



Maricopa County
Office of General Litigation Services

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MEMORANDUM

TO: David Smith, County Administration Officer *WES*
FROM: Wade Swanson, Director of Office of General Litigation Services
RE: MCAO response to special deputy county attorney issues
DATE: October 23, 2009

This morning we received the October 23, 2009 letter and accompanying memorandum entitled "Special Deputy County Attorney Appointments" from the Maricopa County Attorney's Office.

The Office of General Litigation Services stands by the analysis we provided previously, and we are comfortable with its accuracy. In the Board's prior disputes with the County Attorney, it is my understanding that our position has been consistently upheld by the Courts.

MCAO's memorandum addresses only three of the County's substantive concerns when it alleges that the Board of Supervisor's legal analysis was incorrect. Of note, MCAO's allegations are contrary to its previous actions the last (and only other) time Andrew Thomas appointed a special deputy county attorney for prosecution purposes. In the Wilenchik/New Times debacle, those attorneys were already on contract as a result of the County's procurement process, and they also apparently met the statutory requirement of being Maricopa County residents.

It is unfortunate, but perhaps predictable, that MCAO attacked me personally. This Office prefers to keep any criticisms of another attorney's legal skills on a professional level. Thus, instead of describing MCAO's legal analysis as "bogus" (as Andy Thomas and his staff have described our analysis), we instead consider MCAO's October 23rd letter and memorandum as hastily thrown together, self-serving, and not indicative of an honest analysis of the applicable law and issues.

Although we will be prepared next week to address these issues further, here is our initial analysis which confirms the previous information we provided to you:

1) **RESIDENCY REQUIREMENT**

MCAO allegation: A 1978 Arizona Attorney General opinion was an incorrect interpretation of the Arizona Constitution.

Board position: Our legal analysis relied on a different and valid AG opinion (issued in 1958) for its interpretation of the Arizona statutes which require that the special deputy county attorneys appointed by MCAO be electors of Maricopa County.

The 1988 AG opinion (which MCAO says overturned a 1978 AG opinion cited in our analysis) does not address the appointment of special deputy county attorneys. Instead, the '88 AG opinion criticized the '78 AG opinion's interpretation of an Arizona Constitution provision relating to the residency of non-deputized employees of an elected officer. Thus, the '88 AG opinion is irrelevant to our analysis.

Conclusion: MCAO fails to address the applicable authority on which we relied.

2) **PROCUREMENT**

MCAO allegation: The Board does not require procurement of special prosecutors and, even if it does, the exception for "special investigative services for law enforcement purposes" applies here.

Board position: The Board requires that all outside counsel who provide legal services to the county – including special deputy county attorneys – be properly contracted with in compliance with the County's procurement code.

MCAO is reading too broadly a specific exception in the procurement code to hide its violation of it in this situation. The exception for "special investigative services" does not apply to attorneys but, instead, is intended to allow for, as an example, the hiring of private investigators outside of an open bid process in order to ensure that a non-public investigation is not jeopardized.

Conclusion: MCAO improperly interprets a specific exception to the County's procurement code.

3) YAVAPAI COUNTY

MCAO allegation: MCAO hired D.C. attorneys after Yavapai County withdrew from all further investigations involving Maricopa County.

Board position: Yavapai County withdrew because of MCAO's appointment of D.C. attorneys. MCAO announced the hiring of D.C. attorneys on October 5, 2009. The next day, October 6, 2009, Yavapai County Attorney Sheila Polk sent a letter to "confirm" that her office was no longer handling Maricopa County criminal investigations. Thus, Yavapai County's withdrawal was a result of MCAO's hiring of D.C. attorneys, not the cause for it, as MCAO alleges.

Conclusion: MCAO's appointment of D.C. attorneys is the reason why Yavapai County is no longer investigating or prosecuting new Maricopa County matters.