



# DIGEST OF OPINIONS



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**Director John S. Richard**  
**Department of Central Services**

**Opinion 06-11**  
**April 14, 2006**

1. In accordance with the principles articulated in *Wyatt-Doyle & Butler Engineers v. City of Eufaula*, 13 P.3d 474 (Okla. 2000), Article X, Section 26 (and by extension, Article X, Section 23) of the Oklahoma Constitution prohibits limitation of liability clauses in all state contracts, whether for goods or services, unless at the time the contract is executed funds have been appropriated and encumbered to pay for any contingent liability which might arise.<sup>1</sup> Further, a limitation of liability clause which creates an unfunded contingent liability is void as against public policy.
2. Absent an appropriation as described in Answer 1, limitation of liability clauses that limit any damages, regardless of type, that the State could collect from a vendor in a contract action are prohibited.
3. Absent an appropriation as described in Answer 1, limitation of liability clauses that limit a vendor's damages for loss of profits, revenue, data, or data use are prohibited.
4. The Attorney General is the only person who can agree to grant a vendor sole control over the state's defense of any claim arising from a contract with the vendor. *State ex rel. Nesbitt v. Dist. Court*, 440 P.2d 700, 707 (Okla. 1967); 74 O.S. 2001, § 18b(A)(3). See also A.G. Opin. 78-256, at 597-98. Therefore, a contract clause granting a vendor control over the state's defense in a lawsuit before a claim ever arises is prohibited.
5. Absent an appropriation as described in Answer 1, limitation of liability clauses contained in shrinkwrap agreements for packaged off-the-shelf software which limit a vendor's damages as in Answers 2 and 3 above, are prohibited.
6. Absent an appropriation as described in Answer 1, limitation of liability clauses in contracts for a vendor to provide advice and/or assistance in implementing software applications are prohibited.
7. Although contract language which states a vendor's liability is limited to the extent allowed by law is not prohibited, such language has no legal effect if the State cannot under the Constitution agree to a particular limitation of liability clause.
8. Regarding the proposed language in your Attachment "A," reproduced in full in the text above, see Answers 1 and 2.
9. Regarding the proposed language in your "Attachment B," reproduced in full in the text above, see Answers 1, 2, 3, 4, and 7.

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<sup>1</sup> A vendor remains liable for any damages exceeding the amount the State has by contract agreed to assume.

**The Honorable Cliff A. Aldridge** **Opinion 06-12**  
**State Senator, District 42** **April 18, 2006**

1. The exclusive jurisdiction over permit fees for drilling and operating oil and gas wells, as provided by 17 O.S. 2001, § 52(B), means that both the Corporation Commission and an incorporated city may impose permit fees for drilling and operating oil and gas wells within city limits, but that no other governmental entity may impose such fees.
2. A charter city may exercise jurisdiction, power and authority over drilling and operating oil and gas wells such that the city could deny an application for drilling and operating an oil and gas well located within corporate city limits, even if the Corporation Commission has authorized the drilling and operation of the oil and gas well. 52 O.S. 2001, § 137; *see Reed v. City of Tulsa*, 569 P.2d 451, 453 (Okla. 1977); *C.C. Julian Oil & Royalties Co. v. City of Oklahoma City*, 29 P.2d 952 (syllabus ¶ 6) (Okla. 1934).
3. A charter city may require the operator of an oil and gas well to submit an application to the city council and pay a fee for plugging a well even if the Corporation Commission has ordered the well to be plugged; however, the city council may not deny an application to plug a well that the Corporation Commission has ordered to be plugged. *See* A.G. Opin. 81-146; *Sparger v. Harris*, 131 P.2d 1011, 1014 (Okla. 1942); *Moore v. City of Tulsa*, 561 P.2d 961, 963 (Okla. 1977). State law would prevail over any conflicting municipal laws because plugging abandoned wells is matter of statewide public interest as a protection against pollution. 52 O.S. 2001, § 309.

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**Harry M. Wyatt III,** **Opinion 06-13**  
**Major General, OKANG**  
**Oklahoma National Guard** **April 21, 2006**

1. As used in 44 O.S. Supp.2005, § 77, which authorizes the expenditure of State funds

for “payment/reimbursement of insurance premiums” to provide life insurance for qualified military members of the Oklahoma National Guard, the term “State Sponsored Life Insurance” (“SSLI”), means life insurance directly offered by the State or through the Oklahoma National Guard Association to its members.

