STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL

ANNUAL REPORT REQUIRED BY

Minnesota Statute Sections 8.08 and 8.15
Subdivision 4 (2013)

Fiscal Year 2014

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INTRODUCTION

This report is intended to fulfill the requirements of Minnesota Statutes Section 8.08 and 8.15, Subdivision 4, for Fiscal Year 2014 (FY 2014).

The Attorney General's Office (AGO) is organized into five sections under the direction of deputy attorneys general: Agency Services, Government Services, Legal Services, Civil Law and Solicitor General. This report contains brief summaries of the services provided to state agencies and other AGO constituencies by these sections.

AGENCY SERVICES

ADMINISTRATIVE LAW

The Administrative Law division provides legal representation to 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 and Rehabilitation Board, Minnesota State Board of Investment, Board of Water and Soil Resources, Minnesota executive branch officials, and many other boards, agencies and commissions. The division also provides legal representation to the Minnesota State Colleges and Universities System and other state agencies in contract, lease and other transactional matters. The division's work during FY 2014 included:

- Provided legal representation to DPS, DNR, and those agencies' current and former Commissioners, as defendants in lawsuits seeking millions of dollars in statutory damages for alleged violations of a federal privacy law concerning disclosure of driver's license information, resulting in a dismissal of these suits pending appeal.
- Provided legal advice to state agency clients on legal issues related to state governmental operations; assisted in drafting and revising leases, licenses and contracts; and advised state agencies on intellectual property matters, including registering trademarks on behalf of a number of state agencies.
- Provided legal advice to the Department of Administration on various real estate matters, including leasing matters, restrictive covenants, easements, land acquisitions, including the purchase of land for the new State Veteran's Cemetery, and various issues related to the title work and leasing of the new Legislative Office Building.
- Provided legal representation to the Minnesota Department of Agriculture in various matters, including a challenge to Minnesota food licensing law by home bakers, food safety violations, food borne illness outbreaks, dairy sales, and pesticide application violations.
- Provided legal representation to the Board of Animal Health.
- Provided legal representation to the Campaign Finance and Public Disclosure Board in the enforcement of lobbyist and campaign finance laws.
- Advised and provided legal representation to 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. Provided legal representation to the Department of Commerce to resolve over 60 contested cases which involved disciplinary action against licensees, including mortgage originators, real estate appraisers, real estate salespersons, collections agencies, securities salespersons, insurance salespersons and notaries public. Provided legal representation to the Real Estate Education, Research and Recovery Fund.
- Issued legal opinions to local governments.

- Provided legal representation to the Minnesota Department of Commerce in connection with the agency's telecommunications, energy, and facilities permitting responsibilities as well as its Weights and Measures division. Represented Commerce before the Minnesota Public Utilities Commission and the Office of Administrative Hearings in matters such as contested utility rate increase petitions and requests to build, site or route large generators, and transmission lines and in telecommunications enforcement litigation.
- Provided legal representation to the Housing Finance Agency (HFA) regarding numerous loans to preserve, maintain and create low and moderate-income, single-family and multi-family housing. Provided legal advice on aspects of HFA activity, including federal, state and local laws and regulations and on multi-family and single-family loan program requirements. Represented HFA in litigation related to real estate in which HFA is named as a defendant. Represented HFA in breach of contract matters and in contested cases.
- Provided legal representation to the Department of Labor and Industry (DLI), including the Construction Codes and Licensing division and its State Board of Appeals, and the Contractor Recovery Fund. Handled numerous disciplinary actions against residential building contractors, remodelers, roofers, electricians, plumbers, boiler operators and manufactured home installers for violations, including unlicensed activities, failure to satisfy judgments, failure to complete jobs and code violations. Represented DLI in over 15 contested cases against licensed and unlicensed individuals. Provided legal advice to DLI, appeared in district court and the court of appeals on matters including prevailing wage investigation and enforcement.
- Provided legal representation and real estate title review to the Land Exchange Board. Prepared title opinions, reviewed deeds, and provided research on Indian title issues involving land exchanges.
- Represented the Commissioner of Minnesota Management and Budget (MMB) in district court actions with respect to claims made against the Torrens Assurance Fund and general fund, including tax forfeiture of real estate. Provided legal representation on bond issuance and refunding by MMB of over $1.6 billion in general obligation bonds.
- Provided legal representation to Minnesota State Colleges and Universities regarding a variety of real estate construction, contract, intellectual property, condemnation and licensing matters.
- Provided legal services to the Minnesota Department of Natural Resources (DNR) on a wide variety of Indian law matters including continued negotiation of Phase II of the 1854 Treaty case (Fond du Lac), implementation of the 1855 Treaty settlement agreement arbitration provision, White Earth settlement land transfers, and issues involving tribal sovereignty and state-tribal jurisdiction.
- Filed an amicus for DNR in federal lawsuit.
- Provided legal representation to DNR before the Office of Administrative Hearings concerning the appeal of DNR's denial to renew a black bear research permit.

- Provided legal representation to DNR in various waters use and appropriation permits and environmental review matters before the Office of Administrative Hearings, in District Court, and the Minnesota Court of Appeals.
- Assisted DNR with real estate acquisitions totaling over $14.8 million and involving approximately 9,797 acres of land.
- Provided legal advice to DNR on various real estate title matters, including ownership of submerged lands, tax forfeitures, easements, probate proceedings, trusts, life estates, adverse possession, bankruptcy, boundary agreements, mineral forfeitures, indemnification, deed restrictions, declarations and protective covenants.
- Provided legal representation to DNR on the potential lease of the Upper Post at Fort Snelling State Park and a mechanic's lien on State owned land.
- Provided legal representation to the Department of Public Safety (DPS) as the plaintiff in a district court action to recover unpaid fees to support the State's 911 and hearing impaired telephone service programs, resulting in a recovery of $2.5 million.
- Provided legal representation to DNR forestry division on various matters, including fire suppression cost collection, bankruptcy, timber trespass, and statutory interpretation.
- Provided legal representation to DNR, MnDOT and BWSR in District Court in numerous quiet title actions and land registration proceedings.
- Provided legal representation to DNR in district court for two road vacation proceedings, two condemnations of school trust land and other cases involving the ownership of a peninsula, an island and the establishment of a cartway.
- Provided legal representation to the Office of Secretary of State in connection with lawsuits involving election procedures and voter registration information.
- Provided legal representation to the Minnesota State Board of Investment involving various investment management agreements and investments.
- Provided legal representation to numerous small boards and agencies and represented those boards in contested matters.
- Provided legal representation to the Department of Revenue in quiet title actions and land registration actions involving tax forfeited land. Advised the DNR in a mechanic's lien matter and a common interest community matter involving tax forfeited land.
- Provided legal representation to MnDOT on various real estate matters, including an encroachment on rail bank property, the relocation of Trunk Highway 53, the leasing of the airspace above Ramp A for a golf facility, an encroachment on trunk highway right of way, and the applicability of the Marketable Title Act to highway right of way.
- Provided legal representation to Minnesota Management and Budget (MMB) and Department of Employment and Economic Development (DEED) on General Obligation bond proceeds funded transactions.

BOARDS AND AGENCIES

The Boards and Agencies division provides legal representation to the Departments of Corrections, Employment and Economic Development, Health, Human Rights, Labor and Industry, Veterans Affairs, and the Client Security Board and the Bureau of Mediation Services.

DEPARTMENT OF CORRECTIONS

Provided a broad range of legal services to the Department of Corrections (DOC) and state correctional facilities. Defended a high volume of lawsuits brought by inmates against the Department involving complex constitutional issues.

DEPARTMENT OF EMPLOYMENT AND ECONOMIC DEVELOPMENT

Provided legal representation to the Minnesota Department of Employment and Economic Development (DEED) and participated in bankruptcy proceedings in order to protect the State's interest in collecting unemployment benefits overpayments.

DEPARTMENT OF HEALTH

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. Provided legal representation to the Minnesota Department of Health (MDH) concerning its regulatory responsibilities and in litigation and administrative enforcement actions. Provided legal advice to MDH with regard to legal issues concerning contracts, leases, and other transactions.

Specific examples of the division's work for the MDH in FY 2014 include the following:

- Licensing Laws Regarding Food, Beverages, Lodging Establishments, Public Pools, and Resorts. Provided legal representation to MDH in enforcement proceedings against individuals who operated unlicensed businesses, including food and beverage establishments and campgrounds and operated businesses in violation of the state food code.
- Licensing Laws Regarding Asbestos-Related Work. Provided legal representation to MDH in litigation resulting from enforcement actions against companies licensed by MDH to conduct asbestos-related work and management activities when the companies fail to comply with prescribed standards.

A significant amount of work in FY 2014 involved providing legal defense of 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 provided legal defense of 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 types of cases include:

- Sexual Abuse of Vulnerable Adults.
- Disqualification Appeals.
- Nursing Home Neglect.

DEPARTMENT OF HUMAN RIGHTS

Provide legal representation to the Department of Human Rights (MDHR) following MDHR's determination that there is probable cause to believe that illegal discriminatory conduct has occurred. Represented MDHR in litigation.

DEPARTMENT OF LABOR AND INDUSTRY

Provided legal representation to the Minnesota Department of Labor and Industry (DLI). Engaged in litigation to enforce occupational safety and health standards, including cases regarding workplace fatalities. Engaged in litigation to enforce Minnesota labor laws, such as the Fair Labor Standards Act, including minimum wage and child labor laws.

DEPARTMENT OF VETERANS AFFAIRS

Provided legal representation to the Minnesota Department of Veterans Affairs (MDVA).

MINNESOTA CLIENT SECURITY BOARD

The Fund reimburses clients who suffer economic loss because of the dishonest conduct of their attorneys. Brought collection actions on behalf of the Minnesota Client Security Board to collect and preserve debt obligations to the Client Security Fund.

REVENUE & SCHOOLS

OVERVIEW

The Revenue/Schools division provides legal representation to the Minnesota Department of Revenue (Revenue). The division also provides legal representation to state agencies in a wide range of bankruptcy matters in Bankruptcy Court. The division provides legal representation to the State's complex and varied educational system, handling most student and some faculty and staff-related matters for the Minnesota State Colleges and Universities (MnSCU) system of 32 separate campuses. In addition to representing the numerous MnSCU campuses, the division also provides legal representation to the Minnesota Department of Education, the Office of Higher Education, and the Perpich Center for Arts Education and the State Academies and State pension funds.

TAX LITIGATION & BANKRUPTCY

In FY 2014, the division represented the Department in over 300 active revenue and bankruptcy litigation cases. In FY 2014, legal efforts in the Division helped secure over $14 million in revenue in corporate, sales/use tax and individual income tax assessments. In addition, the division handled 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 court, federal district court and the federal appellate court (8th Cir.) 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 tax ranging in amounts up to $700 million dollars.

Many of the large bankruptcy cases involve multi-million dollar state investments by the State Board of Investment, multi-million dollar tax debts to Revenue and significant state contracts with vendors or service providers who subsequently declare bankruptcy. The division provides legal representation to various state agencies filing claims in bankruptcy court to recover state funds and protect the state's priority of claims.

Reviewed and responded to numerous 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 and defends or seeks to preserve the priority of state tax liens over the liens and judgments of other claimants.

SIGNIFICANT RESOLVED AND PENDING TAX LITIGATION & BANKRUPTCY CASES:

- Corporate Tax. Multi-National Food Corporation. Provided legal representation in a settlement for $3.5 million in the Minnesota Tax Court in a suit by a large multi-national food corporation which challenged Revenue's assessment of corporate tax of over $3 million. The settlement was higher than the original assessment amount because it also resolved years of corporate tax that were outside the assessment period.

- Corporate Tax. Multi-National Retailer. Obtained a favorable settlement on behalf of Revenue in the Minnesota Tax Court in a suit by a large multi-national retailer challenging Revenue's assessment of corporate tax of about $2 million.
- Corporate Tax. Motorcycle Retailer. Obtained a favorable settlement on behalf of Revenue in the Minnesota Tax Court in a suit by a multi-national motorcycle retailer challenging Revenue's assessment of about $3 million in corporate tax.
- Corporate Tax. Obtained a favorable settlement on behalf of Revenue in the Minnesota Tax Court in a suit by a large multi-national food and commodity company challenging Revenue's assessment of about $1.3 million in corporate tax
- Sales/Use Tax. Obtained a favorable decision in the Minnesota Tax Court and provided legal representation with regard to claims by multiple electric cooperatives appealing Revenue's assessment of $15 million of erroneously refunded sales/use tax.
- Sales/Use Tax. Obtained two favorable decisions in the Minnesota Supreme Court affirming Revenue's assessment of sales/use tax on various retailers.
- Sales/Use Tax. Provided legal representation to Revenue in connection with claims by numerous profitable and large bar and restaurants challenging sales tax assessments of over $4 million.
- Officer Liability Assessment for Corporate Officers. Provided legal representation and obtained numerous favorable decisions at the Minnesota Tax Court affirming Revenue's personal liability assessment of corporate officers for the payment of business's unpaid sales tax of multi-million dollars.
- Individual Income Tax on High Income Residents Claiming Non-Residency. Obtained favorable settlements of over $1 million on behalf of Revenue in several separate suits by multiple high income individuals all challenging Revenue's assessment of income tax and asserting that each was not a resident of Minnesota for the assessment period, but rather a resident of a state with no state income tax.
- Individual Income Tax on High Income Residents Claiming Non-Residency. Provided legal representation in Minnesota Tax Court in suits by several high-income individuals who claim they are residents in a non-income tax state. In two of these cases, the individuals challenged 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.
- 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.

MINNESOTA STATE COLLEGES AND UNIVERSITIES (MNSCU)

The division provides legal representation to the MnSCU in a variety of lawsuits initiated primarily by students and some by former staff against MnSCU. In FY 2014, the division continued to litigate several employment law cases on behalf of MnSCU. The division provided legal 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:

- Multiple Student Claims of Sexual Harassment by a Professor. Obtained a decision granting summary judgment in favor of MnSCU against a claim of sexual harassment and retaliation.
- Student Claim of Violation of First Amendment Rights. Provided legal representation to MnSCU in federal district court against a claim by a student that the school violated his First Amendment Rights when he used social media to threaten and harass another student regarding her disability accommodation.
- U.S. Department of Education, Office for Civil Rights (OCR). Provided legal advice and defended against complaints filed with the OCR, including the dismissal of student claims of alleged discrimination.
- Minnesota Department of Human Rights (MDHR). Obtained several dismissals or findings of no discrimination against various MnSCU campuses.

MINNESOTA DEPARTMENT OF EDUCATION (MDE)

The division provides legal representation to MDE, which administers and oversees the State's K-12 education programs, including charter school issues, 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:

- Commissioner's Authority to Regulate Charter Schools. Obtained favorable decisions at the Minnesota Court of Appeals regarding the Commissioner's authority to enforce the state charter school statute and hold authorizers accountable for overseeing various aspects of charter school administration.
- Special Education. Successfully defended MDE in lawsuits in federal 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.
- Maltreatment of Minors in Schools. Provided legal representation to MDE in several maltreatment hearings contesting MDE's findings of maltreatment by a school worker (such as a teacher, assistant teacher or bus driver). Successfully defended several appeals of MDE's final determination of maltreatment to state district court.

