



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Raymond P. Taffora  
Deputy Attorney General

114 East, State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857  
608/266-1221  
TTY 1-800-947-3529

April 22, 2009

OAG-1-09

Mr. Brian W. Blanchard  
District Attorney  
Dane County  
215 South Hamilton Street, #3000  
Madison, WI 53703-3297

Dear Mr. Blanchard:

In your letter dated November 18, 2008, you indicate that Dane County has recently established a revolving bail fund. You state that there has been no judicial action by any Dane County Circuit Court Judge or Judges directing or approving the use of such a fund.

#### BACKGROUND

Your letter indicates that the revolving bail fund is funded by the county. The fund is a line item in the budget of the Dane County Sheriff. Monies are lent by the Dane County Sheriff's Office from the fund to persons who have been booked into the Dane County Jail. Funds are lent to persons who lack the financial resources with which to post bail in connection with certain offenses for which the Uniform Bail Schedule sets bail at \$250 or less. Your letter suggests that the vast majority of these offenses are misdemeanors.

In order to be eligible to receive monies from the revolving bail fund, the person cannot be subject to any outside holds, warrants, or commitments; cannot have been arrested for domestic abuse of any kind; cannot have been booked into the jail for any municipal ordinance violation; cannot have failed to appear in court or have been subject to a bench warrant during the preceding five years; cannot have tested positive for any amount of alcohol; and cannot be incapacitated by any drug. The person must also possess valid identification, such as a current driver's license. If the person meets these criteria, he or she must sign a promissory note payable to the county and must also execute an assignment of bail directing the clerk of court to return the amount loaned from the revolving bail fund to the county once the conditions of the indigent person's bail are satisfied. At the time the funds are loaned, there has been no court appearance, no appearance before a judge or court commissioner, and no involvement by the prosecutor or by defense counsel. I have been unable to locate a Dane County Ordinance establishing a revolving bail fund. See <http://countyofdane.com/unified/information/ordinances.aspx>; <http://danedocs.countyofdane.com/webdocs/pdf/ordinances/ord0y.pdf> (last visited 3/31/2009).

### **QUESTION PRESENTED AND BRIEF ANSWER**

You ask, in effect, whether a county or a county sheriff possesses statutory authority to use county funds to establish a revolving bail fund for the purpose of allowing persons to post bail for certain kinds of offenses for which they are booked into the county jail.

In my opinion, the answer is no.

### **PRINCIPAL STATUTORY PROVISIONS AND JUDICIAL ORDERS INVOLVED**

#### **I. STATUTORY AUTHORITY OF THE SHERIFF.**

Wisconsin Stat. § 59.27 provides in part:

Sheriff; duties. The sheriff of a county shall do all of the following:

(1) Take the charge and custody of the jail maintained by the county and the persons in the jail, and keep the persons in the jail personally or by a deputy or jailer.

(2) Keep a true and exact register of all prisoners committed to any jail under the sheriff's charge, in a book for that purpose, which shall contain the names of all persons who are committed to any such jail, their residence, the time when committed and cause of commitment, and the authority by which they were committed; and if for a criminal offense, a description of the person; and when any prisoner is liberated, state the time when and the authority by which the prisoner was liberated; and if any person escapes, state the particulars of the time and manner of such escape.

#### **II. UNIFORM BAIL SCHEDULE.**

Wisconsin Stat. § 969.065 provides:

Judicial conference; bail alternatives. The judicial conference shall develop guidelines for cash bail for persons accused of misdemeanors which the supreme court shall adopt by rule. The guidelines shall relate primarily to individuals. The guidelines may be revised from time to time under this section.

The Uniform Misdemeanor Bail Schedule, adopted by order of the Wisconsin Supreme Court on October 29, 2007,<sup>1</sup> provides in part:

**Preamble for Forfeiture and Misdemeanor Bail Schedules**

- I. All persons arrested for a violation of a state or municipal ordinance shall be released from custody without a cash bond if they:
  - Have a valid Wisconsin driver's license or can show sufficient evidence of ties to the community; or
  - The arresting officer is otherwise satisfied that the accused will make future court appearances.
  
- II. All persons arrested for a misdemeanor, including a misdemeanor traffic offense, shall be released from custody without a cash bond unless any of the following exist:
  - The accused does not have proper identification.
  - The accused appears to represent a danger of harm to himself or herself, another person or property.
  - The accused cannot show sufficient evidence of ties to the community.
  - The accused has previously failed to appear in court or failed to respond to a citation.
  - Arrest or further detention is necessary to carry out legitimate investigative action in accordance with law enforcement agency policies.
  
- III. All persons not released pursuant to I and II for a forfeiture, misdemeanor or misdemeanor traffic offense shall be released upon compliance with the state deposit or misdemeanor bail schedule unless bail is otherwise set by the court.
  
- IV. These guidelines do not supersede specific statutorily mandated detention.

---

<sup>1</sup>The current Uniform Misdemeanor Bail Schedule addresses the individual circumstances of the person arrested. *See Demmuth v. Wisconsin Judicial Conference*, 166 Wis. 2d 649, 480 N.W.2d 502 (1992).

## ANALYSIS

“A county or a county officer has only such power as is conferred by statute, either expressly or by clear implication.” OAG 1-03 (October 2, 2003), at 2. *See St. ex rel. Teunas v. Kenosha County*, 142 Wis. 2d 498, 504, 418 N.W.2d 833 (1988). *See also County of Milwaukee v. Williams*, 2007 WI 69, ¶ 24, 301 Wis. 2d 134, 732 N.W.2d 770.

The substantive powers of counties are enumerated primarily in Wis. Stat. § 59.01 and Wis. Stat. ch. 59, subch. V. I have located no statute that expressly or impliedly authorizes a county to loan county funds to persons booked into the county jail.

The sheriff does have “charge and custody of the jail[.]” Wis. Stat. § 59.27(1). In exercising that authority, the sheriff must keep a record of “when any prisoner is liberated” and “state the time when and the authority by which the prisoner was liberated[.]” Wis. Stat. § 59.27(2). Nothing in this language or in any other provision of Wis. Stat. § 59.27 expressly authorizes the sheriff to loan county funds to persons booked into the county jail.

The exercise of statutory powers cannot be freely or readily implied. *Compare Madison Metropolitan Sch. Dist. v. DPI*, 199 Wis. 2d 1, 13, 543 N.W.2d 843 (Ct. App. 1995). Statutes ordinarily are strictly construed to preclude the exercise of power that is not expressly granted. *See Browne v. Milwaukee Bd. of School Directors*, 83 Wis. 2d 316, 333, 265 N.W.2d 559 (1978). Any reasonable doubt concerning the existence of an implied statutory power should be resolved against its existence. *Madison Metropolitan*, 199 Wis. 2d at 13. *See, e.g.* 77 Op. Att’y Gen. 94, 95 (1988), concluding that the sheriff could not contract with a private firm to maintain the care and custody of prisoners in the county jail because “the power or discretion to so contract is not presently reposed in him by statute, expressly or by implication[.]”

Other statutory provisions negate the existence of any implied power on the part of the sheriff under Wis. Stat. § 59.27(1) and (2) to establish a revolving bail fund. “[T]he legislature and judiciary exercis[e] shared power over bail.” *Demmith*, 166 Wis.2d at 663. Although the Legislature has authorized the sheriff to accept bail under Wis. Stat. § 969.07, in doing so the sheriff performs a purely “ministerial function[.]” 63 Op. Att’y Gen. 241, 243 (1974). *See also* 8A Am. Jur. 2d *Bail* § 9 (2009); 8 C.J.S. *Bail* § 72 (2008). The judiciary has acted pursuant to Wis. Stat. § 969.065, which provides: “The judicial conference shall develop guidelines for cash bail for persons accused of misdemeanors which the supreme court shall adopt by rule.” The judicial conference and the supreme court have not authorized the sheriff to exercise discretion in determining which persons booked into the county jail should be able to post bail. *Cf.* 63 Op. Att’y Gen. at 244-45. There is no language in Wis. Stat. § 59.27(1) and (2) impliedly granting the sheriff the power or authority to deviate from the provisions of Wis. Stat. § 969.07

Mr. Brian W. Blanchard  
Page 5

or Wis. Stat. § 969.065. I find no statutory authority for a county or a sheriff to establish a revolving bail fund with public funds or to operate such a fund in the manner you describe.<sup>2</sup>

### CONCLUSION

I therefore conclude that neither a county nor a county sheriff possesses statutory authority to use county funds to establish a revolving bail fund for the purpose of allowing persons to post bail for certain kinds of offenses for which they are booked into the county jail.

Sincerely,



J.B. Van Hollen  
Attorney General

JBVH:FTC:cla

---

<sup>2</sup>Your concern that the county or the sheriff may be acting as a surety, contrary to Wis. Stat. § 969.12(2), would be valid if there are situations in which the county posts an appearance bond with the court. Wisconsin Stat. § 969.12(2) requires that “[a] surety under this chapter shall be a natural person[.]” Where monies are lent directly to the person who then posts cash bail, neither the county nor the sheriff acts as a surety. *See* Wis. Stat. § 969.02(2), which refers to a “deposit of cash in lieu of sureties[.]” *See also* Wis. Stat. § 969.13(3) and (4).



**STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE**

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Raymond P. Taffora  
Deputy Attorney General

17 W. Main Street  
P.O. Box 7857  
Madison, WI 53707-7857  
[www.doj.state.wi.us](http://www.doj.state.wi.us)

June 3, 2009

OAG—2—09

Mr. Frank Volpintesta  
Corporation Counsel  
Kenosha County  
912 - 56th Street  
Kenosha, WI 53140-3747

Dear Mr. Volpintesta:

¶ 1. You indicate that in the past the Kenosha County Board has, by resolution, appointed a person nominated by the Kenosha County Land Conservation Committee to be Kenosha County's representative on the Powers Lake Inland Lake Protection and Rehabilitation District Board ("Board"). On March 19, 2009, your office issued a legal opinion to the Kenosha County Executive advising him that he possesses the authority to appoint Kenosha County's representative to the Board. You advise that the chairperson of the Kenosha County Board subsequently requested that you obtain a legal opinion from this office as to whether the power of appointment rests with the county executive or with the county board.

**QUESTION PRESENTED AND BRIEF ANSWER**

¶ 2. You ask whether the county board in a county with a county executive possesses the power to appoint the county representative to a public inland lake and rehabilitation district protection board under Wis. Stat. § 33.28(2)(a).

¶ 3. In my opinion, in a county with a county executive the county executive possesses the power of appointment, which is subject to confirmation by the county board.

**ANALYSIS**

¶ 4. County appointments to public inland lake and rehabilitation district boards are made pursuant to Wis. Stat. § 33.28(2), which provides in part that the "board of commissioners" is to include "(a) One person appointed by the county board who is a member of the county land conservation committee or is nominated by the county land conservation committee and appointed by the county board[.]" Wisconsin Stat. § 59.17(2)(c) provides that the county executive "[a]ppoint[s] the members of all boards and commissions . . . where the statutes provide that the appointments are made by the county board . . . ."

¶ 5. The phrase "boards and commissions" in Wis. Stat. § 59.17(2)(c) is not limited to boards and commissions that are internal to the county. "[A]ppointments to a regional plan

Mr. Frank Volpintesta  
Page 2

commission on behalf of a county . . . must be made by the county board, unless the county has a county executive or a county administrator” in which case “such appointments are made by that county officer[.]” *See* 62 Op. Att’y Gen. 197, 200 (1973). The management of a public inland lake and rehabilitation district is vested in a “board of commissioners.” Wis. Stat. § 33.28(1). The board of commissioners is a board or a commission in contradistinction to a committee. *See* 76 Op. Att’y Gen. 173, 175 (1987) (citing 61 Op. Att’y Gen. 116, 119-20 (1972), for the proposition “that the Legislature used the words ‘boards and commissions’ [in what is now Wis. Stat. § 59.17(2)(c)] advisedly to the exclusion of ‘committees,’ whether such ‘committees’ were created under section 59.06 or some other statutory authority”).

¶ 6. Wisconsin Stat. § 33.28(2)(a) provides that the county representative upon a public inland lake protection and rehabilitation board is to be a “person appointed by the county board[.]” By operation of Wis. Stat. § 59.17(2)(c), the power of appointing the county representative to a public inland lake protection and rehabilitation district is therefore transferred from the county board to the county executive once the office of county executive is created.

¶ 7. The county executive’s appointee must be a person “who is a member of the county land conservation committee or is nominated by the county land conservation committee[.]” Wis. Stat. § 33.28(2)(a). Consequently, if the land conservation committee does not nominate anyone outside the committee, the county executive’s appointee must be a member of the committee.

¶ 8. Wisconsin Stat. § 59.17(2)(c) provides that “[a]ll appointments to boards and commissions by the county executive are subject to confirmation by the county board.” While the power of appointing the county representative to a public inland lake rehabilitation and protection board is vested in the county executive by operation of Wis. Stat. § 59.17(2)(c), the county board possesses the power to confirm the county executive’s appointment.

## CONCLUSION

¶ 9. I therefore conclude that in a county with a county executive, the county executive possesses the power to appoint the county representative to a public inland lake and rehabilitation district protection board under Wis. Stat. § 33.28(2)(a) and that the county executive’s appointment is subject to confirmation by the county board.

Sincerely,

J.B. Van Hollen  
Attorney General

JBVH:FTC:cla



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Raymond P. Taffora  
Deputy Attorney General

114 East, State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857  
608/266-1221  
TTY 1-800-947-3529

July 13, 2009

OAG—3—09

Ms. Susan Churchill  
Deputy Secretary  
Office of the Secretary of State  
30 West Mifflin Street, 10<sup>th</sup> Floor  
Madison, WI 53703

Dear Ms. Churchill:

¶ 1. You have requested my opinion on three questions related to section 137.01(2) of the Wisconsin Statutes,<sup>1</sup> concerning notary public commissions issued to attorneys licensed to practice law in Wisconsin.

¶ 2. In general, any United States resident licensed to practice law in Wisconsin may obtain a permanent commission as a notary public pursuant to section 137.01(2)(a). If an attorney has had his or her license to practice law in Wisconsin suspended or revoked, however, upon reinstatement of his or her license the attorney may obtain a 4-year commission as a notary public and may be reappointed thereafter for 4-year increments. Sec. 137.01(2)(am), Wis. Stats.

¶ 3. As you note, section 137.01(2)(c) provides that “[t]he supreme court shall file with the secretary of state notice of the surrender, suspension or revocation of the license to practice law of any attorney who holds a permanent commission as a notary public[]” and that such notice is deemed to constitute revocation of the attorney’s notary public commission. You indicate that the Office of Lawyer Regulation (“OLR”), acting as an agent of the supreme court, regularly sends your office notice of attorney licenses suspended or revoked for disciplinary reasons. You further indicate that these notices are checked against your office’s database of permanent notaries public and that permanent notary commissions held by the disciplined attorneys are revoked.

¶ 4. You also indicate that you learned recently of other routine “law license suspensions” which previously have not been reported to your office:

1. Suspensions issued by the Board of Bar Examiners (BBE) for attorney failure to comply with CLE reporting and attendance requirements. This is an administrative suspension and can be imposed by BBE without additional action by the court itself. There are 200-300 of these

---

<sup>1</sup>Unless otherwise indicated, all references in this opinion to provisions of the Wisconsin Statutes are to the 2007-08 edition.

suspensions per year; perhaps 25% - 40% of these will eventually reinstate. BBE generates a notice of these suspensions once a year, usually in late May.

2. Suspensions issued by the State Bar of Wisconsin for attorney failure to pay dues or to provide attorney trust account information. This is an administrative suspension that does not require action by the court. There are approximately 300 of these suspensions per year; about 75% usually reinstate. The state bar generates a notice of these suspensions once a year in late October.

#### QUESTIONS PRESENTED AND BRIEF ANSWERS

¶ 5. As you review how this recent information about additional types of attorney license suspensions and revocations affects your office's administration of the section 137.01 notary public provisions, you have asked my opinion on three related legal questions. Those questions, and my brief answers, are as follows:

1. What is the legal definition of "suspended or revoked" as relates to a law license according to Wis. Stat. s. 137.01? Are all attorney suspensions (including those described in items # 1 and 2 above) included in that definition with the result that those attorneys would therefore be ineligible for a permanent notary commission (but potentially eligible for a 4-year notary commission)?

Brief Answer: The plain language of sections 137.01(2)(am) and (c) does not distinguish among the various types of attorney license suspensions and revocations. The phrase "suspended or revoked," as used in section 137.01(2)(am) therefore includes all suspensions and revocations of licenses to practice law in Wisconsin. Similarly, the phrase "suspension or revocation" in related section 137.01(2)(c) includes all suspensions and revocations of licenses to practice law in Wisconsin.

2. Would this apply both to attorneys (with law license suspensions) applying for the first time for a notary commission and as well as to those who have existing permanent notary commission[s]?

Brief Answer: Yes. An attorney applying for the first time for a notary public commission may be appointed to a 4-year commission if that attorney's license to practice law in Wisconsin has been reinstated after previous suspension or revocation of that license. An attorney who

previously held a permanent notary public commission that had been deemed revoked by notice filed with your office by the supreme court<sup>2</sup> that the attorney's license to practice law in Wisconsin had been suspended or revoked may be appointed to a 4-year notary public commission upon reinstatement of that attorney's Wisconsin law license. And, by operation of statute, the existing permanent notary public commission of an attorney is deemed revoked by notice filed with your office by the supreme court that the attorney's license to practice law in Wisconsin has been suspended or revoked.

3. If the answer to [1] above is yes, what would be the effective date for commission revocation (given that the Office of the Secretary of State only just recently learned of these suspensions). In other words, would attorneys with permanent notary commissions who had been suspended in the past (and reinstated or not) have their permanent commissions revoked retroactively?

Brief Answer: An attorney's permanent notary public commission is revoked only upon filing of notice with your office by the supreme court pursuant to section 137.01(2)(c). Therefore, the date that notice is filed with your office by the supreme court pursuant to section 137.01(2)(c) that an attorney's Wisconsin law license has been suspended or revoked is the date that the attorney's permanent notary public commission is deemed revoked by operation of statute. If notice now is filed with your office that an attorney's Wisconsin law license had been suspended or revoked at some time in the past, that attorney's permanent notary commission is deemed revoked as of the date when the notice is filed with your office—not retroactively as of the date that the attorney's Wisconsin law license was suspended or revoked. Similarly, because section 137.01(2)(c) provides the only authorized mechanism for revoking permanent notary commissions, your office may not revoke permanent notary commissions upon receipt of information about law license suspensions and revocations received from sources other than notice filed by the supreme court.

---

<sup>2</sup>I use the term “supreme court” in this opinion to refer to the Wisconsin Supreme Court and its designated agents.

## ANALYSIS

¶ 6. All statutory interpretation begins with the language of the statute. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. My analysis of your first question therefore begins with the language of section 137.01(2)(am), which applies to “a United States resident [who] has his or her license to practice law in this state suspended or revoked.” Upon subsequent reinstatement of their Wisconsin law licenses, these attorneys may obtain renewable 4-year notary public commissions. Sec. 137.01(2)(am), Wis. Stats.<sup>3</sup>

¶ 7. The Legislature is presumed to deliberately choose the language it uses in a statute, *State v. Briggs*, 214 Wis. 2d 281, 288, 571 N.W.2d 881 (Ct. App. 1997), and to choose statutory language carefully and precisely to convey its intended meaning. *State v. Smits*, 2001 WI App 45, ¶ 15, 241 Wis. 2d 374, 626 N.W.2d 42. Statutory language must be given its common, ordinary, and accepted meaning; technical or specially-defined words are given their technical or specially defined meanings. Sec. 990.01(1), Wis. Stats.; *Kalal*, 271 Wis. 2d 633, ¶ 45. Common and accepted meaning of statutory terms may be ascertained by reference to dictionary definitions. *Kalal*, 271 Wis. 2d 633, ¶¶ 53-54.

¶ 8. In my opinion, the language of section 137.01(2)(am) is not ambiguous. Statutory language is ambiguous if it can be understood by reasonably well-informed persons in two or more senses. *Kalal*, 271 Wis. 2d 633, ¶ 47. Or, in other words, that there exist “different but plausible interpretations of the statute.” *Kroeplin v. Wisconsin Dep’t of Natural Res.*, 2006 WI App 227, ¶ 19, 297 Wis. 2d 254, 725 N.W.2d 286. There is only one plausible interpretation of the relevant section 137.01(2)(am) language, however.

¶ 9. The 4-year notary public provisions of section 137.01(2)(am) apply to “a United States resident [who] has his or her license to practice law in this state suspended or revoked.” Both “suspend” and “revoke” have easily ascertained plain meanings. “Suspend” means “to debar or cause to withdraw temporarily from any privilege, office, or function;” “to cause (as an action, process, practice, use) to cease for a time;” or “to hold in an undetermined or undecided state awaiting fuller information.” *Webster’s Third New International Dictionary* 2303 (1986) (“*Webster’s*”). “Revoke” means “to bring or call back,” “to annul by recalling or taking back (as something granted by a special act),” or “WITHDRAW.” *Webster’s* at 1944.

---

<sup>3</sup>Section 137.01(2)(am) provides:

If a United States resident has his or her license to practice law in this state suspended or revoked, upon reinstatement of his or her license to practice law in this state, the person may be entitled to receive a certificate of appointment as a notary public for a term of 4 years. An eligible notary appointed under this paragraph is entitled to reappointment for 4-year increments. At least 30 days before the expiration of a commission under this paragraph the secretary of state shall mail notice of the expiration date to the holder of the commission.

¶ 10. The common and accepted meanings of “suspend” and “revoke,” ascertained by reference to their respective dictionary definitions, do not in themselves create distinctions between different types of license suspensions or different types of license revocations. Nor do any such categorical distinctions appear in the actual language of section 137.01(2)(am).

