



1963

Study on the Powers, Duties, and Organization of the Office of Attorney General

Committee on the Administration of Justice in the Commonwealth of Kentucky

John B. Breckinridge
Attorney General of Kentucky

Robert F. Kennedy
Attorney General of the United States

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Foreword

By ROBERT F KENNEDY

Attorney General of the United States

The office of Attorney General is an historic part of our system of government which has retained its importance to the present time. The office has evolved in different ways in the federal government and in the fifty states, but the efficient performance of its basic functions is everywhere essential to the just and vigorous enforcement of the laws.

This study of the office of Attorney General in Kentucky should be beneficial not only to persons in that state, but to all who are working to ensure the effective administration of justice. The Committee on the Administration of Justice in the Commonwealth of Kentucky is to be commended for initiating and effectuating such a project. It is clear that this kind of appraisal serves the important purpose of creating a greater awareness of problems and opportunities in this field, and is a real contribution to our common goal as citizens of improving the administration of justice throughout America.

A similar study, involving all of the states, has been undertaken by the National Association of Attorneys General and should help to provide an important basis for evaluating the performance and role of state Attorneys General.

Foreword

The Committee on the Administration of Justice in the Commonwealth of Kentucky, at its initial meeting on May 1, 1961, authorized a study of the office of Attorney General, including its relationship to state agencies, local officials, courts, and the public. The report resulting from this study is presented herem.

The Committee on the Administration of Justice was created pursuant to a resolution adopted by the Board of Bar Commissioners of the Kentucky State Bar Association in January, 1961, "for the purpose of establishing a closer working relationship between the Bench, the Bar and the office of Attorney General in the administration of justice and to recommend the enactment of such legislation as may be appropriate to facilitate the discharge of the duties of these officers" Members of the Committee include representatives of the Kentucky State Bar Association; the Commonwealth's Attorneys and County Attorneys Associations; the deans of Kentucky's two law schools; the Chief Justice and the Administrative Director of the Court of Appeals; a representative of the circuit judges; a representative of the city attorneys, selected by the Kentucky Municipal League; and the Attorney General. By bringing together representatives of various groups within the legal profession, the Committee is in a position to help coordinate planning, research and legislation to improve the administration of justice. It is a continuing body which meets a real need in Kentucky, and which is flexible enough to assume a variety of functions.

The Committee could not have selected a more productive subject for its first research effort than the office of Attorney General. In Kentucky, the Attorney General has no powers over local law enforcement officials or over most attorneys employed by state government. His powers and duties have been revised by successive legislatures until they bear little relationship to his common law role. The lack of a thorough study of his duties, the operations of his office and methods of strengthening working relationships in the administration of justice has been a handicap in evaluating his present role.

A second study, of equal scope, was initiated by the Committee and will be completed later this year. It will include all law enforcement officers and agencies in Kentucky, and will examine the statutory basis and practical operation of their offices. Together, the two studies will present a complete analysis of non-judicial aspects of the administration of justice in the Commonwealth.

The work of the Committee has attracted nationwide attention. The action of the National Association of Attorneys General's Conference in June, 1961 reflects this interest. The Conference adopted a resolution creating a standing Committee on the office of Attorney General, with the purpose of improving working relationships within the legal profession "through a comparative analysis of the powers, duties and operation of the Offices of Attorney General." The undersigned was named Chairman of this Committee. The semi-final draft of this Kentucky report served as a working paper for a program at the Southern Regional Attorney General's Conference in August, 1962 and has been circulated to all Attorneys General.

It is anticipated that this study will be of significant value in defining and executing the nation-wide study of the office of Attorney General, as well as providing a basis for improvement in Kentucky

JOHN B. BRECKINRIDGE,
Attorney General of Kentucky
Chairman, Committee on the
Administration of Justice in
the Commonwealth of Kentucky

Acknowledgements

Many individuals both within and without Kentucky have furnished data and reviewed drafts for this report on the office of Attorney General. The study was made on a cooperative basis, not only to ensure optimum use of research facilities, but to ensure a balanced viewpoint in content and presentation. The Department of Law furnished staff consultation and supervision for the project, assisted in data collection, provided clerical and reproduction services and coordinated and edited the entire study. Part of the research was carried out by the University of Kentucky and University of Louisville Law Schools, under contract with the Attorney General, and part was carried out by law students who were employed as summer law clerks in the Attorney General's office.

The Attorneys General of many other states furnished information and reviewed work papers for this study. Their generous assistance made it feasible to include appreciable data on other states for comparative purposes. Correspondence with particular Attorneys General is cited throughout the footnotes.

The primary source of information on other states is a questionnaire circulated by the Council of State Governments, which serves as secretariat for the National Association of Attorneys General. The questionnaire, sent to each state, called for detailed information on the powers, duties and operations of the office of Attorney General. The final tabulations, when completed and released by the Council, will constitute a thorough, factual description of the office of Attorney General in the fifty states. Copies of various questionnaires were furnished to Kentucky, as completed by individual states, although a majority were not available at the time this report went to press. Particular acknowledgement should be made of the efforts of Mrs. Ruth Turk and Mr. Herbert Wiltsee of the Council staff in making these questionnaires available.

Mr. Glenn Winters, Executive Director of the American Judicature Society, and a member of the Joint Committee for the Effective Administration of Justice and Chairman of its Subcom-

mittee on Public Information, has been helpful in offering suggestions and encouragement throughout the study

Dean William L. Matthews of the University of Kentucky College of Law and Professor James R. Merritt, Director of Research of the University of Louisville School of Law, worked closely and continuously with the Attorney General's staff in developing outlines, questionnaires and reviewing drafts. That part of the study relating to local officials was prepared by Professor Merritt, with the assistance of Norvle Lay, Robert Malone, John Thrapp and Charles Hoodenpyle, students working under his direction. Two University of Kentucky senior law students, who were employed by the Department of Law during the summer of 1961 and worked under contract part of the subsequent school term, prepared drafts of much of the report. Mr. Hugh Cannon carried out research and wrote the initial drafts of parts I, II and IV. Mr. Anthony Wilhoit was primarily responsible for the chapter on the advisory function of the Attorney General.

Almost the entire staff of the Department of Law has been called on to review drafts and assist with particular phases of this study. Particular mention should be made of the contribution of Assistant Attorneys General John B. Browning and Walter C. Herdman. Assistant Attorney General Robert L. Montague, III, worked closely with the study and reviewed the entire draft; his previous study of the office of Attorney General in Kentucky is acknowledged throughout, and was of particular value in preparing part I of this report. Mrs. Patton G. Wheeler, Research Analyst serving with the Department, was responsible for the immediate direction, coordination and editing of the study and carried the major responsibility in bringing the report to its published form.

Chapters II and III are based in large part upon questionnaires circulated to state agencies and to Commonwealth, county and city attorneys. The information they furnished was not otherwise available, and their contribution of time and effort is gratefully acknowledged.

JOHN B. BRECKINRIDGE
Attorney General

ASSISTANT ATTORNEYS GENERAL

From January 4, 1960, to date

Attorneys whose names are in italics are presently serving with the Department of Law

**Ashcraft, J. Gardner	Continuous Service	Assistant Attorney General for Public Service Commission
<i>Bivin, William E.</i>	April 1, 1960	Resigned 12/1/60 to serve as Executive Assistant to Lt. Governor
<i>Boaz, Seth</i>	Previously with office	Resigned 4/60 to return to private practice
<i>Browning, John B.</i>	January 1, 1950	
<i>Caldwell, Robert T., Jr.</i>	July 9, 1962	Resigned 11/30/62 due to illness
<i>Carroll, Wayne J.</i>	July 11, 1960	Resigned 10/13/61 to serve with U. S. Attorney's Office for Western Kentucky
<i>Corns, Ray</i>	June 1, 1960	
<i>Floyd, Morris Briggs</i>	October 18, 1961	Resigned 4/23/62 for military service
<i>Fossett, Ed</i>	Previously with office	Resigned 4/30/60 to serve as Administrative Assistant to the Governor
<i>Gaitskill, Thomas H.</i>	February 20, 1961	Resigned 7/30/61 to return to own business
<i>Glazer, Martin</i>	October 1, 1960	
<i>Hayes, Paul E.</i>	Previously with office	Resigned 12/19/60 to return to private practice
<i>Herdman, Walter C.</i>	June 1, 1948	
**Lamkin, William A.	Assistant Attorney General for Department of Health	Transferred 8/14/61 as Assistant Attorney General for Highway Department

<i>Mangeot, Henri L.</i>	January 14, 1963	
<i>McTyewre, Holland N.</i>	April 25, 1960	
<i>Montague, Robert L., III</i>	June 6, 1961	
<i>Nagle, Joe</i>	January 1, 1962	
*Neel, Jr. James N.	October 1, 1961	Coordinator of Nuclear Activities
<i>Osborne, James G.</i>	August 1, 1962	
Powell, Earle V	With office previously	Resigned 1/6/61 to serve as Commissioner of Economic Security
**Reed, H. D., Jr.	With office previously	Transferred to Law Department as Assistant Attorney General for Department of Highways on 1/1/60; resigned 6/17/61 to serve with House Committee on Education & Labor in Washington, D. C.
**Riley, William S.		Assistant Attorney General for Department of Revenue
Savage, Troy D.	February, 1960	November 9, 1961, Deceased
**Sebree, David B.	With office previously	Transferred as Assistant Attorney General for Department of Health 8/14/61
Simpson, William F	April, 1948	May 17, 1962, Deceased
<i>Sullivan, Ronald M.</i>	October 31, 1961	
Watson, William A.	September 6, 1960	Resigned 12/11/61 to serve with U. S. Attorney's Office for Eastern Kentucky
<i>Whalin, Fred R.</i>	September 10, 1962	

* Attorney for other Departments.

** Departmental Assistant Attorneys General.

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I. Powers, Duties and Organization Of the Office of Attorney General

INTRODUCTION

The office of Attorney General is one of the oldest in our system of government and exists in each of the fifty states. State Attorneys General share a common heritage in the development of the office and the evolution of a body of common law defining its powers and functions. Their present powers and duties, however, are as diverse as the states they serve. This report traces the origin of the office of Attorney General and its development in one state, Kentucky. It shows the extent to which the Attorney General's common law duties have been modified by legislative enactment, while new duties have been added. Some knowledge of the office's historical background and its function in other states is necessary to lend perspective to an examination of the Attorney General's role, and to appraise his present powers in relation to his traditional duties.

This study is divided into five sections, subsequent to this introductory chapter. One explores the relationship of the Attorney General to state government, and one examines his relationship to local officials in matters of interest to the Commonwealth. Separate sections are devoted to his advisory function and to his role in litigation, since these constitute his major activities. A final section reviews those duties which are not derived directly from his role as chief law officer. These sections are closely interrelated, as each of the Attorney General's activities must be viewed in relationship to the others.

The 1960-62 Biennial Report of the present Attorney General of Kentucky emphasized the great growth in the responsibilities of his office:

[T]he traditional areas of activity and responsibility of this office have been substantially expanded and diversified in an unprecedented manner—charged, as it has been with carrying forward an extensive series of projects and programs of vital interest to the administration of justice and

the welfare and development of the Commonwealth. While carrying out these new functions, the office has continued to perform its customary duties as advisor and litigator for the state and its various departments and agencies. The situation is reflective of the increasing tempo and complexity of governmental affairs, the vital relationship of this office to the accomplishment of the purposes of state government and the philosophy with which these tasks have been approached.

This study is an effort to evaluate these functions, and to explore ways in which they might be performed more effectively.

HISTORICAL DEVELOPMENT

Origin of the Office. The office of Attorney General is an ancient and honorable one in English constitutional history¹ It evolved gradually from the practice of appointing attorneys to represent the Crown in suits which might arise during a specified period, or in a specified county or court.² These counsels had only limited authority and were called by various names such as "narratores pro rege," "qui sequuntur pro rege," and "the king's serjeants." The term Attorney General apparently was first used in a certificate signed by the Duke of Norfolk's attorney general in 1398.³ The title of "attornatus Regis" appears first in the time of Henry III, but the office seems to have existed as early as 1278.⁴

In 1472 an Attorney General of England was appointed, with power to name deputies to act for him in any court of record, and the office was held singly thereafter.⁵ The Attorney General was often appointed to serve during good behavior or for life, until the reign of Henry VIII, when he served at the king's pleasure.⁶ During the Tudor period the Attorney General be-

¹ Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 Am. J. Legal Hist. 304 (1958).

² Bellot, *The Origin of the Attorney General*, 25 L.Q. Rev. 400, 403 (1909).

³ Holdsworth, *The Early History of the Attorney and Solicitor General*, 13 Ill. L. Rev. 602 (1919); Bellot, *supra* note 2, at 403; Cooley, *supra* note 1, at 305.

⁴ "In 1278 an *attornatus regis* appears for the crown at the Cornish Assizes; William Bonneville appears in the same capacity at the Essex Assizes, and an *attornatus regis* appears for the King at York." Bellot, *supra* note 2, at 407.

⁵ *Id.* at 410.

⁶ Holdsworth, *supra* note 3, at 605-06.

came a powerful figure in government and his role became that of chief law officer.

Evolution of Powers. The Attorney General represented the Crown, looking after the king's interest in the king's own court. Since the king was said to be *praerogative*, his attorney had a standing superior to that of an ordinary attorney, and it devolved upon the courts to see that all procedural advantages afforded to the king were given to his attorney.⁷ It appears that after 1604 the Attorney General was the only person who could take the initiative in legal proceedings on behalf of the Crown.⁸

When the Attorney General emerged as chief law officer, he was entrusted with the management of all legal affairs and the prosecution of all suits, civil and criminal, in which the Crown was interested.⁹ Additional powers of investigation and participation in preliminary proceedings developed from his powers over criminal litigation.¹⁰

Blackstone gives the following illustrations of the Attorney General's criminal powers:

The objects of the king's own prosecutions, filed ex officio by his own attorney-general, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offenses so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal.¹¹

The same authority enumerates certain civil powers of the Attorney General: he filed informations to recover money or other chattels, or to obtain satisfaction in damages for any per-

⁷ Cooley, *supra* note 1, at 305; Holdsworth, *supra* note 3, at 613.

⁸ "Hudson tells us that it was resolved in 1604 that the king's serjeant could not, like the king's attorney, proceed on his own motion by information in the Star Chamber." Holdsworth, *supra* note 3, at 616.

⁹ 2 R.C.L. *Attorney General* 913, 915, citing *State v. Cunningham*, 83 Wis. 90, 53 N.W. 35 (1892); 5 Am. Jur. *Attorney General* § 5 (1936); Howison, *Attorney General—Common Law Powers Over Criminal Prosecutions and Civil Litigation of the State*, 16 N.C.L. Rev. 282 (1938). See also *Commonwealth ex rel. Miner v. Margiotti*, 325 Pa. 17, 188 Atl. 524 (1936); *State v. Ehrlich*, 65 W. Va. 700, 64 S.E. 935 (1909).

¹⁰ *Appeal of Margiotti*, 365 Pa. 380, 75 A.2d 465 (1950); *Commonwealth ex rel. Miner v. Margiotti*, *supra* note 9; Howison, *supra* note 9, at 291.

¹¹ 4 Blackstone, *Commentaries* 308-09.

sonal wrong committed in the lands or to other possessions of the Crown, the most usual informations being those of intrusion or debt; he filed an information *in rem* to recover goods that were to become the property of the king, such as treasurer-trove, wrecks and estrays; he issued a *quo warranto* against those who claimed or usurped any office, franchise or liberty; he proceeded by *scire facias* to revoke and annul grants made by the Crown improperly, or forfeited by the grantee.¹² Blackstone indicates that the king's counsel could not be employed in any cause against the Crown without special license.¹³

As early as Henry VIII's reign, the Attorney General began to take a major part in legislation:

In some of the very first entries on the journals of [the House of Lords] he is not only employed by it to take bills from the Lords to the Commons, but also to amend bills and put them into shape. All through the Tudor period it is the king's attorney who is usually consulted by the government on points of law; and it is he who conducts important state trials, not only in courts, but also in their preliminary stages.¹⁴

American Adaptation. By the time governments were established in America, the office of Attorney General in England had extensive and well-defined powers. The office came to America as part of colonial government and was later incorporated into state governments. Most, if not all, of the colonies appointed Attorneys General, some of whom exercised considerable administrative power in addition to their legal functions. In Virginia, for example, the Attorney General supervised revenue collections.¹⁵ In America, as in England, the Attorney General or his deputies advised state departments and appeared for them in court.

¹²*Id.* at 261-62, 427. See also *Chambers v. Baptist Educ. Socy*, 40 Ky. (1 B. Mon.) 215 (1841). It should be noted that in *Commonwealth ex rel. Ferguson v. Gardner*, 327 S.W.2d 947 (Ky. 1959), the Kentucky Court held that the Attorney General could not intervene in a will contest case although the will purported to establish a charitable trust.

¹³ 3 Blackstone, Commentaries 261.

¹⁴ Holdsworth, *supra* note 3, at 607.

¹⁵ *Johnson v. Commonwealth ex rel. Meredith*, 291 Ky. 829, 165 S.W.2d 820 (1942); *People v. Miner*, 2 Lans. 396 (N.Y. 1868); Cooley, *supra* note 1, at 310, citing Hammonds, *The Attorney General in the American Colonies* 21 (Anglo-American Legal History Series, Ser. I., 1939).

The duties of state Attorneys General differ in many respects from those of their English predecessors, but they still serve as the state's chief law officer. The continuing importance of the office is seen in the fact that it is elective in forty-two states, and, in the seven states where the Governor appoints an Attorney General, legislative confirmation is required. In one state (Tennessee) the Supreme Court appoints the Attorney General.¹⁶ All of the states thus recognize that the Attorney General serves the whole state, and is not just an officer of the executive branch.

The role of the Attorney General in each state was shaped by the whole pattern of state and local government, as well as by his traditional duties. Those states with a tradition of strong local governments, for example, tend to limit the powers of the Attorney General in this area. In all states he is head of a department, with appropriate administrative responsibilities, as well as a legal officer. The various Attorneys General have been charged with a wide variety of duties which do not derive from common law, but reflect relatively new areas of governmental activity

THE OFFICE OF ATTORNEY GENERAL IN KENTUCKY

Constitutional Basis. Kentucky has had an Attorney General from the beginning of her government. From 1792 to the present, under Kentucky's four constitutions, there have been thirty-nine Attorneys General.¹⁷

¹⁶ Council of State Governments, Book of the States 140-42 (1962-1963).

¹⁷ The Attorneys General of Kentucky:

1. George Nicholas	-----	1792-1792
2. William Murray	-----	1792-1793
3. John Breckinridge	-----	1793-1797
4. James Blair	-----	1797-1820
5. Jos. M. White	-----	1820-1820
6. Ben Hardin	-----	1820-1821
7. Solomon P. Sharp	-----	1821-1825
8. Frederick W S. Grayson	-----	1825-1825
9. J. W Denny	-----	1825-1832
10. Chas. S. Morehead	-----	1832-1838
11. Owen G. Cotes	-----	1838-1849
12. M. C. Johnson	-----	1849-1849
13. James Harlan	-----	1849-1859
14. Andrew J. James	-----	1859-1861
15. John M. Harlan	-----	1861-1865
16. John Rodman	-----	1865-1875
17. Thomas Moss	-----	1875-1879

(Footnote continued on next page)

The first Constitution, adopted in 1792, provided that the Governor, with the advice and consent of the Senate, would appoint an Attorney General to hold office during good behavior. It directed that "he shall appear for the Commonwealth in all criminal prosecutions, and in all civil cases in which the Commonwealth shall be interested, in any of the superior courts; shall give his opinion when called upon for this purpose, by either branch of the Legislature, or by the Executive, and shall perform such other duties as shall be enjoined him by law"¹⁸ The second Constitution, adopted seven years later, provided only that the Attorney General's duties "shall be regulated by law"¹⁹

The Constitution of 1850 made the office of Attorney General elective and provided that his "duties and responsibilities" should be prescribed by law²⁰ Election was for a four-year term.

The fourth and present Constitution, adopted in 1891, provides in section 91 that:

[An] Attorney General shall be elected by the qualified voters of the State at the same time the Governor is elected, for the term of four years [he] shall be at least thirty years of age at the time of his election, and shall have been a resident citizen of the State at least two years

(Footnote continued from preceding page)

18. P. Watt Hardin -----	1879-1889
19. W J. Hendricks -----	1889-1896
20. W S. Taylor -----	1896-1900
21. R. J. Breckinridge -----	1900-1902
22. C. J. Pratt -----	1902-1904
23. N. B. Hays -----	1904-1908
24. James Breathitt -----	1908-1912
25. James Carnett -----	1912-1916
26. M. M. Logan -----	1916-1917
27. Charles H. Morris -----	1917-1920
28. Chas. I. Dawson -----	1920-1923
29. T. B. McGregor -----	1923-1924
30. Frank E. Daugherty -----	1924-1928
31. James W Cammack -----	1928-1932
32. Bailey P. Wooton -----	1932-1936
33. B. M. Vincent -----	1936-1937
34. Hubert Meredith -----	1937-1944
35. Eldon S. Dummit -----	1944-1948
36. Elvarado E. Funk -----	1948-1952
37. J. D. Buckman, Jr. -----	1952-1956
38. Jo M. Ferguson -----	1956-1960
39. John B. Breckinridge -----	1960-
18 Ky. Const. art. II, § 16 (1792).	
19 Ky. Const. art. III, § 23 (1799).	
20 Ky. Const. art. III, § 25 (1850).	

next before his election. [His duties] shall be such as may be prescribed by law.

Section 92 of the Constitution requires that the Attorney General shall have been a practicing lawyer eight years before his election. Section 93 stipulates that he may not succeed himself. Section 97 specifies the conditions under which he succeeds to the office of Governor. The Attorney General, like other elective state officers, is subject to the impeachment provisions of section 68 and the salary limits of section 96 of the Constitution.

Only two provisions of the Constitution specify duties of the Attorney General. Section 87 prescribes that he shall convene the Senate, for the purpose of choosing a President of the Senate, if neither the Governor, the Lieutenant Governor, nor the Secretary of State are able to administer the government. Section 217 provides that the Attorney General, upon notice of the violation of various constitutional provisions relating to railroad and related companies, shall institute proceedings to enforce such provisions.

Kentucky's Constitution states twice, in sections 91 and 93, that the duties and responsibilities of the Attorney General shall be prescribed by law. Similar provisions are found in the constitutions of at least half the states.²¹ Judicial interpretations of this provision, where the question has arisen, have not been uniform. Kentucky's highest court, the Court of Appeals, in *Johnson V Commonwealth ex rel. Meredith*,²² set out three divergent views found in court construction of this provision:

(1) the legislature may not only add duties but may lessen or limit common law duties

(2) the term "as prescribed by law" has been held in effect, to negative the existence of any common law duties, so that the Attorney General has none, and the legislature may deal with the office at will

(3) the term has been construed in Illinois and Nebraska to mean that the legislatures may add to the common law duties of the office, but they are inviolable and cannot be diminished

²¹ Legislative Drafting Research Fund of Columbia University, Index Digest of State Constitutions 39 (2d ed. 1959).

²² 291 Ky. 829, 165 S.W. 820 (1942).

The court held, *inter alia*, that the Constitution authorizes the legislature to prescribe the Attorney General's duties at will, thereby adopting the first view

Status of Common Law. Section 15.020 of the Kentucky Revised Statutes (hereinafter cited as KRS) provides that the Attorney General is the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies and political subdivisions; and invests him with all the common law powers of his office except where those powers have been modified by statute. The Kentucky court in *Commonwealth ex rel. Ferguson v. Gardner*,²³ held that:

To declare that the common law and statutes enacted prior to that time should be in force was equivalent to declaring that no rule of the common law not then recognized and in force in England should be recognized and enforced here. James I ascended to the throne of England in 1603 (March 24), and the fourth year of his reign commenced March 24, 1607; and when it is sought to enforce in this state any rule of English common law, as such, independently of its soundness in principle, *it ought to appear that it was established and recognized as the law of England prior to the latter date.*

The Constitution of Kentucky, section 233, adopts all general laws of Virginia which were in force on June 1, 1792:

All laws which, on the first day of June, one thousand seven hundred and ninety-two, were in force in the State of Virginia, and which are of a general nature and not local to the State, and not repugnant to this Constitution, nor to the laws which have been enacted by the General Assembly of this Commonwealth, shall be in force within this state until they shall be altered or repealed by the General Assembly

Therefore, it seems that the powers and duties of the Attorney General of Kentucky are those which were recognized at common law in England on March 24, 1607, and those recognized in Virginia as of June 1, 1792, except as they have been modified by the Constitution, statute or construed by judicial decision.

²³ 327 S.W.2d 947, 949 (Ky. 1959), citing *Aetna Ins. Co. v. Commonwealth*, 106 Ky. 864, 51 S.W. 624, (1899).

The burden of proving that a power existed at common law rests upon the Attorney General.²⁴

Legislative and Judicial Modifications. Chapter 15 of KRS establishes a Department of Law and defines the powers and duties of the Attorney General. Much of this chapter seems to be largely declaratory of the common law Section 15.020, which is a general description of the Attorney General's powers and duties, includes the following language:

The Attorney-General is the chief law officer of the Commonwealth of Kentucky and all of its departments, commissions, agencies, and political subdivisions, and the legal adviser of all state officers, departments, commissions and agencies and shall exercise all common law duties and authority pertaining to the office of the Attorney-General under the common law, except when modified by statutory enactment.

In other statutes, however, the General Assembly has encroached upon the common law position of the Attorney General as the chief law officer of the Commonwealth by granting state departments the right to employ legal counsel. The Attorney General's position in relation to other state officers and agencies is the subject of part II of this report. Transfer of authority from the Attorney General to other state officers has been upheld by the Court of Appeals which has recognized a broad degree of legislative discretion:

[W]e are of the opinion that, while the Attorney General possesses all the power and authority appertaining to the office under common law and naturally and traditionally belonging to it, nevertheless the General Assembly may withdraw these powers and assign them to others or may authorize the employment of other counsel for the departments and officers of the state to perform them. This, however, is subject to the limitation that the office may not be stripped of all duties and rights so as to leave it an

²⁴ Ky. Const. §233; Commonwealth *ex rel.* Ferguson v. Gardner, *supra* note 23; Burks v. Commonwealth, 236 S.W.2d 68 (Ky. 1953); Benjamin v. Coff, 314 Ky. 639, 236 S.W.2d 905 (1951); Kentucky Hotel, Inc., v. Cinotti, 298 Ky. 88, 182 S.W.2d 27 (1944); Commonwealth *ex rel.* Attorney General v. Howard, 297 Ky. 488, 180 S.W.2d 415 (1944); Johnson v. Commonwealth *ex rel.* Meredith, 291 Ky. 829, 165 S.W.2d 820 (1942); Aetna Ins. Co. v. Commonwealth, *supra* note 23.

empty shell, for obviously, as the legislature cannot abolish the office entirely, it cannot do so indirectly by depriving the incumbent of all his substantial prerogatives or by practically preventing him from discharging the substantial things appertaining to the office.²⁵

Kentucky's Attorney General is the state's "chief law officer", but, as a result of legislative modification and judicial construction of his common law power, he exercises less authority than other state Attorneys General.²⁶ New functions have been added to the office of Attorney General as new governmental activities have developed, but his common law authority has been weakened.

Many powers exercised exclusively by the Attorney General in most states are shared with other authorities in Kentucky. The statute cited above, KRS 15.020, states that:

[The Attorney General] shall appear for the Commonwealth in all cases in the Court of Appeals wherein the Commonwealth is interested, and shall also commence all actions or enter his appearance in all cases, hearings, and proceedings in and before all other courts, tribunals, or commissions in or out of the state, and attend to all litigation and legal business in or out of the state required of him by law, or in which the Commonwealth has an interest, and any litigation or legal business that any state officer, department, commission, or agency may have in connection with, or growing out of, his or its official duties, except where it is made the duty of the Commonwealth's attorney or county attorney to represent the Commonwealth.

The relationship of the Attorney General to Commonwealth's attorneys and county attorneys is discussed in detail in part III of this report. He does not have power of supervision over local officers, or power to intervene in local actions. In few states are his powers in local civil and criminal actions as limited as they are in Kentucky.

As early as 1829, the Court of Appeals implied that the Attorney General's common law duties were not complete, by holding that he could represent a defendant in a criminal trial;

²⁵ Johnson v. Commonwealth *ex rel.* Meredith, *supra* note 24, at 844, 165 S.W.2d at 829.

²⁶ See generally Montague, *The Office of Attorney General in Kentucky*, 49 Ky. L.J. 194 (1960).

in England, the Attorney General could not appear against the Crown.²⁷ A more recent example of limitations on his common law status is seen in a 1944 decision, holding that section 68 of the Kentucky Constitution abolished the common law *quo warranto* proceeding for removal of a Commonwealth's attorney because of malfeasance and misfeasance.²⁸

Organization of Office. KRS 15.010 makes the Attorney General head of the Department of Law. Section 15.100 authorizes employment of a Deputy Attorney General, and "such assistants and special attorneys as he [the Attorney General] deems necessary to transact the business of the Department of Law, and perform such duties as he may designate." The same section authorizes the Attorney General to contract for legal services. As of June, 1962, eight assistants were employed in the office of Attorney General and there was no deputy. In addition, Assistant Attorneys General were permanently assigned to four state departments.

Assistants were first authorized in 1908, when the General Assembly empowered the Attorney General to employ three assistants and a chief law clerk.²⁹ Prior to that year, no assistance was authorized by law, but the Attorney General employed a clerk under an arrangement between various state departments.³⁰ He was, however, authorized to employ such assistants in the counties of the state as were necessary to aid him in the investigation or collection of unsatisfied claims, demands, and judgments in favor of the Commonwealth.³¹ In 1928, the number of authorized Assistants was increased to six,³² and, currently, the number is limited by appropriation rather than by statute. Prior to 1960, the qualifications and salary of each Assistant were specified by statute.³³

²⁷ *Sharp's Adm. v. Kirkendall*, 25 Ky. (2 J.J. Marsh) 150 (1829); 3 Blackstone, Commentaries 27.

²⁸ *Commonwealth ex rel. Attorney General v. Howard*, 297 Ky. 488, 180 S.W.2d 415 (1944).

²⁹ Ky. Acts 1908, ch. 32, § 3 at 86-87.

³⁰ Breathitt, 1908-09 Ky. Att'y Gen. Rep. 4; Cammack, 1928 Ops. Ky. Att'y Gen.

³¹ Ky. Acts 1892, ch. 100, art. II, § 18 at 262-3.

³² Ky. Acts 1928, ch. 113, amending Ky. Acts 1908 ch. 32 § 3; Ky. Acts 1912, ch. 21; Ky. Acts 1924, ch. 23.

³³ Ky. Acts 1948, ch. 14, § 1; Ky. Acts 1950, ch. 123, § 29.

With the increase in the Department of Law's workload, increasing attention is being directed to administrative organization and procedures. In 1963, the present Attorney General organized the Department into two divisions, each under the direction of a Chief, who is responsible to the Attorney General and his Deputy. The Division of Investigations, Litigation and Appellate Practice is responsible for the preparation and conduct of the Department's practice before the various courts and administrative agencies. The Division of Opinions is responsible for the preparation of opinions for the political subdivisions of the Commonwealth and the various state boards, commissions, departments and agencies entitled by law to such services, and for providing such other advice and assistance as is required by law. Consideration had been given to establishing three divisions, with one responsible solely for assistance to political subdivisions, but this degree of specialization was not considered necessary with the office's present duties.³⁴

At present, each Assistant is assigned particular agencies and departments of government and is responsible for opinions or litigation relating to those agencies. Certain assistants are also assigned administrative responsibilities, such as those relating to the current review and publication of opinions. Publication of opinions is a service to city and county officers and attorneys, Commonwealth's attorneys, courts, and others inaugurated during the current term of office. Administrative organization of the Department is based neither on statute nor regulation, but has evolved through experience and an effort to make maximum use of available staff.

THE ATTORNEY GENERAL IN OTHER STATES

¹ *Basis of Powers.* State constitutions generally establish the office of Attorney General, but do not specify his duties. His duties are defined by statute and by common law. Courts usually grant him broad common law powers, except where these have been restricted by statute.

From the very nature of his office the Attorney General as chief legal officer is under a duty to enforce the laws of the state.³⁵

³⁴ Breckinridge, 1960-1962 Ky. Dept. of Law Biennial Rep. 37.

³⁵ *Ex parte Young*, 207 U.S. 123, 161 (1907).

In those cases where the state's rights are in no way injuriously affected, and its interference must be permitted, the Attorney General, as the representative of the people, is charged with the duty of interfering. Examples of such situations are: where there is no person or corporation capable of suing; where, because of the practice of the courts, the Attorney General has the duty of instituting the suit; where private persons are held incompetent to sue; and where the rights of all or a considerable portion of the people are in danger from unlawful acts of persons acting, or assuming to act, under color of law, or otherwise.³⁶

The Minnesota court, in 1907, stated that:

[A]s the chief law officer of the state, he [the Attorney General] may, in the absence of some express legislative restriction to the contrary, exercise all such power and authority as public interests may from time to time require. He may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the law of the state, the preservation of order, and the protection of public rights.³⁷

It has been stated by the New York court that the Attorney General may also intervene in any suits or proceedings which vitally concern the general public.³⁸ Another New York case cited the civil powers of the Attorney General enumerated by Blackstone, and added that he may

[B]y writ of quo warranto vacate the charter, or annul the existence of a corporation, for violations of its charter, or for omitting to exercise its corporate powers.

