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

August 2, 2010 OAG—4—10

Mr. Robin J. Stowe
Corporation Counsel
Langlade County
800 Clermont Street
Antigo, WI 54409

Dear Mr. Stowe:

¶ 1. You request a legal opinion as to whether the corporation counsel has discretion to refuse to commence an involuntary civil commitment proceeding under Wis. Stat. § 51.20(1) after receiving signed statements under oath from three adults that meet the requirements of that statute. To the extent that such discretion exists, you ask whether its exercise is subject to legal challenge.

¶ 2. It is my opinion that a corporation counsel has discretion to refuse to file a petition for examination after receiving signed statements under oath that meet the requirements contained in Wis. Stat. § 51.20(1) if the corporation counsel determines that it is not in the interests of the public to file the petition. A good faith discretionary determination on the part of the corporation counsel that the filing of a petition for examination would not be in the interests of the public is not susceptible to challenge in a mandamus action.

ANALYSIS

¶ 3. Wisconsin Stat. § 51.20 governs the procedures to involuntary commit individuals for treatment. Court proceedings are initiated when a petition for examination is filed. Wis. Stat. § 51.20(2). Except as otherwise noted in the statutory language, Wis. Stat. § 51.20(1)(a) sets forth the grounds that must be alleged in a petition; Wis. Stat. § 51.20(1)(b) requires that each petition be "signed by 3 adult persons, at least one of whom has personal knowledge of the conduct of the subject individual"; and Wis. Stat. § 51.20(1)(c) sets forth other pleading requirements. Wisconsin Stat. § 51.20(1)(c) also authorizes the petition to be filed in the court assigned to exercise probate jurisdiction for the county in which individual is present or resides. If the judge or circuit court commissioner who handles probate matters is unavailable, Wis. Stat. § 51.20(c) allows the petition to be filed with a judge or court commissioner of any circuit court for the county.

¶ 4. While Wis. Stat. § 51.20(1) provides significant detail about what is to be contained in a petition for examination and Wis. Stat. § 51.20(2) makes clear court proceedings for an

involuntary commitment are initiated with the filing of a petition, the statutes do not expressly state who is to file the petition. Statutory context, enhanced by court decisions, provides the answer.

¶ 5. Wisconsin Stat. § 51.20(4), which defines the role of corporation counsel in involuntary commitment proceedings, states:

> (4) PUBLIC REPRESENTATION. Except as provided in ss. 51.42(3)(ar)1. and 51.437(4m)(f), the corporation counsel shall represent the interests of the public in the conduct of all proceedings under this chapter, including the drafting of all necessary papers related to the action.

In *In Matter of D.S.*, 142 Wis. 2d 129, 136-37, 416 N.W.2d 292 (1987), the Wisconsin Supreme Court interpreted this language, under a prior version of the statute, to mean only those officials designated in Wis. Stat. § 51.20(4)—today, only corporation counsel—are authorized to prepare the initial petition to commence court proceedings.[1]

¶ 6. Your principal concern appears to be whether the corporation counsel must file a petition for examination after receiving statements under oath from three persons that meet the formal or literal requirements contained in Wis. Stat. § 51.20(1)(a)1. and 2. While the corporation counsel's discretion in involuntary civil commitment proceedings was extensively discussed in 79 Op. Att'y Gen. 129 (1990), that opinion did not specifically determine whether the corporation counsel has discretion to refuse to file a petition for examination. *See* 79 Op. Att'y Gen. at 132-33. The answer to this question turns on a proper interpretation of Wis. Stat. § 51.20(4), which is quoted above.

¶ 7. Wisconsin Stat. § 51.20(4) imposes two specific duties on corporation counsel. First, it requires corporation counsel to "represent the interests of the public[.]" In doing so, corporation counsel do not represent the individuals who have submitted a petition for examination under Wis. Stat. § 51.20(b). 79 Op. Att'y Gen. 129, 132-33; *cf.* 74 Op. Att'y Gen. 188, 189 (1985) (in protective placement proceedings, "[a]ssistance [to the

