a referral to the Attorney General by the Board under Wis. Stat. § 5.05(2m)(c)16.

The district attorney to whom a matter has been referred by the Board can seek judicial appointment of a special prosecutor under Wis. Stat. § 978.045 to serve in lieu of the district attorney. See Wis. Stat. § 5.05(2m)(c)17. Nothing in 2007 Wisconsin Act 1 precludes the Attorney General or an assistant attorney general from serving in that capacity.

There are also certain statutory provisions that authorize the Attorney General to commence actions alleging specific violations of the election laws, lobby laws, or ethics laws. Wisconsin Stat. § 5.05(2m)(i) authorizes the Attorney General to commence criminal prosecutions under the election laws, lobby laws, or ethics laws if the defendant “is a district attorney or a circuit judge or a candidate for either such office[.]” Wisconsin Stat. § 5.07 authorizes the Attorney General to commence actions for equitable, legal, or peremptory relief to compel compliance with the election laws. Wisconsin Stat. § 5.08 authorizes the Attorney General to commence actions to compel compliance with the election laws upon the filing of a verified petition with the Attorney General after the district attorney has declined or failed to prosecute in response to the filing of a petition. Wisconsin Stat. § 5.081 authorizes the Attorney General to commence actions or proceedings in any court of competent jurisdiction on behalf of any elector of this state under the Help America Voting Act, 42 U.S.C. § 1973(a) and (b). Wisconsin Stat. § 8.28 authorizes the Attorney General to investigate and prosecute any verified complaint alleging that a state or local elected official does not meet residency requirements. Wisconsin Stat. § 19.579(1) provides that at the request of the Board the Attorney General shall commence an action against any person who has not paid a forfeiture imposed under the ethics laws as provided in that statute. Wisconsin Stat. § 19.58(8)(c) and (cn) authorize the Attorney General to commence certain actions against local government officials for violation of the code of ethics after the district attorney has declined or failed to prosecute such actions. See also Wis. Stat. § 7.23(2).

The fourth question asks for delineation of the division of authority between the Board and district attorneys to enforce the election laws, lobby laws, and ethics laws.

As explained in response to the preceding questions, after the passage of 2007 Wisconsin Act 1 the Board and district attorneys possess joint and co-equal authority to investigate possible violations of election laws, lobby laws, and ethics laws and to prosecute civil forfeiture actions under those statutory provisions. Unless otherwise stated in a specific statutory provision, district attorneys possess the authority to prosecute criminal proceedings under those statutory provisions. Except as provided in Wis. Stat. § 5.05(2m)(i), the Board cannot prosecute criminal proceedings under those statutory provisions. The Board has no statutory obligation to commence an investigation in situations where no investigation has been commenced by the
district attorney. The Board also is not required to refrain from commencing an investigation after an investigation has been commenced by the district attorney. The district attorney has no statutory obligation to refrain from commencing an investigation once an investigation has been commenced by the Board. The district attorney also has no statutory obligation to refrain from commencing a criminal proceeding once the Board has commenced a civil action.

To the extent statutorily possible the Board, district attorneys, the Attorney General, and law enforcement authorities should endeavor to cooperate and timely communicate with each other. Doing so will enhance efficiency, avoid duplication of effort, and permit the best use of limited investigative and prosecutorial resources on the part of all of the agencies involved.

CONCLUSION

At least three major changes from past practice under the Elections Board and the Ethics Board were effected by 2007 Wisconsin Act 1. One significant change involves matters referred to the district attorney or the Attorney General under Wis. Stat. § 5.05(2m)(c)11., 14., 15., or 16. With respect to such matters, the sequential process in Wis. Stat. § 5.05(2m)(c)11.-16. must be followed. Another significant change established new venue or residency requirements for the prosecution of criminal proceedings and civil forfeiture actions under the election laws, lobby laws, ethics laws and certain matters related to those laws by amending Wis. Stat. § 978.05(1) and (2). A third significant change created Wis. Stat. § 5.05(2m)(a), under which the Board may prosecute civil forfeiture actions under the election laws, lobby laws, and ethics laws directly in circuit court. 2007 Wisconsin Act 1 did not establish any statutory mechanism under which the Board must or should await the outcome of proceedings independently initiated by the district attorney. That legislation also did not establish any statutory mechanism under which the district attorney must or should await the outcome of investigative proceedings that can or are being conducted by the Board.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:FTC:cla
Mr. Keith Bozarth  
Executive Director  
State of Wisconsin Investment Board  
121 East Wilson St.  
Madison, WI 53703

Dear Mr. Bozarth:

You have requested an opinion regarding the management authority of the State of Wisconsin Investment Board (“SWIB”) in light of 2007 Wisconsin Act 212.