[I]n certain cases, by information in chancery, for the protection of the rights of lunatics, and others, who are under the protection of the Crown.³⁹

A further common law power of the Attorney General has been held to be that of instituting equitable proceedings for the abatement of public nuisances which affect or endanger the public

³⁶ *People v. Miner*, 2 Lans. 396, 397 (N.Y. 1868) (dicta).

³⁷ *State ex rel. Young v. Robinson*, 112 N.W. 269, 272 (Minn. 1907).

³⁸ *In re Co-op. Law Co.*, 198 N.Y. 479, 92 N.E. 15 (1910) (This case involved an unauthorized practice of law).

³⁹ *People v. Miner*, 2 Lans. 396, 398 (N.Y. 1868). See also *Board of Pub. Util. Comrs v. Lehigh Valley R.R. Co.*, 106 N.J.L. 411, 149, Atl. 263 (1930); *Commonwealth ex rel. Miner v. Margiotti*, 325 Pa. 17, 188 Atl. 524 (1936).

safety or convenience and require immediate judicial interposition.⁴⁰

Statutory Powers and Duties. Within the broad framework of constitutional provisions and common law authority, the statutes of each state spell out the powers and organization of the office of Attorney General. Detailed comparison is beyond the scope of this study, but examples of other state laws and procedures are used to the extent practicable. The fifty Attorneys General have a common background in British history, and retain, to a greater or lesser extent, common law authority. Each state, however, represents a different development of the office, and a different approach to adapting the Attorney General's role to current governmental problems.

In this study, five states have been selected for more careful comparison with Kentucky. Each represents a different type of organization, pattern of state legal services, and state-local relationship. A brief description of each, and an explanation of why it was chosen for comparison with Kentucky, follows.

Minnesota. The Minnesota Attorney General acts as the attorney for all state officers and all boards or commissions created by law in all matters pertaining to their official duties.

The Minnesota Constitution states that an Attorney General shall be elected for a two-year term, and his duties shall be prescribed by law.⁴¹ According to the Minnesota court, he is possessed of "extensive" common law powers which are inherent in his office.⁴² Some state departments employ attorneys, but these serve only in an administrative capacity and are not authorized to institute litigation.⁴³

The advisory function of the Minnesota Attorney General is

⁴⁰ *Respass v. Commonwealth*, 131 Ky. 807, 115 S.W. 1131 (1909); *Akers, The Advisory Opinion Function of the Attorney General*; 38 Ky. L.J. 561 (1950); 2 R.C.L., *Attorney General* § 4, at 915-16.

⁴¹ Minn. Const. art. V, §§1, 5.

⁴² *State ex rel. Young v. Robinson*, 101 Minn. 277, 112 N.W. 269 (1907); *Dunn v. Schmid*, 239 Minn. 559, 60 N.W. 2d 14 (1953).

⁴³ Reply to Council of State Governments' [hereinafter cited as COSGO] Questionnaire on the Powers, Duties and Organization of the office of Attorney General, question 15; letter from Wayne H. Olson, Deputy Attorney General, to John Breckinridge, February 15, 1963.

set out by statute in considerable detail. He is required to give legal advice to state officers regarding their official duties, and to certain local officials on questions of public importance. Opinions in a few subject areas are in force until overruled by a court.⁴⁴ There is no provision for rendering opinions to private citizens.

The statutes require that he represent the state in all causes before the Supreme and Federal courts wherein the state is directly interested, and may appear for the state in all civil cases in the district court when he deems that the interests of the state so require.⁴⁵ Upon the request of a county attorney, he may appear in the district court in criminal cases. Apparently, the extent of his authority to initiate and conduct criminal proceedings independently of a local prosecutor has not been interpreted uniformly by Minnesota's Attorneys General.⁴⁶ He has numerous specific statutory duties relating to litigation.

New Jersey. Prior to 1944, the powers and duties of the Attorney General of New Jersey were similar in many respects to those of the Kentucky Attorney General. In 1944 and in 1948, reorganizations of the New Jersey office greatly expanded its role and added unusual administrative responsibilities.

The New Jersey Attorney General is appointed by the Governor with the advice and consent of the Senate⁴⁷ and serves not only as Attorney General but also as head of the Department of Law and Public Safety. This Department was created in 1948 and includes the Divisions of Law, State Police, Alcoholic Beverage Control, Motor Vehicles, Weights and Measures and Professional Boards. He is specifically directed to coordinate the inspection and enforcement activities of these divisions and to integrate all staff services of the Department, so far as is practicable, to eliminate any overlapping.⁴⁸

He retains the duties assigned him by the 1944 reorganization. He gives legal advice to all state officers and agencies on

⁴⁴ Minn. Stat. [hereinafter cited as MS] §§ 8.05-8.07, 270.07, 270.09 (1945).

⁴⁵ MS § 8.01.

⁴⁶ Reply to COSGO Questionnaire, *op. cit. supra* note 43; 1932 Minn. Att'y Gen. Ann. Rep.

⁴⁷ N. J. Const. art. VII, §11 (4).

⁴⁸ N. J. Rev. Stat. [hereinafter cited as NJRS] §§ 52:17 B-2, 52:17 B-35 (1937).

such matters as they may require. State agencies may employ counsel only on the authority of the Attorney General, with the Governor's approval. He exclusively attends to and controls all litigation and controversies to which the state is a party or in which its rights and interests are involved. He acts as the sole legal advisor for state agencies, and controls their legal activities. These and other powers indicate that he is chief law officer of the state in practice as well as title.⁴⁹

The New Jersey Attorney General can prosecute criminal actions in the counties under certain conditions set forth by statute. These include the request of the local prosecutor or, since 1944, the request of the Governor.⁵⁰

Oregon. The Oregon Attorney General exercises a different role in relation to local prosecutors than his Kentucky counterpart, and is the sole legal counsel for state agencies.

The Attorney General of Oregon is elected for a four-year term. As head of the Department of Justice he has full charge of all of the legal business of all state departments and agencies, and no agency or officer may be represented by any other counsel. He is required to give a written opinion on questions of law submitted by the Governor, legislators, departments or boards, and is expressly prohibited from rendering opinions to others. He is also required to prepare drafts of bills upon the request of legislators.⁵¹

In addition to the usual requirement that the Attorney General appear in all proceedings before the Supreme Court in which the state is a party or has an interest, the Governor or the legislature may require his appearance before any court or tribunal where the state may be a party. He may appear in any court upon request of any state officer when, in the Attorney General's discretion, the same is necessary or advisable to protect the interests of the state.⁵²

The Oregon Attorney General is given power to consult with, advise and direct district attorneys in criminal cases in their respective counties. Other statutes give him power to supersede

⁴⁹ NJRS § 52:17 A-4.

⁵⁰ NJRS §§ 52:17-9, 52:17 A-4(j).

⁵¹ Ore. Rev. Stat. [hereinafter cited as ORS] §§ 180.010-180.020, 180.220 (1953).

⁵² ORS § 180.060.

county prosecutors upon request of the Governor. A recent decision of the Oregon Supreme Court, however, held that the powers conferred upon the Attorney General did not deprive the district attorneys of their exclusive authority to execute the criminal laws, except when they are displaced upon direction of the Governor.⁵³ The Attorney General has all of the powers of the district attorney when engaged in criminal prosecutions, including the power of subpoena. An apparently unique part of the Department of Justice is a Welfare Recovery Division which, among other duties, represents individuals in support proceedings.⁵⁴

Tennessee. The Attorney General of Tennessee occupies a unique position in state government. He is appointed by the judges of the Supreme Court for an eight-year term, and is designated the Attorney General and Reporter.⁵⁵ He serves as head of the state Legal Department.

The statutes specify the titles and duties of his seven assistants: a solicitor general, who is charged with the direction and trial of all litigation in which state officers may be interested, except criminal cases appealed to the Supreme Court, which are handled by two advocates general; a counsellor for state departments, who furnishes them legal advice whenever necessary; and three field attorneys who direct and supervise investigations and litigation necessary in the duties of state departments. Employment of additional counsel to represent the state is at the discretion of the Attorney General and the Governor. The employment of other attorneys for regulatory and registration boards is expressly forbidden.⁵⁶

The Attorney General of Tennessee is assigned the usual duties of preparing written opinions when requested by state officers regarding their duties, and of attending to all business of the state in the Supreme Court. He also has the unique duty of reporting opinions of the Supreme Court, and has sole control of publication. Another unusual requirement is that he "attend

⁵³ *Thornton v. Williams*, 215 Or. 639, 336 P. (2d) 68.

⁵⁴ ORS § 180.340.

⁵⁵ Tenn. Const. art. 6, § 5.

⁵⁶ Tenn. Code Ann. §§ 8-603, 8-625 (1955).

to all the business connected with the management of the treasury of the state," or debts due or claimed against the state, in any court in the state where such litigation may be pending.⁵⁷ As in Kentucky, he has no statutory authority to supervise local prosecutors or participate in local criminal prosecutions.

Virginia. The Virginia Constitution provides that the Attorney General shall be an elective official and shall perform such duties as may be prescribed by law⁵⁸ Although Kentucky's office of Attorney General was originally based on Virginia's, important differences have developed.

With a few exceptions, the Virginia Code provides that the Attorney General shall perform all legal services where state agencies or officials are concerned. These exceptions allow the Attorney General to employ special counsel when it is impracticable for his office to provide legal services, allow the Governor to employ special counsel under certain circumstances, and authorize the State Corporation Commission to employ one attorney⁵⁹

The officers to whom he may render opinions are expressly defined, and all opinions must be directly related to the discharge of the duties of the official requesting the opinion. He does not advise private individuals, but may render opinions to a variety of specified local officials.⁶⁰

Virginia's Attorney General has limited authority to conduct criminal proceedings in state courts. He may institute proceedings himself or leave them to the Commonwealth's attorney at his discretion, in cases involving: violations of alcoholic beverage control or motor vehicle laws; the handling of funds by a state agency; or, the unauthorized practice of law. He may also participate in criminal proceedings upon the request of the Governor. He shall appear and represent the Commonwealth in all criminal cases before the Supreme Court of Appeals where the state is a party or has a direct interest.⁶¹

⁵⁷ Tenn. Code Ann. § 8-609.

⁵⁸ Va. Const. § 107.

⁵⁹ Va. Code Ann. §§ 2-87, 2-88 (1950).

⁶⁰ Va. Code Ann. § 2-86.

⁶¹ Va. Code Ann. § 2-90.

SUMMARY

The office of Attorney General developed in England over a period of centuries. At first, special attorneys were appointed to serve the Crown in special circumstances. Later, an Attorney General was chosen to represent the sovereign, who was the King in England and, later, the electorate in America. State Attorneys General usually retain common law powers and duties.

Powers of state Attorneys General are more generally defined by statute and by common law than by constitution. Kentucky's legislature has limited the power of the Attorney General by authorizing state departments to employ their own counsel, and by giving the Attorney General no power over local investigations or prosecutions. The Kentucky situation, however, is unique; most state Attorneys General are in charge of all or most state legal services, and have general or limited powers to intervene in local civil or criminal matters of interest to the state.⁶² All Attorneys General issue advisory opinions to certain persons, although most are restricted to rendering opinions to enumerated officials.

Numerous duties have been assigned to state Attorneys General, many of which do not derive from common law, but which have been developed to meet particular situations. A great variety of duties, powers and organizational patterns are found among the states. The following chapters of this report explore in detail the relationship of the Attorney General to other state agencies and to local prosecutors. Subsequent chapters analyze his advisory functions and those relating to litigation.

⁶² Montague, *supra* note 26, at 199; "Tentative and Preliminary, The Powers, Duties and Operations of Attorneys General Offices," The Council of State Government (1951) (Table D).

II. Relationship of the Office of Attorney General to Other State Agencies

The role of an Attorney General depends to a large extent on his relationship to other state officers and agencies, and the degree to which he advises and represents them. In many states legal services are centralized in the Attorney General's office; in others, he exercises supervisory power over departmental counsel, or does most of their legal work, with their staff counsel being restricted to advisory or administrative functions. In Kentucky, the Attorney General's staff comprises only a small part of the state's legal staff and he exercises no control over most departmental counsel.

The structure of state legal services in Kentucky has been a subject of controversy for decades. Precedent for almost any type of arrangement can be found in Kentucky's legislative history, from vesting such authority exclusively in the Attorney General, to the present law, which places few restrictions on the employment of departmental counsel. This chapter will examine and evaluate the relationship of Kentucky's Attorney General to other state agencies, and will summarize alternative arrangements in other states.

HISTORY OF DEPARTMENTAL COUNSEL IN KENTUCKY

Kentucky's four constitutions have left to the General Assembly authority to prescribe the duties of the Attorney General. The question of whether the Attorney General should have exclusive power to employ state attorneys has been before the General Assembly for almost a century.

Early Legislation. An Act of 1873, under the 1850 constitution, gave the Governor power to employ counsel to represent the Commonwealth in all actions in the courts within or without

the state, to which the Commonwealth was a party or in which it had an interest, and for the defense or prosecution of which "provision is not otherwise provided by law"¹ The subsequent history of this act has been described by the Court of Appeals:

Evidently, there had been some conflict of authority, so the General Assembly passed an act, March 18, 1876, (General Statutes, page 188), and by which it was declared that it should not be lawful for the governor to employ counsel to represent the State in any case when it was the duty of the attorney-general to do so under section 2, article 5, chapter 5, except when the attorney-general should be "sick or otherwise be unable" to represent the Commonwealth. This act was followed by the act of April 24, 1880, which gave the attorney-general the authority to employ attorneys to represent the commonwealth in the collection of judgments.²

The first legislature after adoption of the present Constitution increased the Attorney General's authority to employ attorneys and limited that of the Governor in employing counsel to represent the Commonwealth.³ The 1892 Act also forbade any other state official to employ counsel "to represent the Commonwealth in any action in which the Commonwealth is interested, which may be brought or pending in the Franklin Circuit Court."⁴ The Governor could not employ counsel unless the Attorney General were unable to represent the Commonwealth and requested in writing the employment of temporary assistance.

The court, in interpreting the 1892 statutes, said that the language pertaining to the Governor was restrictive and, as applied to other state officials, it was prohibitory, and was meant to correct some existing abuse of authority or one that might arise. It was not, however, intended to limit the Attorney General's authority to employ attorneys to assist him in the "various counties" of the Commonwealth.⁵

In 1902, the General Assembly again enlarged the Governor's

¹ Ky. Acts 1873, ch. 236, § 1.

² *Rogers v. Bradley*, 100 Ky. 344, 353, 19 Ky. L. Rep. 114, 117, 38 S.W. 501, 502-03 (1897).

³ Ky. Acts 1891-93, ch. 100, art. II, §§ 16-19, at 262-63.

⁴ Ky. Acts 1891-93, ch. 100, art. II, § 19, at 263.

⁵ *Rogers v. Bradley*, 100 Ky. 344, 19 Ky. L. Rep. 114, 38 S.W. 501 (1897).

authority to employ counsel. These statutes were interpreted by the Court of Appeals as:

giving to the Auditor authority to employ attorneys in the various counties, if necessary, to aid the Attorney General in investigating and recovering for the state such unsatisfied claims or other demands as may be due it [and] empowering the Governor to employ counsel to represent the Commonwealth in actions or proceedings for the collection or enforcement of claims or demands of the Commonwealth in such actions or proceedings as it may have an interest in or be a party to.⁶

Attorneys could be employed, however, only with the approval of the Attorney General.⁷

1908 Statute. In 1908, the legislature again revised the authority for employment of departmental attorneys and provided that no state officer should have the authority to employ or to be represented by any other counsel, unless an emergency arose, which, in the opinion of the Attorney General, required the employment of other counsel.⁸ There were a number of court decisions interpreting this which remained in effect until 1942.

In *Commonwealth v. Louisville Property Co.*, the court stated that:

The statute as a whole indicates that the object of its enactment was to do away with the practice, hitherto obtaining, of employing special counsel or attorneys to represent the interest of the Commonwealth in the courts, and to require the Attorney General and his assistants to take charge of and attend to all matters in litigation in which the Commonwealth is, or may be, a party in interest, whether in courts of civil or criminal jurisdiction in or out of the State, except where it is made the duty of the Commonwealth's or county attorney to represent the Commonwealth, or an emergency might arise, which would require the Attorney General to request the Governor in writing to employ special counsel.⁹

⁶ *Commonwealth v. Louisville Property Co.*, 128 Ky. 790, 109 S.W. 1183, 1185 (1908).

⁷ Ky. Acts 1903, ch. 44, § 1622.

⁸ Ky. Acts 1908, ch. 32, § 5 at 85.

⁹ *Commonwealth v. Louisville Property Co.*, 141 Ky. 731, 735-36, 133 S.W. 759, 761 (1911).

A 1913 decision interpreted the 1908 statute to be for the purpose of protecting the state, any department, or institution, from having to pay legal fees. In the case of *Bosworth v. State Univ.*,¹⁰ the State University had employed counsel without the Attorney General's consent. Action was brought to compel the Auditor by mandamus to issue money which had been appropriated to the University. The Attorney General moved to dismiss the action on the grounds that the plaintiff, being a state institution, lacked the authority to hire an attorney without his consent; the motion was denied. The Court held that it was not the purpose of the statute to prevent a state institution from bringing suit to test its rights when the Attorney General was unwilling to employ other counsel.

The Court further stated that the Attorney General represented the Auditor, and it was not the purpose of the statute to prevent such a suit being brought. The Court thus read into the statute an exception to the rule against employment of counsel by state departments. The Court, in *Commonwealth v. Roberta Coal Co.*,¹¹ indicated by dictum that another exception to the rule would be recognized, where counsel volunteered their services with the Attorney General's consent, without expense to the state.¹²

Another case, *Montgomery v. Gayle*,¹³ held that the State Highway Commission could not employ an attorney, although there was an apparent need for his services; the 1908 Act withheld the power of the Commonwealth or any department of the state government to employ special counsel.

1942 Statute. In 1942, the General Assembly authorized administrative departments to employ counsel, on the approval of the Governor.¹⁴ The Court of Appeals, in *Johnson v. Commonwealth ex rel. Meredith*, upheld the Act, but criticized its possible effect:

The Act is indeed so broad in its scope as to be fraught with opportunities for abuse and extravagance and pro-

¹⁰ 154 Ky 370, 157 S.W. 913 (1913).

¹¹ 186 Ky. 394, 216 S.W. 584 (1919).

¹² *Commonwealth v. Begley*, 273 Ky. 636, 117 S.W.2d 599 (1938).

¹³ 216 Ky. 567, 288 S.W. 323 (1926). See annot. 137 A.L.R. 818 at 828 (1942).

¹⁴ Ky. Acts 1942, ch. 106, § 2.

ductive of conflict and confusion in the legal representation which has heretofore been centralized in the Attorney General and his staff. If the authority given by the Act should be exercised in its entirety, the Attorney General would be relieved of many present duties and stripped of many prerogatives which that officer has hitherto performed and enjoyed under statutory direction and authorization or through immemorial custom. However, it is not to be assumed that the attitude of the chief executive and the responsible heads of departments will be so antagonistic to the public welfare that they shall concur to such an extent that the feared evils will result.¹⁵

The Attorney General argued that the 1942 Act, by allowing any department to employ counsel, attempted to take away the inherent and constitutional powers and prerogatives of the Attorney General. The Court held that:

As the several state administrative departments were unknown to the common law (although a few may have had counterparts) and the legislature had previously directed the Attorney General to represent them, there is no doubt as to statutory powers that since the legislature gave them, it can take them away. The point is that the office inherently carries the power and the right to represent the state as the sovereign in all its operations, and that can not be given to anyone else.¹⁶

1944 Act. Adoption of the 1942 Act apparently resulted from conflicts between the Attorney General and certain other state officers and seems to have reflected political considerations rather than any basic change in the concept of the Attorney General's role. In any case, the 1942 Act was repealed by the next session of the General Assembly, which again centralized the state's legal services in the office of the Attorney General.¹⁷ The 1944 statute provided that other or additional counsel could be employed when, in the Attorney General's opinion, an emergency arose requiring such counsel, or in the event of litigation in which the Attorney General had an adverse interest.

1948 Legislation. A 1948 Act, which is still in effect, again

¹⁵ Johnson v. Commonwealth *ex rel.* Meredith, 291 Ky. 829, 833, 165 S.W.2d, 820, 823 (1942).

¹⁶ *Id.* at 838, 165 S.W.2d at 826.

¹⁷ Ky. Acts 1948, ch. 122, § 2.

decentralized the state's legal services.¹⁸ This Act, which became KRS 12.210, was a substantial re-enactment of the 1942 statute. In 1960, the act was revised to require the Governor to consult the Attorney General before approving employment of departmental attorneys.¹⁹

Summary of Judicial Construction. Thus, the 1942 and 1948 Acts, which gave state departments the authority to employ counsel, have been held to satisfy the requirements of the Kentucky Constitution. The Attorney General possesses all the power and authority appertaining to the office under common law,²⁰ but the General Assembly may withdraw those powers and assign them to others, or may authorize the employment of other counsel for the departments and officers of the state. The legislature, however, cannot abolish the office directly, nor indirectly, by depriving the incumbent of all his substantial prerogatives, or by practically preventing him from discharging the substantial things appertaining to the office.²¹

The concurring opinion in the *Johnson* case believed that the 1942 Act did not preclude the Attorney General from appearing in any litigation in which a department, agency or officer is a party where the Attorney General deems it appropriate that he should appear.²² Evidently, the concurring judges were referring to the majority statement that "the departments are merely authorized to use the law when they deem it necessary for the good of the service." In other words, the Act did not purport to take away rights of the Attorney General, but gave rights to the various departments.

In *Miller v. O'Connell*, the Court held that the Secretary of State had the authority to employ counsel in a suit, although the Governor and Attorney General had refused to ratify a contract for such employment. It was contended *inter alia* that such employment was contrary to KRS 12.160 (1942). In reply to this

¹⁸ Ky. Acts 1948, ch. 122, § 2.

¹⁹ Ky. Acts 1960, ch. 68, art. II, § 4.

²⁰ Ky. Const. § 233; Commonwealth *ex rel.* Ferguson v. Gardner, 327 S.W.2d 947 (Ky. 1959); Commonwealth *ex rel.* Attorney Gen. v. Howard, 297 Ky. 488, 180 S.W.2d 415 (1944); Johnson v. Commonwealth *ex rel.* Meredith, 291 Ky. 829, 165 S.W.2d 820 (1942) Respass v. Commonwealth, 131 Ky. 807, 115 S.W. 1131 (1909).

²¹ Johnson v. Commonwealth *ex rel.* Meredith, *supra* note 20.

²² *Ibid.*

contention, the Court construed the section to relate only to full-time attorneys who may be hired by a department, and said also that the section did not provide for a case of emergency, or one in which the Attorney General had an adverse interest. The Court then went on to say that:

Here, the Attorney General had an adverse interest, and an emergency existed. The General Assembly had passed an absentee voters law and had placed on the Secretary of State the duty of administering the Act. The Attorney General sued the Secretary of State, and sought to prevent him from carrying out the provisions of the Act on the ground that the Act was unconstitutional. It was the duty of the Secretary of State to defend the suit, and it was necessary that he be represented by an attorney other than the Attorney General or one of the latter's staff. An election was close at hand, and the exigencies of the occasion required immediate action. In view of the emergency which existed, the Secretary of State had no choice except to proceed with employed counsel.²³

The Court in the *Miller* case appears to have applied the exceptions enumerated in the 1944 Act, which provided that no state officer or agency should employ or be represented by an attorney other than the Attorney General, although it was not applicable. The exceptions provided in the 1944 Act were where the Attorney General had an adverse interest in litigation and where, in the opinion of the Attorney General, an emergency existed. Under the 1944 Act another attorney could be employed only under the named conditions and upon approval of the Governor, after the Attorney General had requested such employment in writing. While the court in the *Miller* case apparently applied the exceptions of the 1944 Act, it did not impose the condition precedent of written approval by the Governor of employment.

In *Hogan v. Glasscock*, the Court interpreted the provisions of KRS 12.210 to apply exclusively to expressly specified state level administrative agencies and officers. The Court in the *Hogan* case held that:

Although there is no specific statutory authority for [county] school boards to employ an attorney, they have

²³ *Miller v. O'Connell*, 304 Ky. 720, 723, 202 S.W.2d 406, 407 (1947).

the implied power to do so when such employment is necessary for their protection and the accomplishment of the purposes for which they are created. The terms of KRS 160.160 provide that each school district shall 'do all things necessary to accomplish the purposes for which it is created. The defense of those cases was clearly necessary to accomplish the purposes for which the board was created and the appellees were fully authorized by implication to make the expenditures [attorneys fees] sought to be recovered.²⁴

The General Assembly, in 1942 and 1948, placed Kentucky's Attorney General in the anomalous position of exercising no control over most state attorneys. The Court of Appeals has held that the General Assembly may restrict his authority in this manner, and has upheld the employment of attorneys by state departments.

Other Powers of the Attorney General. Numerous statutes make it the duty of the Attorney General in specific instances to represent certain departments in litigation. These are discussed in part IV of this report. His advisory duties are the subject of part V. Various duties which do not fall within either of these subjects are described here.

Pursuant to KRS 62.200(1), the Attorney General must approve all bonds as to form and legality before they will be accepted for officers elected by the voters of the state at large, for the heads of statutory administrative departments, and for certain enumerated division directors and commissioners. The Commissioner of Finance is directed to secure blanket bonds to cover other officers and employees, and these blanket bonds must also be approved by the Attorney General. The bond of the Attorney General himself shall be accepted when approved by the Governor.²⁵

Another statute, KRS 56.040, requires that a lessor of land or a building, except a lease of not more than six offices in a building, must submit the lease and a map of the premises to the Attorney General before attempting to lease the same to a state department or agency. The premises may not be paid for or occupied by the state until the Attorney General approves the

²⁴ Hogan v. Glasscock, 324 S.W.2d 815, 817 (Ky. 1959).

²⁵ KRS 62.160, .200 (1).

lease. Before the Department of Finance issues its warrant to pay for land that is to be purchased by any agency, a map thereof and an abstract of title must be submitted to and approved by the Attorney General.

The official duties of the Treasurer may be suspended, until the meeting of the General Assembly, where in the opinion of a majority of the Governor, Auditor of Public Accounts and Attorney General, the public funds are in danger by being under the Treasurer's control. There are no cases interpreting this particular section, KRS 41.050.

When a person continues to exercise an office after having committed an act, or omitted to do an act, which by law creates a forfeiture of his office, he may be proceeded against for usurpation thereof. An action for usurpation of other than county offices or franchises shall be instituted by the Attorney General in the name of the Commonwealth. This section, KRS 415.050, has been held to give him authority to institute ouster proceedings against all state officers.²⁶ This subject will be discussed in greater detail in part IV of this study.

The Attorney General, by statute, is a member of the Governor's Cabinet.²⁷ He is also a member of various statutory boards and commissions, and performs additional duties assigned by executive order, or undertaken on his own initiative. These are examined under part VI, which concerns special duties and functions of the Attorney General.

STRUCTURE OF STATE LEGAL SERVICES IN KENTUCKY

Chapter 15 of the Kentucky Revised Statutes describes the Department of Law, headed by the Attorney General, and provides that he may employ assistants and special attorneys. Assistant Attorneys General for specific departments are required by law. The statutes also authorize any department, with the Gov-

²⁶ Commonwealth v. Mason, 284 S.W.2d 825 (Ky. 1955); Kirwan v. Speckman, 313 Ky. 578, 232 S.W.2d 841 (1950); Salyers v. Lyons, 304 Ky. 320, 200 S.W.2d 749 (1947); Waddle v. Hughes, 260 Ky. 269, 84 S.W.2d 75 (1935); Morgan v. Adams, 250 Ky. 441, 63 S.W.2d 479 (1933).

²⁷ KRS 11.060(1), 12.020.

ernor's approval, to employ attorneys, and this authorization is repeated in various statutes pertaining to particular departments.

Authority for Employment. KRS 12.210(1) provides that:

The Governor, or any department with the approval of the Governor, may employ and fix the term of employment and the compensation to be paid to an attorney or attorneys for legal services to be performed for the Governor or for such department. Before approving the employment of an attorney the Governor shall consult the Attorney General as to whether legal services requested by departments are available in the Attorney General's office. The compensation and expenses of any attorney or attorneys employed under the provisions of this section shall be paid out of the appropriations made to such department except when the terms of employment provide that the compensation shall be on a contingent basis, and in such event the attorneys may be paid the amount specified out of the moneys recovered by them or out of the General Fund.

The terms of such employment are required to be entered in the Executive Journal. Another statute specifies that the term "department" means each and every executive or administrative department, agency, division and independent agency²⁸

This section authorizes any agency to employ counsel, if the Governor approves such employment. There are no requirements that such employment be necessary, or that the Attorney General approve. The Governor is required merely to "consult" the Attorney General before approving such employment. This provision is of doubtful significance, because to consult means merely to confer, or to seek the advice of another. The Attorney General has no power to disapprove the hiring of counsel by departments, even if they would duplicate services already available in his office.

The authority and duties of attorneys employed by departments and agencies are defined by KRS 12.220, which provides that:

(1) Any attorney or attorneys employed pursuant to the provisions of KRS 12.210 shall have authority to appear as

²⁸ KRS 12.200.

the attorney for and to represent the department in the trial and argument of any cases and proceedings in the Kentucky Court of Appeals and in any and all other courts, and before boards, governmental agencies and tribunals in or out of this Commonwealth whenever such department or any officer or employe thereof is a party in interest or the official rights, powers or duties of the department or of any officer or employe thereof are directly or indirectly affected.

(2) Such attorney or attorneys may institute and prosecute any suits, motions, actions and proceedings necessary to cause the assessment of property, the collection of taxes, and the payment of all claims, accounts, demands and judgments of the Commonwealth, for the assessment or collection of which the department may be charged by law, and to take all necessary steps by suit, motion, action or otherwise to collect or cause to be collected and paid into the State Treasury all such claims, demands, accounts and judgments. Any attorney or attorneys so employed shall attend to any litigation or legal business within and without the state, required of him or them by the terms of his or their employment; and also any litigation or legal business that any officer or employe of such department may have in connection with or growing out of his official duties or the official duties of the department; and he or they, upon the written request of any executive or ministerial officer of the department, shall give such department or officer his written opinion as to the duties of such officer and shall prepare proper drafts of all instruments of writing and perform such other legal services pertaining to the functions of the department as may be provided by the terms of employment.

The duties imposed upon the Attorney General by KRS 15.020 are repealed or limited to the extent that they may be in conflict with KRS 12.200 to 12.220. Although all departments are authorized to employ counsel, "the Governor or any department may require the advice or services of the Attorney General and the Assistant Attorneys General in matters relating to the duties or functions of any such office or department."²⁹

Specific Authority for Departmental Counsel. A number of departments are specifically authorized by law to employ coun-

²⁹ KRS 12.230.

sel, in addition to the authorization in KRS 12.210. Most of these specific statutes limit employment to "necessary" legal assistance, or to particular circumstances. Several specify that employment shall be with the Governor's approval.

The Adjutant General, with the Governor's approval, may appoint legal counsel to represent a member of the active Militia or the National Guard in criminal proceedings resulting from the member's discharge of his duty (KRS 37.310; KRS 38.240);

The Director of Banking may employ "counsel and assistance necessary" in the liquidation and distribution of the assets of a bank or trust company (KRS 287.570);

The Commissioner of Economic Security, with approval of the Governor, may appoint attorneys "in any legal proceedings in which he may deem it necessary" and in which the Department is interested (KRS 195.070); He is also authorized to designate an attorney to represent the Unemployment Insurance Commission in any civil action (KRS 341.570);

The Commissioner of Labor, with the Governor's approval, shall appoint "necessary" attorneys (KRS 336.030);

Two professional licensing boards, the State Board of Dental Examiners and the State Board of Registration for Professional Engineers, are authorized to employ attorneys (KRS 313.220; KRS 322.290);

The Department of Welfare, "upon the advice and approval of the Attorney General," may employ counsel in actions to enforce payment for maintenance of patients (KRS 203.110);

The Commissioner of Revenue may employ attorneys to prosecute actions for the collection of delinquent taxes and the assessment of omitted property (KRS 134.380).

Some of these statutes appear to restrict the authority to employ counsel contained in KRS 12.210, by authorizing such counsel only under specified circumstances, or when "necessary." Apparently, however, there has been no litigation to determine whether the statutes conflict. Some of the statutes relating to particular agencies were enacted at the same session of the legis-

lature which enacted KRS 12.210, indicating that they were not considered inconsistent.

Assistant Attorneys General for Departments. In addition to their authority to employ staff attorneys, a few departments are required by law to be assigned Assistant Attorneys General. KRS 15.105 provides that the Attorney General, with the approval of the commissioner of the department involved, shall appoint an Assistant Attorney General for the Department of Highways, the Public Service Commission, the Department of Revenue, and the Railroad Commission. An Assistant Attorney General is assigned to the Department of Health, although this assignment is based on custom and necessity, rather than statute; the Attorney General has numerous duties as an ex-officio member of the Water Pollution Control Commission of the Department of Health, and these require the continuing services of an Assistant Attorney General.