¶ 11. Consideration of section 137.01(2)(c) reinforces my conclusion that the section 137.01(2)(am) “suspended or revoked” language unambiguously refers to any suspension or revocation of an attorney’s license to practice law in Wisconsin. Statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. *Kalal*, 271 Wis. 2d 633, ¶ 46. When the same word is used in neighboring subsections, it generally should be given same meaning in each subsection. *State v. White*, 2004 WI App 237, ¶ 10, 277 Wis. 2d 580, 690 N.W.2d 880.

¶ 12. Section 137.01(2)(c) provides for the supreme court to file with your office “notice of the surrender, suspension or revocation of the license to practice law of any attorney who holds a permanent commission as a notary public.” The section then provides that such notice is deemed a revocation of the attorney’s notary public commission.<sup>4</sup> Like section 137.01(2)(am), the language of section 137.01(2)(c) does not explicitly or implicitly distinguish between types of suspensions or revocations.

¶ 13. Procedurally, sections 137.01(2)(c) and (am) are intimately connected. Section 137.01(2)(c) provides the process for revoking the permanent notary public commission of an attorney whose Wisconsin law license has been suspended or revoked. Section 137.01(2)(am) provides the process by which an attorney whose Wisconsin law license has been suspended or revoked may, upon reinstatement of his or her law license, obtain a 4-year notary public commission. Absence from either of these closely related statutes of any distinction among different reasons for suspension or revocation of an attorney’s Wisconsin law license therefore reinforces my conclusion that the provisions of both statutes apply to all law license suspensions and revocations.

¶ 14. In Wisconsin, lawyer regulation is the purview of the Wisconsin Supreme Court. SCR 10.01(1) and (2). Examination of relevant supreme court rules further reinforces my conclusion that the section 137.01(2)(am) “suspended or revoked” language, and its section 137.01(2)(c) counterpart, unambiguously refer to any suspension or revocation of an attorney’s license to practice law in Wisconsin.

---

<sup>4</sup>Section 137.01(2)(c) provides:

The supreme court shall file with the secretary of state notice of the surrender, suspension or revocation of the license to practice law of any attorney who holds a permanent commission as a notary public. Such notice shall be deemed a revocation of said commission.

¶ 15. The supreme court may revoke or suspend the license of an attorney as discipline for professional misconduct. SCR 21.16(1m)(a) and (b). Attorneys who do not pay their state bar dues or fail to file a trust account certificate are subject to suspension of their state bar membership, following notice and a grace period. SCR 10.03(6m) and SCR 10, Appendix, sec. 3(a). Similarly, the state bar membership of an attorney who fails to comply with CLE attendance and reporting requirements is subject to suspension and “shall not engage in the practice of law in Wisconsin while his or her state bar membership is suspended under this rule.” SCR 31.10(1).

¶ 16. Suspension of state bar membership constitutes suspension of an attorney’s license to practice law in Wisconsin. The same supreme court rule, “License reinstatement,” addresses reinstatement of those attorneys “suspended from the practice of law for nonpayment of state bar membership dues or failure to comply with the trust account certification requirement or continuing legal education requirements,” SCR 22.28(1), and attorneys whose licenses have been revoked or suspended for misconduct, SCR 22.28(2) and (3). *See also* SCR 31.11.

¶ 17. The court’s published decisions in attorney discipline cases confirm that suspension from the state bar constitutes suspension of an attorney’s license to practice law in Wisconsin. *See, e.g., In the Matter of Disciplinary Proceedings Against Michael F. Swensen*, 2008 WI 113, ¶ 3, 314 Wis. 2d 29, 754 N.W.2d 499 (“Attorney Swensen’s Wisconsin law license is currently under suspension for failure to comply with mandatory continuing legal education requirements and failure to pay State Bar of Wisconsin dues”); *In the Matter of Disciplinary Proceedings Against James R. Lucius*, 2008 WI 12, ¶ 3, 307 Wis. 2d 255, 744 N.W.2d 605 (“Attorney Lucius’s license to practice law in Wisconsin was suspended for his failure to comply with continuing legal education (CLE) reporting requirements”).

In Wisconsin, membership in the class of “active members” of the State Bar of Wisconsin is a condition precedent to the practice of law. SCR 10.01; SCR 10.03(4). Moreover, the payment of annual bar dues and assessments is a requirement of membership in the state bar. The failure to pay annual bar dues and assessments may result in the suspension of the attorney’s license to practice law in this state.

*In the Matter of Disciplinary Proceedings Against Edward James FitzGerald*, 2007 WI 111, ¶ 5, 304 Wis. 2d 592, 735 N.W.2d 913 (footnotes omitted).

¶ 18. Suspension of an attorney’s state bar membership therefore constitutes suspension of the attorney’s license to practice law.

¶ 19. For all these reasons, therefore, it is my opinion that attorney suspensions for failure to pay state bar dues, file trust account reports, or comply with CLE requirements constitute suspension of the attorney’s license for purposes of the notary public provisions of

section 137.01(2). As discussed below, your further questions involve practical application of these statutory provisions.

¶ 20. Your second question is whether the same definitions of “suspended or revoked” law licenses apply both to attorneys applying for Wisconsin notary public commissions for the first time, and to attorneys who have existing permanent Wisconsin notary public commissions. In my opinion, the same definitions apply to both groups of attorneys whose Wisconsin law licenses have been suspended or revoked.

¶ 21. On its face, the plain language of section 137.01(2)(am) does not distinguish between attorneys applying for their first Wisconsin notary public commissions and attorneys who previously held permanent notary public commissions.

¶ 22. Moreover, interrelationship of the language of section 137.01(2)(am) language with the language of section 137.01(2)(a) confirms that the section 137.01(2)(am) provisions apply to all attorneys.

¶ 23. Section 137.01(2)(a) establishes the general rule: “any” United States resident licensed to practice law in Wisconsin is entitled to a permanent commission as a notary public upon satisfaction of the specified conditions. The meaning of “any” is unambiguously all-inclusive. “‘Any’ means *any* . . . .” *State ex rel. Hipp v. Murray*, 2007 WI App 202, ¶ 12, 305 Wis. 2d 148, 738 N.W.2d 570.

¶ 24. Section 137.01(2)(a) also establishes by reference that there is one exception to the general rule of entitlement; it begins, “[e]xcept as provided in par. (am) . . . .” Two criteria define the section 137.01(2)(am) exception: an attorney subject to that provision has had his or her Wisconsin law license suspended or revoked, and the attorney subsequently obtained reinstatement of his or her Wisconsin law license. The criteria are stated in terms of the loss and reacquisition of the Wisconsin law license, not in terms of an initial notary public application or a subsequent reapplication.

¶ 25. In my opinion, therefore, section 137.01(2)(am) by its plain language applies both to attorneys applying for their first Wisconsin notary public commission and attorneys applying for a 4-year notary public commission after revocation of their previously obtained permanent commissions.

¶ 26. Likewise, the language of section 137.01(2)(c) is plain and unambiguous. Besides applying to “any” described attorney, like the section 137.01(2)(am) provision discussed above, section 137.01(2)(c) also includes the directive “shall” in two places: the supreme court “shall” file notice of the “suspension or revocation of the license to practice law of any attorney” who holds a permanent notary public commission and such notice “shall be deemed a revocation” of that commission. The word “shall” generally is presumed to be mandatory when interpreting

statutory language. *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 16, 262 Wis. 2d 720, 665 N.W.2d 155. Nothing in the statutory language itself above supports any other interpretation. Conversely, any other interpretation would defeat the Legislature’s regulatory objectives and create inequitable consequences if not uniformly applied to all attorneys whose law licenses have been suspended or revoked. *Cf. Marberry*, 262 Wis. 2d 270, ¶ 17.

¶ 27. In my opinion, therefore, section 137.01(2)(c) by its plain language mandates that filing by the supreme court of notice about any suspension or revocation of an attorney’s Wisconsin law license is deemed a revocation of that attorney’s existing permanent notary public commission.

¶ 28. Your third question concerns the effective date for revocation of permanent notary public commissions by operation of section 137.01(2)(c). By operation of statute, revocation of a permanent notary commission is not automatic or discretionary. Instead, revocation of an attorney’s permanent notary commission only occurs if and when the supreme court files notice with your office that the attorney’s Wisconsin law license has been suspended or revoked.

¶ 29. Section 137.01(2)(c) constitutes the exclusive mechanism for revocation of an attorney’s existing permanent notary public commission. The language of section 137.01(2)(c) is unambiguous: “Such notice shall be deemed a revocation of said commission.” In my opinion, therefore, the operative date for your office’s administration of section 137.01(2)(c) is the date that the supreme court files with your office the notice of the suspension or revocation of an attorney’s Wisconsin law license—not the actual date that the attorney’s law license was suspended or revoked.

¶ 30. By itself, suspension or revocation of an attorney’s Wisconsin law license does not automatically revoke that attorney’s permanent notary public commission. Your office therefore has no independent obligation or authority to seek out lists of suspended or revoked attorneys, verify the law licensing of attorneys holding permanent notary commissions, or otherwise revoke permanent notary public commissions. Instead, your office must act only upon filing of notice by the supreme court pursuant to section 137.01(2)(c).

¶ 31. Conversely, your office may not unilaterally revoke a permanent notary public commission without filing of notice by the supreme court pursuant to section 137.01(2)(c). There is no statutory authority for the Secretary of State to revoke a permanent notary commission without filing of such notice. Section 137.01(2)(c), as noted above, provides the exclusive mechanism for revoking an attorney’s permanent notary public commission.

¶ 32. To summarize, sections 137.01(2)(am) and (c) operate as follows. An attorney applying for the first time for a notary public commission, whose Wisconsin law license previously was suspended or revoked but has been reinstated, is entitled to a 4-year notary public appointment which may be renewed for subsequent 4-year terms. An attorney’s existing

Ms. Susan Churchill  
Page 9

permanent notary public commission is deemed revoked by operation of statute only upon filing of notice by the supreme court with your office that the attorney's Wisconsin law license has been suspended or revoked for any reason. Finally, an attorney who previously held a permanent notary public commission, which was deemed revoked by notice filed with your office by the supreme court that the attorney's Wisconsin law license had been suspended or revoked, is entitled upon reinstatement of his or her law license to a 4-year notary public appointment which may be renewed for subsequent 4-year terms.

¶ 33. I hope that you find this analysis helpful in your office's administration of the notary public statutes.

Sincerely,

J.B. Van Hollen  
Attorney General

JBVH:KMS:MEB:ajw



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Raymond P. Taffora  
Deputy Attorney General

114 East, State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857  
608/266-1221  
TTY 1-800-947-3529

October 14, 2009

OAG-4-09

Ms. Karen Timberlake  
Secretary  
Department of Health Services  
1 West Wilson Street  
Madison, WI 53707

Dear Ms. Timberlake:

¶ 1. You indicate that a group of counties is giving consideration to establishing a commission under Wis. Stat. § 66.0301. You advise that the commission would be a separate governmental legal entity that would lease a unit in an existing county-owned skilled care nursing home facility that currently provides specialized care to the developmentally disabled and to persons with mental illness. You state that the primary purpose of the commission would be to assure that this specialized unit continues to operate, thereby ensuring the continued availability of specialized services to residents of these counties. You also state that the commission would defray losses that are currently incurred solely by the county (“County”) in which the specialized unit is located. My understanding is that both the County and all other counties that currently have residents in the specialized unit desire to voluntarily become commission members.

### BACKGROUND

¶ 2. Medicaid is a cooperative federal-state program created under Title XIX of the Social Security Act that provides reimbursement for certain kinds of medical care given to persons with limited financial resources. *Harris v. McRae*, 448 U.S. 297, 308-09 (1980). Although the federal and state governments share the costs of the Medicaid program, the primary responsibility for its administration lies with a designated single state agency in each state. 42 U.S.C. §§ 1396a(a)(5) and 1396b (2009). In Wisconsin, the Division of Health Care Access and Accountability (“DHCAA”) in the Department of Health Services (“DHS”) serves as the single state Medicaid agency under 42 C.F.R. Part 431 (2007). DHCAA reimburses health care providers for covered medical services received by persons who have qualified for Medicaid. Under Wis. Stat. § 49.45(2)(a)11., DHCAA certifies nursing homes and other health care providers to participate in the state Medicaid program. The Division of Quality Assurance (“DQA”) in DHS licenses nursing homes. A nursing home licensed by DQA under Wis. Stat. § 50.03 qualifies as a Wisconsin Medicaid provider. Wis. Admin. Code § HFS 105.08. The legal entity that is named on the Wis. Stat. ch. 50 license issued by DQA is certified by DHCAA under the Medicaid

program as a nursing home provider. That legal entity receives Medicaid reimbursement from DHCAA.

¶ 3. Each county has “the primary responsibility for the well-being, treatment and care of the mentally ill, [and] developmentally disabled” who are residents of the county. Wis. Stat. § 51.42(1)(b). That “responsibility is limited to the programs, services and resources that the county board of supervisors is reasonably able to provide within the limits of available state and federal funds and of county funds required to be appropriated to match state funds.” *Id.* Consequently, in protective placement proceedings “[e]xcept as provided in s. 49.45(30m), the county may not be required to provide funding, in addition to its funds that are required to be appropriated to match state funds, in order to provide protective placement or protective services to an individual.” Wis. Stat. § 55.12(5).

¶ 4. You advise that few private nursing homes have programs or facilities for the specialized treatment and supervision of individuals with significant behavioral problems due to mental illness or developmental disabilities. You state that certain counties do operate nursing homes with dedicated units that provide such specialized services, but most counties lack the financial resources to establish such units. You indicate that a county that is responsible for the care of a resident who needs such specialized nursing home services therefore often contracts for the placement of that resident in another county in which there is a county nursing home that does have such a specialized services unit. You also state that most but not all residents to whom counties provide care and treatment under Wis. Stat. § 51.42 have qualified for Medicaid. A county nursing home that admits a Medicaid-eligible resident of another county bills the Medicaid program for the care that the nursing home provides. The authorized Medicaid reimbursement rate is normally significantly less than the full cost of providing specialized care for persons with mental illness or developmental disabilities. All Medicaid providers, including nursing homes, are precluded by federal and state statutes and regulations from billing otherwise legally or financially responsible third parties for any amount in excess of the applicable Medicaid reimbursement rate, even where the full cost of providing care to the patient substantially exceeds the amount of government reimbursement received. A county that operates a nursing home with a dedicated unit that provides specialized services to persons with mental illness or developmental disabilities must therefore use funds from its own county treasury to cover any deficits generated as a result of providing services to Medicaid recipients who are residents of other counties.

¶ 5. According to the information you have provided, the County owns and operates a nursing home that does include a dedicated unit which provides specialized services to persons with mental illness and developmental disabilities. You advise that the County has determined that it can no longer afford to cover substantial deficits that it is incurring in connection with the operation of the specialized unit, and that it therefore may be forced to close that unit. You state that the deficits result primarily from treating Medicaid patients who require specialized care for mental illness or developmental disabilities. My understanding is that the human services

departments of certain other counties currently contract with the facility to receive care for individual residents of those counties in the specialized unit of the nursing home and that those counties have proposed entering into an intergovernmental agreement under Wis. Stat. § 66.0301 to create a commission that would lease the specialized unit from the County. You indicate that the County would also be a party to the intergovernmental agreement and a member of the commission. It is my understanding that the specialized unit would not be governed by a multi-county human services department, as has been done in other counties that share costs of medical facilities. *See, e.g., <http://www.norcen.org/>.* My understanding is that the human services department in each of these other counties would therefore continue to be required to enter into a contract with the facility for the care of each individual resident in the specialized unit. *See Wis. Stat. § 51.42(3)(as)1r.*

¶ 6. You state that the commission would be licensed and certified as a skilled Medicaid facility and would be responsible for all costs, including capital costs, necessary to maintain the specialized unit and keep it operational. You advise that the County would retain ownership of the land, building, fixtures, equipment, and personal property and would continue to provide all labor, materials, and related services necessary to operate the specialized unit. You indicate that the County would continue to hire, pay, supervise, and discharge all employees, would continue to maintain all financial accounts, and would continue to collect all patient charges.

¶ 7. You state that the commission would make payments to the County for rental of the facility. You advise that the rental payments would consist of reimbursement for all costs that could have been reported on Medicaid Program Nursing Home Cost Reports by the County had it not entered into the lease. You have not inquired about the Medicaid reimbursement aspects of the proposed lease arrangement.

¶ 8. You state that the commission would also pay additional funds to the County for the various services that the County agrees to continue to provide. You indicate that all state and federal funds that the commission receives in connection with the operation of the facility and all assessments made by the commission against its member counties would be remitted to the County by the commission.

¶ 9. You advise that the proposed annual assessments against the other counties would be entirely prospective and would take into consideration required lease payments, operational costs, anticipated patient days per member, capital costs, and any other expenses that the commission anticipates would be incurred in the ensuing fiscal year in order to maintain the facility in appropriate operating condition. You state that the assessments would be made against these counties on a uniform prorated basis. Although you have provided no specific examples, you advise that the proposed assessments would also take into consideration the prorated expenses to be incurred by the commission that are associated with a member county's

residents in the facility.<sup>1</sup> Because most persons who receive services in the specialized unit are Medicaid recipients, a substantial portion of the proposed assessments against the other member counties would therefore necessarily be used to defray deficits anticipated to occur as a result of providing care to Medicaid patients for whom each such county is responsible under Wis. Stat. § 51.42(1)(b).

¶ 10. You advise that annual assessments against the County would consist of two components. You indicate that one component of those assessments would be computed at the same uniform, prorated rate and upon the same bases that annual assessments are made against the other counties. My understanding is that this first component of the annual assessment would therefore take into consideration the prorated expenses to be incurred by the commission that are associated with the County's own residents in the facility. You advise that the second component of the annual assessment against the County would be a retroactive assessment that is the difference between the proceeds of all prospective assessments made against all counties at the uniform prorated rate and the actual costs of the commission's operations, as determined in its Medicaid cost reports. You have not inquired about the Medicaid reimbursement aspects of the commission's payment of all of the assessments to the County.

¶ 11. The materials you have provided indicate that a county could be expelled from the commission by a two thirds vote of all member counties. Those materials also indicate that a county could withdraw from the commission at the close of any fiscal year by providing timely notice to the commission. They also indicate that a condition of commission membership for the other counties would be that upon withdrawal or expulsion each such county must take all actions necessary to remove all of its residents who are patients of the facility in a manner that is consistent with federal and state law. You state that, by prior agreement, assessments against a county that withdraws or is expelled from the commission would continue as long as the county has residents in the facility.

#### **QUESTION PRESENTED AND BRIEF ANSWER**

¶ 12. You ask whether the mandatory assessments by the commission would violate federal and state statutory and regulatory provisions prohibiting Medicaid supplementation.

¶ 13. In my opinion, counties may enter into joint agreements to collectively furnish and fund nursing home services if the agreements do not violate federal and state Medicaid statutes and regulations prohibiting supplementation. Assessments resulting from such agreements that

---

<sup>1</sup>*Compare* Wis. Stat. § 46.20(6)(b) (prescribing a specific method of proration for joint county institutions using “the percentage which the aggregate cost of keeping the inmates at public charge from each such county bears to the aggregate cost of keeping the inmates at public charge from all such counties,” and “adopting as the unit of cost the total average cost per capita per week of keeping all the inmates, at public charge or otherwise, in said institution.”).

are computed without reference to and that are not attributable to purchase of services contracts involving Medicaid patients would not constitute supplementation. Assessments that are computed with reference to or are attributable to purchase of services contracts involving particular Medicaid patients are not permissible. The validity of hybrid assessments that do not fit solely within either one of those two categories must be determined on a case-by-case basis.

¶ 14. You have not specifically inquired whether any county could be forced to join the commission in order to have its residents served by the specialized unit. I decline to provide an opinion concerning that issue because I understand that a similar issue is in civil litigation between two counties. *See* 77 Op. Att’y Gen. Preface No. 3.D. (1988).

### ANALYSIS

¶ 15. The term “supplementation” refers to “the practice by which [Medicaid] providers [attempt to] augment th[e] [Medicaid] reimbursement rate by billing other sources.” 73 Op. Att’y Gen. 68, 68 (1984). In my opinion, the formation of a commission to fund the operation of the specialized unit would be permissible even though the commission could make mandatory assessment that would be used in part to cover deficits incurred in providing care to Medicaid recipients.

¶ 16. Wisconsin Stat. § 66.0301(2) authorizes counties to contract with each other for “the joint exercise of any power or duty required or authorized by law.” Counties have “primary responsibility for the well-being, treatment and care of the mentally ill, [and] developmentally disabled” who are county residents. Wis. Stat. § 51.42(1)(b). Counties possess statutory authority to establish facilities that provide various forms of medical care, including nursing home care and mental health care. *See* Wis. Stat. §§ 49.70, 49.71, 49.72, 49.73, and 51.09. *See also* Wis. Stat. § 46.20 (authorizing the establishment of joint county institutions). Counties may therefore contract with each other under Wis. Stat. § 66.0301(2) to collectively provide nursing home and related mental health services to their residents. Any such contract may contain “provisions as to proration of the expenses involved” and may provide for “creation of a commission[.]” Wis. Stat. § 66.0301(3). A single county that owns or leases a nursing home that provides direct care including mental health services must cover all of the costs associated with the upkeep and operation of the facility, including all deficits incurred as a result of providing direct care to Medicaid patients. The formation of a commission under Wis. Stat. § 66.0301(3) appears to be designed to permit the counties that are commission members to jointly share all costs associated with the upkeep and operation of a multi-county specialized nursing home unit and to determine how those costs should be prorated among member counties. Costs associated with the upkeep and operation of a multi-county facility necessarily include any deficits incurred as a result of providing care to patients who are Medicaid recipients. Cost-sharing between counties is specifically authorized by statute.

