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**STATE OF MINNESOTA  
OFFICE OF THE ATTORNEY GENERAL**

**ANNUAL REPORT REQUIRED BY**

**Minnesota Statute Sections 8.08 and  
8.15, Subdivision 4 (2009)**

**Fiscal Year 2010**

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## **INTRODUCTION**

This report is intended to fulfill the requirements of Minnesota Statutes Section 8.15, Subdivision 4, for Fiscal Year 2010 (FY 10) and the requirements of Minn. Statutes Section 8.08 (2009).

The Attorney General's Office (AGO) is organized into five sections under the direction of deputy attorneys general: Government Operations, Solicitor General, Civil Regulation, Civil Protection, and Public Enforcement. This report contains brief summaries of the services provided to state agencies and other AGO clients by these sections, as well as a number of "opinions of general interest."



# GOVERNMENT OPERATIONS SECTION

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## EDUCATION DIVISION

The Education Division represents the State's complex and varied educational system, handling most student and some faculty and staff-related legal matters for the Minnesota State Colleges and Universities ("MnSCU") system of 32 separate campuses. Other divisions throughout the Office of the Minnesota Attorney General provide legal services to MnSCU on issues such as employment law and public finance issues. In addition to representing the numerous MnSCU campuses, the Education Division also represents the Minnesota Department of Education, the Office of Higher Education, and the Perpich Center for Arts Education and the State Academies. In FY 2010 the Division opened 52 new cases almost all of which are in active litigation. The Division resolved 28 cases in FY 2010.

### MINNESOTA STATE COLLEGES AND UNIVERSITIES ("MnSCU")

The division represents the Chancellor's staff and MnSCU administrators at institutions throughout the state. It represents MnSCU in a variety of formal lawsuits initiated primarily by students and some former staff against the schools. In FY 2010 the division handled a number of employment law litigated cases on behalf of MnSCU. The division provides client advice on a wide range of issues including: student disciplinary proceedings and various additional constitutional issues that arise in the context of educating, counseling and the housing of students and employment law matters. Examples of the division's work for MnSCU during the last year include:

- **Faculty Member Claim of Discrimination.** Assisted in settling a lawsuit by a staff member for significantly less than the demand.
- **Faculty Member Claim of Discrimination.** Defended a MnSCU campus in U.S. District Court against a claim of racial and pay discrimination.
- **Students Claims of National Origin Discrimination.** Defended a MnSCU campus against claims by multiple students of national origin discrimination.
- **Dismissals and Default Judgments.** Obtained a number of dismissals and default judgments in State district courts against plaintiffs who sued various MnSCU campuses.
- **U.S. Department of Education, Office for Civil Rights ("OCR").** Defended against complaints filed with the OCR, including the dismissal of student claims of alleged discrimination.
- **Minnesota Department of Human Rights ("MDHR").** In FY 2010 there was an increase in students filing MDHR complaints. Obtained several dismissals or findings of no discrimination against various MnSCU campuses.

## **MINNESOTA DEPARTMENT OF EDUCATION (“MDE”)**

The division provides legal advice to MDE, which administers and oversees the State’s K-12 education programs, such as state and federal special education programs, data practices, the federal “No Child Left Behind Act,” graduation standards and testing, the child and adult food care program and state financial audit issues. The division’s legal work for MDE included:

- **Obtained Review by the Minnesota Supreme Court on the Commissioner’s Interpretation of Special Education Regulations.** Argued at the Minnesota Supreme Court that a local school district must comply with federal IDEA special education requirements that require school districts to examine what accommodations a special education student might need to participate meaningfully in and have access to after-school extra curricular activities that are already available to other students.
- **Special Education.** Defended MDE in numerous lawsuits in U.S. District Court and in the Eighth Circuit Court of Appeals which challenged MDE’s supervision of local school districts in complying with federal and state special education laws and MDE’s complaint resolution decisions regarding special education services.
- **Charter Schools.** Successfully defended MDE in lawsuits in state district court and the Minnesota Court of Appeals arising out of closure of charter schools. The division is defending the Commissioner of Education in U.S. District Court in a large lawsuit, which contains numerous claims by the American Civil Liberties Union (“ACLU”) against MDE, the Commissioner, the charter school, its sponsor and its board members, among others, arguing, in part, that the Commissioner and MDE failed to appropriately oversee the administration of a charter school. In essence, the ACLU claims that MDE and the Commissioner impermissibly violated the Establishment Clause of the First Amendment by allowing the charter school to operate as a religious school and providing state and federal funding to the school. The division successfully brought a motion to dismiss several claims against the Commissioner and MDE. A trial is scheduled for May 2011.
- **Maltreatment of Minors in Schools.** Represented MDE in several maltreatment hearings. Reports of maltreatment of minors that occur in school buildings are investigated by MDE. After MDE makes a finding of maltreatment by a school worker (such as a teacher, assistant teacher or bus driver), the school worker may request an administrative hearing. Defended several appeals of MDE’s final determination of maltreatment to state district court.

## **OFFICE OF HIGHER EDUCATION (“OHE”)**

The division provides to the OHE legal advice and representation. During the last year, the division argued successfully at the Office of Administrative Hearings that a particular private educational entity was subject to OHE’s registration and licensure statutes. The entity settled with OHE by completely refunding the full amount of the tuition a student paid for the course.

## PUBLIC FINANCE DIVISION

The Public Finance Division represents the departments of Administration, Agriculture, Commerce, Employment and Economic Development, Minnesota Management and Budget, Labor and Industry, and Natural Resources, as well as the Housing Finance Agency, Iron Range Resources, Minnesota State Board of Investment, Secretary of State, State Auditor, Board of Water and Soil Resources and many other smaller boards, agencies and commissions. The division also represents the Minnesota State Colleges and Universities System and other state agencies in contract, lease and other transactional matters. The division's work during FY 10 included:

- Provided advice to state agency clients on legal issues related to state government operations; assisted in drafting and revising leases, licenses and contracts and registered trademarks on behalf of a number of state agencies.
- Responded to requests for written opinions and legal guidance from local governmental units.
- Advised the Department of Administration on various real estate matters, including ownership of a defunct bridge over the Mississippi River; possible condemnation of land for utility purposes for a correctional facility; easements over state land for construction of a dike and central corridor LRT, and conveyance of land to the U of M for a forest center.
- Advised the Office of Administrative Hearings in connection with municipal boundary adjustment matters and enforcement of the Fair Campaign Practices Act.
- Represented the Minnesota Department of Agriculture ("MDA") in various matters, including food safety violations, the largest food safety penalty ever collected, pesticide application violations, data practices litigation and the Emerald Ash Borer quarantine.
- Represented the Campaign Finance and Public Disclosure Board in court cases to enforce lobbyist and campaign finance laws.
- Advised and represented the Department of Commerce, which is charged with regulating financial services industries in Minnesota including insurance, banks and other financial institutions, securities, mortgage lending, and the real estate industry.<sup>1</sup> Provided advice and representation to the Petroleum Release Tank Compensation Board ("Petrofund") and the Real Estate Education, Research, and Recovery Fund, both of which are administered by the Department of Commerce. Resolved 35 contested cases for Commerce involving disciplinary action against licensees; obtained over \$1,448,750 in civil penalties and

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<sup>1</sup> The Commerce Department also regulates telecommunications and energy providers as a result of the merger between the Commerce Department and the Department of Public Service. The AGO's Telecommunications and Energy Division represents of the Department with respect to telecommunications and energy issues.

settlements, including disciplinary actions against mortgage originators, real estate appraisers, real estate salespersons, collections agencies, securities salespersons, insurance salespersons and notaries public. Forty-seven contested cases remain active. Provided legal advice to Commerce and drafted pleadings that stipulated to payment of \$267,379 on 11 applications to the Real Estate Education, Research and Recovery Fund, as well as defended the fund against ineligible and/or overstated claims, saving the State \$599,983.

- Advised the Housing Finance Agency (“HFA”) regarding numerous loans to preserve low income housing. Provided client advice on aspects of HFA activity, including compliance with federal, state and local laws and regulations. Advised the HFA on multi-family and single-family loan program requirements. Represented HFA in litigation related to real estate in which HFA has a mortgage and HFA is named as a defendant. Initiated cases against loan services for breach of contract claims.
- Represented the Department of Human Services regarding litigation arising from termination of a major software design and development contract.
- Advised Iron Range Resources Agency and Board regarding various economic development loans and equity transactions, including, First Wind in participation with Mt. Iron to install wind turbines, Mesabi Nugget’s concentrated iron production facility, Minnesota Steel Industries’ integrated steel plant, Magnetation’s stockpiled ore processing, Silicon Energy’s Mt. Iron photovoltaic panel manufacturing facility, Ironworld Development Corporation, Northeast Higher Education Consortium grants for engineering programs, Disability Specialists grants for Cook, and Silver Bay Assisted Living facility as well as mining and community development grants, workouts, collections, contracts, data practices requests and trademark registrations; various land sales, acquisition of 260 acres of land at Giants Ridge, development agreements, facility management agreements, Giants Ridge Master Association reformation and transition to private control, common interest community issues, title registration actions and easement matters at Ironworld and Giants Ridge, employment matters, title work and easements, advice regarding various taconite production tax assessment and distribution, statute enforcement and amendment matters and bankruptcy claim settlement matters.
- Successfully defended the State in a lawsuit on appeal that sought to declare as unconstitutional the statutory prohibition against so-called air admittance valves in plumbing ventilation systems.
- Successfully represented the Department of Labor and Industry at the Minnesota Court of Appeals concerning an order requiring Wright County to cease and desist from administering the State Building Code (“Code”) in Corinna Township following the township’s decision to adopt and enforce the Code within its boundaries.
- Advised and represented the Department of Labor and Industry (“DLI”), Construction Codes and Licensing Division, including the Contractor’s Recovery Fund. Handled numerous disciplinary actions against residential building contractors, remodelers, roofers, and manufactured home installers for violations, including unlicensed building contractor

activity, failure to satisfy judgments, failure to complete jobs and code violations. Brought to resolution 24 contested cases for DLI against licensed and unlicensed builders and obtained over \$138,750 in civil penalties and settlements. Twenty-two contested cases remain active for DLI. Provided legal advice to DLI, appeared in district court, drafted pleadings that stipulated to payment of more than \$1.6 million to victimized homeowners on 50 applications to the Contractor's Recovery Fund.<sup>2</sup>

- Advised state agencies regarding projects funded with general obligation bonds including regional rail projects and local road improvement programs, represented the Commissioner of MMB with respect to claims made against the Torrens Assurance Fund, which provides compensation to those who have suffered a loss or damage due to an error made by the examiner or registrar of titles and facilitated bond issuance and refunding in over \$3.5 billion in general obligation and revenue bonds.
- Advised MnSCU regarding a variety of real estate financing, construction, contract, intellectual property and licensing matters and drafted licensing and services-level agreements for marketing of state-owned software.
- Provided legal services to the Minnesota Department of Natural Resources ("DNR") on a wide variety of Indian law matters including: resource management and harvest issues under the 1837 Treaty (Mille Lacs) and the 1855 Treaty (White Earth/Leech Lake), continued negotiation of Phase II of the 1854 Treaty case (Fond du Lac), White Earth settlement land transfers; drafted of agreements and provided advice on issues of tribal sovereignty and state-tribal jurisdiction.
- Represented DNR's Waters Division in two appeals to both the Minnesota Court of Appeals and the Minnesota Supreme Court of DNR denials of certification of variances granted by municipalities to local Lower St. Croix River setback ordinances, provided ongoing advice regarding other certification issues.
- Advised DNR in connection with a petition to the U.S. Fish and Wildlife Service for the removal of the gray wolf from the Federal Endangered Species list in Minnesota and in continuing a legal challenge brought under the federal Endangered Species Act to DNR's trapping and snaring regulatory and licensing program.
- Filed on behalf of DNR an amicus brief in a federal appellate court to a challenge brought by environmental groups against the U.S. Forest Service challenging the national forest management plan for Superior National Forest.
- Represented DNR in state district court against takings and trespass claims related to drainage ditch repairs undertaken by a ditch authority/watershed district resulting in the unintentional draining of public water and its subsequent restoration pursuant to a DNR

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<sup>2</sup> The actual payment amount will be reduced by the Contractor's Recovery Fund due to prorating claims to the maximum \$75,000 per licensee limit.

restoration order. Represented DNR before the Minnesota Court of Appeals in an inverse condemnation action seeking damages of \$900,000 and reconstruction of a dam, preservation of lake level, involving possible flooding of agricultural land and, in a declaratory judgment action, to determine DNR's rights to access and repair a dam.

- Advised DNR regarding environmental review issues and represented DNR in district court and the Minnesota Court of Appeals regarding environmental review for the Minnesota Steel, Inc. project. Provided district court representation to DNR regarding numerous enforcement matters, including the Wetlands Conservation Act and vehicle and equipment confiscations.
- Represented DNR in numerous administrative level, district court, and court of appeals matters regarding maintenance and repair of drainage ditches, issuance of permits for work in public waters, enforcement of lakeshore zoning regulations, the issuance of aquatic plant management permits and restoration of waters and wetlands in the development of shoreland and structures rule amendments.
- Assisted DNR with approximately 115 real estate acquisitions totaling over \$23 million and involving approximately 9,422 acres of land. Prepared title opinions and drafted deeds with respect to approximately 23 land exchanges.
- Represented the Department of Public Safety in an action in Ramsey County District Court by six members of the Metro Gang Strike Force who claimed that revealing their identities as attendees at a six-day conference in Hawaii violated the Government Data Practices Act.
- Advised the Secretary of State in numerous election, corporate, and trade name registration matters, including expedited matters in the Minnesota Supreme Court and the U.S. District Court relating to elections and appointment of Supreme Court justices.
- Advised the Office of the State Auditor concerning tax investment fundraising and other local government financial issues and its legal compliance audit manual.
- Advised Minnesota State Board of Investment ("MSBI") in connection with various investment management agreements and alternative investments.
- Advised numerous small boards and agencies and represented those boards in 32 contested matters.
- Advised the Board of Water and Soil Resources ("BWSR") on real estate issues related to 118 easements, the Wetland Conservation Act program, its administrative penalty program, rules and many other matters. Represented BWSR in the Minnesota Court of Appeals in a challenge to denial of a Wetland Conservation Act exemption and two appeals relating to the expansion of watershed districts.

## TAX LITIGATION & BANKRUPTCY DIVISION

### OVERVIEW

The Tax Litigation & Bankruptcy Division represents the Minnesota Department of Revenue ("Revenue") in taxpayer-initiated court cases appealing Revenue's state tax assessments, seeking refunds, contesting collection actions, or challenging the validity of the State's tax laws. In FY 2010, the division opened 152 new Revenue litigation cases (an increase of 50 percent from FY 09) and 17 new bankruptcy cases. In FYI 2010 the division also resolved and closed 92 Revenue litigation cases and 5 bankruptcy cases. The division handles numerous bankruptcy matters for state agencies other than Revenue. Division attorneys appear in the Minnesota Supreme Court, the Minnesota Court of Appeals, Minnesota Tax Court, state district courts, U.S. District Court and the 8th Circuit Court of Appeals and Bankruptcy Court.

The majority of new cases involve the State's income and sales taxes including personal liability assessments against corporate officers for corporations' unpaid withholding taxes and sales taxes. The most financially-significant individual cases are corporate tax refund claims and challenges to Revenue's assessments of corporate taxes. Disputed amounts can be as high as \$20 million dollars.

In addition to representing Revenue, the division also represents several state agencies in a wide range of bankruptcy matters in Bankruptcy Court such as Minnesota Management and Budget and the Minnesota Department of Human Services. Many of these large bankruptcy cases involve significant state contracts with vendors or service providers who subsequently declare bankruptcy. The division represents various state agencies filing claims in bankruptcy court to recover state funds and protect the State's priority of claims

### SIGNIFICANT TAX LITIGATION & BANKRUPTCY CASES:

- **State Tobacco Tax.** Obtained a favorable ruling in the Minnesota Supreme Court, upholding a ruling by the Minnesota Tax Court in a suit by a tobacco products distributor who brought constitutional and statutory challenges to Minnesota's tobacco tax and sought a refund of approximately \$6 million.
- **Corporate Tax on Non-Filing S Corporation.** Obtained a favorable ruling in the Minnesota Tax Court in an appeal by a large S corporation of Revenue's assessment of over \$3 million dollars. A corporation that has made an election for a particular year as an S corporation must file an information return with Revenue. Because the earnings of an S corporation flow through to the individuals who own the corporation, the corporation must state in this information return the identity of the shareholders and their respective percentage ownership. This corporation did not comply with these statutory requirements and was subjected to a 10-percent penalty of the aggregate amount of the items reported.
- **Corporate Tax, Law Firm failing to pay taxes.** Obtained a favorable ruling in the Minnesota Tax Court in an appeal by a prominent law firm which failed to pay its corporate taxes in the amount of about \$500,000.

- **Sales/Use Tax.** Obtained numerous favorable decisions and assisted in settlements in the Minnesota Tax Court of assessment and collection actions against corporations for unpaid sales/use taxes of over \$3 million dollars.
- **Sales Tax, Officer Liability.** Obtained numerous favorable decisions at the Minnesota Tax Court on motions for summary judgment or after trial affirming Revenue's personal liability assessment of corporate officers for payment of unpaid sales tax of over \$1 million dollars.
- **Withholding Tax, Officer Liability.** Obtained numerous favorable decisions at the Minnesota Tax Court on summary judgment or after trial affirming Revenue's personal liability assessment of corporate officers for the payment of a corporation's unpaid withholding tax over \$1 million dollars.
- **Tax Protestors:** Obtained several favorable decisions at the Minnesota Supreme Court, federal district court, state district court and the Minnesota Tax Court rejecting claims of tax protestors that their incomes were not subject to Minnesota income tax or concluding that protestors could not shield income from state taxation by shifting it into sham trusts or other sham transactions.

#### **SIGNIFICANT PENDING TAX & BANKRUPTCY CASES:**

- **Sales Tax, Electric Cooperatives.** Defended Revenue in thirteen (13) separate suits filed in Minnesota Tax Court by 13 electric cooperatives (co-ops) in which the co-ops challenged the assessment of approximately \$4.5 million in sales tax.
- **Corporate Tax, Tobacco Corporation.** Defended Revenue in the Minnesota Tax Court in a suit by a large multi-national tobacco corporation which challenged Revenue's calculation of its taxable income. The assessment at issue is over \$3 million, plus over a \$1 million in a denied refund claim. The resolution of the legal issues in this case will have a significant financial impact on the State because of the precedential value for other corporate taxpayers.
- **Corporate Tax, Computer Software Corporation.** Defended Revenue in the Minnesota Tax Court in a suit by a large software corporation which challenged Revenue's denial of its refund claim. The corporation disputed the statutory interpretation of what constitutes a royalty or a fee under Minnesota law.
- **State's Tobacco Health Impact Fee on Sale of Tobacco Products.** Defended Revenue in the Minnesota Tax Court in a suit by a large tobacco corporation which challenged the statutory interpretation of statutes that determine the wholesale sale price of a tobacco item. The amount at issue in this appeal is over \$400,000, but the outcome of the statutory construction issue will affect all other tobacco distributors and thus will have a significant financial impact on the State.