[1]Though the *Matter of D.S.* Court did not expressly analyze whether Wis. Stat. § 51.20(1)(b) authorized three adult persons to file an involuntary commitment petition independent of the corporation counsel, the Court's opinion appears to reject any such interpretation. The Court stated that Wis. Stat. § 51.20(4) "require[s] the district attorney or corporation counsel to prepare involuntary commitment papers" and used its superintending authority to instruct circuit judges to "refuse to accept petitions drafted by persons not authorized to do so under sec. 51.20(4), Stats." *Matter of D.S.*, 142 Wis. 2d at 132, 136-37. Subsequent to *Matter of D.S.*, Wis. Stat. § 51.20(4) was amended into its current form by 1989 Wisconsin Act 31, sec. 1575. The Act retained the statutory structure considered by the Court in *Matter of D.S.*, but it eliminated the prior statutory designation of the district attorney as an officer (in addition to the corporation counsel) who had a duty to represent the public and draft papers in chapter 51 proceedings.

court] is to be distinguished from prosecution of a petition."). Second, Wis. Stat. § 51.20(4) requires corporation counsel to draft "all necessary papers related to the action." Notably, Wis. Stat. § 51.20(4) does not direct corporation counsel to initiate an involuntary commitment action.

¶ 8. The filing of a petition for examination commences proceedings and is thus part of the proceedings. The corporation counsel therefore must make an initial determination whether it is in the interests of the public that a petition for examination be filed. If the corporation counsel determines that it is in the interests of the public that a petition be filed, then the corporation counsel should proceed to do so even if there is a probability that the court will ultimately dismiss the petition at the conclusion of the proceedings pursuant to Wis. Stat. § 51.20(13)(a)1. *See* 79 Op. Att'y Gen. at 130 (quoting 25 Op. Att'y Gen. 549, 553 (1936)).

¶ 9. Even after receiving the statutorily-required three statements under oath, there may be situations in which the corporation counsel determines that it is not in the interests of the public to file a petition for examination. For example, the corporation counsel may conclude that one or more of the affiants is not truthful or reliable or lacks sufficient understanding of the facts or the law. The corporation counsel may conclude that the quantum of factual information presented is insufficient to warrant the commencement of an involuntary commitment proceeding. The corporation counsel may determine that it is essential to present expert testimony and discover that such testimony cannot be obtained. The corporation counsel may conclude for various reasons that it would not be a productive use of the time of the court, the corporation counsel, county staff, and potential witnesses to commence and conduct an involuntary civil commitment proceeding. Because there is no statutory language expressly mandating that the corporation counsel file a petition for examination under any specified set of circumstances, it is my opinion that the corporation counsel has discretion to refuse to file a petition for examination if the corporation counsel determines that it is not in the interests of the public to do so.

¶ 10. In 25 Op. Att'y Gen. at 553, quoted again in 79 Op. Att'y Gen. at 130, my predecessors stated that:

> [I]t is of public interest that all the facts in the case be presented and considered by someone who is not prejudiced. If the district attorney, after investigation into the matter, believes that it would be error to find the individual insane, he should present these facts to the court. On the other hand, if he believes from the facts that commitment of the individual is better for the general public it is his duty to so inform the court.

This quotation does not mean that corporation counsel lack discretion to refuse to file a petition for examination. In 25 Op. Att'y Gen. 549, my predecessor was addressing the various powers of district attorneys. When the opinion was issued, involuntary civil commitment proceedings could be commenced by persons other than the district attorney. *See* Wis. Stat. § 51.01 (1935);

25 Op. Att'y Gen. 614 (1936). It also apparently was the practice of the courts at that time to request the assistance of the district attorney in certain involuntary civil commitment proceedings. *See* 68 Op. Att'y Gen. 97, 98 (1979) (noting subsequent statutory codification of that practice: "The duties are similar to those required under former sec. 51.02(3), Stats., which in 1968 provided that '[i]f requested by the judge, the district attorney shall assist in conducting proceedings under this chapter.'"). The conclusion reached in 25 Op. Att'y Gen. at 553 was that "it is the duty of the district attorney, upon request of the county court, to appear at hearings for the determination of insanity, sec. 51.02." Although 25 Op. Att'y Gen. at 553 goes on to state that "it is of public interest that all the facts in the case be presented and considered by someone who is not prejudiced," that statement appears to refer to involuntary civil commitment proceedings that have already been commenced. The opinion did not address or analyze the district attorney's discretionary authority to decline to commence an involuntary civil commitment proceeding. That opinion thus does not upset my opinion that under the current statutory scheme, corporation counsel does possess discretion to decline to commence an involuntary commitment proceeding.

