State of Iowa
1989 - 1990

FORTY-EIGHTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

BIENNIAL PERIOD ENDING DECEMBER 31, 1990

THOMAS J. MILLER

Attorney General

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ATTORNEYS GENERAL OF IOWA

NAME	HOME COUNTY	SERVED YEARS
David C. Cloud	Muscatine	1853-1856
Samuel A. Rick	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
Isaac L. Allen	Tama	1865-1866
Frederick E. Bissell	Dubuque	1866-1867
Henry O'Connor	Muscatine	1867-1872
Marsena E. Cutts	Mahaska	1872-1877
John F. McJunkin	Washington	1877-1881
Smith McPherson	Montgomery	1881-1885
A. J. Baker	Appanoose	1885-1889
John Y. Stone	Mills	1889-1895
Milton Remley	Johnson	1895-1901
Charles W. Mullan	Black Hawk	1901-1907
Howard W. Byers	Shelby	1907-1911
George Cosson	Audubon	1911-1917
Horace M. Havner	Iowa	1917-1921
Ben J. Gibson	Adams	1921-1927
John Fletcher	Polk	1927-1933
Edward L. O'Connor	Johnson	1933-1937
John H. Mitchell	Webster	1937-1939
Fred D. Everett	Monroe	1939-1940
John M. Rankin	Lee	1940-1947
Robert L. Larson	Johnson	1947-1953
Leo A. Hoegh	Lucas	1953-1954
Dayton Countryman	Story	1954-1957
Norman A. Erbe	Boone	1957-1961
Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
Richard C. Turner	Pottawattamie	1967-1979
Thomas J. Miller	Clayton	1979-1991
Bonnie J. Campbell	Polk	1991-

PERSONNEL
OF THE
DEPARTMENT OF JUSTICE

PERSONNEL

MAIN OFFICE

THOMAS J. MILLER, 1/79- ..... Attorney General
J.D., Harvard University, 1969
GORDON E. ALLEN, 8/82- ..... Deputy Attorney General
J.D., University of Iowa, 1972
CHARLES J. KROGMEIER, 5/86- ..... Deputy Attorney General
J.D., Drake, 1974
ELIZABETH M. OSENBAUGH, 1/79- ..... Deputy Attorney General
J.D., University of Iowa, 1971
JOHN R. PERKINS, 12/72- ..... Deputy Attorney General
J.D., University of Iowa, 1968
EARL M. WILLITS, 7/79-7/90 ..... Deputy Attorney General
J.D., Drake, 1974
WILLIAM C. ROACH, 1/79- ..... Administrator
DEBRA E. LEONARD, 2/84- ..... Budget Analyst
JULIE FLEMING, 8/88- ..... Executive Assistant
KAREN A. REDMOND, 10/80- ..... Accountant
JANE A. MCCOLLOM, 10/76- ..... Administrative Assistant
EVELYN K. GALLAGHER, 1/79-1/89 ..... Legal Secretary
LAUREN MARRIOTT, 8/84- ..... Legal Secretary
KATHRYN M. MOLINE, 3/83- ..... Legal Secretary
MELISSA MILLER, 1/88- ..... Secretary/Receptionist

ADMINISTRATIVE LAW

DONALD G. SENNEFF, 7/85- ..... Division Head
J.D., University of Iowa, 1967
JOAN F. BOLIN, 7/87-2/90 ..... Assistant Attorney General
J.D. Loyola (University of Chicago), 1975
ANN M. BRICK, 3/86- ..... Assistant Attorney General
M.A., J.D., Drake, 1980
MERLE W. FLEMING, 7/80-1/89 ..... Assistant Attorney General
M.A., J.D., University of Iowa, 1980
SCOTT M. GALENBECK, 1/84- ..... Assistant Attorney General
J.D., University of Iowa, 1974
NOEL C. HINDT, 7/89- ..... Assistant Attorney General
J.D., University of Iowa, 1983
JOHN M. PARMETER, 11/84- ..... Assistant Attorney General
J.D., Drake, 1982
JULIE F. POTTORFF, 7/79- ..... Assistant Attorney General
J.D., University of Iowa, 1978
CHRISTIE J. SCASE, 7/85- ..... Assistant Attorney General
J.D., Drake, 1985
KATHY M. SKINNER, 7/87- ..... Assistant Attorney General
M.S., J.D., Drake, 1987

LYNN M. WALDING, 7/81- ..... Assistant Attorney General
M.A., J.D., University of Iowa, 1981
THERESA O. WEEG, 10/81- ..... Assistant Attorney General
J.D., University of Iowa, 1981
JAMES S. WISBY, 10/88- ..... Assistant Attorney
J.D., University of Iowa, 1968
JAMES F. CHRISTENSON, 7/90- ..... Paralegal
ROXANNA DALES, 9/89- ..... Legal Secretary
MELANIE L. RITCHEY, 8/85- ..... Legal Secretary

AREA PROSECUTIONS

HAROLD A. YOUNG, 7/75- ..... Division Head
J.D., Drake, 1967
VIRGINIA D. BARCHMAN, 10/86- ..... Assistant Attorney General
J.D., University of Iowa, 1979
JAMES E. KIVI, 2/80- ..... Assistant Attorney General
J.D., University of Iowa, 1975
THOMAS H. MILLER, 10/85- ..... Assistant Attorney General
J.D., University of Iowa, 1975
JAMES W. RAMEY, 3/89- ..... Assistant Attorney General
J.D., Drake, 1975
KEVIN B. STRUVE, 7/86- ..... Assistant Attorney General
J.D., University of Iowa, 1979
CHARLES N. THOMAN, 7/84- ..... Assistant Attorney General
J.D., Creighton University, 1976
MICHAEL E. WALLACE, 8/84- ..... Assistant Attorney General
J.D., University of Iowa, 1971
RICHARD A. WILLIAMS, 7/75- ..... Assistant Attorney General
J.D., University of Iowa, 1971
ALFRED C. GRIER, 9/72- ..... Pilot
CONNIE L. ANDERSON LEE, 12/76- ..... Legal Secretary

CIVIL RIGHTS

RICHARD R. AUTRY, 9/86- ..... Assistant Attorney General
J.D., Drake, 1986
TERESA BAUSTIAN, 4/81- ..... Assistant Attorney General
J.D., University of Iowa, 1979

CONSUMER ADVOCATE

JAMES R. MARET, 4/72- ..... Consumer Advocate
L.L.B., University of Missouri, 1963

DAVID R. CONN, 9/78- ..... Attorney 3
J.D., University of Iowa, 1978
DANIEL J. FAY, 4/66- ..... Attorney 3
J.D., University of Iowa, 1965
WILLIAM A. HAAS, 10/84- ..... Attorney 3
J.D., Drake University, 1982
ALICE J. HYDE, 1/81- ..... Attorney 3
J.D., University of Iowa, 1978
RONALD C. POLLE, 8/81- ..... Attorney 3
J.D., Drake University, 1979
BEN A. STEAD, 8/81- ..... Attorney 3
J.D., University of Kansas, 1974
LEO J. STEFFEN, 10/72- ..... Commerce Solicitor
J.D., University of Iowa, 1962
GARY D. STEWART, 7/74- ..... Attorney 3
J.D., University of Iowa, 1969
ALEXIS K. WODTKE, 6/82- ..... Attorney 3
J.D., Drake University, 1978
MARY L. AUGE, 3/82- ..... Utility Analyst II
CHRISTINE A. COLLISTER, 5/88- ..... Senior Utility Analyst
MARK E. CONDON, 11/88- ..... Utility Specialist
DAVID S. HABR, 10/87- ..... Utility Administrator I
JOYETTE D. HENRY, 4/88- ..... Utility Analyst I
SHEILA A. JONES, 6/88- ..... Utility Analyst I
CLARO N. MARTINEZ, 11/87- ..... Law Clerk
LEO J. STEFFEN, JR., 10/72- ..... Commerce Solicitor
ANN E. WALKER, 5/88- ..... Law Clerk
ARTHUR E. ZAHLLER, 12/87- ..... Utility Specialist
KAREN M. GOODRICH-FINNEGAN, 7/76- ..... Secretary
ANN M. KREAGER, 11/84- ..... Secretary

CONSUMER PROTECTION

RICHARD L. CLELAND, 4/79- ..... Division Head
J.D., University of Iowa, 1978
WILLIAM L. BRAUCH, 7/87- ..... Assistant Attorney General
J.D., University of Iowa, 1987
STEVEN FORITANO, 8/88- ..... Assistant Attorney General
J.D., University of Iowa, 1981
CYNTHIA A. FORSYTHE, 7/88-12/90 ..... Assistant Attorney General
J.D., University of Iowa, 1988
RAYMOND H. JOHNSON, 7/87- ..... Assistant Attorney General
J.D., University of Iowa, 1986
PETER R. KOCHENBURGER, 8/88- ..... Assistant Attorney General
J.D., Harvard, 1986
STEVEN M. ST. CLAIR, 5/87- ..... Assistant Attorney General
J.D., University of Iowa, 1978
CARMEL A. BENTON, 9/89- ..... Investigator
NANCY L. DUDAK, 6/87-8/90 ..... Investigator

MARJORIE A. LEEPER, 7/82-.....Investigator
LISE D. LUDWIG, 5/85- .....Investigator
HOLLY G. MERZ, 10/88-.....Investigator
DEBRA A. MOORE, 12/84- .....Investigator
NORMAN NORLAND, 1/80-.....Investigator
STEPHEN E. SWITZER, 12/89-.....Investigator
BARBARA A. WHITE, 8/90-.....Investigator
JANICE M. BLOES, 3/78-.....Legal Secretary
M. SUSAN CONREY, 6/86-12/90 .....Legal Secretary
KATHERINE GRAY, 3/84-.....Legal Secretary
SANDRA J. KEARNEY, 7/90- .....Legal Secretary
MARILYN W. RAND, 10/69- .....Legal Secretary
RHONDA J. CLYCE, 11/87-5/89 .....Secretary/Receptionist
DIANE DUNN, 10-88- .....Secretary/Receptionist
EDITH M. OMILE, 6/89- .....Secretary/Receptionist

CRIME VICTIM ASSISTANCE

MARTHA J. ANDERSON, 7/89-.....Program Director
JACQUELINE M. MCCANN, 5/87- .....Program Planner
VIRGINIA W. BEANE, 6/89- .....Program Planner
CLARENCE J. WEIHS, 6/89- .....Investigator
KELLY J. BRODIE, 7/89- .....Investigator
RUTH COX, 6/89-3/90.....Secretary
RUTH C. WALKER, 2/79-.....Legal Secretary

CRIMINAL APPEALS

ROXANN M. RYAN, 9/80-.....Division Head
J.D., University of Iowa, 1980
AMY M. ANDERSON, 7/88-..... Assistant Attorney General
J.D., University of Iowa, 1988
RICHARD J. BENNETT, 6/86-.....Assistant Attorney General
J.D., University of Iowa, 1978
ANN E. BRENDEN, 3/85-.....Assistant Attorney General
J.D., Drake, 1981
SARAH J. COATS, 2/84-12/90 .....Assistant Attorney General
J.D., University of Iowa, 1983
JULIE A. HALLIGAN-BROWN, 7/87-.....Assistant Attorney General
J.D., University of Iowa, 1987
BRUCE KEMPKES, 9/86- .....Assistant Attorney General
J.D., University of Iowa, 1980
THOMAS D. McGRANE, 6/71- .....Assistant Attorney General
J.D., University of Iowa, 1971
SHERYL A. SOICH, 2/88- .....Assistant Attorney General
J.D., Drake, 1987

THOMAS S. TAUBER, 7/89-.....Assistant Attorney General
J.D., Drake, 1989
MARK J. ZBIEROSKI, 3/87-.....Assistant Attorney General
J.D., Drake, 1986
CHRISTY J. FISHER, 1/67-.....Legal Secretary
JANET L. FITZWATER, 10/89-.....Legal Secretary
SHONNA K. SWAIN, 5/81-.....Legal Secretary
SHERILYN S. ZIMMERMAN, 2/87-9/89 .....Legal Secretary
GRACE M. ARMSTRONG, 7/89- .....Secretary/Receptionist

ENVIRONMENTAL LAW

JOHN P. SARCONE, 3/79-12/90 .....Division Head
J.D., Drake, 1975
DAVID L. DORFF, 4/85- .....Assistant Attorney General
J.D., Drake, 1982
ELIZA J. OVROM, 7/79-12/90 .....Assistant Attorney General
J.D., University of Iowa, 1979
DAVID R. SHERIDAN, 5/87- .....Assistant Attorney General
J.D., University of Iowa, 1978
MICHAEL H. SMITH, 9/84- .....Assistant Attorney General
J.D., University of Iowa, 1977
RICHARD C. HEATHCOTE, 9/89-.....Investigator
KAREN J. GOSLIN, 6/86-1/89 .....Legal Secretary
ROXANNE C. PETERSEN, 5/79-12/90 .....Legal Secretary
CATHLEEN M. WHITE, 2/89-.....Legal Secretary

FARM

TIMOTHY D. BENTON, 7/77-.....Division Head
J.D., University of Iowa, 1977
TAM B. ORMISTON, 1/79-8/89 .....Division Head
J.D., University of Iowa, 1974
KAREN B. DOLAND, 7/90-.....Assisatnt Attorney General
J.D., University of Iowa, 1989
LYNETTE A. DONNER, 10/86- .....Assistant Attorney General
J.D., Drake, 1984
STEPHEN H. MOLINE, 6/86-5/89; 7/90-.....Assistant Attorney General
J.D., University of Iowa, 1986
STEPHEN E. RENO, 7/89- .....Assistant Attorney General
J.D., Drake, 1981
STEVEN P. WANDRO, 11/88-2/89.....Assistant Attorney General
J.D., University of Iowa, 1984
HARRY E. CRIST, 7/85- .....Investigator
CHARLES G. RUTENBECK, 12/74- .....Investigator

BEVERLY A. CONREY, 4/85- ..... Legal Secretary

HEALTH

MAUREEN McGUIRE, 7/83- ..... Assistant Attorney General
J.D., University of Iowa, 1983
THOMAS E. NOONAN, 6/89- ..... Assistant Attorney General
J.D., University of Iowa, 1982
CHRIS T. ODELL, 7/90- ..... Assistant Attorney General
J.D., Gonzaga University, 1978
ROSE A. VASQUEZ, 9/85- ..... Assistant Attorney General
J.D., Drake, 1985

HUMAN SERVICES

GORDON E. ALLEN, 8/82- ..... Division Head
J.D., University of Iowa, 1972
SUZIE A. BERREGAARD, 7/87- ..... Assistant Attorney General
J.D., Drake, 1987
JEAN L. DUNKLE, 10/75- ..... Assistant Attorney General
J.D., University of Iowa, 1975
KRISTIN W. ENSIGN, 10/88- ..... Assistant Attorney General
J.D., Drake, 1983
ROBERT J. GLASER, 7/86- ..... Assistant Attorney General
J.D., Creighton University, 1978
DANIEL W. HART, 7/85- ..... Assistant Attorney General
J.D., University of Iowa, 1983
MARK A. HAVERKAMP, 6/78- ..... Assistant Attorney General
J.D., Creighton, 1976
WILLIAM A. HILL, 8/90- ..... Assistant Attorney General
J.D., Drake, 1989
PATRICIA M. HEMPHILL, 2/83- ..... Assistant Attorney General
J.D., Drake, 1981
ROBERT R. HUIBREGTSE, 6/75- ..... Assistant Attorney General
L.L.B., Drake, 1963
ROBIN A. HUMPHREY, 8/90- ..... Assistant Attorney General
J.D., Drake, 1985
LAYNE M. LINDEBAK, 7/78- ..... Assistant Attorney General
J.D., University of Iowa, 1979
VALENCIA V. McCOWN, 6/83- ..... Assistant Attorney General
J.D., University of Iowa, 1983
E. DEAN METZ, 5/78- ..... Assistant Attorney General
L.L.B., Drake, 1955
KATHRINE MILLER-TODD, 1/85- ..... Assistant Attorney General
J.D., Wake Forest, 1974
CANDY S. MORGAN, 9/79-10/90 ..... Assistant Attorney General

J.D., University of Iowa, 1973
CHARLES K. PHILLIPS, 8/84-.....Assistant Attorney General
J.D., Columbia University (NY), 1982
STEPHEN C. ROBINSON, 8/73- .....Assistant Attorney General
L.L.B., Drake, 1962
JUDY A. SHEIRBON, 7/89- .....Assistant Attorney General
J.D., University of Iowa, 1986
ANURADHA VAITHESWARAN, 5/88- .....Assistant Attorney General
J.D., University of Iowa, 1984
MARY K. WICKMAN, 8/89- .....Assistant Attorney General
J.D., University of Iowa, 1986
RUTH J. MANNING, 9/89- .....Legal Secretary
SHARON R. O'STEEN, 8/89 .....Legal Secretary
KATHLEEN A. PITTS, 5/87- .....Legal Secretary
BILLIE J. RAMEY, 1/89-9/89 .....Legal Secretary

INSURANCE

FRED M. HASKINS, 6/72- .....Assistant Attorney General
J.D., University of Iowa, 1972
SUSAN BARNES, 4/84-5/90 .....Assistant Attorney General
J.D., William and Mary, 1978

LOTTERY

SHERIE BARNETT, 7/83 .....Assistant Attorney General
J.D., Drake, 1981

PROSECUTING ATTORNEYS TRAINING COUNCIL

DONALD R. MASON, 9/80- .....Exec. Dir., Training Coordinator
J.D., University of Iowa, 1976
BRIDGET A. CHAMBERS, 2/90- .....Assistant Attorney General
J.D., University of Iowa, 1985
KAY L. CHOPARD, 3/86-11/89 .....Assistant Attorney General
J.D., University of Iowa, 1983
DOUGLAS R. MAREK, 8/89- .....Assistant Attorney General
J.D., Drake, 1984
DIANA ESSY-EMEHISER, 10/90.....Data Processing Specialist
ANN M. CLARY, 1/88- .....Legal Secretary

JONI M. KLAASSEN, 9/85- ..... Legal Secretary

PUBLIC SAFETY

GARY L. HAYWARD, 6/76- ..... Assistant Attorney General
J.D., University of Iowa, 1976
PATRICK J. REINERT, 5/90- ..... Assistant Attorney General
J.D., University of Iowa, 1986
DANIEL C. TVEDT, 7/89-1/90 ..... Assistant Attorney General
J.D., University of Iowa, 1986
JANET L. PETERSEN, 3/88-1/89 ..... Assistant Attorney General
J.D., University of Iowa, 1985
ELIZABETH J. MEYER, 5/89- ..... Legal Secretary

REVENUE

HARRY M. GRIGER, 1/67-8/71, 12/71- ..... Division Head
J.D., University of Iowa, 1966
LUCILLE M. HARDY, 5/86- ..... Assistant Attorney General
J.D., University of Iowa, 1985
GERLAD A. KUEHN, 9/71- ..... Assistant Attorney General
J.D., Drake, 1967
MARCIA E. MASON, 7/82- ..... Assistant Attorney General
J.D., University of Iowa, 1982
JAMES D. MILLER, 12/79-4/82,10/86- ..... Assistant Attorney General
J.D., Drake, 1977
CONNIE M. LARSON, 6/89- ..... Legal Secretary
ELYSE M. SMITH, 7/90- ..... Legal Secretary

TORT CLAIMS

CRAIG A. KELINSON, 12/86- ..... Division Head
J.D., University of Iowa, 1976
GREG H. KNOPLOH, 5/87- ..... Assistant Attorney General
J.D., University of Iowa, 1978
CHARLES S. LAVORATO, 9/83- ..... Assistant Attorney General
J.D., Drake, 1975
DEAN A. LERNER, 2/83- ..... Assistant Attorney General
J.D., Drake, 1981
ELEANOR E. LYNN, 7/83-6/85; 7/87-12/90 ..... Assistant Attorney General
J.D., University of Iowa, 1983
JOANNE L. MOELLER, 8/84- ..... Assistant Attorney General
J.D., University of Iowa, 1984
SHIRLEY ANN STEFFE, 9/79- ..... Assistant Attorney General

J.D., University of Iowa, 1979
ROBERT D. WILSON, 12/86- ..... Assistant Attorney General
J.D., University of Iowa, 1981
CONNIE D. HADAWAY, 9/89- ..... Investigator
KAREN M. LIKENS, 8/77- ..... Investigator
DAVID H. MORSE, 3/78- ..... Investigator
CATHLEEN L. RIMATHE, 8/78- ..... Investigator
CYNTHIA L. BAKER, 8/84- ..... Legal Secretary
MICHELLE L. HAINES, 11/89- ..... Legal Secretary
LINDA S. HURST, 3/86-10/89 ..... Legal Secretary
MARCIA A. JACOBS, 8/82- ..... Legal Secretary
LORELL SQUIERS, 9/87- ..... Legal Secretary

TRANSPORTATION

MERRELL M. PETERS, 7/84-11/90 ..... Acting Division Head
J.D., Drake, 1984
JOHN W. BATY, 9/72- ..... Assistant Attorney General
J.D., Drake, 1967
ROBERT P. EWALD, 2/81- ..... Assistant Attorney General
J.D., Washburn University, 1980
DAVID A. FERREE, 3/84- ..... Assistant Attorney General
J.D., University of Iowa, 1979
ROBIN FORMAKER, 4/84- ..... Assistant Attorney General
J.D., University of Iowa, 1979
MARK HUNACEK, 7/82- ..... Assistant Attorney General
J.D., Drake, 1981
ARDETH T. METIER, 7/86- ..... Assistant Attorney General
L.L.B., J.D., University of Iowa, 1951
RICHARD E. MULL, 7/78- ..... Assistant Attorney General
J.D., University of Iowa, 1977
CAROLYN J. OLSON, 8/87- ..... Assistant Attorney General
J.D., Drake, 1984
DANIEL W. PERKINS, 11/84-9/90 ..... Assistant Attorney General
J.D., University of Washington, 1982
CARMEN C. MILLS, 7/82-1/86; 1/87- ..... Paralegal
MICHAEL J. RAAB, 1/85- ..... Paralegal
DAVETTE D. SMITH, 8/86- ..... Paralegal

ATTORNEY GENERAL
OFFICE
ADMINISTRATIVE DIVISIONS

ADMINISTRATIVE LAW DIVISION

The Administrative Law Division provides legal services to state departments, divisions, boards, commissions and elected officials which include rendering legal advice, preparing opinions, preparing and reviewing legal documents, participating in administrative hearings, and defending or prosecuting litigated matters. The Division represents twelve state departments and three elected officials, including the Auditor, the Division of Banking, the Department of Eduction, Iowa Public Television, the State Board of Accountancy, the State Board of Medical Examiners, the State Board of Regents and the Treasurer.

Depending on the needs of the particular department, legal representation ranges from advice on open meetings and administrative procedures to full participation in all stages of the hearing process. Attorneys from the Administrative Law Division appeared in a considerable number of administrative hearings during the biennium. Throughout 1989-90, informal department inquiries also increased as the Division increased its representation of clients.

Inquiries to the Attorney General's office regarding county and city government operations are referred to the Division for response. Responsibility for inquiries and interpretations concerning the state election laws and campaign finance are also assumed by the Division.

Litigation has arisen in almost every area of the Division's responsibilities, although the majority of cases arise as a result of a petition for judicial review of state agency action.

The Administrative Law Division is responsible for preparing formal and informal responses to requests for many Attorney General's opinions. While the majority of requests concern questions arising in the areas of education and county government operations, and the effect of county home rule, opinions have been issued touching on such varied topics as the courts, public hospitals, banking and financial law, open meetings, state officers and departments, official publications, municipalities and elections.

During the 1989-90 biennium approximately 50 opinions were issued by the Administrative Law Division.

Approximately 250 charitable trusts and private foundations file annual reports with the Department of Justice pursuant to federal regulations, and those reports are processed and maintained by the Administrative Law Division. Pursuant to the Attorney General's supervisory powers over charitable trusts, Iowa Code § 633.303, the Division has been involved in several cases concerning trust instruments. Escheat matters and cases involving unclaimed property turned over to the State Treasurer's office are handled by the Division. In addition, inquiries from the general public regarding charitable solicitations and estate and trust law are referred to the Division.

AREA PROSECUTIONS DIVISION

The primary purpose of the Area Prosecutions Division is to assist local county attorneys in difficult, technical, or multi-jurisdictional criminal cases, and in

those cases where a conflict of interest or the appearance of a conflict precludes the county attorney from handling a prosecution.

The Division is staffed by six general trial attorneys, six specialist attorneys, and one secretary. The specialists include one attorney assigned to prosecute crimes in penal institutions, one to conduct state tax investigations and prosecutions, one as a training/legal advisor for the Department of Public Safety, two attorneys to manage and conduct narcotics cases, and one to prosecute medicaid fraud. The specialist positions are funded by various other state departments and federal grants.

During the period of this report 530 cases were referred to the Area Prosecutors Division. The caseload was evenly balanced between those involving violent crimes and those in which there were other difficult or complicating factors. Members of the Division prosecuted 34 Class A felony cases and 60 other forcible felonies as well as another 50 violent crimes of a lesser nature.

The Division also represents the Commission on Judicial Qualifications, investigating and prosecuting complaints against Iowa Judges and other judicial officers. An increase in the number of cases referred by that agency is once again noted. Twenty-three complaints were investigated however only two resulted in formal hearings.

CIVIL RIGHTS DIVISION

The Civil Rights Division of the Attorney General's office is staffed with two Assistant Attorneys General. Their primary duties are to provide legal advice and assistance to the staff of the Commission, to litigate on behalf of complainants in contested case proceedings before the Commission's hearing officers, and to litigate for the Commission in judicial review proceedings in the district court and upon appeal to the Iowa Supreme Court and Court of Appeals. In addition, they provide informal and formal Attorney General's opinions, participate in training sessions held by the Commission for its staff and throughout the state, and serve as general resource personnel for citizens of Iowa who are concerned about a possible deprivation of their civil rights.

Litigation, however, remains the primary function and during the biennium the division docketed forty-four cases and closed seventy-one cases, collecting $405,000.00 in judgments and settlements.

In 1989 and 1990, the Division was chiefly involved with handling the docket of cases scheduled for administrative hearings. Fifteen new hearing cases were opened while thirtyfive cases were closed during this period. Ten administrative hearings were held during the biennium, and of the twelve decisions rendered during this period, ten were in the complainant's favor. Thirteen other cases were settled in the course of pre-trail preparation. This is a downward trend in the volume of cases tried as the individual cases become more complex.

The activity in the district and appellate courts has changed, as well, with fewer of the Commission's decisions being appealed. Enforcement actions are increasing, however. Ninteen new files were opened at the district court level and thirty cases were concluded, with the Commission succeeding outright in twenty-three of these cases, and winning in part in two additional cases. Three cases were settled prior to any decision. The cases in the district court include original actions for injunctions pursuant to Chapter 601A and enforcement of administrative subpoenas, as well as appeals from the administrative processes of the Commission and actions to enforce the Commission decisions.

During the biennium, the Division represented the Iowa Civil Rights Commission in ten appeals to the Iowa Supreme Court or Iowa Court of Appeals. These appeals have involved interpretatio of the substantive provisions of

Chapter 601A and the Commission's administrative rules in the areas of disability disrimination and retaliation, and further development of the law on remedies for violations of the civil rights laws. Six of the cases are currently pending before the appellate courts, including one in which the Iowa Civil Rights Commission is appearing as an amicus curiae.

OFFICE OF CONSUMER ADVOCATE

When state government was reorganized effective July 1, 1986, the Office of Consumer Advocate was transferred to the Department of Justice. The Office of Consumer Advocate represents all consumers generally and the public generally in all proceedings before the Iowa Utilities Board, which implements and enforces the provisions of Iowa's public utility regulation statutes in Iowa Code chapters 476 and 476A. The Office of Consumer Advocate is also independently authorized to investigate the legality of all rates, charges, rules, regulations and practices of all persons under the jurisdiction of the Board, and may institute proceedings before the Board or court to correct any illegality. Proceedings before the Board in which the Office of Consumer Advocate participated during the 1989-90 biennium included annual reviews of electric and natural gas utilities' fuel purchasing and contracting practices, electric transmission line and gas pipeline certificate cases, formal complaints, investigation dockets of specific utility practices, purchased gas adjustment cases, electric utility service area disputes, rulemakings and rate cases.

Investigation of the legality of proposed rate increases filed by investor-owned utilities represents the most significant area of the Office of Consumer Advocate's litigation before the Board. To carry out its investigatory duties in a rate case, the Office of Consumer Advocate uses its technical staff as well as outside consultants at times to analyze the information presented in the filing by the utility company, and review the utility's books and records to determine the reasonable costs of providing utility service. The Office of Consumer Advocate participates in the case by attending consumer comment hearings held at locations throughout the state, cross-examining utility witnesses at technical hearings, offering evidence through Consumer Advocate sponsored expert witnesses, and filing briefs with the Board. During 1989-90, the Office of Consumer Advocate litigated the legality of approximately 17 increases proposed by electric, natural gas, telephone and water utilities. In addition, the Office of Consumer Advocate instituted rate reduction proceedings proposing to decrease the rates of two investor-owned electric utilities which had excessive earnings.

Each of Iowa's seven investor-owned retail electric distribution utilities are required to undergo an annual review of procurement and contracting practices related to the acquisition of fuel (primarily coal). For use in generating electricity, and the Office of Consumer Advocate participated in these contested cases in both 1989 and 1990. In addition, all electric utilities annually submitted generation planning filings, which address load forecasting, supply options and demand side programs, and the Office of Consumer Advocate submitted comments and participated in the annual meetings to address the filings. The Office of Consumer Advocate also participated each year in the contested case annual reviews of the natural gas procurement and contracting practices for each of Iowa's seven investor-owned retail natural gas distribution utilities.

During the 1989-90 biennium, the Office of Consumer Advocate was involved in 3 electric transmission line certificate or renewal cases, 18 gas pipeline certificate or renewal cases, 22 formal complaints (usually initiated only after

informal attempts to resolve consumer complaints against utilities are unsuccessful) and over two hundred purchased gas adjustments filings by utilities. The Office of Consumer Advocate participated in 28 electric utility service area disputes. During the biennium, the Office of Consumer Advocate was involved in 66 rulemaking proceedings and 5 Board investigation dockets. During 1989-90 the Office of Consumer Advocate was involved in a generating plant certificate filing by a large industrial company in Cedar Rapids requesting Board approval for the operation of 5 combustion turbines (totaling 150 megawatts). Also, during 1990, the Office of Consumer Advocate was active in the proceeding involving the proposed merger of 2 of Iowa's major investor-owned utility holding companies—Des Moines' Iowa Resources, Inc. and Sioux City's Midwest Resources, Inc.

Finally, the Office of Consumer Advocate has been an active participant in a collaborative process involving the promulgation of rules governing the design and implementation of energy efficiency programs. As part of this process, the Office of Consumer Advocate is independently designing energy efficiency programs, which it will recommend be implemented by each of Iowa's investor-owned gas and electric utilities.

The Office of Consumer Advocate is authorized to commence judicial review of Board actions, and to represent the general public interest in all other state or federal court actions challenging the validity of Board actions. During the 1989-90 biennium, the Office of Consumer Advocate was involved in approximately 50 judicial review proceedings in Iowa's district and appellate courts.

At the request of the Consumer Advocate, the Consumer Advisory Panel convened regularly throughout 1989 and 1990 for consultation with the Consumer Advocate on public utility regulation issues. The panel consists of nine consumer members, with at least one appointed from each congressional district. The Attorney General appoints five of the members of the panel, and the Governor appoints the remaining four. During the 1989-90 biennium, the Consumer Advisory Panel selected energy conservation as its central topic for study and discussion.

The Office of Consumer Advocate consists of the Consumer Advocate, 9 attorneys, 14 financial, economic and accounting experts and analysts, 2 electrical engineers, 1 paralegal and 3 secretaries.

CONSUMER PROTECTION DIVISION

The Consumer Protection Division of the Attorney General's office administers and enforces the Iowa Consumer Fraud Act, the Iowa Consumer Credit Code, the Iowa Campground Act, the Iowa Physical Exercise Club Regulation Act, the Charitable Organization Act, and the Cemeteries Regulations Act. In addition, the Consumer Protection Division may bring enforcement actions for violations of the Iowa Business Opportunity Sales Act, the Iowa Trade School Act, the Iowa Door-to-Door Sales Act, the Iowa Transient Merchants Act, the Iowa Drug and Cosmetic Act, the Iowa Preneed Funeral Sales Act, and the Iowa Funeral and Cemetery Services and Merchandise Act.

The Consumer Protection staff consists of 22 full-time employees. The staff consists of seven attorneys, eight investigators, five secretaries, and two receptionists. The Division, through its volunteer program, usually has volunteer or intern "complaint handlers" working for the Division handling non-fraud consumer complaints.

During 1989 and 1990, the Consumer Protection Division received 12,589 consumer complaints and closed 12,627 consumer complaints. There were 2,747 complaints pending at the end of 1990. During the same period, the Consumer Protection Division filed 61 and closed 48 lawsuits. There were 93 lawsuits pending at the end of 1990. During 1989 and 1990, the Division saved or recovered $2,090,099.92 for Iowa consumers. The division was able to assist approximately 81 percent of consumers who complained to the office. This included both direct assistance in the form of money or merchandise recovered, merchandise delivered, or merchandise repaired or replaced, and indirect assistance in the form of providing information or referring the consumer to a more appropriate law enforcement agency for assistance.

The Consumer Protection Division engages in many programs of preventive consumer protection designed to deter potential schemes and inform consumers. The Consumer Protection Division's involvement in mediating consumer problems, investigating complaints of deceptive advertising and sales practices, and filing lawsuits has a substantial deterrent effect on persons and companies who might be tempted to engage in fraudulent practices in Iowa. The office attempts to inform the public about both specific and common schemes of fraud through a variety of means including press releases, informational brochures, and public speaking engagements.

The major areas of activity during 1989 and 1990 include health and nutrition fraud, automobile sales and service practices complaints, retail advertising, debt collection and consumer credit, and consumer education. In the health fraud area, the Division has investigated and filed numerous cases against companies selling questionable diet fraud products. These cases are particularly important since Iowa spend several million dollars a year on fraudulent diet products. This effort has been so successful that many ads for diet pills carry a disclaimer that the product is "not available in Iowa."

In the area of nutrition fraud, Iowa has been active in investigating and prosecuting national companies making questionable health related claims for food products. Some of the claims challenged include representations that a particular food may reduce the consumers risk of osteoporosis, colon cancer, and heart disease. Consumers are particularly susceptible to health claims and have little if any expertise to enable them to separate truthful claims from false claims. Vigorous enforcement in this area is important to ensure that consumers are not mislead about their health.

The number of complaints about automobile sales and service practices remain high. Of particular concern is the increasing number of complaints over the failure to truthfully disclose the prior history of used vehicles. In some cases, vehicles which were wrecked are being repaired and sold to consumers without disclosing the fact that the vehicles have been rebuilt. In other cases, cars which were owned by rental agencies and used in large population areas are being sold to consumers under the label as "executive" or "program" vehicles.

The Division has commenced several investigations of retail advertising and has filed for public comment a set of proposed retail advertising regulations covering such practices as price comparisons, availability of advertised merchandise, and contests. The primary purpose of these regulations is to require that consumers who are being enticed to shop at a particular merchant through sales and price comparison representations.

During calendar year 1990, the top 10 areas that Iowans complained about were:

1. Mail Order 1701
2. Automobiles 1473
3. Magazines 957
4. Services (general) 873
5. Telemarketing 762
6. Credit Code 641
7. Advertising 600

CRIME VICTIM ASSISTANCE PROGRAM

The Crime Victim Assistance Program is responsible for the administration of victim programs at the state level. Programs administrated by the Crime Victim Assistance Program are:

- Crime Victim Compensation - Sexual Abuse Examination Payment - Crime Victim Services Grants - Federal Victims of Crime Act (VOCA) - Federal Family Violence Prevention And Services - State Domestic Abuse - State Rape Crisis

Funds for these programs come primarily from fines assessed on criminals both at the state and federal levels. The exceptions are the state Domestic Abuse and Rape Crisis and Federal Family Violence Prevention and Services funds are general appropriations.

Crime Victim Assistance Board The Crime Victim Assistance (CVA) Board created by the 1989 legislature and appointed by the Attorney General has statutory responsibility for the adoption of rules relating to Crime Victim Assistance program policies and procedures. The Board receives and acts on appeals filed for victim compensation and victim program grants.

Iowa Code 912.2A requires that the Board include a county attorney, a defense attorney, two law enforcement officers, an emergency medicine professional, a licensed psychologist or social worker, a victim service provider, a member of the public who has received victim services, and a person representing the elderly.

Crime Victim Compensation Victims of violent crime received more financial assistance during the past year than in any year since the Crime Victim Reparation Act was passed by the 1982 Session of the Iowa General Assembly. During its first year of operation under the auspices of the Attorney General, the program provided compensation to 1215 crime victims. A total of $1,537,937 was awarded for expenses incurred by those victims and their families.

In addition to the physical and emotional trauma of a criminal attack, crime victims also must bear significant financial burdens. An overnight hospital stay and follow-up medical treatment may result in several days of lost wages and thousands of dollars in medical bills.

While no amount of compensation can erase the physical and emotional trauma of victimization, the Crime Victim Assistance Program strives to lend a responsive hand by providing immediate and substantial financial relief to crime victims. A variety of expenses are compensable under program guidelines, including medical costs, loss of earnings, counseling expenses, loss of support for dependents of deceased or disabled victims and funeral and burial costs.

No tax dollars are used to fund the Compensation Program. Funding comes from fines imposed criminals; the Federal Victims of Crime Act (VOCA) grant, also supported entirely by criminal fines; perpetrator restitution monies; and recoveries from civil actions involving the offender or other third parties responsible for the crime.

Victim compensation programs are justified on humanitarian grounds. They demonstrate the State's concern for victims of violent crime, reduce the financial impact of criminal injuries, and improve victim services throughout the State.

Sexual Abuse Examination Payment The sexual abuse examination program was established by the legislature in 1979 to pay the cost of evidentiary examinations in sexual abuse crimes. Responsibility for the payment of the examinations and administration of the program was transferred from the Department of Public Health to the Department of Justice July 1, 1990.

Evidence of sexual abuse deteriorates significantly during the twelve hours immediately following an assault and must be collected within seventy-two hours of the crime. Victims of sex crimes often have difficulty deciding whether to report the crime to law enforcement within this time frame for evidence collection.

The state of Iowa has established a policy of paying for the examination regardless of whether the victim has decided to report the crime. If the victim decides to report the crime, the prosecutor and law enforcement then have the benefit of evidence effectively collected.

Hospitals, physicians and other medical providers who collect and process evidence of sexual abuse, bill the Crime Victim Assistance program directly. In the case that a victim is inadvertently billed and pays the cost of the evidence collection, the program will reimburse for what she or he paid.

Funds for sexual abuse examination payment come from the victim reparation fund. That fund is comprised of fines paid by drunk drivers as well as a percentage of all criminal fines paid in the state.

Crime Victim Services Grants The Crime Victim Assistance Program administers four grant funds that provide partial funding to local crime victim service programs. The Victims of Crime Act fund is awarded by the U.S. Department of Justice and the Family Violence Prevention and Services Act fund is awarded by the U.S. Department of Health and Human Services. Iowa has received funds from both of these federal agencies since 1985. The Iowa legislature established the Domestic Abuse fund in 1979 and the Rape Crisis Fund in 1989.

Requests for proposals (REP) are sent to all interested victim service providers and any former applicants whenever grant monies are available through the Crime Victim Assistance Program. A statewide press notice assures broad public awareness of grant fund availability. The RFP includes information about grant eligibility, information required in the application, as well as any forms required for application.

The submitted proposals are reviewed by a volunteer grant review committee. More than fifteen volunteers have generously donated their time and expertise to review grants in the last year. The committee and Victim Grants Coordinator submit their remarks and recommendations for grant awards to the Administrator and Crime Victim Assistance Board. The Board determines final subgrantees and grant awards to the extent that funds are available and to the extent to which the applicant meets the criteria of the RFP.

CRIMINAL APPEALS DIVISION

The primary responsibility of the Criminal Appeals Division is to represent the State of Iowa in direct appeals of criminal cases. County attorneys prosecute

the cases in district court, and the Division prosecutes criminal appeals to the Iowa Supreme Court.

The work of the Division represents a major portion of the workload of the Supreme Court. The Division typically is involved in at least one-third of all the cases decided by the Court.

During the biennium, the Supreme Court and Court of Appeals affirmed the state's position argued by the Division in approximately eighty percent of the cases.

In 1989-90, 1098 criminal appeals were taken to the Iowa Supreme Court and 618 defendant-appellant briefs were filed in those cases. The Division filed 615 briefs on behalf of the state.

Other criminal appeal and post-conviction matters handled by the Division include: certiorari proceedings related to criminal cases (usually involving attorney fee cases or allegations that a trial judge acted illegally); appeals in post-conviction relief cases under chapter 663A; applications for discretionary review by the defendant; all criminal appellate actions initiated by the state; and federal habeas corpus cases.

The Division publishes the Criminal Law Bulletin, a periodic update on developments in criminal law in the Iowa Supreme Court and U.S. Supreme Court. It also provides training for prosecutors and police officers around the state.

During the biennium, the Division also carried out a number of advisory and consultative duties with respect to the criminal law. It frequently provided advice and research to county attorneys in criminal matters. It advised the Governor's office on extradition cases. Division attorneys served on and represented the Board of Parole, the Board of Pharmacy Examiners, and the Bureau of Labor. The Division head was a member of the Prosecuting Attorneys Training Council and the Supreme Court Advisory Committee on the Rules of Criminal Procedure.

The Criminal Appeals Division is comprised of eleven assistant attorneys general and four support staff.

ENVIRONMENTAL LAW DIVISION

The Environmental Law Division represents the state in issues affecting the environment. The division has a staff of five attorneys, two secretaries and an environmental specialist and represents the Department of Natural Resources, the Department of Agriculture and Land Stewardship Division of Soil Conservation, and the State Archaeologist, the Iowa Board of Nursing, and the Iowa Department of Inspections and Appeals. The division serves as general counsel to the Underground Storage Tank Board, represents the Division of Community Action Agencies, provides legal assistance to the National Guard and the State Historical Society in real estate transactions. The majority of the Environmental Law Division's work is related to its representation of the Department of Natural Resources.

The Division represents the DNR in real estate transactions involving fee title purchases, land exchanges, access easements, conservation easements, leases, and boundary agreements. Funding of open space acquisition by the Resource Enhancement and Protection Act has nearly doubled the volume of these transactions. The Division also litigates a variety of real estate problems for the DNR. These cases involve disputes concerning lease defaults, easements,

dedicated lands, and boundary disputes, most significantly concerning boundaries of sovereign lands and waters along the Missouri River and in the vicinity of the Iowa Great Lakes. The Division's Missouri River boundary disputes have involved extensive and complex litigation of Indian claims in Federal courts.

Issues relating to allocation of Missouri River water and management of the River by the Corps of Engineers have produced a substantial amount of work for the Division in cooperation with the Governor's office and several other State agencies. This work has involved extensive litigation in Federal courts, including successful litigation in the U.S. Supreme Court. The Division also advises the Iowa delegation to the Iowa-Nebraska Boundary Commission in continuing efforts to resolve our common boundary problems.

The Division provides legal assistance to the DNR in diverse matters relating to management of State-owned lands and waters and development projects on State-owned lands. Examples are National Environmental Protection Act requirements for DNR development projects, construction contract disputes, drainage disputes, permits for special uses of public lands and waters, and regulations relating to fishing, hunting, trapping, boating, and use of State parks.

The legal work we provide for the Environmental Protection Division of the DNR involves mainly litigation of water pollution, water supply, solid waste, air quality, leaking underground storage tanks, and flood plain disputes. The Division is also involved in a significant CERCLA cost recovery action. Most of our cases on behalf of the DNR are brought to seek enforcement of administrative orders and/or penalties, imposition of civil penalties, injunctive relief, both temporary and permanent, and abatement of nuisances. We additionally have a significant number of contempt actions to enforce court decrees.

The Division routinely provides legal advice to DNR Environmental Protection Division attorneys and staff on a number of matters, including: statutory and rule interpretations, administrative law questions, enforcement strategies, and the beverage container deposit law. To date the Division has performed all of DNR's litigation, both defending DNR when it gets sued and filing enforcement actions. In the past year we have defended several significant temporary injunction cases, one involving the DNR's cleanup of aflatoxin-contaminated corn near Lowden, Iowa, and two others involving Iowa Beef Processing's plant in Columbus Junction.

The Division also represents the DNR in all judicial review actions. The Division also reviews department grants to cities for various environmental construction projects.

The Attorney General's Office has independent authority to enforce Iowa Code Chapter 455B (see 455B.112). We have, on four occasions, exercised this authority and have done so only after the EPC was given an opportunity to refer a case to us but refused to do so. The division as of July 1, 1989, was authorized to hire an environmental specialist. This specialist works with a DCI agent assigned to investigate environmental crimes and provides sampling and technical expertise in criminal prosecutions. The past year has been one of training for each individual and they have been involved in a number of investigations. At this point we are not getting the cooperation we need from the Environmental Protection Division of DNR which we will need to successfully battle environmental crime. There must be a change on DNR's part in order for this unit to work effectively.

The Division also represents the Iowa Board of Nursing and the Division of Soil Conservation. The division handles administrative hearings (nursing license disciplinary proceedings) before the Board of Nursing, provides legal advice to the board and represents the Board in judicial review proceedings in district court.

The Division provides various legal services to the Iowa Division of Soil Conservation and the 100 county soil and water conservation districts. It enforces administrative orders issued by the conservation districts to halt excess soil loss caused by erosion. It performs title work for the districts in connection with watershed projects. It enforces the state's coal and mineral mining laws and assists the Mines and Minerals Bureau in collecting administrative penalties. Additionally, it performs general counsel responsibilities including reviewing contracts and administrative rules, and determining eligibility of abandoned mine lands for federal reclamation financial assistance.

The division provides counsel to the Division of Community Action Agencies on its Low Income Housing Energy Assistance Program (LIHEAP). This work involves review of contracts and making sure that landlords are not taking advantage of those entitled to funds under the program and those obtaining assistance use it for program purposes.

The Division prepares opinions in response to opinion requests concerning conservation and environmental protection laws, and real estate questions in areas such as platting, abandoned railroad rights of way, and statutory liens.

Finally the division provides advice to the Department of Inspections and Appeals regarding Indian Gaming. We have three Indian reservations in Iowa. Since passage of the National Indian Gaming Act in 1988, all three tribes have expressed an interest in engaging in Class III gaming which must be done pursuant to a compact between the specific tribe and State. One compact has been negotiated but not signed and discussions on a second compact will be getting underway.

FARM DIVISION

The Attorney General's Farm Division performs legal services for the Iowa Department of Agriculture and Land Stewardship and enforces the Iowa Consumer Fraud Act in the context of agricultural transactions. The Division is staffed with five attorneys, two investigators and a secretary.

In serving as legal counsel to the Department of Agriculture, the Farm Division has represented various divisions within the department such as the Agricultural Development Authority, Grain Warehouse Bureau and the Veterinary Board. The Division represents the Iowa Grain Indemnity Fund Board and the Iowa State Fair Authority. The Division also counsels the Campaign Finance Disclosure Commission and the Iowa Engineering and Land Surveying Examining Board.

In addition to advising its client-agencies on a regular basis, the Division has assisted in drafting administrative rules and represented the agencies in administrative hearings and in court. The Farm Division represented its client-agencies in 32 administrative hearings, 21 district court cases and 2 Iowa Supreme Court appeals through the biennium.

In enforcing the Iowa Consumer Fraud Act, the Farm Division filed 6 actions and saved or recovered $11,278,161.91 for Iowa farmers during the biennium. The Division has concentrated on frauds aimed at farmers through the telemarketing of agricultural chemicals.

The Farm Division also embarked on a new initiative aimed at enforcement of the state's pesticide laws. In the first six months of this effort, the Division filed two criminal actions resulting in guilty pleas and initiated 6 administrative proceedings.

The Farm Division also monitors compliance with both the Iowa Corporate Farming and Nonresident Alien laws. The Division, in cooperation with the Iowa Secretary of State, scrutinized the agricultural reports filed by

corporations owning agricultural land in the state to monitor compliance with the corporate farming law. The Division also filed an Amicus Curiae brief with the Eighth Circuit Court of Appeals in *MSM Farms Inc. v. Spire et al.*, a case involving a challenge to the Nebraska constitutional provisions restricting corporate farming.