Assistant Attorneys General attached to particular departments are paid by the department to which they are assigned and have their offices in those departments. In most respects, their status is the same as other departmental counsel, except that they are appointed by the Attorney General. These assigned Assistants, however, occasionally prepare opinions which are reviewed by the Attorney General and when agreed are issued as official Attorney General's opinions. Other departmental counsel may issue advisory opinions, but these have no official status and are effective only within the department concerned.

Another distinction between assigned Assistant Attorneys General and other departmental counsel is that the Assistants participate in Department of Law staff meetings, routinely receive copies of that department's staff memoranda, and make periodic reports to the Attorney General. Thus, their work is coordinated with that of the Attorney General, although they serve as an integral part of another department and are concerned exclusively with its activities.

Special Attorneys. Under KRS 15.100, the Attorney General may employ such special attorneys as he deems necessary to carry out the business of the Department of Law. He is responsible for the official acts of such special attorneys, as well as those of his assistants. In addition to assistants and special attorneys,

the Attorney General is empowered to "enter into such contracts for legal services as he deems necessary and advisable."

The present Attorney General has not employed any contract attorneys since he took office in January, 1960, with the exception of counsel retained during the last stages of the Newport and Carter County cases for the purpose of bringing them to a conclusion. Because of deaths and resignations among the permanent staff, special attorneys were necessary to complete these cases. This statute, however, would enable him to employ special attorneys, by contract or otherwise, in instances where the Department of Law's workload was such as to require temporary assistance, or where special knowledge and skills were needed. The Governor and state departments also are authorized to employ special assistants, by contract or otherwise, under the provisions of KRS 12.210.

Still another type of arrangement has evolved through practice and necessity. In a few cases, a particular department has paid part of an Assistant Attorney General's salary, with the understanding that the Assistant will give primary attention to that department's work. He is assigned primarily to that department, but is also given routine Department of Law assignments. This arrangement has the advantage of allowing an Assistant to specialize in the laws relating to a particular agency, and of maintaining close contact with that agency, while remaining part of the Department of Law's staff. When slack periods occur in the particular agency's legal work, the Assistant can work with other phases of the state's law work. A basis for this arrangement is found in KRS 12.210(2), which provides that an attorney may be employed to render legal services for more than one department.

Determination of Conflicts Between Departments. In those cases where questions arise between agencies as to their respective functions, or where agencies issue conflicting orders or rules, the Governor with the advice of his Cabinet resolves the questions and the action to be taken, under the authority of KRS 12.090.

A more complex situation exists when the question involves litigation. Both departments have the authority to call upon the Attorney General to represent them, and both have authority to

employ other counsel. There is neither statutory provision nor case law covering such instances. The Attorney General's obligation to both departments is the same, even if one employs departmental counsel and the other does not. He could not represent both parties without representing conflicting interests.

Where an agency followed the Attorney General's advice in taking certain action and litigation resulted, it would appear that the Attorney General should represent the party to whom advice had been rendered, although the statutes are silent on this point. Another question would arise if a department declined to follow the Attorney General's advice, but then called upon him to represent it in resulting litigation.

These hypothetical conflicts would be resolved if the office of Attorney General were viewed as a group of independent attorneys, rather than a law firm, from the standpoint of legal ethics. Different attorneys in the Department of Law could therefore represent the different litigants. It should be noted, however, that in *Miller v. O'Connell*³⁰ the court held that the Secretary of State had authority to employ counsel in a suit involving election laws, although the Governor and Attorney General had refused to ratify such employment. The Court held that the Attorney General represented the adverse party, necessitating the employment of a special counsel.

PRESENT RELATIONSHIPS IN KENTUCKY

The legislative bases of Kentucky's state legal services have been described above. Statutory authority to employ counsel, however, does not describe their relationship to the Attorney General. The number of departmental counsel, their duties, and their working relationships with the Attorney General's office must be considered.

Number of Permanent Counsel. Table I shows the number of permanent counsel employed by state departments and agencies, as of August, 1961, and the total salaries of such attorneys.

³⁰ 304 Ky. 720, 202 S.W.2d 406 (1947).

TABLE I
NUMBER OF AUTHORIZED PERMANENT ATTORNEYS,
AUGUST, 1961

Department	Number of Positions	Total Salaries**
Aeronautics -----	1	\$ 8,134
Alcoholic Beverage Control---	1	8,134
Child Welfare -----	1	6,380
Economic Security -----	5	36,846
Finance -----	1	10,830
Health -----	2 *	19,639
Highways -----	22 *	183,249
Industrial Relations*** -----	27 (25 part-time)	118,441
Insurance -----	1	10,397
Law -----	14	128,109
Legislative Research -----	5	37,807
Military Affairs -----	1	8,134
Motor Transportation -----	1	10,397
Public Service Commission---	5 *	37,026
Railroad Commission -----	2 * (1 part-time)	14,744
Revenue -----	8	68,952

Source: Department of Personnel Records.

*Includes assigned Assistant Attorney General.

**Total salaries given are the total median annual salaries for the authorized pay grades, rather than actual salaries.

***Name changed to Department of Labor by 1962 General Assembly.

Table I shows that, as of August, 1961, a total of ninety-seven legal positions were authorized, with salaries totaling \$696,800. Not all of these positions were filled at the time; there were vacancies in the Departments of Economic Security, Highways, Public Service, Railroad Commission, and the Attorney General's office. The Table does not include all the attorneys employed in state government, but only those occupying positions classified as legal; other attorneys are employed in administrative positions throughout state government, which do not involve legal work.

According to these data, only one-seventh of the state's legal staff works in the Attorney General's office. Two departments,

Highways and Industrial Relations (Labor), each employ more attorneys than does the Attorney General. The authorized annual expenditure for Highway Department counsel is \$55,140 more than that for Department of Law counsel. The Attorney General is the state's chief law officer, but he does not have the state's largest legal staff.

Job descriptions, qualifications, and salary scales are set by the Department of Personnel, and apply to all agencies. Some legal positions require an unusual degree of specialization, and others necessitate the incumbent being admitted to practice before a federal regulatory agency. Generally, however, the qualifications required for an attorney in one department are the same as those for an attorney at the same level of responsibility in another department, or in the Attorney General's office.

Number of Contract Attorneys. The number of contract attorneys employed and the amount of money paid for their services are not available from an official source because:

It appears that no one in state government keeps a complete and separate set of records on legal services. The Division of Purchases keeps an alphabetical file on personal services contracts. The Division of Accounts files encumbrance documents under a numerical coding system. Copies of the contracts are readily accessible if the name is known. If the name is unknown the documents are, for all practical purposes, unavailable for examination.³¹

The survey of legal services quoted above found that there were fifty negotiated contracts for legal services entered into by seventeen state agencies during 1955 through 1959. These contracts were awarded to twenty-eight lawyers or law firms; this was not twenty-eight different lawyers, as some were awarded contracts by more than one department. A total of \$94,993.49 was paid under these contracts during the four-year period, including \$3,399.89 paid as expenses. The aggregate expenditure for permanent state counsel during the same period was \$1,314,282.97

Examples of the services contracted for include: advising and representing the Governor at extradition hearings; representing the Department of Mental Health in proceedings to enforce

³¹ Legislative Research Commission, Staff Memorandum No. 177, Cost of Legal Service FY 1955-56 to 1958-59, pp. 2-5 (Dec. 30, 1959).

delinquent claims; acting as general counsel for the Department of Aeronautics; representing the Department of Public Safety in a particular case before the Court of Appeals; and representing the Department of Finance in a bond issue. In some cases compensation was at a fixed monthly rate, and there is no apparent reason why employment was by contract, rather than routine personnel action. None of these contract attorneys were employed by the Department of Law

Exact data are not available on the number of contract attorneys employed during the 1960-62 biennium. However, a memorandum prepared by the Director of the Budget for the 1960-61 fiscal year showed four contracts for legal services during that year.³² A survey of departments which employ permanent counsel, conducted in August, 1961 and described subsequently in this chapter, showed that at least two of these departments had employed contract attorneys during the 1960-61 fiscal year, and one was in process of negotiating a contract for legal services. A recent newspaper report indicated that, as of November, 1962, the Department of Highways had negotiated contracts with sixty-seven attorneys for part-time legal services. The record would appear to clearly indicate that present statutes contain no effective control over employment of attorneys by departments.

Survey of Present Relationships. Departments which employ permanent counsel may also call on the Attorney General for legal services. KRS 12.230 provides in part that:

The Governor or any department may require the advice or services of the Attorney General and the Assistant Attorneys General in matters relating to the duties or functions of any such office or department.

To obtain information about actual working relationships, permanent counsel employed by state agencies were interviewed. The attorney in charge of a department's legal staff was interviewed in most cases.

To assure some uniformity in the subjects covered, a question-

³² Director of the Budget, Memorandum to Commissioner of Finance, Report on Legal Service Costs FY 1960-61, (Dec. 19, 1960).

naire was developed and used as the basis of the interview. The interviews, however, were sufficiently flexible to cover subjects considered pertinent by the attorney, and to explore his opinions as fully as possible. The information in the following sections of this report are derived from these interviews, and quotations are direct statements by the attorneys who were interviewed. At least one attorney in each agency which employs permanent counsel was interviewed.

Duties of Departmental Attorneys. Duties of departmental counsel generally include giving advice, engaging in litigation, appearing at hearings, and drafting legal instruments and regulations. Several noted that they drafted legislation, and one estimated that a fourth of his time was spent in legal research. The Department of Highways' legal staff is divided into sections, each of which is assigned a different area of responsibility; specific duties are assigned to the general counsel, the administrative trial attorney, the claims counsel, and field attorneys. Duties of Legislative Research Commission attorneys are confined to research, drafting, and statute revision. One departmental attorney indicated that his work consisted mainly in giving advice to officers and agencies of the department, and to private individuals.

Many of the departments which employ attorneys have regulatory functions, which require them to hold hearings, and their attorney is active in these. Most departments' responsibilities involve a substantial body of statutes and the attorney must acquire a specialized knowledge of these. Some departments, such as Aeronautics, assist local boards, and the attorney gives advice to these local units.

Departmental Policies and Legal Decisions. Most of the attorneys interviewed stated that they did not enter into the policy-making phases of the department's work. Generally, however, they draft rules and regulations and render advice, which may involve some degree of policy-making.

The attorneys were asked to what extent, if any, legal decisions were influenced by departmental policies. Responses ranged from "none at all" to "a great extent." Some individual comments are as follows:

Legal decisions are based strictly on the law and the attorney must keep the rights of the public, as well as the department, in view when making a decision;

The attorney strictly follows the statutes;

Departmental policies do not influence decisions, but you cannot rule out the human element;

Departmental policies influence legal decisions in the same way all attorneys decisions are influenced by clients' wishes;

Counsel stay away from policy making and give the law in relation to the question asked; however, counsel should have an unqualified loyalty to the commissioner;

Counsel's decisions may be influenced if the department has acted for a long time without legal advice, and through contemporaneous usage a policy which conflicts with a statute arises, unless the policy is patently unfair or erroneous;

If the department's policies aren't at complete variance with the law, counsel tries to go along with them, but if a variance appears, the commissioner wants to know the law;

The attorney must be an advocate for what the commissioner wants within the framework of the law;

Counsel first looks at the ultimate aim and result to be achieved by the department, then tries to find a legal way to accomplish it.

These examples indicate that there is considerable variation among departmental attorneys in their concept of the attorney-agency relationship. The same difference of opinion exists among students of the role of the attorney in public administration, as the following quotations from two authorities indicate:

[T]he main tasks of the lawyer in public administration are divided into two basic functions. One is protective; he must safeguard his agency against legal challenge from the outside. The other is facilitative; time and again officials need the expert in framing legal devices for the attainment of administrative ends. In his protective task the lawyer is the trusted watchdog.³³

The first duty of the law officer is to see that the rule of law is maintained and that public officers always act

³³ Marx, *The Lawyer's Role in Public Administration*, 55 Yale L.J. 498, 507 (1946). See also Marx, *Some Aspects of Legal Work in Administrative Agencies*, 96 U. Pa. L. Rev. 354 (1948).

within the limits of their powers as declared by law. Supremacy of the law being the very basis of our democratic liberties, there is necessity for someone in daily contact with the course of administration to function as the watchdog to see that bureaucrats stay within prescribed legal boundaries.³⁴

Thus, the departmental lawyer may be viewed as the "watchdog" of the department, or of the public.

Coordination Among Departmental Counsel. There is no formal method of coordinating legal work among departments. Some attorneys feel there may be a need for a more formal system of coordination, but most feel that the present practice is sufficient. Coordination usually is on a case-to-case basis, and thus depends upon the individual attorney's ability to recognize the need for coordination and to work with other attorneys. Some departments recognize a need to coordinate legal services only with specific departments.

Some specific instances where the legal work of one department is coordinated with that of another were given as follows:

Where there are conflicts in statutes, rules and regulations of departments;

Where a problem involves more than one agency, attorneys sometimes work together, except where the departments do not see eye-to-eye; then there is no coordination;

Where a federal agency or authority is involved;

Where the functions of several departments overlap, or where specific statutes are involved.

Some departments saw no need for coordination. Others, however, recognized that lack of adequate communication between departmental counsel may keep the state's legal services from operating with maximum efficiency. Obviously, much of a department's legal work does not require coordination, but present working relationships are dependent entirely upon personal attitudes and custom.

Coordination with Attorney General's Office. Most departmental attorneys indicated that they did not coordinate their

³⁴ Pfiffner, *The Role of the Lawyer in Public Administration*, 20 So. Cal. L. Rev. 37, 46 (1947).

legal work with the Attorney General, although they may call upon him for opinions. Four departments specified instances where their legal work is coordinated with the Attorney General:

Where the department has entered into a contract, these are sent to the Attorney General's office to be checked for form and content;

Where matters concerning the department are referred to its counsel by the Attorney General;

When the department is involved in litigation;

Where matters were of sufficient importance to require his assistance.

One Assistant Attorney General assigned to a department formerly sent copies of all briefs to the Attorney General, but has discontinued this practice. Only one of the departments which employ permanent counsel report that the Attorney General drafts legal instruments for the agency. Departments with counsel generally reported that the Attorney General does not represent them in litigation, unless the litigation involves another agency.

Opinions. The greatest amount of contact between the Attorney General's office and departmental attorneys arises from advisory opinions. Department of Law Regulation No. 1(3) requires that questions submitted by departments having permanent counsel include references to the appropriate constitutional and statutory provisions, cases, departmental regulations, and the conclusions of law arrived at by counsel.

All but one of the departments with permanent counsel requested Attorney General Opinions during 1960. Table 3, in Part V of this Report, shows the number of opinions rendered to each department during 1960. The number rendered to departments with staff counsel ranged from one to ten, with a total of sixty-one. Staff counsel were asked how many opinions were rendered during the year ending June 30, 1961. Their answers ranged from none to one hundred, with a total of 135 to 155 for these departments. Five agencies said that they had requested no opinions during this period; these agencies had received from one to four opinions during 1960. While no count has been made

of the number of opinions actually rendered during the period cited in the interview, it appears that some attorneys greatly over-estimated the number of opinions requested. This may result in part from the fact that advice may be given orally or by memoranda and, therefore, not counted as an opinion.

Departmental counsel gave the following examples of when and why they request Attorney General's opinions:

When litigation is threatened, or when an interpretation is sought for enforcement purposes;

The federal government prefers Attorney General's opinions to those of departmental counsel;

When interpretation of statutes is needed, or there is a conflicting view as to Attorney General's opinions.

To add the weight of an official opinion to a legal position;

Where a statute that has been drafted by departmental attorneys must be interpreted and an objective opinion is sought;

The department head can overrule an opinion of his own counsel, but he cannot overrule an Attorney General's opinion;

When there is a question involving another agency

Several departments reported that they no longer seek Attorney General's opinions, since the Department of Law Regulation requires that, in effect, they draft the opinion first. This would indicate that such departments sought opinions as a method of having the Attorney General do the pertinent research, rather than because they valued his opinion. Another attorney stated that he did not request opinions, because he felt opinions should come from the department, not from the Attorney General.

Most departmental attorneys reported instances where their legal work had conflicted with, or been inconsistent with, that of the Attorney General. This sometimes resulted from a conflict between a departmental opinion and an Attorney General's opinion. The following statements were made about the relationship of agency counsel to the Attorney General:

The Attorney General has sometimes handed down opinions which were properly within the functions of the department, but the Attorney General's opinion prevails in such cases;

There have been only minor differences between the department legal staff and the Attorney General;

Where conflicts arise, the Attorney General has the last say;

The attorney respected the Attorney General's opinions, but the latter does not have power to overrule the agency's legal position or judgments;

A recent conflict was solved by the department attorney conceding in favor of the Attorney General.

Departmental attorneys apparently defer to the authority of the Attorney General when conflicts arise, but most acknowledge the existence of inconsistencies and disagreements. Coordination with the Attorney General, as with other legal officers, depends on the individual attorney and his department.

Control of Counsel by the Attorney General. Each person interviewed was asked, ideally, how much, if any, supervision or control should be exercised by the Attorney General over the permanent counsel of your department? Two attorneys, including one assigned Assistant Attorney General, answered that the Attorney General should exercise general supervision; another Assistant Attorney General answered that present control is sufficient, but the Attorney General should have more control if the department commissioner were not an attorney. One attorney believed that the Attorney General should have supervisory authority in litigation. Eleven departmental attorneys believed that the Attorney General should exercise no supervision or control over their work.

Most of those interviewed felt that the Attorney General should be available for assistance and advice, but have no authority over departmental counsel. Many said that their legal work was so specialized and technical that no outside control should be exercised, while others believed their legal work was not sufficiently important to merit the Department of Law's attention. The following reasons were given for denying control to the Attorney General:

There should be an attorney-client relationship between a department and its legal staff;

The department's legal work involves specialized federal programs;

The Attorney General's office does not have enough time to review department work;

Counsel should be loyal to the department head;

The department's work and politics do not mix;

The department's legal work is highly technical;

Most department heads want constant legal advice about administrative problems, and attorneys should be readily available;

The commissioner should have preference in arguable positions;

Attorneys should know the day-to-day workings of the department.

Those interviewed believed generally that the department head should have authority to hire an attorney, subject to the approval of the Governor or, in a few cases, the Attorney General. It was argued that the department is responsible for the effectiveness with which it performs its duties and that it needs authority commensurate with this responsibility to employ, promote, and discharge staff members. It was also argued that the attorney could not serve both the Attorney General and the department head.

Summary. The interviews with attorneys indicate that their roles, responsibilities and relationships vary from department to department. Most of them consider the department or commissioner their "client", and acknowledge that conflicts arise with the Attorney General because of his more general responsibility to the whole state. There are generally no significant differences in attitude between Assistant Attorneys General attached to departments and other departmental counsel. There is no uniform conception of what the Attorney General's role is or ought to be.

Arguments for independence from the Attorney General's supervision seem to stem primarily from the fact that attorneys identify themselves with the department, rather than the state's legal staff. Problems inherent in this view are summarized by one authority:

If the governmental lawyer is to be an independent watchdog, it goes without saying that he should not have to answer administratively to those whom he watches, for it is human nature to take stock of the views and attitudes of those who have something to say about one's destiny. Hence, if the lawyer is to render objective advice and in-

terpret the law from a strictly professional viewpoint, he should be immune from the recriminations of those adversely affected. Furthermore, if the viewpoint is taken that the attorney is acting quasi-judicially, valid precedent for independence [from administrators] is found in the time-honored Anglo-Saxon principle of judicial independence.⁸⁵

Further problems are apparent in the lack of coordination among legal staffs, the difference in conditions under which the Attorney General's advice is sought, and the weight given to his opinions.

ORGANIZATION OF LEGAL SERVICES IN OTHER STATES

The powers, duties, and organization of the office of Attorney General in selected states were described briefly in Chapter I. The structure of legal services in some of these states is explored in more detail here, to provide some basis for evaluating the Kentucky system.

Minnesota. Minnesota's Attorney General's office has a staff of fifty-two full-time and fourteen part-time attorneys, including the Attorney General, and two law clerks. This staff includes Assistant Attorneys General who are required by law to be appointed for the Departments of Taxation, Public Welfare, Conservation, and Employment Security, and a Solicitor General. Assistants are also assigned to the other major state departments.

The Attorney General has no jurisdiction over permanent counsel for state departments and agencies. Six state departments employ a total of twenty-seven attorneys and five legal assistants, some of whom are employed part-time. Four of the attorneys employed by state departments handle workmen's compensation litigation; otherwise, departmental attorneys act only in an advisory capacity. The Attorney General, by statute, acts as the attorney for all state officers and all boards and commissions in all matters pertaining to their official duties.

The Minnesota Attorney General may, upon written request and at his discretion, employ a special attorney for any board, commission and officer. The special attorney's compensation is

⁸⁵ Pfiffner, *supra* note 34 at 47.

fixed by the Attorney General, but paid by the employing agency. Numerous duties concerning litigation are assigned by statute to the Attorney General, and the Minnesota Court has held that he may come into any litigation in which the rights or interests of the state are at stake.

Minnesota is comparable to Kentucky, in that departments have the right to employ independent counsel. In Minnesota, however, about two-thirds of the state's legal staff works in the Attorney General's office, and most departmental counsel are confined to advisory duties. In contrast, only a small part of the attorneys in Kentucky state government serve on the Attorney General's staff, and departmental counsel participate in litigation.⁸⁶

New Jersey. The Department of Law and Public Safety headed by the Attorney General of New Jersey has been described earlier. The total number of personnel in the Attorney General's Office and the Division of Law as of February, 1961, was 133, but this number included clerical and stenographic employees.

The Attorney General is the sole officer entrusted with the function of representing all state officers and agencies in litigation, as provided by 1944 statute. The rule of construction, however, has been that an agency created after 1944 with provision for its own counsel is not within the exclusive terms of the 1944 law, and must rely upon its own counsel. The leading examples of these exceptions are the New Jersey Turnpike Authority and Highway Authority; otherwise, all legal advice and representation of state government is the responsibility of the Attorney General and his staff.

Special counsel for state agencies may be employed upon authority of the Attorney General, with approval and declaration of an emergency by the Governor, although this authority is seldom used. Under separate statutes, the Attorney General has specific authority to hire special counsel in escheat cases, and to represent the public interest in public utility rate cases. Another

⁸⁶ Minnesota reply to Council of State Governments (hereinafter cited as COSGO) Preliminary Questionnaire, on the Powers, Duties and Organization of the office of Attorney General, tables 6, 9, 14, 15, 27; Minn. Stat. §§ 8.01, .06, .09; State *ex rel.* Peterson v. District Court, 96 Minn. 44, 264 N.W. 227 (1935).

statute recognizes the need to have assigned attorneys in some departments:

The Attorney General may assign a deputy attorney-general or an assistant to serve in or for any officer, department, board, body, commission or instrumentality of the state government on a part-time or full-time basis, whenever, in the judgment of the Attorney General, such assignment will contribute to the efficiency of the operation of such office, department, board, body, commission or instrumentality, but such member of the Department of Law shall remain under the supervision and control of the Attorney General while so serving. (NJRS 52:17 A-12)

New Jersey is in complete contrast to Kentucky, inasmuch as the New Jersey Attorney General has sole responsibility for advising and representing state agencies. In addition, a number of law enforcement agencies have been brought under his supervision in the Department of Law and Public Safety. Provision is made for attorneys to be assigned to departments, but they remain as part of the Attorney General's staff.³⁷

Virginia. The Virginia Department of Law includes the Attorney General, eleven Assistant Attorneys General, and two special assistants.

The Assistant Attorneys General are assigned as counsel to various departments of state government. They normally serve the same department for a considerable length of time, but remain responsible to the Attorney General and subject to removal by him. Two Assistant Attorneys General devote their entire time to representing the Highway Department; they supervise about seventy-five lawyers throughout the state, whose selection is approved by the Attorney General. Both the State Highway Department and the Virginia Employment Commission employ a special counsel, paid out of the agency's fund, but the counsel in each case must be approved by the Attorney General.

The only attorney employed independently of the Attorney General is the Commerce Counsel, employed by the State Corporation Commission. The Commerce Counsel, however, performs

³⁷ New Jersey reply to COSGO Questionnaire, *op. cit. supra* note 36, tables 15, 26, 31; letter from David D. Furman, Attorney General of New Jersey, to John B. Breckanridge, Oct. 2, 1961; N. J. Rev. Stat. §§ 52:17A-2-52:17A-13, 52:17B-2, 52:17B-35.

such other services as the Attorney General and the State Corporation Commission may direct. Special counsel may be employed to render legal services for the state where it is uneconomical and impracticable for the Attorney General or his staff to render such services, but their fees must be approved by the Attorney General.

All litigation concerning state agencies is handled by the Attorney General, or by counsel appointed or approved by him, and under his direction. Numerous specific statutory duties are imposed upon the Attorney General, many of them similar to those found in Kentucky law. The Attorney General of Virginia, however, has almost complete control over the appointment of the state's legal staff, and exercises continuing supervision over attorneys assigned to state departments.³⁸

Other States. The organization of state legal services in Tennessee and New Mexico were described in chapter I. Detailed information on the size and operation of their legal staffs is not available. Examples of legal organization in other states for which information is available are given for further comparison with Kentucky.

Alaska. The coming of statehood required a sharp expansion in the Alaska Department of Law, which grew from six attorneys in 1959 to twenty-two attorneys by December, 1960. This included District Attorneys and Assistant District Attorneys. A considerable part of this growth was due to the ingathering of attorneys from other state departments to the Department of Law. No department now has its own counsel, although some members of the staff are assigned primarily to Highways legal work and two primarily to legal work of the Department of Law. The Attorney General, however, has sole supervision over all legal matters and litigation affecting the state.³⁹

Indiana. The Indiana Department of the Attorney General is organized into four divisions and eighteen sections, each

³⁸ Virginia reply to COSGO Questionnaire, *op. cit. supra* note 36, tables 6, 9, 14, 15, 27, 30; Letter from Frederick T. Gray, Attorney General of Virginia, to John B. Breckinridge, Oct. 9, 1960; Va. Code Ann. §§ 2-87, 2-88.

³⁹ Alaska reply to COSGO Questionnaire, *op. cit. supra* note 36, tables 27, 28; Memorandum from Ralph E. Moody, Attorney General of Alaska, to governor of Alaska, Dec. 9, 1960; Letter from George N. Hayes, Attorney General of Alaska, to John B. Breckinridge, Jan. 31, 1963.

dealing with a particular subject area. The Attorney General has forty-seven assistants and deputies, and two law clerks. He represents all departments and agencies of state government, and no state agency can hire outside counsel except with his approval. He has authority to employ special attorneys, and there is statutory provision for the employment of a special counsel at Washington, D. C.⁴⁰

Michigan. In Michigan, the Civil Service Commission and the state universities are the only agencies which employ independent counsel. The Attorney General's staff includes seventy-seven assistants and deputies, three legal field representatives, two title examiners, and seven law clerks. He frequently hires special counsel for such purposes as title, condemnation, or collection cases.⁴¹

Mississippi. Mississippi statutes provide that the Attorney General, shall, with the approval of the Chief Justice of the Supreme Court, appoint six Assistant Attorneys General, one of whom serves as Reviser of Statutes. He is authorized to employ other staff as needed. Several state departments are authorized by statute to employ special counsel, and the Governor may engage counsel to assist the Attorney General in cases to which the state is a party⁴²

Nevada. Nevada's Attorney General heads a staff of six full-time attorneys, two research assistants, and ten part-time Special Deputy Attorneys General, who are assigned to specific departments and litigation. Nevada statutes prohibit the employment of attorneys by state officers unless the Attorney General and his deputies are disqualified to act in a matter, or unless the legislature specifically authorizes such employment. Counsel are employed only by the Industrial Commission and the legislative service agencies. Other departments are served by Special Deputy Attorneys General, who are selected with the concur-

⁴⁰ Indiana reply to COSGO Questionnaire, *op. cit. supra* note 36, tables 6, 9, 27, 28.

⁴¹ Michigan reply to COSGO Questionnaire, *op. cit. supra* note 36, tables 9, 27, 28, 31.

⁴² Mississippi reply to COSGO Questionnaire, *op. cit. supra* note 36, tables 15, 16, 31; Miss. code of 1942, ch. 1, tit. 17, §§ 3827, 3828, 3829.

rence of the Attorney General and the department head, and are employed on a contract basis.⁴³

North Carolina. The North Carolina Attorney General has nine assistants and fifteen staff attorneys. Other State Departments are not permitted to employ permanent counsel. The North Carolina Attorney General's office performs duties assigned to legislative service agencies in most states, as well as those customarily assigned to the chief law officer.⁴⁴

Pennsylvania. The staff of the Pennsylvania Attorney General includes twenty-five Deputy Attorneys General, twenty-six Assistant Attorneys General, nine investigators, and three administrative officers. All state attorneys must be appointed by the Attorney General, and are subject to dismissal by him. Each deputy is responsible for rendering legal service to particular state departments and agencies.⁴⁵ There are also Assistant Attorneys General located in the larger counties of the Commonwealth, with special attorneys hired elsewhere on a fee basis.

Vermont. Vermont's Attorney General is assisted by one Deputy, one legal assistant, and one investigator. Other state departments may employ attorneys with the Governor's consent, which is usually done after consultation with the Attorney General. Currently, three departments employ a total of four attorneys, two of them on a part-time basis. The Attorney General usually represents all state agencies but need not do so unless, "in his judgment, the interests of the State so require."⁴⁶

Washington. The Constitution of Washington specifies that "the Attorney General shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law" He handles all litigation for the state, and has sole authority to appoint and remove all permanent counsel, subject to minor exceptions. In addition to the Attorney General, the

⁴³ Nevada reply to COSGO Questionnaire, *op. cit. supra* note 36, tables 9, 27, 28, 29.

⁴⁴ North Carolina reply to COSGO Questionnaire, *op. cit. supra* note 36, tables 9, 16, 17, 18, 27-37.

⁴⁵ Pennsylvania reply to COSGO Questionnaire, *op. cit. supra* note 36, tables 9, 27, 28; Rutherford, Department of Justice of the Commonwealth of Pennsylvania, pp. 6-7; letter from David Stahl, Attorney General of Pennsylvania, to John B. Breckinridge, Jan. 2, 1963.

⁴⁶ Vermont reply to COSGO Questionnaire, *op. cit. supra* note 36, tables 9, 27, 32.

staff includes sixty-eight full-time attorneys and nine part-time attorneys, one investigator, one research analyst, and one investigator. Legal services rendered to the various departments of state government are performed by members of the Attorney General's staff, assigned by him to such departments.⁴⁷

Comparison with Kentucky. The twelve states described above, which were chosen primarily on the basis of availability of information, represent a wide variety of state legal organizations. At one end of the range are such states as New Jersey, Alaska and Michigan, with almost total centralization of the state's legal services in the Attorney General's office. At the other extreme are states like Kentucky, Mississippi and Vermont, where departments are empowered to employ permanent legal counsel. Comparative data on all fifty states will become available in the near future, with completion of the Council of State Governments study of the office of Attorney General. It will undoubtedly illustrate to an even greater extent the wide variations available within each type of organization.

Of the twelve states described above, only three authorize the employment of counsel by all or most state departments. Even in these states the Attorney General's staff is a more important part of state legal services than it is in Kentucky. Minnesota departments may employ counsel, but such counsel are usually restricted to an advisory role, and about two-thirds of the state government attorneys work for the Attorney General. In Mississippi, certain departments are apparently authorized to employ counsel. Vermont's law appears comparable to Kentucky in that departments may employ attorneys with the Governor's consent, which usually is preceded by consultation with the Attorney General, but only two full-time attorneys are employed by departments. In contrast, any department in Kentucky may hire counsel, and only one out of each seven attorneys employed in state government works in the Attorney General's office.

Many states with centralized legal staffs recognize the need for attorneys to work closely with state departments. In several of these states, such as New Jersey and Virginia, the Attorney General can assign an attorney to a state agency on a more or less

⁴⁷ Washington reply to COSGO Questionnaire, *op. cit. supra* note 36, tables 4, 15, 27.

continuing basis, but such attorney remains under the control of the Attorney General. The Minnesota Attorney General may employ a special attorney for a state agency, who is then paid by the agency. In Nevada, special Deputy Attorneys General are selected for departments with the concurrence of the Attorney General and the department head.

Several states have express prohibitions against the employment of counsel by state agencies. Examples in addition to those above are Oregon, which states in the statutes that "no compensation shall be allowed to any person as an attorney or counselor to any department of the state government or to the head thereof except in cases specifically authorized by law",⁴⁸ and New Mexico, which provides that the Attorney General shall bring action in the name of the state whenever he has reason to believe that employment as an attorney has been solicited or obtained in violation of state law, and may enjoin such employment.⁴⁹

Kentucky's Attorney General has recommended changing Kentucky law to give his office more authority over state counsel.⁵⁰ He has recommended that permanent and temporary attorneys be retained only by the Department of Law, except upon written agreement of the Governor and the Attorney General. Departments with Assistant Attorneys General, the Governor's Office, the Legislative Research Commission, and the Workmen's Compensation Board would retain the right to employ attorneys. He further proposed that a previous statute be re-enacted, to allow agencies to employ an attorney other than the Attorney General when an emergency arises which, in the opinion of the Governor and the Attorney General, requires the employment of other counsel, or when litigation arises in which the Attorney General has an adverse interest. Compensation for such attorneys would be fixed by the Attorney General, subject to the approval of the Governor and the department involved.

