



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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January 2, 2015

OAG—01—15

Jacob C. Brunette  
Clark County Corporation Counsel  
517 Court Street, Room 206  
Neillsville, WI 54456

Dear Mr. Brunette:

¶ 1. You ask for an opinion about whether a town can assess a fire protection special charge in the absence of an actual fire call, and whether it can assess a special charge against a county, a tax-exempt entity.

¶ 2. I conclude that, pursuant to Wis. Stat. § 60.55(2)(b), a town may assess a fire protection special charge for making fire protection services generally available, and not based on the incidence of fire calls at a property. I further conclude that the special charge is a fee, not a tax. Its primary purpose is to recover costs for fire protection services, supervision or regulation, not to obtain general revenue for the government. Therefore, the special charge may be assessed against the county. I decline to answer your third question concerning the purpose for which the town may use the special charge funds because you have provided no facts to indicate that the town is using these funds for an improper purpose.

¶ 3. You explain that a town in Clark County has adopted an ordinance that charges all real property within the town a fire protection special charge using a fee schedule based on the size and type of property (called a domestic user equivalent). The ordinance was adopted pursuant to Wis. Stat. §§ 60.55, 66.0301, and 66.0627 to provide funding for fire protection within the town. The annual charge varies depending on the town's annual obligation to the fire commission. The ordinance also indicates that delinquent special charges will become a lien on the real property. The fire commission charges a fire call fee in addition to the fire protection special charge. You note that Clark County has received bills for fire protection pursuant to the ordinance.

¶ 4. The ordinance at issue was adopted, in part, pursuant to Wis. Stat. § 60.55(2)(b), which allows a town to fund fire protection by charging all property owners a fee:

The town board may:

....

(b) Charge property owners a fee for the cost of fire protection provided to their property under sub. (1)(a) according to a written schedule established by the town board.

Wis. Stat. § 60.55(2)(b). The cross reference to subsection (1)(a) refers to the town board's authority to "provide for fire protection for the town." You ask if this provision allows a town to assess a special charge against a property owner if it makes no fire call to that property. I conclude that it does.

¶ 5. Statutory interpretation begins with the text of the statute, and if the meaning of the text is clear, the inquiry generally ends there. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Because the phrase "fire protection" is not defined in the statute, we accord the phrase its common, ordinary and accepted meaning by consulting a dictionary. *See Xcel Energy Servs., Inc. v. Labor & Indus. Review Comm'n*, 2013 WI 64, ¶ 30, 349 Wis. 2d 234, 833 N.W.2d 665 (determining ordinary meaning of undefined words, appropriate to consult dictionary to aid in statutory construction). Statutory language should be read "to give reasonable effect to every word, in order to avoid surplusage." *See Kalal*, 271 Wis. 2d 633, ¶ 46.

¶ 6. "Protection" is defined as "the act of protecting," "the state or fact of being protected," and "shelter from danger or harm." *Webster's Third New International Dictionary* 1822 (1986). The legislature's use of the term "protection" in the statute suggests that it was contemplating the assessment of fees for general fire safety rather than for individual fire calls actually made.

¶ 7. The mechanism created by the legislature to assess each property owner's charge confirms that a town may charge for fire protection services regardless of whether a fire call is made. The statute provides for fire protection "according to a written schedule established by the town board." Wis. Stat. § 60.55(2)(b). A "written schedule" contemplates a list of graduated fees, as opposed to a per-use fee. *See Webster's Third New International Dictionary* 2028 (1986) (defining "schedule" as a "list"). Here, the town's fee schedule is based on the size and type of real property. If the statute were intended to allow a charge only for fire

calls actually made, the town would not have an ability to calculate the charges based on "a written schedule." The "written schedule" language would be superfluous.

¶ 8. This interpretation of the statutory language is consistent with the statutory history. The current language of Wis. Stat. § 60.55(2)(b) was created by 1987 Wis. Act 399, made effective May 17, 1988. 1987 Wis. Act 399, § 200j. Before that time, section 60.55(2)(b) allowed a town to fund fire protection by charging property owners a "fee for the cost of fire calls made to their property." Wis. Stat. § 60.55(2)(b) (1985-86).

¶ 9. In *Town of Janesville v. Rock County*, 153 Wis. 2d 538, 451 N.W.2d 436 (Ct. App. 1989), a town sought to collect fire protection charges from a county under the previous version of Wis. Stat. § 60.55(2)(b) (1985-86). The Town of Janesville argued that the statute authorized it to collect fees based on property owned, regardless of fire calls made. By the time the case reached the appellate court, the new statute had been passed. Although the new statute did not apply to the charges at issue, the Town argued that it was merely a clarification of the old law. *Id.* at 541 n.2.

¶ 10. The court concluded that the former version of Wis. Stat. § 60.55(2)(b) permitted the town to charge the county only for fire calls made. In so concluding, the court rejected the notion that the "fire protection" language in the new statute was merely a clarification of the old "fire calls made." The court indicated that the new provision removed the limitation to charge only for fire calls actually made: "The present language regarding a schedule of fees and the removal of the 'per call' limitation are substantive changes with no retroactive effect." *Id.* *Town of Janesville* supports the conclusion that, when the legislature changed the law, it intended to permit a town to assess a fee for the costs of fire protection services generally, even if no fire calls have been made to that property.