OFFICE OF HIGHER EDUCATION (OHE)

The division provides OHE with legal representation on a variety of issues that arise from OHE's administration of federal and state higher education programs, including (1) student loan and financial aid programs; (2) registration of private and out-of-state public higher education institutions that provide programs in Minnesota; and (3) licensure of private business, trade and correspondence schools.

STATE PENSION BOARDS

The division provides the State Pension Boards (MSRS, PERA & TRA) legal advice and representation on a variety of issues that arise from the Board's administration of the state pension funds including (1) consolidation of other city and county pension funds with the larger state funds; (2) claims for disability status or change in benefits; and (3) challenges to legislation changing aspects of the pension funds.

STATE HIGHWAYS

The State Highway division provides legal services to the Minnesota Department of Transportation (MnDOT). A large part of the division's work involves eminent domain litigation. In addition, the division provides legal advice to MnDOT 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 contractual 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 2014, the division:

- Provided legal representation to MnDOT 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 such as light rail. The division also defends MnDOT against claims that its projects have resulted in inverse takings and provides legal assistance in voluntary sales of real estate for transportation projects.
- Represented the Commissioner in contested case hearings in regulatory matters such as highway turnbacks, and applications for highway advertising device permits.
- Advised MnDOT regarding its programs and offices such as Equal Employment Opportunity, Aeronautics, Railroads and Waterways, Project Development, State Aid, Research and Investment Management, Office of Motor Carrier Services, Office of Environmental Stewardship, and Office of Civil Rights.
- Appeared before the Minnesota Court of Appeals in appeals regarding issues including attorney fee awards in eminent domain actions, a proposed land transfer to a political subdivision, turnback agreements with counties, an application for a permit, inverse condemnation regarding previously taken rights of access.

- Appeared before the federal district court in matters including challenges to MnDOT's implementation of its Disadvantage Business Enterprise Program.
- Provided legal representation to MnDOT in its statutory prevailing wage enforcement responsibilities in attempting to recover unpaid wages for contractors' employees on MnDOT projects.
- Provided representation to the Minnesota National Guard regarding legal matters including contract review and real estate transactions.
- Provided legal representation to and advised MnDOT, Minnesota State Colleges and Universities, and the Minnesota Department of Natural Resources in construction contractor claims.
- Provided legal representation to and advised the Office of the Legislative Auditor in claims regarding the Minnesota Government Data Practices Act.

SOLICITOR GENERAL

This section provides litigation services to a variety of agencies. This includes legal advice and litigation for agencies and officials in all branches of government. The legal representation involves various constitutional issues, as well as employment law and tort claims. The section also provides legal representation to the Public Utilities Commission (PUC).

Examples of litigation include:

- Various civil rights actions brought against state officials in federal and state courts.
- Various challenges to the constitutionality of Minnesota Statutes.
- Defending numerous challenges to state tax laws regulating multistate corporate taxpayers, which could impact approximately $700 million.
- Numerous challenges to interpretation and implementation of Minnesota Data Practices Act.
- State laws subjected to claims of federal preemption and dormant commerce clause challenges.
- Successful defense of state mineral lease sales.

The section provides advice and legal representation of the State government on a broad range of tort and employment issues and claims brought before administrative tribunals, and in state and federal courts. In defending such claims, the section has saved the State millions of dollars.

Employment litigation often includes, claims under the Minnesota Whistleblower statute, Family and Medical Leave Act, Fair Labor Standards, and claims of discrimination and harassment under federal and state anti-discrimination statutes. The section also represents the State in lawsuits involving labor issues. Tort claims against the State, its agencies and employees, typically arise in the form of personal injury and property damage lawsuits. Claims include negligence, medical malpractice, defamation, infliction of emotional distress, assault and battery, excessive use of force, and violations of federal civil rights. Examples of specific cases include: highway crash cases in which the Minnesota Department of Transportation is faulted for inadequate design, construction, or maintenance of state roadways and highways; suits against the Department of Human Rights and Department of Corrections for deaths or injuries occurring in institutions they operate; and personal injury claims against multiple state agencies related to snow removal practices or other accidents.

The section also provides representation to the PUC in both state and federal courts. Examples of PUC decisions the section has defended in state court include: approval of a utility's plan under the Mercury Reduction Act and approval of utility acquisition plan for renewable energy sources. In federal court, the section has defended the authority of the State to regulate the use of new coal-fired energy in the state.

LEGAL SERVICES

ANTITRUST AND UTILITIES

The division represents 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 quality issues pursuant to statute. The division investigates potential violations of state and federal antitrust laws, and enforces these laws when it uncovers evidence of anticompetitive conduct.

The division participates in numerous coordinated investigations of potential anticompetitive conduct by multiple state and federal enforcers of antitrust laws, including other state attorneys general, the U.S. Department of Justice, and the Federal Trade Commission.

Specific examples of the division's work in FY 2014 include:

- ***CenterPoint Energy Natural Gas Rate Case.*** CenterPoint Energy filed a rate case for a $44 million increase in rates in 2014. The division intervened in the rate case and contested multiple aspects of the request, including the return on equity provided to investors, the projected inflation rate used to set rates, the methodology used to project CenterPoint's future sales, the study used to determine which customer classes contribute to the cost of providing utility service, application of a higher rate increase to residents and small businesses than to large business customers, decoupling, and CenterPoint's proposal to increase the customer charge for residential customers from $8 to $15 per month. Following a contested case proceeding, the PUC granted a rate increase of $32.9 million. Based in part on this Office's advocacy, the PUC ordered additional studies of CenterPoint's forecast methodology and methodology of assigning costs among customer classes, implemented a three-year pilot decoupling program with extensive reporting and comprehensive consumer education and outreach efforts, and approved a smaller than proposed increase to the residential customer charge at $9.50 per month.
- ***MERC Natural Gas Rate Case.*** MERC filed a rate case for a $14.2 million increase in rates in 2014. The division intervened in the rate case and challenged multiple aspects of the request, including the company's allowed rate of return, the company's method for calculating inflation, the method for allocating costs between customer classes, travel and entertainment expenses, and the company's proposal to increase the customer charge from $8.50 to $11.00 per month. The PUC has not made a final decision on these issues at this time.

- ***Xcel Energy Electric Rate Case.*** Xcel filed a rate case for a $291 million increase in rates in 2014 and 2015. The division intervened in the rate case and contested multiple aspects of the request, including a proposal for implementation of an inverted block rate, costs for nuclear power plant projects that were not completed or were in excess of estimates at the time of project approval, improper accounting treatment of nuclear refueling costs and construction work in progress, a decoupling proposal that would guarantee revenue regardless of sales, application of a proposed 12.6% rate increase to residents and small businesses (which would be higher than for large business customers), and the excessive collection of interim rates. The PUC has not made a final decision on these issues at this time.

- ***Utilities' Privacy Practices.*** Starting in 2012, the division has advocated strongly for the privacy of utility customers' data in various dockets at the Public Utilities Commission. In the last year, the division participated in a workgroup created by the Public Utilities Commission to identify potential privacy issues raised by the collection or release of customer energy usage data. The division also participated in a Commission docket evaluating consumer privacy issues, including the use of FTC rules by utilities for data management and proper standards for the use of personally identifiable information. The division continued to recommend that the Commission adopt standards that prevent utilities from using customer data for purposes other than providing utility service (unless the customer gives explicit, informed consent) or from transferring customer data to other entities for purposes other than providing utility service. The Commission is continuing its evaluation of customer privacy issues.

- ***DRAM Multistate Antitrust Litigation.*** On June 27, 2014, a California federal court approved a settlement between Minnesota and other states and various defendants who had allegedly conspired to fix the price of a common memory product used in computers and other devices, known as DRAM. The settlement calls for payment of damages of $310 million, including over $300,000 directly to the State of Minnesota, among other things. These monies will be disbursed after the appeals process is complete. In addition, Minnesota consumers were eligible to submit direct claims for recovery of losses.

- ***Mississippi ex rel. Hood v. AU Optronics.*** On July 29, 2013, Minnesota and other states filed a brief with the United States Supreme Court encouraging it to prohibit defendants from infringing on states' sovereign right to have state-specific legal issues heard in state court by improperly transferring the matter to federal court. The Supreme Court subsequently ruled in the states' favor, validating the sovereignty and federalism principles at issue in the appeal.

- ***King Drug v. SmithKline Beecham.*** On May 1, 2014, Minnesota and other states filed a brief with the Third Circuit Court of Appeals urging the court to condemn legal settlements between branded drug manufacturers and their generic drug manufacturer competitors that keep the generic competitors' cheaper drugs off the market, thereby driving up drug costs. Minnesota and other states urged the court to broadly interpret a recent U.S. Supreme Court case holding that such deals are subject to antitrust laws. The case remains pending.

- ***Renewable Energy SD, LLC Case.*** The division continued its litigation of a lawsuit filed in Hennepin County District Court in January, 2013, against Renewable Energy SD, LLC

(RESD) and its owner, president, and founder, Shawn Dooling. RESD took millions of dollars from Minnesota farmers for wind turbines and renewable energy projects that were not delivered as promised. The court granted the Office's motion for a temporary injunction, halting all sales while the lawsuit remains pending.

INFORMATION SERVICES AND LEGAL SERVICES PROCESSING

The Information Services and Legal Services Processing division assists consumers, businesses and other organizations who contact it for information and assists them in obtaining settlements with other parties. Through its efforts the division often eliminates the need for costly and time-consuming litigation for both parties.

LICENSING BOARD

The Licensing Board Legal division provides legal representation to the State's health licensing boards and the Health Professional Services Program as well as conducts investigations at the request of the State's health licensing boards.

The division advises the boards on legal issues such as procedural due process, subpoena power, peer review, and agency authority. The division also represents the boards at disciplinary conferences and in contested cases.

During FY 2014, division investigators completed investigations involving over 300 complainants. Some investigations for FY 2014 included:

- A chiropractor whose license was revoked and was convicted of bribery and identity theft for fraudulently listing patients as co-guarantors on health care credit card applications without their knowledge or consent and fraudulently inflating patients' income on such applications;
- A dentist whose license was conditioned by a disciplinary order including a stayed suspension and required participation in the Health Professionals Services Program for abuse of controlled substances and improperly writing prescriptions for controlled substances in the name of third-parties for the licensee's own personal use;
- A physician who surrendered their license for engaging in unprofessional conduct with a patient, including sexual conduct during clinic visits;
- A psychologist who surrendered their license for engaging in sexual contact with a vulnerable, mentally ill patient;
- A nurse whose license was indefinitely suspended for having inappropriate boundaries and financially exploiting clients;
- A social worker whose license was indefinitely suspended for engaging in a sexual relationship with a former client;
- A licensed alcohol and drug counselor whose license was suspended for sending derogatory comments and confidential information about other clients by text message to a client;

- A licensed marriage and family therapist whose license was suspended for making sexually inappropriate comments to clients, engaging in a dual relationship with a client, and being under the influence of alcohol while at work; and
- A licensed physician assistant who was reprimanded and ordered to complete coursework and pay a civil penalty for failure to maintain proper medical records and engaging in unethical and unprofessional conduct with regard to the licensee's treatment of patients.

During FY 2014, the division provided legal representation to boards in contested case proceedings before the Office of Administrative Hearings involving professional misconduct, sexual misconduct, inappropriate dual relationships, and mental health/chemical dependency. For example, the division represented the Board of Dentistry in a contested case against a dentist who was using illegal drugs. The case resulted in a disciplinary order conditioning the dentist's license and requiring the dentist to successfully complete inpatient chemical dependency treatment before resuming practice. The division also represented the Board of Nursing in a contested case against a registered nurse who was convicted of multiple felony charges for the possession and sale of illegal drugs. This case resulted in the revocation of the nurse's license.

In addition to contested cases before the Office of Administrative Hearings, the division provided legal representation to 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 regularly provided legal representation to the boards where licensees failed to maintain sobriety as required by their disciplinary orders. In addition, the division represented the Board of Chiropractic Examiners before the Minnesota Court of Appeals when a licensee challenged the Board's conclusion that the terms of the licensee's disciplinary order had been violated.

The division represented the Board of Chiropractic Examiners in response to a lawsuit challenging the constitutionality of a recently-enacted statute governing chiropractic advertising. The Eighth Circuit Court of Appeals affirmed the federal district court's decision upholding the statute's constitutionality. The division also represented the Board of Chiropractic Examiners in a district court civil action, filed jointly with the Minnesota Attorney General's Office, against a chiropractor who was engaged in identity theft and fraudulent practices related to convincing patients to apply for health care credit cards.

Finally, the division provides legal representation to the Health Professionals Services Program, which is the health boards' diversion program for health care providers diagnosed with mental illness or chemical dependency. The program establishes practice restrictions, monitoring requirements, and sets boundaries for impaired physicians, nurses, pharmacists, dentists, and other participating health care practitioners.

STATE RESOURCES

Attorneys in the State Resources division (SRD) provide legal representation to the Minnesota Pollution Control Agency (MPCA) and the Environmental Quality Board (EQB).

Many enforcement actions involve the MPCA's enforcement programs. SRD attorneys provide advice to the MPCA on the issuance of administrative orders and administrative penalty orders (APOs). The division also assists the MPCA in negotiating stipulation agreements with regulated parties to resolve more broad-based or serious violations. In situations where settlement is not reached, enforcement matters may be litigated on behalf of the MPCA by SRD attorneys in either the district court or through the Office of Administrative Hearings if a contested case hearing is granted. Although less common, SRD attorneys also represent MPCA in federal consent decrees with the United States Environmental Protection Agency (USEPA) and regulated parties.

SRD attorneys also provide legal advice and litigation services to the MPCA on cases arising out of a variety of non-enforcement issues. SRD attorneys provide advice and representation in matters arising out of the MPCA's petroleum ("petrofund"), hazardous substance ("superfund") and closed landfill cleanup programs, including administrative proceedings, cost recoveries, assistance with obtaining access, and real estate issues including restrictive covenants. SRD attorneys also provide advice and litigation services to the MPCA on cases arising out of the MPCA's air, water, solid waste and hazardous waste permitting programs, including advice and representation on environmental review appeals, contested permit conditions, and other contested administrative proceedings. SRD attorneys further provide legal advice and services to the MPCA on bankruptcy, probate, and contract matters as needed.