⁴⁸ Ore. Rev. Stat. § 180.230(1) (1953).

⁴⁹ Letter from Thomas Donnelly, Assistant Attorney General of New Mexico, to John B. Breckinridge, Sept. 6, 1961.

⁵⁰ Report of the Department of Law 1960-62, p. 40; S.B. 297, Ky. Gen. Assembly Reg. Sess. 1962.

Legislation embodying these recommendations was introduced into the 1962 Kentucky General Assembly, but was not enacted. This type of proposal would restore to the Attorney General the authority he exercised prior to 1948, and would make his position more comparable to that of Attorneys General in a majority of states.

III. Relationship of the Office of Attorney General To Local Authorities

The Attorney General's duties embrace a wide range of civil, criminal, administrative and regulatory matters. It is, therefore, to be expected that his relationships with local officials will be highly complex and not readily subject to analysis. This chapter concerns the relationship of the Attorney General of Kentucky to Commonwealth's attorneys, county attorneys, city attorneys, city prosecutors and local police. Information on other states is included to indicate alternative relationships. Both civil litigation and the administration of criminal justice are discussed.

HISTORY OF LOCAL PROSECUTORS

Generally. In general, the American colonies adopted the English system of law enforcement, in which the Attorney General was the chief legal officer, but did not take an active interest in ordinary criminal prosecutions.¹ The public prosecutor did not make his appearance in England until 1879;² prosecution was usually dependent upon the industry of the aggrieved victim, acting through a special prosecutor.

The idea of a local prosecutor with official status seems to be an American innovation.³ Connecticut created the office as early as 1704, and by the end of the Eighteenth Century the office was established in American practice with a function partly like that of the English Attorney General, and partly like the French *procureur du roi*. This pattern of local prosecutors carried over into federal practice, so it was not until 1909 that the Attorney General of the United States assumed control of federal prosecutions.⁴

¹ Jenks, *A Short History of English Law* 351 (1st ed. 1912).

² *Prosecution of Offenses Act, 1879, 42 & 43 Vict., c. 22, § 2.*

³ Hurst, *The Growth of American Law* 174 (1950).

⁴ *Id.* at 175.

Development in Other States. The office of local prosecutor developed differently in the several states, with variations due partly to different relationships between state and local governments. The office now exists in most of the states, but there is little uniformity about its powers and duties. Furthermore, little has been written about the role of the local prosecutor, and the office is often imperfectly understood. The following summary is based primarily upon a series of articles by Professor Nedrud.⁵

Local prosecutors bear different names in the several states, such as Commonwealth attorney, district attorney, county attorney, and solicitor general. In the large majority of the states, prosecuting attorneys are elected; in the others, they are appointed by the local courts, the Governor, or the Attorney General. Apparently, all states now require the prosecutors to be lawyers, and a few specify a period of practice as a prerequisite to office. Only a few states prohibit the prosecutor from engaging in private civil practice, but, with one exception, states prohibit the prosecutor from engaging in criminal practice other than his official duties.

In about two-thirds of the states, jurisdiction of the local prosecutor is limited to the county. Most of the states give him both civil and criminal jurisdiction. In some states, there are classes of prosecutors; for example, district attorneys handle the prosecutions for felones, but misdemeanors are processed by county attorneys. Deputy or assistant prosecutors are elected in one state and appointed in the others. In only a few states is an aggrieved private party allowed to prosecute through special counsel.

There is usually a wide range of salaries for local prosecutors within a state, with the highest compensation going to those in the highly populated areas. In a number of states, the basis of the prosecutor's compensation depends upon the fines and other fees he is able to collect. Almost all states allow prosecutors funds for criminal investigation, and assign police to help them with investigations in many metropolitan areas.

History of the Local Prosecutor in Kentucky. Kentucky was comparatively slow to establish the office of the local prosecutor.

⁵ Nedrud, *The Career Prosecutor*, 51 J. Crim. L., C. & P.S. 343, 557, 649 (1961). Another installment in this series of articles is contemplated.

The first Constitution specified that the Attorney General was to appear for the Commonwealth in all criminal prosecutions.⁶ No provision was made for local prosecutors. Evidently, the Attorney General was expected to handle most of the work personally; a statute of 1798 directed the Attorney General to attend all district courts within the Commonwealth.⁷ This statute further provided that the court should employ a proper person to prosecute for the Commonwealth if the Attorney General were not in attendance.

The 1799 Constitution provided that the Governor could appoint such attorneys for the Commonwealth as might be necessary, in addition to the Attorney General. Attorneys for the Commonwealth for the several counties were to be appointed by the respective court having jurisdiction therein.⁸ Acts of the 1813 legislature⁹, which were re-enacted in slightly different language in 1820¹⁰, directed the Governor to appoint a Commonwealth attorney for each judicial district, whose duty was to prosecute all pleas of the Commonwealth. Another statute created the office of the county attorney and provided that he should be selected by a majority of the judges of the county court.¹¹

In this period the practice of the legislature, which has continued to the present, of singling out certain statutes for the particular attention of the Commonwealth's attorney began.

For example, he was enjoined to oppose divorces under certain circumstances¹² and to prosecute neglectful attorneys.¹³

Under the Constitution of 1850, a Commonwealth's attorney for each judicial district and an attorney for each county were to be elected,¹⁴ in addition to the Attorney General.^{14a} Their duties were not specified, but were prescribed by the General Assembly

⁶ Ky. Const. art. II, § 16 (1797).

⁷ 2 Littell, Statute Law of Kentucky 77 (1810).

⁸ Ky. Const. art. III, § 23 (1799).

⁹ 5 Littell, Statute Law of Kentucky 19 (1819).

¹⁰ Littell and Swigert, Digest of the Statute Law of Kentucky 119 (1822).

¹¹ 1 Morehead and Brown, Digest of the Statute Law of Kentucky 168 (1834).

¹² 4 Littell, Statute Law of Kentucky 20 (1819).

¹³ Littell and Swigert, Digest of the Statute Law of Kentucky 122 (1822).

¹⁴ Ky. Const. art. VI, § 1 (1850).

^{14a} Ky. Const. art. III, § 25 (1850).

Commonwealth's Attorneys were charged with attending the circuit court and prosecuting all violations of criminal laws tried there.¹⁵ In all counties except Jefferson, for which special provisions existed, the county attorney was required to prosecute all misdemeanors before any county judge, police judge, or justice of the peace. In addition, the county attorney was to attend to all cases in the county court which touched on the interests of the county. The Attorney General was charged with representing the Commonwealth in Franklin Circuit Court, the Court of Appeals and the federal courts.¹⁶ Generally, county attorneys were in charge of prosecuting for misdemeanors; Commonwealth's attorneys were in charge of prosecuting for felonies and other crimes within the circuit court's jurisdiction; and the Attorney General handled appeals.

Present Constitution. The question of whether the prosecution of crime should rest with locally-elected officers or with some central authority was debated at length during the 1890 Convention, which framed the present Constitution. Lengthy discussions centered around the question of whether Commonwealth's attorneys should be subject to the Attorney General's direction. Illustrative of the arguments for centralization was one delegate's statement that:

Under the law now he [The Attorney General] must defend in the Court of Appeals proceedings which he can in no way regulate in the inferior courts. He must defend actions which he could not control and might have disapproved. He may see that proceedings should be taken in behalf of the state, yet he is powerless to set the necessary legal machinery in motion. It seems to me that instead of having twelve or fifteen Commonwealth's Attorneys throughout the state independently deciding on these important matters, we should have them acting under the supervision of the Attorney General. But at present our laws are enforced by a sort of local option.¹⁷

In reply, another delegate argued that:

Will you clothe him (the Attorney General) with this power and take away from the Attorneys for the Commonwealth.

¹⁵ Ky. Gen. Stat., ch. 5, art. IV § 1 (Bullitt & Feland 1887).

¹⁶ Ky. Gen. Stat., ch. 5, art. V § 1 (Bullitt & Feland 1887).

¹⁷ Report of the Proceedings and Debates in the Convention to Amend the Constitution of Kentucky, vol. I, p. 1499 (1890).

that leverage which is the best and safest of all orders, the eye of his own constituency, which is ever fastened on him? Love of approval by the people for faithful service and fear of censure for inefficiency, slothfulness and dishonesty, is the fundamental idea of our elective system. Let an officer be responsible to the people who elect him and to them alone.¹⁸

The Convention did not adopt the proposed constitutional provision providing for supervision of Commonwealth's attorneys by the Attorney General. It also rejected a proposal to abolish the office of Commonwealth's attorney and to transfer his duties to the county attorney.¹⁹ The argument was presented that the county attorney was better informed than the Commonwealth's attorney about local matters. The Convention, however, maintained both officers in the Constitution, gave the General Assembly power to abolish the office of Commonwealth's attorney, and left to future legislatures the relationship of the two officers.²⁰

RESPONSIBILITY FOR CRIMINAL PROSECUTIONS IN KENTUCKY

The Constitution of Kentucky sets forth the election, compensation and qualifications of the Attorney General, Commonwealth's attorneys and county attorneys, and establishes an elaborate structure of courts having criminal jurisdiction, but no constitutional provision charges any officer with the prosecution of crimes. The duty to prosecute is either fixed by the General Assembly or left to the rules of common law.

The Attorney General has no general duty to prosecute criminal violations, although he does handle the interest of the state in criminal matters before the Court of Appeals. Prosecution at the trial level is left to the Commonwealth, county and city attorneys.

Commonwealth's Attorney. Section 97 of the Constitution provides that a Commonwealth's attorney shall be elected in each circuit court district and shall serve for a six-year term. Circuit

¹⁸ *Id.* at 1504.

¹⁹ *Id.* vol. IV, at 4676-80.

²⁰ *Id.* at 4684.

court districts are set by statute, within constitutional restrictions, and there are now forty-eight such districts.²¹

The statutes, in section 69.010, charge the Commonwealth's attorney with attending each circuit court held in his district, and prosecuting all violations of the criminal and penal laws therein. This states his duties concisely and limits them to a particular court. Generally, circuit courts have jurisdiction to try felonies and serious misdemeanors,²² but do not have jurisdiction where the punishment is limited to a fine of not more than twenty dollars,²³ nor over violations of city ordinances.²⁴ Thus, Commonwealth's attorneys are charged with the trial of felonies and serious misdemeanors.

County Attorney. According to section 99 of the Constitution, a county attorney is elected in each county for a four-year term. Kentucky now has one hundred and twenty counties, with a tremendous range in their area and population. The county attorney is required by KRS 69.210 (2) and (3) to:

[A]ttend to the prosecution, in courts inferior to the circuit court, of all criminal and penal cases in his county in which the Commonwealth or the county is interested, except those cases in a police court for which there is a prosecuting attorney who has the duty to prosecute such cases.

[A]ttend the circuit courts held in his county and aid the Commonwealth's attorney in all prosecutions therein, and in the absence of the Commonwealth's attorney he shall attend to all of the Commonwealth's business in the circuit court, except those felony cases for which a pro tem Commonwealth's attorney is appointed.

This statute would seem to imply that the county attorney is

²¹ Ky. Const. § 128; Ky. Rev. Stat. [hereinafter cited as KRS] 23.040.

²² KRS 23.010 gives the court jurisdiction over all matters of law not exclusively delegated to some other tribunal. KRS 25.010 vests exclusive jurisdiction over misdemeanors where the punishment is limited to a fine of not more than twenty dollars in the county, quarterly and justice courts. These courts are given concurrent jurisdiction with the circuit courts over misdemeanors where the punishment is limited to a fine of not more than \$500 or imprisonment for not more than twelve months or both. Similar jurisdiction is vested in the police courts except that in addition they are given exclusive jurisdiction over violations of city ordinances. KRS 26.010.

²³ KRS 25.010.

²⁴ KRS 26.010.

subject to direction by the Commonwealth's attorney The Court of Appeals has said that:

In view of these provisions it is clear that the commonwealth's attorney is the chief prosecutor in the circuit court, and that the county attorney is merely his aid. In other words, the commonwealth's attorney is the superior, and the county attorney the inferior, officer. Manifestly, the power of control must rest in one or the other where both are present. Equal authority would often lead to intolerable conditions. It therefore has long been the settled rule that, where both are present, the power of control is in the commonwealth's attorney²⁵

In the absence of the Commonwealth's attorney the county attorney must prosecute the cases before the court unless the judge appoints a special *pro tem* Commonwealth's attorney, whom the judge may assign only in felony cases.²⁶ If the judge assigns a *pro tem* Commonwealth's attorney in a misdemeanor case, the Commonwealth is without authority to pay the attorney, even though he assumed the duties in good faith.²⁷

City Attorney or Prosecutor City attorneys and city prosecutors are not mentioned in the Constitution, but are purely creatures of statute. With a few exceptions, their powers and duties are specified separately in the statutes relating to each class of cities. The Constitution, in section 156, requires that cities be divided into six classes, based on population, for the purposes of their organization and government.

In *cities of the first class*, the prosecuting attorney is elected for a four-year term and is required to appoint an assistant. The same statute, KRS 69.430, requires that he shall represent the Commonwealth and the city in all matters coming before the police court, but the Commonwealth's attorney or the county attorney may be present to assist in the trial of offenses against the Commonwealth.²⁸ Cities of the first class also have a city attorney, appointed by the mayor to head the department of law²⁹ Louisville is the only city in this class.

²⁵ Commonwealth v. Euster, 237 Ky. 162, 166, 35 S.W.2d 1, 2 (1931); See also Wells v. Miller, 300 Ky. 680, 190 S.W.2d 41 (1945).

²⁶ KRS 69.060.

²⁷ Wells v. Miller, 300 Ky. 680, 190 S.W.2d 41 (1945).

²⁸ KRS 69.430.

²⁹ KRS 69.410.

Cities of the second class which have not adopted a city manager or commission form of government have both a city attorney and a city solicitor. The city attorney is elected for four years and handles prosecutions in police court. The city solicitor is appointed by the mayor; he represents the city in the circuit court and the Court of Appeals, provides legal advice for city officers, and performs other duties.³⁰

If a city of the second class adopts a city manager or commission form of government, the office of city attorney and city solicitor are abolished.³¹ An office of city attorney can, however, be created by ordinance.³² There are only eight cities of the second class.

Cities of the third class not operating under the commission or manager form of government have an elective city prosecutor. His duty is to prosecute in the police court crimes against the state as well as violations of city ordinances.³³ Like cities of the first class, third class cities have a city attorney who handles civil matters.³⁴

In *cities of the fourth class*, prosecutions for state and local offenses are handled by the appointed city attorney, who also handles cases in any court if an appeal is taken.³⁵ In cities of the fourth class which have adopted the city manager or commission form of government, all legal services are a matter of contract.³⁶

In *cities of the fifth class*, the appointed city attorney advises the city on all legal matters pertaining to the business of the city.³⁷ The city attorney of a *city of the sixth class* is appointed, and is required to prosecute violations of city ordinances as well as to advise city officers.³⁸ Both fifth and sixth class cities may employ an attorney for special cases. In fifth and sixth class cities operating under the commission form of government, of which there are none at present, the office of city attorney is abolished, along

³⁰ KRS 69.450; 460.

³¹ KRS 89.040; 420.

³² KRS 89.220; 98.570.

³³ KRS 69.510; 520, 89.420, 84.040. The office is retained even with a city manager form of government, but the election is then non-partisan. *Douglas v. Sturgill*, 261 S.W.2d 290 (Ky. 1953).

³⁴ KRS 69.480.

³⁵ KRS 69.560, 570.

³⁶ KRS 89.040, 420.

³⁷ KRS 69.580.

³⁸ KRS 69.590.

with all other city offices.³⁹ Since statutes specifying the duties of attorneys for other classes of cities explicitly require prosecution for offenses against the state, it would appear that there is no requirement that the city attorney in fifth and sixth class cities prosecute violations of state statutes, although police courts have such jurisdiction.⁴⁰

Relationship Between Local Prosecutors. The prosecution of violations of municipal ordinances apparently is left solely to city officials. Misdemeanors are remitted to the county attorneys where punishment is limited to a fine not exceeding twenty dollars,⁴¹ and to the city prosecuting officials except in fifth and sixth class cities, depending upon whether the offense has been committed within or without the city. Apparently, it has not been judicially determined whether county attorneys have concurrent jurisdiction with city prosecutors over misdemeanors committed in cities.

Jurisdiction over misdemeanors where the fine is more than twenty dollars, but not more than five hundred dollars, and where the imprisonment is not more than twelve months, is shared by the county, circuit, and police courts.⁴² This means that the city prosecutor, the county attorney, and the Commonwealth's attorney may each have power to prosecute the same case. Who has priority seems to be settled only in cases in the circuit court, where KRS 69.220 provides that the county attorney cannot dismiss or control proceedings. The courts have held that the county attorney can not dismiss an action over the protest of the Commonwealth's attorney.⁴³ Under KRS 455.070, neither the Commonwealth's nor the county attorney can dismiss an indictment or enter a *nolle prosequi* without filing a written statement of his reasons, and then only pursuant to an order of the judge. The prosecution of high misdemeanors and felonies comes within the exclusive province of the Commonwealth's attorney.

In addition to the general definitions of jurisdiction, a number of statutes specifically enjoin their enforcement upon the county attorney, the Commonwealth's attorney, or the Attorney

³⁹ KRS 89.310.

⁴⁰ KRS 26.010.

⁴¹ KRS 25.010.

⁴² KRS 23.010, 25.010, 26.010.

⁴³ Commonwealth v. Huddleston, 283 Ky. 465, 141 S.W.2d 867 (1940).

General, or upon some combination of these officers. Such statutory assignments do not always seem consistent. For example, the seed laws are to be enforced by the Attorney General, although he may seek the aid of the Commonwealth's attorney,⁴⁴ but the feed laws are enforced by the county attorney⁴⁵

Other statutes assign responsibility to all of these officers, or make no specific assignment. For example, the enforcement of the health laws is given to the county and the Commonwealth's attorneys and to the Attorney General "within their respective jurisdictions."⁴⁶ The enforcement of fish and game laws and of sanitary laws for restaurants is shared by the county and the Commonwealth's attorneys.⁴⁷ Other statutes leave enforcement generally to "the prosecuting attorney in any county"⁴⁸

The Attorney General. The General Assembly, in KRS 15.020, designates the Attorney General as the chief law enforcement officer of the Commonwealth, with common law powers except as modified by statute, and except where it is made the duty of the Commonwealth's or county attorney to represent the state. The power of the Attorney General in criminal law enforcement is limited to handling appeals taken to the Court of Appeals and to prosecuting a number of violations under express statutory direction.

Statutes giving the Attorney General exclusive power to initiate criminal action, either on his own initiative or at the request of a state agency, are summarized in Chapter IV. These specific grants of authority relate to the following subjects: illegal trade practices by railroads; building and loan associations; unemployment compensation; water pollution control; agricultural seeds; workmen's compensation; accounting of state funds; physical therapy; certified public accountants; and securities. No general pattern for assigning authority to the Attorney General is ap-

⁴⁴ KRS 250.160. A similar provision, but explicit as to the Attorney General's right to call in both the commonwealth's attorney and the county attorney is KRS 342.425, concerning violations of the Workmen's Compensation Act.

⁴⁵ KRS 250.600.

⁴⁶ KRS 212.270. Statutes with similar provisions are: The Uniform Narcotic Drug Act, KRS 218.190; The Barbiturate Act, KRS 217.531; the Amphetamine Drug Act, KRS 217.790; the Medical Practice Act, KRS 311.495; and other health laws.

⁴⁷ KRS 150.130, 217.380.

⁴⁸ KRS 228.300.

parent, and the statutes do not indicate any clearly-defined standards for granting him jurisdiction.

Several sections of the statutes charge the county, city and Commonwealth's attorneys and the Attorney General with the responsibility of enforcing a statute "within their respective jurisdictions." It is assumed that this language does not vest any new powers in the Attorney General, but only reiterates his responsibility to represent the Commonwealth in criminal cases where the power to do so is provided elsewhere, as in appeals.

These statutes assigning the Attorney General and other prosecuting officers responsibility within their respective jurisdictions are also described in Part IV. They include: violations of the penal provisions of the Commonwealth's public health laws; violations concerning the labeling of mattresses; violations of laws to prevent the spread of tuberculosis; laws relating to narcotics, and to the licensing and practice of medicine and chiropody.

The role of the Attorney General in local prosecutions was explored in detail in a 1960 opinion,⁴⁹ relating to his responsibilities in the enforcement of state law relating to gambling, alcoholic beverages and prostitution. The opinion stated the Attorney General's position and is quoted at length below:

The statutes granting criminal prosecution powers to local prosecutors have been administratively construed as vesting those powers exclusively in the local prosecutors, the conclusion being that the Attorney General does not have general authority under which to prosecute criminal cases in circuit, county or police courts. There are certain exceptions to this rule where, by statute, the Attorney General is charged with prosecuting violations of specific statutes, such as the Commonwealth's insurance laws.

An attempt was made at the Constitutional Convention of 1890 to vest this enforcement authority in the Attorney General but was defeated, apparently by the argument that local prosecutors should be responsible only to the local electorate and that this was the best means of assuring the proper performance of their duties.

[I]t was suggested that law enforcement in the state might be enhanced by some supervision of the local prosecutors by the Attorney General. [T]he Constitutional Debates disclose that the argument then used against this

⁴⁹ Ops. Ky. Att'y Gen. 60-169 (1960).

form of supervision was that it would be impossible for local prosecutors to keep the Attorney General informed in regard to all prosecutions in their jurisdictions.

A review of the Debates shows that the Convention quite clearly had before it the question of charging the Attorney General with law enforcement responsibilities similar to those which are the subject of this opinion. The language of the Constitution equally clearly shows that, rather than vest the office with such duties and responsibilities, the Convention created the offices of Commonwealth's attorney and county attorney, leaving to subsequent legislatures the division of functions among the three.

It is only after such criminal cases have left the lower courts, and are before the Court of Appeals, that it is the responsibility of the Attorney General to represent the Commonwealth under the present law.

The Role of the Police. The importance of the police in the administration of justice is obvious. Yet in most states there is no formal connection between police and prosecuting officials. In some states the local prosecutor must rely entirely on the police for investigation of crime, but in others he may carry out an independent investigation. Special problems arise from the fact that the office of prosecutor is often based on a larger geographical unit than that of the police system, so he must deal with several police agencies.

Kentucky apparently has no law expressly dealing with the relationship between the Commonwealth's and county attorneys and the police. Cooperation between police and prosecutor depends on the individuals involved. Commonwealth's attorneys, however, may appoint one or more district detectives, depending upon population, providing the county involved has a population of at least 40,000.⁵⁰ The statutes are silent as to the detectives' duties, but a Federal District Court has declared that it is the duty of the Commonwealth's attorney to make use of his detective to keep down crime.⁵¹

Summary. Kentucky's Constitution establishes the offices of Attorney General, Commonwealth's attorney and county attorney

⁵⁰ KRS 69.110.

⁵¹ *Wilbur v. Howard*, 70 F Supp. 980 (E.D. Ky. 1947) (Suit to strike an attorney from court rolls. Reversed on grounds question became moot when defendant died while appeal was pending.)

The statutes establish the office of city prosecutor and city attorney, with different requirements for cities of different classes. The duties of these officers are assigned by statutes, but are not always clear or consistent.

The Attorney General represents the Commonwealth in the Court of Appeals, and when directed by specific statute. The Commonwealth's attorney has jurisdiction primarily over felonies, and the county attorney has jurisdiction primarily over misdemeanors. City prosecuting attorneys have jurisdiction primarily in municipal police courts.

RESPONSIBILITY FOR CIVIL MATTERS IN KENTUCKY

The responsibility for conducting civil law matters has been distributed among the Attorney General, the Commonwealth's attorneys, the county attorneys, the city attorneys, and various administrative agencies.

Attorney General. Numerous statutes charge the Attorney General with attending to matters of a civil nature, including both advisory functions and litigation. Although there is no clear pattern of responsibility, it should be noted that any department may require the advice and services of the Attorney General, but many have their own counsel. These relationships were discussed in part II of this report.

The Attorney General's approval is required of many things, ranging from the compromise of disputed claims against the state (KRS 45.220), to articles incorporating burial associations (KRS 303.090) He may bring action to remove non-elective peace officers (KRS 63.180), or to enforce orders of some administrative boards, but not of others. His duties of examination embrace such varied subjects as the articles of incorporation of insurance companies (KRS 299.040), and nudist colonies (KRS 232.040)

There is little uniformity in the legislative authority given the Attorney General under various statutes. He may condemn land for parks, pursuant to KRS 148.120, but some other condemnation proceedings are independent of his control, such as condemnation for highways under KRS 177.082. He is empowered to sue for the collection of fines imposed under some statutes,

such as KRS 6.130, relating to disobedient witnesses before the General Assembly, but enjoys no such authority generally. He is expressly enjoined to examine title to lands being acquired by the Division of Forestry (KRS 149.020), but he is apparently required to do this for all lands acquired by the state (KRS 56.040)

In performing some specific statutory duties, the Attorney General may call upon the Commonwealth's attorney or the county attorney for assistance. In some instances, such as actions instituted in behalf of the Division of Forestry under KRS 149.070, he may supervise the conduct of the case by the Commonwealth's attorney. In others, such as proceedings for removal of non-elective peace officers under KRS 63.180, he is given joint jurisdiction with the Commonwealth's attorney. In others, such as enforcement of penalties set by KRS 287.990 for violation of certain banking laws, the responsibility is his alone.

Commonwealth's Attorney. Generally, the Commonwealth's attorney is required under KRS 69.010 to "attend to all civil cases and proceedings in which the Commonwealth is interested in the circuit courts of his district," except in Franklin County, where the Capitol is located. Besides this general admonition, numerous duties are assigned by statute to the Commonwealth's attorneys. Some of these duties rest on him alone, but others are shared with the Attorney General or the county attorney. These specific statutes are summarized below.

Exclusive Duties of the Commonwealth's Attorney. *Collection Duties:* the Commonwealth's attorney is required to advise the collector of money due the Commonwealth from delinquent collecting officers for failing to return executions and he must prosecute motions to collect the money due (KRS 69.030), furthermore, the Commonwealth's attorney must take all necessary steps to collect any unsatisfied judgments in his district in favor of the Commonwealth (KRS 69.040). The Commonwealth's attorney is required to bring an action to collect the cost of fire fighting by the Division of Forestry from the person responsible for the origin of the fire (KRS 149.180)

Bar discipline: upon the request of any lawyer's client, the Commonwealth's attorney is required to prosecute his suit against an attorney who negligently performs his duties to his client (KRS 30.180)

Safeguarding elections and offices: it is the duty of the Commonwealth's attorney to institute actions against usurpers of county offices or franchises, if no other person be entitled thereto, or if such person fails to institute action during three months after the usurpation (KRS 415.040) The Commonwealth's attorney for the Franklin Circuit Court must take such steps on behalf of the Commonwealth as are necessary to insure a fair determination in a contested election involving a constitutional amendment (KRS 122.170)

Safeguarding the rights of persons of unsound mind: the Commonwealth's attorney is charged with preventing the finding of any person to be of unsound mind, who is in his opinion of sound mind (KRS 202.050)

Civil duties arising out of criminal cases: when a person indicted for stealing property escapes from jail or otherwise fails to appear, the person claiming the property may make a motion for its return, and the Commonwealth's attorney must defend such motion (KRS 431.210) He is required to transmit to the state prison with the commitment papers of each prisoner a concise statement of the facts adduced at the trial (KRS 439.37). The Commonwealth's attorney must also approve fees paid to circuit clerks in felony cases (KRS 64.020)

Duties which the Commonwealth's Attorney Shares with Others. A few statutes require the Commonwealth's attorney and the county attorney to work under the Attorney General's supervision. The Commonwealths and county attorneys are required to represent the Division of Forestry in any action instituted by it, and the Attorney General has supervisory authority in such actions (KRS 149.070) Litigation of the Workmen's Compensation Board shall, upon request of the Board, be instituted or defended by the Attorney General or by the Commonwealths or county attorney, under his direction (KRS 342.425)

Several statutes assign duties to the Commonwealth's attorney which are shared with the Attorney General and the county attorney When a mine has been closed by the state inspector and the owner brings an action to have it re-opened, the Attorney General and the Commonwealth's and county attorneys are all charged with appearing for the state to defend the action (KRS 352.430) All three are required upon request to represent the

Department of Motor Transportation (KRS 281.800), and the Department of Insurance (KRS 304.023) None of these statutes indicates who will determine which of the three officers shall appear.

A number of statutes assign responsibility to both the Commonwealth's attorney and the county attorney Both have authority to bring proceedings to suspend an attorney from practice when the attorney fails or refuses to pay to the client money collected in his behalf (KRS 30.190). Either the Commonwealth's or the county attorney may maintain an action in equity to enjoin the operation of a house of prostitution (KRS 233.030) Similarly, either may maintain an action in the name of the state against an owner of property declared to be a nuisance because of violations of certain liquor laws (KRS 242.320) The Department of Revenue may require the Commonwealth's and county attorneys to prosecute actions and proceedings and to perform other services incident to enforcement of the revenue law (KRS 131.130).

Both the Commonwealth's and the county attorney are required to investigate the oaths made by voters whose qualifications have been challenged (KRS 118.250). They may present such cases to the grand jury "as they or either of them deem proper." In the other instances of joint duties, the statutes give no indication of who shall take the responsibility for initiating the proceedings, if any are required.

County Attorney's Duties to Act on Behalf of the County. The county attorney is required by statute to attend the county and fiscal courts, to handle all cases there in which the county is interested and, upon the direction of the county or fiscal court, to conduct in other courts any civil actions in which the county is interested. In addition, he must give legal advice to the county and fiscal courts and advise the various county officers concerning county business. He is specifically directed to oppose all unjust or illegally presented claims. In the absence of the Commonwealth's attorney, he is instructed to attend the circuit court and look after the Commonwealth's business there.⁵² The statutes enjoin many other duties upon the county attorney; indeed, he has a far larger number of specific duties than does the Commonwealth's attorney

⁵² KRS 69.210.

The county attorney is assigned by statute a number of specific duties in which he acts on behalf of the county. He is required to institute condemnation proceedings against any property needed for flood control by the county (KRS 104.010). Upon resolution of the fiscal court, he must institute proceedings to condemn land needed by the county for road purposes (KRS 416.110). The county attorney is required to investigate applicants for permits to operate a place of entertainment and to report his findings to the county court (KRS 231.070).

The county attorney is directed to sue county officials to recover taxes improperly spent, or of which the county official should have prevented the expenditure (KRS 68.100). If the county attorney fails to act for six months, any taxpayer may prosecute the action. By statute, he is a member of the county budget commission (KRS 68.230). Before the fiscal court can loan any money accumulated in the county sinking fund on first mortgage real estate security, the county attorney must look up all titles of the property and approve all papers in connection with the loan (KRS 178.200).

County Attorney's Duties to Act on Behalf of the Commonwealth and County. Some statutes require the county attorney to act in behalf of the Commonwealth and the county. He is required to represent the interest of the state and county in all hearings before the County Board of Supervisors on appeals from tax assessments, and on all appeals from the Board's decisions (KRS 133.130). He is required to bring an action in the name of the state or county against an officer failing to levy or return any executions, or failing to pay the money when collected (KRS 135.110). The report of the settlement of an account made by a sheriff to the fiscal court is subject to exceptions from the county attorney, who represents the state and the county (KRS 134.310).

The county attorney is required to institute a civil action for damages to reimburse the state or county for harm done to a highway by a person violating the statute pertaining to the use of chains and lugs (KRS 189.190). He must oppose the wrongful opening, alteration, or discontinuance of any public road (KRS 69.230). Both the county clerk and the county attorney are charged with providing printed instruction cards for the guid-

ance of voters in casting their ballots (KRS 118.220) A similar duty is imposed with respect to voting machines (KRS 125.090).

The county attorney is required by a few statutes to act on behalf of the Commonwealth. He must take all necessary steps to collect unsatisfied judgments in his county in favor of the Commonwealth (KRS 69.240) He represents the state regarding claims for Confederate pensions (KRS 206.040) When the state is buying land the grantor must submit an abstract of title; the county attorney attests to the correctness of the abstract, but the Attorney General approves the title (KRS 56.040)

County Attorney's Duties to Act on Behalf of Local Agencies.

The county attorney is required to perform legal services for the County Board of Drainage Commissioners if it does not hire an attorney (KRS 267.410) He acts as counsel to the County Water Commission and, with the county judge, approves any additional counsel which the district employs (KRS 74.030) He must represent the Board of Pension Fund Trustees for the county police system in any action brought by or against it, and advise Board members in all matters pertaining to their duties (KRS 70.596) He must represent the commissioner of a sanitation district in opposing petitions objecting to the formation of the district (KRS 222.100) Planning and Zoning Commissions may call upon either the city or the county attorney for services (KRS 100.095)

The county attorney is required to assist in a proceeding to assess omitted property in all courts to which it shall be taken, and may represent either the state, county, school or other taxing district (KRS 132.350) He is required to serve notice and prosecute any action on a certificate of delinquency owned by a taxing unit (KRS 134.500)

County Attorney's Duties to Act in Behalf of State Agencies.

Although the Attorney General may be called upon to represent any state agency, a number of statutes assign the county attorney duties in this connection.