- **Officer Liability Assessment against Corporate Officers,** Defended Revenue in the Minnesota Tax Court in an appeal by two officers of a large gasoline franchise contesting Revenue's assessment of over \$3 million of the franchise's unpaid sales and petroleum taxes.
- **State's Property Tax Valuation Method, Energy Corporation.** Defended Revenue in the Minnesota Tax Court in a suit by a large hydro-electric energy facility which challenged the constitutionality of various sections of state commercial property tax valuation methods. This suit involves overlapping questions of county and state interests and jurisdictions.
- **State's Property Tax Valuation Method, Interstate Utility Pipeline.** Defended Revenue in the Minnesota Tax Court in a suit by two large interstate natural gas pipeline companies consisting of hundreds of miles of pipeline located through numerous counties in Minnesota. The pipeline company challenged the constitutionality of various portions of the state commercial property tax valuation methods.
- **Individual Income Tax, Taxation of Tribal Members on Reservations.** Obtained a favorable ruling in the U.S. District Court in a declaratory judgment and injunction suit by a tribal member who resides on an Indian reservation in Minnesota but receives income from a pension for work he completed off the reservation and outside of Minnesota. The taxpayer challenged the state's taxation of the income. The member has appealed the District Court's ruling for Revenue and the case is currently pending before the 8th Circuit Court of Appeals.
- **Individual Income Tax, Residency of High-Income Individual.** Defended Revenue in the Minnesota Tax Court in two suits by two high-income individuals who challenged Revenue's determination that they are residents of Minnesota for purposes of Minnesota state income tax. One of these suits involved an assessment of approximately \$2 million dollars against an individual who owns and operates several businesses in Minnesota but argues he is a resident of Nevada, a state with no state income tax. In one of these cases, the individual challenges the constitutionality of Revenue's application and interpretation of the statutes and promulgated rules that outline the factors to be considered in determining whether an individual is a Minnesota resident for state income tax purposes.
- **Bankruptcy, Fraudulent Chapter 7 Filing of High Income Individual.** Defended Revenue in bankruptcy court in an action opposing an individual's fraudulent filing of a Chapter 7 Bankruptcy and the individual's attempt to discharge \$8 million dollars of combined federal and Minnesota state tax liability. The division attorneys are working closely with U.S. Department of Justice attorneys to file objections to the bankruptcy and to conduct discovery of the individual's numerous and complex financial transactions involving various trusts.
- **Bankruptcy, Chapter 11 Filing of Major Investment Company.** Defended the Minnesota State Board of Investment's interests in a Chapter 11 bankruptcy action by a very large investment company in bankruptcy court. The Board had roughly \$55 million dollars in bonds with the investment company. When the company declared bankruptcy some of the Board's non-bond investments could be recovered under certain provisions of the bankruptcy code, but bonds are not afforded those protections.

- **Bankruptcy, Chapter 11 Filing of Major Computer Manufacturer.** Defended multiple Minnesota state agencies' claims for hardware, service and maintenance guarantees in a major computer manufacturer's Chapter 11 bankruptcy action.
- **Bankruptcy Advice for State Agencies.** Represented numerous state agencies including Minnesota State Colleges and Universities regarding their collection or claim rights when individuals file various forms of bankruptcies while owing a state agency a debt.
- **Collection Litigation for State Agencies.** Represented numerous state agencies in seeking collection of funds owed to state agencies, defending or preserving state agencies' rights in contract actions, collecting misappropriated or stolen funds and defending various claims challenging these collections.
- **Real Estate Matters and Property Liens for the Department.** Reviewed and responded to numerous and varied property liens, lawsuits and filings involving Revenue including: foreclosure actions, quiet title actions, land registration, notices of property sales, etc. in state and federal court defending or seeking to preserve the priority of state tax liens over the liens and judgments of other claimants.

## TELECOMMUNICATIONS AND ENERGY DIVISION

The Telecommunications and Energy Division represents the Minnesota Department of Commerce ("Commerce") regarding the agency's telecommunications, energy advocacy and facilities permitting responsibilities as well as its Weights and Measures Division. Division attorneys represent Commerce before the Minnesota Public Utilities Commission, Office of Administrative Hearings, federal agencies and state and federal courts. In FY 10, the Telecommunications and Energy Division provided legal advice and representation to Commerce on issues such as:

### TELECOMMUNICATIONS

- **Local Service Competition and Excessive Wholesale Cost/Prices.** Provided litigation assistance involving claims that Qwest overcharges its competitors under state and federal laws that require former Bell operating companies such as Qwest, which own the local telecommunications plant, to lease certain parts of the local phone network to competitors at "reasonable" prices, and other parts of the network at "cost." The litigated issues concerned the Commission's authority, federal preemption of Minnesota statutes, and interpretation and application of state and federal laws on pricing. Other pending cases involve Qwest's commingling of regulated and non-regulated elements into bundled service packages, the Commission's authority to price these elements, application of pricing methodology, and procedures for implementing the Commission's Orders.

- **Competition-Including Non-price Issues.** Represented Commerce in various contested case proceedings involving allegations that Qwest violated federal and state laws that promote competition in wholesale and retail markets, including alleged overcharging, failing to provide competitors with access to parts of the Qwest network, causing loss of service to competitor's customers, inadequate network interconnection, maintenance and repair and the improper use of Competitive local exchange carriers (CLECs) customer proprietary information.
- **Competition Reclassification of Qwest's Wire Centers.** Provided litigation assistance regarding Qwest's annual petitions to reclassify wire centers as "unimpaired" and regarding other issues under the FCC's Triennial Review Remand Order that allows Qwest to price certain network elements at wholesale rates that are not at cost where competition is "unimpaired."
- **Lifeline.** Represented Commerce in litigation before the Commission regarding improvement of the procedures used by carriers for residential customers seeking to qualify for lifeline assistance.
- **Interconnection of Voice, Data and Internet Networks.** Provided litigation support for a series of complex matters of first impression in Minnesota regarding the interplay of the traditional public telephone network and the internet, and the obligations of incumbent telephone companies to competitors that operate networks in which voice and other audio (and video) traffic is terminated to public-switched networks. Other proceedings involved "phantom" traffic to local carriers that fails to identify the originating carrier to bill for termination of calls.
- **Price Discrimination and Tariffing Practices.** Represented Commerce in several actions involving authority of the Commission to enforce statutory tariffing requirements, including Minnesota's statutory prohibitions on illegal price discrimination among competitors. For example, the Commission determined that AT&T intentionally violated state statutes and rules and concealed its actions from the public and regulators when it entered into discriminatory arrangements that gave AT&T and its "preferred" competitors dramatically lower prices for termination of in-state long-distance calls. This matter was appealed to the Minnesota Court of Appeals. This Office prevailed in District Court and AT&T's payment of a statutory penalty for intentionally violating Minnesota law was enforced. Represented Commerce regarding generic investigations of discriminatory, misleading and/or ambiguous tariffing practices.
- **Arbitration of Interconnection Agreements.** Represented Commerce in several contested case proceedings that concerned disputed interconnection agreements between incumbent carriers (like Qwest), and their competitors.
- **Disconnection Petitions.** Assisted Commerce on several contested case proceedings involving the disconnection of competing telecommunications carriers for alleged nonpayment of charges, and the companies' responsive claims of Qwest anticompetitive conduct.

- **Investigation of Inter-carrier Practices.** Represented Commerce in litigation concerning the exchange of extended area service (EAS) traffic between competitive local exchange carrier (CLECs).
- **Alternative Form of Regulation ("AFOR") Litigation.** Represented Commerce in litigation involving challenges by Qwest of Commission authority based on Qwest's claims that its AFOR plan(s) preempts Minnesota laws that prohibit anti-competitive and discriminatory conduct.
- **Forbearance Litigation.** Represented the Department before the Commission in an investigation regarding Qwest's efforts to be free from federal regulation by seeking permission to be classified as a "non-dominant" carrier.
- **Switched Access Fees and Traffic Pumping Complaints.** In several dockets, intrastate long distance carriers, such as Verizon, Sprint and Qwest filed complaints requesting that the Commission order local service providers to reduce their access charges to reasonable levels. For example, a pending matter includes allegations that one local carrier splits access fees with its customers, subsidizing customers' businesses of simulating telephone minutes of use (mou), for the purpose of generating access fees from long distance companies.
- **Penalty Monies.** Filed appeal with Minnesota Court of Appeals on behalf of Commerce challenging the Commission's authority to direct penalty money paid by Qwest to a fund other than the State's general fund, under Minn. Stat. § 16A.151 (2008). Also at issue was Commission authority regarding enforcement and oversight of wholesale service quality standards in light of federal law.
- **Merger/Acquisitions.** Provided preliminary legal advice regarding accounting compliance issues in the acquisition of the Qwest by CenturyLink.
- **Low Income Telephone Assistance Programs.** Assisted Commerce regarding general legal issues that involved low income programs such as the Telephone Assistance Program (TAP), and Linkup.

## ENERGY

- **Asset Sales: Transmission Lines.** Provided preliminary legal assistance to Commerce regarding an electric utility's proposal to sell one of its transmission lines to a non-state regulated entity.
- **General Rate Increase Requests.** Provided litigation support and post-trial legal briefing regarding four general rate increase requests of regulated utilities including the State's largest natural gas utility as well as a rate increase filing of an electric cooperative. One of these rate cases involved the industry's first gas-decoupling proposal (decoupling of utility revenue from utility sales) under a new, controversial, statutory provision. Assisted Commerce with post-trial legal briefing of the rate-increase request, that was tried in the previous fiscal year, of the State's largest regulated electric utility, and provided compliance assistance concerning issues that stemmed from the Commission's recent rate-setting

decisions regarding three utilities. Provided preliminary legal advice to Commerce regarding two newly-filed electric rate cases.

- **Certificate of Need for High Voltage Electric Transmission Line Construction.** Provided post-trial litigation support concerning the need request of utilities for the first phase of the massive, three-line CapX high-voltage transmission line project of Xcel Energy and Great River Energy.
- **Route Permitting for High Voltage Electric Transmission Line Construction.** Provided litigation support and post-trial filings for Commerce's Energy Facilities Permitting Staff before the Office of Administrative Hearings and the Commission concerning the contested route permit requests for four of five CapX high voltage transmission lines. These projects have staggered in-service dates. Assisted Commerce in trial and with post-trial filings as to other contested route permit requests including a controversial project proposed through south Minneapolis, a request by a municipal public utilities commission for a high voltage transmission line to serve a new mining and steel plant and transmission lines to wind farms.
- **Site and Permits for New Wind Turbines.** Provided litigation support and post-trial advice concerning site permits for new wind farms. These permit proceedings involve many permitting issues.
- **Coal Gasification Electric Generating Plant.** Provided legal assistance concerning site and route permits, the federal Environmental Impact Statement and other general matters while the request for a proposed power purchase agreement of Excelsior Energy, an independent power producer, was on appeal from an adverse decision by the Commission. The Court affirmed the Commission. This project would have required Xcel Energy's ratepayers to pay for electricity generated by Excelsior's proposed coal-gasification power plant.
- **Certificates of Need and Route Permitting for Underground Crude Oil Pipeline Construction.** Provided legal assistance regarding complaints and permit compliance matters regarding phase one ("Southern Lights Project") involving a proposed 108-mile crude oil pipeline by Enbridge Energy from Minnesota's North Dakota border to Clearbrook, Minnesota, which is the location of Enbridge's existing tank farm and terminal facility. Provided similar advice related to on-going construction, and preliminary assistance with routing issues regarding the second phase of this project, which is 325 miles of new pipe from Alberta, Canada, across Minnesota to Superior, Wisconsin (the "Alberta Clipper Project"), and 175 miles in Minnesota of new pipe from Superior, Wisconsin to Clearbrook, Minnesota (the "Southern Lights Diluent Project").
- **Routing and Siting Matters.** Provided general legal assistance, including permit amendment issues, to the Energy Facility Permitting staff as to transmission line, pipeline and plant siting and routing matters that do not require a certificate of need from the Commission and do not involve contested proceedings..

- **Decoupling of Utility Revenue from Energy Sales.** Provided on-going legal assistance to Commerce with respect to the agency's recommendation to the Commission about partial decoupling criteria for natural gas and electric utilities, and with respect to compliance with the Commission's approval of partial decoupling in the CenterPoint rate case.
- **Certificate of Need for Nuclear Generation Capacity and Dry Cask Storage.** Provided post-trial briefing concerning Xcel Energy's need and site permitting requests to upgrade its nuclear generating capacity and to expand its dry-cask spent-fuel storage facility at its two Prairie Island generating facilities. The Prairie Island requests involved post-trial briefing following a joint trial before the Office of Administrative Hearings.
- **Conservation Improvement Plan ("CIP"), Renewable Energy, and Disbursed Renewable Generation Matters.** Provided legal assistance regarding statutorily-required utility conservation spending, eligibility of "green" electric generation facilities, and renewable energy standards and credits.
- **Utility Line Crossing of Railroad Property Matters.** Provided legal assistance to Commerce in its role under state law as a mediator of valuation disputes between regulated utilities and railroads when utility lines and pipes cross railroad tracks.
- **Weights and Measures Division.** Advised the Weights and Measures Division regarding various legal issues.

## TRANSPORTATION DIVISION

The Transportation Division provides legal services to its primary client the Minnesota Department of Transportation (Mn/DOT). A large part of the division's work involves eminent domain litigation.

The Transportation Division advises Mn/DOT and other state agencies involved in construction projects and represents the State when contractors, subcontractors, or third parties sue the State on construction-related matters. The division also protects taxpayers by filing claims on behalf of the State against entities that perform defective work, fail to pay employees legally-mandated wages, or otherwise fail to comply with contract requirements.

The division advises client agencies on the legal ramifications of proposed activities and development projects, assists state agencies in real estate transactions and evaluates and attempts to resolve claims before litigation arises.

In FY 10, the division's activities included:

- Represented Mn/DOT in litigation that challenged the contract for construction of the I-35W replacement bridge.

- Represented Mn/DOT in litigation related to eminent domain actions and appeals arising in connection with hundreds of properties that are acquired for roadways and other transportation projects. The division also defended Mn/DOT against claims that its projects have resulted in inverse takings and provided legal assistance in voluntary sales of real estate for transportation projects.
- Represented Mn/DOT in its statutory prevailing wage enforcement responsibilities to recover unpaid wages for contractors' employees on Mn/DOT projects.
- Advised the Commissioner in adjudicating contested case decisions in regulatory matters such as prevailing wages, and local road improvement projects.
- Advised Mn/DOT regarding its programs and offices such as Equal Employment Opportunity; Aeronautics, Railroads and Waterways, Project Development, State Aid, Research and Investment Management, and Office of Motor Carrier Services.
- Represented and advised Mn/DOT, the Minnesota State College and University Board regarding construction contractor claims.
- Represented the Minnesota National Guard regarding legal matters, including contract review and real estate transactions.

# **SOLICITOR GENERAL SECTION**

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## **CHARITIES & CIVIL ENFORCEMENT DIVISION**

The Charities & Civil Enforcement Division serves a number of functions. First, it oversees and regulates Minnesota nonprofit organizations and charities pursuant to the Attorney General's authority under Minnesota Statutes and common law. Second, the division maintains a public registry of charitable organizations and professional fund-raisers that operate in the state. Third, the division brings lawsuits to protect Minnesota consumers from unfair and deceptive practices in business, commerce and trade.

### **CHARITIES AND NONPROFIT OVERSIGHT**

The Charities & Civil Enforcement Division oversees laws relating to nonprofits and charitable organizations. By statute, the Office receives notice of certain charitable trust and probate matters filed in the district courts and has reviewed over 400 such notices in the last fiscal year. When necessary, the division acts to protect charitable assets and represent the interests of charitable beneficiaries that might otherwise be unable to represent themselves.

The division also receives notice of the dissolution, merger, consolidation or transfer of all or substantially all assets of Minnesota charitable nonprofit corporations. It received 150 such notices in the last fiscal year. These notices are reviewed to ensure that the assets are protected during the process and used for the purposes for which they were solicited and held.

Another function of the division is to educate the public, as well as officers and directors of nonprofit organizations, about nonprofit and charity law in Minnesota. The division has numerous educational publications it distributes to the public to help inform donors of common charitable solicitation frauds and of tips on how to give wisely to maximize the amount of money going to nonprofits' charitable programs. The division also provides education to charities and nonprofits. Important topics include fiduciary duties for board members, governance issues and solicitation and registration requirements. Typical audiences consist of nonprofit board members, community members, leaders and volunteers, certified public accountants, and attorneys who represent nonprofits. In the past year, attorneys from the division spoke at various continuing legal education seminars and other events.

Additionally, the Charities & Civil Enforcement Division responds to complaints about nonprofits and charities and investigates allegations of fraud and other wrongdoing by charities and nonprofits. Depending on the circumstances, these investigations can lead to formal legal action and can be resolved by working with nonprofit boards to bring them into compliance with the requirements of Minnesota law.

Finally, the division brings suit against organizations that commit charitable solicitation fraud or otherwise violate charities and nonprofit laws. Through the enforcement of laws governing nonprofit and charitable organizations, the Charities Division is able to help combat



fraudulent solicitations, and hold nonprofit organizations accountable to the public for how they raise, manage and spend charitable assets.

## **REGISTRATION**

Charitable organizations and professional fund-raisers must register and file regular reports with the Attorney General's Office. In the last fiscal year, \$517,000 in registration fees were deposited to the State's general fund. At the end of the fiscal year, the division had registered and is maintaining public files for over 8,450 charitable (soliciting) organizations, over 2,850 charitable trusts, and 350 professional fund-raisers. The information from these files is made available to the public at the Attorney General's Office and in summary form on the "Charities" page of the Attorney General's website.

In addition to serving as a public registry for charitable organizations and professional fundraisers, the Charities and Civil Enforcement Division responds to citizen inquiries and acts as a resource for the public in this area. The division provides assistance and education to citizens who call or write about a wide variety of nonprofit or charities issues, including such topics as: charitable solicitation and "do-not-call" regulations, charitable organization and trust registration, forming and dissolving nonprofit corporations, nonprofit governance, the rights and responsibilities of directors and members, disputes with nonprofit hospitals or other nonprofit organizations and misuse of charitable assets.

## **REGULATION OF UNFAIR AND DECEPTIVE TRADE AND BUSINESS PRACTICES**

The Charities and Civil Enforcement Division works to protect Minnesota consumers from fraudulent and deceptive conduct. The division investigates and brings suit against businesses and individuals that violate Minnesota's consumer protection statutes and other Minnesota laws that provide protection to consumers in the areas of business, commerce or trade. These lawsuits accomplish a number of objectives. First, through its lawsuits, the division addresses the unlawful conduct of businesses, deters similar industry conduct, and obtains monetary restitution for Minnesotans who have been defrauded. Second, the division regularly obtains civil penalties and investigative costs as a part of these suits. Proceeds are deposited to the State's general fund. Finally, the division often obtains court orders that stop fraudulent businesses scammer practices.

## **ENFORCEMENT ACTIONS**

The following are examples of lawsuits brought in Fiscal Year 2010 by the Charities and Civil Enforcement Division in the charities and nonprofit and consumer protection areas:

- ***Fraudulent Charitable Solicitation.*** The division brought suit against a California nonprofit, The Dream Scholars Foundation, because it fraudulently solicited donations and otherwise elicited sales from Minnesota consumers on the fraudulent pretense that it gave scholarships to "hundreds" of underprivileged kids. In fact, the organization had never given a single scholarship, had given almost nothing to any charitable cause, and at the same time was generating enormous revenues and paying its executives substantial

sums. In settlement, the company refunded the money it had received from Minnesotans, and paid a large civil penalty and the State's investigative costs.

- ***The Fraudulent Marketing and Sale of Limited "Health Discount" Plans as Traditional Health Insurance.*** The division sued three companies, Consumer Health Benefits Association, Family Care and Direct Medical Network Solutions, for deceptively marketing and selling health discount plans of little or no value to Minnesota consumers. The companies exploited the need of many Minnesotans for affordable health insurance. The scam was essentially a "bait and switch" in which consumers were told that the plan was traditional health insurance or its equivalent over the telephone at the time of sale. When they received the materials, or attempted to use the plan, consumers learned that the product was a near-worthless "discount" plan that offered little, if any, savings on health care costs. The three cases settled, with two of the three companies agreeing to permanently cease doing business in Minnesota, and the other agreeing to substantially modify its sales practices and submit to random sales call monitoring by this Office. The companies also agreed to pay a total of \$900,000 in restitution for Minnesotans harmed by the deceptive practices, civil penalties and the state's investigative costs.
- ***Fraudulent Sale of "Lifesaving" Medical Alert Product to Seniors.*** The division sued an Arizona corporation, EMT Medical, Inc., for its fraudulent sale of its online medical record storage product. EMT Medical represented to Minnesota consumers, almost all of whom are senior citizens, that its online medical record storage product was necessary in order to receive proper medical care during a medical emergency. EMT frightened each person into paying nearly \$400 for the product on the false statement that unless EMT Medical's product, was purchased, medical professionals and emergency responders would not be able to quickly obtain complete and accurate medical files, thus jeopardizing the person's life. In fact, EMT Medical admitted during the State's investigation that it knows of no instance in which its product has ever been accessed by medical professionals or emergency responders. EMT Medical's sales practices also included representing that its product was required by law and that paramedics would not come to consumers' homes if they did not purchase the product. The division sued to stop EMT Medical from doing business in Minnesota, to recover money for Minnesotans who purchased the product, as well as civil penalties and costs.
- ***Illegal Internet Payday Lending.*** Payday loans are short-term loans, often for \$500 or less, with hefty finance charges. Payday loans allow consumers to borrow against an anticipated paycheck or other anticipated earnings. As of August, 2009, Minnesota law has made clear that internet payday lenders must register with the Department of Commerce, follow Minnesota interest rate caps and other consumer-protection requirements when making payday loans. However, many internet payday lenders did not change their practices to comply with the August, 2009 law. The division brought suit against three internet payday lenders: Global Payday Loan, LLC, Jelly Roll Financial and Eastside Lenders, LLC. The companies were not registered by the State and were lending at rates far higher than those allowed under Minnesota law. These suits are pending.