The Division continued to work with the Iowa Mediation Service and the Farm Project of the Legal Services Corporation of Iowa. The Attorney General contracts, pursuant to statute, with the Iowa Mediation Service, Inc. and the Legal Services Corporation of Iowa to provide mediation and legal services to eligible, low-income farmers. The Division recently redrafted its administrative rules to implement statutory changes in the scope of mediation enacted by the 1990 General Assembly.

During the biennium the Farm Division issued 12 Attorney General's opinions.

HEALTH DIVISION

The Health Division, consisting of two and one-half attorneys, represents the Iowa State Department of Public Health and the Division of Health Facilities in the Department of Inspections and Appeals. The attorneys provide daily advice and counsel, represent the departments in administrative hearings and litigation, and render assistance and advice in drafting administrative rules and legislation.

In 1989-90, the Health Division attorneys served as legal counsel to the Division of Substance Abuse and twelve health licensing boards, providing general advice and representation in administrative hearings and court litigation.

The Division attorneys also prepared formal Attorney General opinions and provided frequent informal written and oral advice to the public. The attorneys participated in conferences and panel discussions on health topics at the request of Health Department agencies and other groups or organizations.

HUMAN SERVICES/ CORRECTIONS DIVISION

The Division performs legal services for the Departments of Human Services and Corrections. It is comprised of one Deputy Attorney General, eighteen full-time and one half-time assistant attorneys general (five of whom are assigned to represent the Child Support Recovery Unit of the Department of Human Services), one administrative officer, and five full-time and one half-time legal secretaries.

The legal services which are provided include: 1) defending suits in state and federal courts (1,370 lawsuits pending as of July 1990), including prisoner civil rights litigation, juvenile appeals before the Iowa Court of Appeals and Supreme Court which had been handled by the county attorneys at the district court level, juvenile cases before the Iowa district courts when there is a conflict with the county attorneys, matters involving mental health and correctional state institutions, and appeals to district courts from administrative hearings; 2) providing consultation and advice with regard to statutes, judicial decisions, policy, state and federal regulations, proposed legislation, and administrative rules; 3) inspecting and approving contracts and leases, and handling real estate matters; 4) researching and preparing opinions of the Attorney General; and

5) handling collections of welfare overpayments, fraud, delinquent accounts; and recovering Title XIX Medicaid payments from liable third parties.

Authority is vested in Iowa Code ch. 252B for the Attorney General to perform legal services for the Child Support Recovery Unit, Department of Human Services. Under the direction of the supervisory assistant attorney general assigned to this Division, five assistant attorneys general are located throughout the State and assist in training the county attorneys and their assistants charged with prosecuting child support cases. This responsibility includes conducting training seminars, drafting form pleadings, overseeing all appeals, and prosecuting special cases. Child support collections principally were from absent parents of welfare recipients.

Summary of the monies recovered and collected for the State by this Division during the biennium follows:

Child Support Collections	$ 141,785,076 *
Title XIX Medical Subrogation	954,450
Welfare Overpayments	38,516
Miscellaneous Accounts	19,180
TOTAL RECOVERIES	$ 142,797,222

* Federal Fiscal Years 1989 & 1990

INSURANCE DIVISION

The Insurance Division of the Department of Justice consists of two assistant attorneys general, one full time for insurance, the other full time for securities. Legal advice is rendered to the insurance-related bureaus of the Insurance Division of the Department of Commerce, and to the Securities Bureau of the Insurance Division. The legal questions presented to the insurance assistant span a wide range but mostly involve construction of the statutes in Title XX of the Iowa Code dealing with insurance. The insurance assistant also assists the insurance-related bureaus of the Insurance Division in preparing and drafting legislation and administrative rules and handles insurance-related litigation in which the Insurance Division is a party.

The insurance assistant also fulfills the statutorily prescribed role of reviewing documents of insurance companies such as articles of incorporation and reinsurance treaties. That assistant reviewed numerous documents of this nature in the biennium. The insurance assistant also advised the Commissioner of Insurance on legal questions relating to insurance company mergers, acquisitions, and reorganizations. Considerable attention was given by the insurance assistant in the biennium to the legal ramifications of insurance company insolvencies, in the supervision, rehabilitation, or liquidation stages.

A full-time assistant attorney general was assigned to the Securities Bureau in the summer of 1988. This assistant provides legal advice to the Superintendent of Securities and the Superintendent's staff. In addition, this assistant represents the Superintendent in all court actions brought by or against the Securities Bureau. The primary responsibility of the Securities Bureau is enforcing the Iowa Uniform Securities Act, Iowa Code chapter 502. The Bureau has obtained civil judgments of more than $5,000,000 and has assisted in obtaining a number of criminal convictions against violators of chapter 502.

In addition to the securities-related work performed by the Securities Bureau, the Bureau includes a regulated industries unit which is responsible for administering the following statutes: the Prearranged Funeral Contracts Act, the Loan Brokers Act, the Business Opportunity Act, the Residential Service Contracts Act, the Membership Sales Act and the Motor Vehicle Service Contracts Act. The securities assistant provides legal advice and representation to this unit.

The Securities Bureau also administers the Iowa Commodity Code which was enacted in 1990. The securities assistant represents the Superintendent in all actions filed under that statute.

PROSECUTING ATTORNEYS COUNCIL

The office of the Prosecuting Attorneys Training Coordinator was created by legislation in 1975 (Iowa Code chapter 13A) as an autonomous entity within the Department of Justice. A council of five members was established as the policy-making head of the agency, consisting of the Attorney General or a designated representative, the incumbent president of the Iowa County Attorneys Association, and three county attorneys elected to staggered three-year terms by and from the members of the Association. An Executive Director, a regular employee of the Department, was made the chief administrative officer and was to be appointed by and serve at the pleasure of the Council.

The structure of the office was altered under the state government reorganization legislation in 1986. Effective July 1, 1986, the Council remained in an advisory capacity only and the office was placed under the direct supervision of the Attorney General. The Executive Director (also referred to as the Prosecuting Attorneys Training Coordinator) remains the chief administrative officer responsible for the performance of the functions and duties of the office but now serves at the pleasure of the Attorney General.

The Prosecuting Attorneys Council provides continuing education and training for Iowa prosecuting attorneys and their assistants and other support services to promote the uniform and effective execution of prosecutors' duties. These services are provided to all ninety-nine county attorneys and the more than 200 assistant county attorneys as well as to many assistant attorneys general, other government attorneys and law enforcement officials.

The office has coordinated or assisted with many training events. Spring and Fall Training Conferences have been conducted annually. Each year, the office has also conducted workshops around the state to acquaint prosecuting attorneys with new legislation significant to their duties and has conducted specialized training on such subjects as child abuse, victim services, drunk driving and drug offense prosecution.

Acting as a clearinghouse of information and support services, the office: (1) provided research assistance to prosecuting attorneys; (2) published newsletters, bulletins, manuals and handbooks to keep prosecutors and others in the criminal justice system informed of developments and to provide reference material to assist them in executing their duties; (3) acted as liaison for prosecuting attorneys with the courts, executive departments and agencies, General Assembly, other divisions of the office of the Attorney General, law enforcement agencies, and other local, state or federal entities; (4) conducted annual surveys of county attorney and staff salaries and disseminated the resulting data; (5) assisted the development and implementation of standards of conduct for prosecuting attorneys; (6) assisted prosecutors and the public in the resolution of complaints and other concerns involving questions of

prosecutorial ethics and conduct; and (7) coordinated the promulgation of model forms for use in criminal cases in compliance with requirements of law.

REVENUE DIVISION

The Revenue Division advises and represents the Department of Revenue and Finance with respect to various taxes which are administered by the department, including income taxes, franchise tax imposed on financial institutions, state sale and use taxes, cigarette and tobacco taxes, drug tax, motor vehicle fuel taxes, inheritance and estate taxes, property taxes, hotel and motel local option taxes, local option sales taxes, real estate transfer tax, and grain-handling tax. In addition, the Division drafts responses to tax opinion requests made to the Attorney General.

During the 1989-1990 biennium, the Division participated in the resolution of informal proceedings for 370 protests filed by audited taxpayers, pursuant to Department of Revenue and Finance Rule 701 Iowa Admin. Code § 7.11. The Division also handled sixty-four contested case proceedings before an administrative law judge or the Director of the Department of Revenue and Finance. Of these, twenty-six were won, three were lost, thirty-one were settled, and four were pending decision at the end of the biennium.

In the biennium, seventeen contested cases were disposed of before the State Board of Tax Review in which six were won, three were lost, and eight were settled.

During the biennium, twenty-three Iowa District Court cases were handled by the Division. Of these fifteen were won, none were lost, seven were settled, and one is pending decision. In addition, one federal district court case was won.

This Division was involved in four cases in the United States Supreme Court during the biennium. In two cases, this Division's activities resulted in joinder by Iowa in amicus curiae briefs filed by other states. In one other case, this Division filed a brief in opposition to certiorari which the Supreme Court refused to grant. Finally, in another case, this Division drafted and filed an amicus brief by the Attorney General in which 25 other states joined.

On the appellate Iowa court level, the Division received decisions in twelve cases from the Iowa Supreme Court and in one case from the Iowa Court of Appeals. Of the Iowa Appellate court case decided, eight were won and five were lost. Several of these cases deserve mention.

In *Miller v. Bair*, 44 N.W.2d 487 (Iowa 1989), comprehensive 1985 legislation involving various tax revenues and sale of liquor by private enterprise was upheld against a challenge that it violated Iowa Const. Art. III, § 29, with respect to the title.

In *Wakonda Club v. Iowa State Board of Tax Review*, 444 N.W.2d 490 (Iowa 1989), the Iowa Supreme Court held that various construction and miscellaneous costs paid by golf and county club members were subject to Iowa sales tax.

In *Wapello County v. State Board of Tax Review*, 437 N.W.2d 585 (Iowa 1989), the Iowa Supreme Court upheld the Department of Revenue and Finance's methodology of property tax equalization of levels of assessment of agricultural realty in all Iowa assessing jurisdictions.

In *Ashland Oil, Inc. v. Iowa Department of Revenue and Finance*, 452 N.W.2d 162 (Iowa 1990), the Iowa Supreme Court upheld the Department of Revenue and Finance's application of payments to penalty, interest, and tax in the event of multiple audits.

In *Shroeder Oil Co. v. Iowa Department of Revenue and Finance*, 458 N.W.2d 602 (Iowa 1990), the Iowa Supreme Court held that Iowa Code § 421.8A could not constitutionally be applied to deprive a taxpayer, who could not afford to post a bond or make payment of a tax deficiency assessment, of a contested case hearing.

In *Hearst Corporation v. Iowa Department of Revenue and Finance*, 461 N.W.2d 295 (Iowa 1990), the Iowa Supreme Court held that Iowa Code § 422.45 (9) which provides for a sales tax exemption for newspapers did not violate the First Amendment by failure to provide a like exemption for magazines. This is the only case which has upheld this type of classification. States lost on this issue in Louisiana, Tennessee, and Florida.

A total of twenty-five responses to requests for opinions of the Attorney General were issued during the biennium. The Division also assisted the Department of Revenue and Finance in disposing of twenty-six petitions for declaratory rulings. In addition, 429 proposed rules of the Department were reviewed for content and legality at the Department's request.

In addition to the above activities, the Division rendered advice to Revenue Department personnel and responded to questions from other state officials concerning the tax laws of Iowa.

As a result of the Division's activities on behalf of the Revenue Department during the biennium, $16,032,986 of tax revenue was directly collected or requested refund amounts were not paid.

TORT CLAIMS DIVISION

The Tort Claims Division provides the state, its agencies, officials and employees, with legal representations in personal injury litigation and workers' compensation cases, including defense of the Second Injury Fund. Additionally, the division is charged with the investigation of all administrative claims made to the State Appeal Board under Iowa Code Chapter 25, general claims, and Chapter 25A, tort claims.

Tort litigation involves claims of medical malpractice, premises liability, negligent regulation by state agencies, social service malpractice and civil rights violations, among others. This litigation is defended by the division's eight attorneys and four investigators/paralegals at both the trial and appellate level, in both state and federal court. Workers' compensation claims are defended on the administrative level before the Iowa Industrial Commissioner, and on appeal to the district and supreme courts.

Administrative claims are investigated and recommendations concerning the claims are made to the State Appeal Board. In 1989 and 1990 a total of 3,266 claims were received for investigation, and 3,006 claims were presented for consideration by the State Appeal Board.

TRANSPORTATION DIVISION

Pursuant to Iowa Code § 307.23, a Special Assistant Attorney General serves as General Counsel to the Iowa Department of Transportation. Eight Assistant Attorneys General, two legal assistants and eight support staff provide legal

services to the department, including litigation representation and agency advice.

The three main areas of litigation activity are tort claims, judicial review proceedings, and condemnation appeals. The legal staff represents the department in tort claims which involve highway accidents or accidents on property owned or controlled by the DOT. During 1989 and 1990, thirty tort cases were opened and sixty-three were closed, for a total savings of $62,225,517.15 (the difference between the total amount claimed and the amount paid). The legal staff represents the department when judicial review is sought of department action involving, for example, driver's license revocation or suspension. During 1989 and 1990, 382 judicial review proceedings were opened and 468 were closed. The legal staff also represents the department in judicial condemnation actions. During 1989 and 1990, fiftysix condemnation appeals were filed and fifty-four were closed, representing a savings of nearly $1,282,311.77 (the difference between the total amount claimed and the amount paid).

In addition to the three main areas of litigation, the Department of Transportation is engaged, either as plaintiff or defendant, in extensive litigation, all of which is handled by the Transportation Division. Such litigation, at the trial and appellate level in both federal and state court, involves contract disputes, employment discrimination claims, constitutional challenges, environmental issues, railroad issues and certain tax matters. The legal assistants on the staff represent the DOT in contested case hearings.

The legal staff also provides non-litigation services to the department. Consultation routinely occurs with respect to statutes, court decisions, state and federal regulations, and policy matters. Department contracts, easements, and other agreements are reviewed. The legal staff is also consulted with regard to proposed legislation and administrative rules. Additionally, the legal staff is responsible for researching and drafting Attorney General opinions regarding transportation related matters.

State of Iowa
1989 - 1990

FORTY-EIGHTH BIENNIAL REPORT

OF THE

ATTORNEY GENERAL

BIENNIAL PERIOD ENDING DECEMBER 31, 1990

THOMAS J. MILLER

Attorney General

Published by
THE STATE OF IOWA
Des Moines

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Samuel A. Rick	Mahaska	1856-1861
Charles C. Nourse	Polk	1861-1865
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John M. Rankin	Lee	1940-1947
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Evan Hultman	Black Hawk	1961-1965
Lawrence F. Scalise	Warren	1965-1967
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Thomas J. Miller	Clayton	1979-1991
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STEPHEN C. ROBINSON, 8/73- .....Assistant Attorney General
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JUDY A. SHEIRBON, 7/89- .....Assistant Attorney General
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ATTORNEY GENERAL OPINIONS

JANUARY 1989
TO
DECEMBER 1990

JANUARY 1989

January 19, 1989

JUVENILE LAW: Detention of Juveniles Waived to Adult Court. Iowa Code §§ 232.22(4), 232.45, 356.3 (1987); 1988 Iowa Acts, Ch. 1167, § 3. Iowa Code § 232.22(4) (1987), as amended by 1988 Iowa Acts Ch. 1167 § 3, does not supersede Iowa Code § 356.3 requiring separation of juveniles in jails and the latter statute still applies to juveniles waived to adult criminal court. (Phillips to Thompson, 1-19-88) #89-1-1

Ann B. Thompson, Administrator: You have written this office requesting an opinion regarding two statutes pertaining to juvenile detention practices in Iowa. Specifically, you have inquired as to whether Iowa Code Supp. § 232.22(4) (1987), as amended by 1988 Iowa Acts Ch. 1167, § 3, "agrees with, conflicts with or supercedes" Iowa Code § 356.3 (1987). The 1988 amendment to § 232.22(4) states that certain statutory limitations placed on adult detention facilities holding juveniles within the jurisdiction of the juvenile court do not apply to adult detention facilities holding juveniles within the jurisdiction of the adult criminal court. The latter statute states that the limitations do apply to such facilities. Hence, your question arises on the consistency of the two statutes. In response to that question, it is the opinion of this office that the two statutes can be harmonized without the former statute being deemed to have overruled the latter. It is necessary to set forth both statutes in order to explain that position.

Iowa Code Supp. § 232.22(4) (1987), as amended by 1988 Iowa Acts Ch. 1167, § 3, states in relevant part:

> The restrictions contained in this subsection relating to the detention of a child in a facility under subsection 2, paragraph "c" [an adult detention facility] do not apply if the court has waived its jurisdiction over the child for the alleged commission of a felony offense pursuant to Iowa Code § 232.45.

The restrictions referred to are ones limiting the time and circumstances of a juvenile's stay in an adult detention facility. These restrictions are essentially mandated by federal law if a state wishes to receive certain grant monies. 42 U.S.C. 5633(12)-(14). Their nonapplicability to juveniles waived to adult court on felony charges is specifically allowed by federal regulation. See 28 C.F.R. 31.303(e)(2). The restriction of most relevance here is that set forth in amended § 232.22(4)(c) (1987). It states a juvenile may be detained in an adult detention facility only if "[t]he facility has been certified by the department of corrections as being capable of sight and sound separation pursuant to this section and 356.3." The effect of the new law is, of course, to make this certification unnecessary where the juvenile has been waived to adult court on felony charges.

You have asked whether the elimination of this requirement is inconsistent with the second statute, Iowa Code § 356.3. That statute states, in part:

> Any sheriff, city marshal, or chief of police, having in the officer's care or custody any prisoner under the age of eighteen years, shall keep such prisoner separate and apart, and prevent communication by such prisoner with prisoners above that age, while such prisoners are not under the personal supervision of such officer, if suitable buildings or jails are provided for that purpose, unless such prisoner is likely to or does exercise an immoral influence over other minors with whom the prisoner may be imprisoned.
>
> A person under the age of eighteen years prosecuted under chapter 232 and not waived to criminal court shall be confined in a jail only under the conditions provided in chapter 232.

* * *

The effect of this statute is to require that juveniles in adult detention facilities be kept separate and apart from adults. It is clear from the statute's nonapplicability to juveniles within the jurisdiction of the juvenile court, that the requirement was designed to apply to juveniles waived to adult court.

By setting forth the two statutes thusly, we can see the conflict about which you have inquired. There is an old statute which states that juveniles waived to adult court must be kept separate and apart from adults. There is a new statute effectively stating that when a juvenile is waived up on felony charges you need not keep the juveniles separate. Do these laws conflict? Does the new law overrule the old as far as juveniles waived up on felonies are concerned, or can the two laws in two different Code chapters be harmonized?

It is the opinion of this office that new §232.22(4) and §356.3 can be harmonized. The former section was apparently designed to take advantage of the federal regulation excluding juveniles waived on a felony from the federal jail removal mandates, 28 C.F.R. 31.303(e)(2). It attempts to do this by specifying that the *restrictions on detaining juveniles under juvenile court jurisdiction* do not apply to those waived juveniles. It does not explicitly overrule those *restrictions on detaining juveniles within the jurisdiction of the adult court*, i.e. §356.3 Does this mean that the requirements of §356.3 still stand? That is not entirely clear because amongst the requirements declared to be inapplicable - the requirements pertaining to juveniles under the jurisdiction of the juvenile court - is one that their holding place be certified as capable of sight and sound separation with the meaning given the term in both the juvenile code *and in* §356.3. Does this elimination of certification under §356.3 mean that juveniles waived on felonies are no longer protected under that statute? We think not. As stated earlier, the new statute appears to be designed to eliminate the juvenile court protections for waived juveniles, not to eliminate the adult court protections they have traditionally enjoyed under §356.3. This may be seen from the fact that the new law has been codified as an amendment to the juvenile court detention statute, not to §356.3 itself.

What then is to be made of the fact that the laws declared inapplicable to those type of offenders includes reference to the separation requirements of §356.3? How is the apparent elimination of that sight and sound requirement to be squared with the continued existence of §356.3? In response it can be noted that the eliminated restriction refers to the certification of certain facilities as capable of sight and sound separation from adults. Section 356.3 itself merely requires sight and sound separation, not a certification of that capability. Hence, it is not inconsistent to assert that for juveniles waived up on felonies the requirements of certification under §356.3 do not apply, but the substantive mandates of that statute still do. The new statute declares the requirement of certification under §356.3, not §356.3 itself to be inapplicable.

We cannot find that new §232.22(4) impliedly repealed §356.3. The general rule is that repeals by implication are not favored. *Dan Dugan Transport Co. v. Worth County*, 243 N.W.2d 665 (Iowa 1976); 1986 Op.Att'yGen. 44, 46. It is not necessary to find a repeal by implication here. First, implied repeal is inconsistent with the fact that the section specifically mentions §356.3. Second, §232.22(4) contains a number of requirments for juvenile holding facilities, and does not just address sight and sound separation requirements. The exemption within it for juveniles waived to adult court still has meaning even if §356.3 continues to require separation of those juveniles from adults. Third, as noted above, these sections can be harmonized as §232.22(4) refers to facilities which arecertified as meeting separation requirements while §356.3 imposes no certification requirement.

To summarize, Iowa Code §232.(4)(d) (1987), as modified by 1988 Iowa Acts Ch. 1167, §3, does not supersede Iowa Code §356.3 in that for juveniles waived to adult courts it eliminates the requirement that they be held in facilities

certified as compliant with Iowa Code §356.3, but it does not eliminate the substantive requirements of that statute.

January 26, 1989

MUNICIPALITIES: Administrative Agencies; Airports. Iowa Code ch. 330 (1987); Iowa Code §§330.17, 330.23, 364.2(l). Airport commissions created pursuant to Iowa Code chapter 330 may only be dissolved pursuant to the election provisions of §330.17. Recently adopted §330.23 (1988 Iowa Acts ch. 1229, §1) does not supersede the election provisions of §330.17. (Krogmeier to Rensink, 1-26-89) #89-1-2(L)

January 30, 1989

COUNTIES AND COUNTY OFFICERS: Conservation board; multicounty railroad right of way. 16 U.S.C. §1247(d) (1987); Iowa Const., art. VII, §1; Iowa Code §§111A.4, 111A.6 (as amended by 1988 Iowa Acts, ch. 1216, §45) 111A.7, 331.427 (1987); Iowa Code Supp. §111A.5 (1987), as amended by 1988 Iowa Acts, ch. 1193. A county conservation board is authorized to assume responsibility for liability arising from transfer or use of a multicounty railroad right of way acquired with approval of the Interstate Commerce Commission pursuant to 16 U.S.C. §1247(d), but the conservation board should carefully negotiate the specific terms of any indemnification agreement with the transferor railroad. Approval of the Iowa Natural Resource Commission is required if the cost of acquisition exceeds twenty-five thousand dollars. Specific approval of the county board of supervisors is not required. But the board of supervisors has effective control of financing to the extent that acquisition is dependent on appropriations from the county general fund in excess of conservation revenues. The need for interagency agreements in acquisition, development and management of a multicounty recreational trail depends on the type and extent of cooperation needed from other units of government. (Smith to Siegrist, State Representative, 1-30-89) #89-1-3(L)

January 30, 1989

COUNTIES AND COUNTY OFFICERS; ELECTIONS: Residency of petitioners for establishment of benefited recreational lake district. 1988 Iowa Acts, ch. 1194, §§3 and 8; Iowa Code §39.3(1) (1987). A petition for establishment of a benefited recreational lake district must be signed by owners of property within the proposed district who are eligible electors of the proposed district for the purpose of voting in elections for political office. (Smith to Hanson, State Representative, 1-30-89) #89-1-4(L)

January 30, 1989

APPROPRIATIONS: Reversion of Funds. Iowa Code §8.33. Funds set aside for purchase of real estate and construction of building do not revert if binding real estate contract is entered into before close of the fiscal year. (Lindebak to Running, Representative, 1-30-89) #89-1-5(L)

January 30, 1989

COMMUNITY CORRECTIONS: Purchase of Property. Iowa Code §§246.102, 246,317, 905.4(5), 905.5, 905.8. Judicial District Board of Corrections has the authority to purchase property with approval of the Department of Corrections. (Lindebak to Corbett, State Representative, 1-30-89) #89-1-6(L)

January 30, 1989

COURTS: Witness mileage fees. Iowa Code §622.69 (1987). Under Iowa Code §622.69 witnesses are reimbursed for mileage actually traveled in compliance with a subpoena. The courts retain discretionary power to limit witness mileage reimbursement where the witness's "actual travel" is

unreasonable or unnecessarily increases the cost of the litigation. (Osenbaugh to Short, Lee County Attorney, 1-30-89) #89-1-7(L)

FEBRUARY 1989

February 3, 1989

STATE OFFICERS AND EMPLOYEES: Board of Dental Examiners; Peer Review Committees; License discipline; Mediation of disciplinary complaints. Iowa Code §§17A.10;17A.12(5); 153.33; 153.34; 258A.3; 258A.3(1)(d); 258A.3(1)(i); 258A.3(2); 258A.3(2)(e); 258A.3(4). The Iowa Board of Dental Examiners and Board-appointed peer review committees lack authority to create a program for mediating agreements between dentists and private citizens. (Weeg to Holveck, State Representative, 2-3-89) #89-2-1

The Honorable Jack Holveck, State Representative: You have requested an opinion of the Attorney General on several questions relating to whether the Board of Dental Examiners (Board) may engage in mediation of disciplinary complaints between licensees and private citizens which involve dental care. A brief description of the relevant law as well as the factual background leading to your request may be helpful.

The Board is statutorily authorized to investigate disciplinary complaints against its licensees, and when warranted, to initiate and prosecute disciplinary proceedings against those licensees. *See* Iowa Code §§ 153.33, 153.34, and 258A.3 (1987). To assist it in its investigatory process, the Board often assigns peer review committees to review specific disciplinary complaints. *See* § 258A.3(1)(h) and (i). Historically, those peer review committees have been appointed by the Board with the cooperation of the Iowa Dental Association (IDA). However, recently amended Board rules now also provide for the appointment of independent peer review committees. *See* 650 Iowa Admin. Code § 31.5(1). The peer review committees' statutory function is to "investigate, review, and report to the board" on those complaints referred to them. *See* § 258A.3(1)(i) and 650 I.A.C. § 31.6. According to Board rules, the peer review committee's report is to be submitted to the Board in writing, and is to contain a statement of facts, the recommendation for disposition, and the rationale supporting the recommendation. *See* 650 Iowa Admin. Code § 31.6(4). The Board then reviews the peer review committee's report and decides whether further proceedings are necessary or the case should be closed. *See* 650 Iowa Admin. Code § 31.7.

There is no express mention of mediation of disciplinary complaints in any statute or Board rule. However, it is our understanding that Board-appointed peer review committees have historically engaged in mediating the complaints they receive. Mediation, as we understand that term to be used by the Board and its peer review committees, consists of the peer review committee attempting to reach a resolution of a disciplinary complaint that is agreeable to the dentist and patient. This process begins when a peer review committee meets and investigates the circumstances of that complaint. If the committee decides there is any merit whatsoever to the complaint, it proposes an agreement it believes would be an appropriate resolution of the case. A mediated agreement typically includes a recommendation that the dentist perform additional procedures for the patient without cost or for a reduced cost, or that the dentist make some financial restitution to the patient. In few cases does a peer review committee submit to the Board a recommendation as to whether disciplinary action is warranted, as is required by Board rules. More commonly, the committee's recommendation to the Board states the matter may be resolved if certain conditions, usually involving financial remuneration, are met. If the dentist then complies with that recommendation, the case is closed by the Board.

This office has informally advised the Board there is no authority for either the Board or peer review committees operating under Board authority to engage in mediation between licensees and private citizens. Based on this advice, the Board has moved to discontinue mediation through its peer review process. It is within this context that you have requested our opinion on the following questions:

1. May the [Board] engage in informal settlement mechanisms, such as mediation, to resolve complaints pursuant to Section 17A.10(1)?
2. May the [Board] engage in mediation as a means of resolving complaints after an investigation has been conducted and contested case proceedings have begun pursuant to 650 Iowa Admin. Code Chapter 51 (1987)?
3. May the [Board] engage in mediation as a means of resolving complaints during an investigation and prior to contested case proceedings being initiated?
4. May the [Board] engage in mediation as a means of resolving complaints which relate to the practice of dentistry but do not warrant disciplinary proceedings?
5. As part of their authority to establish both procedures for disposition of complaints and the use of peer review committees, may the Board use members of peer review committees to mediate complaints?

We initially note that as a matter of policy this office supports the concept of mediation of disputes. We believe procedures for the informal resolution of disputes, such as mediation, are of great value to the public. It is often possible through such procedures to reach agreement on an issue more quickly and inexpensively than pursuing that issue into litigation. However, while we support the policy underlying the mediation process here in question, we have serious concerns regarding the absence of underlying statutory authority for this process. Accordingly, the opinion of the Attorney General must be that the Board of Dental Examiners cannot institutionalize a program of mediation between licensees and private citizens as part of the Board's proceedings for investigating and resolving disciplinary complaints against its licensees. Our reasons for this conclusion are as follows.

First, as stated above, there is no specific statutory provision authorizing the Board to mediate dentist-patient disputes. Upon receipt of a disciplinary complaint, the Board's authority under §258A.3(1)(c) is limited to determining whether that complaint constitutes grounds for disciplinary action:

> 1. Notwithstanding any other provision of this chapter, each licensing board shall have the powers to:
>
> * * *
>
> c. Review or investigate, or both, upon written complaint or upon its own motion pursuant to other evidence received by the board, alleged acts or omissions which the board reasonably believes constitute cause under applicable law or administrative rule for licensee discipline.
>
> * * *

If the Board determines pursuant to §258A.3(1)(d) that discipline is warranted, subsections 258A.3(2)(a) through (f) set forth the various disciplinary sanctions that may be imposed by the Board. Those sanctions range from revocation or suspension to issuance of a citation and warning, but do not include any sanction that would specifically authorize remuneration to the complainant or any other affected party. The only statute which even mentions a monetary sanction is §258A.3(2)(e), which provides that civil penalties of up to one thousand dollars may be imposed by Board rule if that rule specifies which acts are subject to civil penalties. This section quite clearly authorizes civil penalties to be paid by the licensee to the State, and can in no way be construed as authorizing the Board to order the licensee to reimburse a patient for damages.

It is well accepted that administrative agencies have only such authority as is specifically conferred upon them by the legislature or necessarily inferred from the statutes creating them. *See, Iowa Power and Light v. Iowa State Commerce Commission,* 410 N.W.2d 236, 240 (Iowa 1987). The authority for licensing boards to mediate between a dentist and a private citizen has clearly not been conferred by, nor can it be necessarily inferred from, the statutes creating professional licensing boards. These statutes are clearly designed to protect the public. *See generally* ch. 258A. The disciplinary sanctions provided by statute are designed not only to punish the licensee for disciplinary infractions, but also to protect the public by revoking or restricting the licensee's authority to practice in the future.

These licensee disciplinary statutes are not designed to compensate private parties who have incurred monetary damages from a licensee's practice. If a patient believes he or she is entitled to reimbursement for damages incurred, that patient has civil law remedies which may be pursued privately. Those remedies are available regardless of whether the treatment in question constitutes grounds for disciplinary action.[1]In sum, under existing law the question whether a dentist should reimburse a patient for damages incurred by that patient in the course of dental treatment is not a licensee disciplinary matter. It only becomes a disciplinary matter when the treatment provided involves an act or omission that constitutes a statutory or rule violation.

It is also the view of this office that a licensing board such as the Board of Dental Examiners may not make an award of monetary damages to a private citizen absent express statutory authority. In *Chauffers, Teamsters and Helpers, Local Union No. 238 v. Iowa Civil Rights Commission,* 394 N.W.2d 375 (Iowa 1986), the Iowa Supreme Court found that the civil rights commission had specific authority to award actual damages, court costs, and attorney fees. The Court held that actual damages included damages for emotional distress, but further held that an administrative agency could not award punitive damages absent express statutory authority. 394 N.W.2d at 384. We believe this opinion makes clear that there must be statutory authority for an agency to award damages, be they actual or punitive, before that agency may do so. Because there is no such authority for the Board of Dental Examiners to award damages, it may not do so.

Further, resolution of disciplinary complaints by mediation of a private party dispute under Board auspices could be coercive. To conduct a confidential investigation which results in a recommendation that makes clear the case will be dismissed if the dentist agrees to a particular monetary settlement with a patient puts the dentist in a difficult position. If the dentist disputes the settlement, he or she risks further, perhaps public, disciplinary proceedings. Alternatively, the dentist agrees to a mediated settlement he or she believes to be unfair in order to foreclose further proceedings. This result is not one of the objectives of licensee disciplinary proceedings.

For these reasons, we conclude the Board of Dental Examiners has no authority to mediate between a licensee and a patient. We do not believe that this conclusion is affected by the point in the disciplinary process at which mediation occurs. It is of no consequence whether mediation occurs during an investigation, but before a contested case proceeding has been filed, or after the contested case proceeding has concluded. Mediation between individuals under Board auspices is simply not authorized by law at any stage before, during, or after licensee disciplinary proceedings.

We also do not believe that this type of mediation is authorized under the informal settlement provisions of § 17A.10. That section encourages the informal settlements of matters that may lead to contested case proceedings. *See also*

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[1] There are certain instances in which a particular course of treatment results in damages which entitle a patient to reimbursement. However, that treatment may not necessarily constitute grounds for disciplinary action.

§17A.12(5) ("Unless precluded by statute, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order or default or by another method agreed upon by the parties in writing."); and §258A.3(4) ("Nothing contained in this section shall be construed to prohibit informal stipulation and settlement by a board and a licensee of any matter involving licensee discipline . . . .") [2] There is nothing in this section which expressly or impliedly provides that parties to a disciplinary proceeding may informally agree to an award of money damages or restitution which, under the rationale for our opinion set forth above, the Board has no authority to otherwise impose.

In closing, we note there may be isolated instances where it may be helpful to the Board to authorize one of its peer review committees to facilitate discussion between a dentist and a patient in order to resolve a dispute which is highly unlikely to result in disciplinary action. However, we do not believe there is statutory authority to institutionalize mediation as part of the regular licensee disciplinary process.

Of course, nothing in this opinion precludes the Iowa Dental Association or any other private group from conducting mediation of dentist-patient disputes. This opinion only addresses whether there is any authority for the Board of Dental Examiners or its appointed committees to conduct this type of mediation as part of the licensee disciplinary process.

In conclusion, it is the opinion of the Attorney General that the Iowa Board of Dental Examiners and Board-appointed peer review committees lack authority to create a program for mediating agreements between dentists and private citizens.

February 14, 1989

COUNTIES AND COUNTY OFFICERS; COUNTY ATTORNEY: County Conference Board; Legal Counsel for County Conference Board. Iowa Code ch. 21: §§21.5, 21.6; §§331.756; 331.756(6)-(7); 331.759; 441.16; 441.41 (1987); Iowa Code of Professional Responsibility for Lawyers, Canon 5, DR 5-101(C), 5-102(A)-(B), EC 5-14, EC 5-18. The duty of the county attorney to legally defend all actions in which the county is interested pursuant to Iowa Code section 331.756(6), includes law suits filed against the county conference board. The county attorney also has the duty, under Iowa Code section 331.756(7), to give advice or a written opinion to the board on contract matters. However, that duty does not include the drafting of contracts, unless the contract is related to litigation involving the county conference board.

The county attorney does not have a conflict of interest in defending the conference board against an individual who brings an open meetings law violation, following a refusal by the county attorney to undertake such action.

The mere possibility that the county attorney may be called as a witness does not preclude representation of the board.

Finally, the county conference board has the power to employ private counsel to assist the county attorney in defending the board in open meetings lawsuits. Such expense should be paid from the general fund of the county appropriated pursuant to Iowa Code section 441.16. If fiscally impossible, section 331.756(6) still enables the board to utilize the services of the county attorney. (Zbieroski to Martens, Iowa County Attorney, 2-14-89) #89-2-2(L)

February 15, 1989

STATE OFFICERS AND DEPARTMENTS: Competition with private enterprise; Iowa State Fair Authority. Iowa Code Supp. §§173.1, 173.14(1), (3), (5), (7) (1987); Iowa Code §23A.2 (1989); 371 Iowa Admin. Code §§3.1, 3.2, 7.15. The use of the Iowa State Fair campgrounds by the public both during the annual Iowa State Fair and interim periods when the fair is

[2] This statutory language referring to informal settlements clearly refers to settlement agreements between the licensing board and the licensee, not agreements between the licensee and private parties.

not in session does not contravene § 23A.2, which generally restricts governmental competition with private enterprise. (Benton to McKean, 2-15-89) #89-2-3

The Honorable Andy McKean, State Representative: This is in response to your letter of December 30, 1988, requesting our opinion on the legality of the Iowa State Fair Authority operating its campground under 1988 Iowa Acts, Chapter 1230, legislation enacted to generally restrict governmental competition with private enterprise. The Iowa State Fair Board offers its campgrounds for public use both during the annual fair, and for various interim events such as horse and cattle shows which take place when the fair is not in session. Camping fees are set during the fair by the Board and are in addition to the admission fee. The Board also charges a fee for camping units which utilize the campground for interim events. In addition, the campgrounds are generally made available to the public for a fee for a period from April 15th through October 15th.

As your letter notes, Iowa Code chapter 23A (1989) relates to governmental competition with private enterprise. The thrust of the legislation is in § 23A.2 which provides in part:

1. A state agency or political subdivision shall not, unless specifically authorized by statute, rule, ordinance, or regulation:
   a. engage in the manufacturing, processing, sale, offering for sale, rental, leasing, delivery, dispensing, distributing, or advertising of goods or services to the public which are also offered by private enterprise unless such goods or services are for use or consumption exclusively by the state agency or political subdivision.
   b. Offer or provide goods or services to the public for or through another state agency or political subdivision, by intergovernmental agreement or otherwise, in violation of this chapter.

The statute also provides that after the effective date of the act, before a state agency is permitted to continue in an existing practice described in subsection 1, "that state agency must prepare for public examination documentation showing that the state agency can provide the goods or services at a competitive price." Section 23A.2(4) also provides that even if a state agency is authorized by statute to compete with private enterprise, or seeks to gain such authorization, the "state agency shall prepare for public inspection documentation of all actual costs of the project as required by generally acceptable accounting principles." You ask whether under this law the Fair Board is authorized to utilize its campground through either the "rule exemption" in section 23A.2 or the ability to "take and hold property" language stated in section 173.14.

Iowa Code Chapter 173 governs the Iowa State Fair Authority. Iowa Code § 173.1 provides in part:

> The Iowa state fair authority is established as a public instrumentality of the state. The authority is not an agency of state government. However, the authority is considered a state agency and its employees state employees for the purposes of chapter 17A, the merit system provisions of chapter 19A, and chapters 20, 25A, 91B, 97B, and 509A. The authority is established to conduct an annual state fair and exposition on the Iowa state fair grounds and to conduct other interim events consistent with its rules. The powers of the authority are vested in the Iowa state fair board.

The powers of the Board itself are set forth in Iowa Code § 173.14 which in part provides:

> The state fair board has the custody and control of the state fairgrounds including the buildings and equipment on it belonging to the state, and may:

1. Hold an annual fair and exposition on those grounds. All revenue generated by the fair and any interim uses shall be retained solely by the board.

* * *

3. Grant a written permit to persons as it deems proper to sell fruit, provisions, and other lawful articles under rules the board prescribes.

* * *

5. Take and hold property by gift, devise, or bequest for fair purposes. The president, secretary, and treasurer of the board shall have custody and control of the property subject to the action of the board. Those officers shall give bonds as required in the case of executors to be approved by the board and filed with the secretary of state.

* * *

7. Grant written permission to persons to use the fairgrounds when the fair is not in progress.

The fair has adopted rules which pertain to camping on the fairgrounds both during the fair and the interim period. 371 Iowa Admin. Code § 3.1 concerns camping available during the fair and provides that:

> Camping facilities will be available to the public in the campgrounds area of the fairgrounds.

Section 3.2 of the fair's rules provides:

> Each campsite must be registered individually. Camping fees will be set and published annually by the Iowa state fair board.

There are also several regulations concerning camping on the fairgrounds in connection with interim events. *See*, generally 371 Iowa Admin. Code Chapter 7. Specifically, the fair has regulations which provide that the camping area will be available for such interim uses as horse and cattle shows. In addition, the fair has at § 7.15 of its rules adopted a procedure for camping to be available to the general public not connected with specific interim events. This rule provides:

(1) Campgrounds are located in the East area of the fairgrounds and during the interim period, Grand Avenue gate is to be used.

(a) Available for interim camping from April 15th through October 15th.

The fair charges a fee for using the campgrounds during this period.

We do not believe that offering the campgrounds to the general public during the run of the state fair itself falls within the meaning of section 2 of the new act. The thrust of the definition prohibiting competition with private enterprise provides that the State shall not engage in an activity which is also offered by private enterprise. However, the state fair is an event solely through the State Fair Authority, and is not an activity which competes with private enterprise. The use of campgrounds by fair goers is an integral part of the conduct of the fair itself and not a separate service.

Even if this section were applicable to the use of the campgrounds during the fair, both statute and regulation specifically authorize this type of activity. For example, section 173.1 authorizes the Board to conduct an annual state fair and exposition. Section 173.14(1) also specifically authorizes the Board to hold an annual fair and exposition on the fairgrounds. Section 3.1 of the fair's rules also states specifically that "camping facilities will be available to the public in the campgrounds area of the fairgrounds," and § 3.2 authorizes that a fee be charged. Consequently, we would conclude that the use of the campgrounds during the course of the fair, even if falling within the meaning of section 2 of the bill, is specifically authorized and therefore permissible.

The second issue raised by your request concerns the propriety of the fair offering the campgrounds to the public for a fee during interim periods when the fair is not in progress. As a preliminary matter, we note that the fair has been specifically authorized to utilize the fairgrounds when the fair is not in session. For example, § 173.1 authorizes the authority to not only to conduct an annual state fair, but to conduct, "other interim events" which are consistent with its rules. In addition, § 173.14(7) gives the Board authority to, "grant written permission to persons to use the fairgrounds when the fair is not in progress." Our office has also issued a series of opinions holding that the Board has the power to lease the facility during interim periods. *See,* for example, 1940 Op.Att'yGen. 272, 1968 Op.Att'yGen. 626, 1974 Op.Att'yGen. 535. Although these provisions authorize the interim use of the fairgrounds, they arguably do not "specifically" authorize offering the campgrounds to the public for a fee when the fair is not in session.

However, the legislation also provides that such specific authorization may be found by rule or regulation. In that connection, we note that § 7.15 of the fair's rules specifically provides that the campgrounds are available for interim camping from April 15th through October 15th, and authorize that a fee be charged. In our view, this provides sufficient authorization to satisfy the new legislation.

We have advised the Board that in conjunction with § 23A.2(4) they should prepare documentation showing the costs of the camping service which they provide in accordance with generally acceptable accounting principles.

February 16, 1989

MUNICIPALITIES: Civil Service; Classification of Employees; Exemptions. Iowa Code Ch. 400 (1987); Iowa Code §§ 364.2(1), 372.5, 400.6, and 400.27 (1987); 1988 Iowa Acts, Ch. 1058, § 1. A city governed by the commission form of government is limited to the five departments listed in § 372.5. The applicability of civil service to a particular position is determined by state law, and not by city ordinance. Determination as to the applicability of civil service, in the administration of Ch. 400, is determined by the city council, which could elect to delegate, by ordinance, that authority internally to a municipal entity which would decide the issue. One possible alternative would be the city's personnel department. Review of the internal administrative decision as to the applicability of civil service to a particular office would be subject to review by the civil service commission; appeal therefrom would be to the district court, after the commission has ruled. (Walding to Angrick, State Ombudsman, 2-16-89) #89-2-4(L)

February 16, 1989

MILITARY; PUBLIC EMPLOYEES: Military leave. Iowa Code §§ 29A.9, 29A.28, and 29A.43. Employee of State, or of subdivision of State, is entitled to take either military leave (under Iowa Code § 29A.28) or compensatory time on days when military duty interferes with scheduled work time. Employee should not return to work after earning a full day's pay from federal sources. Employer may attempt to schedule work days so as to avoid conflicts with military duty. (Galenbeck to Mann, State Senator, and Strobl, 2-16-89) #89-2-5(L)

February 28, 1989

COUNTIES: County Hospital; Constitutional Law. Iowa Const. Art. III, § 31; Iowa Code § 347.14(10). A county hospital board of trustees has the authority to determine that expending hospital sums to recruit health care workers is necessary for the management of the hospital. A program that provides scholarship grants to persons in health care programs who will then work at the hospital may be found to serve a public purpose required by Art. III, § 31 of the Iowa Constitution. However, the board may not transfer assets to a foundation if the effect is to deprive future boards of trustees of control over hospital assets. (McGuire to Scieszinski, 2-28-89) #89-2-6(L)

February 28, 1989

PAROLE: Interstate Compact Directors. Iowa Code §§ 907A.1, 907A.2, 906.1, 906.11, 905.1. The Iowa Probation and Parole Compact Director may coordinate in- state placement of persons paroled out-of-state without amendment of the parole by the Iowa Board of Parole. (McGrane to Angrick, Citizen's Aide/Ombudsman, 2-28-89) #89-2-7(L)

MARCH 1989

March 10, 1989

CONSTITUTIONAL LAW; CRIMINAL LAW: Federal drug-testing rules: Iowa Code Supp. §730.5 (Supp.); U. S. Constitution, Article VI. A state statute which prohibits drug-testing except for that which is mandated by a federal "statute" does not allow for drug-testing mandated by a federal regulation; however, the state statute may be pre-empted by the federal regulation. (Hunacek to Rife, 3-10-89) #89-3-1

The Honorable Jack Rife, Senator: You have requested an opinion of the Attorney General concerning the interplay between state and federal law on employee drug testing. As you note in your opinion request, Iowa Code §730.5 regulates, and (with certain exceptions) prohibits, employee drug testing. One exception to this prohibition is for "drug tests required under federal statutes."[1]

As you also note in your opinion request, the United States Department of Defense has promulgated an administrative rule, passed pursuant to the Drug-Free Workplace Act of 1988, P.L. 100-690, which requires a contractor to establish a program that provides for testing for the use of illegal drugs by employees in sensitive positions. 53 Fed.Reg. 37763-65 (1988). This is an interim rule, and it states that the mandated drug testing programs shall not apply if they are inconsistent with state or local law. However, the General Counsel of the Department of Defense has said that after a forthcoming clarification the rule will pre-empt any such law prohibiting drug testing. Fed.Con.Rep. (BNA) Vol. 50, p. 914 (Dec. 5, 1988).

With this as background, you ask whether drug tests mandated by the federal rule are tests "required under federal statutes" and thus authorized by the Iowa statute. For the reasons expressed below, we think not.

This question is, of course, one of statutory construction. We must determine whether the term "federal statutes" includes administrative rules. In this regard, our supreme court has consistently observed that when "a statute is plain and its meaning is clear, we do not search for meaning beyond its express terms. *State v. Tuitjer*, 385 N.W.2d 246, 247 (Iowa 1986); *Elliott v. Iowa Department of Public Safety*, 374 N.W.2d 670, 672 (Iowa 1985). In addition, "another familiar principle of statutory construction [is] that a word should be given its commonly understood meaning unless it is clear from the reading of a statute that another meaning was intended or unless such a construction would defeat the manifest intent of the legislation." *Casteel v. Iowa Department of Transportation*, 395 N.W.2d 896, 898 (Iowa 1986). The term "statute", in common legal parlance,

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[1] Other exceptions, not relevant to this opinion, are random tests for peace officers and correctional officers, §730.5(2), tests conducted as a part of a preemployment physical or as part of a regularly conducted physical under certain specified circumstances, §730.5(7), and cases where the employer has probable cause to believe an employee's facilities are impaired on the job, the employee is in a position where job impairment presents a danger to others or is a violation of a work rule, and other conditions relating to the accuracy and reliability of the test are satisfied. Iowa Code §730.5(3).

refers to an act of the legislature. *Reitzer v. Board of Trustees of State Colleges*, 477 A.2d 129, 133 (Conn.App. 1984). Therefore, the term would not include an administrative rule, a conclusion explicitly reached by the United States Supreme Court in *United States v. Mersky*, 361 U.S. 431, 437, 80 S.Ct. 459, 463, 4 L.Ed.2d 423, 429 (1960).