¶ 11. The statute's legislative history confirms that plain-meaning interpretation. *See Kalal*, 271 Wis. 2d 633, ¶ 51 (legislative history may be consulted to confirm a plain-meaning interpretation). I have reviewed the drafting records for the relevant statutory change. The analysis by the Legislative Reference Bureau, which is included in the drafting records, reads in relevant part:

Under current law, towns may charge property owners a fee for fire calls made to their property. This bill authorizes towns to charge property owners a fee for fire protection provided to their property.

Analysis by the Legislative Reference Bureau, LRB-2980/1, LRB Drafting File to 1987 Wis. Act 399. This analysis emphasizes that the new statute is more than just a clarification of the old statute. The analysis treats the term "fire protection" as permitting charges related to the costs of fire protection as distinct from the cost of a fire call at a particular property.

¶ 12. Therefore, I conclude that Wis. Stat. § 60.55(2)(b) allows a town to assess a fire protection special charge for making fire protection services available without actually making a fire call. Because I conclude that the ordinance was properly adopted under section 60.55(2)(b), I do not address whether it was legally implemented under section 66.0627(2).

¶ 13. You ask whether a town may assess this special charge against a county. County property is exempt from property tax, but that exemption does not extend to fees. See Wis. Stat. § 70.11(2). Thus, whether a town can assess the special charge against a county depends on whether it is a tax imposed on property owners or a fee assessed for services provided.

¶ 14. "A tax is an enforcement of proportional contributions from persons and property, imposed by a state or municipality in its government capacity for the support of its government and its public needs." *City of River Falls v. St. Bridget's Catholic Church of River Falls*, 182 Wis. 2d 436, 441, 513 N.W.2d 673 (Ct. App. 1994) (citing *Buse v. Smith*, 74 Wis. 2d 550, 575, 247 N.W.2d 141 (1976)). The *River Falls* court explained the difference between taxes and fees: "the primary purpose of a tax is to obtain revenue for the government, while the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of certain activities." *Id.* at 441-42 (citing *State v. Jackman*, 60 Wis. 2d 700, 707, 211 N.W.2d 480 (1973)).

¶ 15. The legislature appears to have recognized this distinction in drafting Wis. Stat. § 60.55(2), creating separate funding mechanisms designated "taxes" or "fees." "One of the basic tenets of statutory interpretation is that the legislature is presumed to act with full knowledge of existing laws, including prior statutes." *Milwaukee Fed'n of Teachers, Local No. 252 v. Wis. Emp't Relations Comm'n*, 83 Wis. 2d 588, 598, 266 N.W.2d 314 (1978). Section 60.55(2) gives the town four options for funding fire protection services. Two specifically authorize the town to levy taxes to pay for those services. See § 60.55(2)(c), (d). In contrast, section 60.55(2)(b) allows the town to "[c]harge property owners a fee for the cost of fire protection." The legislature presumably provided these funding options with full knowledge of the difference between a tax and a fee. It seems reasonable that the

legislature would provide a mechanism for towns to recover the cost of fire protection services from counties and other tax-exempt entities. The fire protection fee explicitly set forth in section 60.55(2)(b) provides such a mechanism.

¶ 16. The legislature's use of the term "fee" does not end the inquiry; the amount charged must also function as a fee. Importantly, a fee is not limited to charges for "commodities actually consumed." *City of River Falls*, 182 Wis. 2d at 442. In *City of River Falls*, a church appealed a judgment ordering it to pay the city charges associated with the cost of providing water for public fire protection under Wis. Stat. § 196.03(3)(b) (1993-94). *Id.* at 438. Among the services the city provided were water production, storage, and transmission for public fire protection. *Id.* at 439. The city elected to collect fire protection charges as part of each utility customer's water bill as calculated by the customer's property value, and the church argued that the statute improperly imposed a tax, not a fee, on tax-exempt properties. *Id.* at 438-39, 441-43.

¶ 17. The court of appeals concluded that the public fire protection charge, which covered the expense of making water available, storing the water, and ensuring the water would be delivered in case it was needed to fight fires, was a fee, not a tax. The court discussed several relevant factors in assessing whether a special charge was a fee or a tax, including whether the statute's administration was an integral part of the property taxing process, whether the municipality was carrying out a governmental or a proprietary function, and whether nonpayment of the charge resulted in a lien on the property. *Id.* at 442-43. Ultimately, however, the court emphasized that the dispositive question for determining whether a charge is a fee or a tax is whether the charge raises revenue or recoups costs for "services, supervision or regulation." *Id.* at 442.

¶ 18. Here, the legislature classified the special charge under Wis. Stat. § 60.55(2)(b) as a fee, not a tax. Based on the information you have supplied, the town has adopted an ordinance pursuant to this statute which has as its primary purpose the recoupment of services to cover the expenses of providing fire protection to property in the community and is not designed to raise general revenue. Although the charge might have some of the qualities of a tax discussed by the *City of River Falls* court, such as the imposition of a lien for nonpayment, on balance it appears to be a fee not a tax.

¶ 19. Finally, I decline to answer your third question concerning the purpose for which the town may use the fire protection special charge funds. As discussed above, Wis. Stat. § 60.55(2)(b) allows a town to charge a fee for making fire

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protection generally available. And section 66.0627(2) permits the town to "impose a special charge against real property for current services rendered by allocating all or part of the cost of the service to the property served." You have not provided any facts which indicate that the town is not abiding by these standards. Accordingly, this question is premature.

¶ 20. I conclude that Wis. Stat. § 60.55(2)(b) authorizes a town to assess a charge for fire protection services based on the property owned, even if no fire calls are made. The charge is a fee and may be assessed against tax-exempt entities.

