STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

October 29, 2008 OAG-10-08

Mr. Todd P. Wolf
District Attorney
Wood County
Post Office Box 8095
Wisconsin Rapids, WI 54495-8095

Dear Mr. Wolf:

In your letter dated September 2, 2008, you ask which agency or agencies are responsible for administering the provisions of Wis. Stat. chs. 5 to 12 (election laws), Wis. Stat. ch. 13, subch. III (lobby laws), and Wis. Stat. ch. 19, subch. III (ethics laws) and for prosecuting alleged violations of those provisions following the passage of 2007 Wisconsin Act 1,[1] which created the Government Accountability Board ("Board").

QUESTIONS PRESENTED AND BRIEF ANSWERS

I have changed the order of your questions, which are as follows:

> [1.] Are there provisions of chapters 5-12, 13 and 19 that can be enforced by a District Attorney independently of the Government Accountability Board? What is the applicability of Wis. Stat. s 5.05(2m)(c)15[.]-18[.] to cases independently initiated by a district attorney?

In my opinion, unless otherwise stated in a specific statutory provision, criminal provisions and civil forfeiture provisions of the election laws, lobby laws, and ethics laws can be enforced by a district attorney independently of the Board. A referral following an investigation by the Board is not required. Wisconsin Stat. § 5.05(2m)(c)15.-18. has no application to cases independently initiated by a district attorney without a referral by the Board under Wis. Stat. § 5.05(2m)(c)11., 14., or 15.

> [2.] Can a District Attorney request assistance from the Attorney General with any duty a District Attorney may have under chapters 5-12, 13 and 19? If so, what type of assistance?

[1]All statutory citations herein are to the Wisconsin Statutes following the amendments contained in 2007 Wisconsin Act 1.

In my opinion, a district attorney may request legal advice and prosecutorial assistance from the Attorney General or investigative assistance from the Department of Justice in connection with any duty of the district attorney under the election laws, lobby laws, or ethics laws. Where a matter has been referred to the district attorney by the Board under Wis. Stat. § 5.05(2m)(c)11., 14., or 15., the district attorney must retain ultimate supervisory authority over that matter until the Board makes a subsequent referral unless a special prosecutor is appointed to serve in lieu of the district attorney.

> [3.] What is the scope of the A[ttorney] G[eneral]'s [prosecutorial] authority in regard to violations of chapters 5-12, 13, and 19?

In my opinion, the Attorney General may prosecute violations of the election laws, lobby laws, or ethics laws where there has been a request from the Governor or either house of the Legislature under Wis. Stat. § 165.25(1m); where there has been a referral to the Attorney General by the Board under Wis. Stat. § 5.05(2m)(c)16.; where the Attorney General or an assistant attorney general has been appointed as special prosecutor to serve in lieu of the district attorney to whom a matter has been referred by the Board; or where there is a statutory provision authorizing the Attorney General to independently initiate the prosecution of specific kinds of civil or criminal actions involving violations of those laws.

> [4.] What is the division of authority between the Government Accountability Board and District Attorneys to enforce chapters 5-12, lobbying under chapter 13, and state ethics violations under chapter 19 of the Wisconsin Statutes? Does the Government Accountability Board have primary . . . [authority] to enforce those provisions?

In my opinion, the Board and district attorneys possess joint and co-equal authority to investigate possible violations of those statutory provisions and to prosecute civil forfeiture actions under those statutory provisions. Unless otherwise stated in a specific statutory provision, the district attorney possesses the authority to prosecute criminal proceedings under those statutory provisions. The Board has no statutory authority to prosecute criminal proceedings under those provisions except as stated in Wis. Stat. § 5.05(2m)(i).

## PRINCIPAL STATUTORY PROVISIONS INVOLVED

### I. DUTIES OF THE GOVERNMENT ACCOUNTABILITY BOARD.

Wisconsin Stat. § 5.05, as amended by 2007 Wisconsin Act 1, provides in part (amendatory material underscored):

> <u>Government accountability</u> board; powers and duties. (1) GENERAL AUTHORITY. <u>The government accountability</u> board shall have the

responsibility for the administration of chs. 5 to 12, other laws relating to elections and election campaigns, subch. III of ch. 13, and subch. III of ch. 19. Pursuant to such responsibility, the board may:

. . . .