¶ 17. Although Wis. Stat. § 66.0301(3) does provide statutory authorization for the proration of expenses among counties, it does not permit counties to prorate expenses in a manner that violates prohibitions upon Medicaid supplementation. *See* 73 Op. Att’y Gen. at 70. For purposes of the Medicaid program, transactions that lack economic substance and are entered into to avoid Medicaid statutes and regulations can be disregarded as sham transactions. *See Estate of Hagenstein v. Wisc. Health & Family Servs.*, 2006 WI App 90, ¶ 29, 292 Wis. 2d 697, 715 N.W.2d 645; *Cox v. Secretary, Louisiana Dept. of Health and Hospitals*, 939 So.2d 550, 554 (La. App.), writ denied, 944 So.2d 1274 (La. 2006); *Deerbrook Pavilion, LLC v. Shalala*, 235 F.3d 1100, 1104 (8th Cir. 2000), cert. denied, 534 U.S. 992 (2001). *See also Cedar Hill Manor, L.L.C. v. Dep’t of Social Serv.*, 145 S.W.3d 447 (Mo. App. 2004). *Cf. Credit Recovery Systems, LLC v. Heike*, 158 F. Supp. 2d 689, 696 (E.D. Va. 2001); *Illinois Council for Long Term Care v. Miller*, 503 F. Supp. 1091, 1096 (N.D. Ill. 1980); *Moehle v. Miller*, 513 N.E.2d 612, 614 (Ill. App. 1987), appeal denied, 520 N.E.2d 387 (Ill. 1988). These cases consider all of the facts and circumstances when determining whether a transaction is a sham for purposes of the Medicaid program. *Compare Milwaukee Reg’l Med. Ctr. v. City of Wauwatosa*, 2007 WI 101, ¶ 35 n.8, 304 Wis. 2d 53, 735 N.W.2d 156 (“court evaluates all the facts and circumstances surrounding the case” when determining whether an entity is the beneficial owner of property).<sup>2</sup>

¶ 18. One form of supplementation involves seeking payments from Medicaid recipients that are in addition to reimbursement received from the Medicaid program for providing medical care. Subject to certain limited exceptions, Wis. Stat. § 49.49(3m) provides that it is a felony for a Medicaid provider to knowingly seek payments from a Medicaid recipient that are in addition to payments received by the provider under the Medicaid program. Similar language is contained in 42 U.S.C. § 1396a(a)(25)(C) (2009). As proposed, the assessments would not impose any additional charges upon Medicaid recipients themselves and therefore would not violate provisions such as 42 U.S.C. § 1396a(a)(25)(C) (2009) or Wis. Stat. § 49.49(3m) insofar as they prohibit Medicaid providers from seeking additional payments for covered services from Medicaid recipients.

¶ 19. Another form of supplementation involves seeking financial or other remuneration in addition to that provided by the Medicaid program as a precondition to admitting a Medicaid-eligible patient to a nursing home or as a requirement for a Medicaid-eligible patient’s continued stay in a nursing home. Under 42 U.S.C. § 1320a-7b(d)(2)(A) and (B) (2006), it is a felony for a Medicaid provider to knowingly and willfully “charge[], solicit[], accept[], or receive[], in addition to any amount otherwise required to be paid under a State plan approved under subchapter XIX of this chapter, any gift, money, donation, or other consideration” either as a precondition to admitting a Medicaid patient to a nursing home or as a requirement for a Medicaid-eligible patient’s continued stay in a nursing home. An exception is provided in

---

<sup>2</sup>To any extent that *Cox* employs a different approach, it provides no authority for departing from an examination of all the facts and circumstances.

42 U.S.C. § 1320a-7b(d)(2) (2006) for “a charitable, religious, or philanthropic contribution from an organization or from a person unrelated to the patient[.]” Virtually identical criminal felony provisions are contained in Wis. Stat. § 49.49(4)(a). Once a county chooses to become a member of the commission, the assessments against the county would be mandatory and not voluntary. They would not constitute charitable, religious, or philanthropic contributions. Member counties would be required to pay assessments resulting in part from anticipated Medicaid deficits generated as a result of operating and maintaining the facility.

¶ 20. Prior attorney general opinions are not helpful in determining the applicability of these criminal provisions because those opinions involve distinguishable fact situations. 73 Op. Att’y Gen. 68 concluded that these federal and state criminal statutes precluded a county from conditioning admission to its nursing home facility upon agreement by other counties to accept direct billing for certain services provided to Medicaid nursing home patients who were residents of those counties. In that situation, a group of counties was purchasing care from a particular county nursing home. In their capacity as purchasers of services, those counties were being required to enter into agreements to make additional purchases of services from the nursing home as a precondition to the admission of their residents who were Medicaid recipients. There was no attempt by the counties involved to establish a direct funding mechanism to defray the costs of operation of an entire nursing home facility, as there apparently is in the situation you describe.

¶ 21. In 76 Op. Att’y Gen. 295 (1987), these criminal provisions were construed to prohibit nursing homes from imposing guarantor requirements upon private parties to the extent that the guarantees would have been applicable to persons eligible for Medicaid. The guarantees described in that opinion ran afoul of those criminal provisions because they could have compelled private parties to make payments to nursing homes as purchasers of services at rates in excess of the Medicaid reimbursement rate. The payments required of the private parties were patient specific and would not have been made to directly fund and continue to maintain the operation of the nursing home in its entirety.

¶ 22. In 75 Op. Att’y Gen. 14, 24-26 (1986), these criminal provisions were construed to prohibit nursing homes from requiring patients to enter into agreements to remain on private pay status for a specified period of time before applying for Medicaid. The effect of those agreements would similarly have been to compel nursing home patients or related persons as purchasers of services to pay money to the nursing homes for nursing home services in excess of the amount that the nursing homes would have been entitled to receive from the Medicaid program. These requirements were also patient specific and would not have been made to directly fund and continue to maintain the operation of the nursing home in its entirety.

¶ 23. You have not specifically inquired whether any county could be forced to join the commission in order to have its residents served by the specialized unit. I decline to provide any opinion concerning the applicability of these criminal felony provisions under those

circumstances because I understand that a similar issue involving two counties is currently in civil litigation. Other legal issues under these criminal felony statutes are similar to the legal issues presented by third-party “balance billing,” which is discussed below.

¶ 24. 42 U.S.C. § 1396a(a)(25)(C) (2009) generally precludes a Medicaid provider from attempting to collect from “any financially responsible relative or representative” of the patient any amount in excess of the amount of Medicaid reimbursement that the provider receives. That practice is referred to as third-party balance billing. It often involves direct billing of an entity that would otherwise have some legal or financial responsibility to provide medical care for a person but for the fact that he or she is a Medicaid patient. Wisconsin Stat. § 51.42(1)(b) is not an insurance or direct liability statute. A Medicaid provider cannot rely upon Wis. Stat. § 51.42(1)(b) as a basis for billing a county unless the county has entered into an agreement to purchase services from that provider. Counties purchase services from Medicaid providers only if they choose to do so. Third-party balance billing is more likely to occur where the cost of providing care to the patient substantially exceeds the Medicaid reimbursement rate, which apparently is the case in the situation you describe.

¶ 25. The federal implementing regulation, 42 C.F.R. § 447.15 (2007), is extremely broad: “A State plan must provide that the Medicaid agency must limit participation in the Medicaid program to providers who accept, as payment in full, the amounts paid by the agency plus any deductible, coinsurance or copayment required by the plan to be paid by the individual.” Restrictions similar to those found in 42 C.F.R. § 447.15 (2007) are contained in Wis. Admin. Code § DHS 106.04(3), which provides:

A [Medicaid] provider shall accept payments made by the department in accordance with sub. (1) as payment in full for services provided a recipient. A provider may not attempt to impose a charge for an individual procedure or for overhead which is included in the reimbursement for services provided nor may the provider attempt to impose an unauthorized charge or receive payment from a recipient, relative or other person for services provided, or impose direct charges upon a recipient in lieu of obtaining payment under the program, except under any of the following conditions [none of which is relevant to your inquiry.]

¶ 26. Court decisions have interpreted the phrase “any financially responsible . . . representative” in 42 U.S.C. § 1396a(a)(25)(C) (2009) in combination with the requirement in 42 C.F.R. § 447.15 (2007) that a Medicaid provider must “accept, as payment in full, the amounts paid by the [Medicaid] agency” to mean that billing the Medicaid program or accepting payment under the Medicaid program precludes collection of any additional funds from any third party for costs incurred as the result of treating a patient. *See, e.g., Evanston Hosp. v. Hauck*, 1 F.3d 540, 543 (7th Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994); *Spectrum Health Continuing Care Group v. Bowling*, 410 F.3d 304 (6th Cir. 2005); *Rehabilitation Ass’n of Virginia, Inc. v. Kozlowski*, 42 F.3d 1444, 1447 (4th Cir. 1994), *cert. denied*, 516 U.S. 811 (1995); *Rybicki v.*

*Hartley*, 792 F.2d 260, 261 (1st Cir. 1986); *Lizer v. Eagle Air Med. Corp.*, 308 F. Supp. 2d 1006, 1009 (D. Ariz. 2004); *Mallo v. Pub. Health Trust of Dade County*, 88 F. Supp. 2d 1376 (S.D. Fla. 2000); *Olszewski v. Scripps Health*, 69 P.3d 927, 941-42 (Cal. 2003); *Dunlap Care Center v. Iowa Dept. of S.S.*, 353 N.W.2d 389, 394 (Iowa 1984); *Pub. Health Trust v. Dade County Sch. Bd.*, 693 So.2d 562, 566 (Fla. App. 1997); *Serafini v. Blake*, 213 Cal. Rptr. 207, 209-11 (Cal. App. 1985); *Palumbo v. Myers*, 197 Cal. Rptr. 214, 222-23 (Cal. App. 1983); *Nickel v. W.C.A.B. (Agway Agronomy)*, 959 A.2d 498, 506-07 (Pa. Cmwlth. 2008).

¶ 27. The prohibition upon third-party balance billing is stringent. The phrase “*payment in full*” in 42 C.F.R. § 447.15 (2007) means exactly what it says. *Spectrum*, 410 F.3d at 318 (italics by the court). 42 C.F.R. § 447.15 (2007) “prevents providers from billing *any* entity for the difference between their customary charge and the amount paid by Medicaid.” *Lizer*, 308 F. Supp. 2d at 1009 (italics by the court).

¶ 28. Prior attorney general opinions do not address attempted third-party balance billing in connection with efforts to jointly fund the operation of an entire facility. 77 Op. Att’y Gen. 287 (1988) concluded that what is now 42 C.F.R. § 447.15 (2007) and what is now Wis. Admin. Code § DHS 106.04(3) precluded a county and a visiting nursing home association from entering into a contract under which that county would have been required to reimburse the association the difference between the association’s cost of providing services to the residents of that county who were Medicaid recipients and the Medicaid reimbursement rates paid to the association for providing services to those persons. Such a contract would have enabled the association to “impose an unauthorized charge or receive payment from . . . [an]other person for services provided,” contrary to what is now Wis. Admin. Code § DHS 106.04(3). 77 Op. Att’y Gen. at 290. The county, acting as a purchaser of services, would have been required to “creat[e] a legal obligation to supplement the [Medicaid] amounts paid by the department [now DHS][.]” 77 Op. Att’y Gen. at 290. The opinion noted that the county was free to make independent gifts or grants to the association under what is now Wis. Stat. § 59.53(15). See 77 Op. Att’y Gen. at 288. No direct funding mechanism was proposed or examined in that opinion. The intergovernmental agreement proposed in 73 Op. Att’y Gen. 68 would have authorized direct billing to counties as purchasers of services for the difference between the applicable Medicaid reimbursement rate and the cost of nursing home care provided to residents of those counties. That opinion specifically declined to address the issue of whether direct funding would have been permissible. See 73 Op. Att’y Gen. at 72.

¶ 29. The third-party balance billing issue is complex because the mandatory assessments you describe possess aspects of a direct funding mechanism to defray the cost of operation of the entire facility, but the human services departments of the other counties apparently would also be purchasers of services under Wis. Stat. § 51.42(3)(as)1r. for individual residents who are patients in the specialized unit. The vast majority of those patients would be Medicaid recipients.

¶ 30. Mandatory prospective proportional assessments would not necessarily constitute knowing and willful acceptance of financial remuneration that is “in addition to any amount otherwise required to be paid under a State plan” within the meaning of 42 U.S.C. § 1320a-7b(d)(2) (2006) or within the meaning of similar language contained in Wis. Stat. § 49.49(4)(a). Mandatory assessments that are unrelated to purchase of services contracts involving Medicaid patients do not involve supplementation. For example, if each of the other counties that voluntarily joined the commission agreed in advance to an assessment of 1% of the annual operating and capital costs necessary to continue to maintain the facility, such assessments would have no relationship to individual purchase of services contracts and involving Medicaid patients and would not violate federal and state prohibitions upon supplementation. Assessments computed with reference to or attributable to purchase of services contracts involving particular Medicaid patients are likely to be considered sham transactions to facilitate third-party balance billing. For example, even if the assessments against the other counties are prospectively computed, they could not be prorated by using either percentages or dollar amounts if the proration depended solely upon the number of each such county’s Medicaid recipients in the facility at the close of the previous fiscal year.

¶ 31. The proposed assessments you describe are hybrid assessments that do not fit solely within either one of these two categories. Certain aspects appear to be unrelated to purchase of services contracts involving Medicaid patients. The proposed assessments apparently would defray all costs necessary to operate the specialized unit. Such costs apparently include both operating and capital costs, and would encompass items such as utilities, insurance, repairs, taxes, certain capital improvements, and any other expenses that the commission anticipates would be incurred in the next fiscal year. While a substantial portion of the proposed assessments would defray deficits to be generated from treating Medicaid patients for whom the counties are responsible under Wis. Stat. § 51.42, those costs are necessarily a component part of all costs that must be incurred in order to operate a nursing home. Other aspects of the proposed assessments appear to be more closely attributable to purchase of services contracts involving particular Medicaid patients. You advise that the proposed assessments against the other counties are intended to take into consideration the expenses to be incurred by the commission that are associated with that county’s residents, and that each such county is likely to have a substantial number of residents who are Medicaid recipients. You provide no specific examples of how this would be done. The more closely such hybrid assessments are computed with reference to or attributable to purchase of services contracts involving particular Medicaid recipients, the more likely a trier of fact would consider such assessments to be sham transactions used as a device to facilitate third-party balance billing. Whether a hybrid assessment constitutes a disguised form of third-party balance billing necessarily requires a highly fact-specific determination. Such determinations could vary from year to year and from assessment to assessment. An opinion of the Attorney General is not an appropriate vehicle for such fact-specific determinations. *See 77 Op. Att’y Gen. Preface No. 3.C.*

¶ 32. Other requirements that do not directly involve the manner in which the proposed assessments are computed may also be attributable to purchase of services contracts involving particular Medicaid patients. The proposed requirement that a county that withdraws or is expelled from the commission must agree to continue to pay assessments while any of its residents remain in the facility could be attributable to purchase of services contracts involving particular Medicaid patients. Additional requirements that involve financial considerations cannot be imposed upon a human services department that has entered into such a contract for care of an individual Medicaid recipient. Although I understand that any requirement involving a county's removal of its residents would be conditioned upon compliance with federal and state law, various federal and state statutes and regulations prohibit the transfer or removal of a patient from a nursing home that is capable of providing appropriate treatment unless the patient or guardian consents to the transfer or removal. *See* 42 U.S.C. §§ 1395i-3(c)(2) and 1396r(c)(2) (2006); 42 C.F.R. § 483.12 (2007); Wis. Stat. §§ 49.498(4) and 50.09(1)(j); Wis. Admin. Code § DHS 132.53. Even if there are limited circumstances under Wis. Stat. § 51.35<sup>3</sup> in which these provisions would be inapplicable to the human services departments of the other counties, patient removal is not a direct funding mechanism. Any patient removal requirement would also relate directly to any Medicaid patient with respect to whom a county human services department has entered into an individual contract under Wis. Stat. § 51.42(3)(as)1r.

### CONCLUSION

¶ 33. I therefore conclude that counties may enter into joint agreements to collectively furnish and fund nursing home services if the agreements do not violate federal and state Medicaid statutes and regulations prohibiting supplementation. Assessments resulting from such agreements that are computed without reference to and that are not attributable to purchase of services contracts involving particular Medicaid patients would not be considered supplementation. Assessments that are computed with reference to or are attributable to purchase of services contracts involving particular Medicaid patients are not permissible. The validity of hybrid assessments that do not fit solely within either one of those two categories must be determined on a case-by-case basis.

Sincerely,



J.B. Van Hollen  
Attorney General

JBVH:FTC:cla

---

<sup>3</sup>Wisconsin Stat. § 51.35 does contain various provisions authorizing a county human services department to transfer the patient in situations where the care provided by a particular facility is no longer appropriate to the patient's medical condition. A county human services department has a statutory obligation to transfer the patient in those circumstances.



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Raymond P. Taffora  
Deputy Attorney General

114 East, State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857  
608/266-1221  
TTY 1-800-947-3529

November 12, 2009

OAG—5—09

The Honorable Russ Decker  
Chair  
Committee on Senate Organization  
211 South, State Capitol  
Madison, WI 53702

Dear Senator Decker:

¶ 1. On behalf of the Committee on Senate Organization, you request my formal opinion with respect to two questions concerning intergovernmental agreements between local units of government involving public works projects whose estimated cost exceeds \$25,000. You are not concerned with intergovernmental agreements between local units of government for purchases of equipment, materials, or supplies in connection with public works projects, nor are you concerned with highways, streets, and bridges constructed or improved with federal or state funds and local matching funds as provided in Wis. Stat. § 86.25(4). You are especially concerned with county highway contracts under Wis. Stat. §§ 83.03(1) and 83.035.

### BACKGROUND

¶ 2. The materials<sup>1</sup> accompanying your request evince concern that counties have engaged in a wide range of competitive bidding against private contractors upon public works projects, but contain no facts or information concerning intergovernmental agreements involving public works projects other than those involving county highway contracts. Counties must have statutory authorization in order to engage in competitive bidding against private contractors. *See St. ex rel. Teunas v. Kenosha County*, 142 Wis. 2d 498, 504, 418 N.W.2d 833 (1988). Counties do currently possess statutory authority to “construct or improve or repair or aid in constructing or improving or repairing any highway or bridge in the county.” Wis. Stat. § 83.03(1).

<sup>1</sup>You have submitted a detailed legal analysis prepared by the Construction Business Group prior to the passage of 2009 Wisconsin Act 28 concerning the two questions posed in your opinion request. The Construction Business Group is a joint labor-management industry trust fund established by Operating Engineers Local 139, Associated General Contractors of Wisconsin, Wisconsin Transportation Employers Council/Wisconsin Transportation Builders Association, and Wisconsin Underground Contractors Association.

¶ 3. I have carefully reviewed a March 10, 2006 letter from my predecessor to you and to Senator Jeff Plale that was not a formal opinion of the Attorney General under Wis. Stat. § 165.015(1). For the reasons that follow, I respectfully disagree with portions of the legal analysis contained in that letter.

### **QUESTIONS PRESENTED AND BRIEF ANSWERS**

¶ 4. I have reworded your questions, as follows:

1. With respect to public works projects whose estimated cost exceeds \$25,000, are intergovernmental agreements between local units of government (other than those for purchases of equipment, materials, or supplies, and those excepted by Wis. Stat. § 86.25(4)) under Wis. Stat. § 66.0301 or Wis. Stat. § 83.035 subject to city, village, and county municipal competitive bidding requirements and therefore to the competitive bidding procedures in Wis. Stat. § 66.0901?

¶ 5. In my opinion, statutorily-authorized intergovernmental agreements for purchases of all services are exempt from municipal competitive bidding requirements and procedures under Wis. Stat. § 66.0131(2). County highway contracts entered into by the county highway committee or the county highway commissioner under Wis. Stat. §§ 83.035 and 83.04(1) are exempt from county competitive bidding requirements pursuant to Wis. Stat. § 59.52(29)(a). Cities, villages, and counties also are exempt from municipal competitive bidding requirements on any project that involves an intergovernmental agreement where the municipalities that will perform the work have made a determination to do the work themselves with their own employees.

2. With respect to any public works or public construction project whose estimated cost exceeds \$25,000, must state prevailing wage rates be paid to the employees of a local unit of government that enters into an intergovernmental agreement pursuant to Wis. Stat. § 66.0301 or Wis. Stat. § 83.035 to perform services for another local unit of government upon such a project?

¶ 6. In my opinion, effective January 1, 2010, the answer is yes. Prior to that date, in my opinion the answer is no. Both before and after January 1, 2010, prevailing wage rates are not required upon public works or public construction projects performed or undertaken pursuant to intergovernmental agreements involving the joint exercise of any power or duty by two or more local units of government.

## ANALYSIS

### I. APPLICABILITY OF STATUTORY COMPETITIVE BIDDING REQUIREMENTS TO INTERGOVERNMENTAL AGREEMENTS BETWEEN LOCAL UNITS OF GOVERNMENT.

¶ 7. “[P]ublic construction” contracts whose estimated cost exceeds \$25,000 that are let by cities or villages ordinarily must be competitively bid. Wis. Stat. §§ 61.55 and 62.15(1). With the exception of certain county highway contracts, Wis. Stat. § 59.52(29)(a) similarly provides that county “public work” whose estimated cost exceeds \$25,000 “including any contract for the construction, repair, remodeling or improvement of any public work, [or] building” ordinarily must be competitively bid. The items that are subject to these competitive bidding statutes are commonly referred to as “public works projects.” The competitive bidding procedures specified in Wis. Stat. § 66.0901 must be utilized in connection with those public works projects that are required to be competitively bid. *See, e.g.*, Wis. Stat. §§ 59.52(29)(a) and 61.55.

¶ 8. Wisconsin Stat. § 66.0301(2) provides that “any municipality may contract with other municipalities . . . for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law.” This provision authorizes one local unit of government to contract with another local unit of government for (1) the receipt of services; (2) the furnishing of services; or (3) the joint exercise of any power or duty. *See, e.g.*, 72 Op. Att’y Gen. 85 (1983). The scope of a local unit of government’s authority to do each of these three things is limited to “the extent of its lawful powers and duties.” Wis. Stat. § 66.0301(2).