Sincerely,



J.B. VAN HOLLEN  
Attorney General

JBV:KZK:js



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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January 2, 2015

OAG—02—15

Mr. Ismael R. Ozanne  
District Attorney  
Dane County Courthouse  
215 South Hamilton Street, Room 3000  
Madison, WI 53703-3297

Dear Mr. Ozanne:

¶ 1. You ask whether the Wisconsin Department of Corrections (“DOC”) may lawfully collect supervision fees from an offender pursuant to Wis. Stat. § 304.074 before the offender has paid court-ordered restitution in full. I conclude that the answer is yes.

¶ 2. The Wisconsin Constitution provides for restitution only insofar as the Legislature confers such rights through statute. The Legislature makes restitution available to crime victims under Wis. Stat. § 973.20 and other statutes, but crime victims are not guaranteed restitution in every instance. Wisconsin Stat. § 973.20(12)(b) makes clear that restitution payments take priority over specific statutory fees, surcharges, fines, and costs, but the priority scheme does not include supervision fees under Wis. Stat. § 304.074. Wisconsin Stat. § 304.074 and related administrative code provisions also suggest that DOC may collect supervision fees when court-ordered restitution has not been paid in full. I expand on each of these points below.

¶ 3. An offender may be required to pay certain financial obligations under a court order or state statute. These obligations include a fine imposed at sentencing, or certain disbursements and fees of officers incurred in connection with the offender’s arrest, preliminary examination, and trial. *See, e.g.*, Wis. Stat. §§ 973.05 and 973.06(1)(a). A court may also order the offender to make full or partial restitution under Wis. Stat. § 973.20(1r). In addition to these obligations, if an offender is on probation, parole, or extended supervision, DOC must charge a supervision fee to partially reimburse DOC for the costs of providing supervision and services. Wis. Stat. § 304.074(2).

¶ 4. You ask whether restitution payments must be prioritized over the supervision fee under Wis. Stat. § 304.074. No source of authority requires this. The Wisconsin Constitution requires the state to ensure crime victims have certain privileges and protections as provided by law, including restitution. Wis. Const. art. I, § 9m. In accordance with the Wisconsin Constitution, restitution is available by statute. The section in the Wisconsin statutes entitled “Basic bill of rights for victims and witnesses” states that crime victims have the right “[t]o restitution, as provided under ss. 938.245(2)(a)5., . . . and 973.20.” Wis. Stat. § 950.04(1v)(g). In turn, Wis. Stat. § 973.20(1r) provides: “[w]hen imposing sentence or ordering probation . . . the court . . . shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing . . . unless the court finds substantial reason not to do so and states the reason on the record.” As the Wisconsin Supreme Court emphasizes, “full or partial restitution is mandatory under the statute unless the court finds substantial reason not to do so and states the reason on the record.” *State v. Fernandez*, 2009 WI 29, ¶ 21, 316 Wis. 2d 598, 764 N.W.2d 509 (internal quotations omitted). The fact that the court can order partial restitution, full restitution, or (if a “substantial” reason exists) no restitution at all demonstrates that a victim’s right to restitution is not absolute.

¶ 5. The statutes prioritize payment of restitution over certain statutory fines, costs, fees, and surcharges, but court-ordered restitution is not given priority over supervision fees under Wis. Stat. § 304.074. “If the court orders restitution in addition to the payment of fines, costs, fees, and surcharges under ss. 973.05 and 973.06 and ch. 814, it shall set the amount of fines, costs, fees, and surcharges in conjunction with the amount of restitution and issue a single order, signed by the judge, covering all of the payments.” Wis. Stat. § 973.20(12)(a). Wisconsin Stat. § 973.20(12)(b) goes on to explain the priority in which those court-ordered payments must be made:

Except as provided in par. (c), payments shall be applied first to satisfy the ordered restitution in full, then to pay any fines or surcharges under s. 973.05, then to pay costs, fees, and surcharges under ch. 814 other than attorney fees and finally to reimburse county or state costs of legal representation.

While this provision prioritizes restitution over certain specific fees and costs, it does not address supervision fees under Wis. Stat. § 304.074.



¶ 6. The only fees that Wis. Stat. § 973.20(12)(b) refers to are “costs, fees, and surcharges” under Wis. Stat. ch. 814. Wisconsin Stat. ch. 814 addresses costs allowed in civil actions and special proceedings, court fees in criminal and civil actions, and various surcharges. Court fees under Wis. Stat. ch. 814 primarily address fees associated with court administrative matters such as filing documents and transmitting documents on appeal. Supervision fees under Wis. Stat. § 304.074 are not among these fees; they partially reimburse DOC for the costs of providing supervision and services to offenders. Wisconsin Stat. § 973.20(12) thus does not prohibit supervision fees from being collected before court-ordered restitution is paid in full.

¶ 7. The statute governing supervision fees also does not require DOC to prioritize restitution payments. Wisconsin Stat. § 304.074 requires DOC to charge a supervision fee. The statute contains several specific exceptions where DOC may use discretion in not charging the fee: (1) the offender is unemployed; (2) the offender is pursuing a full-time course of instruction approved by DOC; (3) the offender is undergoing treatment approved by DOC and is unable to work; and (4) the offender has a statement from a physician certifying to DOC that the offender should be excused from working for medical reasons. Wis. Stat. § 304.074(3). These exceptions do not include a reference to the offender’s restitution obligations. Thus, there is no indication that the Legislature intended supervision fees to be placed on hold until court-ordered restitution is paid in full.