2. The provisions of 44 O.S. Supp.2005, § 77, authorize the Oklahoma Adjutant General to expend State funds specifically appropriated by the Legislature for the “payment/reimbursement of insurance premiums” to provide life insurance coverage, up to the amount of \$250,000 for military members of the Oklahoma Army and Air National Guard who are in good standing in their units and satisfactorily perform all required training. *Id.*
3. The statutory authorization in 44 O.S. Supp.2005, § 77, empowers the Adjutant General to pay/reimburse life insurance premiums for the coverage of qualified military members under either 1) Service-members’ Groups Life Insurance (“SGLI”) — offered by the federal government, or 2) State Sponsored Life Insurance (“SSLI”) — presently offered through the Oklahoma National Guard Association.
4. Under both programs, it is the individual military members who determine whether they will participate in either insurance program and the amount of coverage to be provided. The statute does not authorize the Adjutant General to make these decisions. Rather, the statute merely authorizes the Adjutant General to pay for or reimburse the insurance premiums for the coverage chosen by the National Guards’ qualified military members under either of the two specified insurance programs.

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**Director DeWade Langley** **Opinion 06-14**  
**State Bureau of Investigation** **April 21, 2006**

1. The Oklahoma Highway Patrol may conduct criminal investigations on its own

authority only when the investigations fall within the authority, responsibilities, powers and duties enumerated in 47 O.S. Supp.2005, § 2-117(B).<sup>1</sup>

2. At the request of another law enforcement agency pursuant to 21 O.S. 2001, § 99a, which provides for certain circumstances in which a peace officer may enforce the criminal laws of the State throughout the State, and at the request of the Governor (47 O.S. Supp.2005, § 2-117(B)(1)), the Oklahoma Highway Patrol may initiate and conduct criminal investigations, provided the requesting agency has the requisite investigatory and territorial jurisdiction to initiate and conduct the investigation itself.

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<sup>1</sup> The law enforcement powers and authority of the Oklahoma Highway Patrol on the turnpikes are the subject of an upcoming Attorney General Opinion, and, therefore, are not considered here.

**The Honorable Dennis L. Adkins Opinion 06-15**  
**State Representative, District 75 May 3, 2006**

A telephone company that already possesses statewide authority to place its telephone lines in the public rights-of-way need not obtain a separate municipal franchise to provide additional services, including video programming, over its telephone lines. OKLA. CONST. art. IX, § 2.

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**The Honorable Kenneth Corn Opinion 06-16**  
**State Senator, District 4 May 3, 2006**

Title 59 O.S. 2001, § 731.3 requires that when a diagnosis of a human ill is to be made by a physician, including an examination of a child suspected to have suffered sexual abuse, it must be performed by a physician currently licensed by the state of Oklahoma. Under the provisions of 21 O.S. 2001, § 142.20, a medical examination of a child suspected to be a

victim of sexual abuse for the procurement of evidence to aid in the investigation and criminal prosecution of the sexual assault offense is a forensic examination. Thus, for purposes of licensure, whether entitled medical or forensic, the examination must be performed by a licensed physician within the scope of practice of that physician's license.

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**The Honorable Lucky Lamons Opinion 06-17**  
**State Representative, District 66 May 11, 2006**

The exception to the Oklahoma Open Meeting Act, 25 O.S. 2001 & Supp.2005, §§ 301 – 314, permitting executive sessions of public bodies for the purpose of “[d]iscussing the employment, hiring, appointment, promotion, demotion, disciplining or resignation of any individual salaried public officer or employee,” applies to discussing particular current or prospective public officers or employees and does not permit the discussion of a job opening for a public officer or employee when no particular individual is to be discussed. 25 O.S. Supp.2005, § 307(B)(1).

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**The Honorable Brian Crain Opinion 06-18**  
**State Senator, District 39 May 16, 2006**

Title 24 O.S. 2001, § 148 of the Oklahoma Statutes, entitled “Request of consumer report—Notice to subject of report,” requires the requestor of a consumer report for employment purposes to provide notice to the person who is the subject of the consumer report prior to requesting the report. Title 24 O.S. 2001, § 148 adopts the same meaning of “consumer report” as that term is defined in the federal Fair Credit Reporting Act (“FCRA”), 15 U.S.C. §§ 1681 – 1681t (2000). The definition of “consumer report” found in 24 O.S. 2001, § 148 does not include the exceptions to the definition

of “consumer report” as adopted by the Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”) Pub. L. No. 108-159, 117 Stat. 1952 (2003) (codified as amended at 15 U.S.C. §§ 1681 – 1681y (2005)).