¶ 9. The Legislature has exempted municipal “purchases” from all other units of government from municipal competitive bidding requirements: “Notwithstanding any statute requiring bids for public purchases, any local governmental unit may make purchases from another unit of government, including the state or federal government, without the intervention of bids.” Wis. Stat. § 66.0131(2). The term “purchase” means “**1 . . . d**: to obtain (as merchandise) by paying money or its equivalent : buy for a price (*purchased* a new suit). *Webster’s Third New International Dictionary* 1844 (1986). The term “purchase” is not limited to goods or merchandise. *See* <http://www.merriam-webster.com/dictionary/purchase>.

¶ 10. Legislation must be construed according to its plain meaning by examining the words actually enacted into law. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. The plain meaning of the term “purchases” in Wis. Stat. § 66.0131(2) encompasses all goods and services.<sup>2</sup> The enacted language does not limit “purchases” to specific kinds of items, such as equipment, materials, and supplies.

---

<sup>2</sup>38 Op. Att’y Gen. 175 (1949), discussed extensively in the submitted materials, did not consider the applicability of what is now Wis. Stat. § 66.0131(2).

¶ 11. Related statutes must also be construed together. *See State v. Clausen*, 105 Wis. 2d 231, 244, 313 N.W.2d 819 (1982); *In re Marriage of Levy v. Levy*, 130 Wis. 2d 523, 530, 388 N.W.2d 170 (1986). At least two statutes, Wis. Stat. § 59.70(13)(c)2. (mosquito control services) and Wis. Stat. § 66.0133(3) (contracts for the evaluation and recommendation of energy conservation practices), indicate that the Legislature has viewed Wis. Stat. § 66.0131(2) as extending to purchases of services. *See Kalal*, 271 Wis. 2d 633, ¶ 46 (“[c]ontext is important to meaning”).

¶ 12. When what is now Wis. Stat. § 66.0131(2) was originally enacted in ch. 108, Laws of 1945, that legislation was entitled “AN ACT to create 66.299 of the statutes, relating to intergovernmental co-operation on purchases and public work.” The submitted materials opine that the term “purchases” in Wis. Stat. § 66.0131(2) should be construed to encompass only items such as equipment, materials, and supplies because Senate Substitute Amendment 1 to 1945 Senate Bill 48 deleted the bolded language below from the bill as it was originally introduced:

Notwithstanding any statute requiring bids for public purchases **or for the performance of public work**, any city, village, town, county or other local unit of government may make purchases from, **or have work, services, or facilities performed or provided by**, another unit of government, including the state or federal government, without the intervention of bids.

Extrinsic sources, such as legislative history, may not be used to impose limitations that are not found in the language that was enacted into law. *See Kalal*, 271 Wis. 2d 633, ¶¶ 51, 53-54. Because the statutory language itself contains no words of limitation delineating specific kinds of purchases, intergovernmental agreements involving all purchases, including purchases of services, are not subject to statutory competitive bidding requirements by virtue of the enactment of Wis. Stat. § 66.0131(2).

¶ 13. County highway projects involving contracts that the county board has authorized the county highway committee or the county highway commissioner to make also are statutorily exempt from county competitive bidding requirements. Wisconsin Stat. § 83.03(1) authorizes the county board to “construct or improve or repair or aid in constructing or improving or repairing any highway or bridge in the county.” Wisconsin Stat. § 83.035 provides that the county board may exercise that authority by enacting an ordinance permitting the “highway committee or other designated county official or officials” to “enter into contracts with cities, villages and towns within the county borders to enable the county to construct and maintain streets and highways in such municipalities.” *See Fond du Lac County v. Rosendale Town*, 149 Wis. 2d 326, 333-35, 440 N.W.2d 818 (Ct. App. 1989). Wisconsin Stat. § 59.52(29)(a), which ordinarily requires competitive bidding on county public works projects, “does not apply to highway contracts which

the county highway committee or the county highway commissioner is authorized by law to let or make,” including those described in Wis. Stat. § 83.04(1). A county therefore is not required to engage in competitive bidding with respect to county highway projects involving contracts that the county board has authorized the county highway committee or the county highway commissioner to make.

¶ 14. Municipal competitive bidding statutes are also inapplicable where the municipalities that will perform the work have made a determination to do the work themselves with their own employees. That determination can be made by each local unit of government that is a party to an intergovernmental agreement involving the joint exercise of any power or duty required or authorized by law. A city or a village may, by a three-fourths vote of all of the members elect of the common council or of the village board, provide by ordinance that “any class of public construction or any part thereof . . . be done directly by the city without submitting the same for bids.” Wis. Stat. § 62.15(1). *See* Wis. Stat. § 61.56. After first receiving bids, a village may also, by a two-thirds vote of the village board, reject those bids and provide “that the work to be done, and materials to be furnished shall be performed and furnished by said village directly[.]” Wis. Stat. § 61.54(1). A county may, by a three-fourths vote of all of the members entitled to a seat on the county board, provide that “any class of public work or any part thereof . . . be done directly by the county without submitting the same for bids.” Wis. Stat. § 59.52(29)(a).<sup>3</sup>

¶ 15. The statutory term “directly” means “**4 a** : without any intervening agency or instrumentality or determining influence[.]” *Webster’s Third New International Dictionary* 641 (1986). The term “directly” therefore applies only to situations in which a particular local unit of government will do the work “itself, with its own employes,” although such a municipality may hire persons “on an hourly, daily or other normal and acceptable basis in order to complete th[e] job[.]” *See* 40 Op. Att’y Gen. 489, 491 (1951). Where one of the local units of government that is a party to an intergovernmental agreement will not use any of its own employees to perform any of the work upon a project, that municipality does not perform any work upon that project “directly.” In that circumstance, the municipality may contract for the receipt of services from another municipality without a supermajority vote.

¶ 16. I recognize that 38 Op. Att’y Gen. at 177-78 concluded that a supermajority vote was required even where a municipality that was a prospective party to an intergovernmental agreement did not intend to perform any of the work involved by using its own employees. I also recognize that in *Fond du Lac County*, 149 Wis. 2d at 335, the court held that 38 Op. Att’y Gen. 175 was “persuasive” as to the issue of whether a town and a county could

---

<sup>3</sup>Unlike other municipal competitive bidding statutes such as Wis. Stat. §§ 59.52(29)(a) and 62.15, the town competitive bidding statute, Wis. Stat. § 60.47, does not mention making an explicit determination that the town will perform all or a particular class of public construction or public work itself in lieu of competitive bidding.

voluntarily contract with each other for the repair of county roads lying within the town. 38 Op. Att’y Gen. 175 did not consider the effect of what is now Wis. Stat. § 66.0131(2), which authorizes a local unit of government to “make purchases from another unit of government, including the state or federal government, without the intervention of bids.” The provisions of Wis. Stat. § 66.0131(2) are applicable “[n]otwithstanding any statute requiring bids for public purchases[.]” Wisconsin Stat. § 66.0131(2) contains no supermajority requirement. Because Wis. Stat. § 66.0131(2) absolves municipalities from compliance with those statutes containing competitive bidding requirements, it is my opinion that a municipality that only purchases services from another unit of government on a public works project under an intergovernmental agreement is not required to comply with the supermajority provisions contained in Wis. Stat. §§ 59.52(29)(a), 61.54(1), 61.56, or 62.15. Consequently, only those municipalities that will actually perform the work must make a determination to do the work themselves with their own employees.

¶ 17. In answer to your first question, municipal competitive bidding requirements do not apply to intergovernmental agreements for purchases of all services, to projects involving county highway contracts entered into by the county highway committee or the county highway commissioner under Wis. Stat. §§ 83.035 and 83.04(1), or where the municipalities that will perform the work have made a determination to do the work themselves with their own employees.<sup>4</sup>

---

<sup>4</sup>Although you have not inquired about competitive bidding requirements for towns under Wis. Stat. § 60.47, the submitted materials emphasize that the town competitive bidding statute, Wis. Stat. § 60.47(4), explicitly provides that “[t]his section does not apply to public contracts entered into by a town with a municipality, as defined under s. 66.0301(1)(a).” Historically, the town competitive bidding statutes have been particularly unclear. *See* 66 Op. Att’y Gen. 284, 289-90 (1977). The town government statutes, Wis. Stat. ch. 60, were updated and modernized in 1983 Wisconsin Act 532. The notes to Wis. Stat. § 60.47 by the Legislative Council’s Special Committee on Revision of Town Laws that are included in 1983 Wisconsin Act 532, sec. 7, state in part:

Subsection (4) is based on that part of s. 60.29(1m) which permits a town to enter into a public contract with the county in which the town is located without utilizing competitive bidding procedures. It expands the exemption from bidding to include public contracts between a town and any municipality, as defined under s. 66.30(1)(a) [now Wis. Stat. § 66.0301(1)(a)]. . . . The committee concluded that the concerns that underlie a competitive bidding requirement for public contracts entered into between towns and nongovernmental entities have less weight in relation to contracts between towns and other governmental entities.

Neither the prior town competitive bidding statute nor the updated town competitive bidding statute is applicable to situations in which the governing body of a local unit of government has made a formal determination to perform all or a particular class of public works projects itself.

II. APPLICABILITY OF PREVAILING WAGE RATE REQUIREMENTS TO PUBLIC WORKS OR PUBLIC CONSTRUCTION PROJECTS UNDERTAKEN BY ONE LOCAL UNIT OF GOVERNMENT FOR ANOTHER LOCAL UNIT OF GOVERNMENT PURSUANT TO AN INTERGOVERNMENTAL AGREEMENT.

¶ 18. Prevailing wage determinations are made by the Department of Workforce Development (“DWD”) under Wis. Stat. § 66.0903(3)(am), as amended by 2009 Wisconsin Act 28, sec. 1480e, which provides:

A local governmental unit, before making a contract by direct negotiation or soliciting bids on a contract for the erection, construction, remodeling, repairing or demolition of any project of public works, shall apply to the department to determine the prevailing wage rate for each trade or occupation required in the work contemplated.

¶ 19. Wisconsin Stat. § 66.0903(2), as amended by 2009 Wisconsin Act 28, sec. 1480c, provides in part:

(2) APPLICABILITY. Subject to sub. (5), this section applies to any project of public works erected, constructed, repaired, remodeled, demolished for a local governmental unit, including all of the following:

(a) A highway, street, bridge, building, or other infrastructure project.

**(b) A project erected, constructed, repaired, remodeled, demolished by one local governmental unit for another local governmental unit under a contract under s. 66.0301(2), 83.03, 83.035, or 86.31(2)(b) or under any other statute specifically authorizing cooperation between local governmental units.**

¶ 20. Wisconsin Stat. § 66.0903(2)(b) makes prevailing wage rates applicable to public works projects performed or undertaken pursuant to state statutes authorizing intergovernmental agreements under Wis. Stat. § 66.0301(2) or Wis. Stat. § 83.03 involving any of the five specified services (erection, construction, repair, remodeling, demolition), provided that the service is performed “by one local governmental unit for another local governmental unit[.]” This language encompasses highway projects performed by one local unit of government for another local unit of government because such projects typically involve construction and/or repair. Wisconsin Stat. § 66.0903(2)(b) does not, by its terms, extend to intergovernmental agreements involving the “joint exercise of any power or duty required or authorized by law” within the meaning of Wis. Stat. § 66.0301(2) or pursuant to other statutes authorizing intergovernmental agreements

between local units of government.<sup>5</sup> Wisconsin Stat. § 66.0903(5)(a), as amended by 2009 Wisconsin Act 28, sec. 1482d, makes Wis. Stat. § 66.0903(2)(b) inapplicable to “[a] project of public works for which the estimated project cost of completion is below \$25,000.”

¶ 21. The effective date of the amendments to Wis. Stat. § 66.0903(2), (3)(am), and (5) is January 1, 2010. *See* 2009 Wisconsin Act 28, sec. 9546(1x). 2009 Wisconsin Act 28, sec. 1480c requires that state prevailing wage rates be paid to the employees of a local unit of government that enters into an intergovernmental agreement under Wis. Stat. § 66.0301 or Wis. Stat. § 83.035 to perform services upon a public works or public construction project for another local unit of government if the estimated cost of the project exceeds \$25,000. The amendments contained in 2009 Wisconsin Act 28, sec. 1480c, do not require that prevailing wage rates be paid in connection with public works or public construction projects performed or undertaken pursuant to intergovernmental agreements involving the joint exercise of any power or duty by two or more local units of government.

¶ 22. With respect to the period prior to January 1, 2010, no statutory language comparable to that now contained in Wis. Stat. § 66.0903(2)(b) exists. “When the legislature enacts a statute, it is presumed to act with full knowledge of the existing laws, including statutes.” *Mack v. Joint School District No. 3*, 92 Wis. 2d 476, 489, 285 N.W.2d 604 (1979). In determining the meaning and effect of the newly-enacted statutory language, “It must be presumed that the legislature did not intend to legislate in vain, and that it had a specific purpose in mind.” *Haas v. Welch*, 207 Wis. 84, 86, 240 N.W. 789 (1932), quoting *Harris v. Halverson*, 192 Wis. 71, 76, 211 N.W. 295 (1927). “It should never be presumed that any part, much less all, of a statute is meaningless.” 73 Op. Att’y. Gen. 120, 121 (1984), citing *Associated Hospital Service v. Milwaukee*, 13 Wis. 2d 447, 109 N.W.2d 271 (1961). *Accord State v. Wisconsin Telephone Co.*, 91 Wis. 2d 702, 714-15, 284 N.W.2d 41 (1979).

¶ 23. Applying these principles of statutory construction, I cannot conclude that 2009 Wisconsin Act 28, sec. 1480c was a superfluous enactment. Although Wis. Stat. § 66.0301(2) does refer to an intergovernmental agreement as a “contract,” I am of the opinion that an application for a prevailing wage determination is not required prior to January 1, 2010 in connection with any public works project performed or undertaken pursuant to a statutorily-authorized intergovernmental agreement between local units of government.

---

<sup>5</sup>In practice, it may prove difficult to distinguish between intergovernmental agreements involving services performed by one local unit of government for another local unit of government and intergovernmental agreements involving the joint exercise of powers or duties. *Cf.* OAG 8-08 (October 1, 2008), at 4 (parties to an intergovernmental agreement must “have legal authority to act deriving from some source other than the intergovernmental agreement itself.”)

¶ 24. “[S]tatutory language is interpreted in the context in which it is used, in relation to the language of surrounding or closely-related statutes[.]” *Orion Flight Services v. Basler Flight Service*, 2006 WI 51, ¶ 16, 290 Wis. 2d 421, 714 N.W.2d 130, citing *Kalal*, 271 Wis. 2d 633, ¶ 45. Wisconsin Stat. § 66.0903(12)(a) provides that DWD “shall notify any local governmental unit . . . of the names of all persons whom the department has found to have failed to pay the prevailing wage rate determined under sub. (3),” which is the provision containing the requirement that state prevailing wage rates be paid. Wisconsin Stat. § 66.0903(12)(c) provides that the debarment provisions of Wis. Stat. § 66.0903(12) “do[] not apply to any contractor, subcontractor or agent who in good faith commits a minor violation” of the prevailing wage requirements mandated by Wis. Stat. § 66.0903(3). This language indicates that prior to January 1, 2010 contractors, subcontractors, and agents are the entities to which the prevailing wage requirements contained in Wis. Stat. § 66.0903(3) apply. Absent resort to other statutory language such as that recently enacted in 2009 Wisconsin Act 28, sec. 1480c, this language contains no clear indication that local units of government can be considered contractors, subcontractors, or agents.

¶ 25. Another principle of statutory construction is that “penal statutes must give a clear and unequivocal warning, in language people generally understand, about actions that would result in liability and the nature of potential penalties.” 3 Singer & Singer, *Sutherland Statutory Construction* § 59:3 (7th ed. 2008). Wisconsin Stat. § 66.0903(12)(e) provides that DWD “shall promulgate rules to administer this subsection.” The rules of construction that are applicable to statutes are also applicable to administrative rules. See *DaimlerChrysler c/o ESIS v. LIRC*, 2007 WI 15, ¶ 10, 299 Wis. 2d 1, 727 N.W.2d 311. If possible, administrative rules should therefore be construed together with related statutes to produce a harmonious whole. *Id.* When construing statutes and administrative rules together, unreasonable and absurd results are to be avoided. See *Orion*, 290 Wis. 2d 421, ¶ 32, citing *Kalal*, 271 Wis. 2d 633, ¶ 46.

¶ 26. Wisconsin Admin. Code ch. DWD 294 is entitled “DEBARMENT OF PUBLIC WORKS CONTRACTORS.” Under that chapter, public works contractors are subject to debarment “from performing work, either as a prime contractor or subcontractor, for any state agency or local governmental unit for a specified period.” Wis. Admin. Code § DWD 294.02(5). Wisconsin Admin. Code § DWD 294.02(3) defines the term “contractor”:

“Contractor” means any individual or legal entity in a construction business involved on a public works project, including its responsible officers, directors, members, shareholders, or partners, irrespective of the name by which the group is designated, provided that any officer, director, member, shareholder, or partner is vested with the management of the affairs of the individual or legal entity.

¶ 27. Wisconsin Admin. Code § DWD 294.02(2) defines the term “construction business”:

(2) “Construction business” means:

(a) Any business engaged in erecting, constructing, remodeling, repairing, demolishing, altering, painting or decorating buildings, structures, or facilities; and

(b) Any business engaged in the delivery of mineral aggregate or the transporting of excavated material or spoil as provided by s. 66.0903(4) or 103.49(2m), Stats.

¶ 28. Under DWD’s current rules, only businesses and individuals associated with businesses are subject to debarment. DWD’s current rules contain no indication that local units of government can be considered businesses. Construing the prevailing wage and debarment statutes and rules applicable to periods prior to January 1, 2010 together, the Legislature did not clearly specify that local units of government can be considered “contractor[s], subcontractor[s] or agent[s]” within the meaning of Wis. Stat. § 66.0903(12)(c) and DWD did not clearly specify that local units of government can be considered “[c]onstruction business[es]” within the meaning of Wis. Admin. Code § DWD 294.02(2). In my opinion, prior to January 1, 2010 local units of governments that perform or undertake any public works or public construction projects pursuant to valid intergovernmental agreements under Wis. Stat. § 66.0301 or Wis. Stat. § 83.035 therefore are not required to pay prevailing wage rates under Wis. Stat. § 66.0903(3) to their employees who perform work upon those projects.<sup>6</sup>

## CONCLUSION

¶ 29. I therefore conclude that statutorily-authorized intergovernmental agreements for purchases of services are exempt from municipal competitive bidding requirements and procedures under Wis. Stat. § 66.0131(2). Projects involving county highway contracts entered into by the county highway committee or the county highway commissioner under Wis. Stat. §§ 83.035 and 83.04(1) are also exempt from county competitive bidding requirements. Municipal competitive bidding statutes also do not apply to projects undertaken by

---

<sup>6</sup>The submitted materials refer to a circuit court case in which a city, acting unilaterally, sought and obtained a prevailing wage rate determination for a highway project from DWD under Wis. Stat. § 66.0903(3)(am). The city then sought and obtained competitive bids on the project. The city subsequently requested the county to submit a proposal to do a portion of the work upon which competitive bids had already been obtained. The city accepted the county’s proposal, and rejected the competitive bids for that portion of the work. A circuit court upheld DWD’s determination that the county was required to pay prevailing wage rates to its employees. In that case, there was no intergovernmental agreement under Wis. Stat. § 66.0301(2).

determination to do the work themselves with their own employees. Effective January 1, 2010, with respect to any public works or public construction project whose estimated cost exceeds \$25,000 state prevailing wage rates must be paid to the employees of a local unit of government that enters into an intergovernmental agreement under Wis. Stat. § 66.0301 or Wis. Stat. § 83.035 to perform services for another local unit of government upon such a project. Prior to January 1, 2010, state prevailing wage rates are not required upon such projects. State prevailing wage rates are not required before or after January 1, 2010 upon public works or public construction projects performed or undertaken pursuant to intergovernmental agreements involving the joint exercise of any power or duty by two or more local units of government.

Sincerely,

A handwritten signature in black ink, appearing to read "J.B. Van Hollen". The signature is fluid and cursive, with a long horizontal stroke at the end.

J.B. Van Hollen  
Attorney General

JBVH:KMS:FTC:cla



**STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE**

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Raymond P. Taffora  
Deputy Attorney General

17 W. Main Street  
P.O. Box 7857  
Madison, WI 53707-7857  
[www.doj.state.wi.us](http://www.doj.state.wi.us)

November 16, 2009

OAG—6—09

Ms. Jo-Ann Millhouse  
Corporation Counsel  
Grant County  
130 West Maple Street  
Lancaster, WI 53813

Dear Ms. Millhouse:

¶ 1. As a law enforcement agency, your sheriff's department has the ability to fingerprint individuals. You state that the sheriff would like to charge a fee for, or recover costs associated with, fingerprinting persons who are arrested or taken into custody and to charge a fee for or recover costs associated with fingerprinting persons who need to submit fingerprints to the Department of Justice in order to be eligible for certain occupations or certain kinds of employment.

**QUESTIONS PRESENTED AND BRIEF ANSWERS**

¶ 2. You request my legal opinion concerning two questions, which I have reworded as follows:

1. Are there circumstances in which a sheriff is statutorily authorized to charge a fee for, or to recover costs associated with, fingerprinting persons who are arrested or taken into custody?

¶ 3. In my opinion, the answer is no.

2. Are there circumstances in which a sheriff is statutorily authorized to charge a fee for, or to recover costs associated with, fingerprinting persons who need to submit fingerprints to the Department of Justice in order to be eligible for certain occupations or certain kinds of employment?

¶ 4. In my opinion, the answer is no. If the sheriff's department does fingerprinting that is mandated by a county agency, the county board may in its discretion remit a portion of any statutorily-authorized fee charged by the county agency to the sheriff's department in order to defray some or all of the costs that are incurred by the sheriff's department.

