



DISTRICT ATTORNEY DANE COUNTY



BRIAN W. BLANCHARD
District Attorney

JUDY SCHWAEMLE
Deputy District Attorney
Felony Unit

TIMOTHY R. VERHOFF
Deputy District Attorney
Criminal Traffic &
Misdemeanor Unit

MICHAEL S. WALSH
Deputy District Attorney
Juvenile Unit

SUZANNE BEAUDOIN
Director
Victim Witness Unit

KATHY MCDERMOTT
Administrative Services
Supervisor

November 18, 2008

Attorney General J.B. Van Hollen
Wisconsin Department of Justice
17 W. Main Street
Madison, Wisconsin 53703

**RE: Request For Opinion Regarding Sheriff's Office "Revolving
Bail Fund"**

Dear Attorney General Van Hollen,

I respectfully request an opinion of your office on the following question: Is a "bail fund" operated by a Wisconsin sheriff, as described below, contrary to the terms of §§ 969.01, 969.02, 969.12, Wis. Stats., related provisions of Chapter 969, and the 2008 Uniform Misdemeanor Bail Schedule?

The occasion for my request is a program recently adopted by Dane County, the Revolving Bail Fund. Dane County officials use public money to post cash satisfying bail bonds for selected jail inmates held on misdemeanor charges without judicial involvement. I am not aware of any local rule of Dane County's judges or other judicial action creating or approving of this program.

I have two concerns. First, the sheriff cannot act as a surety in this context pursuant to § 969.12, Wis. Stats. Second, under our system of laws judicial officers, not sheriffs in the role of jailers, determine bail amounts.

As you are aware, pretrial release in Wisconsin is primarily governed by Chapter 969 of the Wisconsin Statutes and the 2008 State of Wisconsin Uniform Misdemeanor Bail Schedule, developed by the Judicial Conference and adopted by the Wisconsin Supreme Court. This schedule sets bail amounts for misdemeanor offenses with the goal of insuring future court appearances and requiring persons in custody to take a stake in compliance with court orders. Wisconsin law establishes that pretrial release for someone who has been assigned a bail amount under the Bail Schedule is allowed only upon payment of the bail by the

Attorney General J.B. Van Hollen

November 18, 2008

Page 2

defendant or his/her surety. The required payment is refundable, upon appearance in court.

Arresting police officers have very broad discretion about who they take to jail. Sheriffs acting as jailers have no authority to set bail amounts or to ignore bail amounts fixed by courts.

This approach recognizes that a trained law enforcement officer, who has the best information about the nature of the reported offense and the community ties of the offender, is in the best position to determine which alleged offenders can be ticketed and which should be taken to jail. The former group consists of persons who appear to pose no ongoing threat to public order and who are likely to appear in court without bail; the latter group consists of persons who may pose an ongoing threat to public order and whose ties to the community or history suggest that they cannot be relied on to appear in court without having posted bail.

The Bail Schedule Preamble establishes that after police determine that confinement in jail is necessary, a jail inmate "shall be released upon compliance with the state deposit or misdemeanor bail schedule unless bail is otherwise set by the court." (emphasis added) A number of Class A and B misdemeanor offenses are set at \$250 or less, including Disorderly Conduct, a common charge.

Under the Bail Schedule and as otherwise authorized by law, sheriffs perform the ministerial act of collecting and holding in trust for the Clerk of Court money posted for bail, and releasing those who post in accordance with the amount set in the Bail Schedule or as otherwise determined by a court. Sheriffs have no independent authority to determine bail amounts or to act as a surety.

Section 969.01(1), Wis. Stats., matches the terms of the Bail Schedule. Under § 969.01(1), Wis. Stats., the determination of bail amounts is made by "the judge," not the sheriff. The Revolving Bail Fund effectively creates what amounts to a sheriff signature bond not provided for in the law, and seeming at odds with multiple provisions in Chapter 969. I believe this also implicates Chapter 950.

Please find attached:

1. A memo of Dane County Sheriff's Office (DCSO) Capt. Jeff Teuscher, dated August 15, 2008, describing aspects of the fund, by which bail is paid in whole or in part through County funds.

2. A "Promissory Note" establishing "Dane County" as the lender and an inmate as the borrower for purposes of a "loan" by the county to DCSO "on behalf of" the inmate, purporting to qualify as the basis for satisfaction of bail and allowing the "borrower" to bail out of jail after signing a bail bond.
3. An "Assignment of Bail" associated with the above "Promissory Note."

Please note that while the "Promissory Note" references "court appearances" and "court orders related to the case," at the time the monetary pledge is made by the County, there is no involvement by any judge or court commissioner in this process, nor involvement of legal counsel for the state or for the defendant. The program is explicitly intended to bypass court proceedings as a response to jail overcrowding.

The question is whether an exclusive authority vested in judges and court commissioners is being exercised under the new program by the Dane County Sheriff. Only judicial officers, including court commissioners, may exercise judicial functions. *See* § 757.69(1)(b), Wis. Stats., (court commissioners powers enumerated, including "set bail"). In addition, a "sheriff signature bond" program potentially deprives victims and public agencies of funds that would otherwise be transferred from posted and forfeited bail funds to victims ("recompense") or to public agencies. *See* § 969.13(5)(b), Wis. Stats.

Under this new program Dane County, not a natural person, is acting as a surety to procure the release the inmate-borrower (the "principal," in the terms of Chapter 969), which appears to conflict with § 969.12(2), Wis. Stats. The inmate-borrower relies on the County to credit a DCSO bail account, which will be depleted only in the event that the inmate-borrower fails to comply with the terms of his or her bail bond. The County is to be indemnified by the inmate-borrower if this payment is forced on the County by the inmate-borrower's failure to fulfill the conditions of the bail bond. The County is held to the default of the inmate-borrower and insures the obligation of the inmate-borrower, using money that does not belong to a natural person.

* * *

I respectfully request that your office analyze this issue for the benefit of county officials throughout the state and the communities they serve. I respectfully invite anyone copied on this letter to forward to your office any facts or law that any of them think might assist in the analysis.

Attorney General J.B. Van Hollen
November 18, 2008
Page 4

Thank you for your attention to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "B. W. Blanchard". The signature is written in a cursive, flowing style.

Brian W. Blanchard

cc: Dane County Sheriff David J. Mahoney
Marcia MacKenzie, Dane County Corporation Counsel
Dane County Executive Kathleen Falk
Dane County Board Supervisor Paul Rusk
(Chair, Public Protection & Judiciary Committee)
Dane County Chief Judge William C. Foust
Dane County Judge Patrick Fiedler, Presiding Judge, Criminal Division
Dane County Chief Court Commissioner Daniel Floeter
Assistant State Public Defender Catherine Dorl