In FY 2014 the SRD represented the MPCA at the Court of Appeals and obtained favorable decisions on several matters including: a challenge to an administrative order issued to address an unpermitted solid waste disposal site, a challenge to an administrative order requiring an unpermitted feedlot to cease operation or obtain a permit, and a challenge to an MPCA action to enforce a statute through permits as an "unadopted rule." The SRD also represented the MPCA in a number of matters at the Office of Administrative Hearings, and lawsuits brought by and against the MPCA in district court. An example of one such case is a lawsuit filed by the State against 3M Company for natural resources damages, including pollution of surface water and groundwater, from the disposal of PFC waste.

The SRD also provided legal services to the MPCA on a variety of real estate and contract matters in FY 2014, including several real estate transactions for MPCA's closed landfill and solid waste programs and various contract issues, often regarding liability, intellectual property, and data practices issues. Four of the real estate acquisitions were closed landfills covered by the closed landfill program. One of the real estate transactions involved obtaining an environmental covenant over a closed ash landfill. The covenant was needed to accommodate road construction for the new St. Croix River bridge.

SRD also provides legal advice to the EQB with respect to the implementation of its delegated legal authorities and legal research needs.

GOVERNMENT SERVICES

DISTRICT COURT TRIAL AND APPELLATE

The District Court Trial and Appellate division provides prosecutorial assistance to county attorneys and local law enforcement agencies in prosecuting serious crimes and in the civil commitment of dangerous sex offenders. In addition, the division provides training for police officers and prosecutors.

The division assists counties in the prosecution of serious crimes in trial courts throughout Minnesota when requested by a county attorney. Representative work during FY 2014 included:

- Convicted Brok Junkermeier of first-degree murder for killing 79-year-old Lila Warwick in her home in Kandiyohi County. The court sentenced him to life in prison without parole.
- Convicted Josue Fraga of first-degree murder for killing his two and a half year old niece during a sexual assault in Nobles County. The court sentenced him to life in prison without parole.
- Convicted Andrew Dikken of two counts of first-degree murder for shooting his former girlfriend, Kara Monson, and Christopher Panitzke in Yellow Medicine County. The court sentenced him to life in prison without parole.
- Convicted Jedediah Troxel of first-degree murder for killing an acquaintance during a sexual assault in Pennington County. The court sentenced him to life in prison without parole.
- Convicted Amanda Peltier of first-degree murder with a past pattern of domestic abuse for killing her boyfriend's four-year-old son in Pope County. The court sentenced her to life in prison.
- Convicted Dane Riley of second-degree murder for killing his cousin, Mark Huesmann, in Cass County. The court sentenced him to 480 months in prison.
- Convicted Raul Perez of second-degree murder for causing the death of his girlfriend's two-year-old son in Norman County. The court sentenced him to 240 months in prison.
- Convicted Sandra Highbear of first-degree manslaughter for causing the death of her 22-month-old son in Redwood County. The court sentenced her to 103 months in prison.
- Conducted grand jury proceedings and obtained first-degree murder indictments.
- Represented the State in post-conviction challenges to murder convictions.

- Provided continuing legal advice and assistance to the Bureau of Criminal Apprehension, the Child Mortality Review Board, the Violent Crime Coordinating Council, the Advisory Committee on the Rules of Criminal Procedure, CriMNet, the Restitution Working Group, the Stop it Now Advisory Committee, and the Minnesota Board of Law Examiners.
- Provided continuing review of Extradition paperwork for the Office of the Governor.

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

Division attorneys handled several cases relating to petitions for habeas corpus by individuals civilly committed as sexual predators. The division's attorneys also handled numerous cases in which civilly committed sexual predators filed motions to vacate their commitments. As the population of committed sexual predators increases, the number of petitions for habeas corpus and such motions 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 in 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, narcotics investigations, search and seizure, suspect interrogation, evidence, working with grand juries, gang investigation and prosecution, and trial advocacy.

The division provides assistance to county attorneys in felony appeals. The cases handled in FY 2014 involved, among other crimes: murder, sexual assault, drug distribution and manufacturing, child sexual abuse and felony assault.

As part of the appellate work, the division also handled federal habeas corpus petitions challenging state-court convictions for non-metro counties during FY 2014. Attorneys in the division appeared on behalf of the State on three habeas petitions in federal district court and one at the 8th Circuit Court of Appeals in FY 2014.

Appellate attorneys assisted prosecutors by providing legal research and preparing legal memoranda, and assisted local prosecutors with legal questions.

MEDICAID FRAUD

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

1. Prosecute health care providers committing fraud in the delivery of the Medical Assistance program.

2. Upon request of a county attorney, assist in prosecuting vulnerable adult abuse and neglect (including financial exploitation) in Medicaid funded facilities, non-Medicaid board and care facilities, and recipients' residences when they receive services from Medicaid providers.

The division recovers Medicaid funds from providers who fraudulently bill the program. The division does this through local, state, and federal criminal and civil prosecutions and through participation in multi-district *qui tam* litigation with other states' MFCUs.

The division prosecutes health care providers who participate in the state's Medical Assistance program. Two of those provider-types include Personal Care Assistants (PCAs) and Personal Care Provider Organizations (PCPOs) engaged in fraudulent billing practices. Typical schemes include billing for services not provided, billing for authorized units rather than actual units provided, billing for registered nurse (RN) services when there is no RN employed by the agency, providing group care, but billing as if one-to-one care is provided, and using identities of individuals not employed by the agency, as if they are employees.

One case in the past year involved the owner of a PCPO who provided PCA services to her disabled brother and two other vulnerable adults. The MFCU opened its investigation due to a fraud hotline call from an RN who claimed the PCPO had stolen her identity and nursing credentials, and the PCPO may have falsely reported to the state that she was the staff RN. The subsequent MFCU investigation determined that the agency had also used the identity of another RN to falsely represent that its PCA services were being supervised. State law requires that an RN or other qualified professional supervise PCA services. Neither RN was ever actually employed by the PCPO and all the PCA services that the PCPO provided were unsupervised. After a week-long trial, the defendant was found guilty of two felony counts of theft by false representation. While a restitution hearing is still pending, the court sentenced the defendant to 47 months prison stayed for five years, with a probationary jail sentence of 30 days. The defendant will also be excluded for five years from owning or operating a PCPO, or from working at any entity receiving federal Medicaid funds.

In another case, the MFCU investigated the owner of a PCPO who received over $2 million in DHS reimbursements in less than three years for PCA and Supervising RN services. The investigation found that the owner was submitting claims for nursing supervision of PCAs and those claims falsely represented how long the nursing visits lasted. For some of the nursing visits, the owner had no record that the visits occurred, but he consistently billed DHS for between two and four hours per nursing visit. After a week-long jury trial, in which both of the agency's nurses testified that they never conducted a visit lasting more than one hour, the jury found the defendant guilty of all three felony counts of medical assistance fraud. The court sentenced the defendant to 5 years of probation, 30 days in jail, and full restitution. The

defendant will also be excluded for five years from owning or operating a PCPO, or from working at any entity receiving federal Medicaid funds.

The Medicaid Fraud division intervenes in civil lawsuits under the Minnesota False Claims Act. From September 1, 2013 through August 30, 2014, the Minnesota MFCU participated in 13 multistate *qui tam* lawsuits, resulting in recoveries paid to the General Fund of $8,657,411.20.

PUBLIC SAFETY

The Public Safety division provides legal representation to 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 approximately $1 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 nearly 5,500 district court Implied Consent proceedings and associated appeals challenging the revocations of driving privileges under Minn. Stat. § 169A.50-.53 and Minn. Stat. § 169A.20, subd. 2.
- Defended the state against numerous constitutional and other challenges to the DWI, implied consent, traffic, and other public safety laws.
- Appeared in 138 district court challenges and resulting appeals to other driver's license cancellations, withdrawals, revocations, suspensions, and license plate impoundments under Minn. Stat. § 171.19.
- Provided training on DWI procedures and traffic safety laws for law enforcement officers and prosecutors throughout Minnesota.
- Published the 2014 DWI/Implied Consent Elements Handbook, utilized statewide by prosecutors, judges, defense attorneys and law enforcement professionals.
- Argued over 100 appeals to the Minnesota Court of Appeals resulting from district court appearances involving the revocation, suspension, cancellation, or withdrawal of driving privileges.
- Argued to the Federal District Court addressing various federal claims including § 1983, and American with Disabilities Act.

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. 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.

In FY 2014, over 20 percent of all driver's license revocations were challenged in court. Today's challenge rate is the result of the toughening of DWI laws by the Legislature over the 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 likely to challenge the underlying revocations in the state's district and appellate courts. Moreover, the increasing complexity of our 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. Implementation of the felony DWI law, statutory increases in the length of revocation periods, and availability of ignition interlock use for repeat offenders continue to increase the division caseload.

The 2013 United States Supreme Court decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), where the Court held that the natural dissipation of alcohol in a driver's blood does not create a *per se* exigency to the warrant requirement, opened the floodgates to Fourth Amendment challenges to Minnesota's Implied Consent Law and Refusal Statute. On October 23, 2013, the Minnesota Supreme Court issued its decision in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), a case where the driver was read the Minnesota Motor Vehicle Implied Consent Advisory after he was arrested for DWI and agreed to submit to testing. The Attorney General's Office submitted an Amicus Brief in support of the constitutionality of the Implied Consent Law. The *Brooks* Court applied a totality of the circumstances test and determined that a driver's consent to chemical testing given in accordance with the procedures of the Implied Consent Law satisfies the Fourth Amendment. The Court rejected the driver's claim that his consent was impermissibly coerced when he was informed that refusal to submit to a test is a crime. On April 7, 2014, the United States Supreme Court denied Brooks' Petition for a Writ of Certiorari. Post-*Brooks*, the Court of Appeals has rejected challenges to Minnesota's Refusal Statute, which makes it a crime for a driver to refuse a peace officer's request—made in accordance with the Implied Consent Law—to submit to chemical testing.

The division also provides legal advice and representation to the Gambling Control Board, the Minnesota Racing Commission, and the Alcohol and Gambling Enforcement division of the Department of Public Safety. These entities issue thousands of licenses and conduct numerous investigations each year. These investigations often result in contested case hearings requiring representation from this division. This division also provides advice to the Alcohol and Gambling Enforcement division on issues relating to illegal liquor sales, and illegal gambling devices, and Indian gaming. The division also represents that agency in taking action against manufacturers and distributors of liquor and gambling equipment.

With regard to the Minnesota Racing Commission, this division provides legal representation to the commission in appeals of disciplinary action taken against horse owners, trainers, and jockeys, and has represented the commission in challenges to commission action at the appellate court level.

CIVIL LAW

SOCIAL SERVICES

The Social 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 matters concerning Minnesota Health Care Programs (MHCP), continuing and long-term care, health care compliance, and benefit recovery. MHCP includes Medical Assistance and MinnesotaCare, which together cover approximately 800,000 Minnesotans. In continuing care, division attorneys represent DHS on matters concerning autism services, aging and adult services, disability services, emergency medical assistance, and personal care assistance. In the compliance and recovery area, division attorneys handle health care compliance matters and recover payments for health care services from providers, responsible third-parties, and estates.

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, the Federal Supplemental Nutrition Assistance Program (SNAP," formerly called Food Stamps) and Group Residential Housing. Division attorneys represent DHS in litigation contesting the operation of these programs. In the child support area, division attorneys defend challenges to child support statutes and programs. In children's protection, attorneys represent DHS in matters concerning children's welfare, adoption, foster care, guardianship, tribal issues, and other matters.

MENTAL HEALTH

Division attorneys in the mental health area provide representation to DHS's adult and children's mental health programs, chemical dependency programs, 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). Division attorneys represent DHS's interests 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; 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, child foster care, child care, and services for mental health, developmental disabilities, and chemical health. Division attorneys appear in administrative proceedings and district 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:

- ***Supreme Court Appeal Panel:*** division attorneys handled numerous hearings before the SCAP on petitions from civilly committed individuals for transfer, provisional discharge, or discharge.
- ***Jarvis/Price-Sheppard Hearings:*** division attorneys handled numerous hearings to authorize medically necessary medication and/or therapy for patients who lack the legal capacity to make the decision themselves.
- ***Medicaid Overpayment Recovery:*** division attorneys represented the State of Minnesota in connection with the recovery of overpayments in the Medicaid program.
- ***Karsjens, et al. v. Jesson, et al.:*** division attorneys are defending the State of Minnesota against a class action alleging unconstitutional treatment and conditions at the Minnesota Sex Offender Program.
- ***Disqualification Matters:*** division attorneys handled disqualification proceedings; for example, defending the state's disqualification and license revocation of an individual who financially exploited a vulnerable adult in that person's care.
- ***Walker v. Jesson:*** division attorneys defended the DHS commissioner in a taxpayer lawsuit over the use of public funds.
- ***Greene v. Jesson:*** division attorneys represented the DHS Commissioner in opposition to a petition for transfer, provisional discharge, and discharge brought by an indeterminately committed sex offender.

CHARITIES/CIVIL

The Charities/Civil 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 enforces State laws.

The Charities/Civil division oversees laws relating to nonprofits and charitable organizations. By statute, the Attorney General's Office receives notice of certain charitable trust and probate matters filed in the district courts. When necessary, the division acts to protect charitable assets and represents 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 over 170 such notices in the last fiscal year. The division reviews these notices to ensure that charitable assets are protected during these transactions and used for the purposes for which they were solicited and held.

Additionally, the Charities/Civil division responds to complaints about nonprofits and charities, and investigates allegations of fraud, misuse of funds, and other wrongdoing by nonprofits and charities. Depending on the circumstances, these investigations can lead to formal legal action, are resolved by working with nonprofit boards to bring them into compliance with the requirements of Minnesota law, or are referred to other government agencies.

Another oversight function of the division is to educate officers and directors of nonprofit organizations about nonprofit and charities laws in Minnesota. The division provides education to nonprofits and charities on important topics such as 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.

The division brings suit against organizations that commit charitable solicitation fraud or otherwise violate the State's nonprofit and charities laws. Through the enforcement of laws governing nonprofit and charitable organizations, the Charities/Civil division helps combat fraudulent solicitations, deter fraud in the nonprofit sector, educate the public about charitable giving, and hold nonprofit organizations accountable for how they raise, manage, and spend charitable assets.

Minnesota law requires charitable organizations and professional fund-raisers to register and file annual reports with the Attorney General's Office. In the last fiscal year, $647,040 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 10,000 charitable (soliciting) organizations, over 2,800 charitable trusts, and over 1,300 professional fund-raisers. The information from these files allows the donating public to review a charitable organization's financial information, allowing for greater transparency, and 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.