## ANALYSIS

¶ 5. Your first question is whether there are circumstances in which a sheriff is statutorily authorized to charge a fee for, or recover costs associated with, fingerprinting persons who are arrested or taken into custody. Wisconsin Stat. § 165.84(1) requires fingerprinting of certain persons who have been arrested or have been taken into custody for felonies, misdemeanors, certain ordinance violations, and in various other circumstances. *See* Wis. Stat. § 165.83(2)(a).

¶ 6. As public officials, sheriffs “take their offices *cum onere*, and services required of them by law for which they are not specifically paid must be considered compensated by the fees allowed for other services or by their official salaries.” 68 Op. Att’y Gen. 223, 225 (1979). Wisconsin Stat. § 59.32(1) provides that “[t]he sheriff shall collect the fees prescribed in s. 814.70[.]” Wisconsin Stat. § 814.70 enumerates those items for which the sheriff can charge fees in connection with the performance of his official duties. The express mention of only certain items in a statute impliedly excludes all other items that are not mentioned in the statute. *See, e.g., State v. James P.*, 2005 WI 80, ¶ 26, 281 Wis. 2d 685, 698 N.W.2d 95. *See* 70 Op. Att’y Gen. 17, 18 (1981) (citing *Appleton v. ILHR Department*, 67 Wis. 2d 162, 172-73, 226 N.W.2d 497 (1975)). Because fingerprinting is not one of the items that is mentioned in Wis. Stat. § 814.70, fingerprinting persons that have been arrested or taken into custody is not an item for which the sheriff may charge a fee.

¶ 7. In addition, Wis. Stat. § 59.32(4) provides:

EXCESSIVE FEES. No sheriff, undersheriff or deputy shall directly or indirectly ask, demand or receive for any services or acts to be performed by that officer in the discharge of any of that officer’s official duties any greater fees than are allowed by law; and for the violation of any of the provisions of this subsection every such officer shall be liable in treble damages to the party aggrieved and shall forfeit not less than \$25 nor more than \$250.<sup>1</sup>

Although the supreme court has not addressed whether the “greater fees than are allowed by law” language contained in Wis. Stat. § 59.32(4) refers to the kinds of items for which fees can be charged, Wis. Stat. § 59.32(4) is a further indication that the ability of the sheriff to charge fees is strictly limited by the provisions of Wis. Stat. § 814.70. Wisconsin Stat. § 814.70 does not authorize the sheriff to charge a fee for fingerprinting persons that have been arrested or taken into custody. The sheriff therefore may not charge any fee in such circumstances. Because the

---

<sup>1</sup>A prior statute, Wis. Stat. ch. 129, sec. 2955 (1913), provided: “No judge, justice, sheriff or other officer whatever, or other person to whom any fees or other compensation shall be allowed by law for any service, shall take or receive any other or greater fee or reward for such service than such as shall be allowed by the laws of this state.”

sheriff may not charge any fee for fingerprinting a person who has been arrested or taken into custody, costs associated with fingerprinting also are not recoverable as taxable disbursements in criminal proceedings or forfeiture actions. *See State v. Dismuke*, 2001 WI 75, ¶ 22, 244 Wis. 2d 457, 628 N.W.2d 791.

¶ 8. Your second question is whether there are circumstances in which a sheriff is statutorily authorized to charge a fee for, or recover costs associated with, fingerprinting persons who need to submit fingerprints to the Department of Justice in order to be eligible for certain occupations or certain kinds of employment. Fingerprinting is either mandatory or can be required in connection with various occupations or forms of employment, including but not limited to court-appointed special advocates, Wis. Stat. § 48.07(5)(b)2.; certain kinship care and long-term kinship care relatives, Wis. Stat. § 48.57(3p)(d); certain caregivers, non-client residents, or persons under eighteen years of age who are caregivers at day care centers, Wis. Stat. § 48.685(2)(bm); certain foster home licensees, Wis. Stat. § 48.685(2)(c)1.; certain adult caregivers, Wis. Stat. § 50.065(2)(bm); certain employees of the Department of Transportation who are involved in issuing operator's licenses or identification cards, Wis. Stat. § 110.09(1)(a) and (b); certain applicants for teacher's licenses, Wis. Stat. § 118.19(10)(c); certain persons engaged in providing pupil transportation services, Wis. Stat. § 121.555(3)(b); certain school bus operators, Wis. Stat. § 343.12(6)(b); all persons seeking private detective licenses or private security permits and certain persons seeking other forms of professional licensure, Wis. Stat. § 440.03(13)(c); designated representatives of wholesale distributors of prescription drugs, Wis. Stat. § 450.071(3)(c)9.; racetrack operators and certain persons connected with racetrack operators, Wis. Stat. § 562.05(7)(b) and (bg); lottery vendors, Wis. Stat. § 565.25(4); and Indian gaming employees and vendors, Wis. Stat. § 569.04(2). *See also* Wis. Admin. Code § Game 13.05(6) and (7).

¶ 9. Wisconsin Stat. § 165.82(1)(ar) authorizes the Department of Justice to charge a \$15 fee “[f]or each fingerprint card record check requested by a governmental agency or nonprofit organization[.]” No other state or local agency is statutorily authorized to charge such a fee.

¶ 10. My understanding from the limited information provided is that the sheriff would like to charge a fee for providing fingerprint cards and placing fingerprints on those cards before the cards are submitted to the Department of Justice to perform a record check. It appears from the materials submitted that some private firms or agencies offer such services and charge for them.

¶ 11. “A county or a county officer has only such power as is conferred by statute, either expressly or by clear implication.” OAG 1-03 (October 2, 2003), at 2. For the reasons indicated in response to your first question, a sheriff cannot impose a charge for fingerprinting persons who

need to submit fingerprints to the Department of Justice in order to be eligible for certain occupations or certain kinds of employment.<sup>2</sup>

¶ 12. I will also address whether the county itself or certain county agencies may impose such a charge. A county has only those powers expressly granted or impliedly authorized by statute. *See St. ex rel. Teunas v. Kenosha County*, 142 Wis. 2d 498, 504, 418 N.W.2d 833 (1988). *See also County of Milwaukee v. Williams*, 2007 WI 69, ¶ 24, 301 Wis. 2d 134, 732 N.W.2d 770. Insofar as relevant to your inquiry, the substantive powers of counties are enumerated primarily in Wis. Stat. § 59.01 and Wis. Stat. ch. 59, subch. V. Those statutes do not expressly or impliedly authorize counties to charge fees for fingerprinting persons solely as the result of the fact that such persons need to submit fingerprints to the Department of Justice in order to be eligible for certain occupations or certain kinds of employment.

¶ 13. There are circumstances in which a county agency does mandate that a person be fingerprinted. Wisconsin Stat. § 48.57(3p)(j) provides that “[a] county department or, in a county having a population of 500,000 or more, the department may charge a fee for conducting a background investigation under this subsection. The fee may not exceed the reasonable cost of conducting the investigation.” Wisconsin Stat. § 48.685(8) similarly provides:

The department, the department of health services, a county department, a child welfare agency, or a school board may charge a fee for obtaining the information required under sub. (2)(am) or (3)(a) or for providing information to an entity to enable the entity to comply with sub. (2)(b)1. or (3)(b). The fee may not exceed the reasonable cost of obtaining the information.

The “county department” referred to in Wis. Stat. § 48.57(3p)(j) and in Wis. Stat. § 48.685(8) is the county department of social services or the county department of human services. *See* Wis. Stat. § 48.02(2d).<sup>3</sup>

¶ 14. As part of a background investigation under Wis. Stat. § 48.57(3p)(j), a county department that “determines that the person’s employment, licensing or state court records provide a reasonable basis for further investigation . . . shall require the person to be fingerprinted

---

<sup>2</sup>There is no statutory requirement that the sheriff provide fingerprint cards to such persons or that the sheriff fingerprint persons for submission to the Department of Justice for a record check for such purposes.

<sup>3</sup>In contrast, Wis. Stat. § 50.065(8) provides that “[t]he department may charge a fee for obtaining the information required under sub. (2)(am) or (3)(a) or for providing information to an entity to enable the entity to comply with sub. (2)(b) or (3)(b).” “Department” means the Department of Children and Families. *See* Wis. Stat. § 48.02(4). Wisconsin Stat. § 50.065(8) does not include a county department.

on 2 fingerprint cards, each bearing a complete set of the person's fingerprints."<sup>4</sup> Wis. Stat. § 48.57(3p)(d). Similarly, in providing the kinds of information referred to in Wis. Stat. § 48.685(8), a county department "may require the person to be fingerprinted on 2 fingerprint cards, each bearing a complete set of the person's fingerprints." Wis. Stat. § 48.685(2)(bm).<sup>5</sup>

¶ 15. A background investigation under Wis. Stat. § 48.57(3p)(j) may require the submission of fingerprint cards. The items of information referred to in Wis. Stat. § 48.685(8) may also include the submission of fingerprint cards. In cases where a county agency requires fingerprint cards to be submitted, the sheriff's department may do the actual fingerprinting. Wisconsin Stat. § 48.57(3p)(j) authorizes a county department to charge a reasonable fee for the cost of the entire investigation. Wisconsin Stat. § 48.685(8) authorizes a county department to charge a reasonable fee for the cost of submitting all statutorily-required information. No fee may exceed the reasonable cost of obtaining the information. A component of the fee that is charged by the county agency under these statutes may include the reasonable costs of fingerprinting. If the sheriff's department does the fingerprinting that is mandated by a county agency, the county board may in its discretion remit a portion of the fee to the sheriff's department to defray some or all of the costs involved.

## CONCLUSION

¶ 16. I therefore conclude that there are no circumstances in which a sheriff is statutorily authorized to charge a fee for or to recover costs associated with fingerprinting persons that are arrested or taken into custody or for fingerprinting persons who need to submit fingerprints to the Department of Justice in order to be eligible for certain occupations or certain kinds of employment. If the sheriff's department does fingerprinting that is mandated by a county agency, the county board may in its discretion remit a portion of any statutorily-authorized fee charged by

---

<sup>4</sup>The introductory clause of Wis. Stat. § 48.57(3p)(d) cross references Wis. Stat. § 48.57(3p)(b) and (c), under which a county department may be required to conduct a background investigation. A determination to require the submission of fingerprints is a part of the investigation.

<sup>5</sup>The introductory clause in Wis. Stat. § 48.685(2)(bm) cross references Wis. Stat. § 48.685(2)(am) and (b)1. Wisconsin Stat. § 48.685(2)(c)1. cross references 42 U.S.C. § 16962(b) (2006). 42 U.S.C. § 16962(d) (2006) provides that "the States may charge any applicable fee for the [fingerprint] checks."

Ms. Jo-Ann Millhouse  
Page 6

the county agency to the sheriff's department in order to defray some or all of the costs that are incurred by the sheriff's department.

Sincerely,

A handwritten signature in black ink, appearing to read "J.B. Van Hollen". The signature is written in a cursive style with a prominent flourish at the end.

J.B. Van Hollen  
Attorney General

JBVH:FTC:cla



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Raymond P. Taffora  
Deputy Attorney General

114 East, State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857  
608/266-1221  
TTY 1-800-947-3529

November 16, 2009

OAG—7—09

Mr. Thomas B. Eagon  
District Attorney  
Portage County  
1516 Church Street  
Stevens Point, WI 54481-3598

Dear Mr. Eagon:

¶ 1. You have requested my opinion on several questions arising from the Wis. Stat. § 12.13(5) prohibition against disclosure of certain records and investigative information related to possible violations of state elections, lobbying, and ethics laws.

**QUESTIONS PRESENTED AND BRIEF ANSWERS**

1. Are these prohibitions limited to information regarding matters referred to a prosecutor or law enforcement from the Government Accountability Board?

2. Is information obtained pursuant to an independent investigation or prosecution by a prosecutor or law enforcement officer subject to this statute?

¶ 2. Your first two questions appear to assume that the prohibition against disclosure in Wis. Stat. § 12.13(5) applies to district attorneys and law enforcement agencies. Having assumed that the statute applies to those authorities, you ask whether it makes any difference to the application of the law whether the records and information are generated following a referral from the Government Accountability Board (“GAB”) or as part of an independent investigation or prosecution. However, as will be explained in detail below, I have concluded that Wis. Stat. § 12.13(5) does not apply to district attorneys or law enforcement agencies, but only to the GAB, its employees and agents, and to the investigators and prosecutors retained by the GAB, and the assistants to those persons.

3. When and under what circumstances are district attorney or law enforcement records regarding investigations or prosecutions into the enumerated offenses subject to disclosure under the public records law?

¶ 3. By “enumerated offenses” I assume you are referring to the offenses identified in Wis. Stat. § 12.13(5)(a), that is, offenses under the elections, ethics, and lobbying laws and “any

other law specified in s. 978.05(1) or (2).” In my opinion, Wis. Stat. § 12.13(5) does not apply to district attorneys or law enforcement agencies, and therefore Wis. Stat. § 12.13(5) does not alter standard application of the Wisconsin public records law to district attorney and law enforcement records regarding investigations or prosecutions under the enumerated offenses.

4. If a district attorney concludes that no prosecution is warranted because there is either no probable cause or the case cannot be proven beyond a reasonable doubt, or declines to issue charges for any other reason, what statements may be made or records disclosed regarding that conclusion by a district attorney or law enforcement official?

¶ 4. In my opinion, Wis. Stat. § 12.13(5) does not affect the statements that may be made or the records disclosed by a district attorney or law enforcement official if a district attorney concludes that no prosecution under the enumerated offenses is warranted due to lack of probable cause or insufficient evidence to prove charges beyond a reasonable doubt, or declines to issue charges for any other reason.

## ANALYSIS

### I. RULES OF STATUTORY CONSTRUCTION.

¶ 5. Your questions require interpretation of Wis. Stat. § 12.13(5) and related statutes. The purpose of statutory interpretation “is to determine what a statute means in order to give the statute its full, proper, and intended effect.” *Orion Flight Services v. Basler Flight Service*, 2006 WI 51, ¶ 16, 290 Wis. 2d 421, 714 N.W.2d 130. All statutory interpretation begins with the text of the statute; if the meaning of the statute is plain, the inquiry ordinarily stops there. *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶ 15, 312 Wis. 2d 1, 754 N.W.2d 439. Statutory language is generally given its common, ordinary, and accepted meaning. *Town of Madison v. County of Dane*, 2008 WI 83, ¶ 17, 311 Wis. 2d 402, 752 N.W.2d 260 (citing *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110). “[M]eaning should be given to every word, clause and sentence in the statute, and a construction which would make part of the statute superfluous should be avoided wherever possible.” *Hutson v. State Pers. Comm’n*, 2003 WI 97, ¶ 49, 263 Wis. 2d 612, 665 N.W.2d 212. Further, “[s]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Kalal*, 271 Wis. 2d 633, ¶ 46.

¶ 6. I am also guided by recognized canons of statutory construction. The statutes in question limit the public’s access to records. As a statutory exemption to the public records law, Wis. Stat. § 12.13(5) must be narrowly construed. *Chvala v. Bubolz*, 204 Wis. 2d 82, 88, 552 N.W.2d 892 (Ct. App. 1996) (“When it is not clear whether an exception to the open records law exists, we are to construe exceptions to the open records law narrowly.”). The public

records law serves a basic tenet of our democratic system by providing opportunity for oversight of government. *Nichols v. Bennett*, 199 Wis. 2d 268, 273, 544 N.W.2d 428 (1996). People must be informed about the workings of their government and “openness in government is essential to maintain the strength of our democratic society.” *Linzmeier v. Forcey*, 2002 WI 84, ¶ 15, 254 Wis. 2d 306, 646 N.W.2d 811. It is “the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.” Wis. Stat. § 19.31. The public records law therefore must be construed “in every instance with a presumption of complete public access, consistent with the conduct of governmental business.” *Id.* Denial of public access generally is contrary to the public interest. *Id.* This is one of the strongest legislative policy declarations found anywhere in the Wisconsin Statutes. *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 49, 300 Wis. 2d 290, 731 N.W.2d 240.

## **II. APPLICABILITY OF THE LIMITATIONS SET FORTH IN WIS. STAT. § 12.13(5).**

¶ 7. Wisconsin Stat. § 12.13(5) provides:

(a) Except as specifically authorized by law and except as provided in par. (b), no investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board may disclose information related to an investigation or prosecution under chs. 5 to 12 [the “elections law”], subch. III of ch. 13 [the “lobby law”], or subch. III of ch. 19 [the “ethics law”] or any other law specified in s. 978.05(1) or (2) [collectively, the “enumerated offenses”] or provide access to any record of the investigator, prosecutor, or the board that is not subject to access under s. 5.05(5s) to any person other than an employee or agent of the prosecutor or investigator or a member, employee, or agent of the board prior to presentation of the information or record in a court of law.

(b) This subsection does not apply to any of the following communications made by an investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board:

1. Communications made in the normal course of an investigation or prosecution.
2. Communications with a local, state, or federal law enforcement or prosecutorial authority.
3. Communications made to the attorney of an investigator, prosecutor, employee, or member of the board or to a person or the attorney of a person who is investigated or prosecuted by the board.

¶ 8. A person violating Wis. Stat. § 12.13(5) has committed a crime punishable by a fine of up to \$10,000, imprisonment up to 9 months, or both. Wis. Stat. § 12.60.

¶ 9. Combining the content of Wis. Stat. § 12.13(5)(a), (b) into subparts, these prohibitions apply to:

- the disclosure of records and information that relates to an investigation of the enumerated offenses, unless disclosure is the release of the record and it is authorized by Wis. Stat. § 5.05(5s)<sup>1</sup> or specifically authorized by any other law;
- prior to presentation of the information or record in a court of law;
- by an “investigator or prosecutor, or employee of an investigator or prosecutor, or member or employee of the board;”
- to any person other than
  - an employee or agent of the prosecutor or investigator or a member, employee, or agent of the board;
  - a person to whom a communication would be made in the normal course of an investigation or prosecution;
  - local, state, or federal law enforcement or prosecutorial authority;
  - attorneys of a person under investigation; or
  - attorneys of an investigator, prosecutor, employee, or member of the board.

¶ 10. Fundamental to answering the questions you present is to first determine whether Wis. Stat. § 12.13(5) applies at all to district attorneys offices and law enforcement agencies. By its terms, the statute’s prohibitions on disclosure cover only disclosures made by an “investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the board.”

¶ 11. Defining the last category is simple. As used in Wis. Stat. chs. 5 to 12, “board” is defined to mean the GAB. *See* Wis. Stat. § 5.02(1s). The GAB is composed of “members,” appointed pursuant to Wis. Stat. § 15.60, who are assisted by nonpartisan “employees.”

---

<sup>1</sup>For the authorizations contained in Wis Stat. § 5.05(5s), *see* Section II.C., *infra*.

*Cf.* Wis. Stat. § 5.05(4). Wisconsin Stat. § 12.13(5) therefore regulates disclosures by GAB members and GAB employees.

¶ 12. While, absent context or limitations, the definitions of “investigator” and “prosecutor” might normally be thought to include law enforcement and district attorneys, respectively,<sup>2</sup> the rules of statutory construction command me to consider the full text and structure of Wis. Stat. § 12.13(5) and closely related statutes. *Kalal*, 271 Wis. 2d 633, ¶ 46. The statutory context shows that those terms are being used in a more restricted sense in Wis. Stat. § 12.13(5). Thus, I conclude that the phrase “of the board” is intended to modify “investigator[s],” “prosecutor[s],” and “employee of an investigator or prosecutor” such that Wis. Stat. § 12.13(5)(a)’s prohibitions apply only to GAB-employees, GAB-members, investigators, and prosecutors retained by GAB pursuant to Wis. Stat. § 5.05(2m), and employees of those investigators and prosecutors.

**A. Background of 2007 Wisconsin Act 1.**

¶ 13. The global context of Wis. Stat. § 12.13(5) can be understood by examining the Act in which it was created. The prohibitions on disclosure of investigative information were enacted as a part of a comprehensive reform to the administration of the state’s elections, ethics, and lobbying laws. 2007 Wisconsin Act 1 (“Act 1”). Act 1 created the GAB and vested it with the administration of these laws. Wis. Stat. § 5.05(1). Under Act 1, GAB “shall investigate violations of laws administered by the board and may prosecute alleged civil violations of those laws” and allows GAB to make referrals to others for criminal enforcement. Wis. Stat. § 5.05(2m). Act 1 details this process. *See generally* Wis. Stat. § 5.05(2m). If GAB receives a complaint alleging a violation of the laws it administers, then it may commence an investigation and retain a “special investigator.” Wis. Stat. § 5.05(2m)(c)4. GAB can also retain special counsel to exercise its authority to prosecute civil violations. Wis. Stat. § 5.05(2m)6. The enforcement provisions in Wis. Stat. § 5.05(2m) also provided a series of provisions that would enable the GAB to refer cases to a district attorney or the attorney general if certain conditions are met. *See* Wis. Stat. § 5.05(2m)11., 14.-17.

---

<sup>2</sup>Act 1 does not define “prosecutor” or “investigator.” *Cf.* Wis. Stat. § 5.02. The common and accepted meaning of statutory terms may be ascertained by reference to dictionary definitions. *Kalal*, 271 Wis. 2d 633, ¶¶ 53-54. An “investigator” is, most essentially, “one that investigates.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1189 (1986) (“Webster’s”). The commonly accepted meaning of “investigator” does not limit the term to members or employees of any particular agency or entity, such as the GAB. Under the broadest interpretation of the phrase “investigator,” even a private entity who, prior to filing a complaint with the GAB, investigates the facts underlying the complaint would be an “investigator.” The dictionary definition of a “prosecutor” is a “prosecuting attorney” or “a person who institutes an official prosecution before a court.” Webster’s at 1821.