- ***Fraudulent Sale of Long-Term Care Insurance to Seniors.*** The division sued a Nevada company, Home Health America (HHA), and its principal, Michael Woodward, for fraudulent in-home sales of purported home-care or long-term-care insurance. Woodward and HHA fraudulently and deceptively induced Minnesota seniors to pay between \$3,000 and \$4,000 for policies or subscriptions that did not, in fact, exist. In short, HHA and Woodward simply did not provide care or coverage consistent with their representations to these seniors. In settlement, the Office recovered \$50,000 to compensate seniors who had been deceived.

## **CIVIL LITIGATION DIVISION**

The Civil Litigation Division serves a number of functions. First, the division provides litigation services to a variety of clients, ranging from constitutional officers to various state agencies. This includes legal advice and litigation defense for agencies and officials in the judicial branch of government. Second, the division provides legal representation to state agencies and the judicial and legislative branches of the State regarding a broad range of employment issues and claims. Third, the division litigates tort claims brought against the State, its agencies and employees in personal injury, property damage and wrongful death lawsuits. Fourth, the division serves as general counsel to the members of the Public Utilities Commission ("PUC") and the PUC's staff.

Litigation, included:

- Various civil rights actions brought against state officials in federal and state courts.
- State's right of reimbursement to some or all of the payments made pursuant to the I-35W bridge collapse victims' compensation fund.
- The validity of campaign finance legislation.
- The Governor's unallotments of funding for some budget items.
- The validity of statutory prohibition against knowingly-false campaign material.
- The State's immunity from costs and disbursements in non-tort civil cases.
- The validity of provisions of the Minnesota Code of Judicial Conduct prohibiting judicial candidates and judges from endorsing other candidates and from personally soliciting campaign contributions.
- The system and procedures for bail bond forfeitures.
- State laws subjected to claims of federal preemption.

- The expungement of fraudulent Uniform Commercial Code ("UCC") filings made against government officials.

The division provides legal representation to all state agencies and the judicial and legislative branches of the State on a broad range of employment issues and claims, including claims under the Minnesota Whistleblower statute, Minnesota Human Rights Act, Americans with Disabilities Act ("ADA"), Family Medical Leave Act ("FMLA"), Fair Labor Standards Act ("FLSA"), and claims of discrimination and harassment under Title VII of the Civil Rights Act. The division also represents the State in lawsuits involving labor issues. The division has represented state agencies in several class action lawsuits involving claims of discrimination. The division represents the State and state officials in actions filed in federal and state courts and before administrative tribunals.

In FY 10, the division saved the State in excess of \$3.3 million dollars in resolving employment lawsuits.

The division litigates tort claims against the State its agencies and employees in personal injury and property damage lawsuits. Most commonly, allegations are of negligence, but they involve defamation, infliction of emotional distress, excessive use of force, interference with business relations and violations of federal civil rights laws. Examples include: highway crash cases in which the Minnesota Department of Transportation is faulted for inadequate design, construction or maintenance of a state highway, suits against the Departments of Human Services and Corrections for deaths occurring in the institutions they operate and claims against the Department of Natural Resources arising from snowmobile and ATV accidents on state trails. In conjunction with the Solicitor General the division represents the State in litigation arising from the I-35W bridge collapse. Thus far, \$6 million has been recovered by the State relating to the Bridge collapse litigation. During FY 10 the division saved the State more than \$1.9 million in its resolution of other personal injury litigation.

The division represents the PUC in both state and federal courts. In the past year, the division has defended PUC decisions in state court involving matters related to the authorization of new electric transmission facilities and gas pipelines, telephone company performance plans, power purchase agreement requirements and approval of a power plant mercury-reduction plan.

The division also advises the PUC on energy, siting and telecommunications matters that come before the agency. Energy matters for which the PUC seeks advice include the rates and practices of electric and natural gas utilities providing energy services in the State of Minnesota. The division advises the PUC on matters related to the siting and routing of large energy facilities, including petroleum and natural gas pipelines, electric transmission lines and electric generating facilities. In addition, the division advises the Commission on telecommunications matters before the PUC, including interconnection agreements between telecommunications providers, complaints filed with the PUC alleging violations of state telecommunications law and rate and service quality issues. Finally, the division provides counsel to the PUC on issues related to the implementation of legislative directives, such as the development of the renewable energy credit tracking system.

# **CIVIL REGULATION SECTION**

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## **ENVIRONMENTAL PROTECTION DIVISION**

Attorneys in the Environmental Protection Division ("EPD") provide legal advice and representation to the Minnesota Pollution Control Agency ("MPCA") and the Environmental Quality Board ("EQB").

## **ENVIRONMENTAL LAW ENFORCEMENT**

EPD attorneys provide legal advice to MPCA staff regarding available enforcement alternatives. Once MPCA decides on a course of action, EPD attorneys represent MPCA in carrying out the action. Most enforcement involves issuance of an administrative penalty order ("APO") that identifies corrective actions to be taken by a party to come into compliance with environmental laws and the assessment of a civil penalty in an amount up to \$10,000.

Division attorneys assist in negotiating stipulation agreements with the regulated parties. These agreements establish a schedule for taking corrective actions or coming into compliance, payment of a civil penalty and the implementation of supplemental environmental improvement projects. Enforcement actions may include recovery of expenditures made by the State to mitigate or remediate environmental damage. Division attorneys assist in drafting enforcement orders that prescribe the roles and responsibilities of regulated parties. When settlement is not reached, the enforcement matter is litigated by division attorneys in district court on behalf of MPCA.

In FY10, MPCA enforcement actions resulted in approximately 140 APOs and stipulation agreements and the imposition of approximately \$1 million in civil penalties.

## **CLIENT REPRESENTATION**

EPD pursued the recovery of insurance proceeds to reimburse landfill cleanup costs under the Landfill Cleanup Act. There are presently two active lawsuits filed by the State to recover landfill cleanup costs from insurers. These are the fifth and sixth such lawsuits in a series filed in the past few years.

EPD provides legal advice and litigation services to MPCA on a variety of non-enforcement issues. At any given time, at least 200 files are maintained in EPD requiring ongoing legal advice. Division attorneys give legal advice involving permitting, rulemaking and environmental review. Additional issues include: tank leak cleanup cost recoveries, superfund cleanups, natural resource damages, asbestos removals, bankruptcies, contract disputes, hazardous and solid waste disposal, creation of conservation easements, purchases of easements and real property, groundwater contamination, federal facility superfund cleanups, individual septic treatment systems, administrative inspection orders, storm water runoff, air toxics and federal new resource review

In FY10 the EPD represented the MPCA in numerous environmental review and permitting appeals in state district courts, the Office of Administrative Hearings, the Minnesota Court of Appeals, the Minnesota Supreme Court, and in U.S. District Court. One such matter included the revocation and reissuance of a permit for Excel Dairy that was affirmed by the Minnesota Court of Appeals.

EPD provided legal services to the MPCA and the Department of Natural Resources, acting as trustees for natural resource damages, regarding remediation, and natural resource damage and property transfer issues at the Twin Cities Army Ammunition Plant (TCAAP) site in Arden Hills. This site covers approximately 2,000 acres. Division attorneys are negotiating with the Department of Justice, the United States Army and the United States General Service Administration regarding groundwater issues at this site.

EPD provided legal services to the MPCA on a variety of real estate and contract matters in FY10, including several real estate transactions for MPCA's closed landfill program.

EPD provides legal services, including contract and grant review, to the MPCA division of Office of Environmental Assistance ("OEA") which awards grants for innovative projects to reduce and prevent waste and pollution, improve recycling and composting, conserve resources, conduct resource recovery and provide environmental education.

EPD provides legal advice to the Environmental Quality Board ("EQB") with respect to the implementation of its delegated legal authorities.

## **PENSION DIVISION**

The Pension Division provides legal services to the three statewide pension funds, Teachers Retirement Association ("TRA"), Minnesota State Retirement System ("MSRS") and Public Employees Retirement Association ("PERA").

In FY10, the division advised the boards of these funds at their meetings. Additional legal advice related to benefits, tax ramifications and governance issues. The division also represented the funds at contested case hearings and in appeals at the Minnesota Court of Appeals.

The division represented PERA in a contested case hearing involving the calculation of employee benefits for pension salary purposes.

The division is representing all three funds in a challenge to 2010 legislation modifying the cost of living adjustment for state pension plans.

## **HEALTH LICENSING INVESTIGATIONS DIVISION**

The Health Licensing Investigations Division performs statutory investigative services for 16 health licensing and 2 non-health licensing boards. The division works with the Office's Health Licensing Division. Upon completion of an investigation, an investigative report is prepared and forwarded to the Health Licensing Division for review with the licensing board. The referral of investigations to this division provides separation of the investigative function from a board's quasi-judicial responsibilities and for consistency among all boards.

Complaints received for investigation often involve numerous allegations and are increasingly complex. First, the complaint is reviewed for jurisdiction. Next, a case strategy is prepared to ensure a coordinated and focused approach for successful completion of the case. Division staff investigate: allegations of impairment due to mental health concerns or drug or alcohol use, allegations of sexual misconduct, allegations of incompetent medical care and billing fraud. Investigations usually involve: (1) interviews of complainants, patients, licensees and witnesses, (2) an analysis of records and other evidentiary documents and (3) in cases alleging infection control deficiencies, inspection of practice settings.

Expedited investigations are conducted when allegations, if substantiated, present immediate danger to the public. During FY10, expedited investigations occurred, for example, where (1) a nurse was charged with encouraging at least two people online to commit suicide, (2) a physician was charged and convicted of forging prescriptions, (3) a veterinarian's practice deteriorated dramatically and suddenly.

During FY10, division investigators completed over 300 investigations.

## **HEALTH LICENSING DIVISION**

The Health Licensing Division represents the State's health licensing boards, the Health Professional Services Program, Minnesota Board of Law Examiners and the Minnesota Continuing Legal Education Board. During FY10, the division provided legal representation to all 16 of the State's health licensing boards, which are the Board of Behavioral Health and Therapy, Board of Chiropractic Examiners, Board of Dentistry, Board of Dietetics and Nutrition, Emergency Medical Services Regulatory Board, Board of Marriage and Family Therapy, Board of Medical Practice, Board of Nursing, Board of Nursing Home Administrators, Board of Optometry, Board of Pharmacy, Board of Physical Therapy, Board of Podiatry, Board of Psychology, Board of Social Work and Board of Veterinary Medicine. Legal representation includes representation at disciplinary conferences and representation in contested cases and judicial proceedings. The Health Licensing Division and Health Licensing Investigations Division are jointly assisting the boards with more than 650 cases as of June 30, 2010.

## **HEALTH RELATED LICENSING BOARDS**

Legal services primarily consist of participation in complaint resolution, a process that involves activities devoted to protecting the public. By statute, the Attorney General's Office

plays a role in the complaint resolution process. The division advises the boards on procedural due process, statutory interpretation of disciplinary provisions, subpoena power, jurisdiction, peer review and agency authority. The division is responsible for reviewing investigative reports, advising complaint committees, representing the boards at disciplinary conferences, negotiating settlements and representing the boards in contested cases.

During FY10, the boards used negotiation and mediation extensively to resolve complaints. The division negotiated suspension agreements and agreements requiring licensed health care providers to attend training sessions to improve substandard skills, to limit their professional practice to appropriate settings and to refrain from unethical and unprofessional conduct. In one case, the division assisted the Board of Medical practice in resolving a contested case involving multiple violations of the Medical Practice Act for prescribing controlled substances. The settlement required monitoring of the physician's practice and partial reimbursement of the Board's litigation costs.

The division's work supports a wide range of regulatory activities, from initial licensure to revocation and reinstatement. For example, the division assisted the Board of Dentistry in a contested case involving allegations of substandard practice, infection control, record keeping and billing. The case was successfully resolved with an order limiting and conditioning the dentist's license.

During FY10, the division represented boards in administrative contested case proceedings involving professional misconduct, unlawful practice and mental health/chemical dependency. The division initiated a contested case for the Board of Chiropractic Examiners into fraudulent billing involving medical credit cards. One case has been resolved with the chiropractor agreeing to a suspension of his license and an eventual return to practice under strict conditions. The investigation and litigation into these issues remains ongoing.

In addition to contested cases before the Office of Administrative Hearings, the division represents the boards' complaint committees directly before the boards in matters involving noncompliance with disciplinary orders, orders for mental and physical examinations and temporary suspensions. For example, the division represented the Board of Nursing in a petition to temporarily suspend a nurse's license based on her attempts to divert medication from hospital patients.

During FY10, the division represented the boards in multiple actions in district court and in cases before the Minnesota appellate courts. In one case, the division successfully represented the Board of Chiropractic Examiners in its attempts to enforce the suspension of a chiropractor's license.

#### **BOARD OF LAW EXAMINERS**

The division regularly defends the Board of Law Examiners in appeals from applicants who do not obtain a passing score on the Minnesota Bar Examination. In FY10, the division successfully defended the Board's determinations on two occasions from applicants whose character and fitness did not merit admission to the Minnesota Bar.



## **HEALTH PROFESSIONALS SERVICES PROGRAM**

The division assists the Health Professionals Services Program, which is the health boards' diversion program for health care providers diagnosed with mental illness or chemical dependency, in establishing practice restrictions and setting boundaries for impaired physicians, nurses, pharmacists, dentists and other health care practitioners.

## **HUMAN RIGHTS/HEALTH/LABOR/CORRECTIONS DIVISION**

The Human Rights/Health/Labor/Corrections Division represents the Departments of Human Rights, Health, Labor and Industry, Employment and Economic Development, Corrections and Veterans Affairs as well as the Bureau of Mediation Services and the Client Security Board.

### **DEPARTMENT OF HUMAN RIGHTS**

The division's major human rights activity is the handling of cases forwarded by the Department of Human Rights (MDHR) following a determination that there is probable cause to believe that illegal discriminatory conduct occurred. The division participates in negotiation and litigation regarding these matters and seeks to obtain appropriate monetary and non-monetary relief. The division resolved more than 75 cases in FY10. The division's enforcement efforts resulted in Minnesota and its citizens receiving compensatory and injunctive relief for illegal discriminatory treatment. For instance, the division represented the MDHR in a case against a large retailer at the Mall of America. The store manager had refused to allow an autistic girl and her sister to use the store's dressing room together, which constituted disability discrimination under the Minnesota Human Rights Act because the store had an obligation to reasonably accommodate the girl's disability. The division sued the store on behalf the MDHR. The case was tried before an Administrative Law Judge (ALJ), who issued a decision awarding \$25,000 in damages to the girl and a \$25,000 civil penalty in addition to other relief. In FY10, the division assisted the Department in obtaining compensatory relief for Minnesota citizens totaling over \$650,000.

### **DEPARTMENT OF HEALTH**

The division provides legal advice to the Minnesota Department of Health (MDH) concerning its regulatory responsibilities and represents the Department in all litigation and administrative enforcement actions. MDH regulates and oversees a number of different subject areas, including infectious diseases, food-borne illness outbreaks, health care facilities, environmental health hazards, health maintenance organizations (HMOs) and certain health professionals. The division also advises MDH with regard to legal issues concerning contracts, leases and other transactions.

Specific examples of the division's work for DH in FY10 include the following:

- ***Defending the Newborn Screening Program.*** Plaintiffs sued MDH alleging that MDH's collection, storage and use of blood samples pursuant to the Newborn Screening Program violated Minn. Stat. § 13.386, the genetic privacy law. In late 2009, the district court granted the division's motion on behalf of MDH and dismissed the case. Plaintiffs appealed and the matter was argued to the Minnesota Court of Appeals on June 8, 2010.
- ***Protecting the Public from Asbestos Contamination.*** MDH received a complaint regarding flooring work performed by a company that allowed asbestos fibers to become airborne. MDH issued an Administrative Penalty Order (APO) to the company for failure to comply with the Minnesota Asbestos Abatement Act and Rules. The company appealed and the matter was tried before an ALJ at the Office of Administrative Hearings (OAH). The ALJ recommended that MDH's APO be affirmed and the Commissioner adopted the ALJ's recommendation.
- ***Enforcing X-Ray/Radiation Laws.*** The division assists MDH in enforcing laws regulating radiation and x-ray equipment. For instance, the division brought an administrative action at Office of Administrative Hearings against a doctor who failed to properly maintain his x-ray equipment, a violation of Minnesota law.
- ***Enforcing Licensing Laws Regarding Food, Beverages, Lodging Establishments, Public Pools, and Resorts.*** The division represented DH in enforcement proceedings against individuals who operated unlicensed businesses including food and beverage establishments, resorts and spas.

A significant amount of the division's work in FY10 involved defending MDH's determinations that individuals or health care facilities violated the Vulnerable Adults Act by neglecting, abusing, or financially exploiting vulnerable adults. In addition, the division defended MDH decisions not to allow certain disqualified individuals to work in direct contact with patients or residents of health care facilities or health care service organizations (such as home care agencies). Examples of these cases include:

- ***Nursing Home Neglect.*** The division represented MDH in an administrative proceeding arising after a nursing assistant neglected a nursing home resident when he placed her on the toilet, left her alone and she fell. Following an evidentiary hearing, a Human Services Judge recommended reversal of the maltreatment finding and reversal of the appellant's disqualification. The division filed exceptions on behalf of MDH. The Commissioner issued a final order affirming MDH's determinations maltreatment and disqualification.
- ***Disqualification Appeal.*** The division represented MDH in a case where a health care worker was disqualified after a county determined that she had committed maltreatment by threatening to physically abuse her children and striking one son multiple times. After a hearing, a Human Services Judge and the Commissioner of the MDH upheld worker's disqualification.
- ***Disqualification Appeal.*** The division represented MDH in a case where a worker was disqualified because of a county maltreatment finding concerning the neglect and

threatened sexual abuse of her child. After a hearing, a Human Services Judge recommended that MDH's decision not to set aside the disqualification be affirmed. The Commissioner's final order upheld MDH's decision.

- ***Nursing Home Neglect.*** The division represented MDH in a case where a resident assistant was found responsible for physically abusing a resident. The assistant became frustrated while providing care to the client and grabbed the client by both wrists and shook her, causing bruising on both wrists. The Commissioner adopted MDH's maltreatment finding.

## **DEPARTMENT OF LABOR AND INDUSTRY**

Legal advice and representation to the Minnesota Department of Labor and Industry (DLI) has been a key function of the division's work. In representing DLI, the division engages in litigation to enforce occupational safety and health standards ("OSHA"), including cases regarding workplace fatalities. In FY10, the Office assisted in resolving approximately 20 OSHA cases and obtained over \$350,000 in OSHA fines. The division engages in litigation to enforce Minnesota labor laws, such as the Fair Labor Standards Act, including minimum wage and child labor laws. In addition to fines, the division's litigation and negotiation results in improvements to workplace conditions for Minnesotans.

## **DEPARTMENT OF CORRECTIONS**

The division provides a broad range of legal services to the Department of Corrections (DOC) and state correctional facilities. The division successfully defended a high volume of lawsuits brought by inmates against the Department involving complex constitutional issues. For instance, cases litigated in FY10 involved the tension between rights of inmates to practice their religions and the DOC's responsibility for keeping prisons secure. The division also defended habeas corpus cases in which sex offenders challenged conditions of supervised release. In FY10, the division defended nearly 100 lawsuits brought by inmates.

## **MINNESOTA CLIENT SECURITY BOARD**

The division brought actions on behalf of the Minnesota Client Security Board to collect and preserve debt obligations of more than \$725,000 to the Client Security Fund. The Fund reimburses clients who suffer economic loss because of the dishonest conduct of their attorneys.

## **DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT**

The division provided advice and representation to the Minnesota Department of Employment and Economic Development (DEED), and participated in bankruptcy proceedings to protect the State's interest in collecting reemployment benefits overpayments. In FY10, cases brought by this Office prevented the discharge in bankruptcy of approximately \$400,000 of improperly-received benefits.

