NEIL F. HARTIGAN
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

September 18, 1986

FILE NO. 86-006

ELECTIONS:
Use of Voting Machines or
Paper Ballots

Honorable H. Wesley Wilkins
State's Attorney, Union County
Post Office Box 75
Jonesboro, Illinois 62952

Dear Mr. Wilkins:

I have your letter wherein you inquire concerning the authority of the county clerk of Union County to revert from the punch card balloting system to paper ballots. You have advised that, although Union County has used the punch card system of voting for approximately eight years, the county clerk, against your advice, has determined to use paper ballots for the November, 1986, general election. You pose the following questions:

> "1. Does the County Clerk, pursuant to The Election Code [(Ill. Rev. Stat. 1985, ch. 46, par. 1-1 et seq.)] have sole discretion as to the types of ballots to be used in a General Election in a county with a population of approximately 17,000 persons?
>
> 2. If an elected county official refuses to follow the advice of the State's Attorney who by law is mandated to represent the same, is the State's Attorney required to * * * represent the county official, in this case the County Clerk? What, if any, bearing on this decision does the county official's retention of a private attorney have on this issue?
>
> 3. If the county official retains his own private attorney for advice * * * or upon his being sued by a private citizen concerning the issue of his decision to use paper ballots, is the County of Union obligated to pay the legal fees of said private attorney?"

In response to your first question, it is my opinion that the county clerk of Union County does not have the authority to prescribe the use of paper ballots, rather than the punch card system, for the November, 1986, general election.

Authorization for the use of voting methods other than paper ballots is found in two articles of The Election Code. The use of voting machines, i.e., mechanical devices by means of which votes are cast mechanically and counted and stored internally, is governed by the provisions of article 24 of The Election Code (Ill. Rev. Stat. 1985, ch. 46, par 24-1 et seq.). Article 24A of The Election Code (Ill. Rev. Stat. 1985, ch. 46, par. 24A-1 et seq.), on the other hand, governs the use

of electronic voting systems. The punch card balloting system in use in Union County is an electronic voting system the use of which is authorized under article 24A of the Code, (see Ill. Rev. Stat. 1985, ch. 46, pars. 24A-1, 24A-2), not a voting machine system generally governed by article 24 thereof.

The use of voting machines or electronic voting systems is not mandatory in counties with populations of less than 35,000. (Ill. Rev. Stat. 1985, ch. 46, par. 24-1.1.) Section 24A-3 of The Election Code (Ill. Rev. Stat. 1985, ch. 46, par. 24A-3), however, authorizes the adoption and use of electronic voting systems in all counties, regardless of population:

> "Except as otherwise provided in this Section, any county board * * *, with respect to territory within its jurisdiction, may adopt, experiment with, or abandon [an electronic] voting system approved for use by the State Board of Elections and may use such voting system in all or some of the precincts within its jurisdiction, or in combination with paper ballots or voting machines. * * *
>
> * * * "

Section 24A-3 vests power to adopt or abandon an electronic voting system in the county board, not in the county clerk. Moreover, although the county board was originally granted the general power to abandon the use of an electronic voting system once adopted, reversion to the use of paper ballots is now limited by section 24-1.2 of The Election Code (Ill. Rev. Stat. 1985, ch. 46, par. 24-1.2), which provides in pertinent part:

> "Paper ballots may be used for the conduct of the non-partisan election and the consolidated elections in odd-numbered years, the special municipal primary in even-numbered years, and emergency referenda held at any time, except in regular elections in which the only offices or propositions on the ballot are for political subdivisions for which offices have heretofore been voted on using voting machines or electronic voting systems * * *
>
> * * * "
>
> (Emphasis added.)

Although it is located in the article governing the use of voting machines, and even though it conflicts with section 24A-3 of the Code, there is no question but that the language of section 24-1.2 was intended to extend to all jurisdictions in which either voting machines or electronic voting systems have been in use.

Section 24A-3 of The Election Code, in language similar to that quoted above, was originally enacted by the General Assembly in 1965 (see Laws 1965, p. 2220, effective August 2, 1965). It was the obvious intent of the General Assembly at that time to grant to county boards broad powers to experiment with electronic voting systems, both alone and in combination with other permissible voting methods. Over the subsequent fifteen years, most of the election jurisdictions in the State adopted the punch card electronic voting system.