Our conclusion is further supported by the legislative history of another statute, the Iowa Administrative Procedure Act, Iowa Code Chapter 17A. In that statute, the term "contested case" is defined as a "proceeding . . . in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing." Iowa Code §17A.2(2). Professor Bonfield, discussing this provision, has specifically indicated that an evidentiary hearing required by administrative rule would not qualify as a "contested case". A. Bonfield, *The Definition Of Formal Agency Adjudication Under The Iowa Administrative Procedure Act*, 63 Iowa Law Review 285, 308 (1977). "This conclusion is based on the plain meaning of the specific language used, and the fact that the language was purposely chosen to accomplish this result." *Id.* Professor Bonfield goes on to observe that the legislature specifically used the phrase "required by statute" rather than the broader phrase "required by law", which would encompass hearings required by administrative rule. *Id.* at 308-311. Consistent with this, the United States Supreme Court in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50, 94 L.Ed. 617, 628 (1950) specifically interpreted the federal administrative procedure act's statute referring to "every case of adjudication required by statute . . . ." to exclude hearings which an agency may hold by "regulation, rule, custom, or special dispensation."

Given the legislature's specific decision in this case to use the word "statute" in a narrow way so as not to include all species of what might be more broadly characterized as "law," we think it likely that the term "statute" as used in section 730.5 does not include administrative rules. Of course, if the legislature did so intend, it could make its intent clearer by replacing the word "statute" by the word "law."

We note, however, that in certain cases, as a result of federal law, a requirement specified in a federal regulation may nevertheless be "required by Federal statute." This may occur, for example, if another federal statute mandates compliance with a given federal regulation, or if the federal regulation merely interprets a federal statute and is thus construed by the agency promulgating it as merely specifying what the statute already mandated. However, neither of these situations is the case here; the Drug-Free Workplace Act requires neither drug testing nor obedience to an administrative rule requiring drug testing. We do not address whether other federal statutes may require a particular person to comply with these Department of Defense regulations.

We thus believe that mandatory drug testing done pursuant to a federal administrative rule would conflict with the Iowa statute regulating such testing. This conclusion leads us to another question, which, although not specifically posed by your opinion request, is one that we feel must necessarily be answered: which law, federal or state, controls? Our answer turns on principles of federal preemption.

In general, Article VI of the United States Constitution, the so-called "Supremacy Clause," establishes the supremacy of federal law over state law. "It is a familiar and well-established principle that the Supremacy Clause invalidates state laws that 'interfere, or are contrary to' federal law." *Hillsborough County v. Automated Laboratories, Inc.*, 471 U.S. 707, 713, 85 L.Ed.2d 714, 721, 105 S.Ct. 2371 (1985). This may occur in several different ways. First, when acting within constitutional limits, Congress may pre-empt state law by so stating in express terms. *Id.* In the absence of such express language, congressional intent to pre-empt state law may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that congress "left no room" for supplementary

regulation. *Id.* Pre-emption of a whole field will also be inferred where the field is one in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id.* Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objective of Congress." *Id.* Moreover, it is now firmly settled that "state laws can be pre-empted by federal regulations as well as by federal statutes." *Id.*

Thus the federal administrative rule could preempt the Iowa statute. Whether the rule preempts state law is a question of federal law which turns on the intent of the agency in drafting the rule. The Department of Defense interim rule states that drug testing will not be required where inconsistent with state law. However, we are advised that the Department of Defense is considering a rule which would override contrary state law. Any ambiguity in the federal rule should be resolved by the federal agency rather than this office.

The preceding discussion, of course, assumes the validity of the federal regulation. Whether or not these regulations are, in fact, valid is an issue that is beyond the scope of this opinion.

We conclude, therefore, that, as currently written, Iowa Code section 730.5 does not exempt from its coverage drug testing that is mandated by a federal regulation but not required by federal statute. However, if that regulation is valid, it may pre-empt inconsistent state legislation such as section 730.5.

We recommend that the legislature consider whether to amend the state statute in light of these federal rules to avoid thepotential conflict between state criminal law and federal procurement regulations.

MAY 1989

May 1, 1989

ADMINISTRATIVE LAW; HEALTH: Inspections for no-smoking violations. Iowa Code §§ 98A.2, 98A.6, 804.1, 805.8, 808.14. Inspections for violations of chapter 98A regulating smoking in public places can be conducted with other authorized inspections. Additionally, inspectors may observe violations in any place which the general public may enter and observe. If the civil fine is not timely paid, a citation may be issued by a magistrate under § 804.1. As a scheduled violation, a violation may also be charged by uniform citation and complaint under § 805.6. The Department of Public Health should take the lead in providing information about chapter 98A. (Osenbaugh to Ellis, Director, Department of Public Health, 5-1-89) #89-5-1(L)

May 2, 1989

COUNTIES AND COUNTY OFFICERS: County Assessor; Board of Supervisors; Publication of Claims. Iowa Code §§ 349.16, 349.18 ch. 441 (1989). The county board of supervisors does not have the statutory duty to approve warrants issued at the request of the county assessor, and therefore sections 349.16 and .18 do not require the county auditor to publish the expenditures and salaries of the county assessor's office. (St.Clair to Barbour, Webster County Attorney, 5-2-89) #89-5-2

Stephen E. Barbour, Webster County Attorney: You have requested the opinion of this office as to the proper resolution of the following two issues:

1. Does the county board of supervisors have the statutory duty to approve warrants issued at the request of the county assessor?

2. Does Iowa Code § 349.16 (1989) require the county auditor to publish the expenditures and salaries of the county assessor's office?

As you note in your letter requesting an opinion, the questions you raise have received different and apparently inconsistent answers from different state agencies. *Compare* Op.Att'yGen. #85-12-2(L) (December 10, 1985) with the December 31, 1985, letter from the Iowa Department of Revenue, a copy of which is attached.

In any event, a review of the relevant statutory provisions and past Attorney General's opinions indicates that both of the questions you pose should be answered in the negative. In explaining this conclusion, it would be helpful at the outset to retrace the two primary lines of reasoning which have in the past suggested differing resolutions.

A 1985 Attorney General's opinion determined that expenditures of the county assessor must be approved by the board of supervisors, and therefore must upon allowance by the board be published pursuant to the general publication requirements of sections 349.16 and 349.18. *See* Op.Att'yGen. #85-12-2(L). This approach found that the board's power to approve the county assessor's expenditures derived from the board's statutory grant of power "to examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle, and allow all claims against the county, unless otherwise provided by law." Section 331.401(1)(p). This approach drew support from the public policies favoring disclosure of county business as a check against extravagance and padded claims. *See* 1910 Op.Att'yGen. 223.

A different line of thought has interpreted chapter 441, which creates the office of county assessor, as contemplating a governmental unit almost entirely independent of the board of supervisors, such that no approval of expenditures of the assessor is required by the board. *See* December 31, 1985 letter of the Department of Revenue, attached. Under this reasoning, publication under sections 349.16 and 349.18 is not required because those sections apply only to expenditures "allowed" by the board. Expenditures not subject to board approval would never be "allowed" for purposes of determining the need for publication.

These divergent approaches have agreed that the publication requirement of sections 349.16 and 349.18 applies to expenditures of the county assessor only if such expenditures are subject to approval by the board. This position does appear to be required by the plain language of sections 349.16 and 329.18. Therefore, the resolution of the second question posed above (regarding the necessity of publication) will flow from a determination of whether expenditures of the county assessor are subject to approval by the board of supervisors.

Iowa Code chapter 441 (1989), entitled "Assessment and Valuation of Property", structures the assessment process by developing a framework for the activities and control of the offices of city and county assessor.[2] Several features of the statutory scheme embodied in chapter 441 suggest that the county assessor occupies a special status in county government, and that expenditures of the assessor's office would not be subject to approval by the county board of supervisors. Consider the following:

1. Chapter 441 envisions a system of local assessors which are to some extent subject to guidelines set down by the state director of revenue and finance, to some extent governed by a "conference board" created by section 441.2, and to some extent autonomous.

The director of revenue and finance plays a role in many of the activities of the assessor's office, including qualifying candidates for assessor positions

[2] City and county assessors are treated in basically the same manner throughout chapter 441, with the term "assessor" used to apply to both. *See* section 441.54. In this opinion, "assessor" will refer only to the county assessor, unless otherwise indicated.

(§§ 441.5 & .6), providing continuing instruction to assessors (§ 441.8), and prescribing assessment procedures (§§ 441.19, .26 & .27). Section 441.17, "Duties of assessor," requires the assessor to "[c]ooperate with the director of revenue and finance as may be necessary or required, and obey and execute all orders, directions and instructions of the director of revenue and finance, insofar as the same may be required by law." Section 441.17(4).

The conference board, made up of mayors of incorporated cities assessed by the county assessor, a representative from the board of directors of each high school district in the county, and members of the board of supervisors, also has an immediate and direct role in the operation of the county assessor's office. Among other powers, the conference board plays a role in appointing the assessor (§ 441.6) and removing an assessor (§ 441.9). The conference board also reviews the proposed budget of the assessor's office, which involves authorizing the number of deputies and other personnel, the compensation for the assessor and other staff, and miscellaneous expenses (§ 441.16).

It is important to note that in detailing the operation and control of the assessor system chapter 441 does not establish the county board of supervisors as a controlling authority in and of itself.[3] Neither does the chapter expressly vest authority to monitor or approve individual expenditures of the assessor's office in the board of supervisors or any other body.

2. The board of supervisors constitutes one of three voting units of the conference board, with the chairperson of the board of supervisors serving as chairperson of the conference board (§ 441.2). In its budget authorization role, the conference board receives and passes on the assessor's proposed budget, but does not then approve specific expenditures of the assessor's office as they arise. It would appear inconsistent with this legislative distribution of functions for the board of supervisors, itself a minority voting unit on the conference board, to supervise the assessor's activities under its budget by reviewing and allowing or disallowing specific expenditures.

3. Section 441.16, entitled "Budget", after setting forth a separate "assessment expense fund" to be created through a special tax levy certified by the conference board, states that "[t]he county auditor shall keep a complete record of such funds and shall issue warrants thereon only on requisition of the assessor." This language has been read to mean that the assessor's requisition is a necessary and sufficient condition of the issuance of warrants on the fund by the auditor. *See* Op.Att'yGen. #80-7-12. Admittedly, the ambiguous placement of the word "only" in the quoted language above might suggest that the assessor's requisition is necessary but perhaps not sufficient, thus leaving open the possibility of such additional required procedures as allowance by the board of supervisors. However, when this language is read in the context of the overall division of functions contemplated by chapter 441, it appears that the earlier Attorney General's opinion interpreting the language was correct, and that the assessor's requisition is all that is required for a warrant to issue on the assessment expense fund.

4. Section 441.16 also provides that the assessor may not issue requisitions so as to increase the total expenditures budgeted for the assessor's office, but may transfer funds budgeted for specific items from one unexpended balance to another. Such powers and restrictions are consistent with a legislative scheme in which the assessor controls its own expenditures, but make little sense in a scheme in which each expenditure is independently reviewed by another body in any event.

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[3] As noted below, the board of supervisors does play a role as a voting unit of the conference board. *See* section 441.2. The board of supervisors is also referred to in the context of the auditor's establishment of a real estate indexing system (§ 441.29), the provision of quarters for meetings of the board of review of assessments (§ 441.34) and the approval of platting expenses upon submission by the auditors (§ 441.67).

5. Section 441.55, entitled "Conflicting laws", provides that "[i]f any of the provisions of this chapter shall be in conflict with any of the laws of this state, then the provisions of this chapter shall prevail." This section makes clear that the legislative scheme fashioned by chapter 441 is deemed paramount and takes precedence over conflicting sources of law. This section serves to supplement the operation of a familiar principle of statutory construction, namely that the specific treatment of a subject prevails over the general. *See* Iowa Code § 4.7 (1989).

For the foregoing reasons, it is the opinion of this office that the county board of supervisors does not have the statutory duty to approve warrants issued at the request of the county assessor. This view compels the further conclusion that Iowa Code sections 349.16 and 349.18 do not require the county auditor to publish the expenditures and salaries of the county assessor's office.

The instant opinion is to some extent inconsistent with earlier opinions of the Attorney General. An October 20, 1949 opinion determined that funds disbursed by county auditors warrant for the county assessor's office were subject to prior authorization by the board of supervisors. *See* 1950 Op.Att'y Gen. 99. However, that opinion grew out of a statutory context significantly different from the current context, and the differing result may be attributed to this fact.[4]

The December 10, 1985 opinion of the Attorney General cited at the outset of this opinion also reached a conclusion at variance with that reached herein. *See* Op.Att'yGen. #85-12-2(L). That opinion determined that "expenditures of any county office which are approved by the board of supervisors must be published," and, relying upon a February 19, 1980 letter of informal advice from the office of the Attorney General to the Auditor of State,[5] also determined without discussion that expenditures of the county assessor were among those approved by the board of supervisors. To the extent that the 1985 opinion addressed the need for approval by the board of supervisors or expenditures fo the county assessor, that opinion is overruled.

May 2, 1989

TAXATION: Collection Of Drainage And Levy Assessments. Iowa Code § 445.36, 455.62 and 455.64 (1989). Drainage and levy assessments levied for annual operating budget purposes are collected under § 455.62 in semiannual installments in the same manner as general property taxes are collected pursuant to § 445.36. (Miller to Short, Lee County Attorney, 5-2-89) #89-5-3

Michael P. Short, Lee County Attorney: The Attorney General is in receipt of your opinion request regarding the collection of assessments issued by drainage and levy districts created under Iowa Code ch. 455 (1989). Specifically, you ask whether the assessment of a levy district for its annual operating budget is collected in the same fashion as other property tax assessments are collected under Iowa Code § 445.36 (1989), or does the assessment become due and payable in its entirety before September 30 of each year per Iowa Code § 455.64 (1989).

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[4] Among the differences between the relevant statutes in 1949 and today, the earlier scheme provided for a less detailed involvement by the conference board in the activities of the assessor; the earlier scheme, which treated city and county assessors in separate provisions, did not provide for issuance of county auditor's warrants for the county assessor "only on requisition of the assessor"; the earlier scheme contained no counterpart to the current authorization granted a county assessor to transfer funds budgeted for specific items from one unexpended balance to another; the earlier scheme contained no counterpart to the current language which expressly states that provisions of the chapter governing assessors prevail over any inconsistent provisions elsewhere in Iowa law.

[5] A copy of the February 19, 1980 letter for informal advice was attached to Op. Att'y Gen. #85-12-2(L).

Statutes will be strictly construed in interpreting special assessments for drainage and levy districts as "the power to levy and collect a special assessment for drainage [and levy] purposes is a special power, conferred for a special purpose. . . ." *Howard v. Emmet Co.*, 140 Iowa 527, 530, 118 N.W. 882, 883 (1908).

Originally, under Iowa Code § 1989a26 (1907), which was the forerunner to current Iowa Code §§ 445.62, 455.63 and 455.64 (1989), drainage and levy assessments were collected under two methods. One method allowed the owner to pay the assessment in ten equal installments if the owner agreed in writing not to "make any objection of illegality or irregularity as to the assessment of benefits." Where no agreement was entered into, the entire assessment matured at one time and was to "be collected at the next succeeding March semiannual payment of ordinary taxes." *See*, § 1989a26 (1907) and *Fitchpatrick v. Fowler*, 157 Iowa 215, 138 N.W. 392 (1912). *See also*, 1919-1920 Op.Att'yGen. 317, 321, where it was opined that:

> In view of the interpretation thus placed upon the section [§ 1989a26] by the supreme court [*Fitchpatrick*], we think it clear that in cases where *improvement certificates* are issued that there is no provision in the law authorizing a division of the tax so that one-half may be paid in March and one-half in September. It is our opinion that the law as it appears in the foregoing section, and as interpreted by our supreme court infers that each installment of the tax is due and payable in the month of March of each year.

(Emphasis original).

Section 1989a26 was amended in 1924 when the legislature rewrote the entire drainage and levy laws and implemented, in many instances, the present day code sections currently contained in ch. 455. *See*, House File 185, 40th G.A., Ex. Sess. (Iowa 1924) (unpublished). What is currently § 455.62 was originally passed as part of H.F. 185, § 47, as follows:

> All drainage or levee tax assessments shall become due and payable at the same time as other taxes, and shall be collected in thesame manner with the same penalties for delinquency and the same manner of enforcing collection by tax sales.

For the first time, the Iowa Code authorized drainage and levy assessments to "be collected in the same manner" as other taxes. At the time of this amendment, the payment of taxes were allowed in two installments, with one-half due March 1 and the remaining one-half due September 1. *See*, Iowa Code § 4651 (1919). Currently, § 445.36 provides for property taxes to be paid in full by September 1, "or one-half thereof before September 1 succeeding the levy, and the remaining half before March 1 following." One-half of any taxes not paid by October 1 shall be delinquent as of October 1 and the remaining half not paid by April 1 shall be delinquent as of April 1. *See*, Iowa Code § 445.37 (1989).

Generally, § 455.62 requires drainage and levy assessments to be collected in two installments in the same manner as regular property tax assessments. *See*, 1968 Op.Att'yGen. 362. Section 455.64, however, still allows for certain drainage and levy assessments to be paid through installments if the owner enters into an agreement with the district not to object to the legality of the assessment for benefit. If such an agreement is entered, then the owner shall have two options to pay the installments. The first option under § 455.64(1) provides for three installment payments, the first with the signing of the agreement, the second when the project is half completed and the final payment within 20 days of the completed improvement. The second option under § 455.64(2) provides for the assessment to be paid in 10 to 20 installments, with each installment becoming delinquent September 30 following its due date.

Paying the drainage or levy assessment under § 455.64 is first predicated upon the existence of an agreement between the owner and the drainage or

levy district. Secondly, it is restricted to paying for the cost of new construction for a project or for the improvement or repairs to an existing structure under Iowa Code § 455.135 (1989). If there is no agreement to pay the assessment in installments and if the assessment does not pertain to new construction, improvements or repairs, then § 455.64 is inapplicable and payment becomes due and payable in its entirety in two equal installments under § 455.62. Consequently, an assessment for the annual operating budget of a levy district is collected pursuant to the provisions of § 455.62 in the same manner as regular property taxes are collected under § 455.36.

May 10, 1989

WORKER'S COMPENSATION: Community service. Iowa Code §§ 85.59, 321J.2(2)(a), 903.1, 907.13, 910.2. Defendant sentenced to perform unpaid community service under either the provisions of § 321J.2(2)(a) (operating while intoxicated) or § 903.1 (simple misdemeanors) is not covered by the state for payment of worker's compensation benefits unless such community service is also a condition of probation under chapter 907. (Kelinson to Hindt, Lyon County Attorney, 5-10-89) #89-5-4-(L)

May 24, 1989

COUNTY ATTORNEY, SMOKING: Charging and prosecution of smoking law violations. Iowa Code §§ 98A.6, 331.756, 805.6 (1989). Actions to enforce the smoking law under Iowa Code § 98A.6 (1989) are initiated in the same manner as an unindictable traffic charge and are to be prosecuted by the county attorney. (Hayward to Beres, Hardin County Attorney, 5-24-89) #89-5-5(L)

May 30, 1989

CONSTITUTIONAL LAW; MUNICIPALITIES: Maximum indebtedness of political subdivisions. Iowa Const. art. XI, § 3, Iowa Code §§ 15.284, 15.285, 15.288, 331.441(2)(b) and (c), 384.24(3) and (4) (1989). Loans to cities, counties and school districts by Department of Economic Development under Community and Rural Development Loan Program (CORDLAP) are indebtedness for purposes of debt limitation provisions in Iowa Const. art. XI, § 3, notwithstanding provisions of Iowa Code § 15.288 (1989), to the extent that general tax revenues are utilized for the repayment or pledged as security for the repayment of said loans. (Wisby to Thoms, Director, Iowa Department of Economic Development, 5-30-89) #89-5-6

Allan T. Thoms, Director: You requested an opinion of the Attorney General regarding the impact of Iowa Code § 15.288 (1989) on city, county and other political subdivision debt limitation provisions contained within the Constitution of the State of Iowa. Section 15.288 is contained in Iowa Code ch. 15, subchapter II, part 8, entitled "Community and Rural Development Loan Program (CORDLAP), and reads as follows:

> A city, county, political subdivision, or other municipal corporation shall not be required to issue its bonds to secure loans under the community and rural development loan program. *It is the intent of the general assembly that loans received by a city, county, political subdivision, or other municipal corporation under the loan program shall not constitute any indebtedness of that entity within the meaning of any state constitutional provision or statutory limitation.* (Emphasis added.)

The debt limitation provision to which you refer is contained in Iowa Const., art. XI, § 3, and reads as follows:

> No county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount, in the aggregate, exceeding five percentum on the value of the taxable property within such county or corporation - to be ascertained by the last State and county tax lists, previous to the incurring of such indebtedness.

You have explained that CORDLAP is funded with $4.65 million in lottery revenues for fiscal year 1989 for the purpose of making low-interest and no-interest loans to eligible applicants for traditional and new infrastructure improvements and for housing. You have also explained that the Iowa Department of Economic Development (IDED) is responsible for administering the infrastructure improvement program and that the Iowa Finance Authority is responsible for administering the housing program. This opinion will, therefore, address the debt limitation question only as it pertains to IDED's infrastructure program.

IDED's infrastructure program is comprised of a "traditional" infrastructure category (Iowa Code § 15.284 (1989)) and a "new" infrastructure category (Iowa Code § 15.285 (1989)).

The "traditional" infrastructure category lists projects for which CORDLAP loans may be applied by Iowa cities and counties only, including, but not limited to, several specified projects plus projects listed as "essential corporate purposes" in Iowa Code § 384.24(3) (1989). The "new" infrastructure category lists projects for which CORDLAP loans may be applied by Iowa cities and counties, as well as by other political subdivisions or nonprofit development corporations, including, but not limited to, several specified projects plus projects listed as "general corporate purposes" in Iowa Code § 384.24(4) (1989).

In addition to the previously quoted *constitutional* debt limiting provision, a *statutory* provision limiting city and county debt for general purpose projects is contained in Iowa Code § 346.24 (1989) and reads as follows:

> No county or other political corporation shall become indebted for its general or ordinary purposes to an amount exceeding in the aggregate one and one-fourth percent of the actual value of the taxable property within the corporation. The value of property shall be ascertained by the last tax list previous to the incurring of the indebtedness. Indebtedness incurred by acounty solely for poor relief purposes is not for its general or ordinary purposes.

So, absent the provisions of § 15.288 that a CORDLAP loan will not constitute indebtedness within the meaning of a "statutory limitation", no city or county could engage in *general* purpose spending which exceeds one and one-fourth percent of the actual value of its taxable property, as compared with the 5 percent limit imposed by the Iowa Constitution for combined general and essential city or county spending. The Seventy-second General Assembly, however, suspended the operation of § 346.24 by the enactment of § 15.288, so this provision need be of no further concern to us.[1]

The case of *Richards v. City of Muscatine*, 237 N.W.2d 48 (Iowa 1975), is instructive regarding the constitutional debt question. That case involved issuance of urban renewal bonds by the City of Muscatine pursuant to Iowa Code ch. 403, and a taxpayers' challenge to that bond issue alleging it would exceed the 5 percent constitutional debt limit.

The bonds were to be retired utilizing the tax increment financing provisions of Iowa Code § 403.19. These provisions permit the earmarking of increases in property tax revenues resulting from the enhanced real property tax values that are expected to occur in the wake of urban renewal, and the deposit of those earmarked funds into a special fund pledged to the payment of principal and interest on the bonds.

The City of Muscatine argued that the repayment obligation created by issuance of the bonds under this statutory scheme, to be funded wholly by

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[1] "Ordinarily the legislature alone has the power to suspend the operation of a law, ... " 82 C.J.S. Statutes § 304.

When a general statute is in conflict with a specific statute, the latter ordinarily prevails, whether enacted before or after the general statute. *Ritter v. Dagel*, 156 N.W.2d 319, 324 (Iowa 1968).

the special property tax fund, did not constitute indebtedness for purposes of the constitutional debt limitation contained in art. XI, § 3. The city cited the provision of Iowa Code § 403.9(2) which states, much like § 15.288, that bonds "issued under this section shall not constitute an indebtedness within the meaning of any constitutional or statutory debt limitation or restriction. . . ." Muscatine also cited case law holding that bonds payable solely from special assessments or from revenues generated by a municipal enterprise do not constitute debt under art. XI, § 3.

The Iowa Supreme Court held that the urban renewal statute prevented Muscatine from being generally liable under the bonds and agreed that bonds payable solely from special assessments or revenues generated from municipal enterprises do not create constitutional debt. The court then held that the urban renewal bonds issued by the city *did* create constitutional debt, stating at page 64:

> The purpose of § 3, as indicated by the special assessment and revenue bond cases, is to prevent the general taxes of a political subdivision from becoming over burdened by obligations. The taxes which will be used to pay the proposed urban renewal bonds and interest will be general taxes. This is not a case of a special assessment tax which was never intended to be used, and could not be used, to meet other expenses of the city. Nor is this a case where the bonds are to be paid from the operating revenues of a municipal enterprise which generates income, such as a power plant.
>
> Ultimately the "credit" of a city is its power to levy general taxes. When it pledges all or part of that power, it pledges its credit and in a realistic sense incurs an obligation. *We think the bonds must realistically be treated as a debt for the purposes of § 3.*
>
> Clearly the urban renewal bonds would constitute a constitutional debt if they were payable from the general revenues of the city without limitation. We think the result is not different because § 403.19 carves out a certain portion of a city's general revenues and limits the liability of the city to those revenues. *If the result were otherwise, a city could divide its general revenues into several special funds, each with a bond issue restricted to recourse against its own fund and thus commit large portions of the city's revenues without regard to § 3.* The constitutional debt limitation could thus be virtually nullified.
>
> The decisions of this court and of other courts support the conclusion that these urban renewal bonds are a constitutional debt. (Emphasis added.)

Applying the reasoning of the Iowa Supreme Court in the *Richards* case, repayment or pledge of repayment of a CORDLAP loan, or any portion thereof, with revenues obtained through exercise of the general taxing power of a city or county would, in our opinion, constitute the incurring of "indebtedness". This conclusion would require the amount of the repayment or pledge thereof to be included in calculating the maximum constitutional debt limit for essential or general city or county purposes, or for school corporation purposes, as the case may be, notwithstanding the provisions of Iowa Code § 15.288 to the contrary.

To the extent that a CORDLAP loan is to be repaid from the proceeds of either a special assessment or revenues generated by a city or county enterprise, the *Richards* case appears to support the conclusion that debt is not incurred

within the meaning of Iowa Const., art. XI, § 3.[2] The same would appear to hold to the extent that a CORDLAP loan is to be repaid from proceeds of a private gift or grant to the city, county, or school corporation, or from any other funds on hand not derived from taxation.[3]

In conclusion, it is our opinion that cities, counties and school corporations that borrow funds from IDED under CORDLAP incur indebtedness within the meaning of the constitutional debt limiting provision, notwithstanding the provisions of Iowa Code § 15.288 to the contrary, to the extent that said loans are repaid or are pledged to be repaid, from general tax revenues.

JUNE 1989

June 5, 1989

SCHOOLS: Insurance. Iowa Code § 294.16 (1989). School districts may not limit the number of authorized annuity and mutual fund providers with which its employees may contract. (Scase to Poncy, State Representative, 6-5-89) #89- 6-1(L)

June 9, 1989

MENTAL HEALTH: Confidentiality. Iowa Code §§ 228.2, 228.3, 228.7(1), 230A.12, 230A.13. Counties are required by Iowa Code § 230A.1 to make a single nonrecurring expenditure in support of a community mental health center operated as a non-profit corporation and may not require a citizen or the mental health center to disclose identity as a condition of that support. (Allen to Metcalf, Black Hawk County Attorney, 6-9-89) #89-6-2

James M. Metcalf, Black Hawk County Attorney: We have received your opinion request regarding Iowa Code chapters 228 and 230A. Black Hawk County is considering a change in its procedure for funding the Black Hawk-

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[2] Funding from these sources would be appropriate for a wide range of "traditional" or "new" infrastructure projects by cities or counties.

Special Assessments. Cities may specially assess private property within the city, and issue improvement bonds therefor, for a number of infrastructure improvements, including sewers, drainage conduits, street paving and lighting, water mains and other projects (Iowa Code § 384.37(1) (1989)) that would qualify as both "new" and "traditional" infrastructure (as defined in Iowa Code §§ 15.284 and .285 (1989)) pursuant to Iowa Code §§ 384.37.39 (1989). Counties may assess private property within urban drainage districts, and issue assessment bonds therefor, for drainage improvements that would qualify as both "new" and "traditional" infrastructure pursuant to Iowa Code §§ 331.485.487 (1989). Special assessment financing of a CORDLAP loan, in whole or in part, is not prohibited by either the CORDLAP statute or the regulations promulgated for its administration.

Revenue Bonds. Cities and counties may issue revenue bonds for enterprises that would qualify as both "new" and "traditional" infrastructure (as defined in Iowa Code §§ 15.284 and .285 (1989)), and that fit the provisions of Iowa Code §§ 384.80-.94 and 331.461-.471 (1989).

[3] Iowa Code § 76.4 (1989) reads as follows in this regard:

> Whenever the governing authority of such political subdivision shall have on hand funds derived from any other source than taxation which may be appropriated to the payment either of interest or principal, or both principal and interest of such bonds, such funds may be so appropriated and used and the levy for the payment of the bonds correspondingly reduced.

Grundy Mental Health Center, which operates as a non-profit corporation under the provisions of Iowa Code § 230A.12. The county presently makes an annual determination as to its level of funding and authorizes a single non-recurring expenditure consistent with Iowa Code § 230A.1. Currently, the names and identities of persons receiving treatment from the mental health center are not disclosed to the County.

Black Hawk county proposes a change in its reimbursement for purchase of service. Under the county's proposal any citizen who requests Mental Health Center services must file an application with the county. The applicant would be required to disclose name, address, and some financial information as a precondition to receiving mental health care.

The first question asked is whether this change in the funding structure is in violation of the statutory scheme of Iowa Code chapter 230A. Section 230A.1 calls for each county involved to make a "single nonrecurring expenditure" to the community mental health center. That section does not limit the authority of any board of supervisors to continue to expend funds to support the operation of the center as needed, but does require an initial single nonrecurring expenditure in an amount determined by the board of supervisors. It is our belief that this section is quite specific. Black Hawk county's proposal does not include a single nonrecurring expenditure and is disallowed by the statutory scheme of chapter 230A.

The second issue is whether an application which requires disclosure of the patient's name as a condition of treatment constitutes a statutory violation. Iowa Code § 228.2 (1989) prohibits disclosure of the identity of an individual receiving mental health care services, unless specific statutory authorization exists. Also, Iowa Code § 230A.13 specifically prohibits a county from requiring information that identifies an individual as a prerequisite to treatment of that person, if the budget has been approved and the mental health center is in compliance with statutory financial auditing requirements. For purposes of this letter, it is assumed that these two conditions have been met by the Black Hawk-Grundy Mental Health Center.

With the consent of the individual receiving care by the mental health center, obtained according to the requirements of Iowa Code § 228.3, the patient's name may be disclosed to a third-party payor. Iowa Code section 228.7(1). Black Hawk county's proposed new status arguably comes close to the definition of a "third party payor" providing "benefits" to the recipients of mental health care. Iowa Code section 228.1(8). That secondary issue need not be reached, however. The consent of the individual patient must still be obtained. More importantly, even with consent, the patient must not be required to disclose his or her identity as a condition of support, according to the specific provision found in § 230A.13.

The County suggests the need for this proposed change is to establish better accounting and avoid duplication of services, both legitimate purposes. Stated another way, the County has a legitimate need to demonstrate accountability in the purchase of an intangible service. That need must be balanced against the overall thrust of Iowa Code chapter 228 to preserve and protect the identity of the recipient. Disclosure is strictly controlled.

The necessary balance is struck by Iowa Code § 230A.13 which requires auditing of mental health center accounts by approved methods. Additionally, the characteristics of the persons receiving services, the county of legal settlement, and the aggregate amount expended may be disclosed to the county. Neither the Community Mental Health Center or the county appear to have a choice on the identity of the patient. The Center may not disclose the name, and disclosure of identity may not be made a condition of payment or "support."

Accordingly, we are of the opinion that Black Hawk County is required by § 230A.1 to make a "single nonrecurring expenditure" in support of the community mental health center. In addition, Black Hawk County may not require a citizen to disclose his or her identity as a condition of support for mental health care.

June 9, 1989

CONSTITUTIONAL LAW; STATE OFFICERS AND DEPARTMENTS: Minority Set-Asides; Targeted Small Business. U.S. Const., Amend. XIV; Iowa Code §§ 73.16(2); 73.19; 1988 Iowa Acts, Ch. 1273, § 11; 1989 Iowa Acts, Ch. 315, § 20. It is necessary to suspend the mandatory set aside in Iowa Code § 73.16(2) and any set contract bid preferences based solely on racial status pursuant to state, rather than federal, statutes in order to comply with *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 102 L.Ed.2d 854, 109 S.Ct. 706 (1989). The Department of Management has express legislative authority to suspend those provisions until April 1, 1990, which will provide the general assembly with an opportunity to conform Iowa's statutes to federal law. (Osenbaugh and Brick to Cavanaugh, 6-9-89) #89-6-3

Patrick D. Cavanaugh, Department of Management: We have received your request for an opinion concerning whether Iowa statutes providing incentives for targeted small businesses are unconstitutional as a result of the decision of the United States Supreme Court in *City of Richmond v. Croson*, 488 U.S. 469, 102 L.Ed.2d 854, 109 S.Ct. 706 (1989).

Subsequent to your request, the general assembly considered this issue. Senate File 517, section 20, as passed by the general assembly, stated:

> *As a condition, limitation, and qualification of this appropriation, the department of management shall cause the targeted small business program to operate in its normal manner. It is the intent of the general assembly that as a condition, limitation, and qualification of this appropriation, the department of management shall compile the necessary data so that the Iowa targeted small business program will continue in compliance with the conditions of the United States supreme court decision in City of Richmond v. J. A. Croson Co.* It is the intent of the general assembly that the department of management have authority to develop guidelines for state agencies to operate the targeted small business program to best achieve its goals in conformity with City of Richmond v. J. A. Croson Co., pending completion of a study and further legislative action. The department may, if necessary, suspend the operation of a particular preference until April 1, 1990, if it concludes that the suspension is mandated by federal law.

On June 5, 1989, Governor Branstad item-vetoed the underlined language. The Governor's veto message stated in relevant part:

> I am unable to approve the designated portion of unnumbered paragraph 6 in Section 20. This provision requires the Department of Management to maintain the targeted small business set-aside program despite a Supreme Court decision to the contrary. Moreover, this provision requires the department to collect data to prove that the state discriminates against such business. Such a function of state government lacks credibility. This item veto will allow the department to operate the targeted small business program, consistent with the U.S. Supreme Court decision.

We will assume the validity of this veto for purposes of this opinion.

This office has previously provided advice to you by letter of February 13, 1989, from Ann Marie Brick to Lawrence Bryant of your department. We have also worked with your staff and with legislative staff in an attempt to legislatively resolve the issues raised by the *Croson* decision. The legislature adopted an interim measure to permit further consideration of the issue. You have advised us, however, that you still wish a formal opinion to issue. We are therefore providing you with our opinion based on existing statutes and Senate File 517, section 20.

We conclude that the legislature intended to preserve the targeted small business program as much as possible while still authorizing you to suspend portions of the program as necessary to prevent violations of *Croson*. We will therefore advise you on what we believe are the minimum steps you must take

to avoid judicial determination that the State is violating the holding of that decision. You may conclude that other provisions of the program must be suspended pursuant to your authority under the bill. The *Croson* decision is very new, and the body of law interpreting and applying it will develop further. There may well be subsequent decisions which would establish that other portions of the Iowa targeted small business program would not survive constitutional scrutiny. However, we believe the legislature intended to save as much of the program as possible on an interim basis until there is more judicial guidance and the general assembly has an opportunity to re-convene to consider this program anew.

Consistent with prior action by your agency and the advice of this office, we believe *Croson* and subsequent decisions applying it compel the conclusion that it is necessary to suspend the provision of Iowa Code §73.16(2) which mandates that a certain percentage of state contracts be "set aside" for targeted small businesses. We also believe it is necessary to suspend Iowa Code §73.19 to the extent it permits agencies to provide a bidding preference to targeted small businesses.

Croson struck a program which required contractors with the City of Richmond to set-aside a portion of their subcontracts for businesses owned or operated by designated minorities. The United States Supreme Court held the program was unconstitutional. The city council had not made adequate findings of past discrimination to support the legislative racial preferences. Further, the means used to remedy any findings of past discrimination were not narrowly tailored. Consistent with the advice of Assistant Attorney General Ann Marie Brick provided to Mr. Lawrence Bryant of your office on February 13, 1989, we conclude that the mandatory set-aside for Iowa targeted small businesses in Iowa Code §73.16(2) would also fall.

Decisions following *Croson* have rejected arguments which have been suggested as means to distinguish Iowa's set-aside statute. Iowa's statute sets aside primary contracts with the State and does not require that a certain percentage of subcontracts be awarded to minority owned businesses. This was also true of the statutes found unconstitutional in *Associated General Contractors v. San Francisco*, 813 F.2d 922 (9th Cir. 1987);*Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *affirmed* 103 L.Ed.2d 804 (1989), and *American Subcontractors Ass'n v. Atlanta*, 376 S.E.2d 662 (Ga. 1989).

Granting a percentage preference in competitive bidding based on race would also likely be found to violate the principles articulated in *Croson. See H.K. Porter Company, Inc. v. Metropolitan Dade County*, 825 F.2d 324 (11th Cir. 1987), judgment vacated and remanded for further consideration in light of *Richmond v. Croson*, 102 L.Ed.2d 854 (1989) (Urban Mass Transportation Act required 5% minority participation in construction contracts), and *Shurberg Broadcasting v. Federal Communications Commission*, 876 F.2d 902, (D.C. Cir. 1989) (minority distress sale provisions are not narrowly tailored to remedy past discrimination or to promote programming diversity).

Of course, nothing in this opinion attempts to resolve the constitutionality of Congressionally mandated set aside or preference programs. The Supreme Court in *Croson* specifically distinguished racial preferences mandated by Congress under its authority to redress past discrimination under the Fourteenth Amendment. Thus, the decision in *Fullilove v. Klutznick*, 448 U.S. 488 (1980), upholding federally mandated set asides, is still good law.

We have been unable to find any cases or opinions applying the rationale of *Croson* to minority loan guarantees, bond waivers, or other aspects of Iowa's program. Given the legislative intent to preserve the targeted small business program unless suspension is necessary to prevent a violation of federal law, we will not at this time opine that other aspects of the program must be suspended. We believe the State can encourage the development and progress of minority owned businesses. *See, e.g.*, 74 Ops. Md. Att'yGen. No. 89-007 (Feb. 22, 1989).

In conclusion, it is our opinion that it is necessary to suspend the mandatory set aside in Iowa Code §73.16(2) and any set contract bid preferences based solely on racial status pursuant to state, rather than federal, statutes in order to comply with *City of Richmond v. J.A. Croson Co.*, 488 U.S. ___, 102 L.Ed.2d 854, 109 S.Ct. 706 (1989). The Department of Management has express legislative authority to suspend those provisions until April 1, 1990, which will provide the general assembly with an opportunity to conform Iowa's statutes to federal law. The courts may well render further decisions to clarify whether other aspects of Iowa's targeted small business program will survive constitutional scrutiny. This office will advise you if subsequent developments mandate further suspensions. We are also ready to advise you if you are considering suspension of a particular provision or need other advice.

June 13, 1990

SCHOOLS: Bond Elections; Iowa Code §§75.1, 296.2, 296.3, 296.6. (1989). A school board has discretion to determine how soon an election on a bond petition must be held. Petitions should be acted upon in the order they are filed and elections should be scheduled within ten days of receipt. There is some discretion on the part of the board to refuse petitions or to condition an election if the board determines that an election on the petition to be "contrary to the needs of the school district." Once a petition has been approved at an election, the board is obligated to comply with the proposal's directive, and does not have discretion to delay action pending an election on a conflicting proposal. Where the ultimate objective of two proposals are the same, so that approval of one would defeat the objective of another, the subsequent proposal "incorporates a portion" of the first, and is subject to a six-month delay after the election of the first proposal. (Donner to Garman, State Representative, 6-13-89) #89-6-4(L)

June 15, 1989

MUNICIPALITIES Benefits for surviving spouses: Iowa Code §411.6(8)(b), §411.6(8)(c), §411.6(11)(a). Accordingly, we are of the opinion that the 1988 amendment to §411.6(8)(c) does not apply to a surviving spouse of a firefighter who had remarried and thus was no longer receiving a benefit on July 1, 1988. (Osenbaugh to Horn, State Senator, 6-15-89) #89-6-5(L)

June 15, 1989

FORCIBLE ENTRY AND DETAINER; COUNTIES: Sheriff's Deposition of Mobile Home. Iowa Code §§562C.2, 648.22, 331.653, 723.4(7) (1989). The real property owner and not the sheriff has the duty to place in storage a mobile home removed pursuant to the execution of a writ of forcible entry and detainer. The sheriff may not leave the mobile home at curbside on a public street. (Forsythe to Westfall, Pottawattamie County Attorney, 6-15-89) #89-6-6(L)

June 15, 1989

COUNTIES: Board of Supervisors; County Compensation Board; Reduction of compensation board's salary recommendations. Iowa Code §331.907(2) (1989). The board of supervisors has only two available options when reviewing the county compensation board's salary recommendations; they may accept the recommended compensation schedule or reduce the recommended salary increases by an equal percentage for each county officer. A 1986 amendment to §331.907(2) limited the board of supervisors' authority to reduction of recommended increases in compensation. (Scase to Dieleman, State Senator, 6-15-89) #89-6-7

The Honorable William W. Dieleman, State Senator: You have requested an opinion of the Attorney General regarding whether the decision of the Board of Supervisors rejecting the Jasper County Compensation Board's proposed salary increases for the 1988-1989 fiscal year resulted in "elimination of the $1,000.00 additional compensation that the Chairman of the Board of Supervisors had been receiving since 1984." The facts underlying this question, as set forth in your request letter and attachments, are as follows:

1. Since at least 1984, the County Compensation Board has been recommending that the Chairman of the Board of Supervisors receive $1,000.00 additional compensation, over and above that received by other members of the Board of Supervisors.
2. The Board of Supervisors approved this recommendation for additional compensation in 1985, 1986, and 1987.
3. The Compensation Board's recommendations for the 1988-1989 fiscal year contained this provision for additional compensation, as well as proposed salary increases for all county office holders.
4. At a meeting conducted on February 19, 1988, the Board of Supervisors voted to "lower the proposed increases recommended by the Jasper County Compensation Board for 88-89 by 100%."

Our analysis of your question is based largely upon application of Iowa Code § 331.907(b) (1989), which sets forth procedural guidelines for the board of supervisors' review of the county compensation board's recommendations. This section provides, in relevant part, as follows:

> At the public hearing held on the county budget as provided in section 331.434, the county compensation board shall submit its recommended compensation schedule for the next fiscal year to the board of supervisors for inclusion in the county budget. The board of supervisors shall review the recommended compensation schedule for the elected county officers and determine the final compensation schedule which shall not exceed the compensation schedule recommended by the county compensation board. In determining the final compensation schedule if the board of supervisors wishes to reduce the amount of the recommended compensation schedule, the amount of salary increase proposed for each elected county officer shall be reduced by an equal percentage.

This office has previously interpreted § 331.907(b) as allowing the board of supervisors only two alternative actions in determining the final compensation schedule of salaries. *See* Op.Att'yGen. #85-3-2(L); Op.Att'yGen. #83-3-21(L); 1978 Op.Att'yGen. 111. The board of supervisors may (1) accept the recommendation of the county compensation board as submitted; or (2) determine that it wishes to reduce the recommended compensation. If reduction of the recommendation is desired, the board must reduce the recommended salary increases for each officer by an equal percentage.[1] Under this statute, the board of supervisors is not authorized to reduce a county officer's salary below that received for the prior fiscal year.

This statutory limitation upon the board of supervisors' authority to revise the compensation board's recommendations mandates a negative response to your question. Rejection of the compensation board's proposed salary increases did not eliminate the separate provision for additional compensation for the chairman of the board of supervisors. Under the facts as set forth above, the

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[1] It is important to note that the available method for reduction of the recommended compensation schedule was altered by amendment to § 331.907(b) in 1986. Several prior opinions of this office had concluded that, if compensation reduction was desired, the board of supervisors was required to reduce the total annual salary or compensation of each officer, rather than the proposed increase. *See* Op.Att'y Gen. #85-3-2(L); Op.Att'yGen. #83-3-21(L); 1978 Op.Att'yGen. 111. These opinions represented an accurate interpretation of 331.907(b) (1985), which provided for reduction of "the *annual salary or compensation of* each elected county officer" by an equal percentage. (emphasis added). This clause of § 331.907(b) was amended to its present form in 1986, when "*amount of salary increase proposed for* was substituted for the provision emphasized above. Acts 1986 (71 G.A.) ch. 1095, § 1. As a result of this amendment, the board of supervisors may reduce only the proposed increase of salary or compensation.

$1000.00 "additional compensation" recommended by the compensation board did not represent a "salary increase." It merely represented a manner of designating a differentiation between the salary of the chairman and other members of the board of supervisors. The chairman's prior year salary included the $1000.00 in question. The board of supervisors could not reduce that salary.

In conclusion, it is our opinion that the board of supervisors' action did not eliminate the compensation board's recommendation that the chairman of the board of supervisors continue to receive $1,000.00 additional compensation which he had been receiving since 1984.

June 26, 1989

GIFTS: Enforcement; Criminal Prosecution; Civil Remedies. Iowa Code ch. 68B; §68B.1, §68B.2, §68B.3, §68B.5, §68B.6, §68B.8, §68B.11. Iowa Code ch. 258A; §258A.9. Iowa Code ch. 803; §803.1. The substantive provisions of chapter 68B as well as the reporting requirement are applicable to transactions which occur out of state. Under certain circumstances, there may be jurisdiction to prosecute a criminal charge. Civil remedies, including a reprimand, suspension, or dismissal from office or employment, may be possible. (Pottorff to Halvorson, State Representative, 6-26-89) #89-6-8

The Honorable Roger Halvorson, State Representative: You have requested an opinion of our office concerning application of chapter 68B, the gift law, to public officials and employees when they travel out of state. You point out that chapter 68B prohibits certain public officials and employees or their immediate family members from directly or indirectly soliciting, accepting, or receiving, "from any one donor in any one calendar day a gift or series of gifts having a value of thirty-five dollars or more." Iowa Code §68B.5(1) (1989). Conversely, chapter 68B also prohibits a person directly or indirectly from offering or making a gift or series of gifts "from any one donor in any one calendar day, if the gift or series of gifts has a value of thirty-five dollars or more." Iowa Code §68B.5(2). You further point out that chapter 68B requires public disclosure of gifts through reports of gifts by donors and donees. Iowa Code §68B.11. You specifically ask whether these provisions apply to public officials and employees when they are out of state.

In our opinion the substantive provisions of chapter 68B as well as the reporting requirement are applicable to transactions which occur out of state. Under certain circumstances, there also may be jurisdiction to prosecute a criminal charge. Civil remedies, moreover, including a reprimand, suspension, or dismissal from office or employment, may be possible.

Chapter 68B is titled the "Iowa Public Officials Act." Iowa Code §68B.1 (1989). Its provisions address not only gifts but also public bidding, sales of goods and services, appearance before state agencies, and compensation for services. Iowa Code §68B.3 - 68B.6.

Both civil and criminal penalties for violation of these statutes are provided. Violation of the prohibitions on gifts is a serious misdemeanor. A failure to report a gift, moreover, is also a serious misdemeanor. Iowa Code §68B.11(8). In addition, the violator may be reprimanded, suspended, or dismissed from the person's position or otherwise sanctioned. Iowa Code §68B.8. For the purpose of clarity, we discuss the criminal and civil enforcement of these laws separately.

I. CRIMINAL ENFORCEMENT

Principles governing jurisdiction of criminal offenses are codified in §803.1 of the Code. This section provides:

1. A person is subject to prosecution in this state for an offense which the person commits within or outside this state, by the person's own conduct or that of another for which the person is legally accountable, if:
   a. The offense is committed either wholly or partly within this state.
   b. Conduct of the person outside the state constitutes an attempt to commit an offense within this state.

c. Conduct of the person outside the state constitutes a conspiracy to commit an offense within this state.

d. Conduct of the person within this state constitutes an attempt, solicitation or conspiracy to commit an offense in another jurisdiction, which conduct is punishable under the laws of both this state and such other jurisdiction.

2. An offense may be committed partly within this state if conduct which is an element of the offense, or a result which constitutes an element of the offense, occurs within this state. If the body of a murder victim is found within the state, the death is presumed to have occurred within the state.

3. An offense which is based on an omission to perform a duty imposed upon a person by the law of this state is committed within the state regardless of the location of the person at the time of the omission.