## **HUMAN SERVICES DIVISION**

The Human Services Division provides litigation services and legal counsel to the Minnesota Department of Human Services ("DHS"), one of the state's largest agencies. Division attorneys provide legal services to DHS in the four broad areas of health care, children and family services, mental health and licensing.

### **HEALTH CARE**

Division attorneys in the health care area handle legal matters concerning Minnesota Health Care Programs ("MHCP"), continuing and long-term care, health care compliance and benefit recovery. MHCP includes medical assistance, MinnesotaCare, and General Assistance Medical Care, which cover approximately 707,000 Minnesotans. In continuing care, division attorneys represent DHS on legal matters concerning nursing home rates, aging and adult services, disability services, deaf and hard-of-hearing services and HIV/AIDS programs. In the compliance and recovery area, division attorneys handle legal health care compliance matters and recover payments for health care services from providers, responsible third-parties and estates. Division attorneys also represent the state regarding funding disputes between the state and the federal Departments of Health and Human Services.

### **CHILDREN AND FAMILY SERVICES**

Division attorneys in the children and family services area handle legal issues relating to public assistance programs, child support and children protection matters. Public assistance programs include the Minnesota Family Investment Program, the General Assistance program, the Minnesota Supplemental Aid program and the Food Stamp program. Division attorneys represent DHS in litigation contesting the operation of these programs and advise DHS on the legal issues raised by these programs. In the child support area, division attorneys defend legal challenges to child support statutes and programs, and advise the agency in its oversight role over counties in administering child support collection. In children's protection, attorneys represent DHS in legal matters concerning children's welfare, adoption, foster care, guardianship, tribal issues and other matters.

### **MENTAL HEALTH**

Division attorneys in the mental health area represent DHS's adult and children's mental health programs, chemical dependency programs, and state-operated treatment facilities and forensic services, which include regional treatment centers, state-operated community facilities, children's and adolescent behavioral health centers, the Minnesota Security Hospital ("MSH") and the Minnesota Sex Offender Program ("MSOP"). Attorneys represent DHS in a broad spectrum of litigation including: Jarvis/Price-Sheppard hearings to authorize forced medication and/or electroconvulsive therapy, Judicial Appeal Panel court trials involving petitions for discharge from persons civilly committed as mentally ill and dangerous, sexually dangerous persons, or sexual psychopathic personalities. The division handles Section 1983 civil rights actions in state and federal district and appellate courts, petitions for Writ of Habeas Corpus in

state and federal courts, as well as providing legal advice to state-operated facilities administration and staff.

## LICENSING

Division attorneys represent the DHS Licensing division in maltreatment cases (abuse, neglect and financial exploitation) involving personal care provider organizations and programs licensed to provide adult daycare, adult foster care, services for mental health, developmental disabilities and chemical health. Division attorneys appear in administrative proceedings and appellate courts seeking to uphold disqualifications of individuals providing services in programs licensed by DHS, respond to expungement petitions in district court to preserve judicial and administrative records for disqualification and, also, appear in administrative proceedings and appellate courts to uphold licensing actions against programs licensed by DHS.

The following are some examples of specific matters handled by the division:

- ***Minnesota Pharmacists Assn. et al. v. Timothy Pawlenty et al.***: defended in federal court state statute that reduced the Medical Assistance payments that pharmacies receive for filling prescriptions for brand-name drugs.
- ***Owen Orthman v. Minnesota Department of Human Services***: defended challenge to state statute that caps the hours that a single personal care attendant can bill the Medical Assistance program in a month.
- ***In the Matter of the SIRS Appeal of M.T.S.C.***: defended DHS's action to recover overpayment for services.
- ***Edna R. Rosckes v. Carver County Social Services et al.***: argued before the Minnesota Court of Appeals on behalf of DHS that the principal of a self-settled trust was an available asset to determine eligibility under federal Medicaid law.
- ***George Chamberlain v. Jack Erskine et al.***: defended DHS employees in federal court against a sex offender's constitutional claims regarding treatment, property rights, and conditions.
- ***Nicholas D. Aune v. Commissioner et al.***: defended DHS employees in federal court against a sex offender's constitutional claims regarding double-occupancy rooms.
- ***Supreme Court Appeal Panel ("SCAP")***: handled numerous hearings before the SCAP on petitions from civilly committed individuals for transfer, provisional discharge, or discharge.
- ***Jarvis/Price-Sheppard Hearings***: handled numerous hearings to authorize medication and/or electroconvulsive therapy for patients who lack the legal capacity to make the decision themselves.

- ***Keith McMoore v. Commissioner et al.***: defended in the Minnesota Court of Appeals DHS licensing division's decision not to set aside a disqualification based on felony convictions for possession of a controlled substance and a firearm.
- ***Licensing fair hearings and contested cases***: handled scores of licensing cases involving maltreatment and disqualification decisions.

## CIVIL PROTECTION SECTION

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### COMPLEX LITIGATION AND CONSUMER SERVICES DIVISION

The Complex Litigation and Consumer Services Divisions, sometimes coordinating efforts with other divisions of the Office, seek to protect Minnesota consumers from unfair and deceptive conduct by taking legal action against violators of Minnesota consumer protection laws and laws protecting consumers from unfair, discriminatory and other unlawful practices in business, commerce or trade. The divisions consistently return restitution dollars to Minnesota consumers and successfully resolve consumers' disputes with businesses. The divisions also obtain court orders halting unfair and deceptive practices, which provide consumers protection on an ongoing basis. The monetary effect of enjoining deceptive practices on a going-forward basis provides immeasurable monetary value to Minnesota consumers.

Examples of complex litigation matters handled by the Office during the last fiscal year include the following:

- ***Unsuitable Sales of Annuities and Living Trusts to Seniors.*** The Office has continued to take action against insurance companies that unlawfully market and sell unsuitable long-term deferred annuities to seniors and misrepresent the terms of the marketed annuities in violation of Minnesota law. During the past fiscal year, the Office reached a new settlement with Great American Financial Resources, Inc. and its subsidiaries Great American Life Insurance Company, Annuity Investors Life Insurance Company, and Loyal American Life Insurance Company. This settlement is similar to previous settlements that the Office reached with Allianz Life Insurance Company of North America, American Equity Investment Life Insurance Company, AmerUs Life Insurance Company and American Investors Life Insurance Company (both now part of Aviva USA Corporation), Midland National Life Insurance Company and North American Company for Life and Health Insurance. Like the earlier settlements, the new settlement provides for full notice and restitution to seniors who purchased unsuitable annuities and requires detailed changes to the company's business practices going forward.

This Office went to trial against American Family Prepaid Legal Corporation, Heritage Marketing and Insurances Services, Inc., and Jeffrey and Stanley Norman, for the sale of boilerplate living trusts and millions of dollars of unsuitable deferred annuities to Minnesota seniors. The trial court determined that the companies' sales practices constituted fraud, false advertising, and deceptive trade practices. The trial court also determined that the deferred annuity sales made by Heritage agents were unsuitable and violated Minnesota's Insurance Suitability, Insurance Solicitation, and Financial Planning laws. The Court awarded restitution of \$3,408,525 to nearly 1,300 Minnesota consumers, and issued a permanent injunction against the Defendants. The Court also awarded civil penalties of \$3,408,525 to the State, ordered Defendants to reimburse the State for its attorneys' fees and investigate costs, and awarded the State \$100,000 in sanctions.

- ***Unlawful Employment Schemes.*** This Office filed a consumer fraud action against the Arthur Group, Inc. and its CEO and owner, Barry Trimble, for taking advantage of the desperation felt by many job seekers in the current recession. The lawsuit alleged that defendants promised Minnesota consumers that purchasing their resume and interview services would help them find and secure executive-level jobs and that they misled consumers into believing that their services would give consumers priority access to a job market not accessible to the general public. The lawsuit further alleges that defendants' promises were false, deceptive and misleading. The State also alleged that neither defendant had obtained the employment agency and employment counselor licenses required by Minnesota law. The State is seeking declaratory and injunctive relief, restitution for Minnesota consumers, civil penalties, costs, reasonable attorneys' fees and other appropriate relief.
- ***Unlawful Foreclosure Consulting.*** This Office continues to address the problem of unlawful foreclosure consulting. This Office has filed seventeen lawsuits against companies for violating Minnesota's foreclosure consulting laws, Minn. Stat. § 325N.01 *et. seq.* The suits alleged that the defendant companies used websites, targeted mailings, and/or the telephone to solicit financially-distressed homeowners by assuring them that the companies could stop the foreclosure process and save their homes from foreclosure, or that they could modify homeowners' existing mortgage loans, but failed to deliver on their promises. The suits also alleged that the defendants unlawfully charged customers an up-front fee before any services were performed, and failed to include required safeguards in their contracts with Minnesota homeowners in violation of Minnesota law. To date, the Office has obtained judgments against over one dozen companies involved, which required them to cease doing business in the state, pay restitution to affected homeowners, reimburse the State for its costs and attorneys' fees and also pay a substantial civil penalty if any of these terms were subsequently violated. The lawsuits against four remaining companies are pending.
- ***Predatory Lending.*** This Office continued to prosecute its lawsuit against Source Lending Corporation ("Source Lending") a Plymouth, Minnesota mortgage broker and its owner and president for using false, misleading and deceptive acts and practices to sell risky and complex residential mortgage loans to Minnesota homeowners. Among other things, the lawsuit alleges that Source Lending used "bait and switch" tactics to mislead consumers about the terms of the loans, and engaged in serial refinancings that were not in the best interest of the affected consumers. The lawsuit seeks injunctive relief, restitution, civil penalties and costs and attorneys' fees, among other relief. Source Lending closed its operations and its owner has filed for bankruptcy.
- The division represented the Office in negotiations with Countrywide Financial Corporation ("CFC") that led to a settlement involving the company's sub-prime mortgage lending practices. The settlement requires CFC to make payments totaling \$3,113,059 to Minnesota consumers who lost their homes to foreclosure between January 1, 2004 and March 31, 2009. In addition, the settlement calls for CFC to offer loan modifications to consumers to help them stay in their homes.



- ***Abusive Telephone Practices.*** During the past fiscal year, the Office continued to prosecute and settled its lawsuit against Sprint Nextel. The lawsuit alleged that Sprint Nextel violated Minnesota's Consumer Fraud Act and Deceptive Trade Practices Act by improperly entering consumers into wireless contracts and by extending customers' contracts without providing notice or obtaining meaningful consent. The suit further alleged that, as a result of these unauthorized contracts and contract extensions, consumers were locked into wireless contracts with Sprint Nextel against their will or were improperly charged an early termination fee for ceasing service under an unauthorized "contract." In the Settlement and Consent Judgment Sprint agreed to make adequate disclosures with respect to contract extensions, prorate early termination fees and not extend a consumer's contract term for small changes made to the contract. Additionally, the Settlement and Consent Judgment provided a restitution process to Minnesota consumers for unwarranted contract extensions. The restitution process will continue through December 31, 2010.

In addition to the Sprint Nextel lawsuit, the Office also advocated on behalf of Minnesota telephone customers by urging the Federal Communications Commission ("FCC") to tighten the rules permitting third-parties to place charges on consumers' telephone bills. Minnesota consumers continue to experience problems with unauthorized charges appearing on their telephone bills, commonly known as "cramming." This Office urged the FCC to, among other things, enact rules allowing consumers to instruct their telephone carrier (e.g. Qwest) to block third-party charges from appearing on their bills without the carrier first receiving explicit permission from the consumer. The outcome of these proceedings is pending before the FCC.

- ***Abusive Debt Collection Practices.*** The Office conducted several investigations into debt collection agencies involving their attempts to collect debt from consumers who did not owe the debts at issue. In June of 2009, the Office reached a settlement with Allied Interstate, Inc. ("Allied") regarding its actions in contacting consumers who did not owe the debts Allied was trying to collect. As part of the settlement, Allied agreed to make changes to its business practices to ensure that it was contacting the correct debtor, and to provide the Office with regular reports of its debt collection activities.
- ***Abusive Debt-Relief Practices.*** Last year this Office took action against nine companies for engaging in abusive debt-relief practices. In September of 2009, the Office brought suit against three debt-relief companies who promised to reduce consumers' interest rates on credit cards and to save the consumers thousands of dollars. These companies charged consumers \$500 to \$1,500 for the services, but then did nothing to improve the terms of the consumers' credit. Actions were brought under the Minnesota Credit Service Organizations Act (Minn. Stat. § 332.01-.70), the Consumer Fraud Statute, and the Deceptive Trade Practices Statute. The Office obtained default judgment against one company. The Federal Trade Commission placed the second company in temporary receivership and seized its assets. The Office entered a consent judgment with the third company.

In February of 2010, the Office brought suit against one-half dozen debt-settlement companies that had failed to register with the Department of Commerce pursuant to Minn. Stat. § 332B.02-.14 but who continued to offer and provide debt settlement services to Minnesota debtors after August 1, 2009. Four of these companies have since entered consent judgments with the Office, returning over \$366,941 to over 200 consumers. A hearing on the Office's motion for default judgment was set against a fifth company for August 12, 2010, and litigation against the sixth company is pending.

In July of 2010, the Federal Trade Commission ("FTC") announced regulations that prohibit debt settlement companies from charging up-front fees. The Office submitted comments to the FTC advocating such a ban and was also instrumental in drafting the comments of the National Association of Attorneys General, which also proposed a ban on all advance fees to debt-settlement companies.

- ***Abusive Propane Practices.*** In 2009, this Office launched an investigation against Ferrellgas for deceiving Minnesota consumers with respect to the pricing of propane and charging arbitrary fees. In 2010, this Office filed a claim against Ferrellgas alleging that Ferrellgas deceived Minnesota consumers about the rates and fees charged for propane and for heating. The lawsuit alleges that the propane energy company failed to disclose specific per-gallon prices when consumers called to fill their tanks and represented in its fine-print contracts that it would charge "our current market price," even though Ferrellgas often charged above-market rates and in many cases charged rates substantially above the average market rate on file with the State and federal government. The lawsuit further alleges that the company's advertisements were designed to create the impression among consumers that the company charges a competitive market price for its propane. The lawsuit also alleges that Ferrellgas charged Minnesota consumers significant fees without adequately disclosing them, including "low usage" fees of up to \$199 for consumers who, in its judgment, did not use enough propane, as well as tank pick-up fees of up to \$99. The lawsuit seeks restitution for consumers, injunctive relief and civil penalties for violating the State's consumer fraud and deceptive trade practices laws.
- ***Health Club Closes.*** On February 16, 2010, this Office brought a lawsuit against Quality Fitness, LLC Gregory Austin, Jeff Homich and Old Republic Surety Company, alleging that Quality Fitness in New Ulm, Minnesota, failed to comply with the Minnesota Club Contracts Act and refused to refund pre-paid membership dues owed to its members at the time of its closing. In April of 2010, this Office entered into a settlement of this matter, which provided for full refunds of pre-paid membership dues, to 49 former club members.
- ***Construction Fraud.*** In April of 2009, the Office filed a lawsuit against Pioneer Building Systems, its owner and operator Dennis L. Burton, and Quality Steel Buildings, alleging that Burton charged Minnesota farmers and small businesses for steel farm and storage buildings that he failed to deliver. The lawsuit further alleged that, once Burton received customers' deposits, he failed to deliver the buildings or to refund the deposits. In March of 2010, the lawsuit was settled under terms that prevented

Burton from marketing steel buildings, directly or indirectly, to Minnesota consumers in the future.

- ***Dairy Dispute.*** In the spring of 2008, the Office and the Minnesota Pollution Control Agency (“MPCA”) brought action in Marshall County Court against Excel Dairy of Thief River Falls, Minnesota, based upon hundreds of violations of the State's ambient air quality standards stemming from Excel's three manure basins. In the Spring of 2009, after receiving comments from this Office, the MPCA revoked and reissued a permit that placed more limitations on Excel Dairy's business operations and, in particular, required Excel Dairy to clean and cover its manure basins. After Excel Dairy failed to comply with the permit, the MPCA decided not to renew the permit in the Spring of 2010.
- ***Deceptive Use of “Bait-and “Switch” Tactics to Sell Security Alarm Systems.*** This Office filed a lawsuit against AMP Alarm LLC (“AMP”), an Orem, Utah-based security alarm dealer for using false, misleading and deceptive acts and practices to sell security alarm systems and long-term alarm monitoring contracts to Minnesota homeowners. Among other things, the lawsuit alleges that AMP and its door-to-door salespeople used “bait and switch” tactics to mislead consumers about the terms and duration of AMP's alarm-monitoring contracts, which cost up to \$48 per month and last as long as 5 years without any ability to cancel without paying the full contract value. The lawsuit seeks injunctive relief, restitution, civil penalties and costs and attorneys' fees, among other relief.
- In July of 2009, Minnesota settled claims against DISH Network. Consumer complaints indicated that DISH Network had, among other things, engaged in bait-and-switch marketing campaigns, charged consumers unfair early termination fees and failed to provide agreed-upon prices and services. Minnesota was a member of a 45-state group that settled with DISH Network. Minnesota negotiated an amendment to the general settlement agreement. Under the Minnesota amendment, DISH Network entered a narrower release with the State, and Minnesota was exempted from provisions requiring a 10-day notice to DISH Network before action can be taken.

## **RESIDENTIAL AND SMALL BUSINESS UTILITIES DIVISION**

The Residential and Small Business Utilities Division (“RUD”) represents and advances the interests of residential and small business utility consumers in the complex and changing electric, natural gas, and telecommunications industries, particularly with regard to utility rates, reliability of service and service quality. The issues presented by this area of the law have grown increasingly complicated because of the complex interplay of federal and state jurisdiction with regard to utility regulation and to the development of new telecommunications technologies,

## ***Rate Cases.***

RUD represents the interests of residential and small business ratepayers in utility rate cases when companies request increases in their utility rates. RUD has participated in the following rate cases:

- ***Minnesota Power 2009 Electric Rate Case.*** RUD opposed Minnesota Power's request for the imposition of a \$73 million interim rate increase based on exigent circumstances affecting Minnesota Power's residential ratepayers. The Commission concurred and reduced Minnesota Power's interim rate increase to approximately \$48.5 million. The reduced interim rates have been in effect during the pendency of the on-going rate proceeding, in which RUD has opposed any rate increase.
- ***CenterPoint Energy Natural Gas Rate Case.*** RUD challenged CenterPoint Energy's request to increase rates by \$60 million per year and provided expert testimony opposing CenterPoint's request to increase its residential customer charge by \$1.50 while simultaneously proposing a decoupling mechanism that targeted residential and small business customers, but excluded large industrial and commercial customers. RUD argued that an increase in the residential monthly customer charge from \$6.50 to \$8.00 is unwarranted because its intent was to increase CenterPoint's guaranteed revenue stream, which is already accomplished with CenterPoint's decoupling proposal. RUD also opposed CenterPoint's proposed tracker for bad debt and its environmental tracker, which RUD argued were just further attempts by CenterPoint to stabilize its revenues, while reducing any incentive to control its costs.
- ***Greater Minnesota Gas 2009 Rate Case.*** RUD has opposed high monthly residential customer charges, which are fixed charges that every ratepayer must pay no matter how much or how little natural gas they use. In its recently filed rate increase request, Greater Minnesota Gas asked for a \$10 monthly customer charge, a \$2 per-month increase over its existing customer charge. RUD advocated that the customer charge increase should be limited to no more than \$0.50 per month, which the Company accepted. A final decision on this rate proceeding has not been made.
- ***Interstate Power and Light 2010 Electric Rate Case.*** Interstate Power and Light filed a request for a rate increase on May 7, 2010 seeking an annual increase of approximately \$15.1 million, or approximately 22 percent over existing rates. RUD intervened to analyze this proposed substantial increase in electric rates. RUD will present testimony, cross-examine witnesses and submit legal briefs protecting the interests of Interstate Power and Light's residential and small-business customers.
- ***Otter Tail Power 2010 Electric Rate Case.*** Otter Tail Power filed a request for a \$10.6 million increase in rates, or 8 percent over current rates. RUD is currently analyzing Otter Tail's request and will participate in this proceeding by presenting testimony, cross-examining witnesses and submitting legal briefs to protect the interests of Otter Tail Power's residential and small business customers.