The division also enforces State laws. The following are examples of investigations and suits brought or resolved in the 2014 fiscal year by the Charities/Civil division:

- The division investigated The Wildcat Sanctuary, a Minnesota charitable organization. The investigation revealed, among other things, TWS's misuse of charitable assets, lack of sufficient internal controls, failure to maintain financial records, failure to meet reporting obligations, and insufficient board oversight and governance. In settlement, TWS agreed to change its board governance, financial governance, and other internal policies, and a third-party monitor was appointed to provide governance oversight.
- The division sued A Brighter Day Foundation, an Eden Prairie charity designed to help at-risk youth, and its executive director, alleging that they misspent charitable assets for the personal benefit of the executive director. The Court granted the division's motion to freeze ADBF's bank accounts pending further Court review.
- The division investigated MPHJ Technology Investments, LLC, an alleged "patent troll," for violations of state consumer protection laws regarding MPHJ's series of increasingly threatening letters sent to small business that alleged infringement of its patents for using basic office equipment to scan documents to e-mail. In settlement, MPHJ agreed to cease its patent enforcement campaign in the State and not to assign its patents to anyone who did not agree to the settlement's terms.
- The division sued Bradstreet & Associates, LLC, a Minnesota debt buyer, for charging people up to 21.75% annual interest they did not owe on old bank accounts sold and charged off by two large national banks. Interest of 21.75% is more than three times the 6% statutory interest allowed by Minnesota law. The Court ordered Bradstreet to vacate all judgments entered in its favor against consumers, correct any adverse reporting submitted to credit bureaus, and close all Minnesota consumer accounts. The Court also ordered a judgment against Bradstreet, which included a permanent injunction and provided for a substantial monetary judgment for the State.
- The division investigated Herzing University, a for-profit college based in Wisconsin, regarding Herzing's lack of accreditation for its two-year medical assistant associate degree program in Minnesota, which impacted the ability of students to obtain the Certified Medical Assistant certification, which is preferred by many employers. In settlement, Herzing agreed to fully disclose to students information about accreditation and licensure and to provide refund options to all affected students.

APPENDIX A: SERVICE HOURS
By Agency or Political Subdivision for FY 2014

Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
Partner Agencies				
Administration--Risk Management		2,367.2		$ 243,343.60
AURI		0.9		$ 116.10
Corrections (3)	2,064.6	2,064.6	$ 258,822.00	$ 258,822.40
Education Department	1,381.0	1,653.2	$ 178,071.00	$ 208,994.00
Environmental Quality Board		255.4		$ 32,946.60
Gambling Control Board		76.0		$ 9,804.00
Health		5,865.9		$ 748,389.70
Housing Finance Authority	2,750.0	1,944.1	$ 354,750.00	$ 250,754.10
Human Services	20,700.0	22,580.2	$ 2,583,300.00	$ 2,868,359.80
Iron Range Resources & Rehabilitation		23.8		$ 2,055.20
Medical Practices Board	7,600.0	4,021.4	$ 713,600.00	$ 379,653.40
Minnesota Racing Commission		288.2		$ 36,377.40
Minnesota State Retirement System		208.3		$ 26,412.50
MnSCU	3,584.0	7,113.2	$ 404,336.00	$ 851,830.80
MnSURE		60.1		$ 7,752.90
Natural Resources	6,550.0	9,630.1	$ 835,670.00	$ 1,213,485.90
Petroleum Tank Release Compensation Board		141.7		$ 18,279.30
Pollution Control	9,600.0	7,159.9	$ 1,238,400.00	$ 923,493.70
Public Employees Retirement Association		507.6		$ 65,468.80
Public Safety (3)	3,600.0	3,600.0	$ 375,000.00	$ 464,400.00
Revenue (3)	3,000.0	3,000.0	$ 387,000.00	$ 387,000.00
Teachers Retirement Association		201.8		$ 26,003.20
Transportation	11,450.0	12,502.1	$ 1,477,050.00	$ 1,587,291.50
TOTAL PARTNER AGENCIES	**72,279.6**	**85,265.7**	**$ 8,805,999.00**	**$ 10,611,034.90**
Specialized Boards				
Accountancy Board		127.7		$ 16,438.50
Animal Health Board		1.5		$ 193.50
Architecture Board		171.8		$ 22,139.00
Assessors Board		2.5		$ 322.50
Barber Board		49.6		$ 6,120.00
Client Security Board		315.0		$ 40,246.40
Combative Sports Board		71.5		$ 9,223.50
Cosmetology Examiners Board		92.4		$ 11,896.40
Crime Victims Reparations Board		204.7		$ 25,362.30
Land Exchange Board		2.0		$ 258.00
Peace Officers Standards and Training Board		148.5		$ 19,011.50
Private Detective Board		156.7		$ 20,214.30
School Administrators Board		231.5		$ 29,863.50
State Arts Board		46.9		$ 6,050.10
State Fair Board		8.7		$ 1,122.30
State Investment Board		304.7		$ 38,552.30
Teaching Board		1,023.6		$ 129,521.40
Zoological Board		20.7		$ 2,670.30
SUBTOTAL		**2,980.0**		**$ 379,205.80**
Health Boards/Offices				
Behavioral Health & Therapy Board		221.7		$ 28,599.30
Chiropractic Board		2,783.7		$ 250,596.70
Dentistry Board		3,095.8		$ 301,204.80
Dietetics & Nutrition Practice Board		46.6		$ 6,011.40
Emergency Medical Services Regulatory Board		540.3		$ 65,505.30
Health Professionals Services Program		5.1		$ 657.90
Licensed Drug & Alcohol Counselor Program		1,067.3		$ 89,373.50
Marriage & Family Therapy Board		756.3		$ 67,982.70
Nursing Board		5,958.8		$ 697,374.20
Nursing Home Administrators Board		182.6		$ 18,248.40
Optometry Board		77.1		$ 8,130.50
Pharmacy Board		724.4		$ 74,388.80
Physical Therapy Board		912.7		$ 78,257.70
Podiatry Board		107.3		$ 12,194.50
Psychology Board		2,494.2		$ 237,274.80
Social Work Board		1,965.1		$ 166,608.10
Veterinary Medicine Board		755.7		$ 73,548.70
SUBTOTAL		**21,694.7**		**$ 2,175,957.30**
Higher Education				
Higher Education Facilities Authority		1.9		$ 245.10
Higher Education Services Office		254.2		$ 31,707.20
SUBTOTAL		**256.1**		**$ 31,952.30**

APPENDIX A: SERVICE HOURS
By Agency or Political Subdivision for FY 2014

Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
Other Executive Branch Agencies				
Administration Department		1,129.8		$ 128,959.00
Administrative Hearings Office		123.0		$ 15,867.00
Agriculture Department		498.2		$ 64,227.20
Amateur Sports Commission		22.2		$ 2,863.80
Archaeologist Office		1.8		$ 232.20
Asian Pacific Minnesotans Council		19.5		$ 2,515.50
Black Minnesotans Council		123.3		$ 15,424.30
Campaign Finance Board		381.0		$ 46,968.20
Capitol Area Architectural Planning Board		21.0		$ 2,709.00
Center for Arts Education		26.8		$ 2,482.80
Chicano/Latino Peoples Affairs Council		8.5		$ 1,096.50
Commerce Department		7,441.7		$ 954,330.10
Corrections Department (3)		5,489.8		$ 634,379.20
Corrections Department/Community Notification		1,639.9		$ 171,590.90
Disability Council		1.8		$ 232.20
Employment & Economic Development Department		2,265.2		$ 217,901.20
Executive Council		9.9		$ 1,277.10
Explore Minnesota Tourism		9.4		$ 1,195.20
Faribault Academies		191.7		$ 24,729.30
Firefighter Training & Education Board		6.9		$ 890.10
Governor's Office		304.3		$ 39,254.70
Human Rights Department		293.3		$ 36,890.30
Indian Affairs Council		7.8		$ 930.80
Judiciary Courts		906.0		$ 114,989.00
Labor and Industry Department		4,258.2		$ 548,379.80
Law Examiner's Board		81.3		$ 10,487.70
Lawyer's Professional Responsibility Board		2.3		$ 296.70
Legislature		247.1		$ 31,875.90
Legislature Auditor		17.4		$ 2,244.60
Mediation Services Bureau		13.4		$ 1,728.60
Military Affairs Department		97.5		$ 12,577.50
Minnesota Management & Budget		1,045.7		$ 134,100.70
MN.IT Services Office		270.0		$ 27,440.80
Ombudsman for Mental Health & Developmental Disabilities		7.3		$ 872.10
Ombudsperson for Families		67.6		$ 8,720.40
Public Defender, Local		90.2		$ 11,635.80
Public Safety Department (3)		24,616.2		$ 2,695,737.00
Public Utilities Commission		3,312.8		$ 420,089.60
Revenue Department (3)		7,589.5		$ 978,622.10
Revisor of Statutes		1.9		$ 245.10
Rural Finance Authority		20.7		$ 2,670.30
Secretary of State		1,587.3		$ 196,624.30
Sentencing Guidelines Commission		24.2		$ 3,121.80
State Auditor		133.3		$ 17,195.70
State Historical Society		9.2		$ 1,186.80
State Lottery		14.1		$ 1,157.70
Veterans Affairs Department		268.0		$ 33,649.80
Veterans Homes Board		1,088.5		$ 132,789.50
Water & Soil Resources Board		322.2		$ 40,641.60
SUBTOTAL		**66,108.7**		**$ 7,796,027.50**

APPENDIX A: SERVICE HOURS
By Agency or Political Subdivision for FY 2014

Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
OTHER GOVERNMENT				
Aitkin County Attorney		1.0		$ 71.00
Anoka County Attorney		1,143.8		$ 105,175.40
Becker County Attorney		1,370.9		$ 145,317.30
Beltrami County Attorney		24.5		$ 3,160.50
Benton County Attorney		321.8		$ 31,884.20
Big Stone County Attorney		26.8		$ 2,848.20
Brown County Attorney		75.8		$ 9,546.20
Carlton County Attorney		117.8		$ 14,703.20
Carver County Attorney		40.2		$ 5,185.80
Cass County Attorney		882.1		$ 92,603.50
Chippewa County Attorney		909.6		$ 93,703.40
Chisago County Attorney		444.6		$ 40,127.40
Clay County Attorney		43.8		$ 3,794.20
Clearwater County Attorney		1,164.7		$ 123,502.50
Cottonwood County Attorney		577.9		$ 61,394.70
Crow Wing County Attorney		10.8		$ 1,393.20
Dakota County Attorney		403.5		$ 39,894.70
Dodge County Attorney		36.9		$ 4,760.10
Douglas County Attorney		473.9		$ 49,591.10
Freeborn County Attorney		95.1		$ 12,209.90
Goodhue County Attorney		19.3		$ 2,460.70
Hennepin County Attorney		9,526.3		$ 877,453.30
Hubbard County Attorney		183.5		$ 23,613.50
Isanti County Attorney		17.4		$ 2,244.60
Itasca County Attorney		164.9		$ 18,053.10
Jackson County Attorney		59.9		$ 7,727.10
Kanabec County Attorney		215.8		$ 25,982.20
Kandiyohi County Attorney		3,042.6		$ 324,055.40
Koochiching County Attorney		164.4		$ 21,207.60
Lac qui Parle Attorney		50.9		$ 6,566.10
Lake of the Woods County Attorney		38.0		$ 4,380.00
Le Sueur County Attorney		500.6		$ 51,034.40
Lyon County Attorney		1.5		$ 193.50
Mahnomen County Attorney		117.7		$ 15,183.30
Marshall County Attorney		8.4		$ 1,025.60
Martin County Attorney		12.7		$ 1,174.30
Meeker County Attorney		43.9		$ 5,663.10
Mille Lacs County Attorney		178.9		$ 22,991.10
Morrison County Attorney		64.2		$ 8,044.00
Mower County Attorney		1,125.7		$ 111,604.30
Nicollet County Attorney		193.2		$ 24,922.80
Nobles County Attorney		1,433.9		$ 151,594.10
Norman County Attorney		382.3		$ 40,239.70
Olmsted County Attorney		42.1		$ 2,989.10
Otter Tail County Attorney		342.6		$ 40,141.20
Pennington County Attorney		1,620.8		$ 177,305.00
Pine County Attorney		119.9		$ 11,697.10
Pipestone County Attorney		9.7		$ 1,251.30
Polk County Attorney		169.4		$ 19,213.60
Pope County Attorney		1,983.5		$ 201,090.50
Ramsey County Attorney		2,523.1		$ 239,599.30
Redwood County Attorney		305.9		$ 31,312.10
Rice County Attorney		424.3		$ 54,647.70
Rock County Attorney		0.5		$ 64.50
Roseau County Attorney		126.2		$ 14,499.20
Scott County Attorney		236.6		$ 25,365.20
Sherburne County Attorney		139.6		$ 17,672.00
Sibley County Attorney		545.4		$ 63,959.20
St. Louis County Attorney		2,042.9		$ 224,395.70
Stearns County Attorney		663.8		$ 85,166.20
Steele County Attorney		116.6		$ 14,867.40
Todd County Attorney		382.0		$ 35,880.00
Wabasha County Attorney		487.0		$ 54,697.20
Wadena County Attorney		81.0		$ 10,449.00
Waseca County Attorney		124.5		$ 16,060.50
Washington County Attorney		41.2		$ 4,172.20
Watonwan County Attorney		14.0		$ 1,690.00
Winona County Attorney		10.5		$ 745.50
Wright County Attorney		472.9		$ 54,537.10
Yellow Medicine County Attorney		1,095.6		$ 104,821.40
Association of County Attorneys		56.9		$ 7,340.10
Various Local Governments		89.2		$ 11,158.80

APPENDIX A: SERVICE HOURS
By Agency or Political Subdivision for FY 2014

Agency/Political Subdivision	Estimated Service Hours (1)	Actual Service Hours	Estimated Expenditures	Actual Expenditures (2)
SUBTOTAL		39,979.2		$ 4,115,068.40
TOTAL NON-PARTNER AGENCIES SUBDIVISIONS		131,018.7		$ 14,498,211.30
TOTAL PARTNER/SEMI-PARTNER AGENCIES (from page A-1)		85,265.7		$ 10,611,034.90
TOTAL NON-PARTNER AGENCIES SUBDIVISIONS		131,018.7		$ 14,498,211.30
GRAND TOTAL HOURS/EXPENDITURES		216,284.4		$ 25,109,246.20

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 $129.00 and Legal Assistant $71.00

(3) A number of agencies signed agreements for a portion of their legal services.

APPENDIX B: SPECIAL ATTORNEY EXPENDITURES FOR FY 2014, BY AGENCY

AGENCY		Amount
Administration	$	541,738.95
Labor and Industry	$	33,471.71
Minnesota Management & Budget	$	65,514.89
MnDOT	$	80,635.00
MnSCU	$	15,607.25
Revenue	$	12,147.40
TOTAL	**$**	**749,115.20**

APPENDIX B: SPECIAL ATTORNEY EXPENDITURES BOND COUNSEL FOR FY 2014, BY AGENCY	
AGENCY	**Amount**
Higher Education Facilities Authority	$ 187,138.65
Higher Education Services Office	$ 10,729.60
Housing Finance Agency	$ 301,831.14
Iron Range Resources and Rehabilitation Board	$ 27,462.27
Minnesota Management & Budget	$ 427,982.14
MnSCU	$ 1,613.66
Public Facilities Authority	$ 6,900.00
Rural Finance Authority	$ 202.69
TOTAL	**$ 963,860.15**
NOTE: Certain bond fund counsel are paid from proceeds.	