(c) Bring civil actions to require a forfeiture for any violation of chs. 5 to 12, subch. III of ch. 13, and subch. III of ch. 19 or a license revocation for any violation of subch. III of ch. 13 for which the offender is subject to a revocation. . . .

. . . .

(2m) ENFORCEMENT. (a) The board shall investigate violations of laws administered by the board and may prosecute alleged civil violations of those laws, directly or through its agents under this subsection, pursuant to all statutes granting or assigning that authority or responsibility to the board. Prosecution of alleged criminal violations investigated by the board may be brought only as provided in par. (c)11., 14., 15., and 16. and s. 978.05(1).

. . . .

(c) 2.a. Any person may file a complaint with the board alleging a violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19. . . .

4. . . . . If the board believes there is reasonable suspicion that a violation under subd. 2. has occurred or is occurring, the board may by resolution authorize the commencement of an investigation. The resolution shall specifically set forth any matter that is authorized to be investigated. . . .

. . . .

11. If the board finds that there is probable cause to believe that a violation under subd. 2. has occurred or is occurring, the board may, in lieu of civil prosecution of any matter by the board, refer the matter to the district attorney for the county in which the alleged violator resides, or if the alleged violator is a nonresident, to the district attorney for the county where the matter arises, or if par. (i) applies, to the attorney general or a special prosecutor. For purposes of this subdivision, a person other than a natural person resides within a county if the person's principal place of operation is located within that county.

. . . .

14. If a special investigator or the administrator of the ethics and accountability division of the board, in the course of an investigation authorized by the board, discovers evidence of a potential violation of a law that is not administered by the board arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation, the special investigator or the administrator may present that evidence to the board. The board may thereupon refer the matter to the appropriate district attorney specified in subd. 11.

15. Except as provided in subd. 17., if the board refers a matter to the district attorney specified in subd. 11. for prosecution of a potential violation under subd. 2. or 14. and the district attorney informs the board that he or she declines to prosecute any alleged civil or criminal violation related to any matter referred to the district attorney by the board, or the district attorney fails to commence a prosecution of any civil or criminal violation related to any matter referred to the district attorney by the board within 60 days of the date of the board's referral, the board may refer the matter to the district attorney for another prosecutorial unit that is contiguous to the prosecutorial unit of the district attorney to whom the matter was originally referred. If there is more than one such prosecutorial unit, the chairperson of the board shall determine the district attorney to whom the matter shall be referred by publicly drawing lots at a meeting of the board. The district attorney may then commence a civil or criminal prosecution relating to the matter.

16. Except as provided in subd. 17., if the board refers a matter to a district attorney under subd. 15. for prosecution of a potential violation under subd. 2. or 14. and the district attorney informs the board that he or she declines to prosecute any alleged civil or criminal violation related to any matter referred to the district attorney by the board, or the district attorney fails to commence a prosecution of any civil or criminal violation related to any matter referred to the district attorney by the board within 60 days of the date of the board's referral, the board may refer the matter to the attorney general. The attorney general may then commence a civil or criminal prosecution relating to the matter.

17. The board is not authorized to act under subd. 15. or 16. if a special prosecutor is appointed under s. 978.045 in lieu of the district attorney specified in subd. 11.

18. Whenever the board refers a matter to special counsel or to a district attorney or to the attorney general under this subsection, the special counsel, district attorney, or attorney general shall report to the board concerning any action taken regarding the matter. The report shall be transmitted no later than

40 days after the date of the referral. If the matter is not disposed of during that period, the special counsel, district attorney, or attorney general shall file a subsequent report at the end of each 30-day period following the filing of the initial report until final disposition of the matter.

. . . .

(h) If the defendant in an action for a civil violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 is a district attorney or a circuit judge or a candidate for either such office, the action shall be brought by the board. If the defendant in an action for a civil violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 is the attorney general or a candidate for that office, the board may appoint special counsel to bring suit on behalf of the state.

(i) If the defendant in an action for a criminal violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 is a district attorney or a circuit judge or a candidate for either such office, the action shall be brought by the attorney general. If the defendant in an action for a criminal violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 is the attorney general or a candidate for that office, the board may appoint a special prosecutor to conduct the prosecution on behalf of the state.

(j) Any special counsel or prosecutor who is appointed under par. (h) or (i) shall be independent of the attorney general and need not be a state employee at the time of his or her appointment.