- ***Xcel Natural Gas 2009 Rate Case.*** On November 12, 2009 Xcel Energy filed a request to increase the rates it charges for natural gas service in Minnesota. Xcel initially sought to increase its rates by \$19.67 million. RUD identified numerous concerns with Xcel's request and provided testimony including: Xcel's proposal to increase the monthly residential customer charge from \$8 to \$1, Xcel's untimely request for unsubstantiated pension expense increases, its unreasonable request for ratepayers to fund approximately \$1 million of incentive bonus payments and Xcel's excessive and unsupported increases in operation and maintenance expenses. After the submission of RUD's testimony, Xcel agreed to withdraw its request for \$3.45 million related to its purported pension expenses, reduce its proposed residential customer charge and make additional adjustments to reduce the amount of operation and maintenance expenses included in rates. At the time of the evidentiary hearing, Xcel had reduced its rate increase request to approximately \$9.9 million, about one-half of its original request. Several significant issues remain contested that RUD argues warrant additional reductions to Xcel's rate increase request. This proceeding is currently pending before the Office of Administrative Hearings.

#### ***Other Utility Matters:***

- ***ARCs.*** RUD opposed a Federal Energy Regulatory Commission ("FERC") initiative as potentially detrimental to residential and small business ratepayers. The proposal would have allowed Aggregators of Retail Customers ("ARC") to bid demand response resources, such as interruptible rates, time of use rates and direct load control, such as Xcel's Saver's Switch, from retail utility customers directly into the wholesale energy market. The Commission agreed with RUD's position and *prohibited ARCs*; it also asked the utilities to report on their demand- response activities.

#### ***Telecommunications:***

- ***Qwest AFOR.*** RUD actively advocated on behalf of the interests of Qwest customers in connection with Qwest's proposed new alternative form of regulation ("AFOR") plan. Rather than submit to rate regulation, Qwest operates under an AFOR plan. Qwest's current plan was set to expire at the end of 2009. Qwest filed a proposed new three-year AFOR plan in June of 2009 to be effective beginning January 1, 2010. Qwest's proposed AFOR plan would have allowed it to increase the monthly rate for basic local residential service by \$1 in each of the three years of the plan. RUD conducted extensive discovery and submitted written comments objecting to Qwest's proposed AFOR plan and specifically its proposed continuous increases to the monthly rate for basic local residential service. The Public Utilities Commission agreed with RUD's advocacy and modified Qwest's plan to a four-year plan, rather than three years as proposed by Qwest and authorized Qwest to increase monthly rates by \$1 only in the fourth and final year of the modified plan.

## ANTITRUST DIVISION

The division investigates violations of state and federal antitrust laws and enforces these laws when it uncovers evidence of anticompetitive conduct. The Minnesota Antitrust Act prohibits a number of activities that restrain trade, including price-fixing, bid-rigging, group boycotts, unlawful abuses of monopoly power and anticompetitive mergers. The division ensures consumers, businesses and the government have a competitive environment in which to purchase goods and services.

Specific examples of the division's work in FY 10 include:

- **DRAM litigation.** Minnesota and thirty-one other states sued the manufacturers of dynamic random access memory computer components which were allegedly engaged in a price-fixing scheme. Minnesota alleges that the price-fixing scheme artificially inflated the cost of computer equipment acquired by the State. Litigation is pending.
- **Vitamins Price-Fixing Settlement.** Minnesota, along with several other states and certain private class actions, finalized a settlement relating to violations of Minnesota antitrust law stemming from a world-wide conspiracy to fix the prices of, and allocate the markets for, vitamins A, B1, B2, B3, B4, B5, B6, B9, B12, C, E, H, astaxanthin, beta-carotene, canthaxanthin, as well as all blends and forms of these vitamins. Various firms sold these vitamins and participated in the settlement, including Akzo Nobel Inc., Bioproducts Incorporated, Mitsui & Co., Ltd. and Mitsui & Co. (U.S.A.), Inc., Chinook Global Limited and Chinook Group, Inc., Evonik Degussa GmbH, successor to Degussa AG, and Evonik Degussa Corporation, Lonza AG; Merck KGaA, E. Merck and EM Industries, Inc., Nepera, Inc., Sumitomo Chemical America, Inc. and Sumitomo Chemical Co., Ltd., Mitsubishi Tanabe Pharma Corporation and Tanabe U.S.A., Inc., UCB Pharma, Inc., and Vertellus Specialties Inc. and Vertellus Chemicals SA.
- **Waste Management Monopoly.** This Office launched an investigation against Waste Management of Minnesota ("WMM") in December of 2009 for unlawfully obtaining monopoly power in the commercial solid waste-hauling service industry in Cottonwood County, Minnesota. Waste Management entered into an Assurance of Discontinuance, which was entered by the Court on March 18, 2010. Under the settlement, WMM agreed to make substantial changes to its contracts with commercial customers in Cottonwood County. These contract changes are intended to promote competition in the Mankato area, where the Attorney General's Office determined WMM has a market share of at least 80-90 percent. Specifically, WMM agreed to: change the initial length of its commercial contracts from three years to two years, provide a written renewal notice to commercial customers at least 90 days before the renewal date to inform them that their contracts will automatically renew if they do not cancel before a specified date, allow commercial customers to send their cancellation notice by fax or certified mail and provide a prominent notice to customers that the contract will automatically renew unless the customer cancels in a timely manner.

## **PUBLIC ENFORCEMENT SECTION**

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### **APPEALS DIVISION**

The Appeals Division provides assistance to county attorneys in felony appeals. The cases handled by the Appeals Division in FY 2010 involved, among other crimes, murder, sexual assault, drug distribution and manufacturing, child sexual abuse and felony assault.

The Appeals Division also handled numerous federal habeas corpus petitions challenging state-court convictions for non-metro counties during FY 2010. Attorneys in the Appeals Division appeared on behalf of the State on four habeas petitions in federal district court and eight at the 8th Circuit Court of Appeals in FY 2010.

In addition to handling appellate cases, division attorneys assist the Office's prosecutors by providing legal research, preparing legal memoranda and assisting local prosecutors on legal questions. Appeals Division attorneys provide training to prosecutors and law enforcement officers on a variety of legal issues in the criminal justice system.

### **MEDICAID FRAUD DIVISION**

The Medicaid Fraud Division is a federally-certified Medicaid Fraud Control Unit (MFCU) with a two-fold mission:

1. Review and investigate reports of vulnerable adult abuse, neglect and financial exploitation in nursing homes, group homes, foster care homes, hospitals, board and care residences and by home care providers.
2. Investigate and prosecute health care providers who commit fraud in delivery of the Medical Assistance program.

One goal of the division is to recover Medicaid funds from providers who fraudulently bill the program. The division does this through local, state and federal criminal and civil prosecutions and by participating on a national basis with other Medicaid Fraud units in the country.

The division receives referrals from citizens, police, county adult protection workers and state agencies. The staff in the division follow up on investigations to ensure that law enforcement is involved in criminal cases, and interact with city and county attorneys to request the issuance of criminal complaints for assault, abuse and financial exploitation of vulnerable adults. Division investigators assist local prosecutors in the investigation phase of cases by conducting interviews, reviewing documentation and preparing complex financial spreadsheets. Division attorneys also assist local prosecutors and accept referrals to prosecute cases around the State. Division attorneys made appearances in nine counties during the fiscal year.

The Medicaid Fraud Division has investigated and prosecuted Personal Care Assistants (PCAs) and Personal Care Provider Organizations (PCPOs) engaged in fraudulent billing practices. Typical schemes involve billing for services not provided, billing the authorized units rather than actual units provided, billing for RN services when there is no RN employed by the agency and providing group care but billing as if one-to-one care is provided. Many of the fraud cases have a criminal-neglect component because the recipient's condition is compromised because of lack of care.

One conviction involved the owner of a home health agency providing both private duty nursing and PCA services. The agency billed for registered nursing (RN) services when no RN was on staff, billed for PCA services with no documentation, had insufficient PCAs on staff to provide services and failed to file corporate income taxes. As a result, a resident was severely burned in the shower during a time period when inadequate staff were present to administer the care needed by the residents. The owner was convicted of Medicaid fraud, failing to file corporate taxes and neglect.

Another fraud case involved the owner of a mental health agency providing children's mental health services. The owner double-billed for services, billed for services when a child was not present in the home and billed for non-covered services. The owner was convicted of three counts of theft-by-false representation, ordered to pay restitution of over \$400,000 and was sentenced to prison.

Several investigations involved financial exploitation of vulnerable adults. One case involved a power of attorney who used her grandparents' funds to pay her own expenses (car, cash, and bills) but failed to pay the nursing home, prescriptions and assisted living expenses of her grandparents.

In another financial exploitation case, the power of attorney, also a granddaughter, was using her grandmother's money for camping trips, cell phone bills, and checks written to herself. The power of attorney moved the vulnerable adult out of the nursing home when the bill became delinquent, but failed to properly care for her grandmother resulting in a loss of weight and hospitalization.

The Medicaid Fraud Division conducts civil investigations using civil Medicaid statutes. The civil investigations are investigated jointly with federal agencies. Many are national in scope and involve civil settlements with pharmaceutical manufacturers.

The division continues to provide training to social services, law enforcement and provider groups on financial exploitation, white collar fraud investigations and prosecution of crimes against vulnerable adults.

## **PUBLIC PROTECTION DIVISION**

The Public Protection Division provides prosecutorial assistance to county attorneys and local law enforcement agencies in prosecuting serious, violent, drug and gang-related crimes and



handles the civil commitment of dangerous sex offenders. In addition, the division provides training for police officers and prosecutors.

The division prosecutes serious crimes in trial courts throughout Minnesota when requested to do so by a county attorney. Representative work during FY 2010 included:

- Convicted Ismael Bugarin in Dodge County of one count of first-degree murder for killing his wife during an argument, one count of second-degree murder for killing his 12-year-old son, when the son attempted to intervene, and two counts of attempted second degree murder for stabbing his two daughters, ages 6 and 8. The court sentenced Bugarin to life in prison without parole.
- Convicted Chad Gulbertson of first-degree domestic abuse murder for the beating death of Jody Morrow in her home in Freeborn County. The court sentenced Gulbertson to life in prison without parole.
- Convicted Christopher Hyden of criminal sexual conduct in the first degree, attempted murder in the second degree, and attempted murder in the first degree in Big Stone County. Hyden sexually assaulted a six-year-old girl and then cut her throat, leaving her in a remote field to die. Hyden then drove to her mother's house and attacked the girl's mother, cutting her throat several times. Both victims survived their injuries. The court sentenced Hyden to life in prison without parole.
- Convicted Danny Ortega Sr. and Danny Ortega Jr. of first-degree murder for the stabbing death of Troy Ulrich in Dodge County. The court sentenced both of them to life without parole.
- Convicted Richard Wright of second-degree murder, second-degree criminal sexual conduct and assault in Hubbard County. Wright choked Sonja Hennagir to death in her home, sexually assaulted her six-year old daughter and attacked a family friend in the driveway as he was attempting to flee. The court sentenced him to serve a total of 42 years in prison.
- Convicted Gerald Holt, Axel Kramer, and Lionel Benavidez of second-degree murder for the gang-related murder of a man in Cottonwood County. The court sentenced each of them to prison sentences in accordance with sentencing guidelines.
- Convicted David Collins of second-degree murder and assault in Traverse County. Collins got into a verbal altercation with another man, swung a bat at the man, but hit the man's 14-month old child instead. The child died shortly thereafter from head trauma.
- Convicted Andrew Lemke of second degree manslaughter for the shooting death of his wife in 2004 in Swift County.
- Conducted grand jury proceedings and obtained first-degree murder indictments.

- Represented the State in post-conviction challenges to murder convictions.
- Prosecuted numerous manufacturers and dealers of methamphetamine in multiple counties throughout the state.
- Provided continuing legal advice and assistance to the Forensic Laboratory Advisory Panel for the Bureau of Criminal Apprehension, the Child Mortality Review Board, the Advisory Committee on the Rules of Criminal Procedure, CriMNet and the Stop it Now Advisory Committee.
- Provided continuing review of Extradition paperwork for the Office of the Governor.

Division attorneys provide assistance to county attorneys in civil-commitment hearings involving dangerous sexual predators, upon the request of a county attorney. When a county attorney decides to proceed with a civil-commitment petition, division attorneys are available to assist the county attorney in preparation of the commitment petition, handling of pre-trial matters, handling the commitment hearing and any appeal.

Division attorneys handled several cases relating to petitions for habeas corpus by individuals civilly-committed as sexual predators. As the population of committed sexual predators increases, the number of petitions for habeas corpus from the Department of Human Services' regional treatment centers continues to grow.

The division's attorneys also handle administrative hearings required by the Community Notification Act when a registered sex offender challenges the Department of Corrections' assessment of the offender's level of danger upon release from incarceration. Each month, the division handles several such cases, which affect the type of notice given to the community in which the sex offender will be released. The division also advises the BCA on registration issues and DNA collection issues, and the Department of Corrections on community notification issues.

Additionally, the division trains law enforcement officers and prosecutors throughout the state on such topics as: sex offender commitments, predatory offender registration, stalking and harassment laws, child exploitation laws, firearms laws, narcotics investigations, search and seizure, suspect interrogation, evidence, working with grand juries, forfeiture, gang investigation and prosecution and trial advocacy.

## **PUBLIC SAFETY DIVISION**

The Public Safety Division represents the Commissioner of Public Safety at thousands of implied consent hearings each year in which drivers contest the revocation of their licenses due to driving while impaired by alcohol or drugs. The division is responsible for defending actions that resulted in the collection of \$3 million in driver's license reinstatement fees paid to state government over the last fiscal year. The division's litigation of overweight truck violations also resulted in substantial fines paid to the State. Efforts by the division during the last fiscal year to reduce deaths, injuries, and property damage on Minnesota's streets and highways included:

- Handled over 4,600 district court implied consent proceedings and associated appeals challenging the revocations of driving privileges under Minn. Stat. § 169A.50-.53.
- Defended the state against numerous constitutional and other challenges to the DWI, implied consent, traffic and other public safety laws.
- Provided satellite teleconference training on DWI procedures and traffic safety laws for law enforcement officers throughout Minnesota.
- Published the Attorney General's 2010 DWI/IC Elements Handbook, utilized statewide by prosecutors, judges, defense attorneys and law enforcement professionals.
- Handled 328 district court challenges and resulting appeals to other driver's license cancellations, withdrawals, revocations, suspensions and license plate impoundments under Minn. Stat. § 171.19.
- Argued appeals to the Minnesota Court of Appeals and Minnesota Supreme Court resulting from district court appearances involving the revocation, suspension, cancellation or withdrawal of driving privileges.

The division also provides legal services to the Commissioner of Public Safety and various divisions of the Department of Public Safety including: the State Patrol, Bureau of Criminal Apprehension, State Fire Marshal's Office, Office of Pipeline Safety, Office of Homeland Security and Emergency Management, Office of Justice Programs, Office of Traffic Safety and the Driver and Vehicle Services Division. Petitions for expungement of criminal records served on the Bureau of Criminal Apprehension are monitored and challenged, when appropriate, by the division. Additionally, regulation of the private detective and security industry is enhanced by the division's representation of the Private Detective and Protective Agent Services Board.

The Public Safety Division continues to face a significant challenge from a dramatically increased workload. For example, in 1993 a mere six percent of all revocations were challenged in court. In FY 2010, nearly 15 percent of all drivers license revocations were challenged in court. Today's challenge rate is the result of the toughening of DWI laws by the Minnesota Legislature over the last few years, including the ability to use an implied consent revocation to impound license plates, forfeit motor vehicles and enhance subsequent criminal offenses to gross misdemeanor and felony violations. Because drivers have more at stake from an alcohol-related license revocation on their driving records, they are more willing to challenge the underlying revocations in the state's district and appellate courts. Moreover, the increasing complexity of the State's DWI law has created a specialized DWI defense bar which vigorously challenges more revocations in the hopes of getting prosecutors to negotiate or dismiss the underlying DWI charges.

In FY 2010, the Public Safety Division handled over 4,600 implied consent cases. Implementation of the felony DWI law and recent challenges over accessibility to the Intoxilyzer instrument's computer source code continue to increase the division's caseload.

The division provides legal advice and representation to the Gambling Control Board, the Minnesota Racing Commission, the Minnesota State Lottery and the Alcohol and Gambling Enforcement Division of the Department of Public Safety. These agencies have thousands of licensees and conduct numerous investigations each year. Many of these investigations result in contested case hearings requiring representation from the division. The division provides advice to the Alcohol and Gambling Enforcement Division on issues relating to illegal liquor sales, illegal gambling devices and Indian gaming. The division represents that agency in actions against manufacturers and distributors of liquor and gambling equipment.

With regard to the Racing Commission, the division represents the commission and stewards in appeals of disciplinary action taken against horse owners, trainers and jockeys. The division also provides representation as it relates to the commission's daily activities and regulation at both Canterbury Park and the Running Aces Harness Park race track in Anoka County. The division provides the State Lottery with a wide range of legal advice, from internet issues to lottery retailer contract suspensions, and represents that client in disciplinary hearings against lottery retailers and other licensees. A committee of the Gambling Control Board meets monthly with a number of licensees to discuss alleged violations of statutes and rules. The division provides representation at these settlement meetings, drafts appropriate orders and litigates the cases on the client's behalf before the Office of Administrative Hearings and the Minnesota Court of Appeals.

APPENDIX A: SERVICE HOURS				
By Agency or Political Subdivision for FY 2010				
Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
<b>Partner Agencies</b>				
Administration--Risk Management		1,534.6		\$ 155,254.40
Amateur Sports Commission (3)		19.9		\$ 2,268.60
AURI		1.2		\$ 136.80
Corrections (3)	2,082.9	2,082.9	\$ 237,456.00	\$ 237,456.00
Education Department	2,625.0	4,152.3	\$ 299,250.00	\$ 470,592.20
Gambling Control Board		97.5		\$ 11,115.00
Health	5,965.0	5,822.9	\$ 660,000.00	\$ 641,650.60
Housing Finance Authority	3,000.0	2,635.0	\$ 342,000.00	\$ 300,210.00
Human Services	20,700.0	21,781.1	\$ 2,284,800.00	\$ 2,457,600.40
Iron Range Resources & Rehabilitation	2,800.0	2,771.8	\$ 319,200.00	\$ 313,955.20
Medical Practices Board	7,600.0	6,913.3	\$ 636,400.00	\$ 573,206.20
Minnesota Management & Budget (3)		284.4		\$ 32,421.60
Minnesota Racing Commission		340.5		\$ 38,817.00
Minnesota State Retirement System		316.7		\$ 35,933.80
MnSCU	6,700.0	6,821.8	\$ 731,300.00	\$ 740,190.20
Natural Resources	7,000.0	6,820.5	\$ 785,500.00	\$ 763,112.00
Petroleum Tank Release Compensation Board		118.2		\$ 13,474.80
Pollution Control	15,025.0	14,930.3	\$ 1,712,850.00	\$ 1,696,724.20
Public Employees Retirement Association		1,041.9		\$ 115,791.60
Public Safety (3)	3,000.0	3,000.0	\$ 342,000.00	\$ 342,000.00
Teachers Retirement Association		350.0		\$ 39,745.00
Transportation	17,800.0	16,911.2	\$ 1,981,700.00	\$ 1,896,606.80
<b>TOTAL PARTNER AGENCIES</b>	<b>94,297.9</b>	<b>98,748.0</b>	<b>\$ 10,332,456.00</b>	<b>\$ 10,878,262.40</b>
<b>Specialized Boards</b>				
Accountancy Board		207.1		\$ 19,199.40
Animal Health Board		11.0		\$ 1,254.00
Architecture Board		387.9		\$ 42,160.60
Assessors Board		6.0		\$ 684.00
Barber Board		31.9		\$ 3,011.60
Combative Sports Board		7.2		\$ 820.80
Client Security Board		126.4		\$ 14,174.60
Cosmetology Examiners Board		136.6		\$ 15,457.40
Crime Victims Reparations Board		315.4		\$ 32,575.60
Land Exchange Board		4.2		\$ 478.80
Peace Officers Standards and Training Board		161.6		\$ 16,922.40
Private Detective Board		236.0		\$ 26,904.00
School Administrators Board		209.7		\$ 23,905.80
State Arts Board		11.9		\$ 1,356.60
State Fair Board		17.9		\$ 2,040.60
State Investment Board		220.1		\$ 24,171.40
Teaching Board		728.0		\$ 82,927.00
Zoological Board		41.3		\$ 4,708.20
<b>SUBTOTAL</b>		<b>2,860.2</b>		<b>\$ 312,752.80</b>
<b>Health Boards/Offices</b>				
Behavioral Health & Therapy Board		266.4		\$ 20,814.60
Chiropractic Board		2,197.6		\$ 192,301.40
Dentistry Board		2,483.1		\$ 202,018.40
Dietetics & Nutrition Practice Board		23.1		\$ 2,633.40
Emergency Medical Services Regulatory Board		204.1		\$ 22,112.40
Health Professionals Services Program		24.2		\$ 2,758.80
Licensed Drug & Alcohol Counselor Program		653.3		\$ 54,616.20
Marriage & Family Therapy Board		341.8		\$ 26,195.20
Nursing Board		3,958.9		\$ 395,639.60
Nursing Home Administrators Board		39.8		\$ 3,472.20
Optometry Board		95.0		\$ 7,730.00
Pharmacy Board		710.7		\$ 60,539.80
Physical Therapy Board		329.6		\$ 27,739.40
Podiatry Board		98.1		\$ 9,858.40
Psychology Board		1,985.8		\$ 172,266.20
Social Work Board		1,052.9		\$ 81,330.60
Veterinary Medicine Board		464.9		\$ 40,173.60
<b>SUBTOTAL</b>		<b>14,929.3</b>		<b>\$ 1,322,200.20</b>
<b>Higher Education</b>				
Higher Education Facilities Authority		4.9		\$ 558.60
Higher Education Services Office		582.5		\$ 66,225.00
<b>SUBTOTAL</b>		<b>587.4</b>		<b>\$ 66,783.60</b>