¶ 14. While establishing a mechanism for referring criminal matters, this comprehensive reform did not affect the ability of law enforcement and district attorneys to pursue investigations and prosecutions regarding the elections, lobbying, and ethics laws independent of the GAB.<sup>3</sup> See Wis. Stat. § 978.05(1) and (2); Wis. Stat. § 5.05(2m)(c)11., 15., 16., 18.; see also OAG-10-08 (October 29, 2008) (discussing respective prosecutorial powers of GAB and district attorneys).

¶ 15. In sum, Act 1 created for the first time GAB-investigators and GAB-prosecutors by authorizing GAB to hire investigators to investigate alleged violations of the elections, ethics, and lobbying laws, and to hire counsel to civilly prosecute these violations. The Act left undisturbed the collective investigative and prosecutorial authority of state and local law enforcement and prosecutors.

**B. Wisconsin Stat. § 12.13(5) must be interpreted to avoid superfluity.**

¶ 16. The first reason I believe Wis. Stat. § 12.13(5) does not apply to district attorneys and law enforcement is that applying it to district attorneys and law enforcement would deprive separate clauses of meaning and render portions of the statute superfluous. See *Hutson*, 263 Wis. 2d 612, ¶ 49 (“[A] construction which would make part of the statute superfluous should be avoided wherever possible.”).

¶ 17. Wisconsin Stat. § 12.13(5)(a) applies only if the group of persons to whom the prohibitions apply are not communicating with specified groups of other individuals. Wisconsin Stat. § 12.13(5)(b) provides exceptions to Wis. Stat. § 12.13(5)(a)’s application. One of those exceptions is for “communications made by an investigator, prosecutor, employee of an investigator or prosecutor, or member or employee of the [GAB]” with “a local, state, or federal law enforcement or prosecutorial authority.” Wis. Stat. § 12.13(5)(b)2. District attorneys are plainly “state prosecutorial authorities.” A sheriff is plainly “local law enforcement.” So if the statutory term “prosecutor” were intended to include district attorneys and “investigator” to include a sheriff, then the exception in Wis. Stat. § 12.13(5)(b)2. would refer, among other things, to communications between a district attorney and him or herself. By providing for communications with “local, state, or federal law enforcement or prosecutorial authority” in Wis. Stat. § 12.13(5)(b)2., the legislature considered those entities as being distinct from the entities or persons to whom Wis. Stat. § 12.13(5)(a) applies. By identifying state law enforcement and state prosecutorial authorities in this exception, therefore, the legislature has signaled that the provisions of Wis. Stat. § 12.13(5)(a) do not apply to those agencies. Had the legislature wished to signal otherwise, it could have easily provided that the exception to the disclosure rule provided in Wis. Stat. § 12.13(5)(b)2. applied to communications with *other*

---

<sup>3</sup>While not limiting the prosecutorial authority of district attorneys, Act 1 amended Wis. Stat. § 978.05(1) to change *which* district attorney would have jurisdiction to prosecute an enumerated offense.

prosecutorial authorities or law enforcement agencies or used more specific terms in Wis. Stat. § 12.13(5)(a).

¶ 18. No such superfluity is created, however, if one reads “investigator” and “prosecutor” to mean only those individuals retained by GAB pursuant to Wis. Stat. § 5.05(2m)—in other words, if the phrase “of the board” in Wis. Stat. § 12.13(5)(a) is understood to modify “investigator[s]” and “prosecutor[s].” Each category of the exceptions contained in Wis. Stat. § 12.13(5)(b) to the application of Wis. Stat. § 12.13(5)(a) involve communications with those *outside* of GAB, GAB’s retained prosecutors and investigators, and the employees of the GAB-retained investigators and employees. “Inside” communications would never need to be subject to an exemption because they are not covered by Wis. Stat. § 12.13(5)(a). *See* Wis. Stat. § 12.13(5)(a) (prohibitions do not cover communications with “an employee or agent of the prosecutor or investigator or a member, employee, or agent of the board”). If “prosecutor” included a district attorney, however, then Wis. Stat. § 12.13(5)(a)’s prohibition would not apply to his or her conversation with an assistant in the office—because conversations with a prosecutor’s employees are not covered—and would also be subject to an *exception* from coverage because they would be communications with a “local prosecutorial authority.” There would be no need for the legislature to create an “exception” for a communication that is not covered in the first instance. An interpretation of the terms “prosecutor” and “investigator” that includes only GAB investigators and prosecutors avoids this superfluity and incoherence.

¶ 19. The exceptions in Wis. Stat. § 12.13(5)(b), too, contain superfluity only if Wis. Stat. § 12.13(5)(a) is read to include district attorneys and law enforcement as “prosecutor[s]” and “investigator[s]” respectively. Wisconsin Stat. § 12.13(5)(b)3. exempts from Wis. Stat. § 12.13(5)(a)’s prohibitions communications “made to [an] . . . attorney of a person who is investigated or prosecuted *by the board*.” It also exempts communications made “in the normal course of an investigation or prosecution.” Wis. Stat. § 12.13(5)(b)1. Because statutes are to be construed to give effect, where possible, to every clause, the legislature must have considered “[a] communication[ ] made in the normal course of an investigation” to not include all communications with “the attorney of a person being investigated or prosecuted.” It is difficult to fathom *any* communication with the attorney of the person being investigated about the matter being investigated that would not be in furtherance of an investigation unless the legislature considered *all* such communications to be of a different nature. Thus, if “prosecutor” and “investigator” as used in Wis. Stat. § 12.13(5)(a) referred to a district attorney and a law enforcement officer respectively, then it would appear that district attorneys and law enforcement would be barred from communicating with the attorneys of individuals under investigation. Surely this is not what the legislature intended by using the term “prosecutor” and “investigator” in Wis. Stat. § 12.13(5)(a).

**C. The interrelationship between Wis. Stat. §§ 12.13(5) and 5.05(5s).**

**a. The statutory cross-reference to Wis. Stat. § 5.05(5s) signals the legislature was concerned with the GAB's disclosure of records and information.**

¶ 20. The second reason I believe Wis. Stat. § 12.13(5) does not apply to district attorneys and law enforcement agencies is the statute's reliance upon a cross-reference to Wis. Stat. § 5.05(5s). When one statute specifically refers to another statute, the two statutes should be construed together. *Appointment of Interpreter in State v. Le*, 184 Wis. 2d 860, 865, 517 N.W.2d 144 (1994). Wisconsin Stat. § 12.13(5) is closely related to Wis. Stat. § 5.05(5s). Wisconsin Stat. § 12.13(5) regulates actions by people; Wis. Stat. § 5.05(5s) regulates access to records. Tellingly, Wis. Stat. § 5.05(5s) relates exclusively to GAB-records. This gives further support to the interpretation that the terms "prosecutor" and "investigator" relate to GAB-prosecutors and GAB-investigators. It shows that the legislature was addressing GAB-disclosures in Wis. Stat. § 12.13(5), not disclosures by others.

¶ 21. Wisconsin Stat. § 12.13(5)(a) contains an exception to the general prohibition on disclosure of *records* for records that are "subject to access under s. 5.05(5s)." Wisconsin Stat. § 5.05(5s) provides in part that:

(e) The following records of the board are open to public inspection and copying under s. 19.35(1):

1. Any record of the action of the board authorizing the filing of a civil complaint under sub. (2m)(c)6.
2. Any record of the action of the board referring a matter to a district attorney or other prosecutor for investigation or prosecution.
3. Any record containing a finding that a complaint does not raise a reasonable suspicion that a violation of the law has occurred.
4. Any record containing a finding, following an investigation, that no probable cause exists to believe that a violation of the law has occurred.

¶ 22. By its plain meaning, Wis. Stat. § 5.05(5s)(e) applies *only* to records of the GAB and no other person or governmental authority. Subparts 1.-4. relate to GAB actions or GAB determinations, not determinations by others. *See* Wis. Stat. § 5.05(2m)(c)4., 6., 11.<sup>4</sup> Indeed, Wis. Stat. § 5.05 is entitled “Government accountability board; powers and duties.” In sum, nothing about Wis. Stat. § 5.05(5s) indicates that its provisions were intended to apply to any records authority other than the GAB.

¶ 23. Therefore, if a district attorney or law enforcement authority possesses records related to investigations and prosecutions of the enumerated offenses, the cross-reference in Wis. Stat. § 12.13(5)(a) to Wis. Stat. § 5.05(5s) provides no guidance whatsoever as to when, and under what circumstances, those records can be accessed. It is hard to understand why Wis. Stat. § 12.13(5)(a) would rely upon a cross-reference to another section of the statutes in order to define the scope of a crucial exception to Wis. Stat. § 12.13(5) if the cross-referenced statute only applied to some of the authorities subject to Wis. Stat. § 12.13(5). More plausibly, Wis. Stat. § 12.13(5)(a) regulates GAB, its staff, its retained prosecutors and investigators, and the employees of those retained prosecutors and investigators.

**b. The legislature’s purpose of allowing the disclosure of certain information to the public is defeated if one reads “prosecutor” and “investigator” to include district attorneys and law enforcement respectively.**

¶ 24. This structural aspect of the statutes becomes particularly significant when one considers your fourth question: what statements district attorneys or law enforcement officials could make, and what records they could disclose, upon determining that no prosecution of an enumerated offense is warranted.

¶ 25. The intent of Wis. Stat. § 12.13(5)(a) and its cross-reference to Wis. Stat. § 5.05(5s) is clear: certain records demonstrating the government’s final decisions to investigate or prosecute should be accessible to the public. Without such access, of course, it would be impossible for the public and other government officials including the legislature to evaluate whether the enforcement of laws is operating as it should. An interpretation that would include a district attorney or law enforcement official within Wis. Stat. § 12.13(5)(a)’s definition of

---

<sup>4</sup>Unlike the GAB, law enforcement is not under a mandatory duty to investigate any set of facts giving rise to “reasonable suspicion” that a violation of the law has occurred. Nor must “reasonable suspicion” exist for law enforcement to commence an investigation, so long as the methods of investigation do not violate statutory or constitutional rights. With respect to prosecution, prosecutors may not file charges unless they have probable cause to believe a violation of the law has occurred. SCR 20:3.8(a). But probable cause does not automatically trigger a district attorney’s filing of a complaint. It is well-recognized that a district attorney is vested with prosecutorial discretion and is under no requirement to prosecute “all cases where there appears to be a violation of the law.” *See Kalal*, 271 Wis. 2d 633, ¶ 30.

“prosecutor” and “investigator” would run counter to the clear legislative intent *allowing* the disclosure of certain records relating to investigations and prosecutions by virtue of creating Wis. Stat. § 5.05(5s).

¶ 26. If we read Wis. Stat. § 12.13(5) to apply to district attorneys, then a district attorney who has investigated a possible violation of the enumerated offenses, but who has concluded that no prosecution is warranted (whether because of a belief that no probable cause exists or any other reason), could not disclose *any* records containing the district attorney’s reasons for making that decision. He or she would be bound by the prohibition on disclosure set forth in Wis. Stat. § 12.13(5)(a), unlike the GAB (and its special counsel), who could release such documents to the public under the specific exceptions set forth in Wis. Stat. § 5.05(5s)(3)3. and 4. Such an interpretation would run counter to the legislature’s purpose in creating the exception, and is thus an unreasonable interpretation.

¶ 27. When the legislature enacts a statute, “it is presumed to do so with full knowledge of the existing law.” *State DOC v. Schwarz*, 2005 WI 34, ¶ 24, 279 Wis. 2d 223, 693 N.W.2d 703 (quoting *Peters v. Menard, Inc.*, 224 Wis. 2d 174, 187, 589 N.W.2d 395 (1999)). As discussed above, when the legislature created the GAB, the legislature knew that district attorneys already possessed prosecutorial authority over the elections, ethics, and lobbying laws, pursuant to Wis. Stat. § 978.05. The legislature also knew that under *State ex rel. Richards v. Foust*, 165 Wis. 2d 429, 477 N.W.2d 608 (1991) and its progeny, district attorneys’ case files are protected from public access unless the prosecutor elects in his or her discretion to provide access. So it seems a highly unreasonable interpretation of Wis. Stat. § 12.13(5)(a) to believe that the legislature intended to *curtail* district attorneys’ ability to explain their decisions not to charge, while at the very same time specifically giving the GAB the ability to release records explaining their decisions on the same kinds of matters.

¶ 28. The legislature wanted certain of the GAB’s records to be exempt from the public records law—hence Wis. Stat. § 5.05(5s). The fact that the legislature specifically provided for the lawful release of records dealing with no-charge determinations shows how important it regarded public access to those determinations to be. To read the terms “prosecutor” and “investigator” in Wis. Stat. § 12.13(5)(a) to include district attorneys and law enforcement would criminalize conduct that the legislature expressly authorizes with respect to the GAB and curtail the flow of information that the legislature has specifically permitted. While it is sometimes the case that records are treated differently for purposes of Wisconsin’s public records law depending on which authority has custody over them, *see Portage Daily Register*, 308 Wis. 2d 357, ¶ 18, there is no indication that the legislature intended to create such a disparity here as the statutory context supports reading the terms “prosecutor” and “investigator” in Wis. Stat. § 12.13(5) to relate to prosecutors and investigators of the board and as not applying to district attorneys or law enforcement.

¶ 29. The interplay of Wis. Stat. §§ 12.13(5)(a) and 5.05(5s) causes another, similarly unreasonable result if the terms “prosecutor” and “investigator” in Wis. Stat. § 12.13(5) are read to include district attorneys and law enforcement agencies. Under Wis. Stat. § 5.05(5s)(d), the subject of a GAB-initiated investigation under the enumerated offenses may ask the GAB to make available for inspection and copying records of the investigation that pertain to that person, if those records are otherwise “available by law.” However, since Wis. Stat. § 5.05(5s) pertains only to the GAB and its records, a district attorney presented with the same kind of request by the subject of district attorney-initiated investigation would be prohibited from disclosing records to that person, on threat of criminal penalties, were Wis. Stat. § 12.13(5) to be applied to district attorneys.

¶ 30. Such a stark disparity in treatment seems unreasonable, especially in light of the fact that the legislature is presumed to have known, when it enacted Wis. Stat. § 12.13(5), that district attorneys have discretion, under the public records law, to disclose or withhold their investigative records. *See Foust, supra*. The legislature would not have removed that discretion completely, replaced it with a criminal sanction, and at the same time authorized the GAB to release the very same types of records, without a clear, explicit statement in the statutory language. Act 1 contains no such clear statement.

**D. Prohibitions on public access to records are to be narrowly construed.**

¶ 31. Moreover, as an exemption to Wisconsin’s public records law, Wis. Stat. § 12.13(5) should be narrowly construed so as to ensure public access to public records. Stepping back from the specific issues discussed above, the terms “prosecutor” and “investigator” in Wis. Stat. § 12.13(5)(a) should be read to exclude district attorneys and law enforcement because, to the extent there is any uncertainty about the scope of those terms, they should be read to ensure public access to the greatest extent possible.

¶ 32. Only when the legislature’s intent to curtail access is clear should an exemption be read into a statute. *Chvala*, 204 Wis. 2d at 88. As the supreme court has explained:

Exceptions should be recognized for what they are, instances in derogation of the general legislative intent, and should, therefore, be narrowly construed; and *unless the exception is explicit and unequivocal, it will not be held to be an exception*. It would be contrary to general well established principles of freedom-of-information statutes to hold that, by implication only, any type of record can be held from public inspection.

*Hathaway v. Green Bay School Dist.*, 116 Wis. 2d 388, 397, 342 N.W.2d 682 (1984) (emphasis added). *See also Local 2489, AFSCME, AFL-CIO v. Rock County*, 2004 WI App 210, ¶ 15, 277 Wis. 2d 208, 689 N.W.2d 644 (interpreting undefined term “investigation” narrowly to refer only to investigations conducted by a public authority).

¶ 33. For the reasons stated above, I believe the legislature has not given an “explicit and unequivocal” indication in Wis. Stat. § 12.13(5) of its intention to curtail the public’s access to district attorney and law enforcement records relating to investigations and prosecutions into the enumerated offenses, subject to the traditional public records law analysis. While the generic terms “prosecutor” and “investigator” can have a broad connotation when taken out of context, the text and structure of Wis. Stat. § 12.13(5) demonstrate that the legislature used those terms in a more limited sense, to refer exclusively to the prosecutors and investigators who are either employed by, or are retained by, the GAB.

**E. Additional Concerns.**

**a. Rule of Lenity.**

¶ 34. It also bears mentioning that Wis. Stat. § 12.13(5) is a penal statute. While I have come to the conclusion that traditional methods of statutory construction indicate that the terms “prosecutor” and “investigator” as used in Wis. Stat. § 12.13(5)(a) do not include a district attorney or law enforcement, I note that even if the statute was capable of equally reasonable constructions, a court would apply the rule of lenity if the statute was to be enforced criminally. That principle of statutory construction holds that where a statute is ambiguous and the legislative history unclear,<sup>5</sup> ambiguous penal statutes are to be construed in a defendant’s favor. *See State v. Cole*, 2003 WI 59, ¶ 67, 262 Wis. 2d 167, 663 N.W.2d 700.

**b. The First Amendment.**

¶ 35. Finally, although you have not directly raised the issue, I note that criminal enforcement of the statute may implicate the free speech protections embodied in article I, section 3 of the Wisconsin Constitution and the First Amendment to the United States Constitution.<sup>6</sup>

¶ 36. As an employer, government has broad authority to regulate its employees’ disclosure of information that the employee obtained by virtue of the exercise of his or her duties. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that “when public employees

---

<sup>5</sup>Here, there is no legislative history that illuminates the fundamental question this opinion examines or sheds light on whether or not the legislature intended any of the results that would naturally flow from an interpretation that included district attorneys and law enforcement as “prosecutor[s]” and “investigator[s]” as those terms are used in Wis. Stat. § 12.13(5)(a).

<sup>6</sup>Although the remaining discussion refers to the First Amendment, it applies equally to Wisconsin’s correlating protections which have been held to follow First Amendment guarantees. *County of Kenosha v. C & S Management, Inc.*, 223 Wis. 2d 373, 388, 588 N.W.2d 236 (1999) (“Wisconsin courts consistently have held that Article I, § 3 of the Wisconsin Constitution guarantees the same freedom of speech rights as the First Amendment of the United States Constitution.”).

make statements pursuant to their official duties . . . the Constitution does not insulate their communications from employer discipline”). At the same time, when the government acts in a manner other than as an employer, such as regulation of speech through tort law and presumably criminal law, decisions of the United States Supreme Court suggest the First Amendment provides additional protections to defendants. *Id.* at 417 (recognizing case law permits government’s regulation of employee speech “*as an employer*”) (quoting *Pickering v. Board of Ed. of TP. H.S. Dist. 205, Ill.*, 391 U.S. 563, 568 (1968)) (emphasis added); *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion) (“[T]he government *as employer* indeed has far broader powers than does the government as sovereign”) (emphasis added); *Connick v. Myers*, 461 U.S. 138, 147 (1983) (holding that First Amendment did not protect an assistant district attorney’s disruptive speech in the workplace and upholding government’s discharge of the employee, but recognizing that employees’ speech would receive the same First Amendment protection as all citizens enjoy if it was the subject of a libel action as opposed to a disciplinary action). Put simply, the First Amendment may permit the government to discipline an employee for engaging in speech that the government may not impose criminal sanctions on the employee for making.<sup>7</sup>

¶ 37. As with any statute, Wis. Stat. § 12.60(1)(bm), which criminalizes violations of Wis. Stat. § 12.13(5), is presumed constitutional. *State v. Baron*, 2009 WI 58, ¶ 10, 318 Wis.2d 60, 769 N.W.2d 34. The question of whether the government may impose a criminal penalty on a public employee for disclosing truthful information about a government investigation into a violation of laws relating to ethics, elections, or lobbying may depend on the facts and circumstances of a particular case. Thus, without a specific challenge, I cannot conclude that it is unconstitutional. However, a prosecutor contemplating the criminal enforcement of Wis. Stat. § 12.60(1)(bm), against any individual should be mindful of possible First Amendment implications.

### III. ANSWERS TO YOUR FOUR QUESTIONS.

¶ 38. Given my opinion that Wis. Stat. § 12.13(5) does not apply to district attorneys and law enforcement, my answers to your four questions can be quite succinct. Your first question is: “Are these prohibitions limited to information regarding matters referred to a prosecutor or law enforcement from the Government Accountability Board.” As explained above, I have concluded that the Wis. Stat. § 12.13(5) disclosure limitations do not apply to records in possession of a district attorney or law enforcement agency to which a matter has been referred by the GAB.

---

<sup>7</sup>Wisconsin Stat. § 12.60(1)(bm) makes the unauthorized release of records *or* “information” a misdemeanor. Nothing in this opinion should be construed as concluding that the disclosure of government records raises identical First Amendment concerns as the disclosure of information through speech.

¶ 39. Your second question is: “Is information obtained pursuant to an independent investigation or prosecution by a prosecutor or law enforcement officer subject to this statute?” I assume that you have used the term “prosecutor” in your question as a synonym for district attorney. My answer to your question is no: whether the information is obtained pursuant to an independent investigation or in the course of an investigation that followed upon a referral from GAB, the prohibition in Wis. Stat. § 12.13(5) does not apply to district attorneys and law enforcement.

¶ 40. Your third question asks when and under what circumstances district attorney or law enforcement records regarding investigations into the enumerated offenses are subject to disclosure under the public records law. In my opinion, once in the hands of a district attorney or law enforcement agency, records sent by the GAB to that district attorney or law enforcement agency are not subject to the disclosure limitations of either Wis. Stat. §§ 12.13(5) or 5.05(5s). Disclosure of the records by the district attorney or law enforcement agency would not violate Wis. Stat. § 12.13(5) or 5.05(5s), and would not subject the district attorney or law enforcement agency to the penalty provisions of Wis. Stat. § 12.60.

¶ 41. That is not to say, however, that disclosure of such records by the district attorney or law enforcement agency always would be required by the public records law. It is my opinion that standard public records law analysis would govern disclosure of district attorney or law enforcement records regarding investigations or prosecutions into the enumerated offenses.