Several statutes relate to his duties in regard to the Department of Highways in carrying out its duties (KRS 178.280) He must represent the Highway Department in condemnation proceedings, or shall assist if such proceedings are brought by other counsel "authorized to represent the Commonwealth" (KRS

177.082) Agreements between the Department and a land owner about the value of a right of way must be approved by the county attorney (KRS 177.070); the courts have held that this section does not empower the county attorney to make the agreement, but only to approve agreements previously made by the land owner and the Department of Highways.⁵³ Conversely, an agreement that is not approved by the county attorney may not be enforced by the landowner, even after the highway is constructed.⁵⁴ Agreements as to the purchase of a privately surfaced road must be approved by both the county attorney and the county judge (KRS 177.070)

Various duties concern the Department of Revenue. The county attorney is directed to assist the Department of Revenue in bringing actions to collect unsatisfied executions in favor of the state and to realize upon uncollectible tax bills (KRS 135.040) He must bring an action for the Commissioner of Revenue to recover any sum due the state under the escheat statute, or to recover any property where the heirs of the decedent cannot be found (KRS 393.180). If such property is located in two or more counties, all the property may be included in one action, and the county attorneys of such counties are empowered to join in the action (KRS 393.210). The county attorney is made the Department of Revenue's agent in the collection of all judgments recovered in actions prosecuted by him under the escheat statute (KRS 393.250)

If a sheriff fails to record money collected from a delinquent taxpayer, or fails to collect collectible taxes, he shall be liable on his bond. The motion to collect may be made by the county attorney or by an agent of the Revenue Department, but the county attorney shall prosecute all such motions (KRS 134.340) He is directed to assist the Department in filing and prosecuting any action to declare tax sales invalid (KRS 134.540)

The county attorney must sue in the name of a state sanatorium district to recover the amount of a patient's maintenance in a state tuberculosis hospital. The circumstances under which suit is to be brought are outlined by statute (KRS 215.300). He is required to represent the plaintiff in any proceeding under

⁵³ Postlethweighte v. Towery, 258 Ky. 468, 80 S.W.2d 541 (1935).

⁵⁴ Hacker v. Clay County, 291 Ky. 614, 165 S.W.2d 172 (1942).

the Uniform Support of Dependents Act, upon request of the court or an appropriate welfare official or state agency (KRS 407.190).

City Attorney. Generally, city attorneys or solicitors are charged with giving legal advice to city officials and attending to all legal business involving the city. While most statutes outlining their duties are directed to a particular class of city, a few duties are placed upon attorneys of all cities. For example, a city attorney is authorized to bring condemnation proceedings for a city housing commission (KRS 80.150), and the "chief law officer" of a city must render legal services to city housing commissions (KRS 80.450). All city attorneys, except those of first class cities, are required to seek to recover from city officials who divert, or fail to prevent the diversion of, tax funds (KRS 92.340).

Cities of the First Class. The city attorney of a city of the first class is directed to supervise and direct the city department of law, give legal advice to the mayor and to all other departments, commissions, boards and officers of the city in the discharge of their official duties, and prosecute all suits for and defend all suits against the city (KRS 69.410).

In addition, he is assigned many duties by specific statutes. He is required to bring condemnation suits for a number of different agencies, such as: parks and recreation (KRS 416.120), redevelopment corporations (KRS 99.230); the fiscal court, when land within the city is needed for flood control (KRS 104.010); the county health board (KRS 212.590); and the board of the county children's home (KRS 210.070).

The city attorney in a first class city is charged generally with instituting any proceedings necessary under the public works program (KRS 93.100). He may bring an action against a redevelopment corporation to compel compliance with the redevelopment laws (KRS 99.190). Upon request, he must render legal services and advice to the city and county planning and zoning commission, and to the board of zoning adjustment and appeals (KRS 100.095). He is empowered to bring an action to enjoin violations of the zoning regulations (KRS 100.980). If he feels that the city has been aggrieved by the equalization board, he may appeal from the board to the quarterly court and, if necessary, to the

Court of Appeals (KRS 91.400) When such an appeal is taken by a taxpayer, the city attorney represents the board; when it is taken by the attorney himself, he represents the interest of the city

Cities of the Second Class. As previously noted, in cities of the second class which have adopted the commission or city manager form of government, the offices of city attorney and solicitor are abolished. The legal affairs of the city are apparently taken care of by employed counsel; however, counsel so employed become city attorneys, municipal officers.⁵⁵

Cities of the second class which have not adopted commission or manager government have a city attorney and a city solicitor. The city attorney's main duty is to conduct criminal prosecutions, but other duties may be assigned him by ordinance, or by the city solicitor (KRS 69.450) The city solicitor represents the city in the circuit court and Court of Appeals, provides legal advice for city officials, prepares city ordinances, supervises contracts, and attends to such legal business as may be prescribed by the mayor or by ordinance (KRS 69.460) He apparently assumes the duties assigned the city attorney in first class cities with respect to slum clearance programs (KRS 99.320) The city solicitor, if requested by the Board of Trustees of the Police and Firemen's Pension Fund, must advise, represent, and defend the board in all actions brought against it.

Cities of the Third Class. If a city of the third class has adopted the commission or manager form of government, its legal business is handled by contractually employed counsel (KRS 89.040; KRS 89.420) Otherwise, the city attorney is the general law officer of the city He advises officials and attends to all legal business of the city, except prosecutions, which are handled by an elected prosecuting attorney (KRS 69.490) The city attorney, upon request, handles litigation of the Board of Trustees of the Police and Firemen's Pension Fund (KRS 69.540)

Cities of the Fourth, Fifth and Sixth Classes. Cities of the fourth class which have adopted city manager or commission government contract for legal services; in other fourth class cities, the city attorney advises the legislative body and performs such services as it may require. He also performs services for the

⁵⁵ Black v. Sutton, 301 Ky. 247, 191 S.W.2d 407 (1945).

Board of trustees of the Police and Firemen's Pension Fund (KRS 69.575)

In both fifth and sixth class cities, the city attorney is required to advise city officers and attend to the legal business of the city as directed (KRS 69.580; KRS 69.590) Both classes of cities may employ special attorneys. The city attorney of fifth or sixth class cities is directed to represent the board of equalization (KRS 92.530) and to bring suit to recover taxes illegally spent (KRS 92.340)

Summary. Civil duties of the Attorney General, Commonwealth's attorneys, county attorneys and city attorneys are enumerated throughout the statutes. There is no consistent pattern as to what duties are assigned to which officer.

Specific duties assigned the Commonwealth's attorney cover a wide range of subjects, from approving certain fees of circuit clerks to collecting unsatisfied judgments due the Commonwealth. His duties in respect to several state departments are to be shared with the Attorney General and county attorney, but there is no indication of who will decide which officer shall act. In some instances, he has concurrent jurisdiction with the county attorney and, again, there is generally no indication of who shall initiate action.

The duties of the county attorney in civil matters are set forth in considerable detail. Many of these involve actions on behalf of the county or its officers, such as certain condemnation proceedings. Other statutes charge him with acting on behalf of the Commonwealth and the county, and a few require him to act solely on behalf of the Commonwealth. Numerous statutes require him to represent state agencies, although the Attorney General is required by statute to represent any state agency upon its request.

The duties of a city attorney depend upon the class of city. Generally, he is required to advise and represent city agencies and officers. Duties in connection with particular city boards and commissions are often set by statute.

Civil duties of these officers are scattered throughout the statutes and it is doubtful if every local prosecutor is fully familiar with his statutory duties. Some duties of apparently minor import are specified by statute, while some major duties are mentioned

only in general terms. The duties set by statute and the officer to whom they are assigned seem to derive more from custom, and from the opinions of the person drafting a particular statute, than from an objective standard.

SURVEY OF KENTUCKY PRACTICE

As part of this study, a detailed questionnaire was sent to Kentucky Commonwealths, county and city attorneys in the fall of 1961. Replies were received from twenty of the forty-eight Commonwealth's attorneys, and from fifty-three of the one hundred and twenty county attorneys. Forty city attorneys replied, one from a city of the first class, five from cities of the second class, seven from cities of the third class, and twenty-seven from cities of the fourth class. Questionnaires were not sent to attorneys of fifth and sixth class cities.

Not all respondents answered all questions, and information on some subjects is not statistically sufficient, but is included for informational value only. In addition to specific questions, these attorneys were asked to make any comments they deemed pertinent and to offer suggestions for improving the administration of justice in the Commonwealth. Apparently, this is the first survey of actual practice to be made in Kentucky, and, while it is neither complete nor conclusive, it is useful in relating statutory duties to actual working relationships.⁵⁶

Prior Experience. Some questions concerned the previous experience of these officials. The twenty Commonwealths attorneys replying had served from one to sixteen years in that position, with a median of five years service. Five of them had not held public office previously, eleven had held one other office, and four had held from two to four other offices. Six Commonwealth's attorneys had previously served as city attorneys, five had served as county attorney, three as state Senator, and two as state Representative. Other positions previously held included county judge, Commonwealth's detective, and Assistant Attorney General.

The fifty-three county attorneys responding had served for a median of eight years, or an average of ten years. The range was

⁵⁶ To encourage freedom in responses, the questionnaires were confidential, and were circulated and analyzed by the University of Louisville School of Law.

from two to twenty-four years. Twenty-three had served for longer than ten years. Twenty-four, or almost half of the fifty county attorneys answering this question, had not previously held public office. Eighteen had held one other office, and eight had held two other offices. Eight had previously served as city attorney, six as state Representative, three as county judge, two as police judge, two as county judge *pro-tem*, two as master commissioner, and the remainder of replies listed thirteen various public offices.

Nine of the forty city attorneys responding had served as city attorney for ten or more years, with the longest tenure being thirty-two years. Eighteen had previously held public office: these included six former county attorneys, three former police judges, two former city judges, and two former legislators.

This previous experience in other public offices undoubtedly is extremely helpful to these officers and, in effect, helps achieve a kind of coordination. It probably tends to create better working relationships and a better understanding of the duties of other offices.

Duties of Local Prosecutors. Local prosecutors were asked to estimate the percent of their office's work which was concerned with criminal, civil, administrative and other matters. The replies were as follows:

	Average percent of time of office's work			
	<u>Criminal</u>	<u>Civil</u>	<u>Admin- istrative</u>	<u>Other</u>
Commonwealth's attorneys	91%	4%	4%	1%
County attorneys -----	60%	14%	20%	6%
City attorneys -----	25%	28%	45%	2%

These percents are derived from the average of answers by forty city attorneys, fifty county attorneys, and eighteen Commonwealth's attorneys. This is not, of course, a large enough sample to be conclusive, but it does indicate that city and county attorneys are burdened with a great many duties not related to civil or criminal matters, and that Commonwealth's attorneys are concerned primarily with criminal cases.

County attorneys were asked to give a brief description of their official duties, and forty-six responded. Prosecutions took up 26 percent of their time; county advisory matters took 23 percent; pre-trial criminal duties involving preparing warrants and indictments and working with the grand jury took 16 percent; assisting the Commonwealth's attorney in circuit court took 13 percent; fiscal court matters took 13 percent; domestic relations accounted for 6 percent; and the remaining 3 percent was devoted to county road matters.

In describing their duties, nineteen of the forty city attorneys responding mentioned prosecuting in court; seventeen named writing and drafting ordinances; fifteen mentioned advising the city council; twelve cited representing all city legal actions in local courts; eleven named attending council meetings; nine each named representing the city on legal matters, advising city officials, and eight mentioned advising the city on legal matters. Slightly more than 40 percent of city attorneys said that they gave legal advice to private citizens as part of their official duties, and said such advice was concerned primarily with city government matters such as zoning and licensing.

Commonwealth's attorneys were asked if they gave legal advice to county officials. Forty percent gave such advice often, 50 percent seldom, and 10 percent never advised county officials. The officials most frequently named as receiving advice were the county judge, the sheriff, the circuit court clerk, the county attorney, and the county clerk. The subject of such advice ranged from fiscal matters to search and seizure, with the largest group of answers mentioning criminal matters.

Relationship Between Local Prosecutors. Twenty Commonwealth's attorneys returned the questionnaire. All but two said that they work with the city or county attorney on cases. Eighty percent of these are criminal cases; the rest are civil, juvenile, or other cases. One Commonwealth's attorney stated that he worked with the county attorney on all cases in circuit court, and another said that he worked on any case with which he was asked to help.

All but three of the twenty Commonwealth's attorneys who answered the question conferred with the county or city attorney on legal work done for the Commonwealth. About half of this work concerned criminal matters; 10 percent concerned rights-

of-way; and the rest included civil matters, public buildings, roads and parks, administrative duties, and grand jury work in preparation for indictments and questions of evidence produced in the arraignments in their courts.

Generally, the Commonwealth's attorney handles all cases in the circuit court and the county attorney handles all cases in the quarterly court. Some had arrangements whereby the duties of one were taken over by the other in the event of illness or absence. One Commonwealth's attorney said that he prosecuted all criminal cases because none of the county attorneys in the district liked to try criminal cases; another said that he prosecuted all cases in the three counties of his district.

All but one of the fifty county attorneys answering this part of the questionnaire indicated that they worked with the Commonwealth's attorney, and many added that this cooperation most frequently concerned criminal matters. About forty percent settled problems of divided jurisdiction by prosecuting all cases where jurisdiction overlapped, leaving the Commonwealth's attorney only those cases where he had exclusive jurisdiction. Seven indicated that no conflicts had ever arisen with the Commonwealth's attorney over who was to prosecute, and eight stated that the problem was solved by agreement. Seven of the fifty county attorneys let the Commonwealth's attorney resolve the matter.

Fifty-seven percent of the city attorneys responding said that they worked in cooperation with county or Commonwealth's attorneys. Seventy percent of the fourth class city attorneys worked jointly, but only two in second class cities and one in third class cities said that they worked with these other officers. In first and second class cities, cooperation often resulted from existence of a joint agency and on matters of mutual interest, such as injunctions for disorderly houses and gambling. In fourth class cities, cooperation occurred most often in connection with criminal cases appealed from police court, and in cases where the defendant was held to the grand jury. Felonies, criminal prosecution and professional courtesy sometimes brought about joint work, as did nuisance and juvenile cases, and appeals.

It is interesting to note that a considerable number of answers were qualified by use of the words "rarely," "on rare occasion," and "sometimes." Three questionnaires stated bluntly that they

did not work with other prosecutors on court cases. The need for cooperation apparently is recognized by most local prosecutors, but a variety of methods have evolved for working together, and actual practice seems to derive as much from custom as from statute.

Relationship to Attorney General. The relationship between local prosecutors and the Attorney General was a subject of the questionnaire. Commonwealth's attorneys were asked how often they asked the Attorney General for advisory opinions, and for what reason did they seek his opinion. Almost half replied that they never asked for an Attorney General's opinion, 45 percent said seldom, and only 5 percent said often. Various reasons were given for seeking his opinion, such as: when statutes or court opinions do not cover a matter; when there is a question that does not appear to be settled law; in regard to matters affecting office holders; and extraditions.

In the questionnaire to county attorneys, they were asked whether they referred some inquiries to the Attorney General or the Commonwealth's attorney when they were asked for legal advice. Seventy percent said they sometimes referred inquiries to the Attorney General, while 40 percent said they sometimes referred questions to the Commonwealth's attorney. If the answers are viewed together, 34 percent of the county attorneys referred inquiries to both the Attorney General and the Commonwealth's attorney, while 26 percent referred questions to neither of these officers.

The same question was asked of city attorneys. Of the forty responding, twenty-three referred questions to the Attorney General, one referred questions to the Commonwealth's attorney, and seven referred questions to the county attorney. Questions referred to the Attorney General were primarily concerned with interpretation of statutes, and legal questions beyond the city attorney's research facilities.

Only 20 percent of the Commonwealth's attorneys said they had ever asked the Attorney General for help on a case, but 65 percent said they coordinated with him when a case was appealed. Matters on which help had been requested, but denied, concerned election law violations and challenges to watershed conservation districts. The procedures for coordinating a case with the Attor-

ney General varied greatly, from "suggest theory on which case prosecuted" to "send citations to the Attorney General." Generally, however, they consisted of offering information or suggestions relative to the case.

Slightly over half of the county attorneys responding said that they cooperated with the Attorney General when a case they had prosecuted was appealed; 22 percent said they did not, and 26 percent said they were never asked to cooperate. The procedures varied, but the most frequent response was that they "do whatever the Attorney General wants."

Control Over Local Prosecutors. Several questions concerned the desirability of changing relationships between local prosecutors. Fifteen of the twenty Commonwealth's attorneys responding felt that they should have more direct control over local law enforcement agencies, and seventeen wanted more assistance from such agencies. They were concerned primarily with the need for assistance in gathering, preserving and presenting evidence in criminal prosecutions. To accomplish this, they wanted either a plain clothes detective or a Commonwealth's detective to work with or under them.

One-third of the city attorneys replying to the question felt they should have more direct control over local law enforcement. Slightly more than half of the city attorneys did not feel that they should have more control, and the rest gave no answer. Only one-fifth of the second class city attorneys and one-fifth of the third class city attorneys favored more control; however, forty-four percent of the responses from fourth class cities favored more control over local law enforcement.

Slightly more city attorneys felt there was a need for assistance from local law enforcement agencies: 45 percent answered yes, 30 percent answered no, and 25 percent gave no answer. Fifty-five percent of fourth class city attorneys called for more cooperation, 30 percent felt no such need, and 25 percent did not answer. Of the seven responses from cities of the third class, one favored more assistance, two were opposed, and four did not answer. Attorneys in cities of the second class split their answers evenly

The predominant types of assistance needed, as shown by answers from fourth class cities, were in the area of investigations and arrests, warrants, and police departments.

Only 40 percent of county attorneys desired more control over local law enforcement. Sixty-three percent, however, felt a need for more assistance, particularly in the area of investigation.

Educational and Investigative Facilities. Kentucky is not among those states which make informational and investigative facilities available to local prosecutors. Returns from the questionnaire indicate that Commonwealth's, county and city attorneys recognize the need for improving such facilities to aid in their work.

Seventeen of the twenty Commonwealth's attorneys responding wanted the services of a state bureau of investigation made available to local officials. The kinds of services they wanted included scientific and laboratory analysis, and trained investigators and other experts in fingerprinting, ballistics, handwriting analysis and similar technical services. Nearly all the Commonwealth's attorneys agreed that local law enforcement officials needed such help in the successful prosecution of cases and wanted these services made available to themselves and to sheriffs.

All but two of the Commonwealth's attorneys thought that more informational and educational facilities should be available to local law enforcement officers. Half of them wanted this done through periodic meetings, one-third through bulletins, and one-sixth through personal instruction or periodic training courses.

The subjects in which they felt such training was needed included investigations, gathering and preserving evidence, and trial preparation and procedure. Other subjects mentioned were: arrest procedures, including warrants; search and seizure; and subjects dealing with the rights, duties, and responsibilities of all local law enforcement officers. Two-thirds wanted some state agencies to furnish such services; other suggestions included the Commonwealth's attorney, the circuit judge, the Kentucky Bar Association, and the county attorney.

Eighty percent of answers from city attorneys definitely favored making more informational and educational facilities available to local law enforcement officers. Seventeen city attorneys favored instituting meetings and bulletins, three checked bulletins only, and seven checked meetings only.

About eighty percent of the city attorneys responding favored

establishing a state bureau of investigation; most of the remaining 20 percent did not answer the question.

Response to the questionnaire indicated that officers of smaller municipalities do not have adequate opportunity for training or facilities for investigation. Some of the kinds of services desired were: laboratory work; fingerprints, both latent and normal; technical advice from scientifically trained personnel; handwriting analysis; identification; records and evidence; lie detection; and vehicle license check. The answer to what officials should get such service was often woven into the answer on what kinds of services were wanted, making it difficult to compile. The most precise answer possible under these conditions is that such services should be available to all city officials who need them and do not have the training or facilities to provide them. The city prosecutor, city attorney, and police department were named specifically

Intervention by the Attorney General. In many states, the Attorney General may intervene in local prosecutions, either on his own initiative, or upon the request of some official, such as the Governor or the local prosecutor himself. In some states, such intervention is limited to particular circumstances. The Kentucky survey requested the views of local officials on such intervention.

Sixty percent of the Commonwealth's attorneys were opposed to any intervention by the Attorney General. Most of these gave no reason for their opposition, but others stated that criminal prosecution was a local problem, and should be solved locally. Some expressed a fear that the power of intervention might be used by an Attorney General for political purposes. An additional fifteen percent opposed intervention, but qualified their opposition by stating that the Attorney General should be allowed to intervene where local officials were involved, or would not prosecute.

About one-fourth of the Commonwealth's attorneys thought intervention should be allowed upon invitation of the Commonwealth's attorney, or in cases involving great public interest. One suggested limiting intervention to murder cases where the death penalty is sought. Apparently, no Commonwealth's attorney favored unlimited intervention, but if the qualified negatives

are added to the qualified affirmatives, forty percent would endorse a law allowing intervention in limited circumstances.

About half of the county attorneys responding opposed intervention by the Attorney General, and about half of these gave reasons for their opposition. The primary reasons were a belief that local officials are better advised on local matters, and fear of a politically-motivated Attorney General. Two county attorneys favored allowing such intervention when the Attorney General deems it necessary, or when local law enforcement has failed. Others thought intervention warranted when local officials refuse to act, or are guilty of malfeasance, or in similar circumstances.

About half of the city attorneys also opposed intervention, although many of them qualified their answers with such phrases as "except in extreme circumstances." They apparently believed that local problems are best handled on the local level, and that the Attorney General has enough responsibilities without imposing this added burden.

Some city attorneys cited instances when they thought intervention would be proper, such as in matters of state welfare and interest, or when the Commonwealth's attorney is disqualified and the court wishes to call in the Attorney General. Another view was that the local official should do the work and when he is disqualified, the court should be able to appoint a replacement, but not the Attorney General.

Other Suggestions from Local Officials. Eighty percent of Commonwealth's attorneys answering the questionnaire wanted changes in law and procedure to improve relationships between officials in the administration of justice. More interest was shown in the adoption of a revised Criminal Code than in any other single subject: approximately fifteen percent of those making suggestions favored such an enactment. Since the questionnaire was circulated, a new Criminal Code has been enacted.⁵⁷ About ten percent of the Commonwealth's attorneys felt they should be placed on a salary, rather than paid by fees, and another ten percent wanted a detective assigned directly to their office.

⁵⁷ Ky. Acts 1962, ch. 234.

Other suggestions included: a more specific definition of the duties assigned to each of the local prosecuting officials; a more equal distribution of case loads, or the passage of legislation requiring or encouraging the county attorney to assist the Commonwealth's attorney in grand jury work, an increase in their expense allowance;⁵⁸ and simplifying and printing indictment and warrant forms for use throughout the state. One believed that the county and city attorneys should be subject to supervision by the Commonwealth's attorney, with all three officers being subject to some type of supervision by the Attorney General. Another suggested that the Commonwealth's attorney be abolished, and his duties transferred to the county attorney. Fifteen percent saw no need for any changes, and five percent did not answer the question.

Only half of the county attorneys offered any suggestions. Four favored abolition of the office of Commonwealth's attorney; only one stated his reason, which was that such action would eliminate "buck passing" and make the county attorney clearly responsible for criminal prosecution. Four favored some kind of centralization of prosecuting powers: one of these favored creating a state Department of Prosecution; one would make the Attorney General's office into a Department of Justice. Other suggestions included: establishing a Commonwealth's attorney and a public defender in each county and making the county attorney responsible only for civil matters; abolishing the fee system; giving the county attorney control over all misdemeanors; establishing special facilities for juvenile offenders; authorizing the county attorney to issue warrants; and eliminating the trial jurisdiction of magistrates, leaving the quarterly court with exclusive jurisdiction over misdemeanor cases.

Ten percent of the city attorneys did not suggest any changes, and twelve stated that no changes were necessary. The remainder offered a variety of suggestions. Many of these concerned enlarging police court jurisdiction, to eliminate delay and reduce the problem of witnesses becoming unavailable. Suggestions on this subject ranged from raising the limitation on appeals to creating a completely new system of courts. Many city attorneys

⁵⁸ The 1962 General Assembly increased the commonwealth's attorneys monthly expense allowance from \$125 to \$250, Ky. Acts 1962, ch. 261.

advocated higher qualifications for judges, and one suggested that police judges in fourth class cities be required to be lawyers.

Summary. The survey indicated that there is little uniformity in relationships between local prosecutors. Most of the Commonwealths, county and city attorneys responding said that they worked with other local prosecuting officials, but some did not. In the absence of statutory definition, there was considerable variation in the approach of local officials to dividing jurisdiction. Criminal cases apparently elicit the most cooperation.

Most Commonwealths and many county attorneys felt that they should have more control over local law enforcement agencies, apparently because they believed more assistance from such agencies was needed. Most of the respondents indicated a need for more informational and investigative facilities, primarily through bulletins and meetings. The need for more scientific and technical services apparently is felt by most local prosecutors.

Over half of the Commonwealth's, county and city attorneys were opposed to allowing the Attorney General to intervene in local prosecutions. The primary reasons were a fear that an Attorney General might be politically-motivated, and a belief that local matters should be handled locally. There were, however, few suggestions on how to handle situations where local law enforcement and prosecution procedures are ineffective. Some respondents believed that intervention by the Attorney General would be warranted under limited circumstances, and a few believed that he should be allowed to intervene on his own initiative.

A variety of suggestions were offered for improving the administration of justice. The fact that these suggestions were so varied and covered a broad range of possible changes probably indicates that there has been little discussion among these groups about possible revisions. It may also indicate a lack of information about alternative arrangements which have been found workable in other states.

RELATIONSHIP OF THE ATTORNEY GENERAL TO LOCAL PROSECUTORS IN OTHER STATES

The system in Kentucky contrasts with that of the federal government and of many states. The Attorney General of the United States has complete authority over local prosecutions, which are handled by a local United States Attorney, appointed by the Attorney General. The Federal Bureau of Investigation is directly responsible to the Attorney General. Other special federal investigative agencies are ultimately responsible to the President, who depends upon the Attorney General for law enforcement, so there is in fact an integration of the federal investigative and enforcement agencies.

The states show diverse relationships between the Attorney General and local prosecutors, with a wide variation in the degree of autonomy permitted local officials. A detailed examination of each state is beyond the scope of this study, but a few states are discussed below to illustrate different types of relationships.

Minnesota. Minnesota has local prosecutors, but the Attorney General has considerably more powers in local prosecutions than does his Kentucky counterpart. The Minnesota statutes require the Attorney General to appear for the state in all cases in the supreme and federal courts wherein the state is directly interested; to appear in civil cases in the district court when, in his opinion, the interest of the state requires it; and, upon request of the county attorney, to appear in the district court in such criminal cases as he deems proper.⁵⁹ By custom, the county attorneys for three Minnesota counties handle all of their criminal matters in the Supreme Court.⁶⁰

Upon the Governor's request, the Attorney General is required to prosecute any person charged with an indictable offense, and he may attend upon the grand jury and exercise the powers of a county attorney in such cases. The present Attorney General believes that he has authority to initiate and conduct criminal proceedings independently of the local prosecutor, by reason of being chief law officer. Some Minnesota Attorneys General, how-

⁵⁹ Minn. Stat. [hereinafter cited as MS] § 8.01 (1945).

⁶⁰ Minnesota reply to Council of State Governments [hereinafter cited as COSGO] Preliminary Questionnaire on the Powers, Duties and Organization of the Office of Attorney General, question 35(c).

ever, have taken the position that law enforcement devolves almost entirely on the county attorney and the sheriff.⁶¹

It is the county attorney's duty, upon request of the Attorney General, to appear in any court in the county and act as attorney for all state officers and agencies in matters pertaining to their duties. Specific statutes authorize the Attorney General to require the county attorney to prosecute for: the enforcement of motor vehicle taxes; railroad and warehouse violations; trespasses upon state lands; and to appear in any case instituted by the Attorney General in the county involving applications to preempt or locate public lands claimed by the state.⁶²

The Attorney General has no express statutory authority to direct police officials, but a Bureau of Criminal Apprehension is created by statute under the Attorney General, and is required to cooperate with sheriffs and other local police.⁶³

New Jersey. The situation in New Jersey, where the major law enforcement agencies were brought together under a Department of Law and Public Safety, is unique. This gives the Attorney General supervision over criminal and motor vehicle law enforcement through the state police, as well as other important policing functions. In addition to the State Police, about two hundred investigators, most of them with authority to enforce specific laws, are employed by the Department.⁶⁴

The powers of the New Jersey Attorney General in criminal prosecutions have been summarized as follows:

The Attorney General must proceed in any criminal matter in the event of a vacancy in the office of County Prosecutor, at the request of the Governor, the Assignment Judge of the Superior Court, the County Board of Chosen Freeholders or the County Prosecutor himself. In practice the County Prosecutor will request the intervention of the Attorney General where he has a conflict of interest because he has represented the complaining witness or some other interested person in his private law practice, because he is sick or disabled or on vacation, or because the matter is an important one reaching across county lines and, possibly, because the criminal prosecution has developed from

⁶¹ MS § 8.01; COSGO Questionnaire, *op. cit. supra* note 60, question 33(a), citing 1932 Minn. Att'y Gen. Rep., No. 70.

⁶² MS §§ 168.31(6), 216.10, 388.05, 90.09.

⁶³ MS §§ 626.32, 33.

⁶⁴ New Jersey reply to COSGO Questionnaire, *op. cit. supra* note 60, at 9.

a State Police gambling or narcotics raid. When the Attorney General appears in a criminal proceeding he has all the powers of the Prosecutor to appear before the Grand Jury, to try the case and to take all other necessary actions.⁶⁵

New Mexico. The Attorney General of New Mexico has limited powers in local criminal prosecutions. He may engage in criminal prosecutions upon a request of the Governor, or within his own discretion in certain instances.

The statutes provide that he may attend and assist in the trial of any indictment in any county upon direction of the Governor. Upon the failure or refusal of any district attorney to act in any criminal or civil case in which the county, state or any agency thereof has an interest, the Attorney General may act upon behalf of the county, state or agency if he finds such action to be advisable after a thorough investigation. This is limited, however, to the provision that the Attorney General shall, upon direction of the Governor, investigate any matter in any county in which the county or state may be interested; after such investigation, he may take whatever action he considers the conditions warrant.⁶⁶

Virginia. The Attorney General of Virginia has limited authority to institute and conduct criminal prosecutions in the state courts. He has express authority, within his discretion, to leave prosecutions to the Commonwealth's Attorney or institute proceedings himself where: (1) there are violations of the Alcoholic Beverage Control Act and laws relating to motor vehicles; (2) in cases involving the handling of funds by a state agency; (3) in cases involving the unauthorized practice of law⁶⁷

The Attorney General may also participate in criminal proceedings upon request of the Governor, and in all criminal cases before the Supreme Court of Appeals where the state is a party or is directly interested. In some instances the statutes expressly authorize the Attorney General to institute criminal proceedings or proper proceedings for the enforcement of a particular statute. The Attorney General, however, has taken the position that the statute cited above, which authorizes him to institute proceedings

⁶⁵ *Id.* at 7.

⁶⁶ N. M. Stat. art. 8, §§ 4-3-2, 4-3-3 (1953).

⁶⁷ Va. Code Ann. § 2-90 (1950).

only in three instances, supersedes the statutes which specifically direct him to institute criminal prosecutions.⁶⁸

Michigan. Michigan is an example of a state where the Attorney General has broad powers. He is required to intervene in civil or criminal proceedings at the direction or request of the Governor or legislature, and is authorized to intervene when in his own judgment the interests of the state so require. He may initiate and conduct criminal proceedings independently of the local prosecutor. He may intervene in any action commenced in any court of the state whenever such intervention is necessary to protect any right or interest of the state or its people. He is required by law to supervise, consult with and advise the prosecuting attorneys in all matters pertaining to their official duties.⁶⁹

Summary of Other States. A 1961 Council of State Governments questionnaire will give a current and accurate picture of relationships between the Attorney General and local prosecutors in the fifty states, when its results have been compiled. Pending completion of that study, the most recent detailed information available is that published in 1959 by Roy Hall of the University of North Carolina Institute of Government, in "Control of Prosecuting Officials by the Attorney General."⁷⁰ The following summary is taken from that study, as supplemented by incomplete replies to the Council of State Governments questionnaire.

Local prosecutors are elected in most of the states. They are appointed by the Governor in Florida and New Jersey and by

⁶⁸ Virginia reply to COSGO Questionnaire, *op. cit. supra* note 60, question 33.

⁶⁹ Michigan reply to COSGO Questionnaire, *op. cit. supra* note 60, questions 33, 34, 35; Mich. Stat. Ann. §§ 3.181, 3.212 (?).

⁷⁰ Other studies include a monumental series published by Professors Newman F. Baker and Earl H. De Long in the 1930's. Baker, *The Prosecutor-Initiation of Prosecution* 23 J. Crim. L., C. & P. S. 770 (1932); De Long and Baker, *The Prosecuting Attorney—Provisions of Law Organizing the Office*, 23 J. Crim. L., C. & P. S. 926 (1932); Baker and De Long, *The Prosecuting Attorney—Powers and Duties in Criminal Prosecution*, 24 J. Crim. L., C. & P. S. 1025 (1933); De Long and Baker, *Powers and Duties of the Prosecuting Attorney: Quasi Criminal and Civil*, 25 J. Crim. L., C. & P. S. 21 (1934); De Long, *Powers and Duties of the State Attorney General in Criminal Prosecution*, 25 J. Crim. L., C. & P. S. 358 (1934); Baker and De Long, *The Prosecuting Attorney and His Office*, 25 J. Crim. L., C. & P. S. 695, 884 (1935); Baker and De Long, *The Prosecuting Attorney: The Process of Prosecution*, 26 J. Crim. L., C. & P. S. 3, 185 (1935); Baker, *Legal Aspects of the Office*, 26 J. Crim. L., C. & P. S. 647 (1935); Baker and De Long, *The Prosecuting Attorney and Reform in Criminal Justice*, 26 J. Crim. L., C. & P. S. 821 (1936).

the local courts in Connecticut. They are appointed by the Attorney General in Alaska, Delaware and Rhode Island, and the Attorneys General in these three states appear to have complete control of all details of prosecution. Variations ranging from complete control to complete local independence are found among the other states.