QUESTIONS PRESENTED AND BRIEF ANSWERS

Specifically, you ask three questions:

1. Would a court interpret Wis. Stat. § 25.182 (2007-08) to give SWIB authority to manage the Core Fund and the Variable Fund in any manner that meets the prudent investor standard set forth in Wis. Stat. § 25.15(2)(a), regardless of whether a specific investment or action involved in investment management is expressly authorized by the enumerated types of investments under Chapter 25, and regardless of whether such action is contrary to limitations on and requirements relating to investment management of the Core Fund and the Variable Fund remaining in the statutes other than those in Wis. Stat. § 25.17(5)?

2. Would a court conclude that SWIB is obligated to comply with the authority provided by the “legal list” and the requirements and restrictions on investment management provided in chapter 25 unless SWIB determines that the “legal list” and those restrictions are not prudent?

3. Does SWIB have a heavier burden to prove the prudence of an investment or management decision under Wis. Stat. § 25.182 than the burden it has to prove the prudence of an investment or action specifically authorized by the “legal list?”
The supreme court has held that, where public trustees have questions about the scope of their statutory or constitutional duties, they can uphold their fiduciary duty by seeking guidance from the attorney general. See Wisconsin Retired Teachers Association v. Employee Trust Funds Board, 207 Wis. 2d 1, 26-27, 558 N.W.2d 83 (1997).

I conclude that 2007 Wisconsin Act 212 confers upon SWIB the power to make investments that meet the standard of prudence under Wis. Stat. § 25.15(2), even if those investments are not specifically listed in Wis. Stat. ch. 25. Prior to making investments other than the types enumerated in Wis. Stat. ch. 25, SWIB is not required to make a threshold finding that investing solely in the “legal list” would not meet the standard of prudence. The statutory standard for prudence remains the same whether SWIB is investing in an enumerated investment, or one that is not enumerated. Because the standard of prudence, however, takes into account the trustees’ powers to manage the Funds, SWIB’s expanded powers are a relevant factor in evaluating whether SWIB has met that standard.

BACKGROUND

SWIB is charged with the investment and management of a number of state funds. Prior to the passage of 2007 Wisconsin Act 212, SWIB was held to the standard of prudence set forth under Wis. Stat. § 25.15:

STANDARD OF RESPONSIBILITY. Except as provided in s. 25.17(2)(f), the standard of responsibility applied to the board when it invests money or property shall be all of the following:

(a) To invest, sell, reinvest and collect income and rents with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a similar capacity, with the same resources, and familiar with like matters exercises in the conduct of an enterprise of a like character with like aims.


SWIB’s management responsibilities include the Core Fund and the Variable Fund of the Wisconsin Retirement System. See Wis. Stat. § 25.17(1)(br), (xn). Your questions pertain to SWIB’s authority to manage those Wisconsin Retirement System funds.
Prior to the adoption of 2007 Wis. Act 212, the statutes provided a comprehensive list of the types of investments SWIB was authorized to make. Depending on the fund, SWIB’s authority was limited to specific maturities, specific types of issuers, or, in the case of investment contracts, specific purposes. See e.g., Wis. Stat. § 25.17(2)(a) (2005-06) (permitting investment of Core Fund in loans to the Wisconsin University Building Corporation, Wisconsin State Colleges Building Corporation, or Wisconsin State Public Building Corporation, under certain circumstances). The statutes also articulated the comprehensive list of the types of actions SWIB was empowered to take to manage assets under its control. See, e.g., Wis. Stat. § 25.17(4) (2005-06) (limiting investments in companies at the venture capital stage to two percent of the assets of the Core Fund). This set of authority for investment and management options is commonly referred to as a “legal list.” The Attorney General has previously opined that the former statutory scheme restricted SWIB to making only those management decisions articulated in the statutes. See 60 Att’y Gen. Op. 266, 269 (1971). In addition, the statutes limited SWIB’s delegation of the management and control of assets in the Core and Variable Funds. External management was limited to twenty percent of the Core Fund, and twenty percent of the Variable Fund, in cases where SWIB held title to the investments. See Wis. Stat. § 25.18(2)(e)1.

2007 Wisconsin Act 212, enacted on April 22, 2008, amends SWIB’s authority in several ways. As amended by 2007 Wisconsin Act 212, Wis. Stat. § 25.15(2)(a) now directs SWIB “to manage the money and property.” See Wis. Stat. § 25.15(2)(a). This change makes clear that SWIB’s duties include more than simply buying and selling investments.

The Act also expands the authority of SWIB to manage the Core and Variable Funds:

In addition to the management authority provided under any other provision of law, and notwithstanding any limitation on the board’s management authority provided under any other provision of law, the board shall have authority to manage the money and property of the core retirement investment trust and, subject to s. 25.17(5), the variable retirement investment trust in any manner that does not violate the standard of responsibility specified in s. 25.15(2).

Wis. Stat. § 25.182.