II. DUTIES OF THE DISTRICT ATTORNEY.

Wisconsin Stat. § 978.05, as amended by 2007 Wisconsin Act 1, provides (amendatory material underscored):

Duties of the district attorney. The district attorney shall:

(1) CRIMINAL ACTIONS. Except as otherwise provided by law, prosecute all criminal actions before any court within his or her prosecutorial unit and have sole responsibility for prosecution of all criminal actions arising from violations of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 and from violations of other laws arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19, that are alleged to be committed by a resident of his or her prosecutorial unit, or if alleged to be committed by a nonresident of this state, that are alleged to occur in

his or her prosecutorial unit unless another prosecutor is substituted under s. 5.05(2m)(i) or this chapter or by referral of the government accountability board under s. 5.05(2m)(c)15. or 16. For purposes of this subsection, a person other than a natural person is a resident of a prosecutorial unit if the person's principal place of operation is located in that prosecutorial unit.

(2) FORFEITURES. Except as otherwise provided by law, prosecute all state forfeiture actions, county traffic actions and actions concerning violations of county ordinances which are in conformity with state criminal laws in the courts within his or her prosecutorial unit and have joint responsibility, together with the government accountability board, for prosecution of all forfeiture actions arising from violations of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 and from violations of other laws arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19 that are alleged to be committed by a resident of his or her prosecutorial unit, or if alleged to be committed by a nonresident of this state, that are alleged to occur within his or her prosecutorial unit unless another prosecutor is substituted under s. 5.05(2m)(h) or this chapter or by referral of the government accountability board under s. 5.05(2m)(c)15. or 16. For purposes of this subsection, a person other than a natural person is a resident of a prosecutorial unit if the person's principal place of operation is located in that prosecutorial unit.

. . . .

(8) ADMINISTRATION. . . .

(b) . . . The district attorney may request the assistance of district attorneys, deputy district attorneys, or assistant district attorneys from other prosecutorial units or assistant attorneys general who then may appear and assist in the investigation and prosecution of any matter for which a district attorney is responsible under this chapter in like manner as assistants in the prosecutorial unit and with the same authority as the district attorney in the unit in which the action is brought.

III. DUTIES OF THE ATTORNEY GENERAL AND DEPARTMENT OF JUSTICE.

Wisconsin Stat. § 165.25, as amended by 2007 Wisconsin Act 1, provides in part (amendatory material underscored):

> Duties of department of justice. The department of justice shall:
>
> (1) REPRESENT STATE IN APPEALS AND ON REMAND. Except as provided in ss. 5.05(2m)(a) and 978.05(5), appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party. Nothing in this subsection deprives or relieves the attorney general or the department of justice of any authority or duty under this chapter.
>
> (1m) REPRESENT STATE IN OTHER MATTERS. If requested by the governor or either house of the legislature, appear for and represent the state, any state department, agency, official, employee or agent, whether required to appear as a party or witness in any civil or criminal matter, and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested. . . .
>
> . . . .
>
> (3) ADVISE DISTRICT ATTORNEYS. Consult and advise with the district attorneys when requested by them in all duties pertaining to the duties of their office.

Wisconsin Stat. § 165.50 provides in part:

> Criminal investigation. (1) The department of justice shall perform the following criminal investigatory functions for the state:
>
> (a) Investigate crime that is statewide in nature, importance or influence.

Wisconsin Stat. § 165.70 provides in part:

> Investigation of statewide crime. (1) The department of justice shall do all of the following:
>
> (a) Investigate crime that is statewide in nature, importance or influence.

IV. JUDICIAL APPOINTMENT OF SPECIAL PROSECUTORS.

Wisconsin Stat. § 978.045 provides in part:

> Special prosecutors. (1g) A court on its own motion may appoint a special prosecutor under sub. (1r) or a district attorney may request a court to appoint a special prosecutor under that subsection. Before a court appoints a special prosecutor on its own motion or at the request of a district attorney for an appointment that exceeds 6 hours per case, the court or district attorney shall request assistance from a district attorney, deputy district attorney or assistant district attorney from other prosecutorial units or an assistant attorney general. A district attorney requesting the appointment of a special prosecutor, or a court if the court is appointing a special prosecutor on its own motion, shall notify the department of administration, on a form provided by that department, of the district attorney's or the court's inability to obtain assistance from another prosecutorial unit or from an assistant attorney general.
>
> (1r) Any judge of a court of record, by an order entered in the record stating the cause for it, may appoint an attorney as a special prosecutor to perform, for the time being, or for the trial of the accused person, the duties of the district attorney. An attorney appointed under this subsection shall have all of the powers of the district attorney. The judge may appoint an attorney as a special prosecutor at the request of a district attorney to assist the district attorney in the prosecution of persons charged with a crime, in grand jury or John Doe proceedings, in proceedings under ch. 980, or in investigations. The judge may appoint an attorney as a special prosecutor if any of the following conditions exists:
>
> . . . .
>
> (h) The district attorney determines that a conflict of interest exists regarding the district attorney or the district attorney staff.

INTRODUCTION

The Legislature engrafted the provisions of 2007 Wisconsin Act 1 upon preexisting statutes setting forth the statutory duties of district attorneys, the Attorney General, the Elections Board, and the Ethics Board. "It is presumed that the legislature has in mind previous statutes dealing with the same subject matter when it enacts a new provision." *State v. Temby*, 108 Wis. 2d 521, 530, 322 N.W.2d 522 (Ct. App. 1982). Courts disfavor the implied repeal of longstanding statutory power or authority. *State v. Zawistowski*, 95 Wis. 2d 250, 264,

290 N.W.2d 303 (1980). "'[I]n the absence of any express repeal or amendment therein, the new provision [is] enacted in accord with the legislative policy embodied in the prior statutes, and they should all be construed together.'" *Temby*, 108 Wis. 2d at 530 (quoted authority omitted). It is also axiomatic that an amendment to a statute changes its meaning only to the extent expressly stated or necessarily implied by the amendatory language. *Jaeger Baking Co. v. Kretschmann*, 96 Wis. 2d 590, 598, 292 N.W.2d 622 (1980). *See Milw. Fed. of Teachers, Local No. 252 v. WERC*, 83 Wis. 2d 588, 599, 266 N.W.2d 314 (1978), quoting 1A Sutherland, *Statutory Construction* § 22.30 (4th ed., Sands, 1972), at 179:

> "[A]s to changing statutory law, there is a presumption against the implied repeal or amendment of any existing statutory provision. In accord with this conservative attitude, an amendatory act is not to be construed to change the original act or section further than expressly declared or necessarily implied."

Prior to the passage of 2007 Wisconsin Act 1: (1) Unless otherwise specifically provided district attorneys could enforce criminal provisions and civil forfeiture provisions independently of the Elections Board and the Ethics Board; (2) With respect to items arising under the election laws, lobby laws, and ethics laws, district attorneys were under no statutory restriction as to their ability to seek advice from the Department of Justice under Wis. Stat. § 165.25(3), to request the assistance of assistant attorneys general as provided in Wis. Stat. § 978.05(8)(b), or to seek investigatory assistance from the Department of Justice under Wis. Stat. § 165.50(1)(a) or Wis. Stat. § 165.70(1)(a); and (3) The Attorney General or an assistant attorney general could be appointed as special prosecutor to serve in lieu of the district attorney with respect to items arising under the election laws, lobby laws, and ethics laws. For the reasons that follow, it is my opinion that 2007 Wisconsin Act 1 effected no material change in these provisions and procedures.

## ANALYSIS

The first question is whether there are provisions of Wis. Stat. chs. 5 to 12 (election laws), Wis. Stat. ch. 13, subch. III (lobby laws), and Wis. Stat. ch. 19, subch. III (ethics laws) that can be enforced by a district attorney independently of the Board. As amended, Wis. Stat. § 978.05(1) provides that district attorneys possess "sole responsibility for prosecution of all criminal actions" arising from violations of those provisions as well as sole responsibility for prosecution of criminal actions "arising . . . from violations of other laws arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19[.]" 2007 Wisconsin Act 1 effects a significant change in that the criminal violations of the election laws, lobby laws, and ethics laws over which a district attorney now has jurisdiction are those "that are alleged to be committed by a resident of his or her prosecutorial unit, or if alleged to be committed by a nonresident of this state, that are alleged to occur in his or her prosecutorial unit[.]" Wis. Stat. § 978.05(1). Where the alleged violator meets one of these residency

requirements establishing the appropriate prosecutorial venue, unless otherwise statutorily provided the district attorney has plenary authority to investigate criminal violations of election laws, lobby laws, and ethics laws and to commence criminal proceedings alleging violations of such laws.