¶ 8. Similarly, the Wisconsin administrative code indicates that DOC may collect supervision fees prior to court-ordered restitution being paid in full. Wisconsin Admin. Code § DOC 328.07 governs the establishment and collection of supervision fees. DOC is charged with recording all supervision fees paid by the offender. Wis. Admin. Code § DOC 328.07(4)(a). If the offender has paid in advance for a month that the offender was not under supervision, then DOC “shall apply the refund to restitution ordered by the court or any other outstanding financial obligations required by the department or the court.” Wis. Admin. Code § DOC 328.07(6)(c). This provision indicates that DOC may collect supervision fees even when restitution obligations are outstanding, but any supervision fees paid in excess are to be paid toward restitution.

¶ 9. In contrast, the administrative code provision governing DOC’s collection of payments earmarked for court-ordered obligations requires DOC to apply payments according to the court order and statute. Wisconsin Admin. Code § DOC 328.08(1) states that, when an offender sends a court-ordered payment to DOC, the payment is transmitted to the DOC cashier for deposit in the offender’s

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account. The cashier "shall disburse funds from the account in accordance with the court order or state statute." Wis. Admin. Code § DOC 328.08(1). Under the administrative code, this process is separate from DOC's collection and disbursement of supervision fees.

¶ 10. Neither the Wisconsin Constitution, statutes, nor the administrative code prohibits supervision fees from being collected when court-ordered restitution obligations remain outstanding. Therefore, DOC may lawfully collect supervision fees from an offender before court-ordered restitution is paid in full.

Sincerely,

A handwritten signature in black ink, appearing to read "J.B. Van Hollen". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

J.B. VAN HOLLEN  
Attorney General

JBV:JLV:tls



STATE OF WISCONSIN  
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August 17, 2015

OAG – 03—15

Ms. Leanna Samardich  
Price County  
Assistant Corporation Counsel  
Post Office Box 88  
Phillips, WI 54555-0088

Dear Ms. Samardich:

¶ 1. A Long-Term Care District is an independent local unit of government created by a single county or combination of counties<sup>1</sup> to operate either a Care Management Organization or Resource Center for the provision of family care. You seek my opinion about the jurisdiction, formation, and governance of Long-Term Care Districts. You ask which statute governs the jurisdiction of a District operating a Care Management Organization (CMO) in a county not a member of the District; whether a District may provide CMO services to a non-member county; and whether the District's governing board must include representatives from every county within the District.

¶ 2. I conclude that the jurisdiction of all Long-Term Care Districts is governed by Wis. Stat. § 46.2895(2). I further conclude that a Long-Term Care District may not offer CMO services to a county beyond the District's jurisdiction and membership. Finally, I conclude that every member county of a District must be represented on the District's governing board.

¶ 3. You report that three Wisconsin counties created a Long-Term Care District. The District entered a five-year contract with the Department of Health Services (DHS) to operate a Care Management Organization that would serve the three member counties. A couple of years later, the District extended its CMO

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<sup>1</sup>They may also be created by a tribe, band, or combination of counties, tribes, or bands. Wis. Stat. § 46.2895(1)(a).

services to two non-member counties. In 2014, the District extended its reach still further to serve eleven additional non-member counties. As far as you know, the District took no formal or official action to expand its jurisdiction or increase its membership beyond the original three counties when it extended its CMO services to these thirteen non-member counties.

¶ 4. Your letter does not describe the original composition of the District's governing board. However, you explain that after it extended its CMO services to the first two non-member counties, the board consisted of two representatives from each of the five (three member and two non-member) counties served and one at-large representative for a total of eleven members. Later, when the District's CMO took on another eleven non-member counties, the board's composition changed yet again. In that iteration, the board included one representative from each of the first five counties, five members from the group of eleven new counties, and one at-large representative for a total of eleven board members.

¶ 5. The jurisdiction of a Long-Term Care District is set out in Wis. Stat. § 46.2895(2), which states: "A long-term care district's jurisdiction is the geographical area of the county or counties that created the long-term care district and the geographic area of the reservation of, or lands held in trust for, any tribe or band that created the long-term care district." Wisconsin Stat. § 46.284, which outlines how a Care Management Organization shall be created, financed, certified, funded, and governed, does not address the jurisdiction of Long-Term Care Districts. Section 46.2895(2) explicitly and unambiguously limits a District's jurisdiction to the county or counties that created it. In other words, the District has no jurisdiction in any county that is not a member of the District.

¶ 6. Because of the statutory limitation on its jurisdiction, a Long-Term Care District may not provide CMO services to a non-member county. If the District wants to extend its CMO services to a non-member county, the non-member county must become a member of the District. The statute addresses the withdrawal or removal of a county from a District, but does not provide procedures for the inclusion or incorporation of a new county into a District. *See* Wis. Stat. § 46.2895(14). In the absence of a provision explaining how new counties may be added to an existing District, I conclude that the provisions applicable to counties creating a new District are applicable to new counties joining an existing District.

¶ 7. Wisconsin Stat. § 46.2895(1)(a) directs how a Long-Term Care District is to be created. It requires each participating county (or tribe or band) to adopt an enabling resolution and file copies of the resolution with the Secretaries of the

Departments of Administration, Health Services, and Revenue. Thus, a county joining an existing District must adopt an enabling resolution and file a copy of it with the specified department secretaries.