Wisconsin Stat. § 25.182 now states that SWIB may manage the Core and Variable Funds “in any manner” consistent with the standard of prudence “in addition to” the management authority that is enumerated elsewhere in the statutes, and “notwithstanding” any limitation provided elsewhere in the statutes. SWIB’s investment of monies in the Variable Fund remains subject to Wis. Stat. § 25.17(5), which requires Variable Fund assets to be invested primarily in equity securities. See Wis. Stat. § 25.182.
MAY SWIB MANAGE THE MONIES IN WAYS OTHER THAN THOSE ARTICULATED ON THE LEGAL LIST?

Your first question turns on the meaning of “in addition to” and “notwithstanding” in Wis. Stat. § 25.182, as amended. “Statutory interpretation begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” See State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶ 45, 271 Wis.2d 633, 681 N.W.2d 110 (citations omitted).

“Notwithstanding,” commonly used in our statutes, has generally been accepted by courts as meaning “in spite of.” In Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18 (1993), the U.S. Supreme Court held, “the use of such a ‘notwithstanding’ clause clearly signals the drafter’s intention that the notwithstanding section overrides conflicting provisions of any other section.” See also Bartholomew v. Wisconsin Patients Compensation Fund, 2006 WI 91, ¶ 84, 293 Wis. 2d 38, 717 N.W.2d 216. A dictionary is used to ascertain the meaning of non-technical statutory terms. See Garcia v. Mazda Motor of America, Inc., 2004 WI 93, ¶ 14, 273 Wis. 2d 612, 682 N.W.2d 365. The dictionary definition of “in addition to” is “over and above.” Webster’s Third New International Dictionary (1986).

Wisconsin Stat. § 25.182 gives SWIB the power to invest “in addition to”—“over and above”—its other powers. It allows SWIB to make such management decisions “notwithstanding”—“in spite of”—any other limitations in the statutes. Answering your first question, I conclude that SWIB’s management authority over the Core and Variable Funds thus now includes the authority to manage the monies in ways other than those articulated on the “legal list,” as long as its management meets the standard of prudence under Wis. Stat. § 25.15(2), and as long as the assets of the Variable Fund are invested primarily in equity securities.

The legislative history confirms this reading. Courts have approved the use of legislative history to confirm the plain meaning of statutory language. See State v. Burris, 2004 WI 91, ¶ 32, 273 Wis. 2d 294, 682 N.W.2d 812. The legislative history of 2007 Act 212 indicates that its purpose was to expand SWIB’s management authority beyond the “legal list”: 
Under this bill, instead of its investment authority being limited to the authorized lists, SWIB may manage the money and property of the core trust and the variable trust in any manner that does not violate SWIB’s standard of responsibility. However, SWIB must continue to invest assets of the variable trust primarily in equity securities.


IS THE “LEGAL LIST” OF INVESTMENTS SWIB MAY MAKE TO BE GIVEN PRECEDENCE?

Your second question is whether the statute articulates a presumption for investments on the “legal list” over other investments that SWIB could make—i.e., that SWIB should confine its investments to the “legal list” unless it finds that it would not be prudent to do so. I find no indication of such a preference or presumption in 2007 Wisconsin Act 212.

IS SWIB REQUIRED TO MEET A HIGHER STANDARD WHEN MAKING INVESTMENTS OTHER THAN THOSE ON THE “LEGAL LIST”?

Finally, your third question is whether SWIB must satisfy a higher standard of prudence in cases where it has chosen to make investments other than those on the “legal list.” Again, I conclude that the answer is “no.” Prior to the passage of 2007 Wisconsin Act 212, SWIB was held to a standard of prudence in making investments. See Wis. Stat. § 25.15(2)(a) (2005-06). The fact that a trustee selected an investment from the “legal list” did not in and of itself constitute prudence; the trustee is required to meet the standard in choosing from among those options. See, e.g. Estate of Collins v. Hughes, 72 Cal. App. 3d 663, 672-73 (Cal. Ct. App. 1977) (trustee’s choice of enumerated investment does not in itself satisfy the standard of care).

The standard of prudence articulated in Wis. Stat. § 25.15(2), which considers the nature of the resources and circumstances surrounding a trust, implicitly takes into account the trustee’s scope of powers in assessing the duty of prudence. See Welch v. Welch, 235 Wis. 282, 312, 290 N.W. 758 (1940). A trustee’s ability to invest in a wide spectrum of investment options carries with it the duty to wield that power with care, skill, prudence and diligence.
CONCLUSIONS

I conclude that 2007 Wisconsin Act 212 confers upon SWIB the power to make investments of assets in the Core and Variable Funds that meet the standard of prudence under Wis. Stat. § 25.15(2), even if those investments are not on the “legal list.” SWIB remains subject to Wis. Stat. § 25.17(5), which requires that Variable Fund assets be invested primarily in equity securities. SWIB is not required to determine that investing solely in the “legal list” would not meet the standard of prudence prior to choosing a different investment. The standard of prudence remains the same regardless of whether SWIB’s management choice is one enumerated on the “legal list.” The standard of prudence takes into account, however, SWIB’s expanded power to select among management options for the two Trusts.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:CG:lkf