Section 803.1 addresses jurisdiction in the separate subsections. Subsection 1 addresses offenses committed wholly or partly within the state and attempts, solicitations or conspiracies. Subsection 2 clarifies that offenses are committed partly within this state if an element of the offense or a result which constitutes an element of the offense occurs within this state. Subsection 3 defines an omission to perform a duty imposed on a person by the laws of this state as an offense committed in this state regardless of the location of the person at the time of the omission.

Applying the criminal jurisdiction provisions of § 803.1, we observe that, at least under some circumstances, conduct may be prosecuted criminally even though the official or employee actually solicits, accepts or receives a gift having a value of thirty-five dollars or more while the official or employee is out of state. Although we cannot speculate on all possible fact patterns which may arise, some principles of the application of § 803.1 are clear. Because the acts of soliciting, accepting, or receiving a gift are each actionable, a public official who solicits a gift while in Iowa but accepts or receives the gift while out of state may not escape criminal prosecution. Conversely, a public official who solicits a gift while out of state but accepts or receives the gift in Iowa may not escape criminal prosecution.

Courts in other states have addressed these jurisdictional issues in enforcement of gift laws. In *People v. Roos*, 118 Misc.2d 445, 462 N.Y.S.2d 99 (1983), for example, an official of the New York City Transit Authority was charged in Kings County with improper receipt of meals in various locations over a seven-year period. The defendant moved to dismiss, in part, based on lack of jurisdiction in Kings County for all the alleged offenses. The Court dismissed the charges on other grounds but noted jurisdiction existed when the acts were intended to have a particular effect on the performance of the defendant's duties in Kings County. *Id.* at 101-102.

Similarly in *Commonwealth v. Welch*, 345 Mass. 366, 187 N.E.2d 813 (1963), a member of the Taunton, Massachusetts, Light Commission accepted $200.00 from a contractor for installation of piping at a municipal light plant. The defendant alleged that he accepted the money in Rhode Island and Massachusetts, therefore, was without jurisdiction to criminally prosecute. The Court, however, rejected this claim noting that "[t]he physical act of handing over the money was but one step in the commission of the offense. An offender cannot evade guilt under this statute by the simple expedient of stepping across our state border for the sole purpose of accepting the money." *Id.* at 816.

The results reached by the courts in *Roos* and *Welch* are consistent with application of § 803.1. Based on the language of § 803.1 and these cases from other jurisdictions, it is our opinion that the fact that a person was out of state when part of a gift transaction occurred would not necessarily preclude a criminal prosecution. The particular circumstances in which a criminal

prosecution would be viable, of course, would need to be assessed on a case-by-case basis.

The failure to report gifts under § 68B.11(8) is a serious misdemeanor and carries a separate criminal penalty. Subsection 3 of § 803.1 addresses the jurisdiction of the court when a failure to perform a duty occurs. Under this provision an offense based on a failure to perform a duty imposed by the law of Iowa is committed within the state for jurisdictional purposes "regardless of the location of the person at the time of the omission." Iowa Code § 803.1(3). Applying this subsection, therefore, a failure to report gifts may result in criminal prosecution even if the person is out of state when the report falls due.

II. CIVIL ENFORCEMENT

Civil enforcement of chapter 68B presents different considerations. The jurisdictional analysis applicable to criminal prosecutions is not determinative. Although civil remedies would be a viable option when criminal jurisdiction exists, the issue of whether civil remedies are viable even when criminal jurisdiction does not exist remains.

In other contexts, persons may shoulder obligations imposed under Iowa law even after they leave the state. As a condition of professional licensure, for example, licensees are obligated to report judgments or settlements of professional malpractice actions. *See* Iowa Code § 258A.9(3). Failure to comply may result in licensee discipline. *See* Iowa Code § 258A.9(4). This duty does not abate because the licensee leaves the jurisdiction. Indeed, the duty, by the terms of the statute, remains even when the judgment or settlement involves an action the entirety of which occurs in another state.

In our view persons subject to the gift law, like their professionally licensed analogues, continue to be bound by Iowa law after they cross state lines. Indeed, to construe chapter 68B otherwise would thwart the legislative purpose of the law. We have observed that restriction on acceptance of gifts is, at least in part, "designed to protect the public's right to equal access to public officials, and to decisions based solely on the merits." 1980 Op.Att'yGen. 705 (#80-5-17(L)), *quoting from The Iowa Task Force on Government Ethics* (1978). If, by crossing state lines, officials and employees move beyond the range of civil enforcement, the public's right to decisions based solely on the merits will turn on the fortuity of the travel schedule of their public officials and employees.

Application of chapter 68B to persons who travel out of state, of course, would be limited by the terms of the statute. Only "gifts" as defined in chapter 68B are prohibited or subject to reporting. The donor, therefore, must: 1) be doing or seeking to do business with the donee's agency; 2) be engaged in activities which are regulated or controlled by the donee's agency; 3) have interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the donee's official duty; or 4) be a lobbyist with respect to matters within the donee's agency. Iowa Code § 68B.2(5)(a)(1)-(4). Accordingly, application of chapter 68B to persons who travel out of state will not broaden its terms but only broaden the range of situations to which the terms apply.

CONCLUSION

In summary, the substantive provisions of chapter 68B as well as the reporting requirements are applicable to transactions which occur out of state. Under certain circumstances, there may be jurisdiction to prosecute a criminal charge. Civil remedies, moreover, including a reprimand, suspension, or dismissal from office or employment, may be possible.

June 30, 1989

COURTS: Retired Judges; Annual Annuity. Iowa Code §§ 602.9107; 97B.49(5); 97A.1(12) (1989). For purposes of calculating the annuity pursuant to Iowa Code § 602.9107, the phrase "annual basic salary" means the annual gross

salary in the fiscal year in which the judge becomes separated from service. (Skinner to Nystrom, State Senator, 6-30-89) #89-6-9(L)

June 30, 1989

GOVERNOR: Appropriations; Statutes; Allotments; Iowa Code §§ 8.3, 8.30, 8.31. The principles articulated in our 1980 opinions remain effective. 1980 Op.Att'y.Gen. 786 and 1980 Op.Att'y.Gen. 805. The Governor may not make selective mandatory reductions in appropriations through the practice of targeted reversions without compliance with Section 8.31. As long as the legislative goals will be achieved, the Governor may eliminate waste and unnecessary spending in state government. (Morgan to Hatch, State Representative, and Varn State Sentor, 6-30-89) #89-6-10(L)

JULY 1989

July 3, 1989

COUNTIES AND COUNTY OFFICERS: Law Enforcement; Sheriff; County Jails; Expenses of Prisoners. Iowa Code Chapter 356 (1989); §§ 356.1, 356.2, 356.15, 804.21, 804.22, 804.25, 804.27, 804.28; Iowa R. Crim. Pro. 1(2)(c) and Rule 2. The county is responsible for the meal expenses of prisoners arrested on state charges by city police officers. (Weeg to Swaim, Davis County Attorney, 7-3-89) #89-7-1

R. Kurt Swaim, Davis County Attorney: You have requested an opinion of the Attorney General on the question of whether the city or the county is responsible for the meals of a prisoner who is arrested by city police officers on a state charge, but who has not yet been convicted of that charge.

You state in your request letter that the city and county operate a joint law enforcement center pursuant to a chapter 28E agreement. This agreement does not specifically address this issue, but does provide in Article VIII that:

> . . . The Police Department of the City of Bloomfield and the Sheriff's Department of Davis County shall operate as separate entities and have sole authority in their respective jurisdictions. . . .

The county and city have also entered into an Agreement for Joint City-County Municipal Facility. Pursuant to this agreement, Bloomfield and Davis County jointly operate a jail facility. Again, this agreement does not specifically address the issue you raise, but does provide the city and county shall jointly and equally run and control the facility (paragraphs 4 and 5), and share the cost of improvements, repairs, and utilities and maintenance equally (paragraphs 6, 7 and 10). Paragraph 8 further provides in part:

> *Occupancy.* The City and the County shall jointly occupy said facility on an equal basis. There shall be joint facilities for the holding of all persons to be detained, whether under the ordinances of the City of Bloomfield or the laws of the State of Iowa. . . .

Finally, paragraph 9 provides that each party shall operate its own office facility and be responsible for all costs of operation.

Thus, while these agreements provide the county and city shall jointly operate facilities and provide certain services for law enforcement purposes, it appears both entities retain authority for law enforcement duties within their respective jurisdictions.

The relevant statutes here are Iowa Code §§ 356.1 and 356.2 (1989). Those sections provide as follows:

> 356.1 How used.

> The jails in the several counties in the state shall be in charge of the respective sheriffs and used as prisons:
>
> 1. *For the detention of persons charged with an offense and committed for trial or examination.*
> 2. For the detention of persons who may be committed to secure their attendance as witnesses on the trial of a criminal cause.
> 3. For the confinement of persons under sentence, upon conviction for any offense, and of all other persons committed for any cause authorized by law.
> 4. *For the confinement of persons subject to imprisonment under the ordinances of a city.*
>
> The provisions of this section extend to persons detained or committed by authority of the courts of the United States as well as of this state.
>
> 356.2 Duty.
>
> The sheriff shall have charge and custody of the prisoners in the jail or other prisons of the sheriff's county, *and shall receive those lawfully committed, and keep them until discharged by law.*

(emphasis added) Also relevant is § 356.15 which provides in relevant part:[1]

> 356.15 Expenses.
>
> All charges and expenses for the safekeeping and maintenance of prisoners shall be allowed by the board of supervisors, except those committed or detained by the authority of the courts of the United States, in which cases the United States must pay such expenses to the county, and those committed for violation of a city ordinance, in which case the city shall pay expenses to the county.

This office has in recent times issued two opinions related to the issue you raise.[2] First, in Op.Att'yGen. #82-10-11(L) we concluded that under Iowa Code § 356.15 (1981) the county was responsible for the safekeeping and maintenance of prisoners arrested on state charges, regardless of whether the arrest was made pursuant to a warrant. We stated the statute made an exception only for the expenses of those prisoners committed or detained under federal law, or for prisoners committed for violations of city ordinances.

This office next issued Op.Att'yGen. #88-8-1, in which we held that the arresting agency, and not the county sheriff, is generally responsible for the safekeeping and custody of prisoners who have not been legally committed to the county jail. One exception discussed in that opinion arises under Iowa Code § 804.28, which provides the sheriff must take immediate charge of prisoners at the request of the Iowa Department of Public Safety. *See also* Op.Att'yGen. #85-9-1(L) (county sheriff has statutory responsibility for housing persons arrested by department of public safety). We concluded this statutory provision implicitly recognized that the Department of Public Safety does not have facilities or personnel to handle its own prisoners.

With regard to our first conclusion, we stated that while the sheriff is responsible for the safekeeping of prisoners lawfully committed to the sheriff's custody, "the sheriff is not obligated to accept prisoners from other agencies until they have been formally committed to the sheriff's custody by the court." Op.Att'yGen. #88-8-1. We stated a person is not "committed" until after the

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[1] Iowa Code Section 356.15 (1989) was amended by 1989 Iowa Acts, H.F. 722.22, to include provisions for the expenses of parole or probation violators who are committed to a county jail. The language quoted above was unaffected by this amendment.

[2] Also of relevance is Op.Att'yGen. #85-9-1(L), which discusses responsibility for transfer of prisoners between jurisdictions and responsibility for housing prisoners arrested by the Department of Public Safety.

arrested person is taken before a magistrate. *Id.* With regard to the lapse of time, however short, between arrest and a preliminary hearing before a magistrate, we stated:

> While the practicalities of the criminal justice system are such that there will be delays in getting before a magistrate, (citation omitted), except for Iowa Code § 804.28 (1987) requiring the sheriff to take custody of Public Safety prisoners, there is no provision relieving the arresting agency of responsibility for prisoners who have not been judicially committed to the county jail.

Id.

We now believe this opinion is flawed because, given the rationale of the 1988 opinion, there would appear to be no authority under §§ 356.1 and 356.2 for the sheriff to use the county jail for the detention or confinement of *any* arrested person prior to a formal commitment order being entered by the court, including those persons arrested by the county sheriff's office itself. While the holding of the 1988 opinion addresses only the sheriff's authority to accept prisoners from other arresting agencies, it interprets §§ 356.1 and 356.2 to mean that the sheriff is required to accept only those prisoners who have been lawfully committed to his custody by court order. In fact, the statutory language provides the jails may only be used as prisons for persons lawfully committed or sentenced to jail. Under a strict reading of this statute, which would appear to be required under our 1988 opinion, there is no authority for the sheriff to confine any persons in the county jail, including those arrested by his own department, unless a lawful court order authorizing detention is entered.

This is an illogical result in view of the consequences of such a conclusion. We also believe it is unrealistic when considering the actual circumstances surrounding arrests. Upon arrest, an arrested person must be taken "without unnecessary delay" before a magistrate for an initial appearance to determine whether there is probable cause to believe an offense has been committed. *See* Iowa Code §§ 804.21 - 804.22 (1989)[3]; Iowa Rule Crim. Pro. 2. If the person is not released at that time, upon bail or other circumstances, an order of commitment is entered by the court. *See also* §§ 804.25 and 804.27. It is this order of commitment which authorizes the sheriff to continue to hold that person at the county jail.

The time between arrest and initial appearance can be extremely brief or can be as long as up to twenty-four hours.[4] Under a narrow reading of §§ 356.1(1), 356.1(3) and 356.2, there is technically no order of commitment and therefore no authority for the sheriff to hold any prisoner during this time period. However, we believe such a narrow reading would obviously hamper law enforcement efforts, a result which was certainly not intended by the legislature when it enacted these sections. It is a well-accepted principle of statutory construction that statutes be accorded a logical, sensible construction which harmonizes related sections and accomplishes legislative purpose. *See, e.g., McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181 (Iowa 1980). For these reasons, we conclude that §§ 356.1(1), 356.1(3) and 356.2 must be interpreted to authorize the sheriff to confine persons for the time period between arrest and initial appearance.

The next issue is what distinctions may be made by the sheriff between persons arrested by the sheriff's department, who must clearly be held in that county's jail, and persons arrested by other law enforcement agencies. As to those persons arrested by any agency for violation of a city ordinance, § 356.1(4) specifically

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[3] There are provisions within these statutes for release of the arrested person prior to the initial appearance.

[4] *See* Iowa Rule Crim. Pro. 1(2)(c) (" 'Unnecessary delay' is any unexcused delay longer than twenty-four hours, and consists of a shorter period whenever a magistrate is accessible and available.")

authorizes the county jail to be used as a prison "for the confinement of persons *subject to* imprisonment under the ordinances of a city." (emphasis added) We believe this language does not require actual commitment or conviction, as suggested in our 1988 opinion, but instead requires only that conviction of the offense charged could result in the arrested person being imprisoned. We believe this section requires only that the city ordinance violation charged includes imprisonment as a possible penalty, and does not prevent such a person from being held at the county jail pending initial appearance or actual conviction.

As to persons arrested by other agencies, our 1988 opinion addresses the question of persons arrested by the Department of Public Safety. We would hope that the spirit of cooperation would prevail in all other situations in which an arresting agency requested that arrested persons be detained in the county jail pending initial appearance.

With regard to your specific question, it is our opinion that under § 356.15 the county is responsible for the meal expenses of any person arrested on state charges, regardless of who the arresting agency is. That section provides the county shall pay for all prisoners' expenses, with two exceptions. First, for these persons committed or detained by the federal courts, the federal government pays expenses. For those persons committed for violation of a city ordinance, the city pays expenses.[5] Because § 356.15 provides the county pays all prisoner expenses except those specifically excepted, and prisoners arrested on state charges by city law enforcement agencies do not fall within either of those exceptions, we believe the statute requires that expenses of prisoners arrested on state charges must be paid for by the county, regardless of who the arresting agency is.[6] This conclusion is consistent with our decisions in Op.Att'yGen. #8210-11(L) and Op.Att'yGen. #85-9-1(L). Also, for the reasons set forth above, we believe under §§ 356.1(4) and 356.15 that these expenses include all those expenses incurred from the time of arrest forward, and not expenses incurred only after the commitment order is entered following the initial appearance.

In conclusion, it is our opinion that the county is responsible for the meal expenses of prisoners arrested on state charges by city police officers. To the extent that this opinion conflicts with Op.Att'yGen. #88-8-1, the 1988 opinion is hereby overruled.

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[5] Your question asks only about meal expenses for persons arrested on state charges by city police officers. However, for clarity's sake, we also conclude that the city is responsible under § 346.15 for the expenses of a prisoner who is arrested for violating a city ordinance, regardless of who the arresting agency is. That section provides the city shall pay expenses to the county for those persons "committed for violations of a city ordinance." While a person is not technically "committed" until the time of the initial appearance, we again believe a hypertechnical application of that definition for the purposes of interpreting Chapter 356 would be inappropriate. With regard to meal expenses, there are likely to be circumstances in which persons arrested on city charges are taken before a magistrate before any meals are scheduled, and other circumstances in which an entire day of meals must be provided. In any event, it seems only fair for the city to meet whatever expenses are incurred by its prisoners, given the city is certainly liable for all expenses after the initial appearance. There is little reason why the county should be responsible for any expenses, including potentially significant expenses for items such as medical care, for the very limited time period between arrest and initial appearance, given the statutory scheme for reimbursement of expenses set forth in § 356.15.

[6] This opinion does not address the question of liability for prisoner expenses incurred by one county in detaining a prisoner being held on behalf of another county.

July 3, 1989

MOTOR VEHICLES: Suspension of Motor Vehicle License. Iowa Code §§ 321.210A, 815.10, 910.1(4) and 910.2. The Department of Transportation may not suspend a person's motor vehicle license for failure to repay court-appointed attorney fees which have been ordered by a court as part of restitution. (Olson to Gustafson, Crawford County Attorney, 7-3-89) #89-7-2

Mr. Thomas E. Gustafson, Crawford County Attorney: You have requested an opinion of the Attorney General concerning certain provisions of Iowa Code section 321.210A relating to suspension of a person's motor vehicle license for failure to pay a criminal fine or penalty, surcharge or court costs. Specifically, you question whether the terms "penalty" or "court costs" include attorney fees when the court, as part of the judgment entry, orders the defendant to repay amountsexpended on his behalf for court-appointed attorney fees. The answer to your question requires examination of several statutes.

Iowa Code section 321.210A requires the department of transportation to suspend a person's motor vehicle license for failure to pay a penalty or court costs in certain criminal cases and states:

> The department shall suspend the motor vehicle license of a person who, upon conviction of violating a law regulating the operation of a motor vehicle, has failed to pay the criminal fine or penalty, surcharge, or court costs, as follows:
>
> * * *
>
> 3. Upon receipt of a report of a failure to pay the fine, penalty, surcharge, or court costs from the clerk of the district court, the department shall in accordance with its rules, suspend the person's motor vehicle license until the fine, penalty, surcharge, or court costs are paid, unless the person proves to the satisfaction of the department that the person cannot pay the fine, penalty, surcharge, or court costs.

In a criminal matter, such as a prosecution for operating while intoxicated (OWI) or operating a motor vehicle while license is suspended (OWLUS), a court may appoint counsel pursuant to Iowa Code Section 815.10, which in pertinent part provides:

1. The court, for cause and upon its own motion or upon application by an indigent person or a public defender may appoint a public defender or any attorney who is admitted to the practice of law in this state to represent an indigent person at any state of the proceedings or on appeal of any action in which the indigent person is entitled to legal assistance at public expense. An appointment shall not be made unless the person is determined to be indigent under section 815.9.
2. If a court finds that a person desires legal assistance and is not indigent, but refuses to employ an attorney, the court shall appoint a public defender or another attorney to represent the person at public expense. *If an attorney other than a public defender is appointed, the fee paid to the attorney shall be taxed as a court cost against the person.* (emphasis added)

Iowa Code chapter 910 is a mandatory restitution statute under which a court may order recoupment of attorney fees to the extent a defendant is reasonably able to pay. Section 910.1(4) defines "restitution" to include ". . .the payment of court costs, court-appointed attorney's fees or the expense of a public defender. . ." Section 910.2 permits a court to order repayment of attorney fees as part of restitution and in relevant part provides:

> In all criminal cases except simple misdemeanors under chapter 321, in which there is a plea of guilty, verdict of guilty, or special verdict upon which a judgment of conviction is rendered, the sentencing court shall order that restitution be made by each offender to the victims of the offender's criminal activities and, *if the court so orders and to the extent that the offender is reasonably able to do so, for court costs, court-*

> *appointed attorney's fees or the expense of a public defender when applicable.* However, victims shall be paid in full before restitution is paid for court costs, court-appointed attorney's fees or for the expense of a public defender. When the offender is not reasonably able to pay all or part of the court costs, court-appointed attorney's fees or the expense of a public defender, the court may require the offender in lieu of that portion of the court costs, court-appointed attorney's fees, or expense of a public defender for which the offender is not reasonably able to pay, to perform a needed public service for a governmental agency or for a private, nonprofit agency which provides a service to the youth, elderly or poor of the community. (emphasis added)

The statutory scheme is that victims are to be paid first, court costs and attorney fees to the extent of the defendant's reasonable ability to pay are second, and finally, when no victim has suffered monetary damages and the defendant is unable to pay all or part of the court costs, court-appointed attorney fees or expense of a public defender, the defendant may be ordered to perform public service. *State v. Harrison*, 351 N.W.2d 526, 528 (Iowa 1984). This statute has withstood constitutional challenge. *State v. Haines*, 300 N.W.2d 791 (Iowa 1985).

For several reasons, restitution of court-appointed attorney fees would not be considered a fine or penalty. For example, "penalty" is defined as "a punishment imposed by statute as a consequence of the commission of an offense." Black's Law Dictionary. To constitute a penalty, there must be a deprivation of property or some right, such as the enjoyment of liberty. *State v. Cowen*, 231 Iowa 1117, 3 N.W.2d 176 (1942). Similarly, a "fine" is a pecuniary punishment. It is a sentence pronounced by the court for the violation of a criminal law. *Marquart v. Marquart*, 215 N.W.2d 278 (Iowa 1974).

Restitution, by contrast, is viewed as reparative rather than punitive. Iowa Code section 913.2 has a two-fold purpose: (1) to protect the public by providing compensation to victims of crime and (2) to rehabilitate the defendant. *State v. Kluesner*, 389 N.W.2d 370, 372 (Iowa 1986). Restitution is designed to instill responsibility in criminal offenders. *Id.* Reimbursement of attorney fees may contribute to a defendant's rehabilitation by enhancing his self-esteem and self-confidence in his community. *Id.* at 373. Furthermore, orders for repayment of attorney fees may be made only after an os offender's reasonable ability to repay is established, whereas fines are automatically imposed. In our opinion, an order for repayment of court appointed attorney fees does not constitute a "fine or penalty."

Although attorney fees are neither fines nor penalties, they may be considered as court costs. As a general rule, attorney fees are not awarded as part of the court costs unless clearly authorized by statute. *Woodbury County v. Anderson*, 164 N.W.2d 129, 133 (Iowa 1969). "Costs" includes sums ordinarily taxable for expense incurred in an action as provided by statute. *Id.* A court does not have inherent power to tax costs even to the losing party. *Dole v. Harstad*, 278 N.W.2d 907, 909 (Iowa 1979).

Section 815.10(2) clearly states that court appointed attorney fees shall be taxed as a court cost when a person is not indigent but refuses to employ an attorney. Attorney-fee recoupment pursuant to section 815.10 applies only to that limited situation, which has been described as "rare". *State v. Rogers*, 251 N.W.2d 239, 242 (Iowa 1977); *State v. Coburn*, 294 N.W. 57, 60 (Iowa 1980).

The legislature has in other selected areas provided for reasonable attorney fees to be taxed as part of the costs. *Weaver Construction Co. v. Heitland*, 348 N.W.2d 230, 232 (Iowa 1984). Some examples are sections 598.24 (contempt in dissolution actions) ". . .the costs of the proceeding, including reasonable attorney's fees, may be taxed against that party."; 553.12 (violation of state anti-trust laws) "Recover the necessary costs of bringing suit, including a reasonable attorney fee."; 472.33 (appeals from condemnation juries) "The applicant shall also pay all costs occasioned by the appeal, including reasonable attorney fees to be taxed by the court. . ."; 633.673 (guardianships) "The ward

or the ward's estate shall be charged with the court costs of a ward's guardianship, including the guardian's fees and the fees of the attorney for the guardian."

Sections 910.1(4) and 910.2 allow a court to order repayment of "court costs, court-appointed attorney's fees or the expense of a public defender, and the performance of a public service by an offender. . .when the offender cannot reasonably pay. . ." Missing from chapter 910, however, is the phrase "court costs, *including* attorney fees." Since the examples in the preceding paragraph all clearly provide that court costs include attorney fees, the legislature most likely would have used the same language in chapter 910 if court costs were to include attorney fees. By using a comma between "court costs" and "court-appointed attorney's fees or the expense of a public defender," the legislature must have intended that court costs and attorney fees be separate and distinct items of restitution. While reimbursement of attorney fees is clearly authorized by chapter 910, in our opinion, those fees are not to be taxed to the defendant as court costs.

In conclusion, when a defendant has been convicted of either OWI (§321J.2) or OWLUS (§321J.21) and the court has ordered him to make restitution for all or part of his court-appointed attorney fees, those fees are neither a "fine or penalty," nor "court costs." The department may not suspend a defendant's motor vehicle license pursuant to section 321.210A if he fails to repay court-appointed attorney fees which have been ordered by a court as part of restitution.

July 3, 1989

MUNICIPALITIES: Civil Service; Diminution of Employees; Seniority. Iowa Code §§19A.9(5) and 400.28 (1989). A person removed or suspended pursuant to §400.28 continues to be eligible for appointments and promotions for a period of not less than three years even if he or she has declined to accept a prior offer of employment. The name of a person who declines an appointment or promotion under §400.28 should remain on the §400.28 preferred list for the entire statutory period. (Walding to Connors, State Representative, 7-3-89) #89-7-3(L)

July 5, 1989

MUNICIPALITIES: Library Board of Trustees; Petitions. Sufficiency. Iowa Code ch. 392 (1989); Iowa Code ch 378 (1971); Iowa Code §§376.3, 392.1, 392.5 and 392.6 (1989); Iowa Code §§378.3 and 378.10 (1971). 1985 Iowa Acts, ch. 203, §39. 1975 Iowa Acts, ch. 203, §39; 1972 Iowa Acts, ch. 1088, §§192, 196 and 199. Submission of a proposal to elect library board of trustees to the voters is not authorized in §392.5. A proposal to replace a library board with an alternative form of administrative agency, the members of which are elected, is authorized by §392.5. The proposal, however, must describe the action proposed with reasonable detail. Reasonable detail, minimally, would include the title, powers and duties of the agency, the method of appointment or election, qualifications, compensation and terms of members. Any proposal for election should provide for adoption by ordinance of existing statutory election provisions. A proposal which fails to satisfy the requirements of §392.5 is void and may not be altered nor submitted in part to the voters by the city council. (Walding to Chapman, State Representative, 7-5-89) #89-7-4(L)

July 10, 1989

CONSERVATION: Nonresident hunting laws. House File 88, 73rd G.A., 1st Sess. (Iowa 1989); 1989 Iowa Acts, ch. 237; Iowa Code §§109.1(26), 109.39 (1989). The zoned biological balance limitations of House File 88 could reasonably be construed not to apply to nonresident wild turkey and deer hunting licenses issued in 1989. Ambiguity in House File 88 should be resolved by the Natural Resource Commission through rulemaking. (Smith to Hutchins, State Senator, 7-10-89) #89-7-5(L)

July 21, 1989

COUNTIES AND COUNTY OFFICERS: Civil Service Commission; Compensation of county personnel director; Compensation for added duties. Iowa Code §§ 331.904, 331.907, 341A.5 (1989). A presently employed county employee or officer appointed by the civil service commission to serve as county personnel director, pursuant to Iowa Code § 341A.5 (1989) may receive additional compensation for the performance of duties associated with that position if the amount of additional compensation is awarded in accordance with the general code provisions for determination of county officer and employee salaries. (Scase to Thole, 7-21-89) #89-7-6(L)

July 21, 1989

MAGISTRATE NOMINATING COMMISSIONS: Open Meetings Law. Iowa Code ch. 21; § 21.2(1); Iowa Code ch. 602; §§ 602.6403, 602.6501. The Open Meetings Law is applicable to county magistrate nominating commissions established under Iowa Code § 602.6501. (Pottorff to Scieszinski, Monroe County Attorney, 7-21-89) #89-7-7(L)

AUGUST 1989

August 8, 1989

COUNTIES; JOINING AIRPORT AUTHORITIES: Iowa Code § 330A.6 & 7(2). The County in its ordinance joining an airport authority should follow the provisions of its resolution and may not put conditions on its membership. The County may use Rural Services Funds for its contribution to the Airport Authority. A commitment by the Airport Authority to keep an airport open for 20 years is an outstanding obligation of the authority. (Peters to Martin, Dickinson County Attorney, 8-8-89) #89-8-1(L)

August 16, 1989

SCHOOLS: Conflict of interest, employment of school board member's spouse. Iowa Code § 277.27 (1989). The spouse of a member of the board of directors of a school district may be employed by or contract with that school district. A board member whose spouse is so employed or contracted with should abstain from voting on issues where actual or potential conflicts of interest exist. (Scase to Frisk, Harrison County Attorney, 8-16-89) #89-8-2(L)

August 16, 1989

COUNTIES; Health: Iowa Code § 137.6(4), § 331.324(1)(o). To the extent that employees of the local board of health are employees of the county, the county board of supervisors has the authority to fix wages for those employees. (McGuire to Short, Lee County Attorney, 8-16-89) #89-8-3(L)

August 29, 1989

AGRICULTURE; STATE DEPARTMENTS; PUBLIC RECORDS: Aflatoxin test results. Iowa Code §§ 22.1, 22.2(1), 22.7, 22.7(3); 190.5(1), 192.8(7), 192.11, 192.13, 192.14 (1989); 1989 Iowa Acts, ch. 313, § 1 (H.F. 795). If the aflatoxin testing program set forth in H.F. 795 took effect, the bill establishes a particular class of aflatoxin test results which could only be disclosed to the persons authorized by the Department of Agriculture in its discretion. The portion of the bill which would restrict access to aflatoxin test results in milk would apply only to test results which come into the Department's possession after the measure takes effect. (Benton to Cochran, 8-29-89) #89-8-4

The Honorable Dale Cochran, Secretary of Agriculture and Land Stewardship: You have requested our opinion on the interrelationship between Iowa's public records law, Iowa Code chapter 22 (1989), and a portion of House File 795, a drought assistance measure enacted by the 1989 General Assembly. Under

the bill, the Department of Agriculture and Land Stewardship (the Department) is appropriated $100,000.00 for various drought-related programs such as a hay hotline for farmers, climatological services and laboratory analysis relating to aflatoxin contamination. Section 6 of the bill provides that monies appropriated under its terms which are not expended by June 30, 1990 shall revert to the State's general fund. The Department is not authorized to expend the appropriated monies or implement the bill's provisions until at least fifteen Iowa counties are subject to a proclamation of disaster emergency issued by the Governor due to a drought. At this writing fifteen counties have not been subject to this gubernatorial proclamation of emergency.

In addition to the appropriation, section 1 of H.F. 795 provides that the Department administer a program to detect aflatoxin in milk. Aflatoxin is a powerful natural carcinogen produced by the fungus Aspergillus flavus which infects corn plants under hot and dry conditions, and is 100 times more likely to induce cancer than the industrial pollutant polychlorinated biphenyl (PCB). *Wall Street Journal*, February 23, 1989, p. 1. It is this portion of the bill which gives rise to your questions. Section 1 provides in pertinent part that:

> It is the intent of the general assembly that the department administer an effective program for detecting aflatoxin in milk. The department shall establish a response level for aflatoxin in milk which is one-half the federal food and drug administration action level. The department shall implement a systematic program of testing raw milk for aflatoxin. If any sample testing exceeds the response level, the department shall, through an aggressive program of follow-through testing, identify the source of the contaminant for remediation. Notwithstanding section 192.13, test results below the response level shall be disclosed only to persons authorized by the department.

With respect to the last sentence in this provision, you ask whether the test results are public records under chapter 22. If the test results are not public records you ask who is authorized by the Department to obtain test results. Your final question asks whether this section is applicable to all test results or only those which came into the possession of the Department after the effective date of the bill.

The Federal Food and Drug Administration has established "action" levels for the presence of aflatoxin in food. Producers who sell products that are contaminated above the action level are subject to enforcement proceedings initiated by the FDA. *See, Community Nutrition Institute v. Young*, 818 F.2d 943, 945 (D.C. Cir. 1987). For example, the level for corn destined for food use by humans is a level in excess of 20 parts per billion (ppb). The level for milk or milk products is .5 ppb.

The Department regulates the production of Grade "A" pasteurized milk under Iowa Code chapter 192 (1989). Only grade "A" pasteurized milk can be sold to the final consumer, and it is unlawful to sell any milk which is adulterated. Iowa Code § 192.11. Milk is deemed to be adulterated if it bears any poisonous or deleterious substance injurious to health. Iowa Code § 190.5(1) (1989). The Department has not formally adopted the .5 ppb standard, but considers milk containing levels of aflatoxin in excess of this level to be adulterated. Any adulterated milk may be impounded by the Secretary under § 192.11.

The procedure to test for the presence of contaminants like aflatoxin in milk is set forth in § 192.14 which provides:

> During any consecutive six months, at least four samples of raw milk for pasteurization shall be taken from each producer having a permit as defined in section 192.5 and four samples of raw milk for pasteurization shall be taken from each milk plant having such a permit after receipt of the milk by the milk plant and prior to pasteurization. In addition, during any consecutive six months, at least four samples of pasteurized milk and at least four samples of each milk product defined in this chapter

> and chapters 190 and 191 shall be taken from every such milk plant. Such samples of milk and milk products shall be taken while in possession of the producer or distributor at any time prior to final delivery. Samples of milk and milk products from dairy retail stores, restaurants and food establishments as defined in chapter 170, grocery stores, vending machines, and other places where milk and milk products are sold shall be examined periodically as determined by the secretary . . . .

Section 192.8(7) defines a "milk plant" as "any place where milk or milk products are collected, handled, processed, stored, pasteurized, aseptically processed, bottled, or prepared for distribution." The Department takes milk samples from dairy producers by collecting samples from the bulk tank which hauls milk to the plant. The Department also collects samples from the milk plants. These samples are taken to the Department's laboratory and tested for aflatoxin. If the aflatoxin level would exceed the .5 ppb level, the milk would be impounded as adulterated. In addition, certain milk plants have undertaken a testing program using their own laboratories to detect aflatoxin.

Since the 1988 drought the Department has been testing for the presence of aflatoxin in milk utilizing the procedures already existing under chapter 192. However, the Department has applied the .5 ppb standard of the FDA to determine if the milk is adulterated. The Department has also regarded aflatoxin test results as a public record under chapter 22, and therefore such results have been disclosed to those persons requesting this information.

House File 795 does not purport to amend either the present procedure or the status of aflatoxin test results as public records under chapter 22. However, if effective, the program established under section 1 of the bill would establish a "response" level of .25 ppb or one-half the level presently utilized. And "notwithstanding" § 192.13, test results below the .25 ppb level could be disclosed only to persons authorized by the Department.

The last sentence in the aflatoxin testing program in H.F. 795 would provide that test results below the response level could only be disclosed to persons authorized by the Department. In asking how this language would interact with chapter 22 you note that there is no reference to chapter 22 and, ". . . it is unclear whether it is an implicit exception to disclosure that would otherwise be required or whether chapter 22 is still applicable and if so how." House File 795 does not refer to chapter 22. In Iowa, statutory amendment by implication is not favored and statutes are to be construed to be consistent. *Caterpillar Davenport Comp. Credit Union v. Huston,* 292 N.W.2d 393 (Iowa 1983). Accordingly, if the aflatoxin program in H.F. 795 is implemented, aflatoxin test results of the Department would remain public records.

However, as to test results below the .25 ppb level, it appears there would be no general right of public access as provided in chapter 22. Rather, as to this limited class of test results, the Department would have discretion to determine those persons to whom these results would be disclosed. To the extent that this is more restricted than a general public right of access, it is a limitation on otherwise required disclosure.

Your second question asks, if there is an override of chapter 22, what limitations would be upon the Department in determining who should be authorized to obtain test results below the .25 ppb level. More specifically, you ask whether the Department may authorize the media to receive the information. As we noted above, the bill does not override chapter 22, and it appears to grant the Department discretion to determine those persons who would have access to these results. This is consistent with discretion already vested in the lawful custodian of public records as to those public records which are confidential. The introductory paragraph of § 22.7 provides:

> The following public records shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information . . .

The Department's decision as to which persons will have access to this class of test results would be subject to judicial review under a reasonableness standard. Therefore, the Department's discretion is not unlimited. In determining who should be authorized to receive the test results, it would seem reasonable to balance the interest to be served by disclosure against the legislature's evident intent to restrict access. The factors to be considered might include the extent of the aflatoxin presence, how widely the information would be disseminated (for example, if disclosure is made to the media), the extent of public concern about the presence of aflatoxin, the public interest in information about its presence and the potential economic injury to the industry. The criteria which the Department would follow in exercising its discretion should be developed through the rule-making procedure of chapter 17A. The rule-making process would permit public examination of these criteria before actual injury from disclosure would occur.

Your final question concerns what test results would be subject to the bill's last sentence, that is, whether the language would apply to all results in the possession of the Department or only those results which come into the possession of the Department after the effective date of the Act. Based on the language which the legislature used, the language at issue should apply only to the test results generated after the effective date of the program.

The bill would establish a temporary program for aflatoxin testing with a response level different than the FDA action level which the Department presently follows. The language on disclosure is limited to the temporary program found in the bill. There is no express or implied intent to amend chapter 192 or to apply the new response level to samples which the Department has already drawn. Given that the disclosure language is keyed to the new response levels which go into effect only when the program is implemented and then only for its duration, we conclude that the legislature intended this language to apply to test results which come into the possession of the Department after the bill becomes effective.

In summary, H.F. 795 would not amend or override chapter 22. If implemented, the bill would provide that a certain class of aflatoxin test results below the .25 ppb level could only be disclosed to persons authorized by the Department in its discretion. The exercise of that discretion would be subject to judicial review. The bill would apply only to aflatoxin results obtained after the new program is implemented.

August 30, 1989

NOTARIES PUBLIC; REAL PROPERTY: Acknowledgments. 1989 Iowa Acts, ch. 50, §2, Iowa Code §§77A.2(2), 558.30, 558.39 (1989). Section 2(2) of 1989 Acts Ch. 50., to be codified as Iowa Code §77A.2(2), does not conflict with Iowa Code §558.39 (1989). The acknowledgment provisions required by Code §§558.30 and 558.39 must be included in all certificates of acknowledgment of instruments affecting title to real property. The general definition of notarial acknowledgment contained in 1989 Acts Ch. 50, §2(2) applies to notarial acknowledgments of documents which do not affect title to real property. (Scase to Garman, State Representative, 8-30-89) #89-8-5

Teresa Garman, State Representative: You have requested an opinion from this office concerning the interaction of section 2(2) of House File 693, 73rd G.A., 1st Sess. (Iowa 1989) [1989 Iowa Acts, ch. 50, §2(2)], defining acknowledgment, and the provisions of Iowa Code chapter 558 which set forth forms for foreign acknowledgments on instruments affecting the title to real property. House File 693, which repealed Iowa Code chapter 77 (Notaries Public) and replaced it with a new chapter, 77A (Iowa Law on Notarial Acts), became effective upon enactment on April 26, 1989. H.F. 693, §§14, 16. Section 2(2) of H.F. 693, to be codified as Iowa Code §77A.2(2), provides as follows:

77A.2 Definitions.

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

* * * * *

> 2. "Acknowledgment" means a declaration by a person that the person has executed an instrument for the purposes stated in the document and, if the instrument is executed in a representative capacity, that the person signed the instrument with proper authority and executed it as the act of the person or entity represented and identified in the document. Iowa Code chapter 77 (1989) contained no definition of, or form for, acknowledgments. Iowa Code § 558.39 (1989) sets forth various forms for acknowledgments of instruments affecting real estate. Each form included therein contains a provision indicating that the instrument was "executed as a voluntary act and deed." [1]

This inconsistency between the definition of acknowledgment contained in Code § 77A.2(2) and the requirements of § 558.39 has prompted you to inquire:

> 1. Is new Code section 77A.2(2) in conflict with existing Code section 558.39?
>
> 2. Is § 558.39's requirement that acknowledgments of instruments affecting title to real property contain a provision regarding voluntariness implicit in section 77A.2(2)?

"The general rule is, prior and later statutes dealing with the same subject matter although in apparent conflict, should, as far as possible, be construed in harmony with each other so as to allow both to stand and to give force and effect to each." *Polk County v. Iowa Natural Resources Council*, 377 N.W.2d 236, 241 (Iowa 1985), *quoting, Baird v. Webster County*, 256 Iowa 1097, 1113, 130 N.W.2d 432, 441-42 (1964). If statutes cannot be harmonized, a specific statute prevails over a general statute. *Doe v. Ray*, 251 N.W.2d 496, 501 (Iowa 1977).

Your first question can be resolved by consideration of the context in which the two acknowledgment provisions appear. Code § 77A.2(2) is a part of Iowa's law on notarial acts. The definition of acknowledgment contained therein applies to notarial acknowledgments in general. Section 77A.2 itself specifically limits application of the definitions contained therein to use of the defined terms within chapter 77A.

While chapter 77A is a statute of general application, chapter 558 (Conveyances) sets forth specific requirements for instruments affecting title to real property. The acknowledgment forms contained in § 558.39 are to be utilized by all officers authorized to certify acknowledgments, including notaries public. Iowa Code § 558.21 (1989). Viewed in this light, there is no inherent conflict between sections 77A.2(2) and 558.39. To the extent that sections 77A.2(2) and 558.39 both apply to one instrument, i.e. when a notary public certifies an acknowledgment on an instrument affecting title to real property, the specific requirements of § 558.39 would prevail over the general definition contained in § 77A.2(2). A provision that execution of the instrument is a voluntary act and deed must be included in all certificates of acknowledgment upon instruments affecting title to real property. Iowa Code §§ 558.30(3), 558.39 (1989).

The same principles of statutory construction apply to determination of whether the voluntariness requirement of § 558.39 is implicit in § 77A.2(2). As we concluded above, these two code sections are not in conflict. The voluntariness provision included in the forms set forth in § 558.39 is a requisite for certificates of acknowledgment on instruments governed by the provisions of chapter 558.

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[1] Several additional sections of Code chapter 558, relate to the content of certificates of acknowledgment upon instruments affecting the title to real property. Each of these sections also requires inclusion of a provision that execution of the instrument is a voluntary act and deed. *See* Iowa Code § 558.26 (1989) ("Acknowledgments by military and naval officers."); Iowa Code § 558.30 (1989) ("Certificate of acknowledgment — verification."); and Iowa Code § 558.37 (1989) ("Certificate of acknowledgment — attorney in fact.")

No basis exists for reading such a requirement into the general definition of notarial acknowledgments. [2]

It follows that a provision that execution of an instrument is a voluntary act and deed need not be included in the notarial acknowledgment of a document which does not affect title to real property unless required by other code provisions governing the form of that instrument.

In summary, it is our conclusion that Section 2(2) of House File 693, to be codified as Iowa Code § 77A.2(2), does not conflict with Iowa Code § 558.39 (1989); the acknowledgment provisions required by Code §§ 558.30 and 558.39 must be included in all certificates of acknowledgment of instruments affecting title to real property; and the general definition of notarial acknowledgment contained in H.F. 693, § 2(2) applies to notarial acknowledgments of documents which do not affect title to real property.

August 30, 1989

AGRICULTURE: Grain Warehouse; Grain Indemnity Fund. Iowa Code Supp. §§ 543A.1(9), 543A.6 (1989). Each depositor and seller who suffers a loss in relation to transactions with a particular grain dealer or warehouse operator is subject to the $150,000 and the ninety percent limitations on recovery from the Fund. Recovery by a person for a loss relating to one licensee does not bar recovery by the same person for a subsequent loss relating to a different licensee. Both limitations provide for payment from the Fund for a portion of the loss. The "loss" excludes other recovery through means such as receivership; therefore, the limitations do not restrict the aggregate recovery by the person from all sources. Donner to Halvorson, 8-30-89) #89-8-6(L)

SEPTEMBER 1989

September 1, 1989

CORPORATIONS: Professional corporations; Trust ownership of shares. Iowa Code §§ 496C.10, 496C.11, 496C.16 (1989). Shares of capital stock in a professional corporation may be issued to and held by a trustee who is licensed to practice the profession which the professional corporation is licensed to practice, even if one or more of the beneficiaries of the trust is a nonprofessional. (Scase to Zimmerman, Lieutenant Governor, 89-9-1) #89-9-1

The Honorable JoAnn Zimmerman, Lieutenant Governor of Iowa: You have requested an opinion from this office concerning the propriety of issuance of shares in a professional corporation to a trust. Specifically, you inquire:

> Does the issuance of shares of capital stock of a professional corporation to a trust, the trustee of which is licensed to practice the profession which the professional corporation is licensed to practice, but the beneficiaries of which might or might not be licensed to practice such profession, but to who the corporation's charter and bylaws prohibit the issuance or transfer of such shares, comply with Chapter 396C, Code of Iowa?

Iowa Code Chapter 496C (Professional Corporations) contains several provisions placing limitations upon the issuance, ownership, and transfer of shares of a professional corporation. These provisions include the following:

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[2] The legislature did not include a voluntariness provision in § 77A.2(2)'s general definition of notarial acknowledgments. "In the field of statutory interpretation, legislative intent is expressed by omission as well as by inclusion. The express mention of certain conditions of entitlement implies the exclusion of others." *Barnes v. Iowa Department of Transportation*, 385 N.W.2d 260, 263 (Iowa 1986).

496C.10 Issuance of shares.

Shares of a professional corporation may be issued, and treasury shares may be disposed of, only to individuals who are licensed to practice in this state, or in any other state or territory of the United States, or in the District of Columbia, a profession which the corporation is authorized to practice.

* * * * *

No shares of a professional corporation shall at any time be issued in, transferred into, or held in joint tenancy, tenancy in common, or any other form of joint ownership or co-ownership.

496C.11 Transfer of shares.

No shareholder or other person shall make any voluntary transfer of any shares in a professional corporation to any person, except to the professional corporation or to an individual who is licensed to practice in this state a profession which the corporation is authorized to practice.

* * * * *

The articles of incorporation or bylaws may contain any additional provisions restricting the transfer of shares.

Similar provisions, prohibiting the issuance or transfer of shares of a professional corporation to anyone not licensed to practice the profession(s) which the corporation is licensed to practice, are a uniform feature of all professional corporation acts. *See* Op.Att'yGen. #86-7-1(L), *citing, Resignation: Issues Pertaining to Ownership of Professional Corporations as Affected by Resignation from Corporate Practice by Active Shareholder*, 32 A.L.R. 4th 921, 923 (1984). "Without such prohibitions, ownership or control of professional corporations could be lost to individuals or interests not professionally qualified, thus creating a potentially injurious situation to the general public of the State of Iowa who utilize the services of licensed professionals." 1974 Op.Att'yGen. 270.

In a 1974 opinion this office concluded that capitol stock of a professional corporation could be issued to and held by a trustee who was licensed to practice a profession which the professional corporation was licensed to practice. 1974 Op.Att'yGen. 270. In making this determination, the 1974 opinion assumed that the beneficiaries of the trust in question would also be licensed professionals. 1974 Op.Att'yGen. at 271.

Your inquiry contemplates the transfer of capital stock of a professional corporation to a professionally licensed trustee for a trust the beneficiaries of which may or may not be licensed to practice the profession for which the corporation is licensed.[3] Presumably, such a trust would be established as a type of profit-sharing or stock-bonus plan. "A frequent motivation for incorporating a professional's practice is to enable him to qualify for fringe benefit arrangements with greater tax savings than he could while his practice was not incorporated." Hayes, *Professional Corporations in Iowa — 1970-1972*, 25 Drake L.Rev. 161, 172 (1975).

The Iowa business corporation act grants all corporations established thereunder the power "[t]o pay pensions and establish pension plans, pension trusts, profit-sharing plans, stock-bonus plans, stock-option plans and other incentive, insurance and welfare plans for any and all of its directors, officers and employees." Iowa Code §496A.4(15) (1989). "Each professional corporation, unless otherwise provided in its articles of incorporation or unless expressly prohibited by [Chapter 496C], shall have all powers granted to corporations by the Iowa business corporation Act." Iowa Code §496C.4 (1989). It follows

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[3] As delineated above, your inquiry also presumes that beneficiaries are individuals to whom the corporation's charter or bylaws prohibit the issuance or transfer of shares. The effect of provisions of corporate charters or bylaws upon the propriety of trust arrangements will vary according to the terms of the charters and bylaws of individual corporations. We cannot, in an opinion, anticipate all potential issues created by such provisions. Therefore, this opinion will focus upon whether such a trust can comply with chapter 496C.

that a professional corporation may establish an employee stock ownership trust for all of its employees if such a trust may be developed so that it complies with the stock ownership limitations imposed by Code Chapter 496C.