¶ 8. The statutes do not require the creation of a wholly “new” District as you suggest. However, the counties that created the original District may be required to take one or two actions when new counties join. First, the expansion of the District’s membership may correspond to a change in the District’s “primary purpose” as defined by Wis. Stat. § 46.2895(1)(a)1.b. “A long-term care district may change its primary purpose” if all the creating counties “adopt a resolution approving the change in primary purpose.” Wis. Stat. § 46.2895(1)(e). Thus, if the expansion of the District’s membership also results in a change in its primary purpose (such as a shift from a Care Management Organization to a Resource Center), a resolution approving the change must be adopted by the creating counties. Second, the expansion of the District’s membership may result in a reconfiguration of its governing board. If so, each county will be required to adopt and file a new enabling resolution specifying the make-up of the reconfigured board. See Wis. Stat. § 46.2895(1)(a)1.c.

¶ 9. A District’s governing board must include representatives from each of its member counties. This requirement is implicit in the statute. See Wis. Stat. § 46.2895(1)(a)1.c. (enabling resolution must specify “how many members shall be appointed by each county”); § 46.2895(3)(a) (county board of supervisors, county executive, or county administrator “shall appoint the long-term care district board members whom the county is allotted”); § 46.2895(3)(b)3. (board membership “shall reflect the ethnic and economic diversity in the jurisdiction” of the District); § 46.2895(3)(b)5. (“[o]nly individuals who reside within the jurisdiction of the long-term care district may serve as members of the long-term care district board”). I assume that if a District expands to include additional counties, each new member will be entitled to representation on the governing board. I find nothing in the statute that would support the exclusion of new member counties from the governing board.<sup>2</sup>

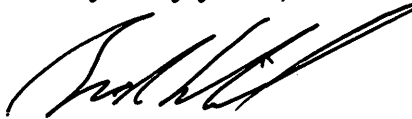
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<sup>2</sup>You note that Wis. Stat. § 46.284(6), describing the composition of a Care Management Organization’s governing board, and Wis. Stat. § 48.2895(3)(b), describing the composition of a Long-Term Care District’s governing board, are substantively similar. In fact, § 48.2895(3)(b) has more requirements than § 45.284(6) does. You also note that, because the statutory composition requirements for a District’s governing board satisfy the requirements for a CMO’s governing board, many CMOs use their District’s governing board as their own governing board. This seems reasonable to me. However, a CMO’s reliance on its District’s governing board does not illuminate any of the questions presented here.

¶ 10. The statute does not direct how District governing boards are to be constituted. It does not require or even suggest that each member county have equal representation. It leaves these decisions to the participating counties. According to the statute, each county's enabling resolution must "[s]pecif[y] the number of individuals who shall be appointed as members of the long-term care district board, the length of their terms, and, if the long-term care district is created by more than one county or tribe or band, how many members shall be appointed by each county or tribe or band." Wis. Stat. § 46.2895(1)(a)1.c. Thus, the statute allows the participating counties to determine how each of them will be represented on the governing board.

¶ 11. I conclude that jurisdiction of a Long-Term Care District is governed by Wis. Stat. § 46.2895(2) and is limited to the counties that are members of the District. Before a District may provide CMO services to a county beyond its jurisdiction, that county must become a member of the District. New counties joining a District, like the original creating members, are entitled to representation on the District's governing board.

Very truly yours,



BRAD D. SCHIMEL  
Attorney General

BDS:MFJW:mlk



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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November 12, 2015

OAG-04-15

The Honorable Robin Vos  
Chairperson  
Assembly Committee on Organization  
211 West, State Capitol  
Madison, WI 53702

Dear Representative Vos:

¶ 1. The Wisconsin State Assembly, through your request as Chair of the Assembly Committee on Organization, asks for my opinion on issues under the emergency detention statute related to (1) the right of an individual in custody to make his or her own healthcare decisions; (2) the authority of a police officer to make healthcare decisions for an individual in the officer's custody; and (3) the duty of a healthcare provider to the individual and public when the officer and county do not proceed with an emergency detention.<sup>1</sup> See Wis. Stat. § 51.15 (2013-14) (emergency detention).

¶ 2. Emergency detention provides treatment to mentally ill, drug dependent, and developmentally disabled individuals when there is reason to believe that the individual is unable or unwilling to cooperate with voluntary treatment. Wis. Stat. § 51.15(1)(ag). A police officer may take such an individual into custody when the officer has cause to believe that the individual exhibits a substantial probability of physical harm, impairment, or injury to himself, herself, or another person. Wis. Stat. § 51.15(1)(ar). A police officer also may take into custody an individual with a mental illness when the individual exhibits a substantial probability that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue because the individual is unable to satisfy basic needs. Wis. Stat. § 51.15(1)(ar)4.

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<sup>1</sup>The Assembly's request originates from recommendations by the Speaker's Task Force on Mental Health (see Letter from The Speaker's Task Force on Mental Health, to Speaker Robin Vos (Oct. 9, 2013), <http://legis.wisconsin.gov/documents/MentalHealthReport.pdf>).

Once in custody, an individual remains within the custody of the officer until the individual is admitted to one of the approved facilities enumerated by statute. 81 Op. Att’y Gen. 110, 113 (1994) (citing Wis. Stat. § 51.15(2)). When an individual in custody experiences a medical condition, an officer may need to take the individual to a hospital emergency department for treatment by a healthcare provider. But not every hospital is an approved facility for emergency detention under the statute. 81 Op. Att’y Gen. 110. So the officer cannot relinquish custody of an individual to the hospital emergency department if it is an unapproved facility. *Id.* at 110-13; see *Sherry v. Salvo*, 205 Wis. 2d 14, 28-29, 555 N.W.2d 402 (Ct. App. 1996). Custody of the individual remains with the officer until arrival at a facility approved for emergency detention evaluation, diagnosis, and treatment. Wis. Stat. § 51.15(2), (3), and (8).