¶ 11. You also ask whether the exercise of the corporation counsel's discretionary authority to decline to file a petition for examination is subject to legal challenge. You are particularly concerned about mandamus actions attempting to compel the corporation counsel to commence an involuntary civil commitment proceeding. The requirements for obtaining a writ of mandamus were enumerated in *State ex rel. Greer v. Stahowiak*, 2005 WI App 219, ¶ 6, 287 Wis. 2d 795, 706 N.W.2d 161:

> Mandamus is an extraordinary writ that may be used to compel a public officer to perform a duty that he or she is legally bound to perform. *See Karow v. Milwaukee County Civil Serv. Comm'n*, 82 Wis. 2d 565, 568 n.2, 263 N.W.2d 214 (1978). In order for a writ of mandamus to be issued, there must be a clear legal right, a positive and plain duty, substantial damages, and no other adequate remedy at law. *Pasko v. City of Milwaukee*, 2002 WI 33, ¶ 24, 252 Wis. 2d 1, 643 N.W.2d 72.

¶ 12. "'It is well settled that mandamus will not lie to compel the performance of an official act when the officer's duty is not clear and requires the exercise of judgment and discretion. *Wisconsin Pharmaceutical Asso. v. Lee* (1953), 264 Wis. 325, 58 N.W. (2d) 700.'" *Vretenar v. Hebron*, 144 Wis. 2d 655, 662, 424 N.W.2d 714 (1988), quoting *Beres v. New Berlin*, 34 Wis. 2d 229, 231-32, 148 N.W.2d 653 (1967). "A plain duty 'must be clear and unequivocal and, under the facts, the responsibility to act must be imperative.'" *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶ 22, 271 Wis. 2d 633, 681 N.W.2d 110, quoting *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 377-78, 166 N.W.2d 255 (1969).

¶ 13. *Kurkierewicz* was a mandamus action attempting to compel the district attorney to order the coroner to hold an inquest. Describing the powers of the district attorney in great detail, the court held:

> It is clear that in his functions as a prosecutor he has great discretion in determining whether or not to prosecute. There is no obligation or duty upon a district attorney to prosecute all complaints that may be filed with him. While it is his duty to prosecute criminals, it is obvious that a great portion of the power of the state has been placed in his hands for him to use in the furtherance of justice, and this does not per se require prosecution in all cases where there appears to be a violation of the law no matter how trivial. . . .
>
> The district attorney's function, in general, is of a discretionary type, the performance of which is not compellable in mandamus.

Kurkierewicz, 42 Wis. 2d at 378.

¶ 14. The discretionary authority of the corporation counsel in involuntary civil commitment proceedings is similar to the discretionary authority of the district attorney in criminal matters.[2] *See* 79 Op. Att'y Gen. at 132-33. Although the corporation counsel plainly has a duty to make a good faith discretionary determination as to whether the filing of a petition for examination would be in the interests of the public, that duty requires the exercise of legal judgment. Consequently, the exercise of that duty is not susceptible to challenge in a mandamus action.

[2]Unlike district attorneys, who are elected, corporation counsel are employed by, and subject to the supervision and control of, the county board or other authorized authority. *See, e.g.*, Wis. Stat. § 59.42(1); *see also* 79 Op. Att'y Gen. at 131 (county board must supervise "policy-making functions" of corporation counsel). My opinion is only intended to address the corporation counsel's discretion, *vis-à-vis*, the public, and is not intended to address any issues relating to supervision or control over corporation counsel by other authorities.

CONCLUSION

¶ 15. I therefore conclude that the corporation counsel has discretion to refuse to commence an involuntary civil commitment proceeding by filing a petition for examination under Wis. Stat. § 51.20(1) after receiving signed statements under oath from three adults that meet the requirements of that statute. A good faith discretionary determination on the part of the corporation counsel that the filing of a petition for examination would not be in the interests of the public is not susceptible to challenge in a mandamus action.

Sincerely,

J.B. VAN HOLLEN
Attorney General

JBVH:KMS:cla