Clearly, the purpose of the stock ownership restrictions of chapter 496C is to preserve the integrity of professional corporations by ensuring that ownership and control of such corporations remains in the hands of licensed professionals. A related section of chapter 496C specifically provides that "[n]o person who is not licensed shall have any authority or duties in the management and control of the corporation." Iowa Code § 496C.16 (1989). The critical issue for resolution here is: Can the stock ownership and control provisions of Code §§ 496C.10, 496C.11, and 496C.16 be complied with if shares in a professional corporation are transferred to and held by the trustee of a trust established for the benefit of non-professionals?

Iowa Code chapter 496C nowhere expressly prohibits separation of the legal and beneficial interests in professional corporation shares. Rather, it provides that the capital stock of a professional corporation may only be issued to, held by, and transferred to licensed professionals. We believe that these requirements will be satisfied so long as legal title to such stock is held by a person who is duly licensed to practice a profession which the corporation is licensed to practice, regardless of whether that person hold the stock outright or in trust and, if in trust, regardless of whether all beneficiaries of the trust are licensed professionals.

> The historic and universal rule, basic to the concept, origin, growth, and scope of equity jurisdiction, is that a trustee is vested with a legal, as distinguishable from equitable, estate, which legal estate equity recognizes but compels to be used by the trustee in accordance with the terms of the trust and for the benefit of all beneficiaries, present and future.

76 Am.Jur.2d, *Trusts*, § 97 at p. 343 (1975); *see* 74 Op.Att'yGen. at 270 (quoting Am.Jur.1st); *see also* G. Bogert, *The Law of Trusts and Trustees*, § 1, at pp. 1-2 (rev. 2d Ed. 1984) ("A trust may be defined as a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another." (footnote omitted)); Restatement (Second) of Trusts, § 2 (1959) (defining a trust as a "fiduciary relationship with respect to property, subjecting one person by who the title to the property is held to equitable duties to deal with the property for the benefit of another person."). The Iowa Supreme Court has consistently subscribed to this basic view of trusts. *See Cox v. Cox*, 357 N.W.2d 304, 305-06 (Iowa 1984); *National Bank of Burlington v. Huneke*, 250 Iowa 1030, 1037, 98 N.W.2d 7, 12 (1959); *Ellsworth College of Iowa Falls v. Emmett County*, 156 Iowa 52, 58-63, 135 N.W. 594, 596-98 (1912).

Under the facts presented by your question, the legal title to shares of a professional corporation will pass to a trustee who is a licensed professional. An equitable interest in these shares will be held by the beneficiaries of the trust, some of whom may be non-professionals. The rights and powers of the trustee and the beneficiaries will be limited by the terms of the trust instrument. *See* Restatement (Second) of Trusts, §§ 186, 199. The equitable interest held by the beneficiaries will have been granted by the professional corporation and will remain subject to the limitation that trustee may not be required to act in a manner that conflicts with public policy or exceeds the authority permitted under applicable laws. Restatement (Second) of Trusts, § 62 ("A trust or a provision of the terms of a trust is invalid if the enforcement of the trust or provision would be against public policy, even though its performance does not involve the commission of a criminal or tortious act by the trustee.") and § 166 ("The trustee is not under a duty to the beneficiary to comply with a term of the trust which is illegal."). Public policy considerations underlying the stock ownership restrictions of chapter 496C would prohibit the transfer of legal title to professional corporation shares to nonprofessional beneficiaries of the trust.

It might be argued that permitting the stock of a professional corporation to be held in trust for the benefit of nonprofessional would run counter to the

general philosophy of chapter 496C, in that it would permit a nonprofessional to have an interest in the operations of a professional corporation. As noted above, it is commonly recognized that the ownership restrictions on stock of professional corporations were designed to permit the preservation of the professional's ethical standards, to preserve the personal relationship between the professional and his client or patient, and to preserve that personal relationship from interference by nonprofessional interested solely in maximizing the return on their investment. *See* 6 Hayes, *Iowa Practice* § 1141, et seq. (1985); Op.Att'yGen. #86-7- 1(L). We do not believe, however, that the fact that stock of a professional corporation is held in trust for nonprofessionals will necessarily interfere with the proper practice of a profession in light of the fact that the trustee, as holder of legal title in the stock, will have both the power and obligation to carry out professional responsibilities and comply with public policy and law.[4]

We note that our determination of this issue is consistent with an opinion issued in 1985 by the Ohio Attorney General on an analogous question. Op.Att'yGen. #85-065 (Ohio 1985). The Kansas Attorney General, also analyzing the question presented here, concluded that a Kansas professional corporation could issue stock to a trust only if the trustee and all the beneficiaries were personally qualified to hold stock of the professional corporation. Op.Att'yGen. #79-302 (Kansas 1979). The Kansas statute governing ownership of professional corporation stock was subsequently amended to specifically allow a trustee for an employee stock ownership plan, qualified for special tax treatment pursuant 26 U.S.C. § 401(a), to hold professional corporation stock. *See* Kan. Stat. § 17-2707. Due to the existence of conflicting opinions on this topic in other jurisdictions and the desirability of having specific guidelines for the formation of employee stock ownership plans by professional corporations, legislation addressing this subject would be useful.

In summary, we conclude that shares of capital stock in a professional corporation may be issued to and held by a trustee who is licensed to practice the profession which the professional corporation is licensed to practice, even if one or more of the beneficiaries of the trust is a nonprofessional.

September 12, 1989

TAXATION: Real Estate Transfer Tax; Taxation of Deeds Involving Exchanges of Real Property and Cash Payment. Iowa Code § 428A.1 (1989). A grantor who transfers real property and cash in exchange for real property is liable for the real estate transfer tax calculated on the fair market value of the real property transferred. (Griger to Schroeder, Keokuk County Attorney, 9-12-89) #89-9-2(L)

September 13, 1989

COUNTY OFFICERS: Vacancies; Special Election; Statutes: Effective Date. Iowa Const. art. III, § 26. Iowa Code §§ 3.7, 69.2, 69.4, 69.8, 69.14A. A vacancy created by the resignation of the county attorney effective at the stroke of midnight in the final moment of June 30, 1989, is subject to § 69.14A and a special election may be requested by petition. (Pottorff to Thole, Osceola County Attorney, and Honrath, Lyon County Attorney, 9-13- 89) #89-9-3(L)

September 14, 1989

STATE OFFICERS AND DEPARTMENTS: Corrections; payment of housing allowance to deputy wardens. Iowa Code § 246.305 (1989) and § 246.7 (1979). After the repeal of Iowa Code § 246.7, deputy wardens may not be paid housing allowances. The salaries of the deputy wardens could be changed by legislation. In the absence of legislation, the Department sets the salaries of the individuals subject to the approval of the Department of Personnel and budgetary restraints. (Parmeter to McKean, State Representative, 9-14-89) #89-9-4(L)

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[4] We are not considering whether other statutes or ethical provisions governing members of particular professions might operate to make particular trust arrangements impermissible in certain circumstances.

September 14, 1989

TORT CLAIMS ACT: Care Review Committee members; Care Review County Coordinators; Iowa Code §§25A.2(3), 25A.14, 25A.21, 25A.23, 25A.24, 135C.25(4), 249D.44(4)(1989). Volunteer Care Review Committee members and County Coordinators are considered state employees and would be defended and indemnified by the state under the Tort Claims Act, Iowa Code chapter 25A. The personal liability of volunteers is limited by §§25A.23 and 25A.24. (Forsythe to Grandquist, Executive Director, Department of Elder Affairs, 9- 14-89) #89-9-5(L)

September 27, 1989

NOTARIES PUBLIC; REAL PROPERTY: Use of notary seal on acknowledgments of instruments affecting title to real property. 1989 Iowa Acts 73 G.A., ch. 50 [House File 693 (73rd G.A., 1st Sess., §6(3) to be codified as Iowa Code §77A.6(3)]; Iowa Code §§558.20, 558.34 (1989). Section 6 of House File 693, to be codified as Code §77A.6, effectively repeals the judicially imposed requirement that notaries public utilize a seal or stamp when certifying acknowledgement of instruments affecting title to real property. County recorders should accept for filing documents affecting title to real estate with certificates of acknowledgment by notaries public even if no notarial seal or stamp is affixed. (Scase to Noah, Floyd County Attorney, 9-27-89) #89-9-6

Mr. Ronald K. Noah, Floyd County Attorney: You have requested an opinion of the Attorney General concerning the effect of 1989 Iowa Acts (73 G.A.) ch. 50 [H.F. 693], which replaced Iowa Code Chapter 77 (Notaries Public) with a new chapter 77A (Iowa Law on Notarial Acts). Until April 26, 1989, the old law required all notaries public to procure a seal or stamp before being commissioned by the Secretary of State. Chapter 77A now makes procurement of a seal or stamp optional and specifically provides that a notary public is not required to use a seal or stamp in the performance of a notarial act. In light of this change in the law, you inquire:

> May a county recorder accept for filing a document affecting real estate that has been acknowledged by an official purporting to be a notary public when no notarial seal or stamp is affixed to the acknowledged document?

Response to your inquiry requires comparison of the repealed notary public laws to the provisions of new Code chapter 77A (H.F. 693), examination of Iowa Code §§558.20, 558.21 and 558.34 (1989) (governing the acknowledgement of instruments that convey or encumber title to real property), as well as an understanding of the basis for prior case law holding that a notarial seal or stamp had to be affixed to papers and documents authenticated by notaries public. *See Koch v. West*, 118 Iowa 468, 471, 92 N.W. 663, 664 (1902) (holding notary's certificate of acknowledgement to a deed must be authenticated by his seal); *Stephens v. Williams*, 46 Iowa 540, 541 (1877); and discussion in 1938 Op.Att'yGen. 650. The critical subsection of the repealed statute, Iowa Code §77.4(1) (1989), provided as follows:

> 77.4 Conditions—seal—fee. Before any [notary] commission is delivered to the person appointed, that person *shall:*
>
> 1. Procure a seal, or an ink stamp of a size and design approved by the secretary of state, on which shall be included the words "Notarial Seal" and "Iowa", with the person's surname at length and at least the initials of the person's given name. The embossed impression made by the seal may be blackened, but permanent black ink shall be used for fixing an impression with the official ink stamp. The seal or stamp may include the date of expiration of the notary's commission, but the date of expiration shall not be mandatory.

(emphasis added.) No corresponding seal or stamp requirement is contained in the revised law. Rather, H.F. 693, §6(3) [to be codified as Code §77A.6(3)], makes procurement of a seal or stamp a purely discretionary act.

> A notary public *may* procure a seal or stamp for use in performing notarial acts. A seal or stamp used by a notary public in the performance of

> notarial acts shall contain the words "Notarial Seal" and "Iowa". The stamp may include the name of the notary public. However, a notarial act is not invalid if a seal or stamp used in the performance of a notarial act fails to meet the requirements of this subsection. *This subsection does not require the use of a seal or stamp in the performance of a notarial act.*

H.F.693, § 6(3) (emphasis added). The taking of an acknowledgement is a notarial act. H.F. 693, § 2(1) [to be codified as Code § 77A.2(1)].

It is our opinion that repeal of the seal requirement for notaries public removes the basis for Iowa's longstanding rule that acknowledgements of instruments affecting title to real property must contain a notary's seal or stamp in order to be eligible for recording.

Iowa's land conveyancing statutes do not mandate the use of a seal by a notary public. Under Iowa Code § 558.20, an acknowledgement in Iowa "must be made before some court having a seal, *or* some judge or clerk thereof, *or* some county auditor, *or* judicial magistrate or district associate judge within the county, *or* notary public within the state. Each of the officers above named is authorized to take and certify acknowledgements of all written instruments, authorized or required by law to be acknowledged." (emphasis added). This section requires that a court which acknowledges an instrument must be a court with a seal. The requirement of a seal in § 558.20 does not, however, apply to other officials who may certify the acknowledgment of an instrument.[1] The use of a seal by other officials is governed instead by Iowa Code § 558.34, which provides as follows:

> 558.34 Use of seal. The certificate of proof or acknowledgement *may* be given under seal *or otherwise, according to the mode by which the officer making the same usually authenticates the officer's formal acts.*

(emphasis added.)

Review of Iowa's case law reveals that the requirement that certification of acknowledgement by a notary include a seal or stamp was originally derived from the statutory mandate that a notary procure a seal.

> Our statute, Secs, 258 and 259, provides that "the governor may appoint and commission one or more notaries public in each county. * * * Before any commission is delivered to the person appointed, he shall procure a seal, on which shall be engraved the words 'Notarial Seal', and 'Iowa', with his surname at length, and at least the initials of his Christian name. . . ."
>
> Whilst the statute does not, in terms, prescribe that the acts of a notary shall be authenticated by his seal, yet there could have been no other purpose in requiring him to procure a seal;. . . .

Stephens v. Williams, 46 Iowa 540, 541 (1877); *see also* 1938 Op.Att'y.Gen. 650. It follows that removal of the requirement that a notary procure a seal or stamp should allow notaries to certify acknowledgments without use of a seal or stamp.

In conclusion, it is our opinion that § 6 of H.F. 693 [to be codified as Code § 77A.6] effectively repeals the judicially imposed requirement that notaries public utilize a seal or stamp when certifying acknowledgement of instruments affecting title to real property. County recorders should accept for filing documents affecting title to real estate with certificates of acknowledgment

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[1] Nor do the forms in Iowa Code § 558.39 (1989) provide for the seal of a notary public. *See* unnumbered paragraph 1 of § 558.39 (providing that a seal must be attached "when necessary under the provision of this chapter"). The forms expressly provide, when applicable, for the seals of courts and corporations. See § 558.25 (1989) and § 558.39(3), (6), (9), (10), (11) and (13) (1989).

by notaries public even if no notarial seal or stamp is affixed, so long as the remaining acknowledgement requirements are met.

OCTOBER 1989

October 17, 1989

TOWNSHIPS: Township Trustees; disposition of real property. Iowa Code §§ 297.15, 360.9 (1989). The provisions of Iowa Code § 360.9 (1989) control disposition of real property owned by a township. The township trustees are not authorized to avoid reversion of real estate by giving or selling the property to a private entity. (Scase to Stromer, 10-17-89) #89-10-1(L)

October 31, 1989

MUNICIPALITIES: City Utilities; Civil Penalties. Iowa Const., Art. III, § 38A. Iowa Code §§ 362.2 (18); 364.22; 364.22 (2); 364.22 (5 through 12); 364.22 (4); 384.84; 388.1; 388.2; 388.3; 388.4; 1989 Iowa Acts, Ch. 150, §§ 5, 6, 7, 8. A municipal utility board may not impose a civil penalty for a violation of a municipal infraction pursuant to Iowa Code § 364.22 (1989). Municipal infractions must be enacted by ordinance, and a municipal utility board lacks authority to pass an ordinance. (Walding to Osterberg, State Representative, 10-31-89) #89-10-2(L)

October 31, 1989

INCOMPATIBILITY OF OFFICES: County assessor and secretary of school board. Iowa Code §§ 279.3, 291.2, 291.3, 291.6 - 291.11, 441.1, 441.17 (1989). The offices of county assessor and secretary of the school board are not incompatible. (Scase to Kliebenstein, 10-31-89) #89-10- 3(L)

NOVEMBER 1989

November 2, 1989

COUNTY HOME RULE; MOTOR VEHICLE LAWS: County Traffic Ordinances. Iowa Code §§ 321.207, 321.210A, 321.235, 321.236, 321.513, 321C, 331.301, 331.302, 331.307, 305.6 (1989). Iowa Code § 321.236 preempts the county's general authority under § 331.301(1) to classify motor vehicle traffic offenses as civil matters except as provided in § 321.236(1-13). Citations for violation of county traffic ordinances must use the uniform citation form promulgated under § 805.6. A violation of a civil traffic offense is not recorded under § 321.207. A civil traffic offense is not subject to § 321.210A. A civil traffic offense must be reported under the nonresident traffic violator compact, § 321.513, but not under the interstate drivers license compact, Iowa Code Chapter 321C. (Peters to Rensink, 11-02-89) #89-11-1

Mr. Darrel W. Rensink, Director: You have requested an opinion of the Attorney General concerning a county's authority to enact an ordinance which makes certain traffic violations civil rather than criminal offenses. The specific questions presented are set out and discussed separately below.

I.

Does a county have authority under Iowa Code chapter 331 and section 321.236 to enact ordinances which classify motor vehicle traffic offenses, such as speeding, as civil rather than criminal?

Your question necessarily implicates the County Home Rule provision of the Iowa Constitution. Iowa Const. art. III, § 39A (amend. 37). The general powers of the county are set out in Iowa Code § 331.301(1) (1989), which states:

> A county may, except as expressly limited by the Constitution, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the county or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents. This grant of home rule powers does not include the power to enact private or civil law governing civil relationships, except as incident to an exercise of an independent county power.

The Attorney General has opined that the County Home Rule amendment is self-executing. 1980 Op.Att'y Gen. 54, 59. "This simply means that counties have the power and authority to determine their local affairs' immediately and without the necessity of any further express legislative act or authorization." *Id.*

The Iowa constitutional amendment contains four limitations on the county's home rule authority. The third limitation is particularly relevant to your inquiry. The exercise of the county's power cannot be "inconsistent with the laws of the General Assembly." Iowa Const. art. III, § 39A. This limitation is further clarified by Iowa Code § 331.301(4) which states: "An exercise of a county power is not inconsistent with a state law unless it is irreconcilable with the state law."

This limitation is based on the concept of preemption. The county's authority over criminal matters and the state's preemption of this area of law was addressed by this office in 1981.

> ". . . in any given area the state, by broad and comprehensive legislation, has intended to exclusively regulate a subject matter. Where "preemption' is applicable, any local government regulation regardless of content, is inconsistent with the pervasive legislation". *See* Op. Att'y Gen. #79-4-7, citing Scheidler, *Implementation of Constitutional Home Rule in Iowa*, 22 Drake L. Rev. 294 (1975). The conclusion that the counties may not legislate in areas which have been preempted by the state government is buttressed by the County Home Rule Amendment's express proviso that counties are authorized "to determine their *local affairs* and government." [Emphasis supplied.] Conversely, they may not legislate with regard to state affairs, absent express legislative authority. It follows that an historical demonstration of a legislative intent to preempt an area of regulation indicates a belief on the part of the legislature that the matter in question is inherently a state, and not a local matter.

1982 Op.Att'y Gen. 27, 28 - 29. We concluded, "It is our opinion that the establishment of criminal laws is indirectly a matter of state-wide concern and, in addition, is a matter which has been preempted by the state government." *Id.* at 28.[1]

This analysis applies to traffic violations as well as other criminal offenses which are set out in the Iowa Code. The county's power over criminal matters is limited and subject to the state statutes which preempt the general grant of authority to the county. *See* Iowa Code § 331.302(2) and § 331.307(3). As your question states, traffic violations, as set out in Iowa Code Chapter 321, are criminal offenses. For example, Section 321.285 sets speed restrictions, and §§ 321.482 and 321.483 set out the criminal responsibility for these violations.

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[1] This opinion was later discussed in view of subsequent legislation, Iowa Code § 331.302(2), establishing civil penalties for violation of county ordinances. 1986 Op.Att'y Gen. 105, 106. The later opinion does not overturn the discussion of state preemption in the area of criminal law.

The narrow question becomes: are traffic offenses, including civil penalties, an area which the legislature intended to be exclusively regulated by the state?

Iowa Code Section 321.236 grants the state exclusive authority over traffic violations defined in Chapter 321. The statute provides in relevant part:

> Local authorities shall have no power to enact, enforce, or maintain any ordinance, rule or regulation in any way in conflict with, contrary to or inconsistent with the provisions of this chapter, and no such ordinance, rule or regulation of said local authorities heretofore or hereafter enacted shall have any force or effect, however the provisions of this chapter shall not be deemed to prevent local authorities with respect to streets or highways under their jurisdiction and within the reasonable exercise of the police power from:

There follows a list of narrow exceptions to the state's exclusive authority. Iowa Code § 321.236 (1-13).

The statutory language shows a clear legislative intent that the majority of traffic violations are under the exclusive authority of the state. The terms "conflict with," "contrary to," or "inconsistent with" remove any doubt that counties have no role to play in this area. "When a statute is plain and its meaning is clear, we do not search for meaning beyond its express terms." *State v. Tuitjer*, 385 N.W.2d 246, 247 (Iowa 1986) (citations omitted). Counties may only legislate in those areas listed in § 321.236 (1-13). Otherwise the state has exclusive control over this area of the law.

A county's general power to create civil offenses is limited to those areas of the law where "the violation is [not] a felony, and aggravated misdemeanor, or a serious misdemeanor under state law . . ." § 331.307(3). In the remaining areas of the law concerning traffic violations, the county's authority is preempted by Iowa Code § 321.236. This preemption forecloses the county from creation of alternative civil sanctions, except as provided in the § 321.236(1-13).

There are also sound policy reasons for this state preemption. Iowa Code § 321.235 requires the laws of the road to be uniform throughout the state. To allow each of Iowa's 99 counties to create alternative civil sanctions would destroy any uniformity. The whole procedure covered in Chapter 321 is placed in question when counties attempt to create an alternative system. The state has a compelling interest to avoid the balkanization of traffic laws in this state.

In conclusion, counties are preempted from classifying motor vehicle offenses as civil offenses, except in those areas covered by Iowa Code § 321.236 (1-13).

II.

> If a county has enacted such ordinances, is it required to use the uniform citation and complaint adopted by the commissioner of public safety pursuant to Iowa Code section 805.6?

The answer to this question is necessarily limited by the answer given above. It is assumed the county ordinances are limited to the exceptions set out in § 321.236 (1-13).

Iowa Code § 805.6(a) provides in relevant part:

> The director of public safety and the director of natural resources, acting jointly, shall adopt a uniform, combined citation and complaint which shall be used for charging all traffic violations in Iowa under state law or local regulation or ordinance, and which shall be used for charging all other violations which are designated by section 805.8 to be scheduled violations.

The statutory language requires all traffic violations, under whatever governmental authority, to be reported by a uniform citation and complaint form. This includes violations of county ordinances.

III.

If a county having enacted such ordinances forwards to the Department of Transportation pursuant to Iowa Code section 321.207, a "record of the conviction" for a civil traffic offense, should the DOT record it on the person' s driving record as a "conviction" under Iowa Code section 321.200?

As your question states, courts are required to forward "records of convictions" of traffic violations to the Department. § 321.207. The narrow question is whether a civil sanction under a county ordinance is a conviction?

The term "conviction" was construed by the Iowa Supreme Court in *State v. Hanna*, 179 N.W.2d 503 (Iowa 1970).

> The word "conviction" is of equivocal meaning, and its use in a statute presents a question of legislative intent.
>
> In the restricted or technical legal sense in which it is sometimes used, the word "conviction" includes the status of being guilty of, and sentenced far, a criminal offense, whether that status is established after confession of guilt by a guilty plea or after determination by a jury verdict upon an assertion of innocence. Stated otherwise technically the word means the final consummation of the prosecution against the accused including the judgment or sentence rendered pursuant to an ascertainment of his guilt.
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> In its general and popular sense and frequently in its ordinary legal sense, the word "conviction" is used in the sense of establishment of guilt prior to and independently of judgment and sentence by a verdict of guilty or a plea of guilty.

Id. at 507-08. Although the term "conviction" has been given a "broader definition when protection of the public has been involved," *State v. Kluesner*, 389 N.W.2d 370, 372 (Iowa 1986), it has always been connected with enforcement of a criminal statute. *See id.*

Under the facts you have given, the county ordinance provides a civil sanction and therefore, there is no determination of criminal guilt. Consequently, the sanction does not constitute a conviction pursuant to the Supreme Court's reasoning in *Hanna*, and Section 321.207 is not applicable.

IV.

If a person fails to pay the fine, penalty, surcharge or costs resulting from a civil traffic offense, is the person subject to suspension under Iowa Code section 321.210A?

Section 321.210A provides in relevant part:

> The department shall suspend the motor vehicle license of a person who, upon conviction of violating a law regulating the operation of a motor vehicle, has failed to pay the criminal fine or penalty, surcharge, or court costs, as follows.

In order for Section 321.210A to be applicable, there must be a "conviction." As set out in question III, civil sanctions do not constitute a conviction. The use of the terms "criminal fine or penalty" in Section 321.210A indicate a legislative intent to limit the statute's applicability to criminal actions.

V.

Do the nonresident traffic violator compact Iowa Code section 321.513, and the interstate drivers license compact, Iowa Code chapter 321C, require the Department of Transportation to report "convictions" under county civil ordinances to other member jurisdictions?

A.

The nonresident traffic violation compact and the interstate drivers license compact are separate pieces of legislation and should be examined separately. We will begin with the nonresident compact found at Iowa Code Section 321.513.

This compact provides for enforcement of a traffic citation in a jurisdiction outside the jurisdiction issuing the citation. § 321.513(1)(b). The term "citation" is defined as "a summons, ticket or other official document issued by a police officer for a traffic violation containing an order which requires the motorist to respond." Section 321.513(1)(a)(1).

The broad definition of a citation clearly embraces civil sanctions for traffic violations. There is no limiting language such as the term "convictions". The compact covers all traffic violations without regard to the nature of the violation or source of the law. Therefore, we conclude that the Department is required to report failure to comply with civil sanctions under county ordinances. See Section 321.513(1)(b).

B.

The Interstate Drivers License Compact is found at Iowa Code Chapter 321C. Again the answer to your question turns on the use of the term "conviction." Pursuant to Section 321C, Art. II "c" a "conviction" means:

> . . . any offense related to the use or operation of a motor vehicle which is prohibited by state law, municipal ordinance or administrative rule or regulation, or a forfeiture of bail, bond or other security deposited to secure appearance by a person charged with having committed any such offense, *and which conviction or forfeiture is required to be reported to the licensing authority.* (emphasis added).

The reporting of convictions is covered by § 321.207. As addressed above, "convictions" are limited to criminal penalties. Since the county ordinances provide civil sanctions, they are not reported under Section 321.207. This in turn takes the civil sanction outside Chapter 321C.

November 9, 1989

TAXATION; CONSERVATION: State-owned open space lands. Iowa Code §§ 111E.2, 111E.3, 111E.4 (1989); 1989 Iowa Acts, ch. 236 (H.F. 769). "Open space property" that is taxable pursuant to Iowa Code 111E.4 after state acquisition includes only the real estate acquired by the Department of Natural Resources since January 1, 1987, pursuant to states which appropriate funds expressly for "open space" land acquisition. (Smith to Wilson, Director, Department of Natural Resources, 11-9-89) #89-11-2(L)

November 21, 1989

PUBLIC OFFICERS AND EMPLOYEES: Gifts of travel expenses. Iowa Code §§ 68B.2(a), 68B.2(5)(b)(2), 68B.2(5)(b)(7), 68B.5, 565.3, 565.5 (1989). The payment of a governmental employee's travel expenses by an entity meeting the definition of a "donor" is almost always prohibited. The argument that payment of travel expenses and other intangible services which benefit public employees is a gift to the State or other governmental body has been rejected. If equal consideration is given in return for the reimbursement of travel expenses, the travel would not be a gift. Adequacy of consideration would be a question of fact. Although the legislature has generally excepted educational or seminar benefits from the definition of gift in § 68B.2(5)(b)(2), this exception does not include travel or lodging expenses. (Osenbaugh to Halvorson, State Representative, 11-21-89) #89-11-3(L)

November 29, 1989

COUNTIES AND COUNTY OFFICERS: Law Enforcement; Prisoner's Medical Expenses. Iowa Code § 356.5(2) (1989). Iowa Code section 356.5(2) does not preclude the county from seeking reimbursement of the medical costs it pays for a nonindigent prisoner's medical treatment while incarcerated in the county jail. (Zbieroski to Thole, Osceola County Attorney, 11-29-89) #89-11-4(L)

JANUARY 1990

January 3, 1990

CONSTITUTIONAL LAW; REAL ESTATE: Interest on trust accounts. Ia. Const., Art. I § 10, cl.1, Iowa Code Chapter 117.46 (1989), I.A.C. 193E 1.27(1), 1.27(4). A real estate buyer and seller can authorize the broker to pay expenses from the broker's trust account; the account must be interest bearing. The requirement that the broker transfer interest quarterly to the state treasurer for the title guaranty fund can be abrogated by the seller and the buyer, as long as the broker does not benefit from the interest received on funds in trust; the individual's right to contract is not violated. (Skinner to Harbor, State Representative, 1-3-90) #90-1-1(L)

January 3, 1990

STATE OFFICERS & DEPARTMENTS; ADMINISTRATIVE LAW: Department of Inspections and Appeals Administrative Law Judges. Iowa Code §§ 10A.103, 10A.104(5), 10A.202; 10A.402(8); 17A.2(2), 17A.11, 17A.15, 258A.6, 602.9206. The agencies listed in section 10A.202 need not use administrative law judges (ALJs) from the Department of Inspections and Appeals (DIA) to conduct contested case proceedings. DIA's rules could not supersede procedural rules adopted by the agency for which DIA is conducting a particular contested case proceeding. DIA has authority to adopt procedural rules to apply in the absence of conflicting agency rules. An agency with power to make the final decision in a contested case may hear an interlocutory appeal before an ALJ has made a proposed decision. The regulatory agency which has been delegated statutory authority to finally decide contested cases is the agency with jurisdiction; a DIA ALJ appointed to conduct a contested case acts on behalf of the regulatory agency. (Osenbaugh to Rosenberg, State Representative, 1-3-90) #90-1-2

The Honorable Ralph Rosenberg, State Representative: You have requested an opinion of the Attorney General concerning the authority of the Department of Inspections and Appeals (DIA) over contested case proceedings conducted on behalf of other state agencies. In 1986, as part of the state reorganization bill, the legislature created the Department of Inspections and Appeals. One division of that department, the Division of Appeals and Fair Hearings, consists of administrative law judges (ALJs) who act as presiding officers to render proposed decisions in contested case proceedings for various agencies listed in § 10A.202(1). When DIA was created, various hearings officers from other state agencies were transferred to DIA for this purpose.[1] In this opinion, we will refer to the agencies for which DIA conducts contested case proceedings as the "agency."[2]

You ask whether the agencies listed in Iowa Code § 10A.202(1) must use DIA administrative law judges, whether DIA may adopt procedural rules which supersede the procedural rules of the regulatory agency, whether parties can seek interlocutory review of procedural rulings of an ALJ and which agency has "jurisdiction" over contested cases.

A number of states have created a separate agency, often called a "central panel" agency, which hires hearing officers or ALJs to conduct procedures for other state agencies. One reason frequently given for "central panels" is to reduce bias which may result from the presiding officer being an employee of the agency that is both a party to the proceeding and the final decision-

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[1] In 1988, the title "hearing officer" was changed to "administrative law judge" throughout the Code. 1988 Iowa Acts, ch. 1109. That bill simply changed the title of these officers. The administrative law judge serves the same function previously fulfilled by hearing officers.

[2] In a few instances, DIA is itself a regulatory agency. For example, entities within DIA regulate health care facilities and race tracks. Iowa Code §§ 10A.202(1)(g), 99D.5(g); 1986 Op.Att'yGen. 102, 103.

maker. The ALJ is hired by an independent agency and thus theoretically has more independence than an employee of the agency. The independence of a hearing officer is, however, limited to independence in deciding the facts; all issues of policy and law are to be resolved finally by the agency. *In re Uniform Adm. Procedural Rules*, 90 N.J. 85, 447 A.2d 151, 159 (1982). An ALJ's decision is only a proposed decision, which is subject to review by the agency before it becomes final. The agency, therefore, retains the decisional authority. "The discretion given to the agency is granted to the agency as a policy-making entity and not to the individual hearing examiners who are called upon to apply that policy." *Lenning v. Iowa Dept. of Transportation*, 368 N.W.2d 98, 102 (Iowa 1985).

Other reasons often given for creation of a "central panel" of ALJs are the promotion of efficiency and uniform qualifications. Many state agencies do not need full-time ALJs. By pooling ALJs who handle cases from a number of agencies, those agencies can have ALJs available when needed. Many states which have adopted "central panel" systems have also statutorily imposed significant requirements such as experience in the practice of law to assure that qualified ALJs are available.

"Central panel" statutes differ in the degree to which agencies must utilize central panel ALJs, the authority to promulgate rules, the agencies which use the panel, etc.

(1)

You ask initially whether the agencies listed in §10A.202(1) may elect to hold hearings with their own ALJs or whether use of a DIA ALJ is mandatory. The Department of Inspections and Appeals was created for the purpose of "... coordinating and conducting various audits, appeals, hearings, inspections, and investigations related to the operations of the executive branch of state government." §10A.103. DIA's authority to conduct hearings is found in sections 10A.202(1) and 10A.202(2). Section 10A.202(1) states:

> The administrator shall coordinate the division's conduct of appeals and hearings as otherwise provided for by law including but not limited to the following:
>
> * * *

"Hearings" and "appeals" of specific agencies are delineated in subsections (a) through (m).[3] Iowa Code §10A.202(1); 1989 Iowa Acts, ch. 231, §9. Section 10A.202(2) further states:

> The administrator shall coordinate the division's conduct of all nonstatutory administrative hearings and appeals provided for in the Iowa administrative code and bulletin.

Chapter 10A nowhere states that DIA has exclusive authority to conduct all of the hearings for the agencies listed in §10A.202(1). For several reasons we conclude that the quoted language merely authorizes DIA to coordinate the hearings it conducts but does not require that DIA conduct all of the hearings listed.

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[3] "Appeals" is the term generally used in administrative law to describe appellate review of a formal decision made by a subordinate agency official. *See* Iowa Code §17A.15(3). However, section 10A.202 uses the term "appeals" to describe certain contested cases requested by a non-agency party. See n. *3*. Because section 17A.2(2) requires only "an *opportunity* for an evidentiary hearing," many contested cases are triggered only upon request of an affected person who disagrees with a staff action. *See, e.g.*, Iowa Code §455B.138 ("An appeal to the commission [from the director's order] shall be conducted as a contested case.") This contested case evidentiary hearing differs significantly from a true "appeal" and should not be confused with that process. We do not read section 10A.202 as addressing appellate review of other agency decisions; the appeals it addresses are original contested case proceedings.

Unlike Iowa Code § 10A.202, the language in some other state statutes creating "central panels" expressly provide that only the agency head or a central panel ALJ can serve as a presiding officer. *See, e.g.*, Fla. Stat. Anno. § 120.57(1)(a) ("A hearing officer assigned by the [Division of Administrative Hearings] shall conduct all hearings under this subsection, except . . . .") A few states require the agency to use a central panel ALJ even when the agency head hears the evidence. In those cases, the ALJ presides, rules on evidence, advises on the law, but does not assist in resolving questions of fact. *See* West's Anno. Cal. Code (1989 pocket part), §§ 11502, 11512. Minnesota expressly requires, "All hearings of state agencies [conducted under the APA] shall be conducted by an [ALJ] assigned by the chief [ALJ]." Minn. Stat. § 14.50. Several state statutes expressly provide that hearings may be conducted by the agency, by a central panel ALJ, or "if otherwise authorized by law" a person designated by the agency. *See* Colo. Rev. Stat. § 24-4-105(3); Tenn. Code Anno. §§ 4-5-102, 4-5-301; West's Rev. Code of Wash. Anno. §§ 34.12.040; 34.05.425, as amended by West's Wash. Legis. Service (1989), ch. 175, § 14. Some states' central panels provide ALJs upon the request of an agency. Mass. Ann. Laws, c. 7, § 4H. In Virginia the central panel is a list of qualified hearing officers maintained by the Supreme Court. Va. Code § 9-6.14:14.1. Wisconsin has a central panel but it holds hearings for only a few agencies. Wis. Stat. Anno., §§ 227.43, 227.46.

We are advised by DIA that it does not construe section 10A.202 as governing hearings conducted by an agency itself. Thus DIA agrees that an agency need not use a DIA ALJ if the agency itself conducts the hearing. The Iowa Administrative Procedure Act, enacted in 1975, authorizes the agency head to elect to hear the contested case directly. ("When the agency presides at the reception of the evidence in a contested case, the decision of the agency is a final decision."). Iowa Code § 17A.15. *See also* § 17A.11. The issue, therefore, is whether section 10A.202 precludes listed agencies from appointing ALJs other than those from DIA.

The Administrative Procedure Act, Iowa Code § 17A.11, specifically authorizes agencies to appoint ALJs as staff when needed. Section 17A.11 also authorizes agencies to borrow ALJs from other agencies. Other Code chapters make special provision for conducting contested cases. Iowa Code section 258A.6(1) requires that professional licensing board disciplinary hearings be heard by the licensing board or a panel of persons licensed in the relevant profession.[4] Iowa Code section 602.9206 also authorizes the Supreme Court to assign senior judges as administrative law judges upon request of an agency.

The key language from § 10A.202(1) states:

> The administrator shall coordinate the division's conduct of appeals and hearings as otherwise provided for by law including but not limited to the following:

This language clearly requires the administrator to coordinate hearings conducted by the division but it does not state that the listed hearings shall be conducted by the division. Indeed the section states that the hearings to be conducted by the division will be "as otherwise provided for by law."

Another reason section 10A.202(1) cannot be read as listing hearings which must be conducted by DIA is its ending phrase, "including but not limited to . . . ." Section 10A.202(2) is even more inclusive; it states,

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[4] Because section 258A.6 requires that professional licensing disciplinary hearings be heard by board members, board panels or peer review panels, DIA and the licensing boards have construed these sections as authorizing the use of a DIA ALJ to sit with the panel and assist by conducting the hearing but not participate in the substance of the decision-making. This interpretation, we believe, correctly harmonizes the statutes in question.

> The administrator shall coordinate the division's conduct of all nonstatutory administrative hearings and appeals provided for in the Iowa administrative code and bulletin.

If section 10A.202 mandates use of DIA ALJs in all hearings listed in it, this would lead to the anomalous conclusion that DIA ALJs have exclusive authority to hear all "nonstatutory" hearings and appeals provided in the rules of any agency. Unless required by constitution, these hearings would not technically be "contested cases." *See* Iowa Code §17A.2(2). The language that the administrator "shall coordinate the division's conduct of... hearings and appeals . . ." as used in subsections 10A.202(1) and 10A.202(2) does not expressly or impliedly mandate that the division conduct all the hearings listed in those sections.

Additionally, DIA does not control the final decisions of agencies for which it conducts contested cases. Section 10A.202(1) recognizes that decisions of DIA ALJs are subject to review by the regulatory agency in question.[5] As final decision-making authority is in the regulatory agency and nothing in section 10A.202 purports to repeal sections 17A.11 or 602.9206 or the authority of those agencies to hear the evidence directly, section 10A.202 does not compel the listed agencies to utilize an ALJ to preside at the taking of the evidence.

We would also note that many of the states which require use of a central panel ALJ require the ALJ to be a lawyer.[6] *See, e.g.*, Minn. Stat. § 14.50 ("learned in the law."); N.C. Gen. Stat. §7A-754 (authorized to practice law); Fla. Stat. Anno. § 120.65(5) (member of bar for 5 years). Iowa does not require that DIA ALJs lawyers be admitted to the bar, presumably because some types of hearings do not require legal qualifications. However, many proceedings do require either legal skills or expertise in the subject matter. (The regulatory agency's expertise is a primary basis for granting it primary jurisdiction over contested cases and for deference to its decisions. *See Northwestern Bell Telephone Co. v. Hawkeye State Telephone Co.*, 165 N.W.2d 771, 776 (Iowa 1969); Iowa Code § 17A.14(5).) Should the situation arise where DIA could not provide an ALJ with appropriate expertise for a particular hearing, it is our view that the legislature left intact the agency's ability to appoint a qualified presiding officer under section 17A.11. In practice of course, most of the listed agencies request the services of DIA ALJs for contested case hearings.

(2)

You also ask whether DIA's rulemaking authority confers power upon it to require that contested cases be conducted under its procedural rules if those rules conflict with the regulatory agency's procedural rules for conduct of contested cases. Under established Iowa law prior to the creation of DIA, each agency had the authority and duty to adopt procedural rules necessary for the conduct of hearings under the statutes administered by that agency. The Iowa Supreme Court has long recognized that "[i]t is necessary and proper for administrative departments... to adopt rules of procedure as to the matters coming under the jurisdiction of the commissions." *Bruce Motor Freight v. Lauterbach*, 247 Iowa 956, 961, 77 N.W.2d 613, 616 (1956). The Administrative Procedure Act, § 17A.3(1)(b), requires each agency to adopt rules "setting forth

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[5] Subsections (a) through (d) and (f) through (m) all specify that decisions of the division are subject to review by the agency. Subsection (e) regarding certain professional licensing boards differs in two respects; it lists only "appeals" rather than "hearings and appeals" and it states that "Judicial review of the division's actions in these areas may be sought in accordance with the terms of chapter 17A." This is difficult to apply in two respects: (1) It is unclear what, if any, "appeals" are contemplated (see note 2), and (2) section 17A.15 and 17A.19(1) and the licensing board's enabling acts would require a final decision of the board prior to judicial review.

[6] In New Jersey permanent ALJs are appointed by the Governor with the advice and consent of the Senate. N.J. Stat. Anno. § 52:14F-4.

the nature and requirements of all formal and informal procedures available to the public . . . ." Indeed, a failure to adopt any procedural rules can violate due process. *See Citizens v. Pottawattamie County Board of Adjustment*, 277 N.W.2d 921, 923-924 (Iowa 1979).

You question whether the DIA rules for contested case proceedings would supersede the procedural rules of the agency for which DIA is conducting the hearing. The act creating DIA grants the Director authority to adopt "rules deemed necessary for the implementation and administration of this chapter in accordance with chapter 17A, including rules governing hearing and appeal proceedings." Iowa Code § 10A.104(5). Thus the question is whether, by enacting § 10A.104(5), the legislature impliedly repealed the rulemaking authority of the state agencies listed in § 10A.202(1) to promulgate procedures for the conduct of contested cases under their enabling statutes.

Rules of statutory construction do not support implied repeal.

> The general rule is that amendments or repeals by implication are not favored. *Dan Dugan Transport Co. v. Worth County*, 243 N.W.2d 655 (Iowa 1976). Amendments by implication will not be upheld unless the intent to amend clearly and unmistakably appears from the language used, and such a holding is absolutely necessary. *Peters v. Iowa Employment Security Comm'n*, 235 N.W.2d 306 (Iowa 1975); *Wendelin v. Russell*, 259 Iowa 1152, 147 N.W.2d 188 (1966).

1986 Op.Att'yGen. 44, 48, 1986 Op.Att'yGen. 102, 104.

The presumption against silent repeal or amendment is especially strong when the statute arguably repealed or amended is chapter 17A, which was intended to be a uniform minimum procedural code applicable to all state agencies. Section 17A.1(2) states, "This chapter is meant to apply to all . . . contested case proceedings . . . that are not specifically excluded from this chapter or some portion thereof by its express terms or by the express terms of another chapter." Section 17A.23 similarly states, ". . . this chapter shall be construed to apply to all covered agency proceedings . . . not expressly exempted by this chapter or by another statute specifically referring to this chapter by name." While this statutory rule of construction is not conclusive, *Jew v. University of Iowa*, 398 N.W.2d 861, 865 (Iowa 1987), it provides a clear direction concerning how to draft legislation to create exceptions to the APA. Had the legislature intended to limit the authority of agencies to adopt procedural rules governing contested cases, sections 17A.1(2) and 17A.23 indicate how that intent would be expressed.

Applying these principles, we conclude that DIA's authority to adopt procedural rules did not impliedly repeal each regulatory agency's authority to determine the procedure for the conduct of its contested cases. First, section 10A.104(5) does not purport to create an exclusive source of rulemaking for procedural rules to govern these cases. Indeed, section 10A.104(5) can be read as authorizing DIA to adopt rules for hearings conducted under its own regulatory authority, or to adopt rules as necessary to fit with the procedural rules of the agencies for which it is conducting hearings.

Some states have granted authority to the "central panel" agency to adopt uniform rules for certain contested cases. These states have, however, enacted express legislation so providing. *See, e.g.*, Mass. Ann. Laws, ch. 30A, § 9) ("standard rules" to govern all adjudicatory proceedings except as provided); Minn. Stat. § 14.51 (Chief Hearing Examiner with Attorney General approval authorized to adopt procedural rules for rulemaking and contested cases which are "binding upon all agencies and shall supersede any other agency procedural rules with which they may be in conflict."); N.J. Stat. Anno. § 52:14F-5(e), (g) ("[d]evelop uniform standards, rules of evidence, and procedures. . . .") Had the legislature intended to authorize mandatory uniform rules of procedure, it would likely have done so expressly as this would be a significant change in Iowa law.

Authority to adopt uniform rules is not essential to the concept of a "central panel" system. Washington State has, for example, recently amended its "central panel" legislation to expressly authorize state agencies to adopt their own variances from the central panel's model procedural rules. Revised Code of Washington § 34.05.250; West's Wash. Legis. Service, ch. 175, § 4, amending RCW § 34.05.220. Other states also have provisions for exceptions and variances. *See* Mass. Ann. Laws, c. 30A, § 9.

"Uniform" rules for all contested cases heard by a DIA ALJ could result in disparate procedures for identical cases. The agency head can always hear the case directly rather than use an ALJ. Iowa Code § 17A.15(1). DIA has clearly not been granted any authority to mandate procedural requirements for those hearings which it does not conduct. It would be anomalous for contested case procedures for hearings held under the same authority and ultimately decided by the same agency head to be conducted under different rules depending upon who is the presiding officer. Additionally, the agency in reviewing an ALJ's proposed decision has "all the power which it would have in initially making the final decision." Iowa Code § 17A.15(3).

The regulatory agency head always retains ultimate authority to decide a contested case. "Administrative law judges have no independent decisional authority." *In re Certain Sections of the Uniform Administrative Procedure Rules*, 90 N.J. 85, 447 A.2d 151, 156 (1982) (hereafter *Uniform Rules*). "The discretion given to the agency is granted to the agency as a policy-making entity and not to the individual hearing officers who may be called upon to apply that policy." *Lenning v. Iowa Dept. of Transportation*, 368 N.W.2d 98, 102 (Iowa 1985). Absent a statute mandating that a regulatory agency apply DIA rules, the agency head would be free to apply its own procedural rules. Thus any attempt by DIA to apply its own rules instead of a contrary agency rule could be set aside by the agency.

It has generally been recognized that agencies need discretion to adapt their procedures to the needs of the agency.

> Absent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'" *FCC v. Schreiber*, 381 U.S. at 290, 14 L.Ed.2d 383, 85 S.Ct. 1459.
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> ...[T]he agency should normally be allowed to "exercise its administrative discretion in deciding how, in light of internal organization considerations, it may best proceed to develop the needed evidence and how its prior decision should be modified in light of such evidence as develops." Id., at 333, 46 L.Ed.2d 533, 96 S.Ct. 579.

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543-544, 55 L.Ed.2d 460, 479-80, 98 S.Ct. 1197 (1978). Even in states with central panel authority to adopt uniform rules, those rules may not "nullify or frustrate the essential decisional authority of the agency itself and thereby undermine its ultimate regulatory responsibilities." *Uniform Rules*, 447 A.2d at 156.

Significant issues would need to be addressed if mandatory uniform rules for contested case proceedings were to be authorized. There is great variety in the contested case proceedings conducted by various state agencies. The nature of the issue and the needs of the parties are, for example, quite different in Human Services AFDC eligibility hearings than in Department of Revenue substantive tax hearings. By and large, DHS hearings must be resolved quickly and by simple procedures which assure quick justice without need for legal assistance. In contrast, a Department of Revenue substantive tax case often involves extensive discovery and briefing of sophisticated legal issues. The parties there are more interested in the full and orderly development of the facts and law in a complex administrative proceeding than in immediate disposition.

Many agencies listed in § 10A.202(1) have committed to follow certain federal procedural requirements in order to obtain authority to enforce a program or to obtain federal funds. These requirements are conditions imposed under the spending power rather than direct federal mandates under the Supremacy Clause. In other words the state agency exercises discretion to adopt the rules in order to get federal approval. *See South Dakota v. Dole*, 483 U.S. 203, 97 L.Ed.2d 171, 107 S.Ct. 2793 (1987). If these agency procedural rules do not govern, the state could face the loss of significant authority or funds. Were the legislature to authorize uniform rules, we believe it would consider these issues and provide mechanisms to address them. *Cf.* No. Car. Gen. Stat. § 7A.759(h).