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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August 9, 2013

Mr. Chad D. Miller
Krekelberg, Skonseng & Miller, P.L.L.P.
213 South Mill Street
Fergus Falls, MN 56537

Dear Mr. Miller:

I thank you for your correspondence received on June 24, 2013, requesting an opinion from the Attorney General's Office regarding the application of the Public Employment Labor Relation Act ("PELRA") to Pelican Valley Hospital District ("the District").

BACKGROUND

You state that the District operates a nursing home and two assisted living facilities and leases physical space to Sanford Health for the operation of a clinic. You indicate the District formerly operated a hospital, but no longer does so.

You express considerable doubt as to whether PELRA's charitable hospital exclusion applies to the District under these circumstances.

LAW AND ANALYSIS

Hospital districts in Minnesota are municipal corporations and political subdivisions of the State. Minn. Stat. § 447.31 subd. 6 (2012). They have broad powers to take actions reasonably necessary or convenient to the operation of hospitals, nursing home facilities, and assisted living facilities, including the employment of nursing, administrative, and other personnel. Minn. Stat. § 447.33, subds. 1 and 2(1) (2012).

PELRA governs public employers' labor relations with their employees. Minn. Stat. § 179A.01. PELRA applies to political subdivisions of the State, but excludes charitable hospitals and their employees. Minn. Stat. § 179A.03, subds. 14(a)(8) and 15(a)(6), (b) and (c) (2012).

Hospital districts, as political subdivisions of the State, are "public employers" under PELRA, unless otherwise excluded. Minn. Stat. §§ 179A.03, subd. 15(a)(6), (b), 447.31, subds. 1, 6. The charitable hospital exclusion applies to specific types of hospitals. Minn. Stat. §§ 179.35, subd. 2; 179A.03, subds. 14(a)(8), 15(c).

"The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2012). "The touchstone for statutory interpretation is the plain meaning of a statute's language." *ILHC of Eagan, LLC v. Cnty. of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005). "[W]hen the words [of a statute] are clear, explicit, unambiguous, and free from obscurity, courts are bound to expound the language according to the common sense and ordinary meaning of the words." *State ex rel. Gardner v. Holm*, 241 Minn. 125, 129, 62 N.W.2d 52, 55 (1954) (quoting *Minn. & Pac. R.R. Co. v. Sibley*, 2 Minn. 13, 20 (1858)). "A statute should be interpreted, whenever possible, to give effect to all of its provisions; no word, phrase, or sentence should be deemed superfluous, void, or insignificant." *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (quotation omitted).

The charitable hospital exclusion does not apply to the District's operation of a nursing home and assisted-living facilities. Minnesota statutes, as well as common usage,[1] distinguish between hospitals and nursing homes and assisted living facilities. Throughout chapter 447, the legislature listed hospitals, nursing homes, and assisted living facilities separately. *See, e.g.*, Minn. Stat. §§ 447.31, subd. 3 ("hospital and nursing home facilities"), 447.33, subd. 1 ("hospital, nursing home facilities, and facilities [attached or related to a nursing home providing supportive services to elderly persons who are not yet in need of nursing home care]"); 447.34, subd. 1 (2012) (same). Because these terms should not be deemed superfluous, they must have different meaning.

In addition, hospitals are licensed and operated under Minn. Stat. Ch. 144 (2012), while nursing homes and assisted living facilities are licensed and operated under Minn. Stat. Chs. 144A and 144G (2012) respectively. Hospitals are defined as institutions where the sick and injured are hospitalized for the purpose of diagnosis and treatment. Minn. Stat. § 144.50, subds. 2 and 3 (2012). In contrast, "nursing homes" are facilities that provide "nursing care"; and by statute, the term "nursing home" "does not include . . . a hospital . . . ." Minn. Stat. § 144A.01, subd. 5 (2012). Moreover, "nursing care" in nursing homes is limited to patients "who are not in need of . . . an acute care facility." Minn. Stat. § 144A.01, subd. 6 (2012). Similarly, assisted living facilities provide sleeping accommodations and health or other supportive services to primarily elderly people; and by statute, do not include hospitals or

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[1] *Compare* "hospital" in MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/hospital ("1: a charitable institution for the needy, aged, infirm, or young; 2: an institution where the sick or injured are given medical or surgical care") *with* "nursing home" in MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/nursing+home ("[A] privately operated establishment providing maintenance and personal or nursing care for persons (as the aged or the chronically ill) who are unable to care for themselves properly") *and* "assisted living" in MERRIAM-WEBSTER ONLINE DICTIONARY, http://www.merriam-webster.com/dictionary/assisted%20living ("[A] system of housing and limited care that is designed for senior citizens who need some assistance with daily activities but do not require care in a nursing home.")

nursing homes. Minn. Stat. §§ 144D.01, subd. 4(b), 144G.01, subd. 1, 144G.03, subd. 2 (2012). Accordingly, the term "hospital" does not include nursing homes or assisted living facilities.

As a political subdivision of the State, the District meets the definition of a public employer under PELRA. As you suspect, the charitable hospital exclusion does not apply because the District's operation of a nursing home and assisted-living facilities does not constitute the operation of a hospital.

Very truly yours,

JACOB CAMPION
Assistant Attorney General
(651) 757-1459 (Voice)
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STATE OF MINNESOTA

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August 13, 2013

Chad D. Lemmons
Kelly & Lemmons, P.A.
7300 Hudson Boulevard North, Suite 200
Saint Paul, MN 55128

Dear Mr. Lemmons:

I thank you for your correspondence received July 26, 2013 requesting an opinion from the Attorney General's Office regarding the process for the adoption of a six-year term for town supervisors on the White Bear Town Board under Minn. Stat. § 367.02, subd. 4a (2012).

BACKGROUND

You state that in March 2013 the electors of the Town of White Bear approved a ballot measure moving the date of the town general election to November in even-numbered years. You indicate that given this change in the timing of the town's general election, the White Bear Town Board may adopt an ordinance lengthening the term of each town supervisor to six years pursuant to Minn. Stat. § 367.02, subd. 4a (2012).

Based upon these facts, you ask whether the White Bear Town Board must place an ordinance adopting a six-year term for town supervisors on the ballot of the next town general election for approval by the town's electors.

LAW AND ANALYSIS

A town's adoption of six-year term for town supervisors is addressed in Minn. Stat. § 367.02, subd. 4a (2012) as follows:

> The resolution required under section 205.075, subdivision 2, to adopt the alternative November date for town general election may include the proposal and corresponding transition plan to provide for a six-year term for town supervisors. A town that has adopted the alternative November date for general town elections using the four-year terms provided under subdivision 4 may adopt a resolution establishing six-year terms for supervisors as provided under this subdivision. The resolution must include a plan to provide an orderly transition to six-year terms. The resolution adopting the six-year term for town supervisors may be proposed by the town board or by a resolution of the electors adopted at the annual town meeting and is effective upon an affirmative vote of the electors at the next town general election.

Minn. Stat. § 367.03, subd. 4a (2012).

This statutory provision sets forth two methods by which a town may adopt a six-year term for town supervisors: either the town board may propose a resolution adopting a six-year term for town supervisors, or such a resolution may be adopted by the town's electors at the annual town meeting. Regardless of which alternative is chosen, the resolution does not become effective until it is affirmatively approved by the electors during the next town general election. In other words, the adoption of an ordinance by a town board extending the term of its supervisors to six years does not take effect without elector approval at the next town general election.

Very truly yours,

FIONA B. RUTHVEN
Assistant Attorney General

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October 22, 2013

The Honorable Dave Thompson
Assistant Minority Leader
Minnesota Senate
131 State Office Building
100 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

The Honorable Mary Liz Holberg
State Representative
Minnesota House of Representatives
349 State Office Building
100 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Dear Senator Thompson and Representative Holberg:

I thank you for your correspondence received on September 24, 2013.

You state that there are freight rail lines running through residential neighborhoods in your districts. You report that despite efforts to educate residents about the dangers presented by railroads and trespassing laws, children have still been playing on and around rail cars parked on the tracks. You ask whether Minn. Stat. § 219.31 (2012), which states, in part, that "[e]very railroad company shall build and maintain good and substantial fences on each side of all lines of its railroad," creates a legal duty to limit access to rail lines for the public's protection. If so, you ask whether any existing federal law would preempt Minnesota law.

I appreciate your concerns. Railroad accidents are tragic. As you may know, the authority of the Attorney General to render formal opinions pursuant to statute is limited. For example, this Office is authorized to provide opinions at the request of either the Senate or the House of Representatives, or a committee of the Legislature. *See* Minn. Stat. § 8.05 (2012). That authority, however, does not extend to providing opinions at the request of individual legislators.

In an effort to be helpful to you, however, I looked into this matter further. I can tell you the following:

Under Minnesota law, "[i]t is well settled that where a child strays onto an unfenced track and is injured, the railroad may be held liable if it is shown that an adequate fence would have kept the child off the track." *O'Neal v. Burlington N., Inc.*, 413 N.W.2d 631, 633 (Minn. Ct. App. 1987) (citing cases). According to the Minnesota Supreme Court, the purpose of section 219.31 "is to protect those who would be deterred from entering the right of way by fences of the kind specified in the statute." *Strand v. Great N. Ry. Co.*, 233 Minn. 93, 100, 46 N.W.2d 266, 271 (1951). However, the courts have held that the statute does not protect children that are "possessed of sufficient mentality and ability so that a fence of the kind required by the statute would not have deterred him from going onto the railroad right of way." *Id.* at 99,

46 N.W.2d at 270. "In each case there is a simple question of fact as to whether or not a legal fence would probably have prevented a child of the plaintiff's age, ability, intelligence, and discretion from entering the railroad right of way." *Id.* at 101, 46 N.W.2d at 271. Therefore, with respect to children who would be deterred by fencing from entering the right-of-way, railroads owe a duty under Minnesota law.

Whether federal law preempts Minnesota law in this area has yet to be decided by a court. There are two relevant bodies of federal law: the Interstate Commerce Commission Termination Act (ICCTA) and the Federal Rail Safety Act (FRSA).

A. The FRSA

"The FRSA grants the Secretary of Transportation broad regulatory authority over railroad safety." *Kurns v. R.R. Friction Products Corp.*, ___ U.S. ___, ___, 132 S. Ct. 1261, 1267 (2012). Nevertheless, the FRSA explicitly provides that:

> A State may adopt or continue in force a law, regulation, or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—
>
> (A) is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> (B) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (C) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106(a)(2).

The Sixth Circuit Court of Appeals, in *Tyrrell v. Norfolk S. Ry.*, held that the Federal Railroad Administration under the FRSA exercises primary authority over rail safety. 248 F.3d 517, 522–23 (6th Cir. 2001). The court therefore decided that the FRSA, not the ICCTA, determines whether a state law relating to rail safety is preempted. *Id.*; *see also Iowa, Chicago & E. R.R. Corp. v. Washington Cnty., Iowa*, 384 F.3d 557, 560 (8th Cir. 2004) (citing *Tyrrell*).

Given its purpose, section 219.31 seems to be a law relating to rail safety. Since there does not appear to be any applicable federal regulations with respect to fencing, a good argument can be made that section 219.31 is not preempted by the FRSA. *See* 49 U.S.C. § 20106(a)(2) (expressly permitting states to "continue in force a law . . . related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject

matter"). At least one court has found that a similar state law is not preempted. *See Union Pac. R.R. Co. v. State ex rel. Corp. Comm'n*, 990 P.2d 328, 330 (Okla. Civ. App. 1999) (rejecting preemption argument with respect to state statute requiring railroads to construct fences along the right-of-way because "[n]o federal regulation or federal law directly addresses . . . maintenance of a railroad right-of-way"); *see also Lin ex rel. Estate of Zhang v. Nat'l R.R. Passenger Corp.*, CV990431868S, 2002 WL 318279 (Conn. Super. Ct. Feb. 11, 2002) (rejecting FRSA preemption argument with respect to wrongful death claim based on inadequate fencing because there is "no explicit congressional intent to preempt state law claims premised on inadequate fencing"); *Edwards v. Consol. Rail Corp.*, 567 F. Supp. 1087, 1101 (D.D.C. 1983) (rejecting preemption argument with respect to inadequate fencing claim because although the Federal Railroad Administration "may well exercise its powers in the areas of fencing or catenary wire safety in the future, . . . it has not done so") *aff'd*, 733 F.2d 966 (D.C. Cir. 1984).

B. The ICCTA

The ICCTA created the Surface Transportation Board to effectively regulate certain aspects of railroad operations. 49 U.S.C. §§ 10101–10102. The ICCTA is particularly concerned with economic regulation. *See Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 451 (D.C. Cir. 2010) ("[T]he core of ICCTA preemption is 'economic regulation'"). The ICCTA states that:

> The jurisdiction of the Board over
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501(b).

In analyzing the preemptive scope of the ICCTA, the Fifth Circuit Court of Appeals recently held that while the ICCTA "completely preempts state laws (and remedies based on such laws) that directly attempt to manage or govern a railroad's decisions in the economic realm," it "does not expressly preempt generally applicable state laws that have a mere remote or incidental effect on rail transportation." *Elam v. K.C. S. Ry. Co.*, 635 F.3d 796, 505, 807 (5th

Cir. 2011) (quotation omitted); *cf. City of Auburn v. United States*, 154 F.3d 1025, 1029–31 (9th Cir. 1998) (rejecting the argument that ICCTA preemption is limited to economic regulation and affirming federal preemption of state and local environmental permitting laws).

Although ICCTA has been interpreted broadly, *see, e.g.*, *City of Auburn*, 154 F.3d at 1029–31, as noted above, some courts have held that the FRSA, not the ICCTA, determines whether a state law relating to rail safety is preempted. *See Tyrrell*, 248 F.3d at 522; *Iowa, Chicago & E. R.R. Corp.*, 384 F.3d at 560; *Rawls v. Union Pac. R.R.*, 1:09-CV-01037, 2012 WL 2803764 (W.D. Ark. July 10, 2012). Even if the ICCTA does apply, at least one court has rejected an ICCTA preemption argument with respect to fencing along the railroad right-of-way. *See State ex rel. Okla. Corp. Comm'n v. Burlington N. & Santa Fe Ry. Co.*, 24 P.3d 368, 371 (Okla. Civ. App. 2000) (holding the ICCTA does not preempt a state agency's police power to require an operating railroad to maintain a fence along its right-of-way, unless there is evidence that such a requirement has a significant economic impact on the railroad's operation).

In sum, railroads owe a duty under Minnesota law to prevent children who would be deterred by fencing from entering the right-of-way. And although the preemption issue has yet to be addressed by a state or federal court in Minnesota, there is authority from other jurisdictions that could be used to support the validity of Minn. Stat. § 219.31.

I thank you again for your correspondence.