Wisconsin Stat. § 978.05(2) provides that district attorneys possess "joint responsibility, together with the government accountability board, for prosecution of all forfeiture actions arising from violations of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19" as well as joint responsibility for prosecution of forfeiture actions in connection with alleged "violations of other laws arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation under chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19[.]" 2007 Wisconsin Act 1 effects the same significant change in residency requirements for prosecutorial venue in civil forfeiture actions that applies to the prosecution of criminal actions under the election laws, lobby laws, and ethics laws.

The responsibility of the Board and district attorneys to commence civil forfeiture actions alleging violations of election laws, lobby laws, and ethics laws is "joint." Wis. Stat. § 978.05(2). The Legislature has enacted no requirement that the district attorney await action by the Board prior to commencing a civil forfeiture action. The Legislature also has enacted no requirement that the Board await action by the district attorney prior to commencing a civil forfeiture action.

Wisconsin Stat. § 5.05(1) does provide that the Board "shall have the responsibility for the administration of chs. 5 to 12, other laws relating to elections and election campaigns, subch. III of ch. 13, and subch. III of ch. 19." More specifically, Wis. Stat. § 5.05(2m)(a) provides that in exercising that responsibility "[t]he board shall investigate violations of laws administered by the board and may prosecute alleged civil violations of those laws . . . pursuant to all statutes granting or assigning that authority or responsibility to the board." Despite the fact that both "shall" and "may" are used in Wis. Stat. § 5.05(2m)(a), the Board clearly is not required to investigate all alleged violations of election laws, lobby laws, and ethics laws. Under Wis. Stat. § 5.05(2m)(c)4., the Board may conduct an investigation only (1) if it "believes there is reasonable suspicion that a violation . . . has occurred or is occurring," (2) the Board has passed a resolution "authoriz[ing] the commencement of an investigation," and (3) the Board's resolution "specifically set[s] forth any matter that is authorized to be investigated." There is no statutory requirement that the district attorney first determine whether the Board will investigate a matter that might lead to the commencement of a civil forfeiture action or that might lead to commencement of a criminal action, nor is there any statutory requirement that the district attorney await the outcome of an investigation by the Board that might lead to the commencement of a civil forfeiture action or that might lead to commencement of a criminal action.

It follows that the provisions of Wis. Stat. § 5.05(2m)(c)15.-18. have no application to investigations, criminal proceedings, or civil forfeiture actions independently initiated by a district attorney in the absence of a referral by the Board under Wis. Stat. § 5.05(2m)(c)11., 14., or 15. Wisconsin Stat. § 5.05(2m)(c)11. contemplates that the Board first have conducted an investigation authorized under Wis. Stat. § 5.05(2m)(c)4. If the Board has authorized such an investigation and determined that probable cause exists, then the Board "may . . . refer the matter to the district attorney for the county in which the alleged violator resides, or if the alleged violator is a nonresident, to the district attorney for the county where the matter arises[.]" Wis. Stat. § 5.05(2m)(c)11. If the Board has authorized the investigation of specific matters and during the course of the investigation discovers evidence of a potential violation of a law that is not administered by the Board but involves the official functions of the subject of the investigation or if the Board has authorized the investigation of specific matters and during the course of the investigation discovers evidence of a potential violation of other election laws, lobby laws, or ethics laws, the Board may refer such other matters to the district attorney. Wis. Stat. § 5.05(2m)(c)14. Wisconsin Stat. § 5.05(2m)(c)14., 15., 16., and 18. each specifically requires a referral by the Board. Wisconsin Stat. § 5.05(2m)(c)17. references Wis. Stat. § 5.05(2m)(c)11., which also requires a referral by the Board. The provisions of Wis. Stat. § 5.05(2m)(c)15.-18. therefore have no application to criminal actions or civil forfeiture actions independently initiated by a district attorney in the absence of a referral following a finding of probable cause by the Board under Wis. Stat. § 5.05(2m)(c)11., 14., or 15.