For all of these reasons, we conclude that section 10A.104(5) did not impliedly repeal the procedural rulemaking authority of other agencies and confer authority on DIA to adopt procedural rules which override the individual agencies' contested case procedures. We recognize that DIA, with the assistance of this office, is in the process of revising rules of procedure. Further, the Governor has appointed a Task Force which plans to consider contested case rules. The Task Force may ultimately produce procedural rules which would provide model rules for many agencies. Ideally, each agency would consider the rules when completed and determine whether all or some of those rules would appropriately govern the conduct of its own proceedings. The agency ultimately responsible for administration of the statute in question, must, however, have the power to prescribe the procedures necessary to carry out its statutory obligations.

(3)

You also ask whether the regulatory agency can hear interlocutory appeals from procedural rulings by ALJs. It is clear from both Code sections 17A.15(3) and 10A.202(1) that the ALJ renders a proposed decision but the agency retains full power to render the final decision.[7] § 17A.15(2).

The issue is whether the agency can hear an interlocutory appeal before the ALJ has rendered a proposed decision in a contested case. In this regard, we follow the reasoning of the New Jersey Supreme Court in *Uniform Administrative Procedure Rules*, 447 A.2d 151 (N.J. 1982). New Jersey has a mandatory central panel which has authority to adopt some uniform procedural rules. Nonetheless, the New Jersey Supreme Court held that the agency retains authority to review an interlocutory ruling by an ALJ. The court reasoned that adjudication is regulation and the agency's decisional authority in contested cases is "directly and integrally related to its regulatory function." 447 A.2d at 156. The Court also concluded that ". . . the Legislature intended no alteration of the regulatory authority or basic decisional powers of administrative agencies." *Id.* The Court also concluded that interlocutory review authority was necessary to protect the agency head's ultimate right to decide contested cases and to promote efficiency where interlocutory review would prevent delays. 447 A.2d at 159. The Court also said:

> Because the agency has the statutory jurisdiction to set and enforce regulatory policy, the final decision in contested cases is entrusted solely to the agency head. It would be inimical to this scheme to impose restraints on the agency head's ability to review and correct rulings affecting the conduct of proceedings before the agency. This is especially true when such supervisory measures are necessary to ensure the soundness of the final regulatory result. Since the basic responsibility for administrative adjudication reposes in the agency, the agency head has the inherent power to review any order or ruling made by an ALJ during the hearing of a contested case.

447 A.2d at 157.

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[7] See note 3 and text *supra*.

For the same reasons, we conclude that the agency can provide for interlocutory review of ALJ orders where appropriate. The agency rules can provide an appropriate means to assure that such review is available where necessary but does not result in excessive inconvenience, expense, and delay. *See* 447 A.2d at 159.

(4)

You also ask which agency has mandatory "jurisdiction." For the reasons stated above, we conclude that the agency delegated authority to apply a particular law through adjudication is the agency with "jurisdiction" over a contested case. That is the agency with primary and exclusive jurisdiction over a proceeding. *See Rowen v. LeMars Mutual Ins. Co.*, 230 N.W.2d 905, 909 (Iowa 1975). Section 10A.202 and the Iowa Administrative Procedure Act authorize the agency to delegate to an ALJ the authority to preside at the taking of the evidence and to render a proposed decision. But the ALJ is acting on behalf of the regulatory agency and exercising the jurisdiction of that agency as delegated by the legislature in the regulatory agency's enabling act. The agency can therefore determine whether and when to request the use of an ALJ to preside in a contested case proceeding.

The DIA Appeals and Fair Hearings Division is not a court holding judicial power; it is an executive agency. *Western International v. Kirkpatrick*, 396 N.W.2d 359, 362-363 (Iowa 1986). An administrative agency may be delegated "quasi-judicial powers, including the power to hear and determine facts as a necessary adjunct to determining what action the law imposes." *State ex rel. Keasling v. Keasling*, 442 N.W.2d 118, 121 (Iowa 1989).

> Quasi-judicial power resembles judicial power but any quasi-judicial power must be derived from and capable of being traced back to basic legislative or executive powers. See Galloway v. Truesdell, 83 Nev. at 21, 422 P.2d at 243. Thus, the Commission must have been set up to put into effect a function of legislative or executive power and the action complained of here should be a means to that end.

Cedar Rapids Human Rights Commission v. Cedar Rapids Community School District, 222 N.W.2d 391, 397 (Iowa 1974). The regulatory agency has been vested with authority to adjudicate controversies as part of its regulatory authority to execute the laws. The ALJ exercises adjudicatory authority by delegation from the agency and not by any independent decisional authority. *See Lenning v. Iowa Department of Transportation*, 368 N.W.2d 98, 102 (1985). Chapter 10A confers no substantive authority to revoke licenses, fix tax liability, etc. The authority of an ALJ to render proposed decisions adjudicating legal rights is derived from the statutory authority vested in the regulatory agency.

In conclusion, the agencies listed in section 10A.202 need not use DIA ALJ's to conduct contested case proceedings. DIA's rules could not supersede procedural rules adopted by the agency for which DIA is conducting a particular contested case proceeding. DIA does have authority to adopt procedural rules to apply in the absence of conflicting agency rules. An agency with power to make a final decision in a contested case may hear an interlocutory appeal before an ALJ has made a proposed decision. The regulatory agency which has been delegated statutory authority to decide contested cases is the agency with jurisdiction; a DIA ALJ appointed to conduct a contested case acts on behalf of the regulatory agency.

January 5, 1990

SCHOOLS: Insurance. Iowa Code §294.16 (1989). An employee of a school district has a statutory right to select the provider of an annuity contract made available by the school district for his or her benefit, even if the annuity is funded solely with school district monies. (Scase to Poncy, State Representative, 1-5-90) #90-1-3(L)

January 5, 1990

COUNTIES AND COUNTY OFFICERS: County Attorney and County Fair Society. Iowa Code §§ 174.2, 174.15, 331.756, 331.756(7). The County Attorney

has no statutory duty to give legal service or advice to a county fair society. (Reno to Mertz, Marion County Attorney, 1-5-90) #90-1-4(L)

January 12, 1990

GENERAL ASSEMBLY; HIGHWAYS: Titles; Fiscal Notes. Iowa Const; Art. III, §29; Iowa Code §§25B.5, 313.2A. 1989 Iowa Acts, ch. 134. A statute titled "an act relating to roads" may constitutionally contain a provision altering the way in which the jurisdiction of certain highways is transferred. The failure of the Legislative Fiscal Bureau to prepare a fiscal note for this statute does not invalidate it. (Hunacek to Chambers, Beres, Coleman and Fuller, 1-12-90) #90-1-5(L)

January 12, 1990

CRIMINAL LAW; CLERK OF COURT: Costs; expert witness fees; blood alcohol tests; OWI. Iowa Code §§321J.2(1); 625.14. Clerk of court is not authorized to tax cost of State's blood alcohol test against convicted OWI defendant unless court specifically so orders. (Ewald to Vander Hart, Buchanan County Attorney, 1-12-90) #90-1-6(L)

January 18, 1990

CONSERVATION: Hunting licenses. Iowa Code Supp. §110.24 (1989); 1989 Iowa Acts, ch. 87. A farm owner and a member of the owner's family who operates the farm are not both eligible for free licenses to hunt deer or wild turkey. (Smith to Hagerla, State Senator, 1-18-90) #90-1-7(L)

January 19, 1990

ELECTIONS: Vacancy. County Central Committees. Iowa Code ch. 43; §§43.4, 43.99, 43.100, 43.101. Iowa Code ch. 69; §69.2(3). A vacancy is not created under §69.2(3) if a county central committee member moves outside his or her precinct. The ultimate determination of the residency requirements for county central committee members rests with the political party. (Pottorff to Zenor, Clay County Attorney, 1-19-90) #90-1-8

Michael L. Zenor, Clay County Attorney: You have requested an opinion of the Attorney General concerning the grounds under which a vacancy is created on a political party county central committee. You point out that Iowa Code §43.99 provides that "[t]wo members of the county central committee for each political party shall, at the precinct caucuses, be elected from each precinct." This same section further states that the term "shall continue for two years and until a successor is elected and qualified, unless sooner removed by the county central committee for inattention to duty or incompetency." You also point out that Iowa Code §69.2 defines a "vacancy" in a "civil office," in part, to include "[t]he incumbent ceasing to be a resident of the state, district, county, township, city, or ward by or for which the incumbent was elected . . . ." In light of these two code sections, you pose the following question:

> Does a person, who was a resident of the appropriate township or precinct at the time of a precinct caucus, and who was elected to a political party central committee at that caucus, and who has subsequently moved to another township within the same county, and who desires to continue his membership on the county central committee and to perform the functions of his office, remain a member of the central committee until his or her successor is elected and qualified; or does the fact that such person has moved, result in a vacancy in the office?

In our view, a vacancy is not created by operation of law under these circumstances. The ultimate determination of the residency requirements for county central committee members rests with the political parties.

Chapter 43 includes several statutes which govern the composition and function of county central committees. Section 43.99 directs the election of members:

> Two members of the county central committee for each political party shall, at the precinct caucuses, be elected from each precinct. *The term of office of a member shall begin at the time specified by the party's state*

> *constitution or bylaws and shall continue for two years and until a successor is elected and qualified, unless sooner removed by the county central committee for inattention to duty or incompetency.* The party's state constitution or bylaws may permit the election of additional central committee members from each precinct in a number proportionate to the vote cast for the party's candidates for office in the respective precincts at preceding general elections.

Iowa Code § 43.99 (1989) (emphasis added). Under this provision two members are to be elected from each precinct at the precinct caucuses.[8] Precinct caucuses, in turn, are held every two years. Iowa Code § 43.4. Members, therefore, serve for two years and until successors are elected and qualified. Additional members may be authorized by the political party's state constitution or bylaws. Iowa Code § 43.99.

Notably § 43.99 expressly states in the emphasized language that members may be "removed by the county central committee for inattention to duty or incompetency." Iowa Code § 43.99. No additional grounds for removal are stated and no grounds under which a vacancy is created are provided. Plainly, however, the term of a member may end prematurely other than by removal for inattention to duty or incompetency. The statutes provide that the position of an officer of the county central committee, for example, may become vacant by death or resignation. Iowa Code § 43.101 ("The term of office of an officer . . . continues for two years and until the officer's successor is elected and qualified, unless the officer dies, resigns or is sooner removed by the county central committee for inattention to duty or incompetency"). These same circumstances may, of course, affect nonofficer members of the county central committee as well. We do not, therefore, consider the grounds for removal stated in § 43.99 to be a finite list of the grounds upon which a vacancy may be created.[9]

In our view, the provisions of chapter 69 do not provide the answer to this issue. Section 69.2 states that "[e]very civil office shall be vacant upon the happening" of any of six delineated events. One of these events, set out in subsection 3, is the "incumbent ceasing to be a resident of the state, district, county, township, city, or ward by or for which the incumbent was elected or appointed . . . ." Iowa Code § 69.2(3). Two factors persuade us that this section is not applicable to county central committees.

First, it is doubtful that a committee member holds a "civil office" within the meaning of this statute. The Iowa Supreme Court has observed that a "civil office" is "a grant and possession of the sovereign power, and the exercise of such power within the limits prescribed by the law which creates the office constitutes the discharge of the duties of the office." *State v. Spaulding*, 102 Iowa 639, 644-45, 72 N.W. 288, 289 (1897). The term "civil office" in § 69.2 has been applied in a variety of circumstances. *See, e.g., Welty v. McMahon,*

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[8] A statutory predecessor to § 43.99 provided that two members were to be elected from each precinct at the primary election. *See* Iowa Code ch. 36 § 626 (1931). In a terse opinion issued in 1931 this office concluded that election of a committee member who was not a resident of the precinct at the time of election created a vacancy to be filled by the county central committee as provided by law. 1932 Op.Att'yGen. 234, 235. Because your question focuses on a change in residency after election as a committee member rather than a failure to meet residency imposed as a qualification for election, we express no view on the continued vitality of this opinion.

[9] In 1970 this office determined that the grounds for removal specified in § 43.99 are exclusive and constitute the only grounds upon which a county central committee member could be removed by the county central committee. 1970 Op.Att'yGen. 692, 693. In view of intervening United States Supreme Court decisions, discussed *infra*, we question whether this continues to be a correct statement of law.

316 N.W.2d 836, 838 (Iowa 1982) (State Judicial Nominating Commissioner); *Independent School District v. Miller*, 189 Iowa 123, 128, 178 N.W. 323, 325 (1920); (school district treasurer); 1980 Op.Att'yGen. 494, 494-95 (county supervisor); 1976 Op.Att'yGen. 730, 730-32 (city council member). Application of the term under this definition and in these contexts has been to public offices for which the duties are prescribed by law. A county central committee member, however, holds a position for which only some, but certainly not all, duties are prescribed by law.

The election of county central committee members is directed by statute. Iowa Code § 43.99. These committee members, thereafter, are directed to elect officers and adopt a constitution and bylaws. Iowa Code §§ 43.100, 43.101. Some additional statutory duties are imposed in conducting precinct caucuses. *See, e.g.*, Iowa Code § 43.4 ("The central committee of each political party shall notify the delegates . . . of the time and place of holding the county convention.") Generally, however, the committee members pursue the private goals of their respective political parties which are neither directed by nor limited by statute.

In other contexts, we have observed that a member of a county central committee does not hold a "public office" for purposes of applying additional statutory provisions. In 1970 the Attorney General determined that a county central committee member does not hold a "public office" within the meaning of § 66.1 which establishes grounds for removal of an appointive or elective officer by a court. 1970 Op.Att'yGen. at 693. For purposes of this opinion, we do not perceive a significant difference between a "public office" under § 66.1 and a "civil office" under § 69.2 in application to county central committee members.

Second, the language § 69.2 does not include a "precinct" as a geographic area from which the incumbent may create a vacancy by "ceasing to be a resident." Section 69.2(3) enumerates six geographic areas — state, district, county, township, city, or ward. Under principles of statutory construction the express mention of certain terms implies the exclusion of others. *See Barnes v. Iowa Department of Transportation*, 385 N.W.2d 260, 263 (Iowa 1986); Crees v. Chiles, 437 N.W.2d 249, 252 (Iowa App. 1988). In § 69.2(3) the legislature expressly mentioned six geographical areas from which "ceasing to be a resident" would create a vacancy. A "precinct" simply is not one of them.[10]

In our opinion, the ultimate determination of whether a committee member who moves out of his or her precinct creates a vacancy on the county central committee rests with the political party itself. The United States Supreme Court has repeatedly held that the constitutional associational rights of political parties to conduct their own political processes has primacy over state law. Recently in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 109 S.Ct. 1013, 103 L.Ed.2d 271 (1989), the United States Supreme Court reviewed California state statutes which regulated governing bodies for political parties. These statutes, inter alia, provided for state and county central committees, dictated the size and composition of the state central committee, established criteria for selection and removal of committee members, fixed a maximum term of office for the state central committee chair, specified the time and place of committee meetings and limited the dues which could be imposed on members. *Id.* at 218, 109 S.Ct. at 1017, 103 L.Ed.2d at 279. The Court held that these laws violated the associational rights of the political party by limiting the party's discretion "to organize itself, conduct its affairs and select its leaders" in the absence of a showing by the state that the regulations served a compelling state interest. *Id.* at 232, 109 S.Ct. at 1025, 103 L.Ed.2d

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[10] We note that you couch your question alternatively in terms of residency in the appropriate township or precinct. Precincts are not necessarily congruent with township boundaries. *See* Iowa Code § 49.4. Section 49.99, moreover, specifies election of county central committee members from each "precinct." Analysis of the impact of § 69.2(3), therefore, is limited to the term "precinct."

at 288. Because the state failed to show the regulations were necessary "to ensure an election is orderly and fair," the statutes were ruled unconstitutional.

This result in *Eu* is consistent with earlier United States Supreme Court decisions which had upheld the right of political parties to conduct candidate nominating proceedings in disregard of state laws. *See Tasjian v. Republican Party*, 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986); *Democratic Party v. Wisconsin*, 450 U.S. 107, 101 S.Ct. 1010, 67 L.Ed.2d 82 (1981); *Cousins v. Wigoda*, 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975). In light of these decisions, and particularly in the face of statutory silence on the grounds for vacancy, we believe the determination of the residency requirements for county central committee members rests with the political party.

In summary, it is our opinion that a vacancy is not created under § 69.2(3) if a county central committee member moves outside his or her precinct. The ultimate determination of the residency requirements for county central committee members rests with the political party.

FEBRUARY 1990

February 2, 1990

NEWSPAPERS: Official Publications. Iowa Code chapters 349 and 618; Iowa Code §§ 349.1, 349.3 and 349.16 (1989). A county board of supervisors is required to publish official proceedings in each of the designated official county newspapers. Selecting between the designated official county newspapers for publication will not satisfy the mandatory publication requirement. (Walding to Black, State Representative, 2-2-90) #90-2-1(L)

February 2, 1990

COUNTIES: Auditor's duty to file claims. Iowa Code §§ 331.401(1)(p), 331.504(8) (1989). The county auditor acts as a ministerial officer when carrying out his or her duty to file claims against the county for presentation to the board of supervisors, the board is responsible for assessing the adequacy of proof supporting such claims, and the auditor may not refuse to file a claim for submission to the board. (Scase to Wilson, Jasper County Attorney, 2-2-90) #90-2-2(L)

February 5, 1990

INSURANCE: Counties. Iowa Code Section 613A.7 (1989). A county, through a self-insurance risk pool, may bind itself to a commitment beyond the current fiscal budget year for the protection from tort liability as specified in section 613A.7. (Haskins to TeKippe, County Attorney, 2-5-90) #90-2-3(L)

February 5, 1990

TAXATION: Tax Sales; Notice of Expiration of Right of Redemption. Iowa Code § 447.9 (1989), as amended by 1989 Iowa Acts, ch. 66, § 1, and Iowa Code § 446.9(3) (1989). Mortgagees, vendors, lessors, and other persons with recorded interests in real property sold at tax sale are entitled to notice of expiration of right of redemption, without any further twenty- five dollar fee payment, if they have complied with the request for notice of tax sale as prescribed in § 446.9(3). (Griger to Murphy, State Senator, 2-5-90) #90-2-4(L)

February 8, 1990

TAXATION: Tax Sale Procedures; Sale Price And Proper Bidding Procedure At Tax Sales Of Real Property. Iowa Code §§ 446.7; 446.16; 446.18 and 446.19 (1989). Under the present Iowa tax sale statutes, real property sold at either a regular tax sale or a scavenger tax sale must always be sold for exactly the full amount of taxes, interest and costs owed. (Hardy to Lievens, Butler County Attorney, 2-8-90) #90-2-5

February 8, 1990

ELECTIONS OPEN MEETINGS: Board of Supervisors, Canvasses. Iowa Code §§ 21.2, 21.3, 21.4; 43.49, 43.50, 43.62; 50.24, 50.26, 50.27, 50.45; 331.201, 331.212, 331.213; 349.16, 349.18. The Open Meetings Law is not applicable to a canvass of an election by a county board of supervisors. Other provisions of law, however, require canvasses under chapter 50 to be public and minutes to be kept. These minutes need not be published. (Pottorff to Martin, Cerro Gordo County Attorney, 2-8-90) #90-2-6(L)

February 12, 1990

ASSESSOR: Duties of Assessor. Iowa Code § 441.17(1) (1989). An assessor may not do eminent domain appraisals in the Assessor's assessment district. (Baty to Johnson, Auditor of State, 2-12-90) #90-2-7(L)

February 15, 1990

COUNTIES: County Conservation Board; Board of Supervisors: Iowa Code § 331.434 (1989). After adopting a budget for the county conservation board and appropriating the budgeted amount, the board of supervisors does not have authority to disapprove payment of a claim for a budgeted conservation expenditure. To reduce an appropriation the board of supervisors must follow the procedure set forth in Iowa Code § 331.434(6). (Smith to Black, State Representative, 2-15-90) #90-2-8(L)

Feburary 21, 1990

SCHOOLS: Levy for cash reserve. Iowa Code §§ 442.13, 442.22 (1989); Iowa Code Supp. §§ 257.31, 257.34, 298.10 (1989); 1989 Iowa Acts, ch. 135, §§ 31, 34. A school district may certify a cash reserve levy pursuant to Iowa Code § 298.10 to provide cash to replace withheld state aid and allow the district to meet authorized expenditures even though utilization of this levy will cause variation in the property tax rates among districts. (Scase to Pate, State Senator, 2-21-90) #90-2-9(L)

MARCH 1990

March 2, 1990

SCHOOLS: Sale of real property. Iowa Code § 297.22 (1989). The fourth unnumbered paragraph of Iowa Code section 297.22 applies to a transaction in which a community school district sells real property to a merged area school so long as the school district is within the jurisdiction of the merged area. (Scase to Nystrom, State Senator, 3-2-90) #90-3-1(L)

March 2, 1990

COUNTIES AND COUNTY OFFICERS: Recovery of support to the poor. Iowa Code §§ 252.13, 252.14. The county may recover from the estate of a poor person if the claim has been timely filed even though not filed within the two years after the county made payment. (Robinson to Zenor, Clay County Attorney, 3-2-90) #90-3-2(L)

March 5, 1990

STATE BOARD OF REGENTS: Appropriations; Statutory Construction. Iowa Code §§ 8.38, 8.39, 262.9, 262.12. The State Board of Regents may require the institutions it governs to reimburse the board office for services actually performed by the board office for that institution only if the service is within the scope of the appropriations made for the institution. If the Board uses appropriated funds for a purpose outside the scope of the appropriation, the transfer provisions of Iowa Code section 8.39 should be followed. (Barnett to Varn, State Senator, 3-5-90) #90-3-3(L)

March 7, 1990

COUNTIES, COURTS, CLERK OF COURT OFFICES: Iowa Constitution Articles III §1; V §1; V §4; V §6; Iowa Code §§602.1303; 602.8102(9); 331.361(5); 4.1(22); Iowa R. Civ. P. 378, 379, A county or city which provides office space for a clerk of court or for other state court functions cannot determine when those offices will close. Other than statutorily mandated legal holidays, it is the court system under the supervision of the Iowa Supreme Court which decides when court offices will close. (Skinner to Royer, 3-7-90) #90-3-4(L)

March 7, 1990

COUNTIES; SHERIFFS; MOTOR VEHICLES: Levies on exempt personal property. Iowa Code §§626.50 - .55, 627.6; 761 Iowa Admin. Code 400.11; Iowa R. Civ. P. 258, 260. Personal property exempt from execution is protected from a sheriff's levy. When a sheriff receives written notice of exemption, a valid lien no longer exists and the sheriff should release the levy unless the judgment creditor provides an indemnity bond. (Olson to Werden, Carroll County Attorney, 3-790) #90-3-5(L)

March 9, 1990

SCHOOLS; INTERGOVERNMENTAL AGREEMENTS: Interstate gradesharing agreements. Iowa Code §§28E.1, 28E.3, 28E.5, 28E.6, 274.7, 277.27, 282.7 (1989). An Iowa school corporation may, through its board of directors, enter into an interstate grade-sharing agreement with a South Dakota school district which provides for joint exercise of control over some affairs of the Iowa district. The Iowa district may not, however, delegate obligations statutorily imposed upon its governing board. Guidelines for the composition of such joint board and selection of its members should be included within the agreement of the parties. (Scase to Banks, State Representative, 3-9-90) #90-3-6

The Honorable Brad Banks, State Representative: You have requested an opinion of the Attorney General on several questions concerning the authority of an Iowa school corporation to enter an interstate school district compact which provides for joint exercise of control over the affairs of the school corporation with persons who are not Iowa residents. Your request has arisen in the following context. The Akron-Westfield Community School District, an Iowa public school corporation, is a party to an interstate school district compact with Greater Hoyt Independent School District, which is located entirely in the state of South Dakota.

The purpose of this interstate agreement is to allow students residing in the Hoyt district to attend classes at school facilities which are located in the Akron-Westfield district, but jointly maintained by the Akron-Westfield and Hoyt districts. The current agreement between Akron-Westfield and Hoyt provides that each district shall maintain a Board of Directors according to the laws of their respective states. The Akron-Westfield Board of Directors is designated as the "controlling board" and is granted policy-making and governing authority for administration and operation of the school. Members of either board are allowed to attend meetings of the other board in an advisory, non-voting capacity.

During re-negotiation of the above agreement, a request was made that the Akron-Westfield board, as controlling board, agree to extend voting rights on the controlling board to either the South Dakota residents of the Hoyt district or to the Hoyt Board of Directors. On behalf of the Akron-Westfield board, you have requested our opinion as to whether voting rights on the controlling board may legally be granted to residents or members of the board of directors of the Hoyt district. Specifically, you inquire:

1. Under the provisions of Iowa Code Chapter 28E authorizing the joint exercise of governmental powers, may an Iowa school corporation enter into an agreement with a South Dakota school district which provides that the affairs of the Iowa school district will be governed by a board

of directors one or more of whose members is a resident of the State of South Dakota and a resident of the South Dakota school district which is a party to the agreement?

2. Under the provisions of Iowa Code Chapter 28E, may an Iowa school corporation enter into an agreement with a South Dakota school district which provides that the affairs of the Iowa school corporation will be governed by a joint board of directors comprised of the members of the board of directors of the Iowa school corporation and all of the members, or some lesser number, of the board of directors of the South Dakota school district?
3. If the answer to Question #1 is "yes," what statutory provisions govern the procedures for the election of the members of the board of directors of the Iowa school corporation?
4. If the answer to Question #2 is "yes," what statutory provisions govern the procedures for the election of the members of the joint board of directors that would govern the Iowa school corporation?
5. If the answer to Question #1 or #2 is "yes," does the Constitutional principle of one-man one-vote to the election apply? If this Constitutional provision does apply, how does it apply to the election that would be held?

Several provisions of the Iowa Code are relevant to resolution of your inquiries. Initially, we must examine Iowa Code chapter 28E, entitled "AN ACT to authorize joint exercise of governmental powers by public agencies," which sets forth general guidelines governing all interagency agreements. Under this code chapter any public agency, including a school district, may enter into an agreement with another public agency of this state, another state, or the federal government "to make efficient use of their powers by enabling them to provide joint services and facilities . . . and to cooperate in other ways of mutual advantage." Iowa Code § 28E.1 (1989).

Code chapter 28E provides for interagency agreements, such as the agreement existing between the Akron-Westfield and Hoyt school districts, and allows participating agencies to provide for the exercise of its powers by an administrator or joint board. *See* Iowa Code §§ 28E.4, 28E.5, 28E.6 (1989). *Goreham v. Des Moines Metropolitan Area Solid Waste Agency*, 179 N.W.2d 449, 455-56 (Iowa 1970).

> Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed . . . jointly with any public agency of another state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency.
>
> Iowa Code § 28E.3 (1989).

A public agency's 28E authority to enter agreements for the joint exercise of powers is not, however, without limitation. The Iowa Supreme Court, applying Chapter 28E, has held that this chapter does not allow a public agency to bypass obligations imposed by statute through delegation to a 28E entity. In *Barnes v. Dept. of Housing and Development*, 341 N.W.2d 766 (Iowa 1983), the Court ruled that where city council approval of housing projects was expressly required by statute, the city could not bypass city council approval by delegating its powers to a regional housing authority created under chapter 28E. *Id.* at 768.

In addition to Chapter 28E, we must consider Iowa Code § 282.7 (1989), which directly addresses interstate grade-sharing agreements between school districts. Section 282.7(3) provides, in relevant part, that "[n]otwithstanding . . . section

28E.9,[1] a school district may negotiate an agreement . . . for attendance of its pupils in a school district located in a contiguous state subject to a reciprocal agreement by the two state boards [for wholegrade sharing]." This section contains no provision directly addressing the questions you raise.

In the absence of specific statutory provision limiting a school district's power to execute an agreement with an out-of-state school district, Code Chapter 28E allows such joint exercise of the Iowa school board's authority. Iowa Code § 274.7 (1989), provides that "[t]he affairs of each school corporation shall be conducted by a board of directors . . . ." As noted above, Code Chapter 28E empowers any public agency or political subdivision of this state to enter into an interstate agreement providing "for an administrator or a joint board responsible for administering the joint or cooperative under-taking. In the case of a joint board, public agencies party to the agreement shall be represented." Iowa Code § 28E.6(1).

Based upon these Code provisions, we must conclude that an Iowa school corporation may, through its board of directors, enter into an interstate grade-sharing agreement with a South Dakota school district which provides that the affairs of the Iowa school corporation will be governed by a joint board. In light of *Barnes*, certain obligations imposed by law upon the Iowa school district should continue to be discharged by the Iowa school district itself and not by the joint board created under chapter 28E. *See e.g.*, Iowa Code § 274.39 (1989) (regarding the sale of land to the government: . . . "the board of directors of such school districts by resolution is authorized to sell and convey such property at a price and upon terms as may be agreed upon . . . .") Given the absence of statutory guidelines regarding delegation of duties by a school district, determination of which duties must remain with the Iowa school board can only be made on a case-by-case basis and should be outlined in the terms of the joint agreement.

The joint board must include representatives of both school districts. The representative or representatives of the South Dakota district may be either residents of that district or members of its board of directors.[2] Therefore, we answer your first two inquiries affirmatively.

Your remaining inquiries concern the procedural guidelines governing election of members of the joint board of directors. As noted above, it is our conclusion that an Iowa school district which enters into an interstate agreement for the exercise of control over its affairs by a joint board must continue to maintain its own independent board of directors. "Members of boards of directors of community and independent school districts, and boards of directors of merged areas shall be elected at the school election." Iowa Code § 39.24 (1989). The school election must be conducted pursuant to the procedural guidelines of Iowa Code Chapter 277. The general election laws contained in Code Chapters 39 to 53 apply to all school elections. Iowa Code § 277.3 (1989).

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[1] Code § 28E.9 provides that interstate agreements executed pursuant to chapter 28E shall have the status of interstate compacts and must be approved by the attorney general as to form and compatibility with Iowa law. Pursuant to section 282.7(3), interstate whole-grade sharing agreements, are subject to approval by the state board of education.

[2] Please note that we have not attempted to analyze the effect of South Dakota statutes upon the validity of such an arrangement. The school laws of that state may require that the representative or representatives of that district be members of the district's board of directors.

If the boards of directors of both the Iowa and South Dakota school district resolve to enter into an agreement providing for control by a joint board,[3] the agreement itself should contain provisions regarding the composition of that board and method of appointment of its members. Please note that, in the absence of statutory authority providing for election of members of such a joint board, an election for this purpose cannot be held. The agreement may, however, provide that only persons who have been elected to the boards of directors of the participating schools may be appointed to serve as joint board members.

As noted above, the agreement should also contain provisions regarding the retention of statutory obligations by the Iowa school board. We believe that further clarification by the legislature regarding the delegation of duties by a school board could simplify this problem.

In conclusion, it is our opinion that an Iowa school corporation may, through its board of directors, enter into an interstate grade-sharing agreement with a South Dakota school district which provides that some of the affairs of the Iowa school corporation will be governed by a joint board. The Iowa district may not, however, delegate obligations statutorily imposed upon its governing board. The Iowa school must maintain its own board of directors; and the agreement should provide guidelines for the composition of the joint board and appointment of its members.

March 14, 1990

MOTOR VEHICLES: Safety Standards. 15 U.S.C. § 1392(d). The Federal Vehicle Safety Act, 15 U.S.C. § 1392(d) pre-empts state authority over motor vehicle safety standards where there are applicable federal standards. The State may enforce identical standards or impose higher standards for its own vehicles. (Peters to Rosenberg, State Representative, 3-14-90) #90-3-7(L)

March 14, 1990

STATE OFFICERS AND DEPARTMENTS: Transfer of an Appropriation. Iowa Code §§ 8.33, 8.36, 8.38, 8.39(1), 8.39(2) (1989). Transfer of funds pursuant to § 8.39(1) and (2) must occur prior to the end of the fiscal year in which the appropriation was made. (Peters to Varn, State Senator, and Hatch, State Representative, 3-14-90) #90-3-8

March 30, 1990

COUNTY HOSPITAL: Counties. Iowa Constitution Art. III, § 31; Iowa Code §§ 347.13(5); 347.14(10). The hospital board of trustees has authority to provide active staff physicians and dependents a discount in the cost of hospital services. Upon adequate findings that such a plan furthers the public interest, the plan would not violate Article III, § 1 of the Iowa Constitution. (McGuire to Swanson, 3-30-90) #90-3-9(L)

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[3] Pursuant to Iowa Code §§ 28E.4, "[a]ppropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved is necessary before any [28E] agreement may enter into force." Code § 274.7 (1989) grants sole authority to control the affairs of a school corporation to the board of directors. Therefore, only the local board of directors is empowered to enter into and maintain such an interstate agreement on behalf of the Iowa school district.

APRIL 1990

April 10, 1990

COUNTY HOME RULE: Local boating, fish and wildlife regulations. Iowa Const. art. III, § 39A; Iowa Code chapters 106, 107, 109, 110 (1989). County home rule power does not authorize a county ordinance creating local boating registrations, fishing licenses, hunting licenses or habitat stamps and imposing fees. (Smith to Lytle, Van Buren County Attorney, 4-10-90) #90-4-1(L)

April 10, 1990

STATE OFFICERS AND EMPLOYEES, CONSTITUTIONAL LAW: Industrial Commissioner; Limitation on Political Activity: First Amendment, U.S. Constitution, Fourteenth Amendment, U.S. Constitution; Iowa Code Supp. § 86.2 (1989), Iowa Code § 86.4 (1989). Persons subject to prosecution under § 86.4 are the commissioner, chief deputy commissioner, and deputy commissioners, not other employees of the division of industrial services. The statute permissibly restricts "espousal of a candidate" at local, state, and national levels. "Hard core conduct" including active public solicitation of funds or support for a specific candidate can be successfully prosecuted under the language of the statute, while "lesser political involvement" could not be prosecuted under the existing language. Only "active partisan political campaigning" and "clearly partisan political activity" are subject to prohibition. (Donner to Linquist, Industrial Commissioner, 4-10-90) #90-4-2(L)

April 20, 1990

ENVIRONMENTAL LAW: Solid Waste; Open Dump. Iowa Code §§ 455B.307(1) and (2) (1989). Permitting illegally dumped or deposited solid waste to remain at an unapproved site such as an open dump constitutes a continuing violation of Iowa Code § 455B.307(1) (1989) and clean-up of said solid waste may be required pursuant to Iowa Code § 455B.307(2) (1989). Iowa Code § 455B.307(2) (1989) may be used to require the clean-up of solid waste dumped or deposited prior to July 1, 1975, at an open dump which failed to comply with applicable permit and closure requirements. (Sheridan to Beres, Hardin County Attorney, 4-20-90) #90-4-3

Mr. James L. Beres, Hardin County Attorney: You have requested our opinion on the following questions:

1. Does Iowa Code § 455B.307(1) require the clean-up of solid waste at an open dump?
2. If so, does this requirement apply to open dumps which existed prior to enactment of the statute?
3. What types of materials are "similar inorganic material" which may be used for fill, landscaping, excavation or grading at places other than a sanitary disposal project?

Iowa Code § 455B.307(1) (1989) provides *inter alia:*

> A private agency or public agency shall not dump or deposit or permit the dumping or depositing of any solid waste at any place other than a sanitary disposal project approved by the director unless the agency has been granted a permit by the department which allows the dumping or depositing of solid waste on land owned or leased by the agency. The department shall adopt rules regarding the permitting of this activity which shall provide that the public interest is best served, but which may be based upon criteria less stringent than those regulating a public sanitary disposal project provided that the rules adopted meet the groundwater protection goal specified in section 455E.4. The comprehensive plans for these facilities may be varied in consideration of the types of sanitary disposal practices, hydrologic and geologic

conditions, construction and operations characteristics, and volumes and types of waste handled at the disposal site.

This statute prohibits the dumping, depositing, or permitting the dumping or depositing of solid waste at any place which has not been approved by the director of the Department of Natural Resources. The statute does not contain an express clean up[1] requirement for illegally dumped or deposited solid waste at an unapproved site such as an open dump.[2] Nevertheless, if permitting illegally dumped or deposited solid waste to remain at an unapproved site constitutes a continuing violation of Iowa Code § 455B.307(1) (1989), then, in our view, the enforcement provisions of Iowa Code § 455B.307(2) (1989) would be available to require a clean-up.

In construing a statute, we seek a reasonable interpretation that will best effect the purpose of the statute and avoid an absurd result. *John Deere Dubuque Works of Deere & Co. v. Weyant*, 442 N.W.2d 101, 104 (Iowa 1989). We consider all portions of the statute together without attributing undue importance to any single or isolated portion. *Id.* Environmental statutes should be construed liberally to further legislative objectives. *Polk County Drainage Dist. Four v. Iowa Natural Resources Council*, 377 N.W.2d 236, 241 (Iowa 1985); *see also State ex rel. Iowa Dept. of Water, Air and Waste Management v. Grell*, 368 N.W.2d 139, 141 (Iowa 1985) ("We are not disposed to give a narrow or technical reading to this environmental statute [definition of 'solid waste' in Iowa Code § 455B.301(4) (1983)] . . . .")

In our opinion, the purpose of Iowa Code § 455B.307(1) (1989) is to prevent the disposal of solid waste at an unapproved site. The evil sought to be remedied is not merely the act of tossing the solid waste to the ground, but rather is the presence of said solid waste, and its potential adverse impacts on the public health or environment, at a site without the approval and technical scrutiny of the department. We believe that this purpose is best served by construing Iowa Code § 455B.307(1) (1989) as a prohibition, not only on the initial act of dumping or depositing solid waste at an unapproved site, but also on permitting said illegally dumped or deposited solid waste to remain at an unapproved site.

A contrary construction that the statute only prohibits the initial act of dumping or depositing the solid waste at an unapproved site would undermine the purpose of the statute and create an absurd result. Under such a narrow construction and without rulemaking by the department, solid waste could be dumped or deposited illegally and, except for assessment of a civil penalty pursuant to Iowa Code Supp. § 455B.307(3) (1989) for the day the dumping occurred, no further enforcement actions under part 1 of division IV of ch. 455B could be taken to abate or remedy the problem. The illegally dumped or deposited solid waste would remain at the site. We do not believe that such a result was what the legislature intended.

Our construction of Iowa Code § 455B.307(1) (1989) is, we believe, also consistent with the overall purpose of part 1 of division IV of ch. 455B, namely, to establish a comprehensive legal framework for the regulation of solid waste within the State of Iowa. Iowa Code § 455B.301A(1) (1989) declares a broad legislative policy that solid waste should be regulated through a safe, sanitary, effective and efficient solid waste disposal program in order to protect the public health, safety and welfare and the environment. The statute also

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[1] For purposes of this opinion, we consider "clean up" to mean any remedial action the department may require including but not limited to removal of the solid waste and proper disposal at an approved sanitary disposal project.

[2] An "open dump" is defined by rule as "any exposed accumulation of solid waste at a site other than a sanitary disposal project operating under a permit from the department." 567 Iowa Admin. Code § 100.2.

establishes a solid waste management hierarchy making a sanitary landfill[3] the *least* desired form of solid waste disposal. *Id.* In our opinion, neither this policy nor the solid waste management hierarchy established by the legislature would be effectuated by a narrow construction of Iowa Code § 455B.307(1) (1989) that effectively omits statutory regulation of solid waste *after* it has been illegally dumped or deposited at an unapproved site such as an open dump.

Iowa Code § 455B.307(2) (1989) authorizes the director of the Department of Natural Resources to issue "any order necessary to secure compliance with or prevent a violation of" part 1 of division IV of ch. 455B or the rules adopted thereunder.[4] We believe that the use of the phrase "secure compliance" demonstrates the legislature's intent that orders can be issued, not only to prevent future violations, but also to require affirmative conduct to remedy or abate existing violations. A contrary construction that the statute can only be used to prevent future violations would render the phrase "secure compliance" superfluous and, therefore, should be rejected. *See Sioux City Community School Dist. v. Iowa State Bd. of Public Instruction*, 402 N.W.2d 739, 742 (Iowa 1987).

We conclude that permitting illegally dumped or deposited solid waste to remain at an unapproved site such as an open dump constitutes a continuing violation of Iowa Code § 455B.307(1) (1989) and clean-up of said solid waste may be required pursuant to Iowa Code § 455B.307(2) (1989).[5]

Your second question is whether this authority to require a clean-up applies to open dumps which existed prior to enactment of Iowa Code § 455B.307(1). The prohibition contained in this statute was first enacted, in part, in 1970 with responsibility for implementing and enforcing it being assigned to the Commissioner of Public Health. 1970 Iowa Acts, ch. 1191, § 10 (codified in Iowa Code § 406.9(1) (1971)). In 1972, the statute was reenacted verbatim except that regulatory authority was transferred to the Department of Environmental Quality (a predecessor agency of the Department of Natural Resources). 1972 Iowa Acts, ch. 1119, § 83 (codified in Iowa Code § 455B.82(1) (1973)). Both of these statutes provided that they would be effective "[c]ommencing July 1, 1975 . . . ." Iowa Code § 406.9(1) (1971); Iowa Code § 455B.82(1) (1973). Your question then is whether Iowa Code §§ 455B.307(1) and (2) (1989) may now be used to require the clean-up of solid waste which was dumped or deposited at an unapproved site such as an open dump prior to July 1, 1975.

Iowa Code § 455B.307(1) (1989) does not refer to solid waste that was dumped or deposited prior to July 1, 1975. Nevertheless, the purpose of this statute would, in our view, be served by requiring the clean-up of solid waste regardless of when it was dumped or deposited at an unapproved site. Moreover, prior statutes and rules sought to regulate solid waste which had been dumped or deposited before July 1, 1975.

Iowa Code § 406.6 (1971) and Iowa Code § 455B.79 (1973) required all cities, towns, counties, and private agencies involved in the final disposal of solid waste to qualify for a permit by July 1, 1975, or "be subject to such legal actions authorized" by Iowa Code § 406.9 (1971) and Iowa Code § 455B.82 (1973),

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[3] By definition, a "sanitary landfill" involves the burial of solid waste rather than open dumping. Iowa Code § 455B.301(14) (1989); 567 Iowa Admin. Code § 100.2.

[4] The attorney general is also authorized to initiate any legal proceedings necessary to obtain compliance with an administrative order or to prosecute for a violation. Iowa Code § 455B.307(2) (1989); *see also* Iowa Code § 455B.112 (1989).

[5] Although your question is limited to application of Iowa Code § 455B.307(1) (1989), we note that the enforcement provisions of Iowa Code § 455B.307(2) (1989) may also be used to secure compliance with rules adopted pursuant to part 1 of division IV of ch. 455B. *Cf.* 567 Iowa Admin. Code § 101.3, as amended by the Environmental Protection Commission on March 19, 1990.

respectively, predecessor statutes to Iowa Code §455B.307 (1989). We believe these statutes manifested a legislative intent that even solid waste dumped or deposited before July 1, 1975, would, after that date and in the absence of a required permit or a statutory exception,[6] be subject to the prohibition against dumping, depositing, or permitting the dumping or depositing of solid waste at an unapproved site.

By rule, open dumping was prohibited in 1971. 1973 I.D.R. 296 (Department of Environmental Quality (hereafter DEQ) Rule 26.4(1), filed by the Commissioner of Public Health on September 1, 1971.) Dumping grounds without a permit were to be properly closed by July 1, 1975. 1975 I.D.R. July Supp. 26 (Item 4) (DEQ Rule 26.3(5)) (rescinded as 900 Iowa Admin. Code §101.7 on October 18, 1984, Iowa Admin. Bull. Vol. VII, No. 6 at 434.) Proper closure included the permanent covering of solid waste with earth and the removal of extruding solid waste. DEQ Rule 26.3(5)b(5). In our opinion, these rules demonstrated the DEQ's interpretation that open dumps, which were subject to permit and closure requirements and which were not properly closed by July 1, 1975, would, after that date, be subject to the prohibition contained in Iowa Code §455B.82(1) (1973), a predecessor statute to Iowa Code §455B.307(1) (1989).

We conclude that Iowa Code §455B.307(2) (1989) may be used to require the clean-up of solid waste dumped or deposited prior to July 1, 1975, at an open dump which failed to comply with applicable permit and closure requirements.

Finally, you have asked us to express an opinion on what types of materials are "similar inorganic material" which may be used for fill, landscaping, excavation or grading at places other than a sanitary disposal project. Your question apparently relates to the following statutory provision:

> However, this division [division IV of Iowa Code ch. 455B] does not prohibit the use of dirt, stone, brick, or similar inorganic material for fill, landscaping, excavation or grading at places other than a sanitary disposal.

Iowa Code §455B.301(15) (1989).

The statute identifies three inorganic materials to which this exclusion from solid waste regulation applies, namely, dirt, stone, and brick. We believe that the legislature's use of the word "similar" makes clear that, in order for this exclusion to apply to other "inorganic material," the material must be similar in nature to "dirt, stone, [or] brick." Even without the word "similar," we believe that "inorganic material" would be construed to embrace meanings similar in nature to "dirt, stone, [or] brick" through application of the rule of statutory construction known as "ejusdem generis." *E.g., De More by De More v. Dieters*, 334 N.W.2d 734, 738 (Iowa 1983) ("where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.")

Given the number and variety of solid materials to which your question may relate, it would be impossible for us to apply the statute to every conceivable solid material and inappropriate for us to speculate on which solid materials are of primary concern to you. Moreover, there may be factual issues concerning the description and use of materials that would be pertinent to whether they fall within the exclusion. Accordingly, we decline to render an opinion on what

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[6] We have previously stated our opinion that no permit was required by Iowa Code ch. 455B (1973) and existing rules for depositing solid waste resulting from a public or private agency's own residential, farming, manufacturing, mining or commercial activities on land owned or leased by the agency. 1974 Op.Att'yGen. 644, 647. This exception to the permit requirement remained in effect until 1987. 1987 Iowa Acts, ch. 225, §415.

types of materials are "similar inorganic material" since that determination is appropriately made on a case by case basis.

April 30, 1990

BEER AND LIQUOR; MUNICIPALITIES; Preemption. Iowa Code §§ 123.3(8), 123.3(33), 123.39, 123.47A and 123.49(2)(h) (1989). A city is authorized by Iowa Code § 123.39 to enact an ordinance which is at least as restrictive as § 123.49(2)(h) in regulating the sale of alcoholic beverages to persons under legal age. The violation of such an ordinance can, if the city elects, result in the suspension of a license or permit. (Walding to Putnam, Winnishiek County Attorney, 4-30-90) #90-4-4(L)

April 30, 1990

HIGHWAYS, COUNTIES: Farm Home Lanes. Iowa Code §§ 23A.2(1), 306.1, 306.4, 309.57; Iowa Code § 331.301. A county cannot spend public funds for the maintenance of privately owned fram home lanes. No legal obligation to maintain these lanes at public expense arises simply because the county has maintained these lanes in the past. The county may, however, after passing an appropriate ordinance, maintain these farm home lanes for a fee sufficient to cover operating costs. (Hunacek to Stream, 4-30-90) #90-4-5(L)

MAY 1990

May 10, 1990

TAXATION: Property Tax - Right to Refund or Compromise. Iowa Code §§ 331.301(13) (1989 Supp.), 441.19, 441.37, 441.38, 445.16, 445.60 (1989). Property tax paid on property assessed after the taxpayer erroneously listed the property pursuant to § 441.19 is not refundable under § 445.60 as being a tax "erroneously or illegally paid." The board of supervisors has no authority to compromise the tax paid on property which the taxpayer erroneously listed. The board of supervisors cannot waive the penalty or interest on the tax. (Mason to Short, Lee County Attorney, 5-10-90) #90-5-1(L)

May 11, 1990

COUNTIES: Patient Payment. Iowa Code §§ 230.20, 230.20(6), 230.25,(1989); 441 Iowa Admin. Code § 79.6(2). For the limited number of Medicare and Medicaid eligible persons who receive services from a state mental health institution, a county may only recover costs from the patient for deductible or non-covered services. (Morgan to Saur, Fayette County Attorney, 5-11-90) #90-5-2(L)

May 25, 1990

LABOR, DIVISION OF: Statutory Construction. Iowa Code § 92.17 (1989). Clear meaning of statute and application of rules of statutory construction yield interpretation that nonparental employers are prohibited from hiring persons under the age of fourteen for full-time or part-time seed production work such as detasseling. (Donner to Meier, 5-25-90) #90-5-3(L)

May 25, 1990

MOTOR VEHICLES: Road Maintenance Equipment. Iowa Code § 321.453. The exemption of road maintenance equipment from size, weight, and load restrictions in chapter 321 extends to equipment specifically designed for highway maintenance, although that need not be its sole or only use. The exemption applies when the equipment is being used for highway maintenance or some other use reasonably connected to its maintenance

function. The exemption does not apply to standard, unmodified dump trucks. (Krogmeier to Rensink, 5-25-90) #90-5-4(L)

JUNE 1990

June 8, 1990

WORKERS' COMPENSATION: Industrial Commissioner, sanction and penalty authority, Chapters 86 and 87, and section 86.8, the Code. An administrative proceeding, provided for by rule, to determine compliance with the workers' compensation statutes may be used by the Industrial Commissioner as a sanction where the statutes do not specify another penalty or sanction. Sanctions for a failure to obey an Industrial Commissioner's order from a compliance proceeding under rule 343 IAC 4.3 may be sought from the Insurance Commissioner or the district court. (Kelinson to Linquist, 6-8-90) #90-6-1(L)

June 11, 1990

SCHOOLS: Constitutional Law. Limit on interscholastic participation with open enrollment transfer. Iowa Code Supp. §282.18 (1989), 1990 Iowa Acts, Ch. 1182 (73 G.A.) §1. The restriction on athletic participation placed upon students in grades ten (10) through twelve (12) who transfer to a non-resident school district under open enrollment is not violative of the equal protection or due process clauses of the 14th Amendment. (Scase to Spenner, State Representative, 6-11-90) #90-6-2(L)

June 26, 1990

MUNICIPALITIES; COUNTIES: Pesticide regulation. U.S. Const. Art. VI, cl. 2; Iowa Const. Art. III, §§38A, 39A,; Iowa Code §§206.5, 206.6, 206.8, 206.12, 206.32(1) (1989); Iowa Code §§455E.3(2), 455E.10(2) (1989); 7 U.S.C. §§136(aa), 136a(c), 136a(c)(5)(C), 136f(b), 136u-1, 136v(a); 21 Iowa Admin. Code §45.50. The Iowa Groundwater Protection Act, Iowa Code chapter 455E (1989), does not prohibit political subdivisions in Iowa from regulating pesticides. However, the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C., §136 et seq., and the Iowa Pesticide Act, Iowa Code chapter 206 (1989), preempt local governments in Iowa from regulating pesticides through local ordinances. (Benton to Shoultz, State Representative, 6-26-90) #90-6-3

The Honorable Don Shoultz, State Representative: In your letter to our office of February 21, 1990, you indicate that in at least one city in Iowa an ordinance has been adopted making the application of pesticides by a commercial applicator within the boundaries of that city unlawful. You ask our opinion as to whether Iowa law preempts the ability of a city or county to adopt ordinances banning the commercial application of pesticides. Specifically, you ask whether the Groundwater Protection bill preempts local governments from adopting such ordinances.