APPENDIX A: SERVICE HOURS				
By Agency or Political Subdivision for FY 2010				
Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
<b>Other Executive Branch Agencies</b>				
Administration Department		762.9		\$ 79,330.60
Administrative Hearings Office		1.2		\$ 136.80
Agriculture Department		1,157.4		\$ 131,783.60
Amateur Sports Commission (3)		113.7		\$ 12,781.80
Archaeologist Office		0.2		\$ 22.80
Black Minnesotans Council		87.9		\$ 9,910.60
Campaign Finance Board		116.3		\$ 10,633.20
Capitol Area Architectural Planning Board		119.3		\$ 13,600.20
Center for Arts Education		89.4		\$ 9,761.60
Chicano/Latino Peoples Affairs Council		13.3		\$ 1,346.20
Commerce Department		8,036.2		\$ 915,731.80
Corrections Department (3)		4,978.8		\$ 485,127.80
Corrections Department/Community Notification		1,207.3		\$ 110,992.20
Demographics Board		15.8		\$ 1,801.20
Disability Council		5.8		\$ 651.20
Employment & Economic Development Department		1,875.1		\$ 181,266.40
Environmental Quality Board		77.4		\$ 8,823.60
Executive Council		3.4		\$ 387.60
Explore Minnesota Tourism		9.5		\$ 768.00
Faribault Academies		12.3		\$ 1,392.20
Firefighter Training & Education Board		19.4		\$ 2,211.60
Geographic & Demographic Analysis		2.5		\$ 285.00
Governor's Office		343.7		\$ 39,181.80
Human Rights Department		1,594.2		\$ 163,128.80
Indian Affairs Council		0.5		\$ 42.00
Judiciary Courts		768.8		\$ 87,643.20
Labor and Industry Department		4,010.0		\$ 450,225.00
Law Examiner's Board		139.4		\$ 15,696.60
Lawyer's Professional Responsibility Board		28.2		\$ 3,214.80
Legislature		114.6		\$ 11,994.40
Mediation Services Bureau		33.1		\$ 3,773.40
Military Affairs Department		69.0		\$ 7,866.00
Minnesota Commission Serving Deaf & Hard of Hearing People		0.6		\$ 68.40
Minnesota Gang Strike Force		63.9		\$ 7,284.60
Minnesota Management & Budget (3)		1,063.4		\$ 117,742.60
Office of Enterprise Technology		53.9		\$ 6,089.60
Ombudsman for Mental Health & Developmental Disabilities		8.2		\$ 934.80
Ombudsperson for Families		72.1		\$ 8,219.40
Public Defender, Local		38.8		\$ 4,423.20
Public Defender, State		7.7		\$ 877.80
Public Safety Department (3)		26,835.5		\$ 2,677,152.00
Public Utilities Commission		4,335.5		\$ 478,502.00
Revenue Department		6,906.2		\$ 784,881.80
Rural Finance Authority		35.8		\$ 4,081.20
Secretary of State		541.7		\$ 61,528.80
Sentencing Guidelines Commission		14.3		\$ 1,630.20
State Auditor		24.1		\$ 2,742.40
State Lottery		97.0		\$ 9,128.00
Strategic and Long Range Planning Office		27.6		\$ 3,146.40
Veterans Affairs Department		675.7		\$ 68,734.80
Veterans Homes Board		74.0		\$ 8,236.00
Water & Soil Resources Board		938.1		\$ 106,848.40
<b>SUBTOTAL</b>		<b>67,620.7</b>		<b>\$ 7,113,764.40</b>

APPENDIX A: SERVICE HOURS				
By Agency or Political Subdivision for FY 2010				
Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
<b>OTHER GOVERNMENT</b>				
Aitkin County Attorney		64.6		\$ 7,364.40
Becker County Attorney		372.7		\$ 42,487.80
Beltrami County Attorney		728.3		\$ 75,461.20
Benton County Attorney		220.8		\$ 22,691.20
Big Stone County Attorney		980.3		\$ 84,479.20
Blue Earth County Attorney		172.2		\$ 16,010.80
Brown County Attorney		1.0		\$ 114.00
Carlton County Attorney		91.5		\$ 8,911.00
Carver County Attorney		246.8		\$ 22,285.20
Cass County Attorney		602.5		\$ 61,170.00
Chippewa County Attorney		67.0		\$ 6,858.00
Chisago County Attorney		25.7		\$ 2,929.80
Clay County Attorney		738.4		\$ 74,927.60
Clearwater County Attorney		730.8		\$ 67,161.20
Cook County Attorney		8.5		\$ 969.00
Cottonwood County Attorney		422.8		\$ 41,349.20
Crow Wing County Attorney		947.4		\$ 87,278.60
Dakota County Attorney		7.8		\$ 499.20
Dodge County Attorney		1,631.5		\$ 158,756.00
Douglas County Attorney		75.1		\$ 8,121.40
Faribault County Attorney		274.2		\$ 25,258.80
Fillmore County Attorney		660.4		\$ 65,230.60
Freeborn County Attorney		1,555.4		\$ 141,410.60
Goodhue County Attorney		168.6		\$ 16,260.40
Hennepin County Attorney		2,544.8		\$ 209,272.20
Houston County Attorney		0.7		\$ 79.80
Hubbard County Attorney		921.7		\$ 92,868.80
Isanti County Attorney		445.4		\$ 48,465.60
Itasca County Attorney		514.8		\$ 52,232.20
Jackson County Attorney		339.2		\$ 31,263.80
Kanabec County Attorney		1,081.2		\$ 111,106.80
Kandiyohi County Attorney		333.6		\$ 37,630.40
Kittson County Attorney		4.0		\$ 256.00
Koochiching County Attorney		223.1		\$ 20,738.40
Lake of the Woods County Attorney		17.9		\$ 1,905.60
Le Sueur County Attorney		580.4		\$ 54,435.60
Lincoln County Attorney		208.9		\$ 21,909.60
Lyon County Attorney		200.5		\$ 22,857.00
Mahnomen County Attorney		858.1		\$ 75,023.40
Marshall County Attorney		132.6		\$ 12,516.40
Marlin County Attorney		338.8		\$ 28,183.20
McLeod County Attorney		37.8		\$ 2,434.20
Meeker County Attorney		121.3		\$ 12,003.20
Mille Lacs County Attorney		1,001.9		\$ 105,276.60
Morrison County Attorney		377.8		\$ 40,309.20
Mower County Attorney		407.3		\$ 43,772.20
Murray County Attorney		184.8		\$ 20,147.20
Nicollet County Attorney		23.1		\$ 1,623.40
Nobles County Attorney		106.7		\$ 12,163.80
Norman County Attorney		1.4		\$ 159.60
Olmsted County Attorney		979.8		\$ 111,517.20
Otter Tail County Attorney		695.4		\$ 69,050.60
Pennington County Attorney		415.2		\$ 39,972.80
Pine County Attorney		644.2		\$ 59,428.80
Polk County Attorney		175.7		\$ 16,829.80
Pope County Attorney		8.1		\$ 793.40
Ramsey County Attorney		1,028.6		\$ 84,710.40
Red Lake County Attorney		48.2		\$ 5,494.80
Redwood County Attorney		878.5		\$ 79,394.00
Renville County Attorney		217.0		\$ 22,523.00
Rice County Attorney		1,506.6		\$ 147,182.40
Rock County Attorney		232.8		\$ 26,539.20
Roseau County Attorney		511.8		\$ 47,945.20
Scott County Attorney		428.7		\$ 38,006.80
Sherburne County Attorney		460.1		\$ 46,111.40
St. Louis County Attorney		1,416.2		\$ 153,986.80
Stearns County Attorney		675.6		\$ 75,103.40
Steele County Attorney		383.8		\$ 38,598.20
Stevens County Attorney		20.2		\$ 1,627.80
Swift County Attorney		2,117.3		\$ 179,387.20
Todd County Attorney		992.1		\$ 105,539.40
Traverse County Attorney		763.8		\$ 70,428.20
Wadena County Attorney		388.4		\$ 43,962.60
Waseca County Attorney		242.2		\$ 26,810.80
Washington County Attorney		133.0		\$ 14,732.00
Watsonwan County Attorney		598.0		\$ 60,852.00

APPENDIX A: SERVICE HOURS				
By Agency or Political Subdivision for FY 2010				
Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
Wilken County Attorney		51.2		\$ 5,526.80
Winona County Attorney		477.3		\$ 42,232.20
Wright County Attorney		1,147.0		\$ 109,143.00
Yellow Medicine County Attorney		228.1		\$ 22,173.40
Various Local Governments		489.6		\$ 55,814.40
<b>SUBTOTAL</b>		<b>40,156.6</b>		<b>\$ 3,898,037.40</b>
<b>TOTAL NON-PARTNER AGENCIES SUBDIVISIONS</b>		<b>126,154.2</b>		<b>\$ 12,713,538.40</b>
<b>TOTAL PARTNER/SEMI-PARTNER AGENCIES (from page A-1)</b>		<b>98,748.0</b>		<b>\$ 10,878,262.40</b>
<b>TOTAL NON-PARTNER AGENCIES SUBDIVISIONS</b>		<b>126,154.2</b>		<b>\$ 12,713,538.40</b>
<b>GRAND TOTAL HOURS/EXPENDITURES</b>		<b>224,902.2</b>		<b>\$ 23,591,800.80</b>
Notes:				
(1) The projected hours of service were agreed upon mutually by the partner agencies and the AGO. Actual hours may reflect a different mix of attorney and legal assistant hours than projected originally.				
(2) Billing rates: Attorney \$114.00 and Legal Assistant \$64.00				
(3) A number of agencies signed agreements for a portion of their legal services.				



APPENDIX B: SPECIAL ATTORNEY EXPENDITURES	
FOR FY 2010, BY AGENCY	
AGENCY	Amount
Administration	\$ 289,561.51
Education	\$ 6,979.10
Housing Finance Agency	\$ 8,162.52
Minnesota Management & Budget	\$ 128,887.00
MnDOT	\$ 623,860.64
MnSCU	\$ 7,416.88
Perpich Center for the Arts High School	\$ 3,317.50
State Academies	\$ 9,993.69
<b>TOTAL</b>	<b>\$ 1,078,178.84</b>

<b>APPENDIX B: SPECIAL ATTORNEY EXPENDITURES</b>	
<b>BOND COUNSEL FOR FY 2010, BY AGENCY</b>	
<b>AGENCY</b>	<b>Amount</b>
Agricultural and Economic Development Board	\$ 130,345.83
Employment and Economic Development	\$ 294,854.99
Higher Education Facilities Authority	\$ 180,430.03
Higher Education Services Office	\$ 47,327.16
Housing Finance Agency	\$ 269,510.02
Iron Range Resources and Rehabilitation	\$ 3,363.00
Minnesota Management & Budget	\$ 378,889.45
MnSCU	\$ 24,207.10
Rural Finance Authority	\$ 1,465.40
<b>TOTAL</b>	<b>\$ 1,330,392.98</b>
NOTE: Certain bond fund counsel are paid from proceeds.	

# APPENDIX C:

## Opinions of Interest



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON  
ATTORNEY GENERAL

September 12, 2008

SUITE 1800  
445 MINNESOTA STREET  
ST. PAUL, MN 55101-2134  
TELEPHONE: (651) 297-2040

Mark Ritchie, Secretary of State  
180 State Office Building  
100 Rev. Dr. Martin Luther King Jr. Blvd.  
St. Paul, MN 55155-1299

Dear Secretary Ritchie:

Thank you for your correspondence of September 11, 2008.

You point out that in the November 4, 2008 primary election for Seat 4 Associate Justice of the Minnesota Supreme Court, the apparent difference between the number of votes for the candidates finishing second and third was less than one half of one percent of the total vote for the office, which calls for an automatic recount pursuant to Minn. Stat. § 204C.35, subd. 1 (2006). If a recount is in fact required, it will be formally ordered by the State Canvassing Board at its September 16 meeting. The Canvassing Board will then reconvene as soon as possible after the recount is completed to hear the recount report, resolve challenges to particular ballots, and canvass the recount results. In light of these facts, you ask the following question:

May the secretary of state certify the nomination of candidates for Associate Justice of the Minnesota Supreme Court, seat 4 upon the conclusion of the canvassing of the recount by the State Canvassing Board, or must the certification of nominees for that office be delayed until the time period for the filing of an election contest has expired?

In our opinion, the Secretary of State must certify the names of the two candidates for Seat 4 whom the State Canvassing Board determines to have received the most primary votes promptly upon completion of the canvass of the recount results. In contrast to Minn. Stat. § 204C.40, subd. 2 (2006), which requires a delay of seven days before issuance of a certificate of election following canvass of general election results,<sup>1</sup> we are aware of nothing in the statutes or

<sup>1</sup> That subdivision provides:

No certificate of election shall be issued until seven days after the canvassing board has declared the result of the election. In case of a contest, an election certificate shall not be issued until a court of proper jurisdiction has finally determined the contest. This subdivision shall not apply to candidates elected to the office of state senator or representative.

According to Minn. Stat. § 209.021, the time for filing an election contest in most cases is seven days after completion of canvass of a general or special election.

rules that would require or justify any delay in certifying the names of persons chosen at the primary to appear on the general election ballot. To the contrary, Minn. Stat. § 204.32, subd. 2 (2006) provides:

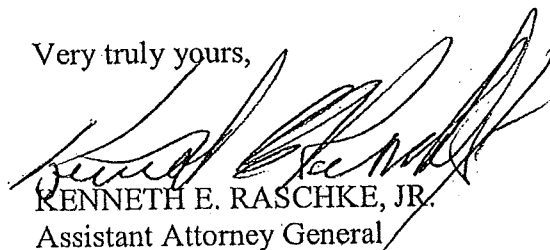
The State Canvassing Board shall meet at the Secretary of State's Office seven days after the state primary to canvass the certified copies of the county canvassing board reports received from the county auditors. *Immediately after the canvassing board declares the results, the secretary of state shall certify the names of the nominees to the county auditors.* The secretary of state shall mail to each nominee a notice of nomination.

(Emphasis added.) No exception to the highlighted mandate is made for cases in which the primary results are determined following a recount. In the case of an automatic recount pursuant to section 204C.35, subd. 1 (2006), the Canvassing Board's declaration of results for that race will normally not be made on the same day that the Board initially convenes. It will be made, nevertheless, when the Board reconvenes following recess for the conduct of the recount. Minn. Stat. § 204C.35, subd. 1(c) (2006) states:

A recount must not delay any other part of the canvass. The results of the recount must be certified by the canvassing board as soon as possible.

If faced with this issue, a court would likely give strong deference to the importance of prompt action by the Secretary in certifying the names of the nominees to the county auditors given that the limited time for general election ballot preparation will have been further reduced by the recount.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

(651) 297-1141 (Voice)  
(651) 297-1235 (Fax)



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON  
ATTORNEY GENERAL

September 19, 2008

SUITE 1800  
445 MINNESOTA STREET  
ST. PAUL, MN 55101-2134  
TELEPHONE: (651) 297-2040

Mr. Mark Ritchie  
Secretary of State  
180 State Office Building  
100 Rev. Dr. Martin Luther King Jr. Blvd.  
St. Paul, MN 55155-1299

Dear Secretary Ritchie:

I thank you for your correspondence dated September 17, 2008 concerning composition of the State Canvassing Board (the "Board").

You point out that at its meeting on September 16, 2008, the Board approved a plan for a recount of the primary election ballots for the office of Supreme Court Associate Justice seat 4 as required by Minn. Stat. § 204C.35, subd. 1 (2006).<sup>1</sup> According to the recount plan, the Board is scheduled to reconvene on Sunday, September 21, 2008 to canvass the recounted returns. You enclosed a letter you received from Supreme Court Chief Justice Eric J. Magnuson, a member of the Board, which states that because the state-wide recount "involves, at least indirectly," a sitting member of the supreme court, all other members of the court have elected to recuse themselves from sitting on the Board "to avoid any appearance of impropriety," and consequently will not attend the September 21 meeting. In light of these facts you pose the following questions:

1. Is the secretary of state permitted to appoint district court judges to fill vacancies in the membership of the State Canvassing Board when no supreme court justices are available to attend the board?
2. If so, is the secretary of state required to make such appointments?

Minn. Stat. § 204C.31, subd. 2 (2006) provides:

**State Canvassing Board.** The State Canvassing Board shall consist of the secretary of state, two judges of the supreme court, and two judges of the district court selected by the secretary of state. None of the judges shall be a candidate at the election. If a judge fails to appear at the meeting of the canvassing board, the secretary of state shall fill the vacancy in membership by selecting another judge

<sup>1</sup> The recount plan also provided for recount of the Independence Party primary for state representative in District 3A.



who is not a candidate at the election. Not more than two judges of the Supreme Court shall serve on the canvassing board at one time.

Standing alone, the wording of that subdivision would seem to suggest that either a supreme court judge or district court judge may be appointed to take the place of a supreme court judge who fails to appear. The only stated qualification on appointment of a replacement is that the replacement judge not be a candidate at the election. In addition, the statement that not more than two supreme court judges may serve implies that the panel could include more than two district judges and less than two supreme court judges.<sup>2</sup>

However, Minn. Const. art. VII, § 8 provides:

**Election returns to secretary of state; board of canvassers.** The returns of every election for officeholders elected statewide shall be made to the secretary of state who shall call to his assistance two or more of the judges of the supreme court and two disinterested judges of the district courts. They shall constitute a board of canvassers to canvass the returns and declare the result within three days after the canvass.

While the Constitution is silent on the matter of filling of vacancies on the Board, the plain language states that the Board is to consist of two or more supreme court judges, and exactly two judges of district court.<sup>3</sup>

In accordance with Minn. Stat. § 645.17 (2006), statutes should be construed, when possible, to be consistent with the Constitution. Therefore, we do not believe that

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<sup>2</sup> Prior to 1993, the subdivision read as follows:

Subd. 2. **State Canvassing Board.** The state canvassing board shall consist of the secretary of state, two judges of the supreme court, and two judges of the district court selected by the secretary of state. None of the judges shall be a candidate at the election. If a judge fails to appear at the meeting of the canvassing board, the secretary of state shall fill the vacancy in membership by selecting another judge *from either court* who is not a candidate at the election. Not more than two judges of the supreme court shall serve on the canvassing board at one time.

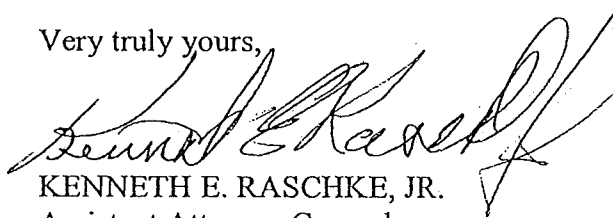
(Emphasis added.) 1993 Minn. Laws ch. 223, § 13 permitted appointment of court of appeals judges in lieu of supreme court judges, and deleted the phrase "from either court" from the sentence dealing with appointing replacements. 1997 Minn. Laws ch. 147, § 39 removed the reference to court of appeals judges.