In five of the states where local prosecutors are elected, the Attorney General has over-all responsibility for prosecuting criminal cases, and exercises wide supervisory powers. In the remaining states, control and coordination by the Attorney General is exercised in varying degrees and by varying methods.

About half of the states have sought to maintain uniformity of law enforcement by permitting the Attorney General to initiate criminal proceedings on his own motion, thus giving him concurrent jurisdiction with the local prosecutors. Most other states authorize the Attorney General to act only in limited circumstances. In about twenty states, he may intervene in or initiate criminal proceedings only upon request of the Governor. Other states allow the Attorney General to act when local law enforcement has broken down, but several states require an invitation from the local prosecutor. Some states authorize the Attorney General to initiate prosecutions or to intervene in pending prosecutions in certain types of cases designated by statute, such as liquor and gambling violations, motor vehicle theft, and misuse of state funds.

Over half of the states, including Kentucky, have divided jurisdiction over criminal matters between the Attorney General and the local prosecutors, so that the prosecutors conduct the trials, and the Attorney General handles cases on the appellate level. Most of these states, unlike Kentucky, require local prosecutors to participate in preparing the brief, or to assist in presenting the case if the Attorney General so requests.

Several states provide for control by the Attorney General through threats of removal, either by quo warranto or by some simplified statutory proceeding, but this power is usually given along with substantial grants of other powers. Kentucky is one of about a dozen states in which the Attorney General appears to have little or no supervisory power over local prosecutors.

Several states help coordinate the work of the Attorney General and local prosecutors through educational programs. For example, Indiana's statute provides that the Attorney General may call two annual conferences of prosecuting attorneys; decided cases of importance are discussed, and a detailed syllabus and highlights of cases are furnished in brochure form.⁷¹ The California Attorney General holds bi-monthly meetings with district attorneys and sheriffs, who have been organized into zone groups for this purpose, and the meetings are used to discuss law enforcement problems of statewide importance and of special interest to the particular zone.⁷² In Texas, the Attorney General has been calling an annual conference of state law enforcement agencies and prosecutors for the last decade, on his own motion.⁷³

Several states offer certain police and reporting services to local officials. The North Carolina Department of Justice has a Division of Criminal and Civil Statistics and a State Bureau of Investigations which, among other functions, provide local officials with statistical data and technical services.⁷⁴ The Attorney General of Washington publishes various booklets for the information of local officers, including a booklet on search, seizure and arrest, a manual for justices of the peace, and Washington juvenile laws.⁷⁵ The Attorney General of Maine may employ detectives at state expense whenever the occasion, in his opinion, warrants such services, and may authorize county attorneys to avail themselves of this service, without expense to their county.⁷⁶

The local prosecutor in about twenty states apparently reports to the Attorney General, either periodically or on demand. Reports may be primarily statistical or may be limited to fiscal matters. Reports are usually required in those states where all or part of the prosecutor's salary comes from the state.

⁷¹ Indiana reply to COSGO Questionnaire, *op. cit. supra* note 60, question 85.

⁷² Council of State Governments, Preliminary Compilation, State-by-State Summaries of Powers of the Attorney General in Criminal Law Enforcement, May, 1961.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Washington reply to COSGO Questionnaire, *op. cit. supra* note 60; Table 25 A.

⁷⁶ COSGO Preliminary Compilation, *op. cit. supra* note 72, citing *Watts Detective Agency v. Inhabitants of Sagadanoc County*, 137 Me. 233, 18 A.2d 308 (1941).

Recommendations of Experts. The local prosecutor has an important and often dominant position in the administration of justice. He is extremely influential in determining who is to be prosecuted, or when the court is to accept a plea of guilty to a lesser offense. One authority said of the local prosecutor that:

Nowhere is it more apparent that our government is a government of men, not of laws. Nowhere do the very human elements of dishonesty, ambition, greed, lust for power, laxness or bigotry have more room for development. Also there is no office where an able and honest public servant can be more effective.⁷⁷

Because the office is so important, there have been many efforts to revise it, and to integrate the work of the local prosecutor into an orderly structure including all offices from the Attorney General to the lowest police officer.

Recommendations of experts in this area cover a wide scope. Many are directed at specific defects, such as the fee system of compensating local prosecutors, or aim at attracting competent career personnel.⁷⁸ Other recommendations involve ministerial matters, such as keeping better records, or preparing cases more adequately. Some proposals seek to reorganize the entire system for administration of justice.

Some of the principle criticisms and suggestions for improvement made by authorities in the field are summarized below. Only those recommendations which might be considered applicable to Kentucky are included. For example, it is often suggested that aggrieved parties be allowed to engage private counsel to press criminal prosecutions if the official prosecutor fails to act.⁷⁹ But this suggestion does not relate to Kentucky, where private prosecutors are apparently permitted to operate,⁸⁰ so the recommendation is not discussed here.

The argument of students in this field against part-time prosecutors may be summarized as follows: a prosecutor who is employed on a part-time, short-term basis is subject to many temptations; he may be a young man interested in building up a practice

⁷⁷ Mayers, *The American Legal System* 397 (1955).

⁷⁸ See generally Baker and De Long, *The Prosecuting Attorney and Reform in Criminal Justice*, 26 J. Crim. L., C. & P. S. 821 (1936).

⁷⁹ Note, 65 Yale L.J. 209 (1955).

⁸⁰ *Bennyfield v. Commonwealth*, 13 Ky. L. Rep. 446, 17 S.W. 271 (1891).

and, while he can vigorously prosecute a bank robber, he must be wary of offending prominent citizens who might have committed some public welfare offenses.⁸¹ This leads to leniency with respect to politically influential persons and others who might aid the prosecutor's career.⁸² Therefore, a full-time career prosecutor is needed.

The case for central control of local prosecutions is presented as follows: the Attorney General's power to prosecute is often limited to regulatory and taxation statutes, so that the prosecution of crimes is generally in the hands of local officials. The local prosecutor, who is usually elected, is in no sense subordinate to the Attorney General, so there is no official who has power to make law enforcement uniform throughout the state. The Attorney General is the chief law officer of most states, and is nominally responsible for enforcing the law, but he is stripped of means by which this responsibility may be met. Thus, even a career prosecutor may be lax in enforcing laws and not be called to account.⁸³ Therefore, supervision by a central authority, probably the Attorney General, is indicated. On the other hand, it is argued that the efficiency of state prosecutions might be increased at the neglect of local matters if the local prosecutors were made subject to central control.

As long ago as 1934, the American Bar Association in its annual report⁸⁴ recommended the creation in each state of a "State Department of Justice, headed by the attorney-general or by such other officer as may be desirable, whose duty it would be to direct and supervise actively the work of every district attorney, sheriff, and law enforcement agency, and who would be specifically charged with responsibility therefor." The report further recommended that the Commissioners on Uniform State Laws prepare such an act. A preliminary draft was promptly offered,⁸⁵ but a model act was not forthcoming until 1952.⁸⁶ As of 1960,

⁸¹ See Nedrud, *The Career Prosecutor*, 51 J. Crim. L., C. & P. S. 557 (1961).

⁸² See *What is Wrong with the Prosecutor?*, 11 J. Am. Jud. Soc'y 67 (1927); *The Full Duty of the Prosecutor*, 23 J. Am. Jud. Soc'y 238 (1940).

⁸³ *Wilbur v. Howard*, 70 F. Supp. 980 (E.D. Ky. 1947).

⁸⁴ 59 Rep. of Am. Bar Ass'n. 113 (1934).

⁸⁵ 1935 Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 249.

⁸⁶ 1952 Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 366.

no state had adopted this act. Another model act has been proposed in recent literature.⁸⁷

Kentucky's Attorney General has suggested that consideration be given to "the desirability of empowering the Department of Law to intervene or supersede in criminal matters where essential to effect the administration of justice."⁸⁸ A bill introduced by the Senate and House Majority Leaders in the 1962 General Assembly, which was passed by the House but never brought to a vote in the Senate would have provided that:

(1) County and Commonwealth Attorneys may request in writing the assistance of the Attorney General in the conduct of any criminal investigation or proceeding.

(2) Whenever requested in writing by the Governor, or by any of the courts or grand juries of the Commonwealth, or upon receiving a communication from a sheriff, mayor, or majority of a city legislative body stating that his participation in a given case is desirable, or when deemed necessary by the Attorney General to effect the administration of justice and the proper enforcement of the laws of the Commonwealth and when regarded by the Attorney General as of particular significance to the welfare of the Commonwealth or beyond the resources of the local prosecutor to handle effectively, the Attorney General may either supersede or intervene and participate in and direct any investigation or criminal action, conducting any proceeding necessary to preserve the rights and interests of the Commonwealth.⁸⁹

The bill would have given the Attorney General broad powers in such cases, and created a special account to finance such actions.

The lack of clarity and consistency in Kentucky statutes regarding the relative roles of prosecuting officials, and the problems and inconsistencies revealed by a survey of these officials, indicates that some revisions may be desirable. The experience of other states and the recommendations of experts in the field offer suggestions for alternative relationships.

Kentucky, with forty-eight circuit court districts and one hundred and twenty counties, has more local prosecutors than

⁸⁷ Nedrud, *The Career Prosecutor* 51 J. Crim. L., C. & P. S. 649 (1961).

⁸⁸ 1960-62 Ky. Dept. of Law Biennial Rep. 41.

⁸⁹ H.B. 459, S.B. 295, Ky. Gen. Assembly, Reg. Sess. (1962).

most states and, presumably, more variety in local practice. Both the statutes and the survey indicate a need for greater coordination on the local level, and between the local officials and the state. It is not probable that Kentucky, with a strong tradition of local government, would adopt a completely centralized system for the administration of justice. Many states with a similar emphasis on local independence, however, have adopted laws allowing intervention or supercession by the Attorney General in particular circumstances and allowing some degree of supervision. The existence of problems in Kentucky's system is recognized by most prosecutors, on the state and local level; continued consideration may indicate methods of meeting these problems.

IV Litigation

The Attorney General, as the chief law officer of the Commonwealth, has broad powers derived from the common law. In the absence of modification by the Constitution, statutes or judicial decision,¹ he has the power to file any civil action or proceeding directly involving the rights and interests of the state, or which he deems necessary to enforce the laws of the state,² the preservation of order, and the protection of public rights and interest.³ A few examples of actions prosecuted by Kentucky's Attorney General indicate the scope of his duties in litigation. He has prosecuted actions to abate public nuisances,⁴ actions to enforce public charities,⁵ and quo warranto or ouster proceedings against state officers.⁶

GENERAL POWERS IN LITIGATION

Statutory Authority. KRS 15.020 prescribes the duties of the Attorney General to commence actions and appear in litigation on behalf of the Commonwealth:

¹ Ky. Const. § 233; Commonwealth *ex rel.* Ferguson v. Gardner, 327 S.W 2d 947 (Ky. 1959); Burks v. Commonwealth, 259 S.W 2d 68 (Ky. 1953); Benjamin v. Goff, 314 Ky. 639, 236 S.W 2d 905 (1951); Kentucky Hotel, Inc. v. Cinotti, 298 Ky. 88, 182 S.W 2d 27 (1944); Commonwealth *ex rel.* Attorney General v. Howard, 297 Ky. 488, 180 S.W 2d 415 (1944); Johnson v. Commonwealth *ex rel.* Meredith, 291 Ky. 829, 165 S.W 2d 820 (1942); Aetna Life Ins. v. Commonwealth, 106 Ky. 864, 51 S.W 624 (1899).

² *Ex parte* Young, 209 U.S. 123, 161 (1907).

³ *E.g.*, Pierce v. Superior Ct., 1 Cal. App. 2d. 759, 37 P. 2d 460 (1934); Respass v. Commonwealth, 131 Ky. 807, 115 S.W 1131 (1909).

⁴ Respass v. Commonwealth, *supra* note 3.

⁵ Chambers v. Baptist Educational Society, 40 Ky. (1B. Mon.) 215 (1841). *But see* Commonwealth *ex rel.* Ferguson v. Gardner, 327 S.W 2d 947 (Ky. 1959).

⁶ Ky. Rev. Stat. (Hereinafter cited as KRS) 415.050, .060; Commonwealth *ex rel.* Buckman v. Mason, 284 S.W 2d 825 (Ky. 1955); Salyers v. Lyons, 304 Ky. 320, 200 S.W 2d 749 (1947); Jones v. Browning, 298 Ky. 467, 183 S.W 2d 38 (1944); Chadwell v. Commonwealth, 288 Ky. 644, 157 S.W 2d 280 (1941); Commonwealth v. Begley, 273 Ky. 636, 117 S.W 2d 599 (1938); Waddle v. Hughes, 260 Ky. 269, 84 S.W 2d 75 (1935); see also KRS 320.240 (3) and .370 (Board of Optometric Examiners); 323.250 (Board of Architects); 327.040 (2) (Physical Therapists) as additional examples.

[The Attorney General] shall appear for the Commonwealth in all cases in the Court of Appeals wherein the Commonwealth is interested, and shall also commence all actions or enter his appearance in all cases, hearings, and proceedings in and before all other courts, tribunals, or commissions in or out of the state, and attend to all litigation and legal business in or out of the state required of him by law, or in which the Commonwealth has an interest, and any litigation or legal business that any state officer, department, commission, or agency may have in connection with, or growing out of, his or its official duties, except where it is made the duty of the Commonwealth's attorney or county attorney to represent the Commonwealth.

Apart from KRS 15.020, numerous statutes require the Attorney General to institute litigation, or provide that litigation shall be instituted with his consent. These will be discussed in this chapter.

The preceding chapter indicated the number and variety of duties assigned by statute to local prosecutors. These statutes, in effect, limit the Attorney General's responsibilities in litigation as set forth by KRS 15.020. In numerous instances the duty of representing the Commonwealth in certain circumstances has been assigned to the Commonwealth's or county attorney, rather than to the Attorney General. His duties are further limited by the fact that any state agency may employ counsel to represent it in litigation, as well as to serve in an advisory capacity. The relationship of the Attorney General to state agencies was the subject of chapter II.

Subpoena Power Under KRS 12.120, the head of each state department or his agent is authorized to "examine witnesses under oath relative to any matter properly subject to inquiry, hearing or investigation in the conduct of the work of the department." While this section authorizes the Attorney General, as head of the Department of Law, to examine necessary witnesses, it does not, nor does any other statute, give him the power to subpoena such witnesses. Certain departments, such as the Department of Industrial Relations and the Legislative Research Commission, are expressly granted subpoena power,⁷ although it is withheld from

⁷ KRS 336.060; 7.110.

the Attorney General. The 1962 legislature gave subpoena power to such varied groups as the Board of Auctioneers and the State Committee for School District Audits of which the Attorney General is a member, but not to the Attorney General.⁸

It does not appear that the subpoena power was recognized at common law as resting in the Attorney General. Instead, it was a power resting with the courts and legislatures. Kentucky is one of twenty states which do not give the Attorney General subpoena power.⁹ Nine states give him broad powers in this area, eleven limit the subpoena power to trust laws, and ten impose other limitations.

Persuasive arguments have been made both for and against empowering the Attorney General to issue subpoenas. A study published by Michigan summarized arguments for withholding this power:

The power of subpoena in the hands of an elected officeholder would be subject to grave abuse. It might be used as a smearing device, its secrecy provisions raising an often unwarranted and always un rebuttable presumption of guilt against innocent witnesses. Infringement of constitutional rights, indiscriminate application, and other excesses would comprise a constant threat to the rights of the individual. ¹⁰

Those favoring giving the Attorney General subpoena power believe that it is requisite to effective law enforcement. There are a number of criminal violations which cannot be effectively prosecuted with the usual methods of investigation. Examples of these are restraint of trade violations, and conspiracies extending across county and state lines. It is argued that the fact that the power may be abused is not sufficient reason to withhold such power, especially when it has been granted to courts and legislative investigating bodies.

Apparently, the main reason the Attorney General is denied the subpoena power is that it is normally a judicial and legislative function, and the Attorney General is concerned with prosecu-

⁸ Ky. Acts 1962, ch. 244, art. II, § 4.

⁹ Fein and Stachable, *The Subpoena Power of the Attorney General*, Research Report No. 2, Bureau of Social and Political Research, Michigan State University (1959).

¹⁰ *Ibid.*

tions. It appears that the question is one of precedent, rather than principle.

Investigation. Two sections of the statutes give the Attorney General specific investigatory powers. The first is KRS 15.060(1), which provides that the Attorney General, with the assistance of the Auditor and the Department of Revenue, shall investigate "all unsatisfied claims, demands, accounts and judgments in favor of the Commonwealth." The second is KRS 440.190, which involves the extradition of persons from Kentucky when another state makes a demand upon the Governor for the surrender of a person charged with a crime. In such cases, the Governor may call upon the Attorney General to investigate, or to assist in investigating, the demand.¹¹

A 1960 Attorney General's opinion,¹² which found that the Department of Law was not vested with power to enforce state law in connection with gambling, alcoholic beverages and prostitution, described the limits on his investigative power:

It has been suggested that this office has the authority to send investigators into a community to determine "conspiracies against the Commonwealth"^{12a} or to "abate nuisances"^{12b}, and to act upon the evidence collected. Even were the Attorney General to enter criminal cases in such a manner, the record indicates that little of consequence could be accomplished under this awkward and limited procedure. Under our present statutes, a member of the Attorney General's staff discovering a violation of

¹¹ It is to be noted that this usually consists of preparing a written opinion as to the legal sufficiency of extradition papers prepared in response to the Governor's request. When hearings are called this office participates either to represent the demanding state or to assist the hearing officer. There are between 50 and 70 extradition matters each year.

¹² Ops. Ky. Att'y. Gen. 60-169 (1960).

^{12a} It cannot be said that one who violates the statutes in question is per se guilty of conspiracy against the Commonwealth; the fact that a crime has been committed by two or more persons acting in concert does not mean that a conspiracy to commit the crime had to exist. The rule seems to be that where a concert of action is necessary for the commission of the offense, no indictable conspiracy exists. 15 C.J.S. *Conspiracy* § 47, at 1073 (1939); U.S. v. Hagan, 27 F Supp. 814 W.D. Ky. (1939). It appears that the types of violations suggested fall within this rule since a plurality of agents or a concert of action would be necessary for their commission.

^{12b} Such an action would be civil proceeding by nature, rather than criminal, and could or should be brought by the Commonwealth's Attorney. *Goose v. Commonwealth ex rel. Dummit* 305 Ky. 651, 205 S.W 2d 326 (1947).

the law has only that authority afforded private citizens—he may make an affidavit for a warrant or go before a grand jury. There is no power to search, subpoena witnesses, administer oaths or prosecute criminally. As our statutes provide for investigative agencies such as the state police, alcoholic beverage control, local police, etc., it is evident that this office is not, as presently constituted, intended as an investigative arm of the government. To investigate—if we give the term its ordinary meaning in law—suggests the power to compel the attendance of witnesses, the production of documents and the administration of oaths. While the offices of the Commonwealth's Attorney and the County Attorney are vested with such powers, we find no authority either in the statutes or under the common law^{12c} for the Attorney General to conduct this type of investigation. (OAG 60-169, March 18, 1960)

As this opinion makes clear, Kentucky's Attorney General does not have power to investigate and prosecute criminally. Some states, however, give the Attorney General investigative powers, either generally or in connection with certain statutes. The New Jersey Attorney General heads an integrated Department of Law and Public Safety¹³. Oregon statutes provide that in special investigations or prosecutions for violation or alleged violations of the criminal laws of the state, the Attorney General may call upon other law enforcement agencies of the state or may employ special investigators.¹⁴ Various other states and the federal government give the Attorney General authority to call upon other agencies to investigate, or to initiate investigations himself.

Validity of Statutes. Since the validity of statutes, ordinances and franchises is of interest to the Commonwealth, those challenging such validity are required to serve a petition upon the Attorney General, and he has a right to be heard in such proceeding (KRS 418.075). Apparently, this right exists irrespective of the level of the proceedings. There seems to be nothing inconsistent in the Attorney General, as the chief law officer of

^{12c} No such power is mentioned as existing under the common law in either Corpus Juris or American Jurisprudence. There is a reference to such an investigative power conferred by statute at 7 C.J.S. *Attorney General* § 7, at 1226 (1939). No such authority is, however, conferred by statute on the office of the Attorney General of the Commonwealth.

¹³ See part I, p. 11-12 *supra*.

¹⁴ Ore. Rev. Stat. § 180.090 (1953).

a state, testing the validity of a statute, because the Commonwealth and the people have a vested interest in having its validity determined.¹⁵

In some jurisdictions, the Attorney General may not oppose a state agency without specific legislative grant of authority, since it is his duty to represent and advise such agencies.¹⁶ The Supreme Court of Washington stated the argument against this construction:

The law cannot be given any such construction. His [the Attorney General's] paramount duty is made the protection of the interest of the people and, where he is cognizant of violations of the Constitution or the statutes by a state officer, his duty is to obstruct and not assist, and, where the interests of the public are antagonistic to those of state officers, or where state officers may conflict among themselves, it is impossible and improper for the Attorney General to defend such state officers.¹⁷

Kentucky has no law authorizing the Attorney General to institute litigation against a state agency, but he has such power according to practice and to the common law

Usurpation of and Ouster from Office. KRS 63.180 provides for the removal of a nonelective peace officer by the Commonwealth's Attorney, the county attorney, the Attorney General or any three or more citizens of the county where the officer is serving. When it appears that such officer does not meet the general qualifications of office set by KRS 61.300, the Attorney General, or the other persons named above, may institute a proceeding in equity for removal of such officer. This is the only officer whom the Attorney General is authorized by statute to remove. Such other ouster powers as are exercised by the Attorney General derive from the common law.

The Attorney General's authority to institute actions for usurpation of office is defined by KRS 415.050:

¹⁵ See *Wilentz v. Hendrickson*, 133 N.J. Eq. 447, 33 A2d 366 (1943), *aff'd*, 135 N.J. Eq. 244, 38 A. 2d 199 (1944); Comment, 2 Ariz. L. Rev. 293 (1960).

¹⁶ E.g., *Arizona State Land Dep't. v. McFate*, 87 Ariz. 139, 348 P. 2d 912 (1960).

¹⁷ *State ex rel. Dunbar v. State Bd. of Equalization*, 140 Wash. 361, 249 Pac. 996, 999 (1926). See also *State ex rel. Winston v. Seattle Gas & Elec. Co.*, 28 Wash. 488, 68 Pac. 946 (1902).

For usurpation of other than county offices or franchises, the action by the Commonwealth shall be instituted and prosecuted by the Attorney General.

The conditions under which such action may be instituted are defined by KRS 415.060:

A person who continues to exercise an office after having committed an act, or omitted to do an act, the commission or omission of which, by law, creates a forfeiture of his office, may be proceeded against for usurpation thereof.

These statutes enable the Attorney General to institute actions for usurpation of office against state, city and district officers.¹⁸

The authority to institute ouster proceedings in Kentucky has been exercised against three types of public school officers: the superintendent, who is chosen by the district board of education;¹⁹ members of a county board of education;²⁰ members of a board of education of an independent school district.²¹ The Attorney General has authority to bring ouster proceedings against certain other officers,²² such as city attorneys and a chief of police.

The Court of Appeals, in *Commonwealth v. Mason*, laid down the following rule for determining whether such authority exists:

[In] deciding whether the Attorney General has authority to bring ouster proceedings for usurpation of a public office, it is the governmental level of the office, rather than the nature of the usurpation for which ouster is sought, that is controlling. On many occasions we have held that county school board members are state officers. Therefore, it is clear that usurpation of the office is to be attacked through actions brought by the Attorney General under KRS 415.050.²³

¹⁸ See *Commonwealth ex rel. Buckman v. Mason*, 284 S.W. 2d 827 (Ky. 1955); *Hirschfield v. Commonwealth ex rel. Attorney General* 256 Ky. 374, 76 S.W. 2d 47 (1934).

¹⁹ *Commonwealth v. Burnett*, 237 Ky. 473, 35 S.W. 2d 857 (1931).

²⁰ *Commonwealth ex rel. Buckman v. Mason*, 284 S.W. 2d 825 (Ky. 1955); *Jones v. Browning*, 298 Ky. 467, 183 S.W. 2d 38 (1944); *Chadwell v. Commonwealth*, 288 Ky. 644, 157 S.W. 2d 280 (1941); *Tipton v. Commonwealth*, 238 Ky. 111, 36 S.W. 2d 855 (1931).

²¹ *Waddle v. Hughes*, 260 Ky. 269, 84 S.W. 2d 75 (1935).

²² *Hirschfield v. Commonwealth ex rel. Attorney General*, 256 Ky. 374, 76 S.W. 2d 47 (1934); *Leigh v. Commonwealth*, 203 Ky. 752, 263 S.W. 14 (1924).

²³ 284 S.W. 2d 825, 827 (Ky. 1955).

These procedures are in addition to the Governor's powers to oust officials under KRS 63.100 - 63.130, in which the Attorney General may be called upon to participate.²⁴

Appeals. The Attorney General is required by KRS 15.020 to appear in all cases in the Court of Appeals wherein the Commonwealth is interested. It is further provided, by KRS 15.090, that he "may prosecute an appeal, without security, in any case from which an appeal will lie to the Court of Appeals wherever, in his judgment, the interest of the Commonwealth demands it." Previous to revision of the Criminal Code by the 1962 General Assembly, the Code provided that the Attorney General could appeal a case if he was "satisfied that error has been committed to the prejudice of the Commonwealth, upon which it is important to the correct and uniform administration of the criminal law that the Court of Appeals should decide." ²⁵ This authority to appeal a case appears to be the rule, notwithstanding a defendant's conviction, because it is of interest to the Commonwealth that the rules of criminal law be settled, as well as that they be just.

SPECIFIC STATUTORY DUTIES IN LITIGATION

Some provisions of the statutes require a department or person to give the Attorney General notice of intended proceedings, while others require the agency or individual to obtain his consent. Others require the Attorney General himself to initiate proceedings, or authorize him to proceed in his discretion.

Notice. Only one section of the statutes requires a department to give the Attorney General notice of intended litigation. Under KRS 46.070, the Department of Finance must report to the Attorney General when public officers or public debtors fail to render accounts promptly, or fail to pay money due the state. The Department is required to cause actions to be brought against the delinquent.

Consent. The Department of Welfare is required to obtain the Attorney General's approval before employing counsel to

²⁴ *Frederick v. Combs*, 354 S.W. 2d 506 (Ky. 1962).

²⁵ Ky. Crim. Code, § 337 (1958), repealed, Ky. Acts 1962, ch. 234.

institute or defend suits to enforce the payment or reimbursement for board and maintenance of patients (KRS 203.110)

The Director of the Division of Banking must obtain the Attorney General's consent to institute proceedings for the appointment of a receiver to wind up the business of a bank (KRS 287.520) or a trust company (KRS 287.540), or a building and loan association (KRS 289.425). The Director of Banking must also obtain the Attorney General's consent to institute proceedings to revoke the corporate powers of a bank, where the bank has violated banking laws with a resultant loss to creditors, and has not made such a loss good within a reasonable length of time. Such proceedings, however, are mandatory upon the Director of Banking (KRS 287.990)

The Department of Revenue, with the consent of the Attorney General, may endorse the right to replevy on the execution of a judgment for taxes, where the tax is payable to the department (KRS 135.100)

A statute which relates to litigation only in a negative sense is KRS 45.220, which provides that "the Department of Finance, with the approval of the Attorney General, may authorize the compromise of any disputed claim by or against the state or any budget unit thereof." A related statute is KRS 44.020, which authorizes the Department of Finance, upon the advice of the Attorney General, to refuse to pay certain fee-bills, settlements, or credit, if the department believes the charge or claim to be fraudulent, erroneous, or illegal, and then contest the claim in the Franklin Circuit Court.

Discretionary Institution of Litigation. Some statutes state that the Attorney General may institute proceedings, or cause others to institute proceedings, but do not require him to do so. These statutes are summarized below

Corporations—If a consolidated corporation operating a toll bridge across an interstate boundary stream violates certain statutes, either the Attorney General or the Governor may institute proper proceedings for the forfeiture of all of its rights, powers, privileges, immunities and franchises (KRS 280.990). Another statute applies to all private corporations:

If any corporation fails to comply with any provisions of its articles or certificate of incorporation under which it

does business in this state, or is guilty of any abuse or misuse of any corporate power, privilege or franchise, or becomes detrimental to the interest and welfare of the state or its citizens, the Attorney General may institute proceedings necessary and proper to revoke its corporate powers. (KRS 271.590).

Escheats—The Attorney General may bring actions to escheat real property held by a domestic or foreign corporation contrary to statute, since the action must be brought in the name of the state (KRS 271.145). A similar statute deals with escheat of real property owned by a religious corporation or society (KRS 273.090).

Oil, gas and salt water wells—Whenever it appears that any person is violating any provisions of statutes relating to oil, gas and salt water wells, or any order or regulation issued thereunder, the Attorney General or any person adversely affected may bring suit to restrain such violation in any court where the Department of Mines and Minerals could have brought suit (KRS 353.710). In the event of such a suit the Department of Mines and Minerals must be named a defendant.

Water pollution—The Attorney General or any other law enforcement officer may institute an action for the enforcement of the orders of the Interstate Water Sanitation Control Commission (KRS 220.570). It should be noted that a certificate establishing a sanitation district is conclusive of the regular organization of the district against all persons except the state, upon suit commenced by the Attorney General (KRS 220.120).

Discretionary Institution of Litigation Upon Request of State Agency. In some instances, a state department or agency may request the Attorney General to institute litigation, but it is not mandatory that he comply with such request.

Public Accountants—KRS 325.380 prohibits any person from using the title "certified public accountant" unless he has been certified under the provisions of the accountancy law. KRS 325.990 makes a violation of this section a misdemeanor, and grants the Attorney General authority to cause appropriate proceedings to be brought against a violator whenever the State Board of Accountancy certifies the facts of such violation to him. The Attorney General also represents the Board in its hearings (KRS 325.360).

Securities—Criminal proceedings for violation of chapter 292, the “blue sky law,” may be instituted by the Attorney General, in his discretion, with or without reference to evidence from the Director of the Division of Securities concerning such violations (KRS 292.991).

School funds—1962 legislation requires the Attorney General, upon written recommendation of either the Governor, the Auditor of Public Accounts, the Superintendent of Public Instruction, or the State Board of Education, to “institute the necessary actions to recover school funds from any source, which he believes have been erroneously or improperly allowed or paid to any person.” This section uses the term “shall”, implying that action is mandatory, but the phrase, “which he believes have been erroneously paid” implies that the Attorney General may exercise his discretion (KRS 156.138)

Mandatory Institution of Litigation After Action by State Agency. Under KRS 12.230, any department may require the advice and services of the Attorney General. A number of statutes specifically require him to institute litigation when requested by a state agency. Others require that the Attorney General, the Commonwealth’s attorney, or the county attorney institute such action within their respective jurisdictions. In some cases, the Attorney General must initiate action after request of notice from a state agency. In others, he represents the agency after it has already taken some action. The wide variety of subjects concerning which the Attorney General must act is apparent from the following summary

Agricultural seeds—The Attorney General, either personally or through the Commonwealth’s attorney, must institute proceedings against any person charged with violation of the agricultural seed law, which deals principally with labeling requirements, when such violations are reported to him by the Director of the Agricultural Experiment Station (KRS 250.160)

Building and loan associations—Whenever penalties are incurred by building and loan associations, the Attorney General must institute action to recover the same (KRS 289.990). Whenever a foreign building and loan association acts to make its surety liable upon its bond, and the surety refuses to make the prescribed payment, the Attorney General must bring suit against

such surety company (KRS 289.990) Penalties against building and loan associations may be invoked by the Director of Banking.

Business schools—The Attorney General, or the Commonwealth's or county attorneys, must represent the State Board of Business Schools, upon its request, in matters relating to enforcement of the laws regulating business schools (KRS 331.100)

Condemnation proceedings—The Department of Highways shall be represented by the Attorney General when it brings condemnation proceedings against the owner of any bridge, or real or personal property, or rights needed for bridge or approach purposes (KRS 180.030), or for the purpose of acquiring a ferry (KRS 280.270) Upon the direction of the Department of Parks, or "instructions contained in any Act of the General Assembly," the Attorney General must conduct condemnation proceedings for the acquisition of property for park purposes (KRS 148.070) He is also required to bring condemnation proceedings upon request of the National Park Commission (KRS 148.120). The Attorney General is given supervisory authority over all actions brought by the Division of Forestry (KRS 149.070)

Health—The Attorney General, the Commonwealth's attorneys, and the county attorneys are required, within their respective jurisdictions, to prosecute violations of the penal provisions of the public health laws of Kentucky (KRS 211.240), and to represent the state and local boards of health in all matters relating to the enforcement of health laws (KRS 212.270) Other statutes concern specific health laws, and require action by the Attorney General within his jurisdiction. These are: control of communicable tuberculosis (KRS 214.350); labelling of mattresses (KRS 214.300), laws relating to barbituates and amphetamine drugs (KRS 217.531); and statutes governing the use, possession, and dispensation of narcotics (KRS 218.190)

Hospital service companies—When hospital service, burial and medical service companies go into involuntary dissolution, such action is brought by the Attorney General's making an application to a circuit judge, upon a report of the facts from the Commissioner of Insurance (KRS 303.150).