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**Suzanne McClain Atwood,                      Opinion 06-19**  
**Executive Director                              May 17, 2006**  
**District Attorneys Council**

1. District attorneys are authorized to pay the annual bar dues of their assistant district attorneys. Title 19 O.S. Supp.2005, § 215.35C authorizes district attorneys to determine the compensation or financial benefits of their assistant district attorneys and payment of an assistant district attorney’s bar dues constitutes a financial benefit. Payment of such compensation constitutes a public purpose under OKLA. CONST. art. X, § 14. *See Okla. City News Broadcasters Ass’n v. Nigh*, 683 P.2d 72, 75-76 (Okla. 1984).
2. Payment of annual bar dues on behalf of district attorneys is not authorized because their compensation is fixed by statute and cannot exceed the fixed amount. 19 O.S. Supp.2005, § 215.30(A); *see* 20 O.S. Supp.2005, § 92.1A(1).
3. The District Attorneys Council is authorized to determine the compensation of its Executive Coordinator and Assistant Coordinator within the pay scale limits for district attorneys. 19 O.S. 2001, § 215.28(B). To the extent each coordinator’s compensation does not exceed a district attorney’s salary, the District Attorneys Council is authorized to pay the annual bar dues of its Executive Coordinator and Assistant Coordinator. *Id.* Payment of such compensation constitutes a public purpose under OKLA. CONST. art. X, § 14. *See Okla. City News Broadcasters Ass’n v. Nigh*, 683 P.2d 72, 75-76 (Okla. 1984).
4. The District Attorneys Council is authorized to pay the annual bar dues of such

other attorneys it employs, so long as such attorneys’ compensation does not exceed a district attorney’s salary. Title 19 O.S. 2001, § 215.28(H) authorizes the District Attorneys Council to determine the compensation, or financial benefits, of other employees it deems necessary, including licensed attorneys in addition to the Executive and Assistant Coordinators. Payment of such compensation constitutes a public purpose under OKLA. CONST. art. X, § 14. *See Okla. City News Broadcasters Ass’n v. Nigh*, 683 P.2d 72, 75-76 (Okla. 1984)

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**The Honorable Paul Roan                      Opinion 06-20**  
**State Representative, District 20              June 8, 2006**

1. Title 47 O.S. Supp.2005, § 956(A) does not prohibit a sheriff’s secretary from owning a wrecking or towing service. However, the Political Subdivisions Ethics Act (“Ethics Act”) (51 O.S. 2001, §§ 301 - 325) prohibits a county employee from having any interest, direct or indirect, that is in substantial conflict with the proper discharge of the employee’s duties. *Id.* § 302(6). Whether a conflict of interest exists is a question of fact beyond the scope of this Opinion. 74 O.S. 2001, § 18b(A)(5). It is prudent, however, to avoid situations that create a greater likelihood of a conflict of interest.
2. Title 47 O.S. Supp.2005, § 956(A) does not prohibit a person who is married to the owner of a wrecking or towing service from being employed as the sheriff’s secretary. However, caution should be taken to avoid situations that create a greater likelihood of a conflict of interest for the same reasons as provided in the response to Question One above.
3. Title 47 O.S. Supp.2005, § 956(B) prohibits a reserve deputy sheriff from owning a wrecking or towing service even if the deputy’s only duty is to teach Drug Abuse Resistance Education (“D.A.R.E.”) classes.

4. Title 47 O.S. Supp.2005, § 956(B) prohibits a person married to the owner of a wrecking or towing service from serving as a reserve deputy even if the deputy's only duty is to teach Drug Abuse Resistance Education ("D.A.R.E.") classes.