<sup>3</sup> While we have not located any documented legislative history, we understand that the 1997 amendment removing reference to the court of appeals judges from section 204C.31, subd. 2 was made to bring the statute back into line with the constitutional language.

section 204C.31, subd. 2 may be construed to authorize appointment of a district court judge by the secretary of state to replace a supreme court judge who fails to attend the canvassing board. You have fulfilled your duties by calling to your assistance two judges of the district court and two judges of the supreme court. Since you have been informed by the Chief Justice that no judge of the supreme court will attend the Board meeting, any attempt to appoint substitute judges would be futile and would only serve to delay completion of the Board's business, and thus unnecessary. Provided you and the two district court judges you have appointed attend the canvassing board meeting, there will be a quorum present and able to take action. I further understand you have made arrangements for additional district court judges to be available in the event one or more of the district court judges does not attend the meeting.

For the foregoing reasons we answer your question in the negative.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kenneth E. Raschke, Jr.", is written over the typed name and title.

KENNETH E. RASCHKE, JR.  
Assistant Attorney General

(651) 297-1141 (Voice)  
(651) 297-1235 (Fax)





# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON  
ATTORNEY GENERAL

September 25, 2008

SUITE 1800  
445 MINNESOTA STREET  
ST. PAUL, MN 55101-2134  
TELEPHONE: (651) 297-2040

Mr. James Gelbmann  
Deputy Secretary of State  
180 State Office Building  
100 Rev. Dr. Martin Luther King Jr. Blvd.  
St. Paul, MN 55155-1299

Dear Mr. Gelbmann:

I thank you for your correspondence dated September 24, 2008.

You state that a candidate in the Republican primary election for State Senate District 16 has requested a discretionary candidate recount pursuant to Minn. Stat. § 204C.35, subd. 2 (2006), as amended by 2008 Minn. Laws ch. 336, § 3. In a letter to the Secretary of State and the Elections Director, the candidate takes the position that, in conducting the recount it is necessary to review "all ballot inventories" in order to ascertain the number of validly cast ballots in the District 16 Republican primary. You ask whether the matters requested by the candidate in that regard are the proper subject of a recount as defined by Minn. Stat. § 204C.35.

To our knowledge, the term "ballot inventories" does not appear in the statutes or rules relating to elections. Therefore, it is not clear to what particular documents or information the candidate is referring. As you point out, Minn. Stat. § 204C.35, subd. 3 (2006) provides.

**Scope of recount.** A recount conducted as provided in this section is limited in scope to the determination of the number of votes validly cast for the office to be recounted. Only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process.

That subdivision expressly limits the election materials that may be consulted in a recount. Pursuant to Minn. Stat. § 204C.24, subd. 1 (2006), summary statements to be certified by the election judges in each precinct are required to contain the following information for each kind of ballot:

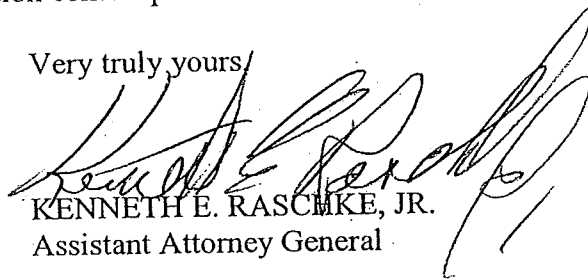
(a) the number of votes each candidate received or the number of yes and no votes on each question, the number of undervotes or partially blank ballots, and the number of overvotes or partially defective ballots with respect to each office or question;

(b) the number of totally blank ballots, the number of totally defective ballots, the number of spoiled ballots, and the number of unused ballots;

- (c) the number of individuals who voted at the election in the precinct;
- (d) the number of voters registering on election day in that precinct; and
- (e) the signatures of the election judges who counted the ballots certifying that all of the ballots cast were properly piled, checked, and counted; and that the numbers entered by the election judges on the summary statements correctly show the number of votes cast for each candidate and for and against each question.

The information referred to in items (a) and (b) above can be described as an "inventory," *i.e.*, itemized record, of each precinct's ballots. To the extent that such information may be relevant to determining the number of votes cast for each candidate in the Republican primary, it might be considered. However, it is not clear in what connection that data would come into play inasmuch as the scope of the recount and canvass thereof would not extend beyond the resolving of individual ballot challenges, and the counting of the ballots judged to be cast for each Republican candidate. Any other issues relating to the propriety of the election procedures followed that might be suggested by the summary statements or other available information would be more properly addressed by an election contest pursuant to Minn. Stat. ch. 209.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON  
ATTORNEY GENERAL

SUITE 1800  
445 MINNESOTA STREET  
ST. PAUL, MN 55101-2134  
TELEPHONE: (651) 297-2040

November 6, 2008

The Honorable Mark Ritchie  
Secretary of State  
180 State Office Building  
100 Rev. Dr. Martin Luther King Jr. Blvd.  
St. Paul, MN 55155-1299

Dear Secretary Ritchie:

You have asked this Office to clarify the authority and procedure for a losing candidate in the general election to waive the automatic recount to which the candidate may be entitled pursuant to Minn. Stat. § 204C.35 (2008).

As you know, section 204C.35, subdivision 1(b) provides that, in the state general election, the State Canvassing Board is required to conduct a manual recount of ballots whenever the difference in votes between a losing candidate and the winning candidate for certain state and federal offices is less than one half of one percent of the total votes counted for that office.<sup>1</sup> Paragraph (e) of that subdivision, however, states:

A losing candidate may waive a recount required pursuant to this section by filing a written notice of waiver with the canvassing board.

The statute does not specify any particular form for the waiver. Accordingly, any writing that is directed to the State Canvassing Board and signed by the candidate, expressly stating that he or she thereby waives, in accordance with paragraph(e) of section 204C.35 the recount otherwise required by Minn. Stat. § 204C.35, subd. 1, should be sufficient to satisfy the statute. While it is not statutorily required, you may in developing any form wish to consider requesting that the signature be attested by a notary. It would also be good practice for the Canvassing Board to follow up with the candidate to confirm the authenticity of any waiver submitted pursuant to paragraph (e).

To be of practical effect, the waiver should be filed in time to be presented to the Canvassing Board at its meeting on the second Tuesday following the general election, at which time the recount would otherwise be ordered.

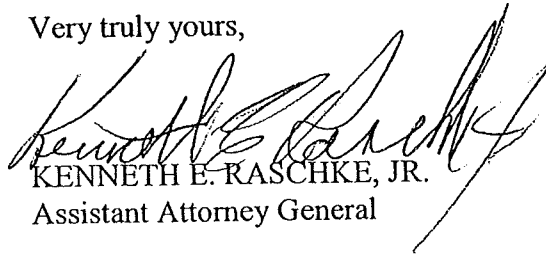
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<sup>1</sup> If 400 or fewer votes were cast, the threshold differential is ten votes.

The Honorable Mark Ritchie  
November 6, 2008  
Page 2

If you have further questions, please feel free to contact this Office.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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AG: #2337292-v1



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON  
ATTORNEY GENERAL

November 17, 2008

SUITE 1800  
445 MINNESOTA STREET  
ST. PAUL, MN 55101-2134  
TELEPHONE: (651) 297-2040

The Honorable Mark Ritchie  
Secretary of State  
180 State Office Building  
100 Rev. Dr. Martin Luther King Jr. Blvd.  
St. Paul, MN 55155-1299

**Re: Canvass of Rejected Absentee Ballots**

Dear Secretary Ritchie:

You request legal advice as to whether Minnesota law allows returned absentee ballots that were rejected by election judges pursuant to Minn. Stat. § 203B.12, subd. 2 (2008) to be reviewed in connection with the upcoming state-wide recount of the votes cast in the November 4 election for the U.S. Senate.

## ABSENTEE BALLOT PROCESS

A person voting by absentee ballot, after marking the ballot in the presence of another registered voter, seals the ballot in a ballot envelope provided with the absentee voting materials. The ballot envelope is then placed into a return envelope, upon which is printed a "certificate of eligibility," to be signed and sworn to by the voter. The return envelope also contains a statement by the voter's witness that the unmarked ballot was displayed to the witness, the voter marked the ballot in the presence of the witness and, if not previously registered, the voter provided proof of residence required by Minn. Stat. § 201.061, subd. 3 (2008). *See* Minn. Stat. §§ 203B.07, 203B.08 (2008). The return envelope is then sealed and mailed or delivered by an agent to the county auditor or municipal clerk. Minn. Stat. § 203B.08 (2008).<sup>1</sup>

On election day the unopened return envelopes are delivered to the election judges. Minn. Stat. §§ 203B.08, subd. 3, 203B.12, subd. 1 (2008). Two or more judges examine each return envelope. A return envelope is "Accepted" if a majority of the judges are satisfied that:

- (1) the voter's name and address on the return envelope are the same as the information provided on the absentee ballot application;

---

<sup>1</sup> Voters may also complete absentee ballots in person during the 30 days preceding the election at the office of the county auditor or other place designated by the auditor. Minn. Stat. § 203B.081 (2008).

- (2) the voter's signature on the return envelope is the genuine signature of the individual who made the application for ballots and the certificate has been completed as prescribed in the directions for casting an absentee ballot, except that if a person other than the voter applied for the absentee ballot under applicable Minnesota Rules, the signature is not required to match;
- (3) the voter is registered and eligible to vote in the precinct or has included a properly completed voter registration application in the return envelope; and
- (4) the voter has not already voted at that election, either in person or by absentee ballot.

Minn. Stat. § 203B.12, subd. 2 (2008). The ballot envelopes are removed from the "Accepted" return envelopes and placed unopened in a separate absentee ballot container. *Id.*, subd. 4. After the last election-day mail delivery, each "Accepted" ballot envelope is opened, and the ballot contained therein is initialed by the judges and deposited in the ballot box.

If a majority of the election judges examining a return envelope find that the voter has failed to meet one or more of the above requirements, the return is "Rejected." The "Rejected" return envelopes are returned unopened to the county auditor.<sup>2</sup>

The procedures applicable to absentee ballots submitted by military personnel and persons residing outside the United States differ in certain respects from that described above. *See* Minn. Stat. §§ 203B.13-203B.27 (2008).<sup>3</sup> However, the ultimate treatment of the "Accepted" and "Rejected" ballot return envelopes is similar.

#### APPLICABLE LAW

The purpose and scope of an administrative recount pursuant to Minn. Stat. § 204C.35, subd. 3 (2008) is as follows:

**Scope of recount.** A recount conducted as provided in this section is limited in scope to the determination of the number of votes validly cast for the office to be recounted. **Only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process.**

---

<sup>2</sup> The "Accepted" return envelopes from which ballots have been removed are also retained and returned to the county auditor.

<sup>3</sup> For example, pursuant to Minn. Stat. § 203B.23, subd. 2 (2008), an absentee ballot board examines all returned ballot envelopes immediately during the thirty days before the election, and a return envelope that is rejected at least five days before the election is treated as a "spoiled" ballot and the voter may submit a replacement in lieu thereof.

*Id.*, subd. 3 (Emphasis added). Likewise, the rules of the Secretary of State relating to recounts are directed to the recounting of "ballots cast" (Minn. R. 8235.0200) and "voted ballots" (Minn. R. 8235.0300, 8235.0700).

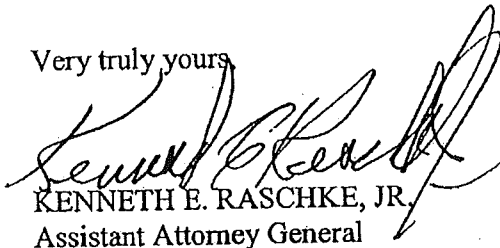
Courts that have reviewed this issue have opined that rejected absentee or provisional ballots are not cast in an election. *McDonald v. Secretary of State*, 153 Wash.2d 201, 204, 103 P3d 722, 723 (2004) (review of rejected absentee ballots not within the scope of statutory recount); *Nguyen v. Nguyen*, 158 Cal. App.4th 1636, 1665, N.27 (Cal. App. 2008) (registrar not permitted by statute to count rejected provisional ballots during recount). The Hand Count Instructions in the 2008 Recount Guide prepared by your office similarly state:

This is an **administrative** recount held pursuant to M.S. 204C.35 and M.R. 8235. It is **not** to determine who was eligible to vote. It is **not** to determine if campaign laws were violated. It is **not** to determine if absentee ballots were properly accepted. It is **not** - except for recounting the ballots - to determine if judges did things right. It is simply to physically recount the ballots **for this race!**

(Emphasis in original.) Further, your office has not advised us of any previous recount in Minnesota that has included reconsideration of rejected absentee ballot return envelopes.

This is not to suggest that there is no remedy for the wrongful rejection of absentee ballots. Minn. Stat. ch. 209 (2008) sets forth the process for an eligible voter or candidate to commence a judicial election contest to challenge, among other things, "an irregularity in the conduct of an election."

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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# STATE OF MINNESOTA

## OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON  
ATTORNEY GENERAL

September 1, 2009

SUITE 1800  
445 MINNESOTA STREET  
ST. PAUL, MN 55101-2134  
TELEPHONE: (651) 297-2040

Ms. Laurie Beyer-Kropuenske  
Director, Information Policy Analysis Division  
201 Administration Building  
50 Sherburne Avenue  
St. Paul MN 55155

Dear Ms. Beyer-Kropuenske:

I thank you for your correspondence dated August 3, 2009.

You request an opinion of the Attorney General regarding the authority of a state agency commissioner to delegate "the powers inherent in the role of responsible authority (RA) under the Minnesota Statutes, Chapter 13 to a subordinate employee."

As noted in Op. Atty. Gen. 629a, May 9, 1975, this Office does not, as a rule, render official Opinions on broadly hypothetical questions. In addition, given their advisory nature, Attorney Generals' Opinions are generally rendered only at the request of the government agency whose authority or duties are at issue. The question you pose relates primarily to the authority of state agency heads other than the commissioner of administration, for whom the Attorney General may subsequently be required to provide legal advice or representation in a variety of circumstances as yet unknown. See Minn. Stat. § 8.06 (2008). For these reasons we decline to render a formal Opinion that purports to definitively answer the question you pose for all purposes. I can however, offer the following comments, which I hope will be helpful.

The Minnesota Government Data Practices Act ["MGDPA"], assigns a variety of functions to an official denominated as the "responsible authority" for each state agency, statewide system or political subdivision. Minn. Stat. § 13.02, subd. 16 (2008) defines "responsible authority" for a state agency or statewide system as:

The state official designated by law or by the commissioner [of administration] as the individual responsible for the collection, use and dissemination of any set of data on individuals, government data, or summary data.

In some circumstances, the commissioner of a state department is expressly designated by statute as the responsible authority for certain categories of data. See, e.g., Minn. Stat. § 13.46, subd. 10(1) (2008) (Human Services). In other cases, responsibility for collecting and maintaining particular data is statutorily assigned to a departmental official other than the commissioner. See, e.g., Minn. Stat. §§ 299F.04, subd. 3a, 299F.05 (State Fire Marshal), 299L.036 (Director of Alcohol and Gambling Enforcement).



For instances in which the statutes do not specify such responsibility, Minn. R. 1205.0200, subp. 13, adopted by the commissioner of administration, provides:

**Responsible authority in state agencies.** In state agencies, the responsible authority shall be as follows, unless otherwise provided by state law: for departments, the commissioner of the department; for constitutional offices, the constitutional officer; for the University of Minnesota, the individual appointed by the Board of Regents; for all other state agencies, the chief executive officer, or if none, then an individual chosen by the agency's governing body.

In a memorandum accompanying your letter, you indicate that by identifying the commissioner of a state department as the default "responsible authority" for departmental data, the language of Rule 1205.0200 could potentially preclude a commissioner from delegating his or her "role as responsible authority" to any other person in the absence of express statutory authority for such delegation.

Your memorandum goes on to note, however, that Minn. Stat. § 15.06, subd. 6 (2008) relating to the heads of state departments provides:

**General powers of commissioners.** Except as otherwise expressly provided by law, a commissioner shall have the following powers:

(1) to delegate to any subordinate employee the exercise of specified statutory powers or duties as the commissioner may deem advisable, subject to the commissioner's control; provided, that every delegation shall be made by written order, filed with the secretary of state; and further provided that only a deputy commissioner may have all the powers or duties of the commissioner;

(2) to appoint all subordinate employees and to prescribe their duties; provided, that all departments and agencies shall be subject to the provisions of chapter 43A.

The memorandum concludes that this statutory language controls over Rule 1205.0200 and permits a commissioner to delegate the "role of responsible authority" to subordinate employees, subject to the commissioner's control.

As a general proposition, public officials and entities, even in the absence of express authority, may delegate administrative and ministerial functions to subordinate personnel. *See, e.g., Wilson v. City of Minneapolis*, 168 N.W.2d 19, 22-23 (Minn. 1969); *Finley v. Ind. Sch. Dist. No. 566*, 359 N.W.2d 749, 751 (Minn. Ct. App. 1985); Op. Atty. Gen. 125A-64, April 9, 1980. Consequently, regardless of whether the identity of the responsible authority is established expressly by statute or by rule, the identified official is not necessarily required to perform all of the specified functions personally. Indeed, the MGDPA itself and Department of Administration rules both indicate that many of the ministerial functions assigned to the responsible authority

may be performed by departmental staff members designated by the responsible authority. *See, e.g.,* Minn. Stat. §§ 13.03, subd. 3, 13.04, subd. 3 and Minn. R. 1205.0900.<sup>1</sup>

A public official may not generally delegate those duties that call for the exercise of judgment and discretion. *See, e.g.,* *Wilson; Finley*; Ops. Atty. Gen. 125a-64, April 9, 1980, 1007, July 8, 1977. That prohibition is overcome, however, where the legislature provides statutory authorization for such a delegation. *See, e.g.,* *Nelms v. Civil-Serv. Comm'n*, 220 N.W.2d, 300, 301 (Minn. 1974). In that regard, Minn. Stat. § 15.06, subd. 6, in broad terms, expressly authorizes a departmental commissioner to delegate the exercise of such powers and duties "as the commissioner may deem advisable" to subordinates, subject to the commissioner's control. That provision does not contain express exceptions for any specific powers.<sup>2</sup> Nor do any other statutes appear to contain language prohibiting delegation of any responsible authority functions under the MGDPA.<sup>3</sup>

Therefore, it seems clear that, as a general matter, commissioners of state departments are authorized by section 15.06 to delegate the exercise of powers necessary to fulfill the responsibilities of a "responsible authority" under the MGDPA, including those calling for the exercise of judgment and discretion. *Cf. Independent Sch. Dist. No. 276 v. Department of Ed.*,

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<sup>1</sup> That rule provides in part:

Pursuant to Minnesota Statutes sections 13.02 to 13.06, the responsible authority shall have the authority to:

...

E. where necessary, direct designees to perform the detailed requirements of the act and this chapter under the general supervision of the responsible authority.

This authority is not expressly limited to the functions performed under statutes that refer specifically to a "responsible authority or designee." *See, e.g.,* Minn. Stat. §§ 13.03, subd. 3(a), (c), (f), 13.04, subd. 3, 13.43, subd. 11 (2008).

<sup>2</sup> *But see* Minn. Stat. § 45.024, subd. 2 (2008) which contains express authority for the commissioner of commerce to delegate authority to make final decisions in specific contested case and rulemaking matters, which is described as being "in addition to" the delegation authority granted pursuant to section 15.06.

<sup>3</sup> *Cf.* Minn. Stat. § 116C.03, subd. 2 (2008) which states:

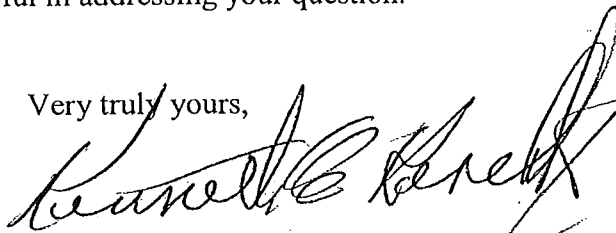
Notwithstanding the provisions of section 15.06, subdivision 6, members of the [environmental quality] board may not delegate their powers and responsibilities as board members to any other person.