The Iowa Groundwater Protection Act is codified at Iowa Code chapter 455E (1989). Chapter 455E sets forth the general policy of the state to preempt further contamination of the groundwater. The statute does not regulate the commercial application of pesticides. There is a reference to pesticides in §455E.3(2) in which the legislature noted that the, ". . . manufacturing, storing, handling, and application to land of pesticides and fertilizers . . . have resulted in groundwater contamination throughout the state," but there is no language within the statute under which pesticides and their application are regulated. Moreover, section 455E.10(2) states:

> Political subdivisions are authorized and encouraged to implement groundwater policies within their respective jurisdictions provided that the implementation is at least as stringent but consistent with the rules of the department.

There is no language within chapter 455E which would bar local governments from banning the commercial application of pesticides.

The sale, labeling and application of pesticides are governed by provisions of both federal and state law. Under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 et seq. (FIFRA), the Environmental Protection Agency regulates the sale and labeling of pesticides. The Pesticide Act of Iowa, Iowa Code chapter 206, provides for the registration of pesticides, the licensing of commercial applicators and the certification of applicators of restricted use pesticides. Your question as to the extent to which local governments may ban pesticide applications within their boundaries requires an examination of both statutes.

All pesticides are required to be registered with the EPA under 7 U.S.C. § 136a(c). The EPA may not register a pesticide unless it determines that the pesticide will not cause "unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(C). However, the statute explicitly provides for a "state" role in the regulation of pesticides. For example, 7 U.S.C. § 136u-1 provides that a state may enter a cooperative agreement with the EPA under which the state shall have ". . . ." primary enforcement responsibility for pesticide use violations The state of Iowa has such a cooperative agreement with the EPA which, under the statute, grants the state primary enforcement responsibility as long as the agency administrator is satisfied that the state has adopted and is implementing adequate procedures for the enforcement of state laws and regulations.

In regard to state laws regulating pesticides, FIFRA specifically provides that the states may enact such legislation. Under 7 U.S.C. § 136v(a):

> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

The state of Iowa itself has the authority, pursuant to this statute, to actually prohibit the sale or application of pesticides. For example, Iowa Code § 206.32(1) bans the sale or application of the pesticide chlordane. Similarly, regulations have recently been promulgated which limit the application of pesticides containing the active ingredient atrazine. *See,* 21 Iowa Admin. Code § 45.51 et. seq. For purposes of your opinion request, we must decide whether a unit of local government in Iowa such as a city or county may regulate pesticides under FIFRA.

The federal preemption doctrine stems from the Supremacy Clause of the Constitution which provides that the law of the United States "shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. In determining whether a state or local law is preempted it is necessary to determine the intent of Congress. *New York State Pesticide Coalition v. Jorling,* 874 F.2d 115, 118 (2nd Cir. 1989).

Congress may manifest the intent to preempt in three ways. A federal statute may expressly state that it displaces state law. *Jones v. Rath Packing Co.,* 430 U.S. 519, 525, 98 S.Ct. 1305, 1309, 41 L.Ed.2d 604 (1977). Congressional intent to occupy the field may be inferred from the pervasive nature of the federal regulation. *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624, 633, 93 S.Ct. 1854, 1859, 36 L.Ed.2d 547 (1973). Finally, when Congress and the states occupy the same area, federal law will preempt the state or local law to the extent there is actual conflict. *California Federal Savings and Loan Ass'n v. Guerra,* 479 U.S. 272, 281, 107 S.Ct. 683, 689, 93 L.Ed.2d 613 (1987).

The intent to displace state law is not lightly inferred. Preemption will not be found unless that was the "clear and manifest purpose of Congress". *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). The "clear and manifest purpose" may be inferred from the pervasive scope of federal regulation and derived not only from the federal statute itself but its legislative history. *City of Burbank,* 411 U.S. at 633, 93 S.Ct. at 1859.

Various courts in different jurisdictions have recently considered the question of whether FIFRA preempts local governments from regulating the use of pesticides. Our task in answering your request is made difficult because these

courts have examined the legislative history behind 7 U.S.C. §136v and reached differing conclusions as to whether Congress intended to preempt local governments in this area.

For example, the question whether the term "state" as used in 7 U.S.C. §136v includes the political subdivision of a state was addressed directly in *Maryland Pest Control Association v. Montgomery County, Maryland,* 646 F. Supp. 109 (D. Md. 1986), *aff'd,* 822 F.2d 55 (4th Cir. 1987). In this case, a Maryland county had enacted ordinances requiring commercial applicators of pesticides to post property to which the pesticides were applied and to disseminate information regarding the application of pesticides. The applicator was subject to a fine for failure to comply.

After considering the language of the statute and its legislative history, the Federal Court held that under 7 U.S.C. §136v only the states and not their subdivisions should be authorized to regulate the sale and use of pesticides. *Maryland Pest Control Association,* 646 F. Supp. at 111. The Court noted that FIFRA, in 7 U.S.C. §136(aa), defines "state" without expressly including political subdivisions. *Maryland Pest Control Association,* 646 F. Supp. at 111. Moreover, the Court noted that FIFRA refers specifically to political subdivisions as distinct from states in several provisions so that when Congress intended local governments to play a role in FIFRA's regulatory scheme it said so explicitly. *Maryland Pest Control Association,* 646 F. Supp. at 111.

The Court also examined the legislative history of 7 U.S.C. §136v, noting that both the House and Senate expressly considered the question of whether local governments should be authorized to regulate pesticides and that the legislation as finally enacted did not include language which would have authorized local pesticide regulation. *Maryland Pest Control Association,* 646 F. Supp. at 113. The Fourth Circuit affirmed this decision in a per curiam opinion. *Maryland Pest Control Ass'n v. Montgomery County,* 822 F.2d 55 (4th Cir. 1987). The same result was reached in *Long Island Pest Control Association, Inc. v. Town of Huntington,* 341 N.Y.S.2d 93 (1973), which held that a town ordinance providing for the registration and control of pesticides had been preempted under FIFRA.

The Wisconsin Supreme Court has decided recently that Congress did not intend to permit local governments to regulate pesticides. In *Motier v. Town of Casey,* 452 N.W.2d 555 (Wis. 1990), the Wisconsin Court considered whether a town ordinance which in part banned the aerial application of pesticides was preempted by FIFRA. The Court held that federal law preempted the local ordinance because the legislative history of the statute revealed the clear intent of Congress to preempt local regulation of pesticide use. *Motier,* 452 N.W.2d at 555. In *Motier* the Wisconsin Court reviewed the legislative history of FIFRA and reached the same conclusion as the Federal Court in *Maryland Pest Control Association;* the intent to preempt should be inferred from the fact that both the Senate and House considered language which would have permitted local regulation, and yet this authorization was left out of the final bill. *Motier,* 455 N.W.2d at 559. The Court in *Motier* also noted the repeated reference in legislative committee reports to the effect that the decision of the House and Senate was to "deprive" political subdivisions and local authorities of any authority over pesticides. *Motier,* 455 N.W.2d at 560. Consequently, the Wisconsin Court found a "clearly manifested intent of the congress" to preempt any regulation of pesticides by local governments.

By contrast, there is a line of cases which have found that FIFRA does not preempt local pesticide regulation. In *People ex rel. Deukmejian v. County of Mendocino,* 683 P.2d 1150 (Cal. 1984), the California Supreme Court examined the same legislative history and reached a different conclusion. In the California case, Mendocino County, through a voter initiative, enacted a measure which prohibited the aerial application of any of the family of phenoxy herbicides, including 2, 4-D. The regulation was challenged as being preempted under both state law and FIFRA. As to the latter issue, the California Supreme Court found that nothing in 7 U.S.C. §136v itself expressly prohibited states from delegating their authority over pesticides to local governments and that California had authorized local governments to regulate pesticides. *People ex*

rel. Deukmejian, 683 P.2d at 1159. As a result, in the California Court's view, the county ordinance did not run afoul of FIFRA. *People ex rel. Deukmejian*, 683 P.2d at 1159. The Court found that the legislative history of FIFRA did not manifest a clear congressional intent to preclude states from authorizing local governmental entities to adopt restrictive regulations of pesticides. *People ex rel. Deukmejian*, 683 P.2d at 1161. The California Court refused to infer an intent to preempt from the fact that the final version of FIFRA did not mention the authority of local governments. *People ex rel. Deukmejian*, 684 P.2d at 1160.

The Maine Supreme Court has recently followed the *Deukmejian* case, finding that Congress did not intend to preclude regulation by local governments. *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990). The Maine Court followed the California case because it found its reading of the legislative history more persuasive. *Central Maine Power Co.*, 571 A.2d at 1193. Similarly, a Colorado federal district court in *Coparr, Ltd. v. City of Boulder*, 735 F. Supp. 363, (D. Colo. 1989) upheld a local pesticide ordinance under a preemption challenge, finding that the legislative history is "not conclusive of Congressional intent," and that the California court's analysis was "consistent with the historical view of state sovereignty and the state's freedom to distribute regulatory power between itself and its political subdivisions."

The gist of the discrepancy between each line of cases is the extent to which the courts have found the legislative history of FIFRA manifests an intent to preempt. The courts in *Deukmejian*, *Central Maine Power Co.*, and *City of Boulder* did not find a sufficiently clear expression of a Congressional intent to preempt. We are persuaded like the courts in *Maryland Pest Control*, and *Motier* that Congress intended to preempt local Pesticide regulation.

As the Court, noted in *Maryland Pest Control*, FIFRA contains several provisions referring specifically to political subdivisions and their role in enforcement of the statute. For example, 7 U.S.C. § 136f(b) provides that officers and employees "of any State or political subdivision" are entitled to inspect records. Like the Federal Court in *Maryland Pest Control*, we are inclined to the view that the failure of the Congress to mention "political subdivisions" in 7 U.S.C. § 136v manifests an intent to exclude local governments from this provision. Legislative intent may be expressed by omission as well as inclusion. *Barnes v. Iowa Dept. of Transp.*, 385 N.W.2d 260, 262-63 (Iowa 1986).

Secondly, the Federal Court in *Maryland Pest Control* takes a more reasonable view of the legislative history underlying the statute. In an extensive analysis of the Congressional debates which preceded enactment of the provision, the Courts in *Maryland Pest Control* and *Motier* note that both the Senate and House considered language allowing local governments to regulate pesticides and rejected this language. *Maryland Pest Control*, 646 F. Supp. at 113. *Motier*, 452 N.W.2d at 559. As the dissent pointed out in *People ex rel. Deukmejian*, 683 P.2d at 1165:

> . . . the legislative history from both houses of Congress indicates that the drafters of the legislation did not intend to permit supplementary regulation by local political subdivisions.

There is a clear, albeit implied intent to preclude local governments from pesticide regulation. Accordingly, we conclude that under 7 U.S.C. § 136v local governments in Iowa may not by ordinance make the application of pesticides within their jurisdictions unlawful. Under FIFRA, pesticides in Iowa may be regulated only by state legislation.

Because we have decided that Federal legislation preempts political subdivisions in Iowa from regulating pesticides, we have not discussed whether Iowa law would similarly bar such local regulation.[1] However, if forced to decide the validity of an ordinance as described in your letter solely under the Iowa law dealing with pesticides, it is doubtful that we could find that

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[1] In other cases, courts have directly addressed whether state law preempts the authority of local governments to regulate pesticides. *See, Pesticide Public Policy v. Village of Wauconda*, 622 F.Supp. 423 (D.C. Ill. 1985).

the ordinance would survive. The Iowa Pesticide Act, Iowa Code chapter 206 (1989) provides for the regulation of pesticides at the state level. As we noted above, the statute provides for the licensing and certification of pesticide applicators by the Iowa Secretary of Agriculture. §§ 206.5, 206.6. The law further provides that the Secretary license pesticide dealers and that every pesticide distributed within the state be first registered with the department.[1] §§ 206.8, 206.12.

In the face of this rather comprehensive regulatory scheme, both municipal corporations and counties in Iowa operate under home rule with the authority to enact ordinances "not inconsistent with the laws of the general assembly". Iowa Const. Art. III, §§ 38A, 39A. Under home rule, cities and counties have the power to enact an ordinance on a matter which is also the subject of a statute, if the ordinance and statute can be harmonized and reconciled. *City of Council Bluffs v. Cain*, 342 N.W. 2d 810, 812 (Iowa 1983). To the extent that a political subdivision in Iowa banned the application of pesticides by a commercial applicator certified and licensed by the department, it would prohibit an activity which state law permits. In that case, chapter 206 would preempt the local ordinance. *City of Council Bluffs*, 342 N.W.2d at 812-813.

Local governments in Iowa may not adopt an ordinance which makes the application of pesticides by a commercial applicator within the boundaries of that local government unlawful.

JULY 1990

July 2, 1990

CORPORATIONS; SECRETARY OF STATE: Filing corporate documents. Iowa Code §§490.120, 490.125, 490.130. A document delivered by a corporation to the secretary of state for filing (other than an annual report which does not change the registered office or registered agent of the corporation) must be accompanied by a duplicate copy. The secretary of state should not file such documents unless a copy is provided or made for forwarding to the county recorder. (Hunacek to Noah and Davis, 7-2-90) #90-7-1(L)

July 2, 1990

SCHOOLS: School supplies. Iowa Code § 301.28 (1989). Advertising specialty and novelty items which are not used for instructional purposes are not school supplies to which Iowa Code § 301.28 is applicable. (Scase to Halvorson, State Representative, 7-2-90) #90-7-2(L)

July 3, 1990

CONSTITUTIONAL LAW; STATE OFFICERS AND EMPLOYEES: Public Purpose, Service Club Dues. Ia. Const. Article III, § 31. Public funds may be used to pay for public employees' dues for service clubs only if directly related to an employee's duties. The governing body must determine that a public purpose is met and that the public purpose is not merely incidental to the private benefit to the employee. This test would not likely be met except in an unusual case. (Osenbaugh to Black, State Representative, 7-3-90) #90-7-3(L) Editorial Note (8/29/90): This opinion and Representative

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[1] The department has adopted regulations requiring commercial or public applicators who apply pesticides within urban areas in municipalities to post notification signs at the start of the application. 21 Iowa Admin. Code § 45.50. The department has also promulgated rules concerning the application of pesticides by a municipality itself, which provide in part a procedure through which persons may request that adjacent properties not be sprayed. 21 Iowa Admin. Code § 45.50(5) and (7).

Black's request address service clubs such as Rotary, Kiwanis, etc., and not other associations, such as professional or governmental associations.

July 3, 1990

TAXATION: Tax Deeds. Iowa Code §§ 446.18, 446.19, 446.29, 446.31, 446.37, 447.9 and 448.1 (1989). There is no statutory requirement that a county obtain a tax deed to property upon which it holds a certificate of purchase acquired as the result of a scavenger tax sale. (Kuehn to Parker, Warren County Attorney, 7-3-90) #90-7-4

Kevin Parker, Warren County Attorney: You have requested an opinion of the Attorney General concerning Iowa Code §§ 446.18, 446.19, 446.29, 447.9 and 448.1 (1989). In particular, you ask whether a county which was required to bid for property at a scavenger tax sale pursuant to §§ 446.18 and 446.19 must obtain a tax deed to that property under § 448.1 after the county obtains the certificate of purchase under § 446.29.

The answer is no. A prior letter opinion, #82-9-13(L), stated that there is no statutory requirement that a county obtain a tax deed to such property. 1982 Op.Att'yGen. 519. The opinion, citing to 1946 Op.Att'yGen. 114, stated that the "purchase by the county at a public bidder sale is a *method of collecting the tax.*" (Emphasis added). Since the county bids at scavenger tax sales for the purpose of collecting delinquent taxes, it would be illogical to imply that the legislature expected the county to act to obtain a tax deed if such an act would not further the collection of taxes or would create expenses for taxpayers in excess of amounts which may be recovered by obtaining a tax deed.

The language found in Iowa Code §§ 446.31, 446.37 and 447.9 (1989) also supports the conclusion that the county can indefinitely postpone obtaining a tax deed. Iowa Code § 446.31 states "When the county acquires a certificate of purchase and has the same in its possession *for one year, or more,* the Board of Supervisors may compromise and assign the said certificate of purchase . . . ." (Emphasis added). The language "for one year, or more," indicates that the legislature intended to place no restrictions on the length of time the county may hold a certificate of purchase.

Further, Iowa Code § 446.37 states:

> After five years have elapsed from the time of any tax sale, and action has not been completed during the time which qualifies the holder of a certificate to obtain a deed, the county treasurer shall cancel the sale from the tax sale index and tax sale register.

There are several Attorney General's opinions which conclude that this five-year statute of limitations does not apply to the county. 1978 Op.Att'yGen. 233; 1970 Op.Att'yGen. 160; 1946 Op.Att'yGen. 114. The specific rationale in 1978 Op.Att'yGen. at 234 was that:

> Since the county as the holder of a tax sale certificate does not come within the scope of the provisions of § 446.37 requiring cancellation of such certificates, it would *seem to logically follow that the county could assign such certificates, pursuant to* § 446.31, after the five year period. To say otherwise would result in applying the five year period for purposes of assignment of tax sale certificates, but not for purposes of acquiring a tax deed in the name of the county, thus producing an anomaly. Moreover, there is nothing in the statutes which expressly preclude an assignment *by the county of the certificate after the five year period. Consequently, the county may assign the tax sale certificate before or after the five year period in § 446.37.*

(Emphasis supplied). This reasoning further supports the conclusion that a county need not obtain a tax deed to property unless doing so would be in the best interests of the taxpayers of the county.

Finally, Iowa Code § 447.9 (1989) states:

> After . . . *nine months from the date of a sale made under section 446.18.* . . . [T]he holder of the certificate of purchase cause to be served upon the person in possession of the real estate, and also upon the person in whose name the real estate is taxed, in the manner provided for the service of original notices, a notice signed by the certificate holder or the certificate holder's agent or attorney, stating the date of sale, the description of the property sold, the name of the purchaser, and that the right of redemption will expire *and a deed for the land be made* unless redemption is made within ninety days from the completed service of the notice. *When* the *notice is Given by a county as a holder of a certificate of purchase* the notice shall be signed by the county treasurer. . . .

(Emphasis added). This language is clearly discretionary rather than mandatory in nature and does apply to counties as certificate holders. None of the language in this provision indicates that the legislature intended to require counties to acquire tax deeds in all circumstances. The discretion is left to the county officials.

It is our opinion that there is no statutory requirement that a county obtain a tax deed to property upon which it holds a certificate of purchase acquired as the result of a scavenger tax sale.

July 9, 1990

CITIES: Indebtedness for public hospitals. Iowa Const., Art. XI, § 3; Iowa Code §§ 346.24, 384.24(4)(c), 384.24(4)(i), 384.24A. A loan constitutes city indebtedness if general tax revenues of the city are pledged as security for the repayment of the loan. A city pledge of tax revenues as security for a city hospital debt would count in determining whether a city exceeded its debt limitation ceiling. Section 384.24(4)(i) would permit a city council to conclude that operational expenses of a city hospital constitute "general corporate purposes" for which bonds could be issued. (Osenbaugh to Halvorson, State Representative, 7-9-90) #90-7-5(L)

July 11, 1990

MENTAL HEALTH: Liability for mental health care. Iowa Code § 230.15. Under Iowa Code § 230.15 liability of mentally ill persons or others obligated for their support, is initially limited to a monetary amount equal to 100 percent of the costs of care and treatment a mentally ill person would incur at a mental health institute during a 120 day period. This formula does not consider the number of days that the individual is actually hospitalized or the costs actually incurred in a county care facility. After this monetary limit is reached, liability is determined by a second formula. (McCown to Lievens, Butler County Attorney, 7-11-90) #90-7-6(L)

July 11, 1990

HIGHWAYS: Condemnation of right of way for secondary roads; loss of access. Iowa Code §§ 306.19, 306.27, 306.28, 306.34. A county board of supervisors must pay the damages determined by appraisers appointed under § 306.28 or dismiss the chapter 306 proceedings. The board has no authority to reduce the amount of damages. Loss of a driveway is compensable under § 306.19 if the person is deprived of reasonable ingress and egress to the property. (Olson to Olesen, Adair County Attorney, 7-11-90) #90-7-7(L)

AUGUST 1990

August 15, 1990

COUNTIES AND COUNTY OFFICERS: Board of Supervisors' approval of appointments of deputy officers; Leaves of absence for deputy officers. Iowa Code § 331.903 (1989). The board of supervisors has the power to

determine the number and full or part-time status of deputies, assistants, and clerks to be appointed by each of the county officers listed in Code §331.903. Sole discretion to grant a deputy officer unpaid leave rests with the principal officer. (Scase to Beaman, 8-15-90) #90-8-1(L)

August 23, 1990

ENVIRONMENTAL LAW; COUNTIES: Yard Waste; Definition of "Municipality." Iowa Code Supp. §§455D.9(1), (2) (1989); 1990 Iowa Acts, ch. 1191, §4. A county which provides a transfer station for solid waste must also provide a comparable collection system for yard waste which has not been composted. A county landfill is not required to accept yard waste which has not been composted but may only for purposes of soil conditioning or composting. A municipality which has contracted with a private company for the collection of solid waste must also provide for the collection of yard waste which has not been composted. (Sheridan to Lievens, Butler County Attorney, 8-23-90) #90-8-2

Mr. Greg Lievens, Butler County Attorney: You have requested our opinion on the following questions:

1. If a county owns or provides a transfer station for solid waste or a landfill, is it required to accept yard waste which is not composted?
2. If a municipality contracts with a private company for the collection of solid waste, is the municipality also required to contract with a private company for the collection of yard waste which is not composted, or, is it possible for the municipality to refuse to make arrangements for collection of yard waste?

Your questions are in response to Iowa Code Supp. §455D.9 (1989), which regulates the recycling and disposal of yard waste. This statute was amended by 1990 Iowa Acts, Ch. 1191, §4. Since Iowa Code Supp. §455D.9 (1989), as amended, is an environmental statute, we construe it liberally so as to further legislative objectives. *Polk County Drainage Dist. Four v. Iowa Natural Resources Council*, 377 N.W.2d 236, 241 (Iowa 1985); *see also State ex rel. Iowa Dept. of Water, Air and Waste Management v. Grell*, 368 N.W.2d 139, 141 (Iowa 1985) ("We are not disposed to give a narrow or technical reading to this environmental statute [definition of "solid waste" in Iowa Code §455B.301(4) (1983)]....")

Your first question is in two parts. First, you inquire whether a county transfer station must accept yard waste which is not composted. Iowa Code Supp. §455D.9(2) (1989), as amended, provides:

> The department shall assist local communities in the development of collection systems for yard waste generated from residences and shall assist in the establishment of local composting facilities. Within one hundred twenty days of the adoption of rules by the department regarding yard waste,[2] each city and county shall, by ordinance, require persons within the city or county to separate yard waste from other solid waste generated. *Municipalities which provide a collection system for solid waste shall provide for a collection system for yard waste which is not composted.*

(Emphasis added).

We must first decide whether the term "municipalities," as used in the third sentence of this statute, includes counties. Although Iowa Code Supp. ch. 455D (1989), as amended, does not define municipality, the term has often been used by the legislature to describe a wide variety of local government entities including counties. *E.g.*, Iowa Code §99A.1(3) (1989) (gambling devices) (municipality means "any county, city, village or township"); Iowa Code §329.1(4) (1989) (airport zoning) (municipality means "any county or city"); Iowa Code

[2] Notice of Intended Action regarding yard waste rules was published on May 16, 1990. Iowa Administrative Bulletin Vol. XII, No. 23, at 2042. The current projected adoption date for these rules is September 17, 1990.

§330A.2(3) (1989) (aviation authorities) (municipality means "any county or city"); Iowa Code §403A.2(1) (1989) (municipal housing) (municipality means "any city or county"); Iowa Code §419.1(1) (1989) (municipal support of projects) (municipality means "any county, or any incorporated city"); Iowa Code §455B.291(3) (1989) (sewage treatment works financing program) (municipality means "city, county, sanitary district, or other governmental body or corporation empowered to provide sewage collection and treatment services"); Iowa Code Supp. §613A.1(1) (1989) (tort liability of governmental subdivisions) (municipality means "city, county, township, school district, and any other unit of local government except soil and water conservation districts"). *But see, e.g.*, Iowa Code §23.1(2) (1989) (public contracts and bonds) (municipality means "township, school corporation, state fair board, and state board of regents"); Iowa Code §24.2(1) (1989) (local budget law) (municipality means a "public body or corporation . . . except a county, city, drainage district, township, or road district"); Iowa Code §403.17(2) (1989) (urban renewal) (municipality means "any city"); Iowa Code §455B.241(4) (1989) (sewage works construction) (municipality means "city, sanitary district, or other governmental body or corporation empowered to provide sewage collection and treatment services").

In the absence of a statutory definition, the Iowa Supreme Court has recognized that the term "municipality" is susceptible to a wide variety of meanings:

> The term "municipality" has sometimes been limited by definition to include only municipal corporations, in the proper and strict sense. * * * But the term is also used by good authority in a broader sense, to include public and political corporations, which are not strictly municipal.

Hanson v. City of Cresco, 132 Iowa 533, 541, 109 N.W. 1109, 1112 (1906); *see also* 1 E. McQuillin, *The Law of Municipal Corporations* § 2.20, at 178 (C. Keating rev. 3rd ed. 1987). Accordingly, the Court has sought to determine the "legislative intention in the use of this word . . . rather than the technical or general sense in which it is used . . . ." *Hanson v. City of Cresco*, 132 Iowa at 542, 109 N.W. at 1113 (township was a "municipality" for purposes of pesthouse statute) (quoting *District Tp. of Sheridan v. Frahm*, 102 Iowa 5, 6, 70 N.W. 721, 722 (1897) (school district was not a "municipality" for purposes of saloon tax statute); *cf. Wapello County v. Ward*, 257 Iowa 1231, 1237, 136 N.W.2d 249, 252 (1965) (county was acting as a "municipal corporation" in enacting a zoning ordinance and was authorized like other municipal corporations to enforce the ordinance through misdemeanor fines or imprisonment).

The first sentence in Iowa Code Supp. §455D.9(2) (1989), as amended, refers to state assistance to "local communities" in developing yard waste collection systems and establishing local composting facilities. Nevertheless, the second sentence refers to each "city and county" and directs both to enact ordinances requiring persons within the city or county to separate yard waste from other solid waste. Such an ordinance would appear to be a prerequisite for any effective yard waste collection system and recycling program. The last sentence then refers to "municipalities" and requires them, if they provide for a solid waste collection system, to also provide for a collection system for yard waste which has not been composted.

In our view, the use of the term "municipalities" in the last sentence of Iowa Code Supp. §455D.9(2) (1989), as amended, indicates a legislative intent that the latter provision applies to more than just cities. A statute should not be construed so as to render part of it superfluous. *Sioux City Community School Dist. v. Iowa State Bd. of Public Instruction*, 402 N.W.2d 739, 742 (Iowa 1987). If the legislature had intended the last sentence relating to such collection systems to apply to cities and not counties, it would, in our opinion, have again used the term "city" rather than the arguably broader term "municipalities." *Cf. Torres v. Board of Com'rs of Housing Authority of Tulare County*, 89 Cal.App.3d 545, 549, 152 Cal.Rptr. 506, 509 (1979) (" 'The term 'municipal corporation' is broader than the term 'city,' particularly when the term 'city' already appears in the applicable statute.'")

In addition, a narrow construction of "municipality" to mean only cities would not, in our opinion, further the legislative objective of ensuring that solid waste collection systems also provide for the collection of yard waste which has not been composted. Unlike cities, counties which provide solid waste collection systems would not be required to also provide for the collection of yard waste which has not been composted. We do not believe that this is what the legislature intended by enactment of the last sentence in Iowa Code Supp. §455D.9(2) (1989), as amended.

We next consider whether a "transfer station" constitutes a "collection system" as used in Iowa Code Supp. §455D.9(2) (1989), as amended. A "collection system" is not defined by the statute. The phrase is also used in Iowa Code §384.24(2)(f) (1989) (definition of a "city enterprise" includes both "solid waste collection systems and disposal systems"), but again the phrase is not defined. *Cf.* 1976 Op.Att'yGen. 194, 195 (city garbage pick-up fees). However, "solid waste collection" is defined by rule as the "gathering of solid waste from public and private places." 567 Iowa Admin. Code §100.2. The question then is what constitutes a "system" for solid waste collection.

In the absence of a legislative definition or a particular and appropriate meaning in law, the words used in a statute are given their ordinary meaning. *Painters and Allied Trades Local Union 246 v. City of Des Moines*, 451 N.W.2d 825, 826 (Iowa 1990). The ordinary meaning of the term "system" is an "orderly combination or arrangement" and "method; manner; mode." *Black's Law Dictionary* 1300 (rev. 5th ed. 1979). Accordingly, we believe that the ordinary meaning of the phrase "collection system" would be an arrangement for gathering solid waste and transporting it to another site for recycling or disposal. A "transfer station" is defined by rule as "a fixed or mobile intermediate solid waste disposal facility for transferring loads of solid waste, with or without reduction of volume, to another transportation unit." 567 Iowa Admin. Code §100.2. Although a transfer station does not involve the pickup of solid waste at a residential doorway, it does involve the gathering of solid waste for later transport to another site for recycling or disposal. In our opinion, a "transfer station" would constitute a "collection system" as used in Iowa Code Supp. §455D.9(2) (1989), as amended.

We conclude that a county which provides a transfer station for solid waste must also provide a comparable collection system for yard waste which has not been composted pursuant to Iowa Code Supp. §455D.9(2) (1989), as amended.

You also ask whether a county landfill is required to accept yard waste which has not been composted. We do not believe that a landfill is a "collection system" as used in Iowa Code Supp. §455D.9(2) (1989), as amended. A landfill is, instead, a final disposal facility where solid waste is buried between layers of earth. Iowa Code §455B.301(14) (1989) and 567 Iowa Admin. Code §100.2. *Cf.* Iowa Code §384.24(2)(f) (1989) (definition of a "city enterprise" includes both "solid waste collection systems *and* disposal systems") (emphasis added). In any event, Iowa Code Supp. §455D.9(1) (1989) provides:

> Beginning January 1, 1991, land disposal of yard waste as defined by the department is prohibited. However, yard waste which has been separated at its source from other solid waste may be accepted by a sanitary landfill for the purposes of soil conditioning or composting.

We conclude that a county landfill is not required to accept yard waste which has not been composted but may only for purposes of soil conditioning or composting.

Finally, you ask whether a municipality which has contracted with a private company for the collection of solid waste is required to also contract for the collection of yard waste which is not composted or whether the municipality may refuse to arrange for the collection of such waste. Your question assumes that there is a solid waste collection system. The question then is whether a county "provide[s]" a collection system for solid waste when it hires a private company to collect solid waste.

The ordinary meaning of the term "provide" is "to make, procure, or furnish for future use, prepare" or "to supply; to afford; to contribute." *Black's Law Dictionary* 1102 (5th ed. 1979); *see also Collier v. Smaltz*, 149 Iowa 230, 237,

128 N.W. 396, 399 (1910) ("to provide" means "to make ready for future use, to supply . . . ."), *appeal dismissed*, 223 U.S. 710, 32 S.Ct. 519, 56 L.Ed. 624 (1911). In our opinion, a municipality furnishes or supplies its citizens with a solid waste collection system when it contracts with a private company for the collection of solid waste. Although the labor is performed by the private company, the service is furnished only because of the municipality's decision to undertake the financial obligation under the contract. A contrary conclusion would subvert the legislative intent and allow a municipality to, in fact, furnish a solid waste collection system but, through contract, avoid its statutory obligation to also provide a collection system for yard waste which has not been composted.

We conclude that a municipality which has contracted with a private company for the collection of solid waste must also provide for the collection of yard waste which has not been composted pursuant to Iowa Code Supp. §455D.9(2) (1989), as amended.

August 24, 1990

OPEN RECORDS: Confidentiality; Crime Victims Name and Address. Iowa Code §§22.7(5) and (18). The name and address of a sexual assault victim are not exempt from disclosure under Iowa Code §§22.7(5) and (18), unless the disclosure would jeopardize a continuing investigation or pose a clear and present danger to the safety of any person. (Allen to Branstad, 8-24-90) #90-8-3

The Honorable Terry Branstad, Governor's Office: You have requested an opinion of the Attorney General regarding chapter 22, the Public Records Law, and the application of its provisions to information about the victims of certain violent crimes. Specifically, you ask whether identifying information, such as the name and address of a victim of rape or other form of sexual assault, provided to peace officers is at any time prior to the filing of formal charges in the case, a matter of public record.

We have reviewed Iowa Code §§22.7(5) and (18), applicable case law and comparative statutes of other states. A request for an opinion requires us to review the language chosen by the legislature, to ascertain what the legislature said, not what it could have said. Due to the strong presumption in favor of disclosure of governmental records frequently reiterated by the Iowa Supreme Court, where there is sufficient doubt as to the breadth of an exception to that general policy, it is our view that those doubts would be resolved in favor of disclosure. Unless and until the legislature specifically addresses this question, we believe Iowa Code ch. 22 requires as a general rule the disclosure of the name and address of victims of crime. However, the statute does provide a mechanism for nondisclosure on a case)by)case basis. §22.7(5).

The Constitution provides to the press or media no right of access to governmental records greater than the public has generally. There is no constitutional right of a newspaper to unrestrained gathering of news. *Zemel v. Rusk*, 381 U.S. I (1965). Most states and the federal government have created he right to inspect government and public documents and also provided exceptions to that disclosure. In Iowa specifically, Iowa Code section 22.2 guarantees the right of the public to examine and copy public records. The term "public records" as defined in §22.1 is broad and is consistent with the legislative preference for openness. ". . .chapter 22 establishes a means of access to public information from which departures are to be made only under discrete circumstances." *City of Sioux City v. Press Club*, 421 N.W.2d 895, 897 (Iowa 1988).

Notwithstanding this presumption of disclosure, there are numerous instances contained within the statute where confidentiality is to be maintained. You have directed our attention to Code sections, we must attempt to ascertain the legislature's intent and in so doing must take into account the object sought to be accomplished or the problem sought to be remedied. *In Re Girdler*, 357 N.W.2d 595, 597 (Iowa 1984); *Lau v. City of Oelwein*, 336 N.W.2d 202, 203 (Iowa 1983).

Our role in predicting what the Court may do is limited, like the Court's role in statutory interpretation.

> In controversies such as the present one, it is not the responsibility of the court to balance the competing policy interests. The balancing of those interests is the province of the legislature, and we act only to devine the legislature's intent with regard to those important policy issues.

City of Sioux City v. Press Club, 421 N.W.2d at 897.

Iowa Code chapter 22 is a legislative response to that delicate and difficult balance of interests made necessary by the direct confrontation of two fundamental values: openness in government and individual privacy and integrity. Publication involves the loss of control over what is known and said about the crime victim. However, the U.S. Supreme Court has repeatedly suggested that the First Amendment prohibits penalties for Invasion of privacy for publication of information obtained lawfully from public records.

> If there are privacy interests to be Protected in judicial proceedings, the states must respond by means which avoid public documentation or other exposure of private information. Once true information is disclosed in a public court document open to public inspection, the press cannot be sanctioned for publishing it.

Cox Broadcasting v. Cohn, 420 U.S. 469, 496 (1975). If the information is public record, a newspaper is not generally liable in tort for an invasion of privacy for its disclosure.

The difficulty in the analysis of this issue is occasioned by the significance of the social values in conflict. The public certainly has a right to know about the happenings of government. The public has a significant interest in the reporting of official court records and the administration of government. Publication of information plays an important societal role in subjecting police, prosecutors and the judicial process itself to public scrutiny. In contrast, publication of the victim's identity may result in humiliation and embarrassment to the victim or may subject the victim to further threats and harassment by the perpetrator or others. "Victims and witnesses share a common, often justified apprehension that they and members of their family will be threatened or harassed as a result of their testimony against a violent criminal." *President's Task Force on Victims of Crime*, December 1982 Final Report.

A victim traumatized by a violent offense should not undergo a second traumatization because of public perception of the incident. The President's Task Force identified two major manifestations of this fear which affects the judicial process as a whole. First, victims may choose not to report a crime. Secondly, many victims and witnesses may choose not to cooperate in the investigation of the crime, which has a dramatic effect on its prosecution. The balance of these interests is a difficult and delicate task. It is, however, the province of the legislature.

Our duty is to interpret and give that effect to Code ch. 22 which the legislature intended. The clear purpose of Iowa Code ch. 22 is to open official conduct to the scrutiny of the public but not, as the exemptions attest, at the expense of vital individual interests of its citizens or central governmental functions. Iowa Code § 22.7(5) exempts from the general presumption of disclosure

> peace officers' investigative reports, except where disclosure is authorized elsewhere in this Code. However, the date, time, specific location and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential under this section, except in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual.

This subsection of the Code was added in 1981. Prior to that time it was within the discretion of a governmental body such as a police department to refuse to disclose information contained in an investigative report. See Iowa Code § 68A.7 (1979). Since the amendment, it is our understanding that most if not all police departments routinely disclose the names of crime victims in those crimes other than sexual assault. Your question requires an analysis of whether subsection 5 provides authorization for nondisclosure of the names of a subclass

of crime victims, i.e. sexual assault victims, and whether that subsection provides authorization for nondisclosure of name and address when disclosure of other information is required. As a matter of statutory construction, we find no such authorization.

As demonstrated by its treatment of juvenile offenders and child victims, the legislature when it wishes to prohibit disclosure of name and address or other personally identifiable information can and does do so in specific language. See Iowa Code ch. 232 and Iowa Code § 910A.13. To exempt name and address only from investigative reports requiresjmption about the statute which other legislative enactments discount.

Further, the section applies only to "investigative reports." There may be other records, containing the name and address of the victim, which are not "investigative reports" exempt from disclosure under this subsection. See 1982 Op.Att'yGen. 538, 544 n. 3. Even if contained in "investigative reports," the subsection specifically requires the disclosure of "the date, time, specific location and immediate facts and circumstances surrounding the crime or incident." Unless specifically exempted, we cannot say that the legislature intended that listing of information types which must be disclosed would exclude name and address of the victim.

Such information may be withheld in "those unusual circumstances" where "a clear and present danger to the safety of an individual" is presented. If name and address of a sexual assault victim is to be withheld, it may be withheld under this subsection, but only with a factual basis. We find no basis in this subsection for presuming that *all* sexual assault victims would be subject to a "clear and present danger."

Iowa Code § 22.7(18) in our view provides no authorization for withholding of name and address of sexual assault victims either. That section was added "to permit public agencies to keep confidential a broad category of useful incoming communications which might not be forthcoming if subject to public disclosure." *City of Sioux City v. Press Club*, 421 N.W.2d 895, 898 (Iowa 1988). That section prohibits the disclosure of

> communications not required by law, rule or procedure made ot a government body or to any of its employees by identified persons outside of government, to the extent that the government body receiving those communications can reasonably believe that those persons would be discouraged from making them to that government body if they were available for public examination.

At first reading, and as the Iowa Supreme Court in *City of Sioux City* noted, that is a broadly written exception to the general presumption of disclosure. If fear of harassment and publicity truly does prevent the reporting of the crime, then it may have been within the legislative intent of this subsection to include nondisclosure of sexual assault victims, and thus encourage the reporting of these crimes.

However, as you correctly note, subsection 22.7(18) itself has three exceptions to its exception: § 22.7(18)(a) provides that the communication is a public record if consent is obtained; § 22.7(18)(b) and (c) present essentially the same analytical problem as the "date, time, specific location and immediate facts and circumstances" language contained within subseciton 5. Once again, the legislature has made that information public except to the extent that it would "pose a clear and present danger to the safety of any person." For those specific cases, § 22.7(18)(b) would provide the same protection in allowing nondisclosure of the identity at the time the other information is made available.[3] Similarly to subsection 22.7(5), we are unable to conclude that the legislative intent expressed by subsection 22.7(18) is to allow nondisclosure of all sexual assault

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[3] Subsection 22.7(18)(b) is generally applicable to all communications received by a governmental body and exempts only "identity" from disclosure. The more specific subsection 22.7(18)(c) limits non)disclosure of information about a crime only when disclosure of identity of the victim would "pose a clear and present danger to the safety of any person."

victim names and addresses. The statute clearly provides for a case specific evaluation enabling the police department to make that determination.

The Iowa Supreme Court has had few occasions to discuss these relatively new additions to Iowa Code chapter 22. In *State ex rel. Shanahan v. Iowa District Court*, 356 N.W.2d 523 (Iowa 1984), the Court was asked to review the confidentiality provided to "investigative reports" of the Division of Criminal Investigation under Iowa Code § 22.7(5). That section

> serves to assure all those persons upon whom law enforcement officers rely for information as well as the officers themselves, that official confidentiality attends their conversations . . . (the statute) labels as confidential information about criminal activity or crimes whicch DCI agents receive from other persons and record as part of their files . . . . Surely one purpose . . . was to encourage persons to come forward with information which might be used to solve crimes. . .

356 N.W.2d at 528—9.

Unfortunately, this expansive language is tempered by the knowledge that in *Shanahan* the "basic data" about the homicide under investigation had been released, early on. The exception and what constituted "basic data" was not discussed.

In summary, we are unable to conclude that subsections 22.7(5) and (18) are sufficiently clear statements of legislative intent to exempt the name and address of sexual assault victims as a class from the general requirement of disclosure.

SEPTEMBER 1990

September 14, 1990

CONSTITUTIONAL LAW: Standing Appropriations; Legislative Council; Item Vetoes. Iowa Const. art. III, §24, ch. 2, §§2.12, 2.42(4), 2.42(5). The Legislative Council is empowered to spend funds from the standing appropriation in Iowa Code §2.12 for continuation of a project studying the feasibility of using ethanol fueled trucks in Iowa. The standing appropriation in §2.12 does not violate Article III, §24, of the Iowa Constitution. Item veto of related funds in Senate File 2153, moreover, does not bar the Legislative Council from the appropriation of funds for this purpose. (Pottorff to Branstad, Governor of Iowa, 9-14-90) #90-9-1

The Honorable Terry E. Branstad, Governor of the State of Iowa: You have requested an opinion of the Attorney General concerning recent action by the Legislative Council to appropriate $50,000 to continue a project studying the feasibility of using ethanol fueled trucks in Iowa. You state that funding for this project had been included in Senate File 2153, the lottery appropriations bill, but you item vetoed these funds. Subsequently, the Legislative Council appropriated $50,000 to continue the project through an interim study committee. In light of your item veto of Senate File 2153, you pose the following questions concerning the action by the Legislative Council:

1) Does the Legislative Council have the power to appropriate from any of the State's various funds for any project, purpose or operation it deems necessary under the authority of Section 2.12 of the Code or other relevant section?
2) How does Article III, Section 24 of the Iowa Constitution limit the appropriation authority of the Legislative Council?
3) Does the Legislative Council have authority to appropriate funds for programs considered by the General Assembly but which failed to be appropriated?

4) Does the Legislative Council have authority to appropriate funds for programs approved by the General Assembly but vetoed by the Governor?

It is our opinion that the Legislative Council is empowered to spend funds from the standing appropriation in Iowa Code § 2.12 for continuation of a project studying the feasibility of using ethanol fueled trucks in Iowa. The standing appropriation in § 2.12 does not violate Article III, § 24, of the Iowa Constitution. Item veto of related funds in Senate File 2153, moreover, does not bar the Legislative Council from the appropriation of funds for this purpose.

The study of ethanol fuel in Iowa was initiated by the legislature several years ago. In 1986 the legislature appropriated $150,000 from the energy conservation trust fund to the Department of Natural Resources to be used for "a solar ethanol project" to be administered by "the center for industrial research and service." 1986 Iowa Acts, ch. 1249, § 4(9). In 1987 the appropriation was amended to be used for "an ethanol and corn starch project." 1987 Iowa Acts, ch. 228, § 6.

The time frame for the project has been extended on several occasions. The original appropriation was from July 1, 1986, to June 30, 1987. 1986 Iowa Acts, ch. 1249, § 4. In 1987 the project was extended to June 30, 1988. 1987 Iowa Acts, ch. 230, § 8. In 1988 the project was extended again to June 30, 1989. 1988 Iowa Acts, ch. 1281, § 6. Finally, in 1989, the project was extended to June 30, 1990. 1989 Iowa Acts, ch. 307, § 34.

From January 1, 1989, to June 30, 1990, a specific project entitled "Demonstration of Ethanol Dedicated Fuel Vehicles" was undertaken. A final report on the project entitled "Outlook for Ethanol Fuels in Transportation" has been prepared. The "broad objective" of this project was to "study the feasibility of ethanol dedicated vehicle usage in Iowa and to demonstrate the effectiveness of these vehicles to the Iowa agricultural community." R. Datta and K. Madden, *Outlook for Ethanol Fuels in Transportation*, 1 (1990). The goal was to arrange for purchase, clearance, and importation of "neat ethanol fueled pickups from Brazil" and place them with farmers in Iowa. An evaluation was then to be conducted based on three criteria: 1) the performance of the vehicles visa-vis their gasoline counterparts; 2) the cost of operation of the vehicles; and 3) the level of acceptance in the agricultural community. R. Datta and K. Madden, *Outlook for Ethanol Fuels in Transportation*, at 1.

In 1990 the legislature provided funding to continue ethanol research by establishing from lottery proceeds an "ethanol research and technology office" at the University of Iowa in Iowa City. The text of this appropriation provides:

> 4. For each fiscal year of the fiscal period, moneys allotted to the energy efficiency account shall be appropriated as follows:
>
> a. Twelve percent to the energy and geological resources division of the department of natural resources, to be used to establish the ethanol research and technology office at the state university of Iowa. The office shall coordinate its ethanol research with Iowa state university of science and technology in regard to use of alternative agricultural products and distillation efforts. Up to ten percent of the funds appropriated in this paragraph may be awarded by the office to communities to study the feasibility of opening processing plants which are dry milling ethanol facilities.

Senate File 2153, 73rd G.A., 2nd Sess. § 4(a) (Iowa 1990). All of section 4, including subsection "a" set out above, was item vetoed by Governor Branstad on May 8, 1990, with a veto message which states in part:

> I am unable to approve the item designated as Section 4, in its entirety. This provision would require the marketing activities of the Iowa Lottery to focus on the concept of investing in Iowa's environment, agriculture, and natural resources. Marketing for the lottery would no longer be required to focus on economic development.