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**The Honorable Scott Meacham    Opinion 06-21**  
**Oklahoma State Treasurer        June 12, 2006**

1. The Oklahoma State Treasurer is not required to pay claims to a deceased person's unclaimed property valued between \$10,000 and \$20,000, upon execution of an affidavit by the decedent's successors, pursuant to 58 O.S. Supp.2005, § 393.
2. The Oklahoma State Treasurer shall require claimants to a decedent's unclaimed property valued between \$10,000 and \$20,000 to be supported by one of the documents listed in 60 O.S. Supp.2005, § 674.2 in pertinent part as follows:
  1. A certified copy of letters of administration or letters testamentary from the probate of the estate of the decedent naming the claimant as the personal representative of the estate of the decedent;
  2. A certified copy of the decree of distribution from the probate of the estate of the decedent determining the claimant to be entitled to receive such property through the estate of the decedent; [or]
  3. . . . a properly verified copy of the [decedent's inter vivos trust] which shows the claimant is the trustee or beneficiary of the trust or otherwise entitled to the [unclaimed] property reported[.]

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**The Honorable Lisa J. Billy        Opinion 06-22**  
**State Representative, District 42    June 19, 2006**

1. A municipal police officer holds a public office as contemplated by the dual office holding prohibition. 51 O.S. Supp.2005, § 6(A); A.G. Opin. 77-180, at 123, 125.
2. A member of a city council holds a public office as contemplated by the dual office holding prohibition. 51 O.S. Supp.2005, § 6(A); A.G. Opin. 81-42, at 78.
3. The dual office holding prohibition, 51 O.S. Supp.2005, § 6(A) does not provide an exception for a municipal police officer to simultaneously serve as a city council member of another city.

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**The Honorable Kenneth Corn        Opinion 06-23**  
**State Senator, District 4            June 19, 2006**

1. The Director of the Department of Central Services may only cancel contracts with State Use Committee vendors for reasons specified by OAC 580:15-4-17 or as authorized by the terms of the contract. The Director may implement an internet-based system of purchasing goods as long as the orders for products on the State Use procurement schedule are routed to State Use vendors. The Director may not require State Use vendors to subcontract with the entity under contract to operate the internet-based purchasing system in order for such vendors to be able to make sales to state agencies. *See* 74 O.S. 2001, § 3007(A); OAC 580:15-6-5(2) (2005).
2. The Director of the Department of Central Services may contract with an outside vendor to provide an internet-based service that allows state agencies to place orders over the internet for goods listed on the State Use Committee Procurement Schedule if the orders are directed by the internet-based service to State Use vendors for those products that are available from such vendors within the period required by the state agencies. 74 O.S. Supp.2005

§§ 85.5(A), 3007(A); OAC 580:15-6-5(2) (2005).

3. Unless otherwise provided by law, the State Purchasing Director, under the supervision of the Director of the Department of Central Services, has sole authority over state purchasing contracts, including the issuance of Requests for Proposals (“RFP”) for acquisitions by State agencies. 74 O.S. Supp.2005, § 85.5(A); OAC 580:15-4-5(b). The State Use Committee does not have authority to enter into contracts or to issue or authorize RFPs. State contracts with State Use vendors for items on the procurement schedule are not awarded through an RFP process, but rather, are awarded by the Purchasing Division after approval of the vendor by the State Use Committee and the inclusion of the vendor’s products on the procurement schedule. Because state agencies may purchase items on the procurement schedule from other vendors where the items are not available from State Use vendors within the time frame required by the agency, the Director of the Department of Central Services may issue an RFP for items listed on the procurement schedule.
4. An entity may not be awarded a contract for the sale of software to a state agency if the entity has, through a professional services contract, provided assistance to the agency in developing a Request for Proposal for the purchase of such software. *Medco Behavioral Care Corp. v. State of Iowa Dep’t of Human Serv.*, 553 N.W.2d 556, 565 (Iowa 1996).

5. Depending upon the particular facts and circumstances of the business relationship, it may be a conflict of interest for an entity to sell services to a state agency if a partner of the entity has, through a professional services contract, provided assistance to the agency in developing a Request for Proposal for the purchase of such services. Whether any particular business relationship would create a conflict of interest under circumstances where a partner of an entity has assisted in the development of an RFP is a question of fact that is outside the scope of an Attorney General’s Opinion. 74 O.S. 2001, § 18b(A)(5).

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**The Honorable Fred S. Morgan Opinion 06-24  
State Representative, District 83 June 23, 2006**

Although the Interlocal Cooperation Act, 74 O.S. 2001, §§ 1001-1008, allows cities and towns as public agencies to exercise jointly those powers they possess individually, the Interlocal Act does not create new powers. Consequently, joining together as an “insurer” under 36 O.S. 2001, § 607.1 does not give cities and towns investment options that are not otherwise available to them.

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