256 N.W.2d 619 (Minn. 1977); (Section 15.06 authorized commissioner's delegation of authority to conduct investigations and make decisions in special education matter).

However, the exercise of such delegated powers remains subject to the commissioner's control. Thus the statute does not permit delegation of the power itself, or abdication of the commissioner's ultimate responsibility to assure that the statutory duties imposed upon the "responsible authority" are carried out. *See, e.g., Minn. State College Bd. v. Public Emp. Rel. Bd.*, 228 N.W.2d 551, 559 (Minn. 1975); *Rockwell v. State Bd. of Ed.*, 6 N.W.2d 251, 261 (Minn. 1942). Therefore, while we would agree that case law, and section 15.06 do provide broad authorization for commissioners of state departments to delegate authority to carry out statutory functions of a responsible authority, we are not inclined to characterize that authority as permitting delegation of the "role" of responsible authority *per se*.

I hope the foregoing discussion is helpful in addressing your question.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

(651) 297-1141 (Voice)  
(651) 297-1235 (Fax)

Enclosures: Op. Atty. Gen. 629a, May 9, 1975  
Op. Atty. Gen. 125a-64, April 9, 1980  
Op. Atty. Gen. 1007, July 8, 1977

AG: #2494805-v1



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON  
ATTORNEY GENERAL

October 16, 2009

SUITE 1800  
445 MINNESOTA STREET  
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TELEPHONE: (651) 297-2040

Mr. Paul Ratwik  
Ms. Erin Ische  
Ratwik, Roszak & Maloney, P.A.  
Suite 300, 730 Second Avenue S  
Minneapolis, MN 55402

Dear Mr. Ratwik and Ms. Ische:

I thank you for your correspondence dated August 4, 2009 on behalf of TEAM Academy.

You state that TEAM Academy is a charter school, organized under Minn. Stat. § 124D.10, which is located in Waseca, Minnesota. TEAM Academy contracts with outside entities for certain services. Specifically, TEAM Academy contracts with Independent School District No. 829, Waseca Public Schools (the "District") for Internet and information technology services, special education services, and music services. TEAM Academy also leases space in one of the District's buildings. The service contracts and the lease agreement are renewed annually each summer.

You also state that the District employs the spouses of two current members of TEAM Academy's Board of Directors. In addition, the District employs a parent of TEAM Academy's Executive Director. Further, one current TEAM Academy Board member was involved in the initial start-up of TEAM Academy while she was employed by the District, which was TEAM Academy's sponsor. This Board member's initial involvement was primarily in the nature of developing the charter school's special education assurance plan. TEAM Academy's Executive Director and one of its current Board members are on an extended leave of absence from the District pursuant to Minnesota Statutes section 124D.10, subdivision 20.

You note that the 2009 legislature made certain amendments to Minn. Stat. § 124D.10, subd. 4a relating to conflicts of interest as follows:

Subd. 4a. **Conflict of interest.** (a) ~~A member of a charter school board of directors~~ An individual is prohibited from serving as a member of the charter school board of directors ~~or as if the individual, an immediate family member, or the individual's partner is an owner, employee or agent of or a contractor with a for-profit or nonprofit entity with whom the charter school contracts, directly or indirectly, for professional services, goods, or facilities. A violation of this prohibition renders a contract voidable at the option of the commissioner or the charter school board of directors.~~ A member of a charter school board of

directors who violates this prohibition ~~shall be~~ is individually liable to the charter school for any damage caused by the violation.

(b) No member of the board of directors, employee, officer, or agent of a charter school shall participate in selecting, awarding, or administering a contract if a conflict of interest exists. A conflict exists when:

(1) the board member, employee, officer, or agent;

(2) the immediate family of the board member, employee, officer, or agent;

(3) the partner of the board member, employee, officer, or agent; or

(4) an organization that employs, or is about to employ any individual in clauses (1) to (3),

has a financial or other interest in the entity with which the charter school is contracting. A violation of this prohibition renders the contract void.

(c) Any employee, agent, or board member of the authorizer who participates in the initial review, approval, ongoing oversight, evaluation, or the charter renewal or nonrenewal process or decision is ineligible to serve on the board of directors of a school chartered by that authorizer.

(b) (d) An individual may serve as a member of the board of directors if no conflict of interest under paragraph (a) exists.

~~(e) A member of a charter school board of directors that serves as a member of the board of directors or as an employee or agent of or a contractor with a nonprofit entity with whom the charter school contracts, directly or indirectly, for professional services, goods, or facilities, must disclose all potential conflicts to the commissioner.~~

~~(e) (e) The conflict of interest provisions under this subdivision do not apply to compensation paid to a teacher employed by the charter school who also serves as a member of the board of directors.~~

~~(e) (f) The conflict of interest provisions under this subdivision do not apply to a teacher who provides services to a charter school through a cooperative formed under chapter 308A when the teacher also serves on the charter school board of directors.~~

2009 Minn. Laws ch. 96, art. 2, § 41. That section further provides:

EFFECTIVE DATE.(a) This section is effective the day following final enactment and applies to all contracts and affidavits approved and contracts entered into or modified beginning August 1, 2009, unless otherwise specified in this effective date.

(b) Subdivision 3, paragraph (b), clause (2), applies to an authorizer seeking approval to charter a school after the effective date of this act. The changes in subdivision 3, paragraph (b), clause (2), shall not apply to a sponsor under Minnesota Statutes 2008, section 124D.10, that is a party to a charter contract on the effective date of this act except that subdivision 3, paragraph (b), clause (2), item (iv), applies to such sponsors beginning July 1, 2011.

(c) The changes in subdivision 9 are effective the day following final enactment and apply to the 2010-2011 school year and later.

Based upon the foregoing, you request a written opinion "pursuant to Minnesota Statutes section 8.07" on several specific questions.

As you know, under Minnesota law, the Attorney General's Office has limited authority. For instance, it is authorized to provide legal opinions in appropriate circumstances to attorneys for units of local government, but does not have jurisdiction to provide legal advice or opinions to other local officials or to private citizens. Specifically, Minn. Stat. § 8.07 provides in part:

~~The attorney general on application shall give an opinion, in writing, to county, city, town, public pension fund attorneys, or the attorneys for the board of a school district or unorganized territory on questions of public importance; and on application of the commissioner of education shall give an opinion, in writing, upon any question arising under the laws relating to public schools. On all school matters such opinion shall be decisive until the question involved shall be decided otherwise by a court of competent jurisdiction.~~

(Emphasis added.) While a charter school is a public school, and a part of the state's public education system, it is not itself a "school district" as that term is generally used in the statutes. See Minn. Stat. § 124D.10, subd. 4, 7 (Supp. 2009). Consequently, we are not in a position to provide an opinion pursuant to section 8.07 in response to your request. Notwithstanding this limitation, I can provide the following comments relating to your questions, which I hope will be helpful.

**Question 1.**

**Is a public school district a “nonprofit entity” for purposes of Minnesota Statutes section 124D.10, subdivision 4a(a) (2009)?**

There does not appear to be any statutory definition of the term “nonprofit entity” for purposes of section 124D.10. As a general proposition, however, school districts within its scope. School districts are generally referred to as “public” or “municipal” corporations, or “political subdivisions” of the state, as opposed to nonprofit entities. *See, e.g., Village of Blaine v. Independent Sch. Dist. No. 12*, 138 N.W.2d 32, 37-38 (Minn. 1965) (School districts are public corporations); Minn. Stat. §§ 15.411, subd. 1; 123A.21, 126, subd. 1; 471.85 (2008); *see also Ketchikan v. Cape Fox Corp.*, 85 F.3d 1381, 1386 (9th Cir. 1996) (city as municipal corporation is not a nonprofit organization); *USAA Ins. Co. v. Houston Gen. Ins. Co.*, 559 N.W.2d 98, 101 (Mich. App. 1996) (common and approved usage of “nonprofit organization” does not include government entities). Where the legislature intends governmental entities to be included with private entities within the scope of a statute, they are generally mentioned separately. *See, e.g., Minn. Stat. § 15.991, subd. 1 (2); 18D.01, subd. 8; 181.063, 181.58 (2008).*

**Question 2.**

**Do the conflict of interest provisions adopted by the 2009 legislature in Minnesota Statutes section 124D.10, subdivision 4a apply retroactively?**

Minn. Stat. § 645.21 (2008) states:

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No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.

However, present and future application of the prohibitions contained in subdivision 4a based upon board members’ or administrators’ personal direct or imputed interests in pre-existing contracts would not necessarily be considered to be a “retroactive” application. Further, this “effective date” language appended to the amendments to section 124D.10 states that it applies to all contracts “approved ... and entered into or modified beginning August 1, 2009.”

**Question 3.**

**Do the conflict of interest provisions set forth in Minnesota Statutes section 124D.10, subdivisions 4a(a) and 4a(c), apply to a charter school’s executive director, an ex officio nonvoting board member?**

The prohibitions contained in subdivision 4a(a) and (c) both disqualify persons from membership on the “board of directors” of a charter school on the basis of specified conflicts of

interest, whereas subdivision 4a(b), which restricts specified contract-related actions, applies more broadly to employees, officers, and agents of a charter school, in addition to board members. Cf. *Minnesota Ed. Assn v. Bennett*, 321 N.W.2d 395, 398 (Minn. 1982) (superintendent not member of school board for purposes of Open Meeting Law); *Jensen v. Ind. Comm. Sch. Dist. #1*, 199 N.W. 911, 912 (Minn. 1924) (superintendent not a board member who may be removed only for cause).

#### Question 4.

**Does Minnesota Statutes section 124D.10, subdivision 4a(b), apply to all entities, or does it apply only to for-profit or nonprofit entities?**

Subdivision 4a(b) specifies that a conflict of interest exists when a charter school board member, employee, officer, or agent or other person having a specified relationship to such an official "has a financial or other interest in the entity with which the charter school is contracting." Since the term "entity" is unqualified, it presumably refers to any public or private entity capable of contracting. The term "entity" is generally broadly defined as any "organization (such as a business or governmental unit) that has a legal identity apart from its members." *Black's Law Dictionary* (8th ed. 2004). It is plainly a broader term than "for-profit or nonprofit entity" referred to in subdivision 4a(a). In a number of contexts the legislature uses the term in specific reference to government agencies, including school districts. See, e.g., Minn. Stat. §§ 13.073, subd 4; 16B.122, subd. 1 (f); 123B.51, subd. 5a, 124D.05, subd. 3 (2008). See also *PBA Local 38 v. Woodbridge Police Dept.*, 832 F. Supp. 808, 823 (DNJ 1993) (government agencies are "entities" within meaning of federal wiretap law); *City of Seattle v. State Dept. of Labor and Ind.*, 965 P2d 619, 622 (Wash 1998) (city is an "entity" subject to electrical licensing law).

You argue that to construe the term "entity" to include a school district would make the application of the provision impossibly broad and unenforceable, contrary to the presumption that the legislature does not intend an absurd result. See Minn. Stat. § 645.17(1) (2008). However, in defining conflicts of interest for purposes of subdivision 4a(b) in terms of all financial and "other" interests of board members, officers, employees, and agents, plus those of their family members, partners,<sup>1</sup> employers, and prospective employers, the legislature plainly intended to address such interests in the broadest possible terms. Therefore, there seems no basis upon which to presume an intention to exclude school districts or other governmental bodies from its scope.

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<sup>1</sup> The term "partner" is undefined and may refer to any persons associated with each other "in an area or sphere of common interest." *The American Heritage College Dictionary* (Third ed. 2000).



Questions 5, 6, and 7.

What does it mean to participate in "selecting, awarding or administering" a contract under Minnesota Statutes section 124D.10, subdivision 4a(b)?

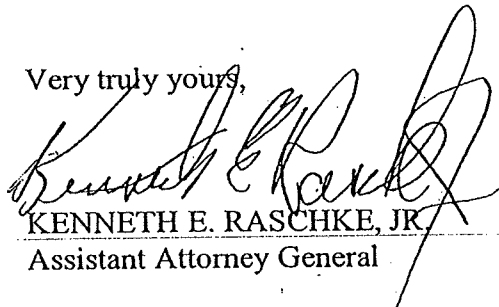
What constitutes a "financial or other interest" for purposes of Minnesota Statutes section 124D.10, subdivision 4a(b)?

What does it mean to participate in the "initial review" for purposes of Minnesota Statutes section 124D.10, subdivision 4a(c)?

As noted in Op. Atty. Gen. 629a, May 9, 1975, Attorney General opinions will not normally be offered on broadly hypothetical questions. The quoted terms in the foregoing questions are not defined for purposes of the statute, and are susceptible to broad construction. It is beyond the scope of the Attorney General's opinion to apply those provisions to the facts at issue here.

I thank you again for your correspondence.

Very truly yours,



KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

LORI SWANSON  
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November 10, 2009

Ms. Michelle Moren  
Lake of the Woods County Attorney  
206 - 8th Avenue SE, Suite 240  
Baudette, MN 56623

Dear Ms. Moren:

I thank you for your correspondence dated September 29, 2009.

You were appointed in 2007 to fill the unexpired term of the full-time Lake of the Woods County Attorney, who had resigned. You state that during your tenure, the Lake of the Woods County Board determined that the county attorney duties do not require a full-time position, but can be performed by a "half-time" office holder. You ask whether the Lake of the Woods County Board has authority to convert the full-time county attorney position to that of a part-time office.

Minn. Stat. § 388.21 provides:

## **FULL-TIME POSITION; ESTABLISHMENT.**

**Subdivision 1. By county board.** The county board of any county in Minnesota by resolution may provide that the office of the county attorney shall be a full-time position and require that one elected to the office not engage in the private practice of law.

**Subd. 2. In January before filing; salary.** If the office of county attorney is made a full-time position, the action shall be taken at the January meeting prior to the first date on which applicants may file for the office of county attorney. The salary shall be set by the county board as provided in section 388.18, subdivision 2.

As a general matter, absent statutory restrictions or the intervention of vested rights of third parties, local governing bodies may reconsider or rescind any previous actions of the body. *See generally*, 62 C.J.S. Municipal Corporations, § 242 (1999). While the office of county attorney itself is established by the legislature, *see* Minn. Stat. § 388.01, section 388.21 authorizes a county board, in its discretion, to establish a "full-time" position. We cannot infer any legislative intent that a county board's decision, at one point in time, to establish a full-time county attorney office should be considered irreversible. Thus, under this general principle, the county board would have the implied authority to abolish or rescind the "full-time" aspect of the

position. This conclusion is consistent with that reached by the Wabasha District Court in *Nordstrom v. Wabasha Co. Board* (Wabasha Co. Dist. Ct. No. 79-CV-06-958). See *Order and Memorandum* dated December 4, 2006 (copy enclosed).

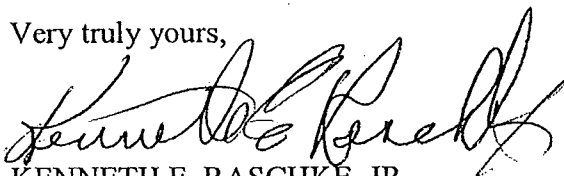
Minnesota law does restrict, however, the authority of a county to reduce a county attorney's salary during his or her term of office. The legislature provided at Minn. Stat. § 388.18, subd. 2 (2008) the following:

The county board . . . shall set by resolution the salary of the county attorney . . . . At the January meeting prior to the first date on which applicants may file for the office of county attorney the board shall set by resolution the minimum salary to be paid the county attorney for the term next following. In the event a vacancy occurs in the office of county attorney the board may set the annual salary for the remainder of the calendar year at an amount less than was set for that year. The board in any case specified in this section may not set the annual salary at an amount less than the minimums provided in subdivision 1 [of Section 388.18] but it may set the salary in excess of such minimums. *The salary of the county attorney shall not be reduced during the term for which the county attorney is elected or appointed.*

Consequently, any reduction in salary to reflect a conversion to part-time status could not be implemented until the next four year term or if a new county attorney was appointed to fill a vacancy.

I thank you again for your correspondence.

Very truly yours,

  
KENNETH E. RASCHKE, JR.  
Assistant Attorney General

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Enclosure: *Nordstrom v. Wabasha Co. Board*, Order and Memorandum,  
dated December 4, 2006.



# STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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May 24, 2010

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Mr. Todd Roth  
Assistant Glenwood City Attorney  
605 S Lakeshore Drive, Suite 1000  
Glenwood, MN 56334

Dear Mr. Roth:

I thank you for your correspondence dated March 29, 2010, on behalf of the City of Glenwood.

You state that the City is considering, as a budget-cutting measure, reducing its police department staff to provide "less than 24-hour coverage." You state further that the Pope County Sheriff has expressed the view that he has no obligation to provide "law enforcement coverage" within any municipality that has employed a police force. Based upon these facts you request the Opinion of this Office on the following questions:

1. May a municipality that employs a police force provide less than 24 hour coverage?

First, I am not aware of any constitutional or statutory provision that requires that all cities to maintain a police force or to provide a specified level of service. *Cf. Taylor v. City of New London*, 536 N.W.2d 901 (Minn. 1995) (city had reasonable basis for disbanding one-man, 40-hour per week police force, and contracting with county for 20-30 hours per week policing service).

Second, some home-rule charters do prescribe maintenance of a police department. We have not reviewed, however, the Glenwood City Charter, and express no opinion upon any requirements it might contain relating to local law enforcement.<sup>1</sup> We also do not opine the public ruling ramifications of the measure under consideration.

Third, it is not clear what is meant by "less than 24-hour coverage." If it is contemplated, for example, that the City's peace officers will neither patrol nor respond to calls for emergency assistance during certain hours, then the City should obviously coordinate that schedule with the County's emergency communication center to assure that emergency calls are routed to the appropriate agency.

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<sup>1</sup> See also Op. Atty. Gen. 629a, May 9, 1975 which indicates that Attorney Generals' Opinions are not generally issued on interpretation of local charters or ordinances.

Finally, I should note that, in the absence of limitations by their employing agencies, peace officers have full powers as such within their jurisdiction at all times regardless of whether they are considered "on-duty" for payroll purposes. *See, e.g., State v. Childs*, 269 Minn. 25 (Minn. 1978); Op. Atty. Gen. 785-L, January 17, 1989.

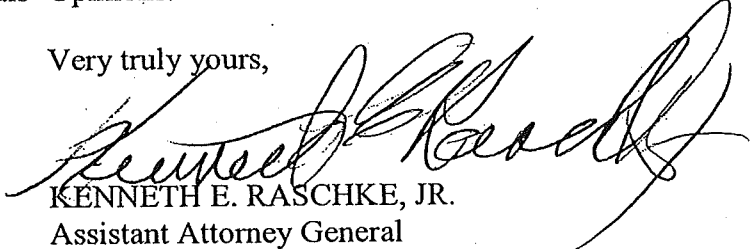
2. Does the County Sheriff have a duty to provide law enforcement coverage within a municipality during the times the municipality's police force does not provide 24 hour coverage?

Given the advisory nature of Attorney Generals' Opinions, they are generally provided only to those agencies, or attorneys for those local governments whose powers or duties are at issue. For instance, an opinion concerning the duties of a county official will not normally be issued in the absence of a request from the county attorney, who is designated by statute as the official's legal advisor. *See Minn. Stat. § 388.051* (2008). Thus, we are not in a position to provide you with an opinion concerning the specific duties of the Pope County Sheriff.

As you have observed, this Office stated in Op. Atty. Gen. 390a-6, October 14, 1997 that the statutory powers and duties of a sheriff extend throughout the county, notwithstanding municipal boundaries or the jurisdiction of municipal police departments. *See also In re Olson*, 300 N.W. 398 (Minn. 1941); Op. Atty. Gen. 733, July 14, 1947. Nevertheless, as an elected county official, a sheriff exercises substantial discretion in determining how best to allocate the resources of his or her department. Thus, the sheriff's office would not necessarily be obligated to provide "law enforcement coverage" at the level or times the City might prefer. If the City wants to assure the availability of particular law enforcement services at particular times, it might consider contracting for those services pursuant to Minn. Stat. § 436.05 (2008).

I hope the foregoing comments are helpful to you. For your convenience, I have enclosed copies of the cited Attorney Generals' Opinions.

Very truly yours,



KENNETH E. RASCHKE, JR.  
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Enclosures: Op. Atty. Gen. 785-L, January 17, 1989  
Op. Atty. Gen. 629a, May 9, 1975  
Op. Atty. Gen. 390a-6, October 14, 1997  
Op. Atty. Gen. 733, July 14, 1947