¶ 3. The Assembly inquires about an individual’s right, a police officer’s authority, and a healthcare provider’s duty prior to custodial transfer to an approved facility. I conclude that an individual in custody has the right to make decisions regarding his or her own health care subject to certain exceptions. I also conclude that an officer does not have the authority to make healthcare decisions for the individual in custody. I further conclude that a healthcare provider has a duty to take whatever steps are reasonably necessary to prevent harm to a patient’s individual self and others.

¶ 4. The Assembly asks whether an individual has the right to make his or her own healthcare decisions while in the officer’s custody under an emergency detention. Wisconsin Stat. ch. 51 explicitly rejects an implication that a person needing emergency detention is incompetent. Wis. Stat. § 51.59. So the question assumes that the individual in custody is legally competent. *See id.*

¶ 5. Individuals have the right of self-determination, described by the U.S. Supreme Court as “the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891), *quoted in In re Guardianship of L.W.*, 167 Wis. 2d 53, 68, 482 N.W.2d 60 (1992). The right of self-determination later expanded “to create the doctrine of informed consent: Every human being of adult years and sound mind has a right to determine what shall be done with his own body.” *Guardianship of L.W.*, 167 Wis. 2d at 68 (citation omitted) (internal quotation marks omitted). Wisconsin has codified the doctrine of informed consent. Wis. Stat. § 448.30.



¶ 6. The doctrine of informed consent is the individual's right to consent and, conversely, the right to refuse medical treatment. *Guardianship of L.W.*, 167 Wis. 2d at 68. Courts and the Legislature "have embraced the notion that although the physician is the expert, the patient should have the opportunity to understand what is happening to his or her body and autonomously and intelligently consent or refuse to consent to proposed medical care." *Jandre v. Wis. Injured Patients & Families Comp. Fund*, 2012 WI 39, ¶ 12, 340 Wis. 2d 31, 813 N.W.2d 627; cf. 2013 Wisconsin Act 111 (amending Wis. Stat. § 448.30 after *Jandre*).

¶ 7. The right of informed consent recognizes that an individual does not possess absolute autonomy over his or her body. See *Scaria v. St. Paul Fire & Marine Ins. Co.*, 68 Wis. 2d 1, 12-13, 227 N.W.2d 647 (1975). For example, informed consent does not extend to an individual incapable of consenting. Wis. Stat. § 448.30(6). But the law presumes a person's right to informed consent absent a statutory provision to the contrary.

¶ 8. An individual in custody who is an adult of sound mind retains the right of informed consent. *Guardianship of L.W.*, 167 Wis. 2d at 68. The Wisconsin Supreme Court has recognized that precommitment detainees have a right of informed consent. *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 735, 416 N.W.2d 883 (1987) (citing Wis. Stat. § 51.15). In *Jones*, the court found an irrational disparity in the statutes for granting the right of informed consent to precommitment detainees, while depriving involuntarily committed individuals of such a right. *Id.* at 733-34. Although subsequent statutory amendments superseded portions of the decision, *Jones* remains instructive. See *State v. Anthony D.B.*, 2000 WI 94, ¶ 18, 237 Wis. 2d 1, 614 N.W.2d 435 ("the legislature repealed and re-created [Wis. Stat.] § 51.61(1)(g) in 1987 Wis. Act 366"). The emergency detention statute authorizes an individual to refuse medication and treatment after arrival at the approved facility. Wis. Stat. § 51.15(8), cited in *Jones*, 141 Wis. 2d at 734. The statute does not expressly address consent and the right to refuse medication or treatment prior to arrival at an approved facility for an individual in custody. Wis. Stat. § 51.15(3). However, since the right of informed consent must be presumed to apply, it is applicable to an individual in custody during the pre-arrival stage of detention to the same extent as after arrival at the approved facility. Thus, an individual in custody has the right to make his or her own healthcare decisions absent a provision to the contrary.

¶ 9. The Assembly asks whether a police officer has authority to make healthcare decisions for an individual in custody under an emergency detention, including when the individual has an emergency medical condition while in custody.<sup>2</sup> The Assembly specifically asks whether “custody” means that the officer is a “person acting on the individual’s behalf,” which is a phrase from the federal Emergency Medical Treatment and Active Labor Act (“EMTALA”). *See Burks v. St. Joseph’s Hosp.*, 227 Wis. 2d 811, 818 n.9, 596 N.W.2d 391 (1999) (quoting 42 U.S.C. § 1395dd(c)(1)(A)(i)). The question assumes that neither the individual designated the officer as his or her health care agent, nor a court appointed the officer as the individual’s guardian. *See* Wis. Stat. §§ 54.15(3) and 155.01(10); *see also* Wis. Stat. § 54.46(2)(b); *see generally* Wis. Stat. ch. 155 (power of attorney for health care).

¶ 10. The officer does not have the authority to make healthcare decisions for an individual in custody under an emergency detention. The EMTALA uses the phrase “person acting on the individual’s behalf” within the context of an individual’s right to refuse consent to treatment or transfer—consistent with rights entrusted to an individual’s healthcare agent. 42 U.S.C. § 1395dd(b)-(c). The individual—not an officer—has the right to appoint a healthcare agent to serve as his or her surrogate decision-maker. *See* Wis. Stat. ch. 155 (power of attorney for health care); *see also* *Guardianship of L.W.*, 167 Wis. 2d at 82-83 (citing Wis. Stat. chs. 155 (health care agent) and 880 (guardian)); *but see* 2005 Wisconsin Act 387 (renumbering and substantially revising guardianship law from Wis. Stat. ch. 880 to ch. 54). The officer is not the individual’s healthcare agent. So the officer is not a person acting on the individual’s behalf for purposes of making healthcare decisions.