It is conceivable that, following its own investigation, the Board could refer certain matters to the district attorney with respect to which the district attorney has already commenced an investigation. Wisconsin Stat. § 5.05(2m)(c)18. contains no exception for matters with respect to which the district attorney has initiated an investigation prior to receiving a referral from the Board. With respect to all matters referred by the Board, the district attorney is therefore subject to the reporting requirements in Wis. Stat. § 5.05(2m)(c)18. Wisconsin Stat. § 5.05(2m)(c)16. also contains no exception for matters with respect to which the district attorney has initiated an investigation prior to receiving a referral from the Board. Even where matters referred by the Board overlap matters with respect to which the district attorney has already initiated an investigation, the Board therefore could transfer the matter to another district attorney if prosecution is not commenced within 60 days of the date of the Board's referral. The Board has no statutory authority to transfer any matter to another district attorney with respect to which a prosecution has already been commenced.

The second question is whether and to what extent a district attorney can request assistance from the Attorney General in connection with any duty that a district attorney may have under the election laws, lobby laws, and ethics laws. 2007 Wisconsin Act 1 amended Wis. Stat. § 165.25(1) as follows (amendatory material underscored):

> (1) REPRESENT STATE <u>IN APPEALS AND ON REMAND</u>. Except as provided in <u>ss. 5.05(2m)(a) and</u> 978.05(5), appear for the state and prosecute or

> defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party. Nothing in this subsection deprives or relieves the attorney general or the department of justice of any authority or duty under this chapter.

I interpret the Legislature's insertion of the reference to Wis. Stat. § 5.05(2m)(a) in the first sentence of this amendment to mean that, with respect to matters investigated by the Board under that provision, the sequential provisions of Wis. Stat. § 5.05(2m)(c)11.-16. must be followed. The last sentence of this amendment therefore establishes that, in all other respects, the Attorney General's authority to provide assistance to district attorneys generally remains unchanged.

As amended, Wis. Stat. § 978.05(1) provides that district attorneys possess "sole responsibility for prosecution of all criminal actions arising from violations" of election laws, lobby laws, and ethics laws. Wisconsin Stat. § 978.05(2) provides that district attorneys possess "joint responsibility, together with the government accountability board, for prosecution of all forfeiture actions arising from violations" of election laws, lobby laws, and ethics laws. In exercising his or her responsibility under Wis. Stat. § 978.05(1) or (2), the district attorney continues to be able to seek advice from the Department of Justice under Wis. Stat. § 165.25(3) and to request the assistance of assistant attorneys general as provided in Wis. Stat. § 978.05(8)(b). Where appropriate, the district attorney may also seek investigatory assistance from the Department of Justice. *See* Wis. Stat. §§ 165.50(1)(a); 165.70(1)(a).

As to matters referred to the district attorney by the Board under Wis. Stat. § 5.05(2m)(c)11., 14., or 15., the sequential provisions of Wis. Stat. § 5.05(2m)(c)11.-16. must be followed. Those provisions establish an ordered, time-sensitive process once a matter has been referred to the district attorney by the Board under Wis. Stat. § 5.05(2m)(c)11., 14., or 15. Under Wis. Stat. § 5.05(2m)(c)11.-16., one statutorily-designated prosecutor is responsible for the matter referred and is required to report to the Board. *See* Wis. Stat. § 5.05(2m)(c)18. The district attorney must retain ultimate control over the matter referred unless a special prosecutor is appointed to serve in lieu of the district attorney or a referral to another district attorney or to the Attorney General is subsequently made by the Board. *See* Wis. Stat. § 5.05(2m)(c)14.-16.

The third question asks for delineation of the scope of the Attorney General's prosecutorial authority with respect to alleged violations of the election laws, lobby laws, and ethics laws.

The Attorney General's powers are purely statutory. *State v. City of Oak Creek*, 2000 WI 9, ¶¶ 19-24, 232 Wis. 2d 612, 605 N.W.2d 526. Wisconsin Stat. § 165.25(1m) contains a general grant of authority for the Attorney General, upon the request of the Governor or either house of the Legislature, to "prosecute . . . in any court or before any officer, any cause or

matter, civil or criminal, in which the state or the people of this state may be interested." The Attorney General may also prosecute violations of the election laws, lobby laws, or ethics laws where there has been a referral to the Attorney General by the Board under Wis. Stat. § 5.05(2m)(c)16.