In 1980, the General Assembly added section 24-1.2 to The Election Code (see Public Act 80-1469, effective December 1, 1980). The necessary effect of section 24-1.2 was to

place a limit upon the power of a county board to revert to the use of paper ballots when an electronic voting system or a voting machine system had previously been in use in the jurisdiction. It is well established that where two statutes pertaining to the same subject conflict, the later statute will be construed as an implied amendment of the earlier. (Hacken v. Isenberg (1919), 288 Ill. 589, 602-03; see also Scott v. Freeport Motor Casualty Co. (1942), 379 Ill. 155, 167; Quinn v. Retirement Board of Firemen's Annuity Fund (1972), 7 Ill. App. 3d 791, 799.) Section 24-1.2 of The Election Code, as the later enacted statute, must be construed as an implied amendment of section 24A-3 of the Code, to the extent that the provisions conflict. Consequently, section 24-1.2 controls on the question of reversion to paper ballots, and prohibits the county board of Union County, or, for that matter, any other official, from now ordering the use of paper ballots instead of the punch card balloting system.

You have stated in your letter that the county clerk is relying upon the language of section 24-11 of The Election Code (Ill. Rev. Stat. 1985, ch. 46, par. 24-11) to support his attempt to reinstate the use paper ballots. Section 24-11 provides in pertinent part:

" * * *

* * * If a method of election for any candidates is prescribed by law, in which the use

> of voting machines is not possible or practicable, or in case, at any election the number of candidates nominated or seeking nomination for any office renders the use of the voting machine for such office at such election impracticable, or if for any reason, at any election the use of voting machines is not practicable or possible, the proper officer or officers having charge of the preparation of the ballot labels for the machines may arrange to have the voting for such or all candidates for offices conducted by paper ballots. In such cases ballots shall be printed for such or all candidates, and the election conducted by the election officers herein provided for, and the ballots counted and return thereof made in the manner required by law for such candidates or candidates or offices, insofar as paper ballots are used." (Emphasis added.)

By its plain language, section 24-11 is applicable only in jurisdictions in which voting machines, as such, are in use. The punch card balloting system in use in Union County, as noted above, is an electronic voting system authorized by article 24A of The Election Code, not a voting machine system the use of which is generally governed by article 24 of The Election Code. Therefore, section 24-11 is not applicable in jurisdictions using the punch card voting system and thus, does not empower the county clerk to order the use of paper ballots in such jurisdictions.

In response to your second question, it is well established that the State's Attorney is the legal advisor and representative of the county and its officers, as well as the people of his county and the State. (Ashton v. County of Cook

(1943), 384 Ill. 287, 299-300; Ill. Rev. Stat. 1985, ch. 14, par. 5.) When a State's Attorney finds himself in a situation where there is a conflict between the interests of the people generally, and a county officer's exercise of power, he must determine which position is correct and represent that party. (1975 Ill. Att'y Gen. Op. 330, 331.) A State's Attorney is not required to defend a county officer whom he believes to have acted unlawfully. (See 1975 Ill. Att'y Gen. Op. 143.) Therefore, it is my opinion that you may decline to represent the county clerk in defending the acts in question, and moreover, that you would be justified in challenging those actions. See People ex rel. Courtney v. Ashton (1934), 358 Ill. 146; 1975 Ill. Att'y Gen. Op. 298.

In response to your final question, when a conflict prevents a State's Attorney from representing a county officer, a special State's Attorney may be appointed pursuant to section 6 of "AN ACT in regard to attorneys general and state's attorneys" (Ill. Rev. Stat. 1985, ch. 14, par. 6). (Lavin v. Commrs. of Cook County (1910), 245 Ill. 496, 502.) Section 6 of "AN ACT in regard to attorneys general and state's attorneys" provides in pertinent part:

> "Whenever the attorney general or state's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some

> competent attorney to prosecute or defend such cause or proceeding, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the attorney general or state's attorney would have had if present and attending to the same * * *." (Emphasis added.)

If, because of the State's Attorney's interest in a proceeding, a special prosecutor is appointed to prosecute or defend an action, the county becomes liable for such expenses. (In re Petition of McNulty (1978), 60 Ill. App. 3d 701; Lavin v. Commrs. of Cook County (1910), 245 Ill. 496, 502.) Without the requisite court appointment, however, private counsel is not entitled to payment of fees and expenses from county funds. (Hutchens v. Wade (1973), 13 Ill. App. 3d 787, 790.) Therefore, it is my opinion that, unless a special State's Attorney is appointed pursuant to section 6 of "AN ACT in regard to attorneys general and state's attorneys", the county will not be liable for any legal fees incurred by the clerk.

Very truly yours,

ATTORNEY GENERAL