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MEMORANDUM

TO: David Smith, County Manager

FROM: Wade Swanson, Director, Office of General Litigation Services *WCS*

RE: Legal Analysis of Proposed Appointments of Special Deputy County Attorneys

DATE: October 19, 2009

Attached is legal counsel's analysis of the issues raised by MCAO's recent proposed appointments of special deputy county attorneys for prosecution purposes.

**LEGAL ANALYSIS OF PROPOSED APPOINTMENTS OF
SPECIAL DEPUTY COUNTY ATTORNEYS**

BACKGROUND

The County Attorney has asked the Board of Supervisors to consent to his appointment of three individuals as special deputy county attorneys. Two are lawyers from Washington, D.C. who are not admitted to practice law in Arizona. The third is a former long-time deputy county attorney who retired from Maricopa County in April, 2008. None of these three attorneys currently possesses a legal services contract with Maricopa County.

ISSUE

Are the proposed appointments by MCAO in compliance with applicable laws, and what other legal issues are raised by the appointments?

SUMMARY

The appointments of the three individuals as special deputy county attorneys are not lawful for at least the following reasons:

They were not properly procured. Procurement is required for the expenditure of RICO monies;

Two of them are not residents of Maricopa County, as required by statute, including the person proposed to be in charge of the tasks;

The substantive matters set forth in the appointments have been previously assigned to the Yavapai County Attorney and cannot be reassigned by the County Attorney;

The three individuals cannot commence work or use court processes until the Board approves their appointments;

The County Attorney will not provide a cost estimate for the proposed work and now appears to admit that the RICO fund does not contain sufficient funds to cover the costs (see MacDonnell memo, which states that Diversion Fund monies may be used). There may be an unknown substantial impact on the County Attorney's budget or the General Fund if the previously planned uses of these funds have to be funded.

The Board of Supervisors has the discretion to reject the proposed appointments. However, consistent with longstanding policy, no matter should appear on a Board agenda unless the Board's approval would be a lawful act within the

discretion of the Board's powers and duties. The proposed appointments are not lawful acts and should not be placed on a Board agenda.

ANALYSIS

A.R.S. § 11-403(B)(1) allows a county attorney to appoint a "special deputy county attorney" to be paid on a fee basis, "with consent of the board of supervisors." The context of the statute is to set out the limited circumstances in which a deputy county attorney can engage in the private practice of law.

A.R.S. § 11-403(B)(1) also states that the special deputy county attorney "may be appointed upon a fee basis in like manner as a special assistant attorney general." A.R.S. § 41-191(B)(1) is the statute that allows the attorney general to appoint a special assistant "except that in no instance shall special assistants engage in any private litigation in which the state or an officer thereof in his official capacity is a party." Thus, a fair reading of this statute in the context of a county attorney's appointment is that a special deputy county attorney can have no conflict with Maricopa County during the term of any appointment.

A.R.S. § 11-409 allows a county attorney to appoint "deputies" "necessary to conduct the affairs of" his office "by and with the consent of, and at salaries fixed by the board." A.R.S. § 11-403(B)(1) will govern as it is the specific statute concerning special deputy county attorneys who work on a fee basis, not full time.

A.R.S. § 11-402 requires that a deputy appointed be "an elector of the county" and that the "board of supervisors shall be the sole judge of such qualifications." Attorney General Opinion 178-55 provides that a lawyer appointed for a school district with the consent of the county attorney must be a resident of the county due to the requirements of A.R.S. § 11-402 and Art. 7, Section 15 of the Arizona Constitution. The proposed appointments fall under this Attorney General's Opinion.

Attorney General's Opinion 58-58 states that the requirements of A.R.S. § 11-402 be satisfied prior to a person becoming a deputy sheriff. Opinion 58-58 cites A.R.S. § 38-462 which allows deputies to have the same powers the county officer. This analysis applies to a special deputy county attorney.

The County Attorney's suggested Official Appointment and Oath of Office for Joseph E. diGenova states that it seeks to appoint Mr. diGenova to handle matters involving Supervisor Stapley and "potential Maricopa County public corruption matters."

On April 6, 2009, the County Attorney represented that he had transferred the Stapley case "as well as any current or future investigations or prosecutions involving the Maricopa County Board of Supervisors or county management" to the Yavapai County Attorney. (See "News Release" attached).