¶ 11. Moreover, Wis. Stat. ch. 51 provides no authority for an officer to make healthcare decisions on the individual’s behalf. The statutes generally permit the approved facility—not an officer—to evaluate, diagnose, and treat the individual when he or she consents. Wis. Stat. § 51.15(8) (citing Wis. Stat. § 51.61(1)(g) and (h)). Requiring medical professionals at the approved facility to obtain consent from the individual demonstrates that an officer cannot assume decision-making authority during transport. *See id.*

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<sup>2</sup>In this opinion, an “emergency medical condition” means “a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result” in a condition described as “placing the health of the individual . . . in serious jeopardy,” “serious impairment to bodily functions,” or “serious dysfunction of any bodily organ or part.” 42 U.S.C. § 1395dd(e)(1)(A)(i)-(iii); *see also* 42 C.F.R. § 489.24(b).

¶ 12. Even if an emergency medical condition prevents the individual from exercising his or her right of informed consent, an officer still does not have authority to make healthcare decisions for the individual. The informed consent statute identifies a physician—not an officer—as the person responsible for making treatment decisions in an emergency. Wis. Stat. § 448.30(5). So the officer does not have the authority to make healthcare decisions for an individual in custody when the individual has an emergency medical condition.<sup>3</sup>

¶ 13. The officer’s role in an emergency detention is only to transport the individual in custody to an approved facility for detention, and for evaluation, diagnosis, and treatment. *See* Wis. Stat. § 51.15(2)-(3). In *Sherry*, the court of appeals confirmed that an officer performs an important, but limited, role. 205 Wis. 2d at 27-28. The court considered liability when officers subdued an individual in an emergency room for his own safety and the safety of others. *Id.* at 28. The court concluded that the officers subdued the individual prior to commencement of a detention. *Id.* So there was no liability under Wis. Stat. ch. 51 because the conduct occurred prior to the officers’ taking the individual into custody. *Id.* at 24-29. The court observed that an officer’s limited role under an emergency detention “is only to transport the individual to the facility.”<sup>4</sup> *Id.* at 27-28.

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<sup>3</sup>The Assembly’s request presents three situations and inquires whether an officer has the authority to make healthcare decisions for an individual in custody having an emergency medical condition in each situation. But the officer is not a person acting on the individual’s behalf for purposes of making healthcare decisions. So the officer cannot make healthcare decisions for an individual in custody under any of the situations presented.

<sup>4</sup>An officer may transport the individual from one medical facility to another facility before arrival at an approved emergency detention facility. For example, an officer may take an individual at an emergency room into custody for emergency detention. *See, e.g., Sherry*, 205 Wis. 2d 14. The officer then may place the individual into protective custody when the person appears incapacitated by alcohol. Wis. Stat. § 51.45(11)(b). The officer may also transport the individual to a public treatment facility for emergency treatment. *Id.* After detoxification, the protective custody device ends. *State v. B.A.S.*, 134 Wis. 2d 291, 296, 397 N.W.2d 114 (Ct. App. 1986). But the individual remains in the officer’s custody for transport to the approved emergency detention facility. Wis. Stat. § 51.15(3). The officer makes statutorily prescribed custodial—not healthcare—decisions when transporting an individual from one facility to another.

¶ 14. Although the officer cannot make healthcare decisions, the individual must remain in the officer's custody until the ultimate transfer to an approved facility. *See* Wis. Stat. § 51.15(3). An individual experiencing an emergency medical condition at an unapproved facility cannot be transferred or removed from the officer's custody. The individual is not a prisoner. Wis. Stat. § 46.011(2). But the custodial status of the individual at an unapproved facility is similar to a prisoner being treated in a hospital. *See* Wis. Stat. § 302.38(1). In such a situation, the officer maintains security over the individual. *Id.* Because a hospital emergency department is not an approved facility, the individual remains within the custody of the officer throughout admission to and discharge from the emergency department.<sup>5</sup> *See* 81 Op. Att'y Gen. at 110-13.

¶ 15. The Assembly also asks whether a healthcare provider has a duty to the individual and public when the officer and county do not proceed with an emergency detention. The question assumes that the healthcare provider believes that the individual is legally competent. *See* Wis. Stat. § 51.59. The question further assumes that the healthcare provider believes that the individual evidences a substantial probability of meeting one of the standards for emergency detention and the individual does not voluntarily agree to treatment. *See* Wis. Stat. § 51.15(1)(ag). The question also assumes that an officer declined to take the individual into custody or the county does not approve the need for emergency detention. *See* Wis. Stat. § 51.15(1)(ar) and (2).

¶ 16. The Assembly's question requires examining the duty a healthcare provider owes to a patient and others as compared to the liability exemption contained within the emergency detention statute. *Compare* Wis. Stat. § 51.15(11) (liability), *with Jankee v. Clark Cnty.*, 2000 WI 64, ¶ 98 n.36, 235 Wis. 2d 700, 612 N.W.2d 297 (a hospital assumes a duty to care for admitted patients, including a duty to prevent harm). The emergency detention statute does not address duty of care. *See generally* Wis. Stat. § 51.15. Instead, the statute contains a liability exemption: "Any individual who acts in accordance with this [emergency detention] section, including making a determination that an individual has or does not have mental illness or evidences or does not evidence a substantial probability of harm . . . is not liable for any actions taken in good faith." Wis. Stat. § 51.15(11).