Sincerely,

JACOB CAMPION
Assistant Attorney General

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February 6, 2014

Peter B. Tiede, Esq.
Murnane Brandt, P.A.
30 East 7th Street, Ste. 3200
St. Paul, MN 55101

Re: Opinion Request

Dear Mr. Tiede:

I thank you for your correspondence dated December 30, 2013 requesting an opinion as to whether a joint-powers entity operating a joint fire department can assume all of the obligations under Minn. Stat. § 424A.092 (2012), including those obligations specifically assigned to "the municipality" under the statute.

The Isanti County Joint Operating Fire District ("Fire District") is a joint-powers entity formed by six towns and one city in accordance with Minn. Stat. § 471.59 (2012) pursuant to the Isanti Area Joint Operating Fire District Joint Powers Agreement ("Joint Powers Agreement"). The Fire District exists to operate a joint fire department that provides fire-protection services to the residents of each of the signatories of the Joint Powers Agreement. The Fire District is responsible for overseeing the joint fire department and its operations. Under the Joint Powers Agreement, firefighters for the Fire District are eligible for membership in the Isanti Firefighters' Relief Association or its successor fire relief association. The funding requirements for fire relief associations are set forth in Minn. Stat. ch. 424A (2012). You state that due to a change in statutory language, a question has arisen as to whether the City of Isanti has additional duties and obligations with respect to the Fire District's fire relief association or whether those duties and obligations may be properly exercised by the Fire District as a joint-powers entity.

The Office of Attorney General has limited authority. For instance, while it is authorized to provide legal opinions in appropriate circumstances to units of local government on questions of public importance, *see* Minn. Stat. § 8.07 (2012), the Fire District as a multi-jurisdictional joint-powers entity is not one of the types of units of local government enumerated in Minn. Stat. § 8.07. I can, however, offer the following comments, which I hope you will find helpful.

First, by state law, cities and towns are authorized to offer fire services. *See* Minn. Stat. §§ 365.15 (towns), 412.22 (statutory cities) (2012). Accordingly, cities and towns may agree to form a joint-powers entity to provide these services. *See generally* Minn. Stat. § 471.59, subd. 1 (2012) (authorizing governmental units to jointly contract to exercise "any power common to [them]"). A fire department operated by a joint-powers board, or established by municipal ordinance, may affiliate itself with a relief association that provides retirement benefits to

volunteer firefighters. Minn. Stat. § 424A.001, subd. 4 (2012). A fire department's affiliation with a relief association carries financial and other obligations identified in statute. *See, e.g.*, Minn. Stat. § 424A.092 (2012).

Second, a "relief association" as that term is defined in Minn. Stat. § 424A.001, subd. 4(a)(3)(iii) (2012), specifically includes firefighter relief associations "directly associated with . . . a fire department operated as or by a joint powers entity that operates primarily for firefighting purposes." Subdivision 3 of Minn. Stat. § 424A.001 defines "municipality" as "a municipality which has established a fire department with which the relief association is directly associated, or the municipalities which have entered into a contract with the independent nonprofit firefighting corporation of which the relief association is the subsidiary." However, Minn. Stat. § 69.011, subds. 1(b)(1) and (2) (2012) separately define "municipality" for purposes of Chapter 424A to include "a home rule charter or statutory city" and "an organized town."

Third, most provisions in Chapter 424A, refer to the relief association's affiliated party as "the municipality." *See, e.g.*, Minn. Stat. § 424A.092, subd. 3 (requiring relief association to, among other things, calculate "the minimum obligation of the municipality with respect to the special fund"); subd. 4 (requiring association to, among other things, certify "the minimum obligation of the municipality with respect to the special fund" to the authority responsible for satisfying that obligation). Given the multiple statutory definitions of "municipality" applicable to Chapter 424A and Minn. Stat. § 424A.001, subd. 4(a)(3)(iii)'s recognition that the statute specifically applies to relief associations affiliated with joint-powers entities, the statute's repeated references to the obligations of a "municipality" with respect to a fire relief association do not appear to preclude that term's applicability to a joint-powers entity directly operating a joint fire department. The Legislature appears to have intended a broad application of "municipality" in this specific context.

Fourth, as noted above, both cities and organized towns are considered "municipalities" for purposes of Chapter 424A under Minn. Stat. § 69.011, subd. 1 (2012). Thus, both types of governmental units could be "the municipality" for purposes of Chapter 424A if they are affiliated with a relief association. Given that individual members of the Fire District are "municipalities" who could operate a fire department and be subject to obligations under Chapter 424A but have instead delegated specific responsibilities under Chapter 424A to the Fire District under the Joint Powers Agreement, it does not appear improper for the Fire District to serve as "the municipality" for purposes of completing such delegated tasks. The 2012 revisions to Chapter 424A appear to support this interpretation. The Legislature revised Minn. Stat. § 24A.092, subd. 4 as follows:

> Subd. 4. **Certification of financial requirements and minimum municipal obligation; levy.** (a) The officers of the relief association shall certify the financial requirements of the special fund of the relief association and the minimum obligation of the municipality with respect to the special fund of the relief association as determined under subdivision 3 ~~to the governing body of the municipality~~ on or before August 1 of each year. The certification must be made

> to the entity that is responsible for satisfying the minimum obligation with respect to the special fund of the relief association. If the responsible entity is a joint powers entity, the certification must be made in the manner specified in the joint powers agreement, or if the joint powers agreement is silent on this point, the certification must be made to the chair of the joint powers board. [. . .]

Minn. Stat. § 424A.092, subd. 4; Minn. Laws 2012, ch. 286, art. 12, sec. 5.[1] The new language explicitly acknowledges that the body responsible for "the minimum obligation of the municipality" may be a joint-powers entity.

Finally, given the broad nature of "the municipality's" financial responsibilities to a relief association under chapter 424A, it may be advisable for the Joint Powers Agreement to delineate the roles of the Fire District and its constituent units with respect to any relief association with which the Fire District is affiliated. You correctly note that the Joint Powers Agreement does not include such provisions.

Thank you again for your correspondence.

Very truly yours,

FIONA B. RUTHVEN
Assistant Attorney General

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[1] Subdivision 4 governs lump-sum pensions. Subdivision 5, governing monthly service pensions, was similarly amended in 2012.

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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February 6, 2014

Mark J. Rahrick
Smith, Tollefson, Rahrick & Cass
108 West Park Square, Suite A
Owatonna, MN 55060

Dear Mr. Rahrick:

Thank you for your correspondence received January 13, 2014 requesting an opinion of the Attorney General as counsel for the City of Claremont (the "City") on questions concerning possible conflicts of interests on the part of the mayor and a member of the City Council.

Facts and Background

You state that an issue has been raised relating to the City's acquisition and potential renovation of a property located at 138 West Front Street in the City (the "Property"). The Property is presently vacant and owned by the State as a result of a tax forfeiture. The State offered the Property to the City for public use at a minimal cost. The City will be required to expend City funds for renovations necessary to put the Property to public use. The City Council voted 3-2 to accept the Property from the State. One of the City Council members owns three buildings attached to and immediately adjacent to the Property and the mayor owns the building immediately to the north of the Property. Both the City Council member and the mayor voted in favor of accepting the Property from the State. There has been a suggestion that these individuals have a conflict of interest because they may receive a financial benefit from the City's renovation of the Property through the increased valuation of their neighboring properties.

Based upon this background, you ask the following questions:

1. Did the member of the city council or the mayor have a conflict of interest when they took part in the decision to accept the Property from the State?

2. Would the member of the city council or the mayor have a conflict of interest if they take part in a future decision to expend city funds to renovate the Property?

3. In the event that both the member of the city council and the mayor must abstain from decisions relating to the Property, is a majority of the remaining three council members sufficient to take action regarding the Property?

For the reason noted in Op. Atty. Gen. 629a, May 9, 1975, this Office does not generally render opinions upon hypothetical or fact-dependent questions, or conduct a general review of a local undertaking after the fact to evaluate its validity or to identify legal problems. Therefore, this Office expresses no opinion concerning the validity of the City's decision to acquire the Property. That being said, I can point you to the following authorities, which I hope you will find helpful.

First, Minn. Stat. §§ 412.311 and 471.87 (2012) generally prohibit a member of a statutory city council from having a personal financial interest in any sale, lease or contract made by the council. These prohibitions are subject to certain exceptions which permit a local governing body to contract with an interested member for goods or services under the circumstances prescribed in Minn. Stat. § 471.88 (2012).

Second, in circumstances not addressed by specific statutes, Minnesota courts have not applied any hard and fast rule regarding the involvement of public officials in decisions that affect their personal financial interests. *See In re 1989 Street Improvement Program v. Denmark Twp.*, 483 N.W.2d 508, 510-11 (Minn. Ct. App. 1992) ("There is no settled rule about whether a conflict of interest will disqualify an individual.") Rather, the courts have taken into account several factors in evaluating, on a case-by-case basis, whether a public official should be disqualified from participating in a particular official action due to a personal financial interest. These factors include:

1. The nature of the decision being made;

2. The nature of the pecuniary interest;

3. The number of officials making the decision who are interested;

4. The need, if any, to have interested persons make the decision; and

5. The other means available, if any, such as the opportunity for review, that serve to ensure that the officials will not act arbitrarily to further their selfish interests.

Lenz v. Coon Creek Watershed Dist., 153 N.W.2d 209, 210 (Minn. 1967).. Courts applying the *Lenz* factors have previously concluded that a council member's interest in abutting or adjacent property may create a conflict of interest sufficient to bar that member from participating in council actions that may affect such property. *See E.T.O., Inc. v. Town of Marion*, 375 N.W.2d 815, 820 (Minn. 1985) (member of town board who owned property directly across from bar who claimed the property was devalued by the existence of the bar had a "direct, admitted financial interest" and should not have voted on bar's license renewal application because "[a] public official with a direct conflict of interest should not be permitted to vote in such a situation or our statutes and decisions prohibiting conflict of interest would be a mere mockery"); *see also In re 1989 Street Improvement Program*, 483 N.W.2d at 511 (noting that the property interests of two members of a town board who owned real property bordering a proposed street improvement "would give the appearance of impropriety" if they were to vote on the proposed improvement).

The Court of Appeals has explained, "[w]here there is a choice, city officials should avoid actions which may appear tainted of impropriety, even though they are legal." *Id.* at 510.

Third, the consequences of a council member acting contrary to such legal restrictions depends upon the nature and severity of the offense. In other circumstances, as well, if a council member votes on a matter before the council and is later found to be disqualified due to a conflict of interest, the action or transaction in question may be voided by a court. *See, e.g., E.T.O., Inc.*, 375 N.W.2d at 819-20.

Fourth, as a general proposition, absent specific statutory language to the contrary, actions of a governing body are valid if approved by a majority of the members voting at a meeting where a quorum is in attendance. *See, e.g.,* 4 McQuillin Municipal Corporations, §§ 13.34, 13.35 (3d ed.); Ops. Atty. Gen. 471-M October 30, 1986. A majority of the members of a statutory city council constitutes a quorum. *See* Minn. Stat. § 412.191, subd. 1 (2012). Absent statutory language requiring approval by a specific number of members, or by a stated proportion of the entire authorized membership, a quorum of a body and the requisite number of votes needed to approve a measure will be computed with reference to the number of members actually in office at the time the action is taken. For example, if there are two vacancies on a board that normally consists of seven members, the board will be treated, for quorum and voting purposes, as if it were a five-member body. *See, e.g., State ex rel Peterson v. Hoppe*, 260 N.W. 215 (Minn. 1935), Op. Atty. Gen. 63-b-14, October 6, 1982. If a member is legally disqualified from voting on a particular matter, the disqualification will be treated as the equivalent of a vacancy for purposes of computing the size of a quorum, and the required voting majority. *See, e.g., Denmark Twp.*, 483 N.W.2d at 511; Op. Atty. Gen. 471-M, October 30, 1986.

I hope the foregoing discussion is helpful to you. For your convenience, I enclose copies of the cited opinions of the Office.

I thank you again for your correspondence.

Very truly yours,

FIONA B. RUTHVEN
Assistant Attorney General

(651) 757-1248 (Voice)
(651) 297-1235 (Fax)

Enclosures: Ops. Atty. Gen. 629-a, May 9, 1975
Ops. Atty. Gen. 471-M, October 30, 1986
Ops. Atty. Gen. 63-b-14, October 6, 1982

LEGISLATIVE: MEMBERS: Privilege from arrest during session does not apply to criminal conduct. Minn. Const. art. IV, § 10.

2801-1
(Cr. Ref. 86a-16)

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota
ST. PAUL, MN 55155

LORI SWANSON
ATTORNEY GENERAL

April 22, 2014

The Honorable Ron Latz
State Senator
Chair, Senate Judiciary Committee
303 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul MN 55155

Dear Senator Latz:

In your letter dated April 10, 2014, you note that the Minnesota Constitution extends the following privilege to members of the Minnesota Legislature:

> Art. IV., Sec. 10. **Privilege from Arrest.**
>
> The members of each house in all cases except treason, felony and breach of the peace, shall be privileged from arrest during the session of their respective houses and in going to or returning from the same....

You ask to what conduct this privilege from arrest applies. You note that there is pending legislation to clarify that this privilege does not apply to criminal conduct.

As you know, the Research Department of the Minnesota House of Representatives issued an opinion on April 9, 2014 on the same question you ask in your April 10 letter. As noted in the House Research Department opinion, various federal courts and courts in other states have interpreted similar constitutional provisions relating to the legislative privilege from "arrest." Almost all of the more recent decisions conclude that the privilege does not apply to any type of criminal conduct. These recent decisions demonstrate an evolution in judicial reasoning over the past century.

For instance, the Minnesota Supreme Court interpreted Art. IV, Sec. 10 in *Rhodes v. Walsh*, 55 Minn. 542, 57 N.W. 212 (Minn. 1893). In that case, several state legislators who were served with a *civil* summons and complaint argued that the above provision granted them a privilege against being served with civil service of process. The Minnesota Supreme Court rejected their argument, finding that the privilege from "arrest" did not apply to service of a civil lawsuit. *Walsh*, 55 Minn. at 533, 57 N.W. at 215. In so holding, the Minnesota Supreme Court

also stated: "As members can only be arrested, during a session of the legislature, for treason, felony, and breach of the peace, does it not necessarily follow that they could not be arrested during such time for the most serious misdemeanors, unless such ones as may be included in the term 'breach of the peace?'" *Id.*

Thereafter, in 1898, a member of the Wisconsin Assembly was arrested and charged with attempting to bribe a Milwaukee alderman. *State v. Polacheck*, 101 Wis. 427, 77 N.W. 708 (Wis. 1898). The assemblyman later tried to retroactively assert a legislative privilege against the bribery charge based upon a provision of the Wisconsin Constitution similar to Art. IV, Sec. 10. While finding that the assemblyman waived the privilege by not timely asserting it, the Wisconsin Supreme Court also found that the privilege from arrest in the Wisconsin Constitution for "all cases, except treason, felony and breach of the peace" only applied to offenses that were felonies at the time the state constitution was adopted in 1848. *Polacheck*, 77 N.W. at 709. Over 100 years later, in *State v. Burke*, 258 Wis. 2d 832, 653 N.W.2d 922 (Wis. Ct. App. 2002), the Wisconsin Court of Appeals rejected the *Polacheck* reasoning, finding that legislators had no privilege from criminal arrest and that the privilege exception for "treason, felony and breach of the peace" was intended to mean "all crimes." *Burke*, 258 Wis. at 841, 653 N.W.2d at 927.

