



Maricopa County
Office of General Litigation Services

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November 2, 2009

VIA EMAIL AND U.S. MAIL

Ms. Sally Wells
Chief Assistant County Attorney
301 West Jefferson Street, Suite 800
Phoenix, AZ 85003

Dear Sally:

We have received your letter dated October 23, 2009, addressed to Mr. David Smith, your letter dated October 27, 2009, addressed to Ms. Fran McCarroll, and your letter dated October 30, 2009, addressed to Chairman Wilson.¹ Please be advised that several legal issues still need to be resolved before the special prosecutor agenda item can be approved by counsel, and we wish to work cooperatively with MCAO in reaching resolution of these outstanding issues. The legal issues, as we currently understand them, and our suggestions for working toward resolving them, are as follows:

YAVAPAI COUNTY TRANSFER

As you are aware, on April 6, 2009, the Maricopa County Attorney Andrew Thomas transferred all "current or future investigations or prosecutions involving the Maricopa County Board of Supervisors or county management" to the Honorable Sheila Polk, Yavapai County Attorney. Mr. Thomas not only made this promise to the public, but he also has subsequently confirmed to the court on numerous occasions that his office has transferred to Yavapai County all criminal matters involving the Board or County Administration.

Despite the transfer to Yavapai County, and apparently because of Mr. Thomas' and/or Sheriff Joe Arpaio's dissatisfaction with the dismissal of charges against Supervisor Don Stapley, Maricopa County Attorney Andrew Thomas announced on October 5, 2009 that he wished to appoint two very expensive Washington D.C. attorneys to assume prosecutorial responsibility for three separate MCSO investigations, plus any number of as-yet-unidentified additional investigations

¹ In each of your letters you claim that the Board's actions in carefully considering the legality of the proposed agenda item regarding the appointment of special prosecutors have either delayed or impeded criminal investigations. To the contrary, because Yavapai County was ready and willing to continue to perform legal services on these matters, the only reason any investigations have been delayed is because Mr. Thomas has inappropriately attempted to transfer matters from Yavapai County to unauthorized private attorneys hired by his office at an in-court hourly rate of \$950.00.

Mr. Thomas may instigate later.² Shortly thereafter, MCAO apparently contacted Yavapai County to notify it that Mr. Thomas intended to reassign Maricopa County's investigations and prosecutions to the D.C. attorneys. Ms. Polk's October 6, 2009 letter to Mr. Thomas was a confirmation of these actions. We believe that Mr. Thomas' interference with Yavapai County's investigation and prosecution of Maricopa County matters is improper and contrary to law.

In order for the justice system to function fairly, "[a]ll appearance of impropriety must be avoided." *See State v. Rupp*, 120 Ariz. 490, 496, 586 P.2d 1302, 1308 (App. 1978). Indeed, "[j]ustice and the law must rest upon the complete confidence of the thinking public and to do so they must avoid even the appearance of impropriety." *State v. Latigue*, 108 Ariz. 521, 523, 502 P.2d 1340, 1342 (1972). As the *Rupp* Court clearly and unequivocally stated, once a criminal case has been transferred to another 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." 120 Ariz. at 495-96, 586 P.2d at 1307-08. Taking any further action – as Mr. Thomas did here by trying to replace the Yavapai County Attorney with D.C. attorneys – leaves the public with no other conclusion than that Mr. Thomas (either for his own benefit or at the request of the Sheriff Arpaio) is "shopping" for an attorney over which he will have more control than a truly independent prosecutor.

As we are sure you understand, the danger of MCAO proceeding contrary to law with either (1) the investigation or prosecution of a matter that has already been turned over to Yavapai County or (2) attempting to reassign such a matter to other counsel is that the entire investigation or prosecution would be tainted and subject to dismissal for such interference. A later dismissal would not only result in a waste of taxpayer money and court resources, but it undermines the public's trust in and expectation of a fair and conflict-free criminal justice system.

All of your prior correspondence regarding the appointment of D.C. attorneys has completely ignored the precedent and policy of *Rupp* and *Latigue*. We trust

² We and the public are understandably concerned about the services to citizens that will have to be curtailed in order to pay for the open-ended investigations contemplated by Mr. Thomas and his celebrity D.C. attorneys. Despite acknowledging that the Board has a statutory obligation to ensure the fiscal responsibility of county officers, MCAO has done nothing to address our legitimate concern that Mr. Thomas has not only given the D.C. attorneys carte blanche to wreak financial havoc on the Maricopa County government, but that Mr. Thomas has essentially written to them a blank check for doing so. This fact alone distinguishes the proposed appointments from MCAO's previous practices. Indeed, based on the records provided with your October 27, 2009 letter, the only other instance in which an appointment of a non-volunteer special deputy county attorney failed to include a specific scope of services was when Mr. Thomas appointed Dennis Wilenchik. That debacle should not be duplicated here.

that this is simply an oversight on MCAO's part and you will promptly provide us with some legal basis for Mr. Thomas' interference with Yavapai County Attorney's handling of these specific MCAO matters.