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<sup>5</sup>This opinion answers the Assembly's question about the meaning of "custody" under an emergency detention. *See* Wis. Stat. § 51.15(3). This opinion does not answer who bears the cost for healthcare expenses incurred while the individual is in custody as this question was not posed and therefore outside the scope of the Assembly's request.

¶ 17. The liability exemption extends to a healthcare provider acting in accordance with the emergency detention statute. *See id.* An appellate court recently explained that “[b]y granting immunity to *any* individual . . . the legislature plainly intended to expand immunity beyond those authorized to take individuals into physical custody.” *Estate of Hammersley v. Wis. Cnty. Mut. Ins. Corp.*, 2012 WI App 44, ¶ 19, 340 Wis. 2d 557, 811 N.W.2d 878. Immunization from liability for a healthcare provider does not depend upon whether an officer takes or declines to take an individual into custody. *See id.* ¶ 23. And immunity does not depend on whether the county approves of the need for emergency detention. *See id.* So a healthcare provider acting under the emergency detention statute is immune from liability regardless of the officer and county’s ultimate determination regarding the need for detention.

¶ 18. However, a healthcare provider’s immunity from liability is not absolute. For example, a healthcare provider may be liable when the provider fails to consider a commitment. *Schuster v. Altenberg*, 144 Wis. 2d 223, 262, 424 N.W.2d 159 (1988). By failing to even consider an emergency detention under the statute, a healthcare provider cannot avail himself or herself to the statute’s immunity provision. *See id.* at 234, 262. Even when a healthcare provider initiates an emergency detention proceeding, the provider exposes himself or herself to liability for any action not taken in good faith. *See* Wis. Stat. § 51.15(11). The phrase “[g]ood faith” means “a state of mind indicating honesty and lawfulness of purpose.” *Hammersley*, 340 Wis. 2d 557, ¶ 29 (quoting Webster’s Third New Int’l Dictionary 978 (unabr. 1993)) (internal quotation marks omitted). Although the statute presumes good faith, the presumption may be defeated “by ‘clear, satisfactory, and convincing’ evidence to the contrary.” *Id.* ¶ 27 (citing Wis. Stat. § 51.15(11)). A healthcare provider generally receives immunity from liability under the emergency detention statute provided he or she acted in good faith in accordance with the statute. *See* Wis. Stat. § 51.15(11).

¶ 19. Further, although the emergency detention statute provides a liability exemption, the exemption does not extend to acts beyond the statute. *Schuster*, 144 Wis. 2d at 234, 262. A healthcare provider has immunity from liability for actions taken in good faith when “making a determination that an individual has or does not have mental illness or evidences or does not evidence a substantial probability of harm.” Wis. Stat. § 51.15(11). But the healthcare provider cannot avail himself or herself to the exemption once the provider is no longer carrying out duties within the ambit of the statute. *See id.*; *see also Schuster*, 144 Wis. 2d at 234, 262. After an officer declines to take the individual into custody or the county does not approve the need for emergency detention, the healthcare provider is no longer

evaluating or treating for emergency detention, but rather is providing, or declining to provide, the care he would to any individual. *See* Wis. Stat. § 51.15(1)-(2) and (11). So the healthcare provider's statutory immunity ceases even though the provider has an ongoing duty to the individual as a patient. *See Jankee*, 235 Wis. 2d 700, ¶ 98 n.36.

¶ 20. A healthcare provider has the duty to “exercise such ordinary care as the mental and physical condition of its patients, known or should have been known, may require.” *Kujawski v. Arbor View Health Care Ctr.*, 139 Wis. 2d 455, 462-63, 407 N.W.2d 249 (1987). The phrase “ordinary care” means “the care which a reasonable person would use in similar circumstances.” Wis. J.I.—Civil 1385 (1999). This duty exists when it is “foreseeable that an act or omission to act may cause harm to someone.” *Schuster*, 144 Wis. 2d at 237-38. This includes a duty to protect the individual patient and public through clinical interventions when the patient is a dangerous individual. *Id.* at 239-40, 244. In exercising this duty, the provider may physically restrain or isolate the individual without his or her consent in an emergency situation. Wis. Stat. § 51.61(1)(i)1. And the provider may administer medication or treatment to an individual without his or her consent when necessary to prevent serious physical harm to the individual or to others. Wis. Stat. § 51.61(1)(g)1.

¶ 21. A healthcare provider may have a duty to prevent an individual from leaving the facility against medical advice, or to require an individual to involuntarily receive services to remove the substantial probability of harm. But whether such a duty exists is evaluated by whether such conduct was consistent with the profession's accepted standard of care. *Schuster*, 144 Wis. 2d at 248. The healthcare provider's “duty is no greater than the duty already owing to the patient.” *Id.* at 261 (citation omitted) (internal quotation marks omitted). And such a duty does not necessarily expose a healthcare provider to liability because “[p]ublic policy considerations may preclude liability.” *Garrett v. City of New Berlin*, 122 Wis. 2d 223, 233, 362 N.W.2d 137 (1985) (citation omitted) (internal quotation marks omitted).

¶ 22. In sum, I conclude that an officer has no authority to make healthcare decisions for an individual in custody under an emergency detention because the individual generally has the right to make his or her own healthcare decisions. A healthcare provider has statutory immunity while acting under the emergency detention statute, as long as his actions are undertaken in good faith. If no officer or

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county decides to proceed with an emergency detention, a healthcare provider has a duty to take reasonable steps to prevent harm to an individual or others.

Very truly yours,



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