The district attorney to whom a matter has been referred by the Board can seek judicial appointment of a special prosecutor under Wis. Stat. § 978.045 to serve in lieu of the district attorney. *See* Wis. Stat. § 5.05(2m)(c)17. Nothing in 2007 Wisconsin Act 1 precludes the Attorney General or an assistant attorney general from serving in that capacity.

There are also certain statutory provisions that authorize the Attorney General to commence actions alleging specific violations of the election laws, lobby laws, or ethics laws. Wisconsin Stat. § 5.05(2m)(i) authorizes the Attorney General to commence criminal prosecutions under the election laws, lobby laws, or ethics laws if the defendant "is a district attorney or a circuit judge or a candidate for either such office[.]" Wisconsin Stat. § 5.07 authorizes the Attorney General to commence actions for equitable, legal, or peremptory relief to compel compliance with the election laws. Wisconsin Stat. § 5.08 authorizes the Attorney General to commence actions to compel compliance with the election laws upon the filing of a verified petition with the Attorney General after the district attorney has declined or failed to prosecute in response to the filing of a petition. Wisconsin Stat. § 5.081 authorizes the Attorney General to commence actions or proceedings in any court of competent jurisdiction on behalf of any elector of this state under the Help America Voting Act, 42 U.S.C. § 1973(a) and (b). Wisconsin Stat. § 8.28 authorizes the Attorney General to investigate and prosecute any verified complaint alleging that a state or local elected official does not meet residency requirements. Wisconsin Stat. § 19.579(1) provides that at the request of the Board the Attorney General shall commence an action against any person who has not paid a forfeiture imposed under the ethics laws as provided in that statute. Wisconsin Stat. § 19.58(8)(c) and (cn) authorize the Attorney General to commence certain actions against local government officials for violation of the code of ethics after the district attorney has declined or failed to prosecute such actions. *See also* Wis. Stat. § 7.23(2).

The fourth question asks for delineation of the division of authority between the Board and district attorneys to enforce the election laws, lobby laws, and ethics laws.

As explained in response to the preceding questions, after the passage of 2007 Wisconsin Act 1 the Board and district attorneys possess joint and co-equal authority to investigate possible violations of election laws, lobby laws, and ethics laws and to prosecute civil forfeiture actions under those statutory provisions. Unless otherwise stated in a specific statutory provision, district attorneys possess the authority to prosecute criminal proceedings under those statutory provisions. Except as provided in Wis. Stat. § 5.05(2m)(i), the Board cannot prosecute criminal proceedings under those statutory provisions. The Board has no statutory obligation to commence an investigation in situations where no investigation has been commenced by the

district attorney. The Board also is not required to refrain from commencing an investigation after an investigation has been commenced by the district attorney. The district attorney has no statutory obligation to refrain from commencing an investigation once an investigation has been commenced by the Board. The district attorney also has no statutory obligation to refrain from commencing a criminal proceeding once the Board has commenced a civil action.

To the extent statutorily possible the Board, district attorneys, the Attorney General, and law enforcement authorities should endeavor to cooperate and timely communicate with each other. Doing so will enhance efficiency, avoid duplication of effort, and permit the best use of limited investigative and prosecutorial resources on the part of all of the agencies involved.

## CONCLUSION

At least three major changes from past practice under the Elections Board and the Ethics Board were effected by 2007 Wisconsin Act 1. One significant change involves matters referred to the district attorney or the Attorney General under Wis. Stat. § 5.05(2m)(c)11., 14., 15., or 16. With respect to such matters, the sequential process in Wis. Stat. § 5.05(2m)(c)11.-16. must be followed. Another significant change established new venue or residency requirements for the prosecution of criminal proceedings and civil forfeiture actions under the election laws, lobby laws, ethics laws and certain matters related to those laws by amending Wis. Stat. § 978.05(1) and (2). A third significant change created Wis. Stat. § 5.05(2m)(a), under which the Board may prosecute civil forfeiture actions under the election laws, lobby laws, and ethics laws directly in circuit court. 2007 Wisconsin Act 1 did not establish any statutory mechanism under which the Board must or should await the outcome of proceedings independently initiated by the district attorney. That legislation also did not establish any statutory mechanism under which the district attorney must or should await the outcome of investigative proceedings that can or are being conducted by the Board.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:FTC:cla