In *Walsh*, *supra*, the Minnesota Supreme Court found that the language of Art. IV, Sec. 10 is "substantially the same" as the similar provision in the U.S. Constitution that applies to members of Congress. *Walsh*, 57 N.W. at 215. Art. I, Sec. 6, cl. 1 of the U.S. Constitution provides that members of Congress "in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses...."

The United States Supreme Court construed the federal constitutional privilege from arrest several times after *Walsh* was decided. In *Williamson v. United States*, 207 U.S. 425 (1908), the Supreme Court held that the phrase "treason, felony and breach of the peace" in the U.S. Constitution "excepts from the operation of the privilege all criminal offenses." *Williamson*, 207 U.S. at 446. The Court reasoned that the privilege only applies to "prosecutions of a civil nature." *Id.* at 438. Thereafter, in *Long v. Ansell*, 293 U.S. 76, 83 (1934), the Supreme Court again found that the legislative privilege from arrest only applies to "arrests in civil suits," which were "still common in America" when the U.S. Constitution was adopted. In *Gravel v. United States.*, 408 U.S. 606, 615 (1972), the Supreme Court reiterated that "the constitutional freedom from arrest does not exempt Members of Congress from the operation of the ordinary criminal laws." As noted in the House Research Department opinion, there is also substantial case law authority from other states that interpret similar provisions in state constitutions to exclude a privilege from arrest for criminal activity.

Since *Walsh*, no Minnesota appellate court has construed Art. IV, Sec. 10. If the Minnesota appellate courts were presented with the issue, it is highly likely they would adopt the majority view set forth in modern cases and find no legislative privilege from arrest for DWIs or other criminal activity under the Minnesota Constitution.

Having said this, I should note that, since the 1980s, the Minnesota Secretary of State has issued a wallet-sized personal certificate to each Minnesota legislator stating that the legislator is entitled to a privilege from "arrest" and quoting Art. IV, Sec. 10 of the Minnesota Constitution. A copy is attached as Exhibit A. Because legislators are issued an election certificate to certify their election, Minn. Stat. § 204C.40, subd. 1, it appears that the wallet-sized certificate card must have been intended to serve some additional purpose, presumably to be used in a situation involving an "arrest."

Furthermore, as noted in the House Research opinion of April 9, it is well-known that at least a few legislators have invoked the privilege when arrested for misdemeanor DWI driving offenses.

As you know, opinions of the Attorney General do not have the force of law. *County of Hennepin v. County of Houston*, 39 N.W.2d 858, 861 (Minn. 1949). Under the circumstances, I believe that it would be helpful and beneficial for the Minnesota Legislature to give additional direction to legislative members, the public, law enforcement, and the courts by enacting legislation to clarify that state legislators have no immunity from arrest for criminal activity, including the crime of driving while intoxicated. Based upon the above analysis, I believe that the Minnesota appellate courts would uphold the constitutionality of such a statute. *See Walsh*, 57 N.W. at 213 ("All citizens should be deemed to stand equal in their rights before the law. This country recognizes no special privileged class...when a citizen or officer claims such a privilege, it is his duty to show affirmatively and conclusively that he is privileged above other of his fellow citizens.").

I thank you for your April 10 letter. If you have any questions, please let me know.

Sincerely,

LORI SWANSON
Attorney General

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota
ST. PAUL, MN 55155

LORI SWANSON
ATTORNEY GENERAL

August 19, 2013

The Honorable Mike Rothman
Commissioner
Minnesota Department of Commerce
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St. Paul, MN 55101

The Honorable Dr. Edward Ehlinger
Commissioner
Minnesota Department of Health
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P.O. Box 64975
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The Honorable Lucinda Jesson
Commissioner
Minnesota Department of Human Services
MNsure Board of Directors
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The Honorable Jim Schowalter
Commissioner
Minnesota Management and Budget
400 Centennial Building
658 Cedar Street
St. Paul, MN 55155

Re: Opinion Pursuant to 2013 Minn. Laws ch. 108, art. 12, § 107

Dear Commissioners Rothman, Jesson, Ehlinger, and Schowalter:

In the most recent legislative session, the Minnesota Department of Commerce was directed to request the United States Department of Health and Human Services ("HHS") to include insurance coverage for autism services in the benefit set for Minnesota beginning in 2016.[1] The Commerce Department was also directed to determine options for coverage of treatment of autism spectrum disorders.[2] The premise of these legislative directives appears to be that the Minnesota Legislature has not mandated coverage for such treatment. Nonetheless, the Legislature also directed this Office to issue an opinion on whether health plans are mandated to provide coverage for treatment of mental health-related illnesses and autism spectrum disorders.[3] This opinion letter is issued pursuant to this legislative directive.

LAW AND ANALYSIS

A "health plan" is a policy, certificate, or contract of accident and sickness insurance offered by an insurance company, a nonprofit health service plan corporation, a health maintenance organization, a fraternal benefit society, a joint self-insurance employee health plan, or a community integrated service network.[4] This opinion separately analyzes the coverage of autism spectrum disorder treatment and mental health treatment that is statutorily required to be

provided by fully-insured individual health plans, small group health plans, and fully-insured large employer health plans in Minnesota.

I. FULLY-INSURED INDIVIDUAL AND SMALL-GROUP HEALTH PLANS.

A. States Must Cover "Essential Health Benefits" Comparable To Those Covered In Their "Benchmark Plans."

In 2010, Congress enacted the Affordable Care Act ("ACA"). Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010), *as amended by* Health Care and Education Reconciliation Act of 2010 ("HCERA"), Pub. L. 111-152, 124 Stat. 1029 (2010). Under the ACA, fully-insured individual and small employer health plans that take effect beginning on or after January 1, 2014 must cover "essential health benefits," also referred to as "EHBs." ACA §§ 1201(4), 1251(a), (e), 1255, 1301(b)(1)(B), 10103(d)-(f). Under the ACA, a small employer health plan is generally one purchased by an employer with 100 or fewer employees, although the ACA allows states to define a small employer as 50 or fewer employees for plan years beginning before January 1, 2016. *Id.* § 1304(b)(1)-(3). Minnesota has defined a "small employer" as one with 50 or fewer employees. *See* 2013 Minn. Laws ch. 84, art. 1, § 47, art. 2, § 4, at 502-03, 537 (amending Minn. Stat. § 62L.02, subd. 26, and enacting Minn. Stat. § 62K.03, subd. 12).

Under the ACA, EHBs include ten categories of benefits, including benefits for "[m]ental health and substance use disorder services, including behavioral health treatment." *Id.* § 1302(b)(1)(E). HHS allowed each state to further define the benefits within each EHB category through the selection of a "benchmark plan." *Standards Related to Essential Health Benefits, Actuarial Value, & Accreditation*, 78 Fed. Reg. 12,834, 12,840-41 (Feb. 25, 2013). All individual and small employer health plans offered in each state must then provide coverage that is substantially equal to that in the benchmark plan in terms of covered benefits, limitations on coverage, and prescription-drug benefits. *Id.* at 12,867 (to be codified at 45 C.F.R. § 156.115(a)(1)). If a benchmark plan fails to provide coverage in an EHB category, the plan must be supplemented to provide coverage. *Id.* at 12,866 (to be codified at § 156.110(b)).

States had authority to select their own benchmark plan from either the largest plan by enrollment offered in the small-group market or by a health-maintenance organization or the largest plan offered to state and federal employees. *Id.* (to be codified at 45 C.F.R. § 156.100(a)). If a state failed to select a benchmark plan, the benchmark plan by default became the largest plan by enrollment in the state's small-group market. *Id.* (to be codified at § 156.100(c)).

B. Minnesota's Benchmark Plan Was Adopted By Default.

Approximately 24 states actively selected a benchmark plan and approximately 26 states allowed the default plan (i.e., the largest small employer health plan in the state) to become their benchmark plan.[5] Minnesota did not actively select a benchmark plan. As a result, HHS determined that Minnesota's benchmark plan defaulted to the HealthPartners Small Group Product (HealthPartners 500 25 Open Access PPO).[6] A copy of this policy—which is now Minnesota's benchmark plan—is attached as Exhibit 1. The Minnesota Department of Commerce approved the HealthPartners plan for issuance in Minnesota on April 27, 2011. Ex. 2.

C. Coverage For Mental Health Treatment Under Minnesota's Benchmark Plan.

As previously noted, EHBs must include coverage for "[m]ental health and substance use disorder services, including behavioral health treatment." ACA § 1302(b)(1)(E). Furthermore, effective May 25, 2013, all health plans in Minnesota must comply with all applicable requirements of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA"), Pub. L. 110-343, 122 Stat. 3861, 3881-93 (2008), and the ACA.[7] The MHPAEA provides that, if a health plan includes both mental health and medical benefits, the coverage must be the same in terms of financial requirements, treatment limitations, and out-of-network coverage. MHPAEA § 512. Before the ACA, the MHAPEA did not apply to individual or small-group plans. *Id.* (applying only to group plans); 29 U.S.C. § 1185a(c)(1)(A) (2012) (exempting small employers from MHPAEA in Employee Retirement Income Security Act); 42 U.S.C. § 300gg-26(c) (2012) (excluding small employers from MHPAEA in Public Health Service Act). The ACA expanded the MHPAEA's parity requirements to apply to individual and small-group plans. *Standards Related to Essential Health Benefits*, 78 Fed. Reg. at 12,844, 12,867 (finalizing 45 C.F.R. § 156.115(a)(3) to require compliance with 45 C.F.R. § 146.136, which requires parity between mental-health and medical benefits).

Minnesota's benchmark plan states: "We cover services for: mental health diagnoses as described in the Diagnostic and Statistical Manual of Mental Disorders–Fourth Edition (DSM IV) (most recent edition) that lead to significant disruption of function in the member's life." Ex. 1 at 15. The plan covers outpatient and inpatient treatment and also generally covers mental-health treatment ordered by a Minnesota court. *Id.* at 15-16; *see also* Minn. Stat. §§ 62Q.47 (imposing parity requirements for mental health and medical coverage if plan covers mental health services), .53 (defining "medically necessary" as health care services that are appropriate for diagnosis or condition in terms of type, frequency, level, setting, and duration and providing that any plan that covers mental health services cannot impose a more restrictive

definition than the statutory definition), 535, subd. 2 (requiring plan that covers mental-health services to cover court-ordered mental-health services) (2012).

Thus, because fully-insured individual and small-group health plans offered in Minnesota on or after January 1, 2014 must provide EHB coverage that is substantially equal to that in the benchmark plan and because the benchmark plan provides mental health coverage, fully-insured individual and small-group plans offered in Minnesota must provide coverage for mental-health treatment effective January 1, 2014. Financial requirements, treatment limitations, and out-of-network coverage plans for mental health must be the same as for medical coverage. MHPAEA § 512; *Standards Related to Essential Health Benefits*, 78 Fed. Reg. at 12,867 (to be codified at 45 C.F.R. § 156.115(a)(3)).

D. Coverage For Autism Spectrum Disorder Treatment Under Minnesota's Benchmark Plan.

For qualified health plans offered through a state's insurance exchange, a state may require benefits in addition to those required as part of the EHB package. ACA § 1311(d)(3)(B)(i). In addition, the Commerce Department historically had authority to disapprove any policy form that contained unjust, unfair, or inequitable provisions. Minn. Stat. § 62A.02, subd. 3(a)(2) (2012). As noted above, the Commerce Department approved the policy that became Minnesota's default benchmark plan. The benchmark plan excludes coverage for "[i]ntensive behavioral therapy treatment programs for the treatment of autism spectrum disorders, including ABA, IEIBT and Lovaas." Ex. 1 at 24. This exclusion appears to be common in the industry in Minnesota. The Commerce Department has approved similar exclusions, for example, in policies issued by Blue Cross Blue Shield of Minnesota[8] (Ex. 3 at 20, 45) and Medica[9] (Ex. 4 at 74).

As set forth above, the Minnesota Legislature enacted a law this year providing that, "[b]y December 31, 2014, the Department of Commerce shall request that the United States Department of Human Services include autism services in Minnesota's Essential Health Benefits when the next benefit set is selected in 2016." In other words, the Legislature appears to have recognized that Minnesota's default benchmark plan expressly excludes such coverage.

As set forth below, in 2013, the Minnesota Legislature required fully-insured large employer health plans insuring employers with 50 or more employees to cover treatment of autism spectrum disorders effective January 1, 2014. Ex. 5. The Legislature also required such coverage for the State Employee Group Insurance Plan (SEGIP)[10] and state medical-assistance program.[11] The Legislature did not enact a similar law to require autism coverage by individual and small employer health plans. To the contrary, the State deferred to HHS to select a default benchmark plan for Minnesota that expressly excludes coverage for certain types of intensive behavioral therapy treatment programs for autism spectrum disorders.

It should be noted that there has been substantial litigation around the country seeking coverage under various health plans for intensive autism treatment for children. One case is pending in federal court in Minnesota. A mother sued various health plans and the Minnesota Department of Commerce alleging that they violated numerous federal and state laws, including the Americans with Disabilities Act and the Minnesota Human Rights Act, by approving or issuing discriminatory policies that exclude coverage for intensive behavioral therapy treatment for autism spectrum disorders. *See Reid ex rel. M.R. v. BCBSM, Inc.*, No. 12-cv-3005 (D. Minn. filed Nov. 30, 2012). A court has the authority to require coverage even if the Department of Commerce has approved its exclusion. *Shank v. Fid. Mut. Life Ins. Co.*, 21 N.W.2d 235, 238 (Minn. 1945).

II. LARGE EMPLOYER HEALTH PLANS.

A. Coverage For Mental Health Treatment by Large Employer Health Plans.

Large employers with at least 50 full-time employees are not required to cover EHBs. They are, however, subject to "assessable payments" if they do not provide full-time employees and their dependents with affordable "minimal essential coverage." ACA §§ 1513(a), 10106(f), *as amended by* HCERA § 1003. "Minimal essential coverage" is defined as merely coverage that arises from a governmental health plan, an employer–sponsored plan, a grandfathered health plan, a plan offered in a state's individual market, or any other health-benefits coverage. ACA § 1501(b); *see also id.* § 1513 (applying definition of minimum essential coverage from 26 U.S.C. § 5000A(f)(2), which was enacted in ACA § 1501). Under the MHPAEA, however, if a large employer covers mental-health services, the coverage must be the same as for medical coverage in terms of financial requirements, treatment limitations, and out-of-network coverage. MHPAEA § 512.