RESIDENCY REQUIREMENT

On October 20, 2009, Maricopa County Manager David Smith provided Mr. Thomas with an overview of our analysis related to whether a deputy county attorney must be a resident of Arizona and a qualified elector of the county in which his or her duties are to be performed. That analysis cited to a 1958 Arizona attorney general opinion which interpreted A.R.S. §§ 11-402 and 38-462 as follows: "a deputy sheriff has the same duties and powers as the sheriff, and it naturally follows that he would be required to have the same qualifications as the sheriff." Ariz. Atty. Gen. Op. 58-58. As applied here, it means that any special deputy county attorney appointed by Mr. Thomas must be a resident of Arizona and a qualified elector of Maricopa County.³ See A.R.S. § 11-402 ("A person shall not be eligible for a county office . . . unless he is, at the time of his election or appointment . . . a resident of the state [and] an elector of the county or precinct in which the duties of the office are to be exercised The board of supervisors shall be the sole judge of such qualifications"). Despite your erroneous allegations, this '58 A.G. opinion has never been rescinded.

The analysis forwarded by Mr. Smith also cited to a 1978 Arizona A.G. opinion which supported a residency requirement. See Ariz. Atty. Gen. Op. I78-55. Later, MCAO countered with an allegation – both in correspondence and in public – that the '78 A.G. opinion had been overruled, rescinded, or withdrawn by a subsequent A.G. opinion. We find no evidence of any such action. Instead, it appears you have misconstrued the effect of a separate 1988 Arizona A.G. opinion.

The '88 A.G. opinion to which you cited (I88-052, dated June 15, 1988), noted that a previous '88 A.G. opinion (I88-052, dated April 26, 1988) "has been withdrawn." According to the June 15 A.G. opinion, the April 26 A.G. opinion "erroneously replied upon two earlier Attorney General opinions, Ariz. Atty. Gen. Ops. I79-186 and I78-55, which had incorrectly interpreted art. VII, § 15 of the Arizona Constitution." Thus, although part of the '78 A.G. opinion was criticized for interpreting a provision of the Arizona Constitution that no longer existed, the remainder of the opinion (and the analysis on which we relied) was

³ The Maricopa County Attorney's Office apparently has historically interpreted these statutes in a similar manner because each and every one of the examples of a special deputy county attorney appointment you attached to your October 27, 2009 letter demonstrates that the appointee was a Maricopa County resident.

not overruled, rescinded, or withdrawn. More importantly, even if the '78 A.G. opinion had been withdrawn, this would have no effect on the two statutes, both of which are still on the books, which create a residency requirement. It also would not change the dispositive analysis found in the '58 A.G. opinion.

If, however, you are confident in your analysis that a residency requirement does not arise out of A.R.S. §§ 11-402 and 38-462, then we invite you to submit your analysis to the Arizona Attorney General's Office alongside our own so that we may jointly ask the Attorney General to provide us with an updated analysis on this issue.

PROCUREMENT PROBLEMS

In Maricopa County, for accountability and good governance reasons, the expenditure of all public funds – including RICO monies – requires that contracts for services paid for by public funds be entered into only after the contracts are awarded through the open and competitive bidding processes found in the County's Procurement Code. According to Maricopa County's Procurement Code, the professional services of attorneys, including special deputy county attorneys, are subject to procurement procedures. *See, e.g.*, MC1-203 (defining "professional services" as including those services provided by attorneys).

Despite the known applicability of the County's Procurement Code, MCAO has acknowledged that Mr. Thomas' attempted hiring of the D.C. attorneys was performed outside of Maricopa County's procurement process. You claim that a narrow exception for "investigative services" excuses Mr. Thomas' actions. However, according to Mr. Wes Baysinger, Maricopa County's Chief Procurement Officer, MCAO has intentionally misinterpreted this exception, which is intended for the hiring of private investigators outside of an open bid process in order to ensure that a non-public investigation is not jeopardized.

If your incorrect interpretation of this exception was accepted, then most (if not all) of the criminal work of MCAO and MCSO performs would be exempt from the County's Procurement Code. The exception would literally eviscerate the rule and would be against public policy.

Your unprecedented interpretation of the "investigative services" exception is also contrary to how MCAO currently operates. If the Board were to consent to your proposed appointments of attorneys who have not been properly procured, then doing so would not only expose the Board to allegations of conspiring with Mr. Thomas to violate the County's Procurement Code, but the Board also could face legal action, pursuant to A.R.S. § 11-641, for spending public money illegally.

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The Board is unable to consider the appointments proposed by MCAO until the procurement process is properly followed. Instead of continuing to dispute the applicability of the County's Procurement Code by relying on nothing more than your incorrect interpretation of an inapplicable exception, we invite you to work with Mr. Baysinger on promptly complying with it.

For all the foregoing reasons, at this time we cannot recommend to the Board that your proposed item be placed on an open agenda. However, we look forward to continue to work with you on resolving the legal issues raised herein.

Sincerely,



Wade R. Swanson
Director, Office of General Litigation Services

WRS/jg

cc: Chairman Max W. Wilson, District 4
Supervisor R. Fulton Brock, District 1
Supervisor Don Stapley, District 2
Supervisor Andrew Kunasek, District 3
Supervisor Mary Rose Wilcox, District 5
David Smith, County Manager
Sandi Wilson, Deputy County Manager
Fran McCarroll, Clerk of the Board