1990 Iowa Legis. Serv. at 556.

Subsequently the Legislative Council voted to provide $50,000 to continue the demonstration study of the neat ethanol fueled vehicles from Brazil under an interim study committee charged with redesigning lottery funded environmental initiatives. It is our understanding the money would be used to maintain and demonstrate the vehicles into 1991.

In order to respond to the questions which you pose, we must begin by reviewing the source of the $50,000 in funds provided by the Legislative Council. Chapter 2 of the Iowa Code includes a standing appropriation for various legislative purposes. Section 2.12 specifically states that:

> [t]here is appropriated out of any funds in the state treasury not otherwise appropriated, such funds as are necessary, for each house of the general assembly for the payment of any unpaid expense of the general assembly incurred during or in the interim between sessions of the general assembly, including but not limited to . . . expenses of standing and interim committees . . . .

Iowa Code § 2.12 (1989) (second unnumbered paragraph).

We have little doubt that a standing appropriation for the legislative expenses of interim study committees is constitutional. The Iowa Constitution requires that "[n]o money shall be drawn from the treasury but in consequence of appropriations made by law." Iowa Const. art. III, § 24. Construing this provision, however, the Iowa Supreme Court has repeatedly upheld standing appropriations in state statutes.

In *Graham v. Worthington*, 259 Iowa 845, 146 N.W.2d 626 (1966), the Iowa Supreme Court upheld a standing appropriation in the Iowa Tort Claims Act for payment of "any award or judgment out of appropriations made, if any, otherwise to be paid out of any money in the state treasury not otherwise appropriated." *Id.* at 862-63, 146 N.W.2d at 637. *See* Iowa Code § 25A.11 (1989) ("Any award to a claimant under this chapter . . . shall be paid promptly out of appropriations which have been made for such purpose, if any; but any such amount or part thereof which cannot be paid promptly from such appropriation shall be paid promptly out of any money in the state treasury not otherwise appropriated."). Addressing the contention that the failure to appropriate some definite amount under some specified fund is unconstitutional, the Court ruled that the constitution simply requires "appropriation by the legislature, not necessarily an appropriation of a sum certain out of some 'ear marked' fund." *Id.* at 862, 146 N.W.2d at 637-38. *See Frost v. State*, 172 N.W.2d 575, 579 (Iowa 1970) (standing appropriation for primary road fund upheld).

In our view the use of the standing appropriation to maintain and demonstrate the ethanol fueled trucks constitutes a legitimate expense of an interim study committee. Other provisions of chapter 2 expressly authorize the undertaking of studies by interim study committees. Section 2.42 lists as an enumerated power and duty of the Legislative Council the appointment of "interim study committees consisting of members of the legislative council and members of the general assembly. . . ." Iowa Code § 2.42(4) (1989). The Legislative Council, in turn, is further authorized to "conduct studies and evaluate reports of studies assigned to study committees and make recommendations for legislative or administrative action thereon." Iowa Code § 2.42(5) (1989).

The scope of the term "studies" in 2.42(5) is not further defined. The ultimate goal in interpreting statutes is to ascertain and give effect to the legislative purpose. To achieve this goal, we "look to the object to be accomplished" and "construe the statute so that it will best effect rather than defeat the legislative purpose." *Iowa Federation of Labor v. Dept. of Job Service*, 427 N.W.2d 443, 445 (Iowa 1988). From the context of § 2.42, the object of the authorization of the Legislative Council to "conduct studies" appears to be to further consideration of legislative action. Section 2.42(5), itself, authorizes the Legislative Council both to "conduct studies" and to "make recommendations for legislative or administrative action thereon." Ultimately the question of whether any particular project constitutes a study within these statutory terms must be decided on a case-by-case basis.

Several factors persuade us that extension of the project studying the feasibility of using ethanol fueled trucks into 1991 constitutes a "study." The legislature has funded research into ethanol fuel over the last four years. Further legislative consideration of ethanol research appears likely. Indeed, the current interim study committee is charged with redesigning lottery funded environmental initiatives. Although we question whether funding of the project from its inception, including purchase and importation of the trucks, would qualify as a "study," we note that the $50,000 in issue will be used only to fund further demonstration of the vehicles. Demonstration of the vehicles to evaluate the level of acceptance was an expressed criteria of the original project. R. Datta and K. Madden, *Outlook for Ethanol Fuels in Transportation*, at 1. Extending demonstration of the ethanol fueled trucks is likely to provide additional information on this subject. We recognize that conducting a study on this empirical basis is an unusual foray for the legislature. In the context of the prior research in ethanol fuel and the role of demonstration in that research, however, we find no legal basis to prohibit the legislature from continuing to study the demonstration aspect of ethanol fueled vehicles. To the extent that the $50,000 will be used to continue demonstration, therefore, the project appears to fall within the scope of §2.42(5).

We find nothing in the item veto of S.F. 2153 that would prohibit utilization of funds from the standing appropriation in §2.12 for this purpose. The Iowa Supreme Court has observed that "appropriation of money is essentially a legislative function." *Welden v. Ray*, 229 N.W.2d 706, 709 (Iowa 1975). All appropriations state how the funds are to be used. These statements are sometimes general and sometimes specific but, in either event, state the purpose for expenditure of the funds. *Id.* at 710. Expenditure of the funds, in turn, must be consistent with the legislative purpose of the appropriation. *See generally, Colton v. Branstad*, 372 N.W.2d 184, 189 (Iowa 1985). It does not follow, however, that there may be only one source of funds for any one purpose.

Although the specific project studying the feasibility of using ethanol fueled trucks was not expressly mentioned in §4(a) of S.F. 2153, research in this area would have come under the auspices of the ethanol research and technology office which was item vetoed. We cannot conclude, however, that item veto of this facility precludes further legislative study of the issue.[1]

In summary, it is our opinion that the Legislative Council is empowered to spend funds from the standing appropriation in Iowa Code §2.12 for continuation of a project studying the feasibility of using ethanol fueled trucks in Iowa. The standing appropriation in §2.12 does not violate Article III, §24, of the Iowa Constitution. Item veto of related funds in Senate File 2153, moreover, does not bar the Legislative Council from appropriation of funds for this purpose.

OCTOBER 1990

October 1, 1990

CORRECTIONS, DEPARTMENT OF: Criminal Law. Iowa Code §§246.513, 903.4, 903.5 (1989); 1990 Iowa Acts (73 G.A.) Chapter 1251, §30. OWI offenders sentenced to the custody of the director of the department of

[1] We note that the availability of funds from alternative sources has been cited in justification of item vetoes of appropriations in the past. In 1989, for example, an appropriation of $100,000 to the Health Data Commission to perform a cost containment analysis was item vetoed based, in part, on the availability of separate funds appropriated to the Commission "to expand its operations" and the Governor's directive that these alternative funds "should be used to help meet" the statutory obligation. *See* 1989 Iowa Acts, ch. 304, p. 805.

corrections may be temporarily housed in county jail facilities pending the availability of space in the department's community-based corrections facilities. If such placements are made, the cost of housing offenders in the county facilities must be borne by the State. (Scase to Varn, State Senator, and Grossheim, Director of Iowa Department of Corrections, 10-1-90) #90-10-1

The Honorable Richard J. Varn, State Senator and Paul W. Grossheim, Director: We have received separate opinion requests from you concerning Iowa Code §246.513, as amended by 1990 Iowa Acts (73 G.A.) Chapter 1251, §30. You each inquire whether the director of corrections may, in light of Code §246.513(1), secure placement of OWI offenders, who have been sentenced to the custody of the director pursuant to Iowa Code §321J.2 (1989), in county jail facilities pending the availability of space in the Department's community-based corrections facilities. Senator Varn also poses a related question concerning whether the State or the county would be responsible for the cost if county facilities may be used for this purpose.

The first paragraph of Code §246.513(1), as amended, provides in relevant part as follows:

> The department of corrections in cooperation with judicial district departments of correctional services shall establish in each judicial district bed space for the confinement and treatment of offenders convicted of violating chapter 321J who are sentenced to the custody of the director. The department of corrections shall develop standardized assessment criteria for the assignment of offenders to a facility established pursuant to this section. The offender shall be assigned by the director to a facility pursuant to section 321J.2, subsection 2, paragraph "b" or "c", *unless initial medical treatment is necessary or there is insufficient space to accommodate the person.* The offenders shall be assigned to the Iowa medical classification facility at Oakdale for classification if medical treatment is necessary or if the offender fails to satisfactorily perform in a treatment program conducted in a residential facility operated by a judicial district department of correctional services. The offender shall be assigned to an institution following classification.

(emphasis added). Under ideal circumstances, assuming the absence of medical complications and availability of bed space, OWI offenders remanded to the custody of the director are to be assigned by the director to a community-based corrections facility upon sentencing. As a practical matter, medical problems and facility overcrowding occasionally occur. The portion of §246.513(1) emphasized above recognizes these facts. Section 246.513(1) includes a specific provision for the assignment of offenders needing medical treatment to the Iowa medical classification facility at Oakdale. This section does not, however, allow for placement of OWI offenders in the medical classification facility at Oakdale merely because space is unavailable in a community-based facility. Nor does the section include any other placement contingency applicable to such cases. We must, therefore, turn to other provisions of the Iowa code for guidance.

Subsection four (4) of section 246.513 provides that "[u]pon request by the director a county shall provide temporary confinement for offenders allegedly violating the conditions of assignment to a treatment program if space is available." While this provision is not literally applicable to cases in which space is unavailable in community-based facilities, it clearly evidences a legislative intent that OWI offenders sentenced to the director not be routinely placed in department of corrections facilities other than community-based facilities. Similarly, Iowa Code §903.4 (1989), which governs the placement of misdemeanants, provides, in relevant part, as follows:

> All persons sentenced to confinement for a period of more than one year shall be committed to the custody of the director of the Iowa department of corrections to be confined in a place to be designated by the director

and the cost of confinement shall be borne by the state. The director may contract with local governmental units for the use of detention or correctional facilities maintained by the units for the confinement of such persons.

Iowa Code § 903.5 (1989) requires that, "[i]n designating places of confinement of misdemeanants, the department shall make optimum use of local facilities offering correctional programs, where such are available."

It is our belief that county jail facilities provide a logical temporary placement alternative for the department of corrections when there is insufficient space available in a community-based corrections facility. Nothing in Code § 246.513 directly prohibits such use of county facilities. In fact, the use of county facilities when space is unavailable in a community-based facility would seem consistent with the overall scheme of § 246.513.

Because we have determined that the director of corrections may secure temporary placement of OWI offenders in county jail facilities, we proceed to Senator Varn's inquiry regarding responsibility for the costs resulting from such placement. Under both § 246.513(4) and § 903.4, the cost of housing offenders who are sentenced to the custody of the director for placement in local corrections facilities must be borne by the state. Code § 246.513(4), governing the temporary placement of an OWI offender in county facilities upon an allegation of a violation of the conditions of assignment, provides for the negotiation of a cost reimbursement rate based upon the average daily cost of confinement in the county facility. Such a negotiated reimbursement rate would seem equally appropriate in cases where local placement is due to the unavailability of space.

In summary, it is our opinion that OWI offenders sentenced to the custody of the director of corrections may be temporarily housed in county jail facilities pending the availability of space in the department's community-based corrections facilities. If such placements are utilized, the cost of housing offenders in the county facilities must be borne by the State.

October 3, 1990

COUNTIES; INSURANCE: Stop-loss coverage affecting self-insurance status. Iowa Code sections 509A.14, .15 (1989). The existence of stop-loss coverage by a public body group benefit plan does not by itself mean that the plan is not self-insured for purposes of the requirement that a public body's self-insured group life or health insurance plan for its employees obtain an actuarial opinion as to the adequacy of the plan's reserves. (Haskins to Drew, Franklin County Attorney, 10-3-90) #90-10-2(L)

October 16, 1990

CIVIL RIGHTS: Inmates as "Employees." Iowa Code §§ 246.701, 246.906, and 601A.2(5). An inmate is not an "employee" within the meaning of Iowa Code § 601A.2(5) if employed by the State or subdivision of the State but may be an "employee" within the meaning of the statute if employed through the work release or prison industry programs by employers who are otherwise subject to the Iowa Civil Rights Act. (Vaitheswaran to Langston, 10-16-90) #90-10-3(L)

October 22, 1990

TAXATION: Local Option Sales and Services Tax. Iowa Code §§ 422B.1 (1989), as amended by 1990 Iowa Acts (73 G.A.) ch. 1256, § 21; 422B.10 (1989). A city or county in which the imposition of a local option sales and services tax has been approved, pursuant to Iowa Code § 422B.1, may not pledge anticipated revenues from the tax to pay the principal and interest on bonds or other long-term debt obligations. (Scase to Nystrom, State Senator, 10-22-90) #90-10-4(L)

October 23, 1990

NEWSPAPERS: Official Publications. Annual Tax Sale. Iowa Code §§ 446.9(2) and 618.7 (1989). 1989 Iowa Acts, Chapter 214, § 5. Publication of the annual tax sale notice, pursuant to amended § 446.9(2), must appear in an official

newspaper. As such, the county treasurer may not publish notice of the annual tax sale, pursuant to § 618.7, in a newspaper other than an official county newspaper. (Walding to Danley, Fremont County Attorney, 10-23-90) #90-10-5(L)

NOVEMBER 1990

November 1, 1990

LABOR: Minimum-wage law; statutory construction: Incorporation by reference. 1991 Iowa Code § ____ (1989 Iowa Acts ch. 14, § 2); 29 U.S.C. 213; Public Law 101-157, § 3(C)(1), 103 Stat. 939. Repeal of a federal exemption by Congress does not affect Iowa minimum-wage law which had incorporated the exemption by reference. (McGrane to Meier, 11-1-90) #90-11-1(L)

November 5, 1990

COUNTIES: Civil Service. Iowa Code §§ 341A.6(1), 341A.8 and 341A.13 (1989). A county civil service commission, designing and administering competitive tests, has authority to conduct oral interviews of applicants for classified civil service positions and to reject applicants who are not qualified. A sheriff is subject to the requirements of chapter 341A, including rules promulgated by the county civil service commission and the statutory requirement to appoint or promote from a certified list. (Walding to Angrick, State Ombudsman, 11-5-90) #90-11-2(L)

DECEMBER

December 18, 1990

COUNTIES: E911 Service Fund. Iowa Code § 477B.7, as amended by 1990 Iowa Acts, ch. 1144, §§ 2 and 3. The amount in a county budget designated to fund E911 service may be reduced pursuant to a successful protest of the county budget. The E911 service fund itself, including county monies deposited therein, is not a county fund and may not be reduced through a protest to the county budget. (Scase to Schroeder, Keokuk County Attorney, 12-18-90) #90-12-1(L)

December 20, 1990

COLLECTIVE BARGAINING AGREEMENTS: PAC checkoff. Iowa Code §§ 20.9, 20.26 (1989). Iowa Code § 20.26 precludes a public employee organization from using moneys it obtains through payroll dues deductions to make PAC contributions. The inclusion of a PAC contribution checkoff is not a mandatory subject of bargaining under Code § 20.9. (Scase to TeKippe, 12-20-90) #90-12-2(L)

December 21, 1990

MUNICIPALITIES: Bond Elections. Resubmission of Proposition. Iowa Code §§ 75.1, 384.27(1), 422A.2(4)(d) and 422A.2(4)(f) (1989); 1990 Iowa Acts, ch. 1024, § 1. A period of six months from the date of an election is required to lapse prior to resubmission of a proposition providing for the issuance of hotel and motel tax bonds at a successive election. That proposition, or a proposal that "incorporates any portion" of that proposition, cannot be included in a successive election prior to the lapse of six months. (Walding to Palmer, State Senator, 12-21-90) #90-12-3(L)

December 21, 1990

ENVIRONMENTAL LAW; CITIES; COUNTIES: Solid Waste; Animal Carcasses. Iowa Code §§ 167.2, 167.3, 167.12, 167.18, 455B.301(15), and 455B.411(4) (1989); Iowa Code Supp. § 455B.302 (1989); 1990 Iowa Acts, ch. 1191, § 6(2); 21 IAC 61; 567 IAC 100.2 and 101.3(1). Cities and counties have a duty to provide a sanitary disposal project for the final disposal of animal carcasses by their residents pursuant to Iowa Code Supp. § 455B.302 (1989) unless the animal carcasses constitute hazardous waste as defined in Iowa Code § 455B.411(4) (1989). (Sheridan to Cochran, Secretary of Agriculture, 12-21-90) #90-12-4

Mr. Dale M. Cochran, Secretary of Agriculture: You have requested our opinion on whether cities and counties have a duty to provide a sanitary disposal project for the disposal of animal carcasses by their residents. Iowa Code Supp. § 455B.302 (1989) provides:

> Every city and county of this state shall provide for the establishment and operation of a comprehensive solid waste reduction program consistent with the waste management hierarchy under section 455B.301A, and a *sanitary disposal project for final disposal of solid waste by its residents.*

(emphasis added). For purposes of part 1 of division IV of ch. 455B, "solid waste" is defined as:

> [G]arbage, refuse, rubbish, and other similar discarded solid or semisolid materials, including but not limited to such materials resulting from . . . agricultural . . . activities.

Iowa Code § 455B.301(15) (1989). We must decide then whether animal carcasses constitute "solid waste" for purposes of these statutes.

Environmental statutes are construed liberally so as to further legislative objectives. *Polk County Drainage Dist. Four v. Iowa Natural Resources Council*, 377 N.W.2d 236, 241 (Iowa 1985); *see also State ex rel. Iowa Dept. of Water, Air and Waste Management v. Grell*, 368 N.W.2d 139, 141 (Iowa 1985) ("We are not disposed to give a narrow or technical reading to this environmental statute [definition of "solid waste" in Iowa Code § 455B.301(4) (1983)] . . . .")

In *Grell*, the Iowa Supreme Court gave deference to the department's interpretation of its organic act, specifically, its interpretation of the meaning of "solid waste" under Iowa Code § 455B.301(4) (1983). 368 N.W.2d at 140. The Court noted that the definition of solid waste included "rubbish." *Id.* The Court also noted that the legislature took a broad view of "garbage, refuse, rubbish, and other similar discarded solid or semisolid materials" by providing that "vehicles" may be included and by expressly excluding "dirt, stone, brick, or similar inorganic material" when used for fill, landscaping, excavation or grading. *Id.* at 141. The Court concluded that the department was correct in treating "demolition materials" as "solid waste" within the meaning of the statute. *Id.*

"Rubbish" is now defined to include only "nonputrescible" wastes and, therefore, in our view does not include animal carcasses. 567 IAC 100.2. Nevertheless, "garbage" is defined as "all solid and semisolid, putrescible animal and vegetable wastes resulting from the handling, preparing, cooking, storing, serving and consuming of food or of material intended for use as food, and *all offal*, excluding useful industrial byproducts, and shall include all such substances from all public and private establishments and from all residences." *Id.* (emphasis added). "Refuse" is defined as "*putrescible* and nonputrescible wastes including but not limited to garbage . . . ." *Id.* (emphasis added).

In our opinion, animal carcasses constitute "solid waste" as defined in Iowa Code § 455B.301(15) (1989). We need not decide whether animal carcasses fall within the meaning of "garbage" or "refuse" as used in Iowa Code § 455B.301(15) (1989) and as defined in 567 IAC 100.2. Since "garbage" is defined to include "all offal" and "refuse" includes "putrescible" wastes, we believe that animal

carcasses constitute "similar discarded solid or semisolid materials" as referred to in Iowa Code §455B.301(15) (1989). In our view, animal carcasses are at least as similar to "garbage, refuse, [and] rubbish" as the demolition materials involved in *Grell.*

The Environmental Protection Commission has, pursuant to its solid waste rulemaking authority under Iowa Code Supp. §455B.304 (1989), treated dead farm animals as solid waste. *See* 567 IAC 101.3(1) (allowing, under certain conditions, the on-farm disposal of dead farm animals). In our view, the legislature approved of this interpretation by recently enacting a statute that directs the department of natural resources to provide copies of these solid waste rules to the Iowa State University extension service and to "cooperate in the preparation and circulation of information which explains how to comply with the rules and encourages the practice as an alternative to disposal of dead animals at a landfill." 1990 Iowa Acts, ch. 1191, §6(2).

We must next determine whether a different meaning of "solid waste" was intended in Iowa Code Supp. §455B.302 (1989). The definitions contained in Iowa Code §455B.301 (1989) apply to part 1 of division IV of ch. 455B "unless the context clearly indicates a contrary intent." We believe that Iowa Code Supp. §455B.302 (1989) contemplates the most broad definition of "solid waste" allowable under Iowa Code §455B.301(15) (1989). This is, in our opinion, evident by the provision requiring the "establishment and operation of a *comprehensive* solid waste reduction program consistent with the waste management hierarchy under section 455B.301A." Iowa Code Supp. §455B.302 (1989) (emphasis added).

Finally, we must decide whether there are any exceptions to the duty created by Iowa Code Supp. §455B.302 (1989) which may apply to animal carcasses. Iowa Code §455B.301(15) (1989) provides that "[s]olid waste does not include hazardous waste as defined in section 455B.411 . . . ." Iowa Code §455B.411(4)(a) (1989) defines "hazardous waste" to include, for example, wastes with certain "infectious characteristics." *See* 567 IAC 100.2 ("toxic and hazardous wastes" include "pathological wastes"). *But cf.* Iowa Code §455B.411(4)(b)(1) (1989) ("hazardous waste" does not include "agricultural wastes"); Iowa Code Supp. §§455B.501(1)(b), (g), and (2)(a) (1989) (require agency recommendations for revision of rules which refer to "infectious waste," including "contaminated animal carcasses from hospitals or research laboratories," as "hazardous or toxic waste"). In our view, a city and county would have no duty under Iowa Code Supp. §455B.302 (1989) to provide for the disposal of animal carcasses which, because of infectious or other characteristics, constituted "hazardous waste" as defined in Iowa Code §455B.411(4) (1989).

You note that Iowa Code ch. 167 (1989) also regulates the disposal of dead animals. Iowa Code §167.2 (1989) prohibits any person from engaging in the "business of disposing of the bodies of dead animals" without obtaining a license from the Department of Agriculture and Land Stewardship. The "business of disposing of the bodies of dead animals" is defined as receiving a dead animal "for the purpose of obtaining the hide, skin, or grease from such animal, in any way whatsoever, or any part thereof." Iowa Code §167.3 (1989). Iowa Code §167.18 (1989) requires a person who has been caring for or owns an animal which has died to dispose of the carcass within twenty-four hours after the animal's death by cooking, burying, burning, or "by disposing of it . . . to a person licensed to dispose of it." Iowa Code §167.12 (1989) contains the disposal requirements. *See also* 21 IAC 61 (dead animal disposal rules).

Unless statutes are in direct conflict, they should be read together and, if possible, harmonized. *E.g., Coleman v. Iowa Dist. Court for Linn County,* 446 N.W.2d 806, 807 (Iowa 1989). We see no necessary conflict between the requirement in Iowa Code §167.18 (1989) that animal caretakers and owners dispose of their dead animals and the duty of cities and counties under Iowa Code Supp. §455B.302 (1989) to provide their residents with a place where such disposal may be legally accomplished. In our view, cities and counties must provide and residents may utilize a sanitary disposal project where, for example, such carcasses are buried pursuant to Iowa Code ch. 455B and

implementing rules. Operation of such a final sanitary disposal project would not, in our opinion, constitute engaging in the "business of disposing of the bodies of dead animals," as defined in Iowa Code § 167.3 (1989).

We conclude that cities and counties have a duty to provide a sanitary disposal project for the final disposal of animal carcasses by their residents pursuant to Iowa Code Supp. § 455B.302 (1989) unless the animal carcasses constitute hazardous waste as defined in Iowa Code § 455B.411(4) (1989).

December 24, 1990

COUNTIES AND COUNTY OFFICERS: County Attorney, Dismissal of Assistants. Iowa Code § 331.903 (1989). Assistant county officers, including assistant county attorneys, are employees at will who serve at the pleasure of the principal officer making the appointment. (Scase to Taylor, Jefferson County Attorney-Elect, 12-24-90) #90-12-5(L)

December 28, 1990

SCHOOLS: Community Colleges, tuition remission, collective bargaining. Iowa Code §§ 20.9, 280A.23 (1989). An Iowa community college may offer tuition-free instruction as a benefit to its employees and their dependents. This benefit would be a permissive subject for collective bargaining. (Scase to Senator Boswell and Representative Daggett, 12-28-90) #90-12-6(L)

December 28, 1990

LAW ENFORCEMENT; CRIMINAL LAW; PRISONS: Strip searches of persons arrested for scheduled violations or simple misdemeanors. U.S. Const., Amend. IV. Iowa Code §§ 719.4, 804.5, 804.30, 805.6, 805.8, 811.2(7), 903.1(1)(a). Iowa Code § 804.30 prohibits strip searches of those arrested for traffic violations and simple misdemeanors throughout the entire pretrial process. The Fourth Amendment of the Constitution prohibits such strip searches for pre-arraignment detainees. Iowa Code § 804.30 allows jail officials to strip search those convicted of simple misdemeanors and sentenced to a term of incarceration if the strip search otherwise meets applicable constitutional standards. Whether jail officials can strip search those convicted of scheduled violations is not addressed because the Iowa Code does not provide for sentences of incarceration for violation of those offenses. (Coats to Short, Lee County Attorney, 12-28-90) #90-12-7

Michael P. Short, Lee County Attorney: Your request for an Attorney General's opinion posed the following question:

> May a person who has been charged with a scheduled violation or a simple misdemeanor violation be subjected to a strip search under the provisions of 804.30 if that person has been committed to the custody of the sheriff pending trial or following conviction?

Our response discusses not only the application of Iowa Code § 804.30 (1989) to the situation described in your request, but the constitutional implications as well. It is our opinion that Iowa Code section 804.30 prohibits strip searches of those charged with scheduled violations or simple misdemeanors before conviction, and that the Fourth Amendment of the United States Constitution prohibits such searches at least through the arraignment. We need not address whether strip searches are appropriate after conviction of a scheduled violation because the Iowa Code does not provide for a sentence of incarceration for scheduled offenses. See generally Iowa Code §§ 805.6, 805.8, subsections 6 and 8 (1989).[1] Finally, we believe that Iowa Code § 804.30 permits strip searches of those convicted of simple misdemeanors and sentenced to a period of incarceration if the strip searches otherwise pass constitutional muster.

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[1] Most sentences of incarceration involving violation of scheduled offenses arise from a conviction of failure to appear. Failure to appear in court as specified by a citation is a simple misdemeanor punishable by imprisonment not to exceed thirty days, or a fine not to exceed one hundred dollars. *See* Iowa Code §§ 805.5 and 903.1(1)(a) (1989).

I. *Pretrial strip searches.*

Iowa Code § 804.30 provides in relevant part that

> [a] person arrested for a scheduled violation or a simple misdemeanor shall not be subjected to a strip search unless there is probable cause to believe the person is concealing a weapon or contraband. . .

You ask this office to examine a proposed change in the Lee County strip search policy which would permit law enforcement personnel to strip search individuals arrested for scheduled violations or simple misdemeanors after they have been committed to the custody of the sheriff at an initial appearance. You suggest in your request that the "arrest" status contemplated by the legislature in Iowa Code § 804.30 terminates after the initial appearance. We do not agree.

We conclude that one's arrest status continues, for purposes of Iowa Code § 804.30, until that person is either convicted or acquitted. An arrest is "the taking of a person into custody when and in the manner authorized by law, including restraint of the person or the person's submission into custody." Iowa Code § 804.5 (1989). We have previously determined that

> [t]his broad definition of arrest under constitutional standards suggests, although it does not mandate, the conclusion that an arrest under Iowa law consists of any extensive restraint on a person's freedom, and that, conversely, a prohibition of arrest prohibits the taking into custody and detention of individuals. A narrow definition of arrest, one that excludes certain types of custodial seizures and detentions, would make little sense, for regardless or [sic] whether a seizure would be an arrest under Iowa law, it would still have to conform to the constitutional requirement of probable cause that extends to virtually all significant deprivations of freedom of action. Accordingly, it is reasonable to assume that the Iowa definition of arrest, like the constitutional one, does not exclude any types of non-consensual seizures of the person. . .

1988 47 Op.Att'yGen. 68, 69. In the context of Iowa Code § 804.30, the legislature appears to have intended this broad definition of "arrest" when applied to those convicted of simple misdemeanors and scheduled violations. Legislative intent is determined by looking to "what the legislature said rather than what it should or might have said." *Kelly v. Brewer*, 239 N.W.2d 109, 113-14 (Iowa 1976); *see also* Iowa R. App. P. 14(f)(13). Statutes must be reasonably interpreted in a way to avoid absurd results. *State v. Alexander*, _____ N.W.2d _____, _____ (No. 304/89-1823, November 21, 1990). Iowa Code § 804.30 flatly prohibits strip searches of "a person arrested for a scheduled violation or a simple misdemeanor. . ." in the absence of probable cause that the person is concealing a weapon or contraband. The statute does not provide for lifting this prohibition at any particular stage of the pretrial proceedings; indeed, under the wording of the statute, it would not make sense to do so. A "person arrested for a scheduled violation or a simple misdemeanor" is a "person arrested" regardless of whether she or he has made an initial appearance. For these reasons, we believe that Iowa Code § 804.30 prohibits *any* pretrial strip searches of those arrested for a scheduled violation or a simple misdemeanor in the absence of probable cause that person is concealing a weapon or contraband.

You suggest that the argument for the legality of the proposed changes finds support in Iowa Code §§ 719.4 and 811.2(7) (1989). Iowa Code § 719.4 provides for criminal penalties for escape or absence from custody and refers to "[a] person convicted of a [felony or misdemeanor], or charged with *or* arrested for the commission of a [felony or misdemeanor] . . ." (Emphasis added.) *See* Iowa Code § 719.4(1), (2). We do not view the legislature's distinction between being "charged with" and being "arrested for" a felony or misdemeanor as significant. Rather, we view the distinction as more of an attempt by the legislature to include all possible groups of detained individuals within the provision than an attempt to distinguish between "arrested persons" and "charged persons".

Iowa Code §811.2(7), concerns the ability of a defendant detained after an initial appearance to appeal the order of the magistrate detaining him. There is no indication from this provision that the detention order changes the defendant's status as an arrestee. Consequently, this provision does not support a different interpretation of Iowa Code §804.30.

Moreover, strip searching persons arrested for scheduled violations or simple misdemeanors is prohibited by the Fourth Amendment to the United States Constitution. The Fourth Amendment provides in relevant that, "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . " However, only unreasonable searches are prohibited. *Carroll v. United States*, 267 U.S. 132, 147, 45 S. Ct. 280, 69 L. Ed. 543 (1925).

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is being conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 444 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). *Bell* discussed the constitutionality under the Fourth Amendment of visual body cavity searches conducted on inmates at the Metropolitan Correctional Center (MCC), a federally operated short-term custodial facility in New York City designed to house pretrial detainees. *See Bell*, 441 U.S. at 523. MCC also housed convicted inmates awaiting sentencing or transportation to federal prisons, prisoners serving relatively short prison sentences, witnesses in protective custody, persons incarcerated for contempt, and those for whom incarceration was necessary to ensure their presence at trial. *Id.* at 524. Inmates in these facilities were regularly required to expose their body cavities for visual inspection as part of a strip search "conducted after every contact visit with a person from outside the institution." *Bell*, 441 U.S. at 558. The *Bell* Court held that visual body cavity inspections can be conducted on less than probable cause after balancing the significant and legitimate security interests of an institution against the privacy interests of inmates. *Bell*, U.S. 441 at 560.

Federal courts have uniformly held that strip searches of persons arrested for scheduled violations or simple misdemeanors are unreasonable under the Fourth Amendment of the United States Constitution absent a reasonable suspicion that the arrestee is harboring contraband or weapons. *See Walsh v. Franco*, 849 F.2d 66, 69 (2nd Cir. 1988)(strip search of man arrested for failure to pay parking tickets and failure to appear); *Stewart v. Lubbock County, Tex.*, 767 F.2d 153, 156-7 (5th Cir. 1985)(strip search of two women, one arrested for public intoxication, and the other for issuing a bad check after a routine traffic stop); *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989), *cert. denied*, ___U.S.___, 110 S.Ct. 503, 107 L.Ed.2d 506 (1989)(two strip searches of woman arrested for expired registration plates and failure to maintain automobile insurance); *Mary Beth G. v. Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983) (strip searches of four women arrested for misdemeanor offenses); *Jones v. Edward*, 770 F.2d 739, 741 (8th Cir. 1985) (strip search of man arrested for violation of animal leash law and failing to sign summons); *Ward v. San Diego*, 791 F.2d 1329, 1333 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987)(strip search of woman arrested for refusal to sign a promise to appear prior to determination of eligibility for "own recognizance" release); *Giles v. Ackerson*, 746 F.2d 614, 617-618 (9th Cir. 1984), *cert. denied*, 471 U.S. 1053, 105 S.Ct. 2114, 85 L.Ed.2d 479 (1985)(strip search of woman arrested for minor traffic violation); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984) (strip search of man arrested for outstanding speeding ticket and violation of restriction on driver's license); *Jones v. Bowman*, 694 F.Supp. 538, 544-45 (N.D. Ind. 1988) (strip search of woman arrested for failure to appear); *Tinetti v. Wittke*, 479 F.Supp. 486, 491 (E.D. Wis. 1979), *aff'd* 620 F.2d 160,

160-61 (7th Cir. 1980)(strip search of non-misdemeanor traffic violator incarcerated solely because of inability to post cash bond). All of these cases turned on the fact that, absent a reasonable suspicion of contraband or weapons, the personal privacy interests of the individual outweighed the very remote possibility that a minor violator would secrete contraband on his or her person.

All of the above strip searches, however, were conducted shortly after arrest, whereas this opinion concerns the legality of strip searches subsequent to the initial appearance. This presents a closer question under the *Bell* balancing test because a longer incarceration presents greater opportunities for the secretion of contraband due to interaction with other inmates and visitors. The Iowa Federal District Court had the opportunity to consider this question with respect to pre-arraignment detainees in *Hunt v. Polk County*, 551 F.Supp. 339 (S.D. Iowa 1982). The court in *Hunt* held that strip searches of temporary pre-arraignment detainees charged with minor offenses not normally associated with weapons or contraband are impermissible under the Fourth Amendment unless there is a basis for a reasonable suspicion that the detainee is concealing a weapon or contraband. *Hunt*, 551 F.Supp. at 334-45. In its decision, the court distinguished between cases in which the strip searches were upheld and in cases in which they were not based largely on the difference and the degree of likelihood that the persons to be searched would be concealing contraband. Unlike already incarcerated prisoners returning from court appearances or contact visits with outsiders, there is little reason to suspect that newly-arrested traffic violators are concealing contraband or weapons, particularly when they are incarcerated solely due to their inability to post cash bail.

Id. at 344. Because Lee County is in the Southern District of Iowa, *Hunt* is applicable to the proposed changes in Lee County's strip search policy.

II. *After conviction.*

We believe, however, that a different result occurs upon conviction of a simple misdemeanor.[2] At that point, the convicted individual is no longer an arrestee under Iowa Code § 804.30, but a convicted offender who has been found guilty of an offense and sentenced to spend up to thirty days in a jail, usually in the company of other inmates. The security problems greatly increase as inmates come into contact with other inmates, and the opportunity for receiving contraband from visitors increases as well. *See Bell*, 441 U.S. at 559. At this point, despite the minor nature of the offense, the need of prison officials to maintain security may begin to outweigh the privacy interests of the individual prisoner. After all, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying the penal system." *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 2804, 41 L.Ed. 2d 495 (1974). Consequently, we conclude that prison authorities may conduct strip searches as they would on any other person serving a sentence of confinement provided that the "test of reasonableness" under *Bell* is met. *See Bell*, 441 U.S. at 559.

In conclusion, it is our opinion that Iowa Code § 804.30 prohibits strip searches of those arrested for traffic violations and simple misdemeanors throughout the entire pretrial process. Furthermore, the Fourth Amendment to the United States Constitution also prohibits such strip searches for pre-arraignment detainees. Finally, those convicted of simple misdemeanors and sentenced to a term of incarceration may be strip searched if the strip search meets the *Bell* test.

December 28, 1990

DEPARTMENT OF TRANSPORTATION; LAW ENFORCEMENT; CRIMINAL LAW: Authority of DOT Officers. Iowa Code §§ 4.7, 80.22,

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[2] As previously noted, we need not discuss the legality of strip searches upon conviction of a scheduled violation because the Iowa Code does not provide for a sentence of incarceration for scheduled offenses. *See generally* Iowa Code §§ 805.6, 805.8.

80B.3(3), 321.1(45), 321.477, 321.492, 321J.1(7)(e), 321J.6, 804.9, 804.17, 804.24, 801.4(7)(h), 804.7 (1989). Iowa Code section 321.477 limits the authority of Department of Transportation (DOT) peace officers to "arrests for violations of the motor vehicle laws relating to the operating authority, registration, size, weight, and load of motor vehicles and trailers and registration of a motor carrier's interstate transportation service with the department." Nonetheless, DOT peace officers may make arrests for Operating While Intoxicated (OWI) if, in the performance of their regular duties, the offense is committed or attempted in the officer's presence. Iowa Code § 804.9 (1989) (arrest by private persons). If properly qualified, DOT peace officers have authority to enforce the OWI laws under Iowa Code chapter 321J, so long as the officer has satisfactorily completed an approved course relating to motor vehicle operators under the influence of alcoholic beverages. Despite these limitations on their authority, DOT peace officers must respond to assistance requests from other law enforcement officers involved in law enforcement activities not related to DOT functions. (Zbieroski to Rensink, Director of the Iowa Department of Transportation, 12-28-90) #90-12-8

Mr. Darrel Rensink, Director: The Attorney General's office issues the following opinion, in response to a series of questions you pose regarding the scope of the enforcement power of Department of Transportation (DOT) peace officers.

First you ask whether DOT peace officers are empowered by the general arrest provisions of Iowa Code section 804.7 or limited by the arrest powers enumerated under Iowa Code section 321.477. *Compare* Iowa Code §§ 321.477, 321.492, 801.4(7)(h), 804.7 (1989).

DOT peace officers are defined as "every officer authorized to direct or regulate traffic or to make arrests for violations of traffic regulations in addition to its meaning in section 801.4." Iowa Code § 321.1(45) (1989). Section 321.477 empowers DOT peace officers with the limited authority:

> to control and direct traffic and weigh vehicles, and to make arrests for violations of the motor vehicle laws relating to the operating authority, registration, size, weight, and load of motor vehicles and trailers and registration of a motor carrier's interstate transportation service with the department.

Iowa Code § 321.477 (1989). In addition, section 321.492 provides that:

> Any peace officer is authorized to stop any vehicle to require exhibition of the driver's motor vehicle license, to serve a summons or memorandum of traffic violation, to inspect the condition of the vehicle, to inspect the vehicle with reference to size weight, cargo, log book, bills of lading or other manifest of employment, tires and safety equipment, or to inspect the registration certificate, the compensation certificate, travel order, or permit of the vehicle.

Iowa Code § 321.492 (1989).

We opine that DOT peace officers are limited to the arrest powers enumerated under sections 321.477 and 321.492.[3]

Although DOT peace officers are defined as "peace officers" under Iowa Code section 801.4(7)(h), we read section 321.477 as specifically limiting the arrest authority of DOT peace officers to "arrests for violations of the motor vehicle laws relating to the operating authority, registration, size, weight, and load of motor vehicles and trailers and registration of a motor carrier's interstate transportation service with the department." Iowa Code § 321.477 (1989); *State*

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[3]This limitation on the power of arrest also, of course, would apply to other aspects of the enforcement power of DOT peace officers, i.e., the issuance of citations, the execution of warrants, and the seizure of evidence. *See* Iowa Code ch. 804 & 805 (1989).

v. A-1 Disposal, 415 N.W.2d 595, 598 (Iowa 1987); *Merchants Motor Freight v. State Hwy. Com'n*, 239 Iowa 888, 32 N.W.2d 773 (1948).

In resolving this apparent statutory conflict, we employ several rules of statutory construction and reached the following consistent results: (1) that sections 321.477 and 321.492 are special provisions that prevail as exceptions to the general provisions, (2) that the express mention of certain conditions of entitlement under sections 321.477 and 321.492 implies the exclusion of others, and (3) that such a reading gives effect to sections 321.477, 321.492, and 804.7. *See* Iowa Code § 4.7 (1989)(conflicts between general and special statutes); *Barnes v. Iowa Dep't of Transp.*, 385 N.W.2d 260, 262-63 (Iowa 1986)(implied exclusion by express mention of certain conditions).

We also believe this result is consistent with prior case law and a previous opinion issued by our office, all of which have construed section 321.477 as limiting the enforcement authority of peace officers empowered by the department. *State v. A-1 Disposal*, 415 N.W.2d 595, 597 (Iowa 1987); *Merchants Motor Freight v. State Hwy. Com'n*, 239 Iowa 888, 32 N.W.2d 773 (1948);[4] 1982 Op.Att'yGen. 451, 456 n.2. Moreover, unless otherwise provided by statute, the DOT is prohibited from further empowering peace officers with general law enforcement authority, as that authority has been specifically reserved in the Department of Public Safety. Iowa Code § 80.22 (1989).

Although the scope of the arrest powers are limited, we believe the above provisions empower DOT peace officers with criminal as well as civil enforcement powers. *See* 61A C.J.S. *Motor Vehicles* § 588(a), at 255 (1970) ("The motor vehicle regulatory statutes and ordinances have been construed to be penal or quasi-criminal in nature, ...")

Next you ask whether DOT peace officers have authority to enforce the Operating While Intoxicated (OWI) laws found in Iowa Code chapter 321J (1989). The definition of "peace officer" under the OWI chapter includes, in pertinent part,

> Any other law enforcement officer who has satisfactorily completed an approved course relating to motor vehicle operators under the influence of alcoholic beverages at the Iowa law enforcement academy or a law enforcement training program approved by the department of public safety.

Iowa Code § 321J.1(7)(e) (1989) (emphasis added). *Cf. State v. Wright*, 441 N.W.2d 364 (Iowa 1989) (reserve peace officers may qualify as peace officer under Iowa Code section 321J.1(7)(e)).

Iowa Code section 80B.3(3) identifies three categories of personnel who qualify as "law enforcement officers." *See State v. Driscoll*, 455 N.W.2d 570 (1990)(identifying three categories of law enforcement officers who are peace officers who can invoke implied consent under 321J.6). The section provides:

> "Law enforcement officer" means an officer appointed by the director of the department of natural resources, a member of a police force, or other agency or department of the state, county or city regularly employed as such and who is responsible for the prevention and detection of crime and the enforcement of the criminal laws of this state . . . .

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[4] In *Merchants Motor Freight v. State Hwy. Com'n*, the Iowa Supreme Court interpreted section 321.477 as a limitation on the enforcement authority of DOT officers. *Merchants Motor Freight v. State Hwy. Com'n*, 239 Iowa 888, 891-93, 32 N.W. 2d 773, 775-76 (1948). *See* 61A C.J.S. *Motor Vehicles* § 593(1)(c), at 276-77 (1970) ("[A] statute may limit the authority of certain peace officers to arrest a violator of motor vehicle laws."). Although section 321.477 has been amended since its anactment, see Iowa Code Ann. section 321.477 (West 1985), the amendments have not changed the limiting nature of the section and nothing indicates that the Court would today interpret this section differently.

Iowa Code § 80B.3(3) (1989).

We opine that DOT peace officers fit the definition of "law enforcement officer" under section 321J.1(7)(e) and, if properly trained and qualified pursuant to that section, have authority to enforce OWI violations under Iowa Code chapter 321J.

Notwithstanding the arrest limitation of section 321.477, the propriety of the implied consent procedures under chapter 321J do not necessarily depend on the law enforcement officer's authority to arrest an individual. *State v. Wagner*, 359 N.W.2d 487, 489 (Iowa 1984); Iowa Code § 321J.6 (1989). When a law enforcement officer initiates the implied consent procedures under chapter 321J, they act as a statutory agent of the DOT for purposes of administering the laws of this state pertaining to revocation of a drivers license. *Id.* at 490.

Moreover, DOT peace officers may make arrests for OWI if, in the performance of their regular duties, the offense is committed or attempted in the officer's presence, pursuant to the citizen arrest powers of Iowa Code section 804.9 (1989). *See also* Iowa Code § 804.24 (1989) (arrests by private persons and disposition of prisoner); *State v. O'Kelly*, 211 N.W.2d 589, 595 (Iowa 1973), *cert. denied*, 417 U.S. 936, 94 S. Ct. 2652, 41 L. Ed. 2d 240 (1974) (arrest by Nebraska police officer of a person in Iowa treated as an arrest by private person); *Merchants Motor Freight v. State Hwy. Com'n*, 239 Iowa 888, 893, 32 N.W.2d 773, 776 (1948); 1988 Op.Att'yGen. 66 (L) (an arrest by municipal police officer, outside of jurisdiction, treated as an arrest by private person).

Finally, you ask whether DOT peace officers "have authority to respond to requests for assistance from city, county, federal or other State law enforcement officers involved in law enforcement activities not directly related to highways or highway traffic?"

Although the arrest power is limited, it does not act to limit a DOT peace officer's capacity to respond to assistance requests from other law enforcement officers. Iowa Code section 804.17 provides that "[a]ny peace officer making a legal arrest may orally summon as many persons as the officer reasonably finds necessary to aid the officer in making the arrest." Iowa Code § 804.17 (1989). The inability of another assisting in the arrest is of no consequence, so long as one officer at the scene has authority to effect the arrest. *State v. O'Kelly*, 211 N.W.2d 589, 595 (Iowa 1973), *cert. denied*, 417 U.S. 936, 94 S.Ct. 2652, 41 L. Ed. 2d 240 (1974). Of no less importance is Iowa Code section 719.2 (1989). Section 719.2 makes it a simple misdemeanor for any person (public or private) to refuse or neglect to render such assistance, without good reason or lawful cause. Iowa Code § 719.2 (1989).

In summary, we conclude that Iowa Code section 321.477 limits the authority of DOT peace officers to "arrests for violations of the motor vehicle laws relating to the operating authority, registration, size, weight, and load of motor vehicles and trailers and registration of a motor carrier's interstate transportation service with the department." Notwithstanding the limitation of section 321.477, we opine that DOT peace officers may make arrests for OWI if, in the performance of their regular duties, the offense is committed or attempted in the officer's presence. Iowa Code § 804.9 (1989) (arrest by private persons). A DOT peace officer has authority to enforce the OWI laws under Iowa Code chapter 321J, so long as the officer has satisfactorily completed an approved course relating to motor vehicle operators under the influence of alcoholic beverages. Finally, we conclude that DOT peace officers must respond to assistance requests from other law enforcement officers involved in law enforcement activities not related to DOT functions.

December 31, 1990

RACING AND GAMING COMMISSION: Drug use in simulcast races. Iowa Code §§ 99D.7(19), 99D.25, 99D.25A, 714.8(10), 714.16. Simulcasting of horse and dog races which are run in states with more lenient medication standards for wagering purposes at an Iowa track is not a violation of Iowa Code §§ 99D.25 or 99D.25A or of Iowa Code § 714.8(10). Whether a licensee's failure to disclose drug use by horses running in a simulcast race violates the Consumer Fraud Act, § 714.16, involves factual issues and would require

us to determine whether an individual is guilty of violation of law. This is beyond the scope of the opinion process. The responsibility of Iowa licensees to disclose facts concerning drug use is a question which can be addressed by the Racing and Gaming Commission through rulemaking or in its selection of the races to be simulcast. (Odell to Osterberg, State Representative, 12-31-90) #90-12-9(L)

December 31, 1990

COUNTIES: Joint 911 Service Board. Iowa Code §§ 357A.2, 357A.3, 477B.3(1). A city which contracts for the provision of fire fighting, police, ambulance, or emergency medical service does not lose its voting status on the joint 911 board unless it contracts for all of these public safety functions. The entity with which the city contracts is entitled to joint 911 board membership with its voting or nonvoting status being dependent upon whether it is a public or private entity. Townships and benefited fire districts which provide fire fighting services to territory within the county are entitled to voting membership on the joint 911 board. Neither the formation of a nonprofit corporation by a city or township nor the tax levying authority of an entity directly affects 911 board membership or voting status. (Scase to Schroeder, 12-31-90) #90-12-10(L)

December 31, 1990

TAXATION; ELECTIONS: Costs of local option tax elections. Iowa Code §§ 47.3, 422B.1. The costs of a special election for the imposition of a local option sales and services tax, called on the motion of a city or cities, should be apportioned among the county and the cities for which the election is held. (Osenbaugh to Westfall, 12-31-90) #90-12-11(L)

STATUTES CONSTRUED

UNITED STATES CONSTITUTION

IOWA CONSTITUTION

CODE OF IOWA, 1971

CODE OF IOWA, 1979

CODE OF IOWA, 1989

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