B. Coverage For Autism Spectrum Disorder Treatment By Fully-Insured Large Employer Health Plans.

In 2013, the Minnesota Legislature required that a fully-insured health plan issued to a large employer—defined as an employer with more than 50 current employees—"provide coverage for the diagnosis, evaluation, multidisciplinary assessment, and medically necessary care of children under 18 with autism spectrum disorders." Ex. 5, 2013 Minn. Laws. ch. 108, art. 12, § 3, at 1292-93 (enacting Section 62A.3094, subdivision 2, and incorporating definition of "large employer" from Section 62Q.18); *see also* Minn. Stat. § 62Q.18, subd. 1(3) (2012) (defining "large employer"). It has been estimated that about 14 percent of the State's population is covered under fully-insured large employer plans.[12] This is because large employers more commonly self-insure their health benefits under the Employee Retirement

Income Security Act, which generally preempts state coverage regulations. *See* 29 U.S.C. § 1144(a) (2012).

If you have any questions, please let me know.

Sincerely,

LORI SWANSON
Attorney General

cc: The Honorable Joe Atkins
The Honorable Thomas Huntley
The Honorable Tina Liebling
The Honorable Tony Lourey
The Honorable James Metzen
The Honorable Kathy Sheran
Mr. Brian Beutner, Chair, MNsure Board of Directors
Mr. Peter Benner, Vice-Chair, MNsure Board of Directors
Mr. Thompson Aderinkomi, MNsure Board of Directors
Dr. Kathryn Duevel, MNsure Board of Directors
Mr. Tom Forsythe, MNsure Board of Directors
Mr. Phil Norrgard, MNsure Board of Directors

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[1] 2013 Minn Laws ch. 108, art. 12, § 106, at 1349.

[2] 2013 Minn Laws ch. 108, art. 12, § 105, at 1349.

[3] 2013 Minn. Laws ch. 108, art. 12, § 107, at 1350.

[4] *See* Minn. Stat. § 62Q.01, subd. 3 (2012) (defining "health plan" to include definition provided in Section 62A.011); 2013 Minn. Laws ch. 84, art. 1, § 7, at 474-75 (amending Section 62A.011, subdivision 3).

[5] Sabrina Corlette et al., The Commonwealth Fund, *Implementing the Affordable Care Act: Choosing an Essential Health Benefits Benchmark Plan* 2, 5 (2013).

[6] In July 2012, HHS identified each state's largest small-group products. States then had two opportunities to select a benchmark plan: by September 30, 2012, and then by December 26, 2012. In February 2013, HHS issued its final rules implementing the ACA's EHB provisions and identified each state's benchmark plan. *See Standards Related to Essential Health Benefits*, 78 Fed. Reg. at 12,871 (identifying Minnesota's benchmark plan); Ctr. for Consumer Info. & Ins. Oversight, U.S. Dep't of Health & Human Servs., *Essential Health Benefits: List of the Largest Three Small Group Products by State* 10 (July 3, 2012) (identifying Minnesota's largest small-group products); Minn. Health Care Reform Task Force, *Roadmap to a Healthier Minn.: Recommendations of the Minn. Health Care Reform Task Force* 36 (Dec. 13, 2012) (noting task force's discussion of EHB, determination that few significant differences existed between Minnesota's benchmark-plan options, and recommendation that state revisit EHB for 2016 plan year); Minn. Health Care Reform Task Force, *Essential Health Benefits: Basic Facts & Frequently Asked Questions* 1, 5 (Oct. 5, 2012) (stating that Minnesota did not select benchmark plan by first deadline to select plan);

Minn. Dep't of Commerce, *Essential Health Benefits Activity to Date* (providing timeline of activity for State's Health Care Reform Task Force, including acknowledgements that Minnesota had not selected a benchmark plan), *available at* http://mn.gov/commerce/insurance/topics/medical/health-insurance-reform/essential-health-benefits/essential-health-benefits-activities.jsp (last visited August 19, 2013).

[7] 2013 Minn. Laws ch. 84, art. 1, §§ 68, 75, 89, at 516, 519, 533-34 (enacting Sections 62Q.021, subdivision 2, 62Q.47(d), and 62Q.81, providing that requirements to comply with ACA and MHPAEA became effective day after enactment, and providing that requirement to provide coverage for EHBs takes effect January 1, 2014).

[8] For example, on pages 20 and 45 of Blue Cross policy CMMHM132A, approved by the Commerce Department on April 27, 2012, the policy excludes coverage for: "[S]ervices for or related to intensive behavioral therapy programs for the treatment of autism spectrum disorders including, but not limited to: Intensive Early Intervention Behavioral Therapy Services (IEIBTS), Intensive Behavioral Intervention (IBI), and Lovaas Therapy."

[9]For example, page 74 of the Medica Choice Passport Certificate of Coverage Form MIC MAN PPMN, approved by the Commerce Department on November 21, 2011, excludes coverage for: "Services for or related to intensive behavior therapy treatment programs for the treatment of autism spectrum disorders. Examples of such services include, but are not limited to, Intensive Early Intervention Behavior Therapy Services (IEIBTS), Intensive Behavioral Intervention (IBI), and Lovaas therapy."

[10] The SEGIP autism coverage is effective the earlier of January 1, 2016 or the date the next collective bargaining agreement or compensation plan is approved. 2013 Minn. Laws ch. 108, art. 12, § 2, at 1292.

[11] 2013 Minn. Laws ch. 108, art. 7, § 14, at 1064-65.

[12] Maura Lerner, *Autism Insurance Mandate Wins Approval*, Star Trib., May 22, 2013, at 2B.

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

August 28, 2014

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Re: ***Minn. Stat. §§ 84.9256 and 169.045***

Dear Mr. Lee:

I thank you for your correspondence of May 9, 2014, on behalf of the City of Argyle.

You state that you have drafted city ordinances for several cities in Minnesota permitting the operation of all-terrain vehicles ("ATV") and golf carts on city streets pursuant to Minn. Stat. § 169.045 (2012), which states:

> The governing body of any county, home rule charter or statutory city, or town may by ordinance authorize the operation of motorized golf carts, all-terrain vehicles, utility task vehicles, or mini trucks, on designated roadways[1] or portions thereof under its jurisdiction. Authorization to operate a motorized golf cart, all-terrain vehicle, utility task vehicle, or mini truck is by permit only.

The statute further provides:

> The provisions of chapter 171[2] are applicable to persons operating mini trucks, but are not applicable to persons operating motorized golf carts, utility task vehicles, or all-terrain vehicles under permit on designated roadways pursuant to this section.

Minn. Stat. § 169.045, subd. 7.

Upon further discussion with you on June 18, 2014, you advised this Office that Argyle is considering adopting an ordinance regarding the use of ATVs and UTVs on its streets. You

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[1] Minn. Stat. § 169.011, subd. 68 (2012) defines a roadway as "that portion of the highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder."

[2] Chapter 171 provides, in relevant part, that "except when expressly exempted, a person shall not drive a motor vehicle upon a street or highway in this state unless the person has a valid driver's license under this chapter for the type or class of vehicle being driven." Minn. Stat. § 171.02, subd. 1(a) (2012).

indicate that local law enforcement officers are concerned that the language in Minn. Stat. § 169.045 is contradicted by the language in Minn. Stat. § 84.9256 (2012), which generally requires a driver's license to operate an ATV on public roads. You raise the following question:

> [C]an an individual who does not have a driver's license but who does have a permit under Minn. Stat. § 169.045 drive an ATV or UTV on designated city streets? To state it another way, despite the language in Minn. Stat. § 169.045, Subd. 7, must an individual have a driver's license to operate an ATV or UTV on designated city streets?

This Office generally does not make factual determinations or review the validity of local ordinances. Op. Att'y Gen. 629a (May 9, 1975) (copy enclosed). Notwithstanding these limitations, I can offer the following comments, which I hope you will find helpful.

The object of all interpretation and construction of laws is to ascertain and to effectuate the intention of the legislature. Minn. Stat. § 645.16 (2012). Every law should be construed, if possible, to give effect to all provisions. *Id.* "When the provisions of two or more laws passed at different sessions of the legislature are irreconcilable, the law latest in date of final enactment shall prevail." Minn. Stat. § 645.26, subd. 4 (2012).

In 1982, the Legislature enacted Minn. Stat. § 169.045, authorizing the governing body of any home rule charter or statutory city or town to adopt an ordinance allowing persons with disabilities to obtain a permit from the city to operate golf carts on designated roadways under its jurisdiction. 1982 Minn. Laws ch. 549, § 2. If a city chose to adopt such an ordinance, it had to designate the permissible roadways, prescribe the form of the application for the permit, require evidence of insurance, and could prescribe other conditions, consistent with the statute, under which a permit may be granted. *Id.* The Legislature provided that Chapter 171 did not apply to persons with disabilities operating a golf cart on designated roadways with a permit from the city. *Id.*

In 1984, the Legislature enacted Minn. Stat. § 82.928, which stated "[e]xcept as provided in chapter 168 or in this section, a three-wheel off-road vehicle may not be driven or operated on a highway." 1984 Minn. Laws ch. 647, § 7. The statute then provided that a three-wheel off-road vehicle may make a direct crossing of a street or highway under certain conditions. *Id.*

In 1986, the Legislature amended Minn. Stat. § 169.045 to authorize a city to adopt an ordinance permitting persons with disabilities to also obtain a permit from the city to operate "four-wheel all-terrain vehicles" on designated roadways under its jurisdiction. 1986 Minn. Laws ch. 452, § 19. The exemption from chapter 171 for disabled persons operating a golf cart on designated roadways with a permit from the city was likewise expanded to include four-wheel all-terrain vehicles. *Id.*

The Legislature also substantially amended Minn. Stat. § 84.928, adding detailed regulations regarding the operation of "all-terrain vehicles." *Id.* § 15. The Legislature provided, among other things, that "Chapter 169 applies to the operation of all-terrain vehicles

upon streets and highways." *Id.* § 15. The Legislature further provided that "[a] county or city, or a town acting by its town board, may regulate the operation of all-terrain vehicles on public lands, waters, and property under its jurisdiction and on streets and highways within its boundaries, by resolution or ordinance of the governing body." *Id.* However, local governmental units could not adopt an ordinance that required an all-terrain vehicle operator to possess a driver's license. *Id.*

As part of the same 1986 act, the Legislature enacted Minn. Stat. § 84.9256, entitled "Youthful Operators; Prohibitions." *Id.* § 13. Section 84.9256 imposed various restrictions on the operations of "all-terrain vehicles" by persons under 18 depending on their age. *Id.*

In 1987, the Legislature deleted the provision in Minn. Stat. § 169.045 that restricted the issuance of permits to persons with disabilities.

In 1989, the Legislature again substantially altered the ATV statutes in Chapter 84. The Legislature amended Minn. Stat. § 84.9256 to provide that, "[e]xcept for operation on public road rights-of-way that is permitted under section 84.928, a driver's license . . . is required to operate an all-terrain vehicle along or on a public road right-of-way." 1989 Minn. Laws ch. 331, § 14. A public road right-of-way was defined as the "entire right-of-way of a public road, including the traveled portions, banks, ditches, shoulders, and medians of a roadway that is not privately owned." *Id.* § 8.

The Legislature also amended Minn. Stat. § 84.928 to provide that "[a] person shall not operate an all-terrain vehicle along or on the roadway, shoulder, or inside bank or slope of a public road right-of-way other than in the ditch or the outside bank or slope of a trunk, county state-aid, or county highway in this state unless otherwise allowed in sections 84.92 to 84.929." *Id.* § 17. In addition, the Legislature removed from Minn. Stat. § 84.928 the ability of a city to regulate the operation of all-terrain vehicles on public road rights-of-way. *Id.* § 19. Nevertheless, Minn. Stat. § 84.928 still provided that "Chapter 169 applies to the operation of all-terrain vehicles upon streets and highways," *id.* § 17, and the Legislature did not change Minn. Stat. § 169.045 during the 1989 session.

In 2009, the Legislature amended Minn. Stat. § 169.045, adding mini trucks to the list of vehicles a city could permit on their roadways. 2009 Minn. Laws ch. 158, § 3. And in 2011, the Legislature added utility task vehicles. 2011 Minn. Laws ch. 107, § 89. The Legislature provided that "[t]he provisions of chapter 171 are applicable to persons operating mini trucks, but are not applicable to persons operating motorized golf carts, utility task vehicles, or all-terrain vehicles under permit on designated roadways pursuant to this section." *Id.* § 94.

In assessing the legislative intent, deference is given to an agency's interpretation of the laws in question. *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater*, 731 N.W.2d 502, 512, 516 (Minn. 2007) (stating that courts defer to agencies' reasonable interpretation of a statute that an agency is charged with administering when the language is unclear and susceptible to different interpretations). Two state agencies—the Minnesota Department of Natural Resources ("DNR") and the Minnesota

Department of Public Safety ("DPS"), which operates the State Patrol—have authority to administer the off highway vehicle laws and to issue tickets for violations of them, respectively. In this case, the two agencies appear to have taken different positions with regard to whether a person needs a driver's license to operate an ATV on city streets when there is a local ordinance that allows such a vehicle to be operated in this fashion:

On the one hand, the DNR, which administers chapter 84, has published regulations for "Off-Highway Vehicles." I enclose a copy for your review. The publication states multiple times that a valid driver's license is required to operate an off-highway vehicle on road rights-of-way. (*See* pgs. 19, 29, 34.)

On the other hand, the Minnesota State Patrol advised this Office that it does not enforce the driver's license requirement in areas where there is a local ordinance that authorizes the use of golf carts and ATVs on designated roadways pursuant to Minn. Stat. § 169.045.

In light of the deference afforded to agency interpretations of statutes that are potentially susceptible to more than one meaning, I recommend that you contact the DNR and the State Patrol to determine whether they interpret the statute differently, and if so, whether they can reconcile their respective positions. You may contact these agencies as follows:

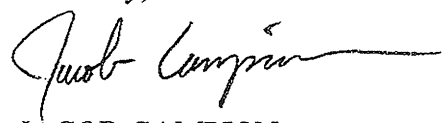
DNR Central Office
500 Lafayette Road
St. Paul, MN 55155-4040
(651) 296-6157

Minnesota State Patrol
445 Minnesota Street
St. Paul MN 55101-5130
(651) 201-7100

In the event you determine that the agencies are applying the law in a manner that cannot be reconciled and are uncomfortable proceeding with a local ordinance as a result, you may want to consider contacting the members of the Minnesota Legislature who represent Argyle about a potential clarifying amendment to the statute.

Thank you again for your correspondence.

Sincerely,



JACOB CAMPION
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Enclosure: Op. Atty. Gen. 629a, May 9, 1975
DNR, Off-Highway Vehicles Regulations 2013-2014