In *State v. Rupp*, 120 Ariz. 490, 496-7, 586 P.2d 1302, 1308-9 (App. 1978), it was held that "[o]nce this criminal case had been transferred to a special prosecutor, the Maricopa County Attorney's Office should have ceased all of its participation therein except for such activities as were stipulated to by counsel and approved by the court. See *State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (1972). All appearance of impropriety must be avoided." *Villalpando v. Reagan*, 211 Ariz. 305, 314, 121 P.3d 172, 181 (App. 2006), citing *Latigue*, states that "we fully expect and require our trial courts to review the nomination of a substitute prosecutorial agency." *Villalpando* goes on to state that the trial court had "independent authority and obligation to ensure that a prosecutorial conflict is cured by the new appointment." *Id.*

The County Attorney has made a series of material representations to the Court in *Thomas v. Board of Supervisors*, CV 2008-033194, concerning having transferred all criminal investigations involving Maricopa County and its employees to the Yavapai County Attorney. Those representations include:

- Plaintiff's Partial Motion for Summary Judgment re: Claim I and Defendants' Counterclaim, pg. 15:10-11.

"In any event, in early April, 2009, the County Attorney turned over the prosecution of Supervisor Stapley to the Yavapai County Attorney's Office."

- Plaintiff's Statement of Undisputed Facts in Support of Motion for Partial Summary Judgment re: Claim I and Defendants' Counterclaim

Statement of Fact ("SOF") 112: "On April 6, 2009, the County Attorney transferred the prosecution of Supervisor Stapley to the Yavapai County Attorney's office and withdrew from further representation in the matter." *Id.* at pg. 19. Plaintiff's statement cites to Exhibit 39 of the Plaintiff's Statement of Undisputed Facts, which is the Notice of Substitution of Counsel in *State v. Stapley*.

SOF 129: "The Board also has alleged that the County Attorney announced investigations of 'other county employees.' Defendants' Motion to Dismiss filed January 20, 2009 at p. 5."

SOF 130: "As of April, 2009, the County Attorney has turned over investigations of County employees to the Yavapai County Attorney." *Id.* at pg. 22.

In support of SOF 130, the County Attorney cites a Declaration of his Chief Deputy, Phil MacDonnell (Exhibit 15 thereto), stating under penalty of perjury that "[a]s of April, 2009, ongoing investigations of county employees had been turned over to the Yavapai County Attorney's Office."

[Statements by the Sheriff to the media alleged that the "new" matter involving Mr. Stapley was under investigation for eight months and was thus part of Mr. MacDonnell's declaration.]

- Response to Board's Motion for Partial Summary Judgment re Count One and Counterclaim, pg. 9:15-19.

"In any event, the specific issue [referring to the Stapley indictment] is moot as the County Attorney transferred the prosecution of Supervisor Stapley and any other County employees to the Yavapai County Attorney's office in April, 2009"

- Opposition to Board's Statement of Facts in Support of Motion for Partial Summary Judgment re Count One and Counterclaim and Plaintiff's Supplemental Statement of Facts, Plaintiff's Response to Board's SOF 30, bullet 4 (pg. 19:1:3) and repeated at bullet 6 (pg. 20:19-21).

"In any event, the County Attorney eliminated any potential conflict by transferring the prosecution of Supervisor Stapley to the Yavapai County Attorney's office in April 2009." *Id.* at

Additionally, in response to the Board's SOF 80(d) (alleging that the pending Judge Donahoe Grand Jury investigation matter is a conflict), Plaintiff stated "[t]he County Attorney's office has transferred this matter the Yavapai County Attorney's office." *Id.* at pg. 44:4-6.

- Plaintiff's Objections to Defendants' Proposed Form of Final Judgment, pg. 6.

Referring to the Judge Donahoe Grand Jury matter, Plaintiff stated "[a]ny conflict of interest on the part of the County Attorney with respect to the criminal investigation of issues relating to the Court Tower was resolved when the County Attorney's office transferred the Court Tower prosecution to the Yavapai County Attorney's office in April, 2009."

The County Attorney's statements and representations in court filings indicate the *State v. Rupp* concept applies and the County Attorney cannot remove or reassign the matters proposed to be assigned to the nominated special deputy county attorneys.

None of the three nominated special deputy county attorneys have a contract with Maricopa County to provide such legal services. Mr. diGenova and Ms. Victoria Toensing do not appear to be lawyers licensed to practice law in Arizona. Legal services contracts have terms to protect Maricopa County that are not contained in the proposed appointments.

The Maricopa County procurement code does not exempt legal services from the requirement of procurement. In order to be paid for legal services as special deputy county attorneys the three individuals would have to be properly procured.