Mines—The Attorney General, or the Commonwealth's or county attorneys, are required to appear for the state in hearings

for the inspection and closing of mines by the Department of Mines and Minerals (KRS 352.430).

Motor transportation—The Attorney General, within his jurisdiction, is required to represent the Department of Motor Transportation in any action in which the department is a party and which arises from the statutes relating to motor carriers (KRS 281.800)

Physical therapy—The Attorney General, within his jurisdiction, must assist the Board of Physical Therapy in prosecuting violations of laws relating to physical therapists (KRS 327.040)

Podiatry—The Attorney General, or other prosecutors within their respective jurisdictions, must prosecute violations of the penal provisions relating to the State Board of Podiatry and represent the Board in matters related thereto, upon its request (KRS 311.380 - 311.495)

Scholarships—The Attorney General, upon recommendation of the Board of the Rural Kentucky Dental Scholarship Fund, is required to institute proceedings to recover any amount due the Commonwealth from recipients of such scholarships (KRS 211.440) The Rural Kentucky Medical Scholarship Fund statute includes no similar provision. Upon recommendation of the State Librarian, the Attorney General must institute proceedings to recover sums due the Commonwealth under a state library scholarship program (KRS 171.306) He is also required to recover funds due under the Teacher Education Scholarship program, when such program becomes effective (KRS 156.640)

Unemployment compensation—Criminal actions for violations of unemployment compensation laws are required to be prosecuted by the Attorney General. except that he may delegate this power to the county attorney of the county in which the employing unit has a place of business, or the violator resides, in which case he supervises the county attorney (KRS 341.570)

Workmen's compensation—When the Workmen's Compensation Board has allowed a claim filed with it and the allowance is opposed, the Attorney General is required to designate one of his assistants to present any opposition posed by the Commonwealth or one of its departments (KRS 44.090) Upon the Board's request, the Attorney General "or, under his direction, the Commonwealth's attorney or county attorney of any county,

shall institute necessary actions and shall defend in like manner all actions brought against the board or the members thereof in their official capacity" (KRS 342.425).

Water pollution—The Attorney General must institute action in the name of the Commonwealth to recover "a civil penalty" against any person who violates any provision of KRS Chapter 220, concerning water pollution control, upon request of the Water Pollution Control Commission (KRS 220.990). The penalty is, in effect, similar to a fine imposed on the violator.

Mandatory Institution of Litigation Without Action by State Agency. In several instances, the Attorney General is required to take action without a prior request of action by a state agency.

Attorneys—If an attorney neglects to attend to business for which he has been employed, or attends to it unskillfully, he is liable to the client for damages. Upon request of the client, the Commonwealth's attorney must institute the suit, and the Attorney General must represent the client if an appeal is taken to the Court of Appeals (KRS 30.180).

Claims—Whenever the Attorney General believes "that any fraudulent, erroneous or illegal fee bill, account, credit, charge or claim has been erroneously or improperly approved, allowed or paid out of the Treasury to any person [he shall] institute the necessary actions to recover the same" and shall "institute the necessary actions to collect and cause the payment into the Treasury of all unsatisfied claims, demands, accounts and judgments in favor of the Commonwealth, except where specific statutory authority is given to the Department of Revenue to do so" (KRS 15.060).

Railroads—Section 217 of the Constitution requires that the Attorney General "upon notice of the violation of any of said provisions [relating to railroads], institute proceedings to enforce the provisions of the aforesaid sections." This does not specify who will give such notice.

Summary. The Attorney General's duties in litigation are many and varied. In some cases, action is mandatory, while in others action is at the Attorney General's discretion, although there often appears to be no logical reason why a statute falls in one category or another. He is specifically assigned the duty of instituting proceedings in connection with a number of licensing

boards, but has no specific duties in regard to others. Some statutes seem merely repetitive of his general obligation to represent state agencies. Others, by imposing a duty upon the Attorney General, the Commonwealth's attorney and the county attorney, do not clearly fix responsibility for initiating action.

VOLUME OF LITIGATION

The amount of attention accorded a duty or power in the statutes does not necessarily correspond to its actual importance. To obtain a balanced picture of the Kentucky Attorney General's duties in litigation, it is necessary to refer to the actual operations of his office.

According to the 1960-1962 Biennial Report, the Attorney General's office instituted 378 civil cases during that period, participated in 370 criminal proceedings, handled 117 cases before the Board of Claims, and participated in many administrative hearings. Most of the criminal cases were before the Court of Appeals of Kentucky; twelve were before U S. District Courts; three were before the U S. Circuit Court of Appeals; and ten were before the United States Supreme Court. The cases were either habeas corpus proceedings or criminal appeals.

The Biennial Report cites five of the 378 civil cases as being of particular significance. These examples illustrate the scope of the Attorney General's duties in litigation.

The first example given involved the city of Newport, and included: ouster proceedings; participation in special grand jury proceedings, which resulted in numerous indictments; a contempt proceeding, which sought to revive a 1944 injunction abating certain persons, activities and gambling places as public nuisances; and a proceeding to enjoin a night club from further operation until it filed the required papers as a nonresident corporation. This case illustrates how a number of statutory powers are brought to bear on a single problem, in the absence of statutory authority to intervene directly in local situations.

The second example given in the report concerned a county school district, where state audits had indicated widespread irregularities. In this case, a special commissioner was appointed by the State Board of Education to study transcripts of hearings

and to advise the Board. The district school board was ousted from office by the State Board and lost an appeal to the circuit court challenging the ouster. The case was taken to the Court of Appeals and was subsequently dismissed. It indicates how the Attorney General may assist in a case as an advisor to state agencies but, again, is handicapped by lack of authority to act directly in local proceedings.

The third instance cited was the enforcement of strip mining laws. A concerted effort by the Attorney General, in cooperation with the Department of Conservation, resulted in enforcing a high degree of compliance with these laws, after extensive and continuing litigation.

Another example was a series of cases to determine the validity of the Veterans Bonus Act. The final example given concerned a state agency filing suit against the city of Maysville to force it to comply with state law and regulations concerning water pollution, under a section of the statutes enacted in compliance with an interstate water compact. The case, if finally carried to court trial, will determine whether the state can force a city to incur an indebtedness to comply with a mandate of a state agency, under action taken pursuant to an interstate compact.

Summary. These statistics and examples reflect several basic facts about litigation which have been alluded to in this study. One is that the great bulk of all criminal litigation is before the Kentucky Court of Appeals. Another is that a substantial portion of the office's practice is before various types of administrative bodies. The third point is that, relatively speaking, the office engages in little trial work before the lower state or federal courts in comparison to its heavy appellate case load.

V. The Advisory Role of the Attorney General

Every Attorney General renders advisory opinions on questions of law to certain persons under certain conditions. This is generally recognized as a common law duty of the office.

The advisory function is not, of course, limited to issuing formal opinions. As chief legal officer of the state, the Attorney General may advise and consult with other officers on a continuing basis. As a member of various boards and commissions, he may advise on their policies and operations. As a drafter of legislation, he may advise on the form and content of bills. The advisory role is an integral part of most of his activities. Furnishing opinions on questions of law is, however, the primary exercise of the Attorney General's advisory role. Preparing opinions is one of the major activities of his office, in terms of staff time, and one of the most important, because of the wide range of subjects involved.

LEGAL BASIS IN KENTUCKY

Kentucky's first Constitution directed that the Attorney General "shall give his opinion when called upon for that purpose, by either branch of the Legislature, or by the Executive."¹ All subsequent constitutions are silent upon this point and his opinion-writing role is defined by statute and regulation.

Statutes. Prior to 1944, the statutes required that "the attorney general shall, upon the written request of any executive or ministerial officer of this Commonwealth, give such officer his written opinion touching any of the duties of the officer."² The same duty was imposed on attorneys employed by other state departments.³ The language was changed slightly in 1944 to provide that "the Attorney General is the legal adviser of all state officers, departments, commissions, and agencies, and when

¹ Ky. Const. art. II, § 16 (1792).

² Ky. Acts 1908, ch. 32, § 2.

³ Ky. Acts 1942, ch. 106, § 3, repealed Ky. Acts 1944, ch. 7.

requested in writing shall furnish to them his written opinion touching any of their official duties. ”⁴

In 1960, the conditions under which opinions would be furnished were set forth in detail by statute:

The Attorney General, when requested in writing, under KRS 15.020, shall furnish such opinions subject to the following conditions:

- (1) When questions of law of interest to the Commonwealth are submitted by a state department, agency, board or commission;
- (2) When public questions of law are submitted by either house of the Legislature or by any member of the Legislature;
- (3) When public questions of law pertaining to local government are submitted in writing by the proper public official of the county or other political subdivision of the Commonwealth;
- (4) When, in the discretion of the Attorney General, the question presented is of such public interest that an Attorney General's opinion on the subject is deemed desirable and when provided for by regulation pursuant to the provisions of this section.⁵

Regulations. The Department of Law has promulgated two regulations which further define the conditions under which opinions are to be written. Both became effective on January 1, 1961.

The first regulation required that all requests for opinions be in writing, and include a “full and complete statement of the facts giving rise to the question, and reference to the relevant provisions of the Kentucky Revised Statutes where known.” State agencies which have staff counsel and all Commonwealth, county and city attorneys must also cite the appropriate constitutional and statutory provisions, case law, department regulations, and the conclusions of law arrived at. If state agencies have sought the opinion of outside counsel, “it will also be advised at the time of request.”⁶

⁴ Ky. Rev. Stat. [hereinafter cited as KRS] 15.020.

⁵ KRS 15.025.

⁶ Dept. of Law Reg. 1, Ky. Adm. Reg. (1960).

The second regulation governs requests from private individuals. It provides that "official opinions may be rendered pursuant to KRS 15.025 to private citizens concerning questions involving their voting rights, eligibility for public office and their election rights, duties and liabilities [and] questions involving licenses and taxation on a state level."⁷ Opinions also may be rendered "concerning the official acts and conduct of office of public officials, provided the legal question involves an actual, current factual situation and is broad enough to be of interest to the general public, the Bar, or other officials in similar positions." Opinions will not be rendered if the question does not relate to a current, factual situation, nor in response to questions being or about to be litigated.

In summary, Attorney General's opinions in response to requests from private citizens are required neither by Constitution nor by statute. They are, however, provided for by regulation. Opinions to state agencies, the legislature and public officers of counties or other political subdivisions are mandatory if they meet certain conditions.

TYPES OF OPINIONS

Kentucky. Kentucky law and regulations refer only to "written opinions" and "official opinions." Approximately one hundred official opinions are written each month.

Departmental procedures, however, differentiate between "major opinions" and others. A "major opinion" is defined as "one concerning the general public or a substantial segment thereof, the continuing conduct, procedures and practices of the business of departments, courts, boards, commissions, agencies, political subdivisions or officers; all constitutional questions concerning the validity of statutes; matters of first impression to the office; opinions modifying, withdrawing, reversing or extending prior opinions, and questions of monetary or political significance."⁸ Opinions coming within this broad definition are subject to special review and release procedures.

⁷ Dept. of Law Reg. 2, Ky. Adm. Reg. (1960).

⁸ Department of Law Procedures, § 1.4.

As a matter of practical necessity, many "informal opinions" are issued in Kentucky, in the form of letters, memoranda or oral advice. These have no official status and are neither processed nor numbered as opinions. Both the former Deputy Attorney General and the Assistant Attorney General who presently prepares the largest number of opinions estimate that there are twice as many "informal" as official opinions issued. Since this part of the advisory function is unofficial, no record is kept of the advice issued informally.

Informal advice is generally given in response to an oral request, made in person or by telephone, for advice on some comparatively simple legal or procedural problem. The request is most frequently made by a state or local official. The Assistant to whom the request is directed is usually able to reply readily, due to his familiarity with the subject and the lack of complexity in the problem. Some such requests can be answered merely by reference to a statute, case, or prior opinion. Legal advice may also be given in the form of informal letters or memoranda.

Formal opinions have the advantage of careful preparation, review and public release. They are available for subsequent reference and assure accountability. It probably would be neither possible nor desirable, however, to issue advice only in the form of official opinions. For example, election officials and candidates who call on election day to ascertain their rights and duties could not submit a written request and await a written reply. Many questions are of such minor importance and involve so little judgment that they do not merit the attention and procedural safeguards required for opinions.

Other questions may involve a situation where the best interest of those concerned require that the matter be kept confidential at the time advice is requested. All official opinions are made public, so the person concerned may not wish to submit a formal request.

A review of past opinions indicates that a surprising number involve no actual legal opinion, but merely furnish factual information or cite a statute. Examples, chosen at random, are inquiries as to: The effective date of a new law; protesting payment of a tax, but not questioning its application; and requesting

information about Kentucky laws on a particular subject.⁹ This kind of inquiry would seem to require an informal letter, rather than an official opinion.

Other States. Many states issue both formal and informal opinions and provide different procedures for each. This distinction results in a relatively small number of official opinions, while allowing the Attorney General considerable scope in exercising his advisory function.

Standards for deciding which requests shall be answered with official opinions vary. In Nevada, "advice is made a matter of official opinion only when deemed of state-wide interest;" official opinions, which number about 120 a year, are published. The Attorney General of Alaska "issues only a limited number of formal opinions. More informal letter opinions run into the hundreds per year." In Indiana, "formal opinions are signed by the Attorney General, himself, designated and published as official opinions. Informal opinions may be written by an Assistant, a Chief Deputy, or a Deputy Attorney General, and are qualified to the extent that they are an expression of the writer of same and are not to be considered as a precedent of the OAG or of the AG himself." The number of formal opinions in recent years ranges from seventy-six in 1950 to fifty-three in 1960. The Attorney General of Vermont gives advice "orally, by letter and by formal written opinion in his discretion, unless specific request is made for a written opinion." Fifty-two opinions were issued in 1959.¹⁰ These states appear typical of those from whom data are available.

Restricting formal opinions to questions of major importance or unusual interest has certain advantages. An official can obtain advice without the publicity attendant upon an official opinion. The number of opinions is sharply reduced, so that greater emphasis may be placed on their preparation and review and, in most states, all may be published. Less important opinions usually need not be reviewed by other staff members or approved by the Attorney General himself and, therefore, can be sent out

⁹ 1960-1964 Ops. Ky. Att'y Gen. 61-533 (1961), 60-314 (1960), 60-558 (1960), 60-105 (1960).

¹⁰ Council of State Governments [hereinafter cited as COSGO] Preliminary Questionnaire on Powers, Duties and Organization of the office of Attorney General, table 19.

more promptly. In turn, more time is available to consider formal opinions carefully and, presumably, there is less likelihood of reversals.

A few states do not provide for informal opinions. In Minnesota, no memorandum upon any legal question will be given to any state officer except in the form of an official opinion," and "no unofficial opinions will be given by members of the staff unless expressly authorized by the Attorney General.¹¹ Perhaps the primary argument against issuing unofficial opinions is that the Attorney General is responsible for the work of his staff and cannot disclaim opinions written by them; even an unofficial opinion will be considered to reflect the judgment of the state's chief law officer. Other disadvantages might be that advice given by an assistant, without the Attorney General's approval, would not carry the same weight as opinions signed by him. Two staff members might issue conflicting opinions on the same subject and, in the absence of review procedures, the conflict might not be identified.

REQUESTS FOR OPINIONS

As previously noted, Kentucky's Attorney General is required to furnish written opinions to state officers and agencies on questions concerning their official duties. A 1960 law requires that opinions be furnished: to state officers on "questions of law of interest to the Commonwealth;" to the legislature on "public questions of law", to officials of political subdivisions "on questions of law pertaining to local government;" and to others "in the discretion of the Attorney General."^{11a} The language of these statutes allows considerable leeway for interpretation.

State Officers. The requirement that opinions be furnished to "all state officers" is somewhat ambiguous. "State officer" has been defined by numerous court decisions and Attorney General opinions. The definitions are not always consistent, but various officers who are not part of any state agency, such as local school board members and presidential electors, generally have been held to be state officers.

¹¹ Minn. reply to COSGO Questionnaire, *op. cit. supra* note 10, table 19.

^{11a} KRS 15.025.

Table 2 shows the number of opinions written in 1960 to each group of persons. The total number of opinions in table 2 does not correspond with that given elsewhere for 1960, because some opinions were not available for analysis, and others were omitted for various reasons.

TABLE 2
PERSONS TO WHOM OPINIONS WERE ISSUED, 1960

Title	Number of Opinions	Title	Number of Opinions
<i>Elective State Officers</i>		<i>Private Citizens</i>	319
Governor	11	<i>Out-of-State Requests</i>	60
Lt. Governor	1	<i>Local School Officials</i>	70
Secty. of State	11	<i>County Officials</i>	
Treasurer	6	Attorneys	114
Auditor	6	Auditors	2
Agriculture Comm.	7	County Clerks	109
Subtotal	42	Circuit Clerks	14
<i>Legislative Branch</i>		Commonwealth Attorneys	18
Senators	3	Constables	3
Representatives	18	Coroners	2
Legis. Research Comm.	2	County Courts	41
Subtotal	23	Sheriffs	18
<i>State Officers and Agencies</i>		Magistrates	30
Alcoholic Bev. Comm.	7	Jailers	4
Banking	12	Circuit Judges	14
Child Welfare	5	Other	15
Conservation	9	Subtotal	374
Econ. Development	14	<i>City Officials</i>	
Education	26	Attorneys	60
Finance	8	Boards and Commissions	9
Highways	10	Clerk-Treasurers	25
Industrial Relations	9	Councilmen	14
Mines and Minerals	8	Judges	21
Public Safety	14	Mayors	29
Welfare	8	Police Departments	7
Teachers Retirement	9	Other	6
Other (28 agencies)	53	Subtotal	171
Subtotal	192	Total number of opinions	1251

Almost half of the 1960 opinions were issued to county, city, or school district officers. Of this group, county clerks and county attorneys request the largest number of opinions. This is probably due to the fact that they have a great variety of duties, involving a great many laws.

One-fourth of the requests are made by private citizens, and one-twentieth come from other states. Only one-fifth of the 1960 opinions were directed to state agencies, departments, boards, commissions, or their officers. Those departments which do not employ permanent counsel submitted more requests than those with staff attorneys. The twenty-one opinions issued to legislators concerned compatibility of office and conduct of elections, rather than legislation.

Private Citizens. KRS 15.025 sets forth four classes of persons to whom opinions shall be furnished "when requested in writing, under KRS 15.020." The first three classes consist of public officials, but the fourth class embraces any "questions of public interest," in the discretion of the Attorney General. This statute apparently is the basis for issuing opinions to private citizens. If KRS 15.025 were strictly construed to be a description of conditions under which opinions provided for in KRS 15.020 were to be rendered, it would not authorize issuing opinions to private citizens, because KRS 15.020 is clearly limited to "state officers." Thus, the statutory basis for issuing opinions to persons other than state officers is not clear.

There are a number of problems involved in rendering opinions to private citizens. The custom adds considerably to the workload of the Attorney General's office. Care must be taken to assure that the Attorney General is not invading private practice. It does not have a clear basis in the statutes, and does not derive from the Attorney General's common law duties. There are no Kentucky cases involving the right of individuals to obtain an Attorney General's opinion.

The problem is not a new one; at least since 1928 there have been attempts to limit the number of opinions issued to private citizens.¹² The policy adopted by the present Attorney General, as set forth in a Department of Law regulation, appears to be the most stringent and the most successful. Many requests from individuals are currently being rejected, as not being of sufficient public interest, and the requestors are advised to seek private legal assistance.

¹² See generally Akers, *The Advisory Function of The Attorney General*, 38 Ky. L.J. 561 (1950).

Opinions are also rendered to persons living in other states, including federal officials, state officials, and private citizens. There is, of course, no legal provision for such opinions, but they are issued as a matter of courtesy.

Other States. Most Attorneys General render written opinions to the Governor, state departments and agencies, and legislators or legislative committees. Some give advice to local prosecuting attorneys. In only a few states are opinions given to private citizens or to officials of political subdivisions.

Eight state constitutions specifically define the advisory function.¹³ Virginia's Constitution requires that the Attorney General furnish the Governor information in writing, on questions of law affecting duties. In Texas, he must give written opinions to the Governor and other executive officers. The Maryland Constitution requires him to furnish written opinions to the Legislature, either House, the Governor, Comptroller, Treasurer, or State's Attorney. The constitutions of Florida, Georgia, North Carolina, Utah and Washington say that the Attorney General shall be legal adviser of the executive department or state officers.

In the other states, the classes of persons to whom opinions will be rendered are defined by law and by custom. Only a few states give opinions to private inquirers or to officials of political subdivisions. Among these are Alaska, where oral opinions are given to such persons only "on a very informal unofficial basis," and Vermont, where "on matters of importance, the Attorney General may advise local officials, courts and others." In New York, "as a general rule, opinions, oral or written, are not given to private inquirers. Exception is made in the discretion of the Attorney General, particularly in fields of the Attorney General's activities, e. g., questions dealing with civil rights, consumer frauds, etc."¹⁴ Oregon is one of the states in which the statutes define the officers to whom opinions may be given, then specifically prohibit rendering opinions or advice to others.¹⁵

¹³ Legislative Drafting Research Fund of Columbia University, Index Digest of State Constitution 39 (2d ed. 1959).

¹⁴ N. Y. reply to COSGO Questionnaire, *op. cit. supra* note 10, table 19.

¹⁵ Ore. Rev. Stat. § 186.060 (1953).

TABLE 3
NUMBER OF WRITTEN OPINIONS IN SELECTED STATES
1957 and 1959

	1957	1959
Alaska	("only limited number of formal opinions")	
Indiana	59	70
Kentucky	1757	1570 (estimated)
Massachusetts	101	112
Michigan	258	211
Minnesota	606	387 (plus 191 by letter)
Mississippi	(estimate over 2,000 per biennium)	
New Jersey	109	58
New York	1405	1564 (includes informal and memoranda)
Nevada	102	120
Pennsylvania	69	49
Vermont	56	52
Virginia	376	405 (fiscal year)
Washington	152	164 (plus 3410 informal in 1959-60 biennium)

(Source: Question 22, COSGO Preliminary Questionnaire)

NUMBER OF OPINIONS

The number of opinions prepared in a particular state depends partly on the definition of opinions. Table 3 shows the number of written opinions issued in 1957 and 1959 by the fourteen states for which comparative data are available. Kentucky, Mississippi and New York show the largest number, but these states include as written opinions many which would be answered unofficially in other states. There is no apparent relationship between the number of opinions and the size of the state or structure of the Attorney General's office.

The number of opinions issued in Kentucky has not increased during the past two decades, despite the growth of government and the consequent increase in the number of persons entitled to request opinions. The numbers shown in table 4 are derived from the number assigned the last opinion issued each year.

TABLE 4
NUMBER OF OPINIONS IN KENTUCKY, 1940-1962

Year	Number of Opinions	Year	Number of Opinions
1940	2280	1950	1410
1941	1290	1951	1240
1942	1650	1952	1390
1943	1080	1953	1480
1944	1080	1954	1690
1945	920	1955	2270
1946	1760	1956	1560
1947	1590	1957	1620
1948	1700	1958	1600
1949	1900	1959	1470
		1960	1281
		1961	1114
		1962	1174

The annual number of opinions has ranged from 920 in 1945 to 2,280 in 1940. The number written does not seem to follow any pattern or relate to other factors, such as the number of attorneys employed by state departments, or the years of legislative sessions. An effort to limit the number of opinions issued resulted in a considerable decrease from 1960 to 1961, but the number increased during 1962.

SUBJECT OF OPINIONS

Kentucky law requires that opinions be rendered to officials "touching any of their official duties." The 1960 enactments broadened this definition by referring to "public questions of law," "questions of law of interest to the Commonwealth," and questions of "public interest."^{15a}

Most states apparently limit opinions to questions involving the duties of officials. Virginia, for example, specifies that the Attorney General shall have no authority to render an official

^{15a} KRS 15.025.

opinion unless the question dealt with is directly related to the discharge of the duties of the official requesting the opinion. This restriction does not apply to the Governor and legislators.¹⁶ In New Mexico, opinions must be furnished to state officials on any subject pending before them or under their control with which they have to deal officially, or with reference to their official duty¹⁷

Table 2 showed the number of opinions issued by the Attorney General of Kentucky in 1960, by the person requesting the opinion. The following tabulation analyzes the same opinions by subject matter:

Subject	Number of Opinions
Administration of state and local government	
Jurisdiction of administrative agencies and officials	52
Administrative procedure	86
Rights and duties of municipalities	51
Title and conveyance of public land	11
Occupational and professional licensing	31
Other regulatory programs	102
	333
Judicial System	
Jurisdiction and venue	25
Court procedure	51
Crimes and punishments	50
	126
Revenue and Taxation	
Sales tax	62
Levy and collection of other taxes, revenue bonds	111
Public expenditures, use of tax money	97
	270
Public Officers and Employees	
Compensation and expenses	86
Compatibility of offices, conflict of interest	64
Terms of office	27
Retirement, leave, tenure	50
	227

¹⁶ Code of Va. ch. 10, § 2-86 (1950).

¹⁷ N. M. Stat. art. 3, §§ 4-3-2 (d) (1953).

Elections

Qualifications of voters	37
Qualifications for office	26
Conduct of elections	140
	203
Subtotal	203

Other

Uniform Commercial Code	14
Recording of legal instruments (excluding the Commercial Code)	33
Rights of individuals (excluding those classified under another category)	19
Rights of person under legal disability	26
	1251
Total Number of Opinions	1251

Any such classification is arbitrary, and some opinions logically could have been placed under more than one heading, but it indicates the kind of questions about which opinions are requested.

Questions relating to elections account for one out of every six opinions. This was the chief subject of inquiry by private citizens, which partly explains the large number of requests. The large number of opinions on elections indicates that continuing clarification of the laws and intensified informational efforts are needed in this area. Compatibility of office is another subject which recurs frequently

New legislation apparently gives rise to many opinion requests. The present Attorney General has noted that "opinions of the Attorney General are of greatest value during the period before the courts have had the time and opportunity to clarify new legislation or spell out questions of law"¹⁸ As an example, the sales tax law, enacted in 1960, was the subject of about five percent of opinions issued during that year. Administration of newly-enacted programs accounted for many of the opinions classified above under regulatory programs.

¹⁸ Breckinridge, Preface 1960-1964 Ops. Ky. Att'y Gen. (1961).

TABLE 5

SUBJECT OF OPINIONS OR AGENCY TO WHICH ISSUED, 1962*

Subject or Agency	Number of Opinions
Agriculture, Department of -----	4
Alcoholic Beverages -----	8
Banking, Department of -----	5
Barbers & Beauticians Board -----	3
Business Reg., Department of -----	4
City Government -----	170
County Government -----	215
Criminal Law -----	32
Crimes & Punishments -----	2
Economic Security, Department of -----	2
Education -----	7
Education, Department of -----	92
Elections -----	93
Finance, Department of -----	8
Fish & Wildlife Res., Department of -----	7
Governor -----	4
Health, Department of -----	3
Health, State Board of -----	3
Historical Society, Kentucky -----	2
Industrial Relations -----	6
Insurance, Department of -----	5
Library & Archives, Department of -----	2
Marriage & Divorce -----	6
Military Affairs, Department of -----	9
Mines & Minerals, Department of -----	4
Optometric Examiners, Board of -----	3
Police Personnel Board, State -----	4
Prisons & Prisoners -----	2
Public Safety, Department of -----	9
Revenue, Department of -----	10
Secretary of State -----	3
State Government -----	8
Strip Mining Commission -----	2
Sunday Closing Law -----	3
Teachers Retirement -----	7
Uniform Commercial Code -----	8
Welfare, Department of -----	12
Agencies requesting only one opinion -----	24
TOTAL OPINIONS -----	791

*Includes opinions issued from January 1-October 15.

Table 5 shows the agencies to which opinions were issued, or the subject of opinions, during the first ten and a half months of 1962. Twelve percent of opinions concerned elections. Over half of the opinions concerned city or county government. The next largest subject was education.

Most of the Attorneys General from whom information is available render opinions on the constitutionality of statutes or legislative bills. Examples of exceptions are North Carolina, which does not render such opinions, and Indiana, which furnishes them only on request of the Governor or the General Assembly.¹⁹ The very limited data available indicates that most Attorneys General do not render opinions on their own motion.

Attorneys General do not ordinarily render opinions on matters pending before a court or on allegation of error. Minnesota is the only state reporting which gives opinions on matters pending in court and the conditions of such opinions are carefully qualified:

When an opinion is requested upon a matter which is or may be at issue before a court or other tribunal authorized to decide it, an opinion on the question of law or the sufficiency of the evidence may be expressed, so far as may be necessary for the guidance of the public officer or agency concerned, but this should always be qualified by a statement that the final decision will be for the proper court or tribunal. Expression of definite conclusions upon questions of fact should be avoided. The Attorney General cannot assume any authority or responsibility which is vested by law in other officers or agencies.²⁰

This apparently is intended to prevent any infringement on the judicial function and to preserve the separation of powers.

LEGAL STATUS OF OPINIONS

Kentucky Attorney General's opinions are advisory only and are not binding upon the recipient, who may either accept or reject them.

The status of opinions seems to vary considerably from state

¹⁹ North Carolina reply to COSGO Questionnaire, *op. cit. supra* note 10, table 19.

²⁰ Minnesota reply to COSGO Questionnaire, *op. cit. supra* note 10, table 20.

to state, as illustrated by the following quotations from a questionnaire circulated by the Council of State Governments:²¹

A written or non-written opinion by the Attorney General is binding upon state and local officials in all cases. (Failure to follow an Attorney General opinion may affect the liability of a public official.) The legal duty to follow the opinion is not clear and stems, at least in part, from custom. (Washington)

The courts accord the Attorney General's opinions great weight. They are treated by the courts as official interpretations of the statute and are frequently cited by the courts. (New York)

This construction of the statute by the Attorney General, while in no sense binding upon this court, is of the most persuasive character and is entitled to due consideration. (Virginia)

[Opinions have] no legal status and are not binding. (Nevada)

A few states specify by statute the effect of opinions. Mississippi law provides that:

When any officer, board, commission, department or person, authorized by this section to require such written opinion of the attorney general, shall have done so and shall have stated all the facts to govern such opinion, and the attorney general has prepared and delivered a legal opinion with reference thereto, there shall be no liability, civil or criminal, accruing to or against any such officer, who, in good faith, follows the direction of such opinion and acts in accordance therewith, unless a court of competent jurisdiction, after a full hearing, shall judicially declare that such opinion is manifestly wrong and without any substantial support.²²

In other states, the courts have given considerable authority to opinions. The Minnesota courts, for example, have stated that the Attorney General's opinion is binding on school officers and that, while opinions are not binding on the supreme court, opinions are entitled to careful consideration by the court, especially

²¹ Replies to COSGO Questionnaire, *op. cit. supra* note 10, table 24.

²² Miss. Code 1942, tit. 17, ch. 1, § 3834.

when they are of long standing and when accompanied with administrative reliance thereon.²³

The Minnesota Attorney General is authorized to render an opinion on matters pending before a court, but such an opinion must be limited to a question of law or the sufficiency of evidence so far as may be necessary for the guidance of the officer concerned, and the ultimate decision on a question of fact must be left to the officer or agency. He does not have to answer hypothetical questions, even though submitted by a public officer.²⁴

The effect of an opinion in Kentucky has been defined neither by statute nor the courts, and apparently the weight attaching to an opinion depends partly on the recipient. A former Attorney General has written that "the activities of the Governor have given rise to many important constitutional questions, many of which eventually resulted in litigation. These matters often originally involved opinions of the Attorney General's office which were not accepted as conclusive by one or other of the parties concerned. Other opinions of the office on equally important constitutional questions were fully accepted, and represent the latest statement of law in their fields."²⁵ A former Assistant Attorney General, with twenty-five years service, wrote that "in construing statutes it is the duty of the members of this Department to reflect the opinion of the Court of Appeals and not their own private construction."²⁶ To the extent that they are derived from judicial construction, opinions would seem to carry considerable weight.

PREPARATION OF OPINIONS

Procedures for writing opinions attempt to ensure quality, by providing for research and review, and to ensure efficiency, by

²³ *County of Henepin v. County of Houston*, 229 Minn. 418, 39 N.W. 2d 858 (1949); *Mattson v. Flynn*, 216 Minn. 354, 13 N.W. 2d 11 (1944); See also 1945 Ops. Minn. Att'y Gen. 629-2, stating that where, upon inquiry, the Attorney General advises that a legislative act is unconstitutional, county officials may rely thereon and officially ignore the legislative mandate.

²⁴ Minnesota reply to COSGO Questionnaire, *op. cit. supra* note 10, table 20; 1944 Ops. Minn. Att'y Gen. 27.

²⁵ Ferguson, Preface, 1956-60 Ops. Ky. Att'y Gen. (1960).