¶ 42. Your final question is: “If a district attorney concludes that no prosecution is warranted because there is either no probable cause or the case cannot be proven beyond a reasonable doubt, or declines to issue charges for any other reason, what statements may be made or records disclosed regarding that conclusion by a district attorney or law enforcement official?” I again assume that your question refers to the enumerated offenses identified in Wis. Stat. § 12.13(5).

¶ 43. In my opinion, as discussed above, the Wis. Stat. § 5.05(5s) disclosure limitations apply to GAB members, GAB employees, GAB-retained investigators, GAB-retained prosecutors, and necessary assistants of those persons—not to district attorneys and law enforcement agencies. Consequently, it is my opinion that a district attorney or law enforcement official may make the same types of statements or disclose the same types of records regarding the district attorney’s conclusion that no prosecution of an enumerated offense is warranted because there is no probable cause or the case cannot be proven beyond a reasonable doubt, or that the district attorney declines to charge an enumerated offense for any other reason, as the district attorney or law enforcement official may make about any other crime or alleged crime.

¶ 44. The nature of such statements and the disclosure of such records generally is entrusted to the sound judgment of the district attorney or law enforcement official involved, guided when applicable by the public records law. Depending on the circumstances of a

Mr. Thomas B. Eagon  
Page 15

particular investigation or prosecution, other disclosure limitations may apply—such as the Wis. Stat. § 968.26 limitations on disclosure of information related to John Doe proceedings or the Wis. Stat. § 146.82 limitations on access to patient health care records. If there remains the possibility of future charges against the same or other persons, the district attorney should be mindful of the SCR 20:3.6 provisions governing trial publicity as well as the legal complications that such statements or disclosures could produce in subsequent proceedings. Conferring with cooperating law enforcement officials about the propriety and potential consequences of any statements or disclosures therefore would be prudent if some future prosecution might be pursued.

Sincerely,

A handwritten signature in black ink, appearing to read "J.B. Van Hollen". The signature is written in a cursive style with a long, sweeping tail on the final letter.

J.B. Van Hollen  
Attorney General

JBVH:RPT:KSJ:LWB:rk



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Raymond P. Taffora  
Deputy Attorney General

114 East, State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857  
608/266-1221  
TTY 1-800-947-3529

November 18, 2009

OAG—8—09

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

Dear Mr. Voelker:

¶ 1. You indicate that for many years a \$25 “warrant fee” has been charged each time that an arrest warrant or commitment order has been issued by a particular municipal court. The term “commitment order” apparently refers to an order for incarceration of a defendant in a municipal court proceeding. *See, e.g.*, Wis. Stat. § 800.095(4)(b)1. Such a fee has most commonly been charged when a warrant has been issued for a defendant who has failed to pay a municipal court judgment. *See, e.g.*, Wis. Stat. § 800.095(1) and (2). The municipal court has been requested to tax each such fee as a cost in proceedings in that court.

¶ 2. All funds derived from the imposition of these fees have been retained by the municipal court. Initially, no municipal ordinance imposed these fees. Enactment of a municipal ordinance or ordinances expressly authorizing the imposition of these fees apparently has occurred or is imminent.

¶ 3. You also indicate that, in addition to the \$25 “warrant fee,” a municipal ordinance or ordinances has imposed a separate \$25 charge to offset law enforcement or other municipal costs associated with the issuance of each arrest warrant or commitment order by this municipal court. This separate charge has been imposed by municipal ordinance regardless of whether service of the arrest warrant or commitment order was ever attempted and regardless of whether the arrest warrant or commitment order was ever successfully served or executed. The municipal court has been requested to tax each such separate charge as a cost against the defendant in proceedings in that court.

¶ 4. Some or all of the funds derived from the imposition of these separate charges have been retained by the municipal court. Enactment of a municipal ordinance or ordinances changing this separate charge to one for actual service of each warrant or commitment order issued by the municipal court apparently has occurred or is imminent.

## QUESTIONS PRESENTED AND BRIEF ANSWERS

¶ 5. You request my legal opinion concerning two questions:

1. Under Wis. Stat. § 814.65(1), does a municipal court or judge have statutory authority to charge a fee that is taxable as a cost against a defendant, with the proceeds to be retained by the municipal court, for each arrest warrant or a commitment order that is issued by the municipal court in a single legal action?

¶ 6. In my opinion, the answer is no. In each legal action, a municipal judge must charge only one fee of between \$15 and \$28. The municipal treasurer must remit \$5 of that fee to the Secretary of the Department of Administration (“DOA”). The balance is to be retained by the municipality itself and not by the municipal court. Only one such fee may be charged in each legal action that comes before the municipal court for final disposition, regardless of how many warrants or commitment orders are issued in that action. Because only one such fee may be charged, only one such fee may be taxed as a cost against a defendant in municipal court.

2. In order to defray law enforcement or other municipal costs, does a municipality have statutory authority to impose a charge separate from the fee to be collected by the municipal judge under Wis. Stat. § 814.65(1) that can be taxed as a cost against a municipal court defendant and that is payable to the municipal plaintiff either for the issuance of each warrant or commitment order by its municipal court in a single legal action or for service by its municipal personnel of each warrant or commitment order issued by its municipal court in a single legal action?

¶ 7. In my opinion, a municipal plaintiff may not impose a charge separate from the fee to be collected by the municipal judge under Wis. Stat. § 814.65(1) in order to defray law enforcement or other municipal costs associated with the issuance of any warrant or commitment order by its municipal court. Because no such charge can be imposed, a municipal court may not permit a municipal plaintiff to tax such a charge as a cost against a defendant. Under Wis. Stat. § 814.65(4)(b), a municipal court may allow a municipal plaintiff to tax costs against a defendant in municipal court for actual service or execution by its municipal personnel of each warrant or commitment order issued by its municipal court in a single legal action. Taxable costs for such service or execution by personnel of the municipal plaintiff may not exceed \$12, unless a higher amount was established by the governing body of the municipality prior to the time that service or execution occurred.

## ANALYSIS

¶ 8. Your first question is whether a municipal court or judge may charge a separate fee each time that it issues an arrest warrant or commitment order in a single legal action. The operation of the state court system is a “state responsibility of statewide importance.” *See Flynn*

*v. Department of Administration*, 216 Wis. 2d 521, 535, 576 N.W.2d 245 (1998). “Since compensation is not indispensable to a public office, any right which a clerk has to compensation for services performed, whether by way of salary or fees, must be found in some constitutional or statutory provision.” 15A Am. Jur. 2d *Clerks of Court* § 11 (footnotes omitted). A clerk of a court “may be required to perform gratuitously or without charge those services for which no compensation is fixed by law[.]” *Id.* (footnote omitted). *See also* 80 Op. Att’y Gen. 223, 223-24 (1992).

¶ 9. Wisconsin Stat. § 814.65(1) specifies that “[i]n a municipal court action . . .” the “municipal judge shall collect a fee of not less than \$15 nor more than \$28 on each separate matter, whether it is on default of appearance, a plea of guilty or no contest, on issuance of a warrant or summons, or the action is tried as a contested matter.” Wisconsin Stat. § 814.65(1) does not authorize a municipal judge or the clerk of a municipal court to collect or impose a fee of less than \$15 or to collect or impose a fee of more than \$28.

¶ 10. Whether a fee may be collected under Wis. Stat. § 814.65(1) each time that a warrant or commitment order is issued by a municipal court in a single legal action depends upon the meaning of the phrase “each separate matter” in that statute. Statutory interpretation “‘begins with the language of the statute.’” *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). Statutory language must be construed in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes. *Kalal*, 271 Wis. 2d 633, ¶ 46.

¶ 11. *Black’s Law Dictionary* 999 (8th Ed. 2004) defines “matter” as: “1. A subject under consideration, esp. involving a dispute or litigation; CASE . . . .” The term “matter” is commonly used to describe an “action” in a particular court. *See, e.g., State v. Ndina*, 2009 WI 21, ¶ 92, 315 Wis. 2d 653, 761 N.W.2d 612.

¶ 12. Related statutes also indicate that the phrase “each separate matter” in Wis. Stat. § 814.65(1) refers to the final disposition of a single legal action in municipal court. In criminal and forfeiture matters, a single fee is collected by the clerk of circuit court upon final disposition of the action. *See* Wis. Stat. § 814.60(1) (\$20 in a criminal action “when judgment is entered against the defendant”); Wis. Stat. § 814.63(1)(b) (\$25 in a forfeiture action “when judgment is entered against the defendant”).

¶ 13. In most civil matters, a single fee is collected by the clerk of court when an action is commenced in that court. *See* Wis. Stat. § 814.61(1)(a) (ordinary civil action); Wis. Stat. § 814.62(3)(a) (small claims action). A portion of the fee collected by the clerk of court in connection with the commencement of an action must be paid to the Secretary of DOA to defray costs incurred by the State in connection with the operation of the state court system. *See, e.g.,* Wis. Stat. § 814.61(1)(a) (\$45 in an ordinary civil action); Wis. Stat. § 814.63(2)(d)2. (\$11.80 in a small claims action). At one time, the portion of the fee that was required to be paid to the State

was called the “suit tax.” *See, e.g.*, Wis. Stat. § 814.21(4) (1977). Wisconsin Stat. § 814.65(1) requires payment of \$5 to the Secretary of DOA “for deposit in the general fund” in the same manner as did the former suit tax.

¶ 14. Historically, Wisconsin statutes have not required that a suit tax or similar fee be paid to the State or to the clerk of court in connection with separate items that come before a particular court in a single legal action prior to its final disposition. *See, e.g., Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 682, 476 N.W.2d 593 (Ct. App. 1991): “Those sections [of the statutes] provide that a filing fee shall be paid at ‘the’ commencement of an action. An action need only be commenced once. The plaintiff need only pay the filing fee once. Nothing in the statutes suggests that the filing fee be collected for each defendant named or added in an action.” The language employed in Wis. Stat. § 814.65(1) contains no evidence of a conscious legislative decision to depart from the long-established practice that only one suit tax or filing fee be paid.

¶ 15. In my opinion, the phrase “each separate matter” in Wis. Stat. § 814.65(1) refers to the various methods in which a single legal action can come before a municipal court for final disposition. The fee authorized by Wis. Stat. § 814.65(1) is therefore a fee that can be charged only once in a municipal court action, regardless of how many warrants or commitment orders are issued in the action prior to its final disposition. Because only one such fee may be charged, a municipal court may allow a municipal plaintiff to tax only one such fee as a cost against a defendant in municipal court.

¶ 16. Your second question is whether a municipality has statutory authority to impose a charge separate from the fee to be collected by the municipal judge under Wis. Stat. § 814.65(1) that can be taxed as a cost to a municipal court defendant and that is payable to the municipal plaintiff either for the issuance of each warrant or commitment order by its municipal court in a single legal action or for service by its municipal personnel of each warrant or commitment order issued by its municipal court in a single legal action.

¶ 17. The “issuance of a warrant or summons” language in Wis. Stat. § 814.65(1) refers to the fee to be collected by the “municipal judge.” That provision does not authorize the municipality itself to impose any other separate charge in connection with the issuance of a warrant. By its plain language, Wis. Stat. § 814.65(4)(a) and (b) authorizes the taxation of costs only in connection with “service.” A warrant or commitment order that is issued by a municipal court might never be served. Wisconsin Stat. § 814.65(4)(a) and (b) therefore contains no language authorizing the municipality itself to impose any separate charge in connection with the issuance of each individual warrant or commitment order by its municipal court. Because a municipality lacks statutory authority to impose any separate charge to defray law enforcement or other municipal costs associated with the issuance of each warrant or commitment order by its municipal court, a municipal court may not allow a municipal plaintiff to tax any such separate charge as a cost to a defendant in municipal court.

¶ 18. Wisconsin Stat. § 814.65(4)(a) does provide that “costs are taxable by a municipality” where they are “directly chargeable to the municipality as a disbursement, such as service of process costs.” Disbursements are statutorily authorized expenses that are “ordinarily charged to and payable by another[.]” *State v. Dismuke*, 2001 WI 75, ¶ 22, 244 Wis. 2d 457, 628 N.W.2d 791. Lawful charges by the sheriff or law enforcement personnel of other municipalities under Wis. Stat. §§ 814.70 and 814.71, as modified by Wis. Stat. § 814.705, are disbursements. *See State v. Dismuke*, 244 Wis. 2d 457, ¶ 26; *State v. Dismuke*, 2000 WI App 198, ¶¶ 7, 12, 238 Wis. 2d 577, 617 N.W.2d 862, *rev'd for lack of an adequate record*, 244 Wis. 2d 457, ¶ 26. *See also* Wis. Stat. § 814.04. Such statutory charges by the sheriff or law enforcement personnel of other municipalities are taxable as costs to a defendant in municipal court.

¶ 19. Costs for service made by personnel of the municipal plaintiff are not disbursements because they are “internal operating expenses of a governmental unit.” *State v. Dismuke*, 244 Wis. 2d 457, ¶ 22. Under Wis. Stat. § 814.65(4)(b), a municipal plaintiff can request a municipal court to tax internal costs incurred in connection with “service of process[.]” The term “process” has two different, well-established legal meanings:

In its broadest sense, the term “process” comprehends all the acts *of the court* from the beginning of a proceeding to its end; in its narrower sense, it is the means of compelling the defendant to appear in court after the suing out of the original writ in a civil case and after indictment in a criminal case. *State ex rel. Walling v. Sullivan*, 245 Wis. 180, 189, 13 N.W.2d 550, 555 (1944).

*Wells v. Waukesha Marine Bank*, 135 Wis. 2d 519, 536-37, 401 N.W.2d 18 (Ct. App. 1986) (italics in original). *See also Varda v. General Motors Corp.*, 2001 WI App 89, ¶ 15, 242 Wis. 2d 756, 626 N.W.2d 346 (using the phrase “service of process” in the narrower sense to refer to “the means by which a lawsuit is instituted and . . . to attain personal jurisdiction over the person of the defendant”) (citations omitted.)

¶ 20. In my opinion, the Legislature used the term “process” in Wis. Stat. § 814.65(4)(b) to refer to all orders issued by the municipal court. In *State v. Dismuke*, 238 Wis. 2d 577, ¶ 13, a case involving an issue similar to those you present, the court of appeals held that orders to produce a criminal defendant for trial constituted “criminal process[.]” because they “were generated out of the criminal court[.]” The court of appeals also held that such orders constituted “process” within the meaning of Wis. Stat. § 814.70(1) because orders to produce a criminal defendant are “other order[s]” within the meaning of that statute. *State v. Dismuke*, 238 Wis. 2d 577, ¶ 13.

¶ 21. My conclusion that the Legislature intended the term “process” in Wis. Stat. § 814.65(4)(b) to refer to all orders issued by the municipal court is also supported by the cross reference to Wis. Stat. § 814.70. *See Kalal*, 271 Wis. 2d 633, ¶ 46. Wisconsin Stat. § 814.70(1)

is entitled “SERVICE OF PROCESS.” Wisconsin Stat. § 814.70(1) authorizes the sheriff to charge for “service of a summons or any other process for commencement of an action, a writ, an order of injunction, a subpoena, **or any other order[.]**” If the Legislature had intended to limit the term “process” in Wis. Stat. § 814.65(4)(b) to certain kinds of court orders, it either would not have included the cross reference to Wis. Stat. § 814.70 or would have qualified that cross reference to make it clear that a more limited meaning was intended.

¶ 22. In *State v. Dismuke*, 244 Wis. 2d 457, ¶ 24, due to the lack of an adequate record, the supreme court simply “[a]ssum[ed] . . .” without deciding that “the execution of an order to produce constitutes ‘service of process[.]’” In the court of appeals, *Dismuke* contended that personal service of an order to produce was not statutorily required. See *State v. Dismuke*, 238 Wis. 2d 577, ¶¶ 17-18. The court of appeals responded to that argument in two ways. It held that, in a criminal case, it is permissible for the sheriff to charge for service of any order issued by the court. See *State v. Dismuke*, 238 Wis. 2d 577, ¶ 13. The court of appeals also upheld the sheriff’s decision to personally serve the warrant, reasoning that “it would be illogical to mail the service of an order to a warden when a sheriff’s deputy is required to effectuate the court’s order.” *State v. Dismuke*, 238 Wis. 2d 577, ¶ 18. In reversing the court of appeals, the supreme court never reached the issue of whether service of an order to produce is statutorily required.

¶ 23. All court costs must be specifically authorized by statute. *State v. Dismuke*, 244 Wis. 2d 457, ¶ 19. Statutes awarding costs in municipal court proceedings are in derogation of the common law and therefore must be strictly construed. *City of Janesville v. Wiskia*, 97 Wis. 2d 473, 479, 293 N.W.2d 522 (1980); OAG 42-82 (July 20, 1982) (unpublished opinion), at 3-4, 1982 WL 188338. Wisconsin Stat. § 59.27(4), which prescribes the duties of the sheriff, requires the sheriff to “serve or execute all processes, writs, precepts and orders issued or made by lawful authority and delivered to the sheriff.” Courts have long held that “[t]o ‘execute process,’ is to perform its mandate.” *Andrews v. Keep*, 38 Ala. 315, 1862 WL 442, \*2 (1862). *Accord Townsend, Arnold & Co. v. Kleckley*, 38 S.C.L. (4 Rich.) 206, 1850 WL 3078, \*5 (1850) (“‘To execute process,’ is to do what the process commands . . .”).

¶ 24. Service of process normally involves delivery of a paper. See Wis. Stat. § 801.10. When interpreting statutory language, some courts have applied the distinction between service of process and execution of process. See *U.S. v. McDonald*, 26 F. Cas. 1074, 1075 (E.D. Wis. 1879) (No. 15,667); *Schuman, Kane, Felts & Everngam, Chartered v. Aluisi*, 668 A.2d 929, 933 (Md. 1995). See also *Steele v. City of Wichita*, 826 P.2d 1380, 1388-89 (Kan. 1992). In *Schneider v. Waukesha County*, 103 Wis. 266, 269, 79 N.W. 228 (1899), the court characterized “the difference in language [between ‘serving process’ and ‘executing process’] as [im]material” for purposes of determining allowable sheriff’s fees under what is now Wis. Stat. § 814.70(4), which authorizes fees “[f]or travel in serving any criminal process[.]” The “service of process” language contained in Wis. Stat. § 814.65(4)(b) is similar to the statutory language construed in *Schneider*. In light of the court’s holding in *Schneider*, it is my opinion that the “service of process” language contained in Wis. Stat. § 814.65(4)(b) also encompasses the execution of

process. I therefore conclude that a municipal court may allow a municipal plaintiff to tax costs against a defendant in municipal court for actual service or execution by municipal personnel of each warrant or commitment order issued by its municipal court in a single legal action.

¶ 25. I briefly address two other statutory requirements. Wisconsin Stat. § 814.65(4)(b) authorizes the taxation of costs only when service “is accomplished[.]” The word “accomplished” means “2 : established beyond doubt or dispute <an *accomplished* fact>.” <http://www.merriam-webster.com/dictionary/accomplished>. The statutory language therefore requires that service or execution actually be accomplished by the municipal plaintiff’s personnel in order for a municipal court to allow a municipal plaintiff to tax service costs against a defendant. The dollar amount of taxable costs where service or execution is accomplished by municipal personnel is also limited. Wisconsin Stat. § 814.65(4)(b) provides that the fee schedule contained in Wis. Stat. § 814.71 is “subject to any modification applicable under s. 814.705[.]” Wisconsin Stat. § 814.70(1) provides that the statutory charge for service of an order issued in a civil action is \$12. Under Wis. Stat. § 814.705, the governing body of the municipal plaintiff is authorized to establish a higher amount. In my opinion, any higher charge must have been established by the governing body of the municipal plaintiff prior to the time that service or execution by its municipal personnel occurred in order for a charge higher than \$12 to be allowable as a cost against a defendant in municipal court.

### CONCLUSION

¶ 26. I therefore conclude that under Wis. Stat. § 814.65(1) a municipal judge must charge only one fee of between \$15 and \$28 that is taxable as a cost to the defendant in conjunction with the final disposition of a municipal court action, regardless of how many warrants or commitment orders are issued in that action. A municipal court may not allow a municipal plaintiff to tax costs against a municipal court defendant in order to defray law enforcement or other municipal costs associated with the issuance of a warrant or commitment order by the municipal court. Under Wis. Stat. § 814.65(4)(b), a municipal court may allow a municipal plaintiff to tax costs against a defendant for actual service or execution by municipal personnel of each warrant or commitment order issued by the municipal court in a single legal action. Allowable taxable costs for such service or execution by personnel of the municipal plaintiff may not exceed \$12, unless a higher amount was established by the governing body of the municipality prior to the time that service or execution occurred.

Sincerely,



J.B. Van Hollen  
Attorney General



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Raymond P. Taffora  
Deputy Attorney General

114 East, State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857  
608/266-1221  
TTY 1-800-947-3529

December 3, 2009

OAG—9—09

Michael E. Nieskes  
Racine County District Attorney  
Racine County Courthouse  
730 Wisconsin Ave.  
Racine, WI 53403-1274

Dear District Attorney Nieskes:

Your office, like others across the state, employs assistant district attorneys to help carry out your statutory functions. Pursuant to Executive Order 285, these assistant district attorneys are subject to mandatory furlough<sup>1</sup> days.

**QUESTION PRESENTED AND BRIEF ANSWER**

¶ 1. You ask whether an assistant district attorney is entitled to representation by the Attorney General for the defense of any claims, and to indemnification for any damages or costs, arising out of the performance of duties on a day when the assistant district attorney is on state-mandated furlough. In my opinion, an assistant district attorney on furlough is entitled to representation and indemnification if he or she is carrying out duties within the scope of his or her employment.