The item submitted for the Board of Supervisor's agenda states that there is no financial impact from the suggested appointment of the three individuals as special deputy county attorneys; presumably due to the County Attorney's announced plan to

pay these individuals with RICO funds. RICO funds, however, cannot be expended without first complying with procurement laws. There is no exemption from the Maricopa County procurement code or from the Arizona State Procurement Code for the expenditure of RICO funds.

The Memo from County Attorney Chief Deputy Philip MacDonnell indicates that Diversion Funds may need to be used if the RICO fund is insufficient. The County Attorney has not provided details as to the budget or as to what tasks he is not going to be able to fund due to this diversion of monies and whether any of those tasks will require other funding.

The amounts involved can be large. In *Andrew Peyton Thomas v. Mundell*, a recent federal court lawsuit filed by the current County Attorney, Mr. Thomas hired a Washington, D.C. law firm that has been paid over \$300,000 to date in the County Attorney's losing efforts in that case. The Arizona law firm that won the case has been paid less than half the amount charged by the Washington, D.C. law firm. Recently, another Washington, D.C. law firm assisted in another failed appellate effort (1CA-SA-09-0231), and the costs of that matter are not yet known. The Board's normal policies require a fiscal analysis of the monies the County Attorney is planning to expend on outside lawyers and the impact on other funded matters.

The MacDonnell memo also suggests that the Board has only "ministerial" authority over approvals of the nomination of special deputy county attorneys. The statute requires the Board's consent and does not suggest that the Board must consent. The Board's statutory duties include ensuring that any matters that it must approve are legal, fiscally sound as defined by the Board's policies and are otherwise proper.

CONCLUSION

The County Attorneys' present nominations of special deputy county attorneys for prosecution purposes appear to violate numerous statutes, case law, and assurances provided to the court in other matters, and also have unknown fiscal consequences. If the legal matters did not bar these nominations from the Board's agenda, the Board could exercise its discretion in considering the matter. However, we conclude that the appointments of the three individuals as special deputy county attorneys should not appear on a Board agenda unless and until the County Attorney can demonstrate that the nominations are in compliance with law and Board policy.



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News Release

FOR IMMEDIATE RELEASE

April 6, 2009

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County Attorney Offers Compromise to End Infighting *Sends Stapley Case, Investigations to Yavapai County; Proposes Mediation*

County Attorney Andrew Thomas announced today several actions to hasten the interests of justice and end the infighting affecting Maricopa County government. The goal, he stated, was to bring about a "global resolution" of issues affecting the relationship between his office and the Maricopa County Board of Supervisors.

Thomas stated, "I am known for making war against crime and illegal immigration. Today, I seek to make peace."

Thomas has referred the criminal case against indicted Supervisor Donald Stapley, Jr. to the Yavapai County Attorney's Office for further prosecution. Yavapai County Attorney Sheila Polk has agreed to accept the case and has indicated she will appoint special counsel to handle it and related investigations. Thomas also is referring to the Yavapai County Attorney the completion of the investigation related to the Maricopa County Superior Court Tower, as well as any current or future investigations or prosecutions involving the Maricopa County Board of Supervisors or county management. The Maricopa County Sheriff's Office will complete those investigations in coordination with this special counsel.

Also today, Thomas sent through counsel an open letter to Max Wilson, Chairman of the Board of Supervisors, proposing that the County Attorney's Office and Board of Supervisors enter into mediation to resolve the civil litigation between them. Thomas sued the Board in December, 2008, challenging its hiring of lawyers and usurpation of the functions of the County Attorney's Office. Mediation is a standard practice during the early stages of civil litigation. A successful resolution of these differences through an independent mediator might save Maricopa County taxpayers hundreds of thousands of dollars in legal fees. The lawsuit will continue in the interim.

Thomas said, "Lawsuits, accusations and political infighting are never a good thing, but are particularly unacceptable during this time of economic distress. Somebody in county government must step forward to try to resolve these differences so we can focus on doing the job we've been elected to do."

Thomas thanked Yavapai County Attorney Polk for accepting the Stapley case and other investigations. The referral of the Stapley case to Yavapai County, Thomas stated, is designed to expedite prosecution of the case and to avoid potential further divisiveness between the County Attorney and Board. He noted the

law is clear there is no conflict of interest in a county attorney investigating or prosecuting an elected county official for crimes (the Arizona Supreme Court so held in State v. Meham as did the Arizona Court of Appeals in State v. Brooks). However, a gesture of goodwill to resolve these disputes is important, and he is willing to make that gesture.

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