**ANALYSIS**

¶ 2. Assistant district attorneys are employed by the State of Wisconsin. *See* Wis. Stat. § 978.12(1)(b). Wisconsin Statute § 895.46(1)(a) provides that, in actions against a state officer or employee “because of acts committed while carrying out duties as an officer or employee . . . within the scope of employment, the judgment as to damages and costs entered against the officer or employee . . . shall be paid by the state . . .” In addition, the state must provide or pay for legal representation if the state officer or employee is “doing any act growing out of or committed in the course of the discharge of his or her duties.” *See id.* Consequently, if an assistant district attorney is carrying out duties within the scope of his or her employment, he or

<sup>1</sup> A “furlough” for purposes of this opinion is limited to the eight days of unpaid leave (or 64 hours of unpaid leave) during each fiscal year of the 2009-2011 fiscal biennium which are required by Executive Order 285. In addition, although you also asked questions regarding prosecutorial immunity and when a furlough days begins and ends, you have notified my office that you are no longer seeking answers to those questions.

she is entitled to representation and indemnification regardless of whether those duties are performed during normal work hours or outside normal work hours on a regular work day, weekend day, vacation day, holiday, or furlough day.

¶ 3. An act is within the “scope of employment” if it can fairly be said to be a natural part or incident of the employee’s duties. *See Scott v. Min-Aqua Bats Water Ski Club*, 79 Wis. 2d 316, 320-321, 255 N.W.2d 536 (1977). An act is within the “scope of employment” if it is similar in kind to that authorized and is actuated by a purpose to serve the employer. *See Block v. Gomez*, 201 Wis. 2d 795, 806, 549 N.W.2d 783 (Ct. App. 1996); *Scott*, 79 Wis. 2d at 321. An employee may be found to have acted “within the scope of employment” as long as the employee was actuated, at least in part, by a purpose to serve the employer. *See Olson v. Connerly*, 156 Wis. 2d 488, 499-500, 457 N.W.2d 479 (1990). The phrase “scope of employment” is to be interpreted, consistent with legislative intent, “to offer the broadest protection reasonably available to public officials and to public employees.” *See Schroeder v. Schoessow*, 108 Wis. 2d 49, 67-68, 321 N.W.2d 131 (1982).

¶ 4. You indicate that on a furlough day, an assistant district attorney could be called upon to answer questions from law enforcement officers about search and seizure, to make charging decisions, and to draft or approve search warrants. These are duties routinely performed by assistant district attorneys as part of their state employment. When determining whether duties are within the assistant district attorney’s “scope of employment,” relevant factors would include, among other considerations, whether the duties being performed are essentially the same duties that would be performed on a non-furlough day, whether the duties would be performed subject to the general control and supervision of the district attorney or other supervisor, *see Wuorinen v. State Farm Mut. Auto. Ins. Co.*, 56 Wis. 2d 44, 54, 201 N.W.2d 521 (1972), whether the assistant district attorney intends to serve the interests of his or her employer, whether the assistant district attorney would have any personal motivation or would derive any personal benefit from the performance of the duties, whether resources of the district attorney’s office would be available for use in the performance of the duties, whether there is a history of assistant district attorneys performing duties outside of normal work hours, and whether the district attorney expects that assistant district attorneys will respond to the needs of law enforcement officers, notwithstanding the furlough status. Absent a very unusual situation, these factors would all weigh in favor of a finding that an assistant district attorney would be acting within the scope of employment if performing the types of duties that you describe on a furlough day. Therefore, in my opinion, the work that you describe would generally involve carrying out duties within the “scope of employment” of an assistant district attorney, even on a furlough day.

¶ 5 The opinion expressed in this letter is supported by the *Wuorinen* case, cited above. In *Wuorinen*, the Wisconsin Supreme Court held that a member of the Wisconsin National Guard was not acting within the scope of his military duties at the time of an automobile accident, even though he was considered to be on “active duty” at all times. 56 Wis.2d at 56-57. In reaching this conclusion, the court noted that, at the time of the accident, the

guardsman was on a 24-hour "free time" pass, was driving a personal vehicle, was pursuing his own personal interests, and was not under the supervision and control of his employer. As applied to the situation you pose, the *Wuorinen* case means that an employee's *status* is not the controlling factor in determining whether certain acts are within the scope of employment. Rather, courts must consider the nature of the activities being performed.

### CONCLUSION

¶ 6. In conclusion, it is my opinion that an assistant district attorney on furlough is entitled to representation and indemnification if he or she is carrying out duties within the scope of his or her employment. This opinion does not address issues relating to furloughs under civil service rules or comparable provisions of collective bargaining agreements.

Sincerely,

A handwritten signature in blue ink, appearing to read "J.B. Van Hollen".

J.B. Van Hollen  
Attorney General



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Raymond P. Taffora  
Deputy Attorney General

114 East, State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857  
608/266-1221  
TTY 1-800-947-3529

December 3, 2009

OAG—10—09

Ms. Malia T. Malone  
Polk County Assistant Corporation Counsel  
1005 West Main Street, Suite 100  
Balsam Lake, WI 54810

Dear Ms. Malone:

¶ 1. You have requested an opinion, on behalf of the Polk County Corporation Counsel, regarding the proper disposition of seized money that may constitute contraband when the state has not sought the forfeiture of such money through judicial proceedings.

**Question Presented and Brief Answer**

¶ 2. Specifically, you ask whether a law enforcement agency may retain seized money when a court has not formally found that the seized money constitutes contraband subject to forfeiture through a proceeding for the return of property under Wis. Stat. § 968.20.

¶ 3. In my opinion, I conclude that the law enforcement agency may not retain the seized money and must comply with the proper statutory procedure for the disposition of unclaimed money.

**Analysis**

¶ 4. Wisconsin Const. art. X, § 2 provides in relevant part that “all moneys and the clear proceeds of all property that may accrue to the state by forfeiture . . . shall be set apart as a separate fund to be called ‘the school fund,’ . . .” Wisconsin law authorizes the state to commence forfeiture proceedings against seized property, including money that constitutes the proceeds of criminal activity. *See* Wis. Stat. §§ 961.55 and 973.075. If the court finds that the property is contraband and orders its forfeiture, the agency must deposit the seized money or the proceeds from the sale of the forfeited property in the state school fund as provided by statute. Wis. Stat. §§ 961.55(5) and 973.075(4).

¶ 5. For a variety of reasons, the state may elect not to initiate a forfeiture action for seized money. Wisconsin Stat. § 968.20 permits a property owner to petition the circuit court for return of property, including money, that law enforcement agencies have seized, but has not been

the subject of a state-initiated forfeiture action. *See Jones v. State*, 226 Wis. 2d 565, 578, 594 N.W.2d 738 (1999). If the state demonstrates that the property is contraband, then the court may not order the property returned. *Id.* at 570. Though Wis. Stat. § 968.20 is not a forfeiture proceeding in the traditional sense, Wisconsin appellate courts recognize that a court's decision declining to return contraband property to its owner constitutes a "forfeiture" of that person's interest in it. *State v. Perez*, 2001 WI 79, ¶¶ 59-61, 244 Wis. 2d 582, 628 N.W.2d 820 (referring to § 968.20 as a forfeiture statute); *In re Return of Property in State v. Bergquist*, 2002 WI App 39, ¶ 8, 250 Wis. 2d 792, 641 N.W.2d 179 (denying return of weapon under § 968.20 held a "forfeiture"); and *State v. Kueny*, 2006 WI App 197, ¶ 7, 296 Wis. 2d 658, 724 N.W.2d 399 ("The forfeiture order was proper under Wis. Stat. § 968.20(1m)(b) if Kueny committed a crime involving the use of the seized weapons."). Requiring law enforcement agencies to transfer contraband money to the school fund is consistent with the purpose of Wis. Const. art. X, § 2 and the framers' intention to "throw everything possible into the school fund." *Estate of Payne*, 208 Wis. 142, 145, 242 N.W. 553 (1932); *accord* 61 Op. Att'y Gen. 208, 209 (1972).

¶ 6. Your question focuses on what happens to seized money when the circuit court has not had occasion to declare it contraband through an asset forfeiture proceeding or through a motion for the return of seized property. Because the money's potential status as contraband does not by itself vest its title in the school fund, the law enforcement agency does not have authority to transfer it to the school fund. Indeed, Wis. Const. art. X, § 2 specifically contemplates that money accrues to the school fund through "forfeiture."

¶ 7. At common law, forfeiture of a person's interest in property to the government contemplated judicial action. As such, a forfeiture cannot occur without a judicial determination that the property constitutes contraband and is subject to forfeiture. *See United States v. 92 Buena Vista Ave.*, 507 U.S. 111, 125 (1993) (plurality) quoting *United States v. Grundy*, 3 Cranch 337, 350-51 (1806) (" 'It has been proved, that in all forfeitures accruing at common law, nothing vests in the government until some legal step shall be taken for the legal assertion of its right, . . . ' "). To be sure, a legislature could adopt a statutory scheme that permits an agency under limited circumstances to administratively forfeit contraband without a judicial action. *See Dusenbery v. United States*, 534 U.S. 161 (2002). However, the Wisconsin Legislature has promulgated a scheme that expressly contemplates a judicial declaration that property constitutes contraband and is subject to forfeiture. *See* Wis. Stat. §§ 961.55-.555; 973.075-.076; *see also Jones v. State*, 226 Wis. 2d 565, 578, 594 N.W.2d 738 (1999). To permit a law enforcement agency to unilaterally declare money or other property contraband and forfeit it would circumvent the legislative preference for judicial involvement in forfeiture proceedings.

¶ 8. Absent a judicial finding that the money constitutes contraband and is subject to forfeiture, a law enforcement agency should dispose of the money as unclaimed or abandoned property. Wisconsin Stat. § 59.66(2) proscribes the procedure for disposing of unclaimed property in possession of county and municipal officials, including law enforcement officials.

Wisconsin Stat. ch. 177 governs disposal of unclaimed property in possession of a state agency. If no one claims the money, then a county or municipal law enforcement agency may not retain the money for its own use. Rather, it must transfer the money to the county treasurer pursuant to § 59.66(2). If at any time during the process for disposing of unclaimed money a person asserts an interest in it, the law enforcement agency may decline to return the money on the grounds that it may constitute contraband. Should the agency decline to return it, the person could seek its return through a proceeding under § 968.20. At that time, if the agency demonstrates its status as contraband and the court orders its forfeiture, the agency should then transfer it to the school fund.

### Conclusion

¶ 9. I conclude that a law enforcement agency may not retain unclaimed contraband money for its own use. In the absence of an asset forfeiture proceeding initiated by the state or a judicial determination that the money constitutes contraband, a local law enforcement agency should dispose of the money as unclaimed property pursuant to Wis. Stat. 59.66(2).

Sincerely,



J.B. Van Hollen  
Attorney General

JBVH:KSJ:DVL:kw:lkw



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN  
ATTORNEY GENERAL

Raymond P. Taffora  
Deputy Attorney General

114 East, State Capitol  
P.O. Box 7857  
Madison, WI 53707-7857  
608/266-1221  
TTY 1-800-947-3529

December 30, 2009

OAG—11—09

Mr. Winn S. Collins  
District Attorney  
Green Lake County  
Post Office Box 3188  
Green Lake, WI 54941

Dear Mr. Collins:

¶ 1. You have requested my opinion on the scope of 2007 Wisconsin Act 84 (“Act 84”), which became effective March 27, 2008.

**QUESTION PRESENTED**

¶ 2. You ask:

Does 2007 Wisconsin Act 84 prohibit a prosecutor from engaging in a settlement discussion with a defendant or defendant’s attorney related to a defendant reimbursing a police department for the actual expenses incurred by the department with respect to blood withdrawals following an OWI arrest?

Act 84 amended Wis. Stat. §§ 778.027 and 967.057. Those provisions, as amended, are set forth below:

Prosecution decisions based on contributions to certain organizations or agencies and government attorney conduct. A prosecutor or an attorney representing the state or a political subdivision of the state may not, in exchange for a person’s payment of money, other than restitution, to any organization or agency, dismiss or amend a citation or complaint alleging a violation that provides for a forfeiture or elect not to initiate an action or special proceeding based on such a violation.

Wis. Stat. § 778.027.

Prosecution decisions based on contributions to organizations and agencies. A prosecutor may not, in exchange for a person's payment of money, other than restitution, to any organization or agency, dismiss or amend a charge alleging a criminal offense or elect not to commence a criminal prosecution.

Wis. Stat. § 967.057.

### SHORT ANSWER

¶ 3. Your question is directed to discussions that may occur during settlement negotiations. However, Act 84 does not address negotiation or discussion. Rather, it addresses actual agreements which provide for certain specific prosecutorial acts that are provided "in exchange for" impermissible consideration. For the reasons that follow, it is my opinion that arrests for operating a motor vehicle under the influence of alcohol or other drugs ("OWI"), as proscribed by Wis. Stat. § 346.63, may *not* be resolved by a settlement agreement that would require the defendant to pay money to a law enforcement agency for the actual expenses incurred by the agency in a blood withdrawal and blood analysis of the defendant, if that settlement agreement also includes a promise by the prosecutor to dismiss or amend the charge, citation, or complaint or to forgo the initiation of a criminal prosecution, action, or special proceeding based on the violation. *See* Wis. Stat. §§ 778.027 and 967.057. It is also my opinion that Act 84 does not prohibit agreements involving reimbursement of blood withdrawal expenses if the agreement does not include a promise by the prosecutor to dismiss or amend the charge, citation, or complaint or to forgo the initiation of a criminal prosecution, action, or special proceeding based on the violation. *A fortiori*, a prosecutor may engage in negotiations relating to a defendant's reimbursement of blood withdrawal expenses, but a prosecutor may not, as a result of a defendant's payment or offer of payment of blood withdrawal expenses, dismiss or amend the charge, citation, or complaint or forgo the initiation of a criminal prosecution, action, or special proceeding based on the violation.

### ANALYSIS

¶ 4. All statutory interpretation begins with the text of the statute; if the meaning of the statute is plain, the inquiry ordinarily stops there. *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶ 15, 312 Wis. 2d 1, 754 N.W.2d 439. It is my opinion that the plain language of Wis. Stat. §§ 778.027 and 967.057, as amended by Act 84, clearly and unambiguously precludes a prosecutor or government attorney from dismissing, amending, or forgoing prosecution of a criminal or civil forfeiture action, in exchange for the payment of money to an organization or agency. The phrase "organization or agency," as used in these provisions, including in the OWI statutes, is properly understood to encompass a police department or sheriff's department, which are commonly referred to as law-enforcement "agencies." *See, e.g.*, Wis. Stat. § 343.305; *see also Black's Law Dictionary* 67 (8th ed. 2004) (defining "agency" as "[a] governmental body with the authority to

implement and administer particular legislation”). Likewise, “a person’s payment of money” would include reimbursement of blood withdrawal and analysis costs.

¶ 5. Although Wis. Stat. §§ 778.027 and 967.057 do not preclude a defendant’s agreement to pay “restitution” under Wis. Stat. § 973.20(1r) to a “victim” of a “[c]rime considered at [the defendant’s] sentencing” . . . ,” Wis. Stat. § 973.20(1g)(a), the cost to a law-enforcement agency of blood withdrawal and blood analysis stemming from an OWI arrest is *not* recoverable as “restitution,” because the agency is not a crime “victim” for purposes of incurring such cost. *Cf., e.g., State v. Ortiz*, 2001 WI App 215, ¶¶ 20, 23, 247 Wis. 2d 836, 634 N.W.2d 860 (overtime costs of SWAT team and negotiating team not assessable as restitution); *State v. Storlie*, 2002 WI App 163, ¶¶ 11-12, 256 Wis. 2d 500, 647 N.W.2d 926 (cost of “stop sticks” used to apprehend defendant not assessable as restitution).

¶ 6. The legislative history confirms this plain reading interpretation of Act 84. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 51, 271 Wis. 2d 633, 681 N.W.2d 110 (stating legislative history may be properly consulted to confirm or verify a plain-meaning interpretation). Before Act 84 was enacted, Wis. Stat. §§ 778.027 and 967.057 only barred a prosecutor from eliciting a defendant’s contributions to either a private nonprofit crime-prevention organization or a law enforcement agency’s crime-prevention fund. At the time, circuit courts had authority to require a convicted defendant “to make a reasonable contribution surcharge” to such entities when taxing costs, if the defendant possessed “the financial ability” to do so. Wis. Stat. § 973.06(1)(f)1. (2005-06); *see also* Wis. Stat. §§ 753.40 and 973.09(1x) (2005-06) (also governing the circuit court’s authority on this subject).

¶ 7. When the Legislature enacted Act 84 and thereby expanded the bar on settlement agreements, it also expressly *repealed* the statutes that gave a circuit court the authority in criminal actions to order a convicted defendant to make a reasonable contribution surcharge to a crime-prevention organization or a law enforcement agency’s crime-prevention fund. The Legislative Reference Bureau analysis to 2007 Senate Bill 244, which became Act 84, describes the current revisions of Wis. Stat. §§ 778.027 and 967.027 as follows:

Current law prohibits a prosecutor from dismissing or amending a criminal charge in exchange for a person’s payment of a contribution to a crime prevention organization or a law enforcement agency’s crime prevention fund. Current law similarly prohibits a prosecutor or an attorney representing the state or a local government from dismissing or amending a citation or complaint in a civil case in exchange for such a payment if the citation or complaint alleges a violation punishable by a forfeiture. This bill extends the scope of these prohibitions so that they apply to a decision by a prosecutor or other government attorney not to commence a criminal prosecution or an action for a forfeiture, not just to a decision to dismiss or amend a charge, citation, or complaint that is already filed. ***The bill also extends the scope of the prohibitions so that they apply in cases***

***involving payments other than restitution to any type of organization or agency, not just those involved in crime prevention.***

Under the circumstances, it is clear that one of the specific purposes of Act 84 was to stop payments to local law enforcement agencies in exchange for (1) either not bringing a criminal or forfeiture action, or (2) dismissing or amending a charge citation or complaint that has already been filed.

¶ 8. The plain language of Act 84 also leads to my second conclusion, which is that it does not apply to a situation where a prosecutor is not negotiating and agreeing to forego a criminal or forfeiture action or dismiss or amend a charge, citation, or complaint that has been filed. The Legislature described three specific prosecutorial acts that may not be promised in exchange for a payment of money. Those acts are: (1) dismissal of a charge, citation, or complaint; (2) amendment of a charge, citation, or complaint; and (3) an election not to commence a criminal or civil action. Because sentencing recommendations are not mentioned, they are not prohibited by Act 84. *See, e.g., State v. Popenhagen*, 2008 WI 55, ¶ 43 n.23, 309 Wis. 2d 601, 749 N.W.2d 611 (*Expressio unius est exclusio alterius* is a rule of statutory interpretation which means that the express mention of one matter in a statute excludes other similar matters not mentioned. The rule applies “when a statute lists, for example, persons, things, or forms of conduct”).

¶ 9. Therefore, as long as a prosecutor or government attorney does not agree to amend, dismiss, or forgo issuing a charge, citation, or complaint, he or she may discuss and enter into an agreement in which the defendant promises to reimburse the costs of blood withdrawal and analysis. Such an agreement may, for example, be negotiated and entered into with respect to a prosecutor’s sentence or penalty recommendation in an OWI case (or any other criminal case) in

exchange for the defendant's agreement to reimburse a law enforcement agency for the actual expenses incurred by the agency in a blood withdrawal and blood analysis.<sup>1</sup>

¶ 10. Although other potential limitations on prosecutorial agreements are outside the scope of this opinion, it is important to recognize that such limits likely exist and must be considered by a prosecutor. For example, prosecutors should be mindful of ethical rules and laws relating to the use of public positions for private benefit. Likewise, prosecutors should be mindful of the requirements for entering into a valid plea agreement that will not be subject to a collateral challenge. Finally, Act 84 appears to reflect a public policy judgment that favors the equal treatment of defendants by prosecutors, regardless of wealth or indigency. Thus, a prosecutor may wish to consider this underlying policy concern when exercising his or her discretion.

---

<sup>1</sup>While you have not inquired as to the court's ability to make the defendant's offer to pay for blood withdrawal and analysis enforceable, my opinion should not be construed as holding a court, as part of its sentencing powers under Wis. Stat. ch. 973, may order the defendant to make such a payment. As I have stated elsewhere in this opinion, these moneys are not restitution. *See supra*, ¶ 5. A prosecutor might ask the trial court, at sentencing, to tax a convicted defendant for such costs—under either Wis. Stat. § 973.06(1)(a) or 973.06(1)(c). But whether taxation of such costs is permissible under these provisions is an open question. Under Wis. Stat. § 973.06(1)(a), a sentencing court may tax a convicted defendant for “[t]he necessary disbursements and fees of officers allowed by law and incurred in connection with the arrest, preliminary examination and trial of the defendant . . . .” To the extent that OWI blood analysis expenses are paid by a law enforcement agency to a private medical facility, they may arguably qualify under this subsection. Under Wis. Stat. § 973.06(1)(c), a sentencing court may tax a convicted defendant for the “[f]ees and disbursements allowed by the court to expert witnesses,” a provision that has been construed to cover the cost of a sexual assault examination done at a private hospital, even though no expert witness testified as to the results, *see State v. Rohe*, 230 Wis. 2d 294, 297-300, 602 N.W.2d 125 (Ct. App. 1999), and the cost of DNA analysis at a private laboratory. *See State v. Beiersdorf*, 208 Wis. 2d 492, 504-08, 561 N.W.2d 749 (Ct. App. 1997).

### CONCLUSION

¶ 11. In summary, it is my opinion that Act 84, codified at Wis. Stat. §§ 778.027 and 967.027, does not allow prosecutors to resolve OWI charges by entering into an agreement to dismiss or amend a charge, citation, or complaint or to forgo the initiation of a criminal prosecution, action, or special proceeding in exchange for a defendant's agreement to reimburse a law enforcement agency for blood withdrawal and analysis expenses. However, it does not preclude agreements where a defendant provides reimbursement in exchange for other consideration.

Sincerely,



J.B. Van Hollen  
Attorney General

JBVH:JMF:cla