²⁶ Hilfield, Ops. Ky. Att'y Gen. 38, 700 (1938).

standardizing preparation and by setting time limits and recording requirements.

Kentucky. Available information indicates that written procedures governing opinions were first adopted by the Kentucky Department of Law in January, 1960. Preparation of opinions is currently governed by a manual adopted in 1961 and revised periodically. Due to the increasing volume and complexity of the Department of Law's work, and to an exceptionally high rate of staff turnover due to deaths and resignations, it became necessary to establish written procedures for opinions. The procedures manual serves as a guide for all staff members. The process of formulating written rules had the additional advantage of bringing about a complete review and revision of procedures.

Requests for opinions are stamped received by the central files clerk and sent to the Assignment Officer, who then determines whether the request is in proper form and deals with a subject for which an opinion is appropriate. The request, whether it merits an opinion or is merely of a miscellaneous nature, is then assigned to the Assistant Attorney General responsible for the agency or subject area involved, who prepares an opinion or letter furnishing requested information, or a letter explaining why an opinion cannot be issued. If the Assistant and the assignment officer cannot agree as to whether the request should be answered, the disagreement is referred to the Attorney General or Deputy Attorney General. Requests must be answered within a week, or, if this is impossible, the person making the request must be advised of the reasons for the delay.

Each Assistant keeps a personal docket, to which is added each opinion assigned to him. Once a week the Assistant's secretary prepares a list of unanswered opinions, and other work assigned to the Assistant. This list is submitted to the Attorney General, his Deputy, the Assignment Officer and the central files clerk for coordination with the list of assignments. Information copies are also given to all other Assistants. This procedure provides a routine check on outstanding opinions and serves as a control on the time involved in answering them.

The Chief of the Opinions Division supervises Assistants in the preparation of opinions. The Assistant Attorney General checks the question involved against prior opinions to see if

one exists that answers the question. If he decides to use a prior opinion, a copy is sent to the requester, attached to a form letter. If he disagrees with the prior opinion, he may write an opinion specifically modifying or overruling it. Opinions changing a prior opinion must be for the signature of the Attorney General.

Every opinion is in the form of a letter and is normally signed by the Assistant who drafted it, under the name of the Attorney General, who reviews the opinion. It must contain a summary of the facts, the questions of law involved, and references to the authorities relied upon. A single opinion may actually involve answers to several unrelated questions which were raised in a single request.

All "major opinions" or opinions of difficulty to the Assistant preparing them are reviewed by a committee composed of the Attorney General, the Deputy, the Review Officer, the Research Assistant, and any Assistant whose area of responsibility is involved. In addition, drafts are circulated to all Assistants for examination and comments. Comments are to be returned within three days to the author of the opinion, who then prepares a final draft. It has not always been possible to adhere to this review procedure, due to heavy workloads and to personnel shortages, but it is observed to the extent possible. All opinions are reviewed by the review officer, then by the Deputy Attorney General.

Opinions are approved by the Attorney General or his designee before release to the inquirer and to the press. They are assigned numbers and filed alphabetically and by author. One index slip is prepared and filed for each addressee, author, subject reference, constitutional citation, KRS, Criminal Code, Rules, Kentucky Administrative Regulation, opinion, and leading case, if applicable.

Other States. Information on opinion procedures was obtained through a survey conducted by the Council of State Governments.²⁷ In all states responding, official opinions are reviewed before release. They usually are drafted by an assistant, then reviewed by all or part of the staff, and by the Attorney General himself. In most of these states, both the Attorney General and the assistant who prepared the opinion sign it.

²⁷ COSGO Questionnaire, *op. cit. supra* note 10, table 21.

Several states, including Montana, require that the entire staff review all opinions. In North Dakota, each staff member must initial an opinion before it is released. This procedure is feasible only where the number of written opinions is relatively small, so that the staff members are not overburdened with review responsibilities.

Other states have special committees to screen opinions. Florida and New Jersey are among the states with special review committees. In Texas, opinions are reviewed by the Division Head, the Assistant in charge of review, the First Assistant, and by an opinion committee. In Indiana, a question is assigned to a staff member for drafting, but at least five examiners act on the draft; when these persons reach agreement, the opinion is presented to the Attorney General for final determination. In Pennsylvania, drafts are circulated among senior staff members and those having a direct interest in or a peculiar knowledge of the problem.

PUBLICATION OF OPINIONS

Kentucky law requires that opinions be filed and open for public inspection, but does not require publication. A 1961 publication, covering opinions written from 1956 to 1960, was the first bound publication since 1932. Of course, all opinions are made public and copies are available to interested persons.

The present Attorney General, after a survey of other states' publication practices, inaugurated a system of continuous publication. The initial volume, covering opinions issued from January 1960 to June 1961, was published in a loose-leaf form, and is supplemented quarterly. Complimentary copies are furnished to the Court of Appeals, circuit courts, Commonwealth's attorneys, selected city attorneys, county attorneys, and state departments. Other persons may purchase the service from the publisher. The person preparing an opinion indicates if it should be published, and a final decision is made by a publications committee. About one-fifth of the opinions are published in this form.

Twenty-six of the thirty-three states replying to a questionnaire²⁸ published opinions. One state published opinions every

²⁸ These replies were given to a questionnaire distributed by the National Association of Attorneys General on March 27, 1961, on behalf of John B. Breckinridge.

three months, one every six months, ten every year, thirteen every biennium, and one quadrennially. Only six states charge some or all recipients for such publications.

All but one of the twenty-five states which reported on distribution of opinions furnish them to other agencies of state government. One state furnishes published opinions only to state courts. Twenty-two Attorneys General distribute opinions to local officials and agencies, and seventeen to the federal government. Twenty-one distribute published opinions to other states, two of them only on a reciprocal basis. A number of states furnish copies to libraries, and at least one distributes publications to the complete bar association.

As a supplemental service in Kentucky, synopses of some of the opinions considered to be of significance and of particular interest to practicing attorneys are published in each issue of the *Kentucky State Bar Journal*. Additional synopses are also published in a monthly digest of *Opinions of Attorneys General* which is prepared by the Council of State Governments.

By making opinions more readily available, publication presumably encourages uniformity in interpreting the law, decreases the number of inquiries, and provides convenient reference on important questions.

CONCLUSIONS

All state Attorneys General issue advisory opinions, but there are great variations in the number and type issued. Kentucky issues an unusually large number of opinions each year. This is due largely to the broad definition of persons to whom opinions may be rendered, and to the practice of issuing official opinions in response to questions of relatively minor importance.

Stricter screening of requests for opinions has reduced the number issued in Kentucky. A further reduction is being accomplished by developing standardized answers to recurring requests. Memoranda, or letters, rather than opinions, are being used to answer requests for information. Publication of major opinions should tend to reduce requests by making prior opinions more generally available to public officials. Procedures are under continuing revision in an effort to restrict the number of opinions rendered.

Consideration is being given to recognizing formally the distinction between "major" and "minor" opinions. This distinction is already acknowledged in Department of Law review procedures, and the possibility of extending it to the entire process of preparation and publication is under construction. The practice of issuing "unofficial" opinions, either verbally or by letter, might be recognized in department procedures. The Attorney General's office gives thousands of informal opinions each year, yet there are no standards for receiving such requests or recording the response.

Kentucky is one of the few states which issues opinions to local officials and private citizens. About half of Kentucky opinions are directed to city, county, and school district officials. This increases the workload of the Attorney General's office, but helps foster uniformity in interpreting the law, and provides an opportunity for the office to be of real assistance to local governments. The statutory basis for issuing opinions to private citizens is ambiguous, and some clarification probably would be desirable in order to avoid misunderstandings which come up from time to time under the present criteria.

The entire elimination of responses to requests from private citizens or, in the alternative, clear definition of all of the circumstances under which their requests should be answered, would probably be of significant assistance to the administration of the office and would help to avoid any danger of encroachment on private practice.

VI. Special Duties and Functions

The Attorney General's duties as chief law officer have been discussed in detail. In addition, he has various duties assigned by the General Assembly or by the Governor which are not primarily legal in nature. This chapter discusses statutes and executive orders which name the Attorney General to state boards and commissions, and assign him special duties and functions. These are grouped topically, rather than by the source of authority

FINANCIAL ADMINISTRATION AND SUPERVISION

Most of the boards and commissions on which Kentucky's Attorney General serves are concerned with financial administration. Presumably, his membership is intended to ensure expert legal advice in investments, sale of bonds, and other matters involving large amounts of public funds, and to ensure participation of an independently elected officer in these matters. Some of these duties involve supervision of a public trust.

County Debt Commission. The County Debt Commission is composed of the Governor, who serves as Chairman, the State Treasurer, the Auditor of Public Accounts, the Secretary of State, the Attorney General, and the Commissioners of Finance, Highways, and Revenue. Members may designate an executive officer of their department to serve in their place. The State Local Finance Officer serves as secretary of the Commission.

The duties of the Commission are to "study the problems of county finance" for the purpose of making recommendations to the legislature, to hear appeals from rulings of the State Local Finance Officer, and to review decisions of the State Local Finance officer regarding approval of county bonds. Each county judge is required to furnish an annual report on county indebtedness, containing such information as the Commission may require.¹

¹ Ky. Rev. Stat. (hereinafter cited as KRS) 66.300-.380 (1962).

Kentucky Public School Authority. The Kentucky Public School Authority was created in 1960 to assist school boards in financing public school buildings. Membership consists of the Superintendent of Public Instruction, who serves as chairman, the Assistant Superintendent for Business Administration, the Attorney General or his designated assistant, and directors of the Divisions of Finance and Buildings in the Department of Education. The Authority is empowered to issue bonds and has numerous accounting duties in connection with such bond issues.²

State Committee for School District Audits. The 1962 General Assembly created a State Committee for School District Audits, composed of the Governor, or a person designated by him, the Attorney General, and the Superintendent of Public Instruction. The Governor, or his designee, serves as chairman. The Committee is required to select independent auditors and to have the accounts of each district board of education audited not less than once every two fiscal years. It may also audit any board at other times, and may cause the accounts of a board to be audited upon written request of the State Board of Education, the Superintendent of Public Instruction, the Attorney General, the Auditor of Public Accounts or the Governor. The Committee is given subpoena and other powers, and penalties are provided for obstructing audits.³

State Property and Buildings Commission. The State Property and Buildings Commission consists of the Governor, as chairman, the Lieutenant Governor, the Attorney General, the Commissioner of Finance, and the Commissioner of Revenue. A 1962 amendment empowers these officers to designate alternates to act in their stead.

The Property and Buildings Commission is charged with broad responsibilities to determine the comparative needs and demands of state agencies for real estate and building projects, to control the use of real estate owned by the Commonwealth, to acquire or sell real estate for state agencies, to issue and sell bonds, and with related duties.⁴

Turnpike Authority of Kentucky. The Turnpike Authority

² KRS 162.510-.620.

³ KRS 156.255-.295.

⁴ KRS 56.450-.463.

was created in 1960 to construct, repair, operate and regulate turnpike projects. It issues bonds, enters into leases, designates locations, and performs related duties. The Governor serves as chairman, and other members are the Lieutenant Governor, the Commissioner of Highways, the State Highway Engineer and the Attorney General.⁵

Board of Trustees of the Teachers' Retirement System. The Superintendent of Public Instruction, the Attorney General, the State Treasurer, and four elected members constitute the Board of Trustees of the Teachers Retirement System. The Board's duties include: keeping actuarial data; designating an actuary and a medical review board; having "full power and responsibility for the investment and disbursement of the funds" of the system; adopting rules and regulations governing eligibility and benefits; and being "the sole judge of eligibility or dependency of any beneficiary"⁶

Board of Trustees of the Kentucky Employees Retirement System. The 1962 General Assembly made the Attorney General a member of the Board of Trustees of the Kentucky Employees Retirement System, which now consists of the Commissioner of Personnel, four members elected by members of various state and county retirement systems, and three members appointed by the Governor, in addition to the Attorney General. The Board employs an executive secretary and other employees, establishes an accounting system, makes rules and regulations, and is authorized to "do all things that it deems necessary or proper in order to carry out the provisions of [the Employees Retirement Act]"⁷

LIBRARIES AND ARCHIVES

Kentucky's Attorney General is a member of the State Law Library Board of Trustees and the Archives and Records Commission. He was also a member of the Public Library Service Commission, which administered grants-in-aid to counties, until that agency was abolished in 1962.

State Law Library Board of Trustees. Trustees of the State

⁵ KRS 175.430-175.440.

⁶ KRS 161.250-161.710.

⁷ KRS 61.645.

Law Library consist of the Attorney General and the Judges of the Court of Appeals. They supervise the state law library, and employ a State Law Librarian.⁸

State Archives and Records Commission. Membership of the State Archives and Records Commission was revised in 1962. It now consists of the Commissioner of Finance, as Chairman, the Auditor of Public Accounts, the Chief Justice of the Court of Appeals, the Chairman of the Legislative Research Commission, the Attorney General, and four members chosen by the Governor from lists submitted by the Presidents of the state university and colleges, the Historical Society, and the Kentucky Librarians Association.

The archives and records program is administered by the Department of Finance, and the Commission's primary duty is to advise the Commissioner of Finance on matters concerning records disposition.⁹

NATURAL RESOURCES

Water Pollution Control Commission. The Water Pollution Control Commission is an agency of the Department of Health. Membership includes the Commissioners of Health, Conservation, Fish and Wildlife Resources, Mines and Minerals, the Director of Strip Mining, the Attorney General, and three members appointed by the Governor, two from groups representing municipalities, and one from groups representing industrial management. The Commission's general duties are to supervise enforcement of water pollution laws, to conduct programs and research for the prevention of water pollution, to cooperate with other agencies, states and the federal government in carrying out such programs, and related duties.¹⁰

Natural Resources Development Committee. The Attorney General is chairman of the Legislative Subcommittee of the Natural Resources Development Committee, which was created by the Commissioner of Conservation. The Committee serves to coordinate efforts in the conservation field, and to review and

⁸ KRS 171.015-.025.

⁹ KRS 171.420.

¹⁰ KRS 220.580-.650.

prepare legislative proposals concerning natural resources protection.

ATOMIC ENERGY

Kentucky's Attorney General has a leading role in the state's newly assumed function of regulating certain nuclear materials, and holds a number of offices in this regard.

Advisory Committee on Nuclear Energy. A federal act of 1959,¹¹ provided for jurisdictional transfer of certain regulatory responsibility for source, by-product and special nuclear materials from the federal government to the states, after state regulatory programs were developed and approved by the Atomic Energy Commission. In February, 1962, Kentucky became the first state to assume such responsibility, when its program was approved by the A. E. C. as being adequate to protect the public health and safety

The Advisory Committee on Nuclear Energy was established in 1958, and attached to the Department of Economic Development.¹² Members were appointed by the Governor, and the Attorney General was named chairman. The Committee was directed to "advise the Governor on atomic energy developments and regulations within the Commonwealth" and perform other functions, related chiefly to coordination and advice. A Task Force on Atomic Energy was created by Executive Order in 1960, and directed to "review their regulatory responsibility pursuant to [Kentucky's nuclear energy statutes]" The Attorney General was named chairman of the Task Force.

Kentucky Atomic Energy Authority. The 1962 General Assembly created a Kentucky Atomic Energy Authority, consisting of the Governor, the Lieutenant Governor, the Commissioner of Economic Development, the Commissioner of Health, the Attorney General, and five citizens appointed by the Governor. The Authority is empowered to acquire and convey lands, construct projects, issue bonds, and exercise other powers in developing the peaceful use of atomic energy, and in providing for disposal of radioactive waste and materials.¹³

¹¹ 73 Stat. 688 (1959), 42 U.S.C. § 2021 (Supp. III, 1959-61).

¹² KRS 152.140.

¹³ KRS 152.540.

Because of Kentucky's leadership in this emerging field, the Kentucky Attorney General holds a number of posts in interstate atomic energy programs. He serves as: vice-chairman of the Southern Interstate Nuclear Board; a member of the Advisory Committee of State Officials to the A.E.C., vice-chairman of the National Association of Attorneys General Committee on Atomic Energy Law; and a member of the American Bar Association's Special Committee on Atomic Energy

SUMMARY

The statutes name the Kentucky Attorney General as a member of eleven boards and commissions. Three of these assignments resulted from 1962 legislation and two from 1960 legislation. The 1962 legislative session discontinued, or removed the Attorney General from membership on three boards and commissions, so the number of posts he held remained stable.

Information on the extent to which Attorneys General of other states serve as members of comparable boards is not available. The Council of State Governments Preliminary Questionnaire did not specifically ask for such data, and duties of this nature were not listed by respondents under a question calling for descriptions of "other duties." It is not, therefore, known whether Kentucky is typical in assigning such a variety of ex-officio duties to the Attorney General, or whether this practice is unusual. In one state from which such information is available, (Pennsylvania), the Attorney General is a constitutional member of the Board of Pardons, and is a statutory member of the Board of Commissioners on Uniform State Laws, the Boards of Finance and Revenue, and Board of Property¹⁴

The practice of making the Attorney General a member of various boards and commissions has both advantages and disadvantages. As an elective officer, he can serve as a watchdog on appointive members. As a law officer, he can give a legal view in policy formulation. His presence undoubtedly lends prestige to many of these groups. On the other hand, he does not have to be a member of a board to render legal advice, and the duties

¹⁴ Rutherford, Department of Justice of the Commonwealth of Pennsylvania 6 (n.d.).

incumbent upon so many memberships deprive him of time that could otherwise be devoted to his legal duties.

LEGISLATION AND CODE REVISION

Kentucky's Attorney General has certain duties in regard to preparation and review of legislation for the biennial sessions of the General Assembly. These are based upon executive order, rather than statute. The statutes require that the Legislative Research Commission draft legislation upon request of legislators and legislative committees, but make no other reference to bill drafting.¹⁵

Bill Drafting. During the 1960 legislative session, an executive order directed certain departments to work with the Attorney General's office in analyzing legislation. Prior to the 1962 session, this procedure was expanded to involve drafting, as well as review, of legislation.

The Inter-Agency Legislative Program Committee was created by executive order. Each state department was directed to develop its own legislative program and submit drafts of all bills to the Attorney General's office for review of form and constitutionality. The Attorney General's office actually drafted bills for agencies not employing counsel. Under this program, a total of more than seventy-five bills, from forty-six agencies, were drafted, reviewed, or otherwise processed by the Attorney General's office. The amount of revision necessary on many departmental drafts indicated that this service improved the form of the administration's legislative program considerably.

Forty-seven states have permanent arrangements for drafting service, in recognition of the technical nature of this function. According to the Council of State Governments, however, "lodging of the drafting function of the Attorney General, once a widespread practice, has been on the wane in recent years. In the great majority of cases, the function has been shifted to the staff serving the legislative council."¹⁶ In some states, like Kentucky, the Attorney General's office provides drafting service, although most legislation is drafted by the legislative agency

¹⁵ KRS 7.100, 7.120.

¹⁶ The Council of State Gov'ts. (hereinafter cited as COSGO), *The Book of the States 1962-1963*, p. 64.

In Alaska, for example, the Attorney General estimates that about thirty percent of bills are drafted by his office, and reports that "the Department of Law tends to concentrate on administration bills, while the Legislative Council concentrates on subjects on which the legislature has requested research and on bills requested by legislators."¹⁷ In New Jersey, the Attorney General drafts about ten percent of the bills prepared for introduction; bills prepared "by administrators or other non-lawyers in the various state departments are cleared by the Attorney General prior to introduction."¹⁸ As a final example, the Vermont Attorney General estimates that he drafts about ten percent of the state's legislation.¹⁹

Initiation of Legislation. All Kentucky Assistant Attorneys General are required by Department of Law procedures, established in 1961, to keep a record of omissions, conflicts, ambiguities and other defects in the statutes that come to their attention in the course of work. They are then required to draft remedial legislation to remedy such defects. This procedure is intended to produce a group of noncontroversial bills that will aid in clarifying the statutes. In the last biennium, particular attention was given to measures designed to clarify voting laws, which give rise to nearly two hundred opinions a year.

Code Revision. All but a few states maintain a continuous process of code revision, to eliminate obsolete and unconstitutional sections and to rectify conflicts and inconsistencies.²⁰ The Attorney General of Kentucky has no responsibilities in this regard, except as noted above. In some states, however, the Attorney General is partially or wholly responsible for this function. Other states give the Attorney General some duties in connection with approval of administrative rules and regulations.

The Virginia Attorney General is a member of the Code Commission, which is an independent agency.²¹ The North Carolina Code Revisor is attached to the Department of Justice.²² The In-

¹⁷ Alaska reply to COSGO Preliminary Questionnaire on the Powers, Duties and Organization of the Office of Attorney General, table 18.

¹⁸ New Jersey reply to COSGO Questionnaire, *op. cit. supra* note 17.

¹⁹ Vermont reply to COSGO Questionnaire, *op. cit. supra* note 17.

²⁰ See The Council of State Gov'ts., *op. cit. supra* note 16. All but nine states now have a program of formal revision.

²¹ Virginia reply to COSGO Questionnaire, *op. cit. supra* note 17, table 16.

²² North Carolina reply to COSGO Questionnaire, *op. cit. supra* note 17, table 16.

diana Attorney General is required by statute to approve, as to form and legality, all administrative rules and regulations, but is infrequently requested to assist in the formulation of such.²³ The Attorney General of Washington has no statutory responsibilities in this regard, but, by custom, apprises the Code Reviser of errors and ambiguities detected by assistants.²⁴

Uniform State Legislation. Kentucky's present Attorney General is a Commissioner on Uniform State Laws, appointed by the Legislative Research Commission. In Kentucky, the Legislative Research Commission functions as the Commission on Interstate Cooperation.²⁵ In many states this is an independent group, of which the Attorney General is frequently a member.²⁶ The Commission on Uniform State Laws consists of from one to five commissioners from each state, usually appointed by the Governor, who draft model laws in areas where such statutes are believed to be useful.

A further activity related to legislation should be mentioned, although it is without formal basis and only recently undertaken. The Kentucky Department of Law cooperates with the Committee on the Administration of Justice in the Commonwealth in reviewing court decisions which, while not questioning the legislative prerogative, have indicated that legislation was technically defective, or possibly unwise. Cooperation in identifying such cases has been solicited from circuit judges and from Commonwealth, county, and city attorneys, and legislation drawn to remedy the defect.

OTHER SPECIAL DUTIES AND FUNCTIONS

A statutory duty assigned to the Attorney General in Kentucky, which does not fit into any of the above categories, is registration of lobbyists. Each legislative agent is required to register his name, occupation, period of employment, and subjects to which the employment relates in a docket kept by the Attorney General. He is further required to file a written authorization, signed by his employer. Within thirty days after the General Assembly's

²³ Indiana reply to COSGO Questionnaire, *op. cit. supra* note 17, table 16.

²⁴ Washington reply to COSGO Questionnaire, *op. cit. supra* note 17, table 16.

²⁵ KRS 7.110.

²⁶ COSGO, *op. cit. supra* note 16, at pp. 548-600.

adjournment, the lobbyist must file a sworn statement of all of his lobbying expense.²⁷

When a constitutional amendment is proposed by the General Assembly, the Governor, Attorney General and Secretary of State must cause the proposed amendment to be published a stated number of times in newspapers of general circulation. The Attorney General states the substance of the amendment and certifies this question upon the ballot.²⁸

Every common carrier is required to keep a record of free passes, or transportation at reduced rates, given to persons other than employees and their immediate families. The Attorney General, by statute, is given access to such records at all times. Each such carrier must file a statement with the Attorney General annually, showing transportation given free or at reduced rates.²⁹

Attorney General's offices are continually initiating new activities and entering new functional areas, in response to emerging problems and needs. The Kentucky Department of Law, for example, has participated in the United States Attorney General's Conference on Anti-Trust and Consumer Protection Problems, as well as the National Association of Attorneys General program in this area, and has helped develop legislation, although it has no specific statutory assignment to do so. It is working with the Kentucky State Bar Association to develop a better approach to legal aid for those who cannot afford such services. These kinds of activities, undertaken informally, are often as important as duties assigned by statute.

INTERSTATE AND FEDERAL RELATIONS

The interstate relationships of the Attorney General of Kentucky consist primarily of his membership in and collaboration with the National Association of Attorneys General. In connection with this organization, he participates in the development of important decisions and positions which the states take as a group in their relationships with the federal government. His further purpose in belonging to this organization is to work toward the development of closer interstate cooperation and understanding

²⁷ KRS 6.280-6.300.

²⁸ KRS 118.430.

²⁹ KRS 276.250.

insofar as the work of the offices of the respective Attorneys General is concerned.

The particular duties of the present Attorney General of Kentucky with respect to the National Association of Attorneys General include the chairmanship of the Committee on the Office of Attorney General, vice-chairmanship of the Committee on Atomic Energy, membership on the Committee on Federal-State Relations, and cooperation with the various standing committees which have been established by the National Association. His functions with the organization will vary from year to year. Cooperation is achieved in this office by the appointment or designation of an assistant in the office to cooperate and collaborate in the work of each of the National Association's committees, thereby permitting the office in Kentucky to derive maximum benefit from the functions of these committees and to make a more effective contribution to their work.

The National Association of Attorneys General helps maintain liaison between the states and the federal government. This organization provides a forum for frequent interchange of information and the development of collaboration between federal and state law enforcement agencies; particularly, for example, through conferences with the Department of Justice and important officials of that department. The office further collaborates with federal authorities in making use of available information from such federal agencies as the Internal Revenue Service for the purpose of conducting its prosecuting activities.

Over the period of the past thirty years we have witnessed a tremendous extension of the activities and powers of federal government into fields which previously were accepted as being within both the legal and administrative jurisdiction of the several states. This trend may continue, but there is evidence that through interstate and federal-state cooperation, this trend can be slowed, halted or possibly even reversed. Although heretofore the areas of navigation and atomic energy have been considered exclusively within the control of the federal government, recent federal legislation has paved the way for the states to assume greater control and responsibility in the regulation of pleasure boating and the peaceful uses of atomic energy, and advances are being made in other areas of federal-state relations. Bills have

been introduced in Congress to relinquish federal legislative jurisdiction over lands located within the several states, and to insure the continuance of the primary role of the states in water resources, planning, development, management and control.

COMMITTEE ON THE ADMINISTRATION OF JUSTICE

Many special duties of the Attorney General derive from his chairmanship of the Committee on the Administration of Justice in the Commonwealth. Created initially as an *ad hoc* committee to establish a closer working relationship between the bench, the bar and the office of Attorney General, the Committee has no statutory basis, but resulted from a resolution of the Board of Bar Commissioners of the Kentucky State Bar Association. The Committee's membership includes representatives of the Kentucky State Bar Association, the Commonwealth's Attorneys and the County Attorneys Associations; the deans of the University of Kentucky and University of Louisville law schools; the Chief Justice and the Administrative Director of the Court of Appeals; a circuit judge; a city attorney, chosen by the Kentucky Municipal League; and the Attorney General. It is currently contemplated that membership may be expanded to include representatives of various local officers who are concerned with the administration of justice.

This study of the office of Attorney General in Kentucky is the Committee's first project. A closely related study, concerning law enforcement in Kentucky, is nearing completion. As secretariat to the committee, the Attorney General's office coordinates, directs, and actually performs much of the research involved in these projects. The broad scope of these studies and the widespread participation in their preparation should assure their usefulness to all groups represented on the committee.

The present Attorney General of Kentucky is chairman of the National Association of Attorneys General Committee on the Office of Attorney General. This Committee is currently undertaking a study of the office of Attorney General in the fifty states, modeled in part on this Kentucky study. The Council of State Governments serves as secretariat to the National Association, but much of the research for the study is being carried out by

the staff of the Kentucky Department of Law. While these responsibilities add considerably to the office's workload, it is considered that the ultimate results will be of sufficient benefit to the office to justify this effort.

Activities of the Committee on the Administration of Justice which relate to legislation have been described previously. As a group representing all aspects of the legal profession, it is uniquely suited to serving as a clearinghouse for legislative proposals relating to the administration of justice. The Committee is also developing plans for a state-wide institute on the administration of justice to stimulate interest in this area.

Concluding Statement and Recommendations

By Attorney General John B. Breckinridge

This cooperative study, of the Office of Attorney General in Kentucky, is one of a projected number of factual reports to the Committee on the Administration of Justice. It does not include specific recommendations. The ultimate value of such a study depends upon whether or not effective action is taken to meet the problems and deficiencies defined therein.

The following observations and recommendations constitute my own findings in a few of the more glaring areas of jurisdictional and administrative inadequacy, in connection with the improvement of the administration of justice throughout the Commonwealth and the rendering of legal services to governmental agencies. They are based on the three years' experience which has culminated in the data and study reflected in this report, as well as on frequent and continuing exchanges of opinion, observation and experience between this office and that of the other Attorneys General of the United States.

It is to be hoped that the National Association of Attorneys' Generals' Committee on the Office of the Attorney General will publish a definitive study of the office which may result in sufficient concensus to enable the bench, the bar and those interested in responsible public administration, as well as the administration of justice, to effect that remedial legislation throughout the nation essential to cope with the complexities and responsibilities imposed by the times. An appreciable portion of the preliminary research necessary to that project, authorized by the Association at its Annual Conference in June of 1962, is in hand at the time this Report goes to press.

1. *The Attorney General of Kentucky lacks ample statutory authority to discharge his duties as chief law officer of the Commonwealth.* Kentucky's Constitution, like that of many other states, designates the Attorney General the Commonwealth's chief law officer. This is his traditional role. The Constitution

further provides, however, that the Attorney General shall have such duties "as may be prescribed by law", and the General Assembly has not seen fit, generally speaking, to give the Law Department either directory or supervisory jurisdiction over state attorneys or local law enforcement officers. Perhaps equally important an omission is that broad investigatory power without which responsible law enforcement is peculiarly inhibited. No other state attempts to conduct its legal business in so limited a manner. It is obvious that no Attorney General can discharge the function of effective law enforcement under these handicaps.

2. *There is no sound basis in administrative procedure of historical precedent for the limitations of #1.* The persuasive nature of the argument for the complete decentralization of the enforcement of laws, applicable on a statewide basis to a rural society in which the "riding of the circuit" was attendant with the pomp and pageantry of a bygone era, loses its force and *bona fides* in today's world of syndicated crime, power of corruption and ever-increasing federal acceptance of responsibility for the enforcement of criminal laws resulting from failure on the part of states to accept and discharge this primary governmental responsibility

This history of the Office of Attorney General in Kentucky indicates that many of the present limitations on its authority are of recent origin. The statutes authorizing state agencies to enjoy counsel are the result of specific political conflicts, with little basis in either legal or administrative philosophy

3. *The present organization of state legal services is inefficient, wasteful, lacking in professional criteria or direction and conflicting in administration.* It is apparent from Part II of this report that the Commonwealth's legal services are not organized for maximum efficiency or uniformity and improvement of quality. Departments may employ or retain counsel to perform services that could be provided by existing staff in the Department of Law or, in practically all other instances, through the consolidation of the various legal positions throughout state government in the Department. The Attorney General has no control over either the quantity or quality of the vast majority of state legal services. There is little, if any, coordination of legal

work with departmental counsel serving lay administrators, and relationships with departmental Assistant Attorneys General could be greatly strengthened and improved by appropriate statutory and budgetary provision. The work of such attorneys provides ample opportunity for conflict with that of the Department of Law

4. *It is recommended that no state department, board, commission or agency be authorized to employ attorneys, except upon the written agreement of the Governor and the Attorney General of Record in the Executive Journal.* Such centralization would improve administrative efficiency, the continuity and quality of professional services and assure the optimum use of the services of the Commonwealth's legal staff. Additional counsel should be retained only in those instances where the need for such services is expressly agreed by the Governor and Attorney General. Exceptions to this policy should, for reasons peculiar to Kentucky, be made for the Governor's office, the Legislative Research Commission and the Workmen's Compensation Board. Attorneys employed by departments having assigned Assistant Attorneys General should be recruited through the Department of Personnel and appointed by the Attorney General. This procedure would give the Attorney General responsibility commensurate with his role as chief law officer and would correspond with the organization adopted successfully by most of our sister states.

5. *The Attorney General's lack of any authority or control in local prosecutions makes it impossible for him to assure the effective or uniform enforcement of state laws.* Part III of this study discloses the lack of clarity and consistency in Kentucky law concerning the relative roles of prosecuting officers. It also points out a situation that has proven to be a grave obstacle to the effective administration of this office's duties: The Attorney General's complete lack of authority to either intervene or supersede in local prosecutions, even when the interests of the Commonwealth are directly involved, or when local authorities desire such assistance. In many states supervisory powers are effected through the provision of routine, periodical reporting and for-

warding of additional data concerning criminal charges, indictments, prosecutions, convictions, etc.

6. *It is recommended that the Attorney General be authorized to intervene or supersede in local prosecutions under certain circumstances.* The Attorney General should be empowered and staffed to assist County and Commonwealth's Attorneys in the conduct of any criminal investigation or proceeding, upon their request, when, in his discretion, he feels such assistance is warranted. He should be further empowered to intervene or supersede and participate in any investigation or criminal proceeding which he considers of particular significance to the Commonwealth or beyond the resources of the local prosecutor, or, when requested by the Governor, any court or grand jury, sheriff, mayor or city legislative body. Comparable authority is granted to the Attorney General of many states and there is no indication that it misused or that it has led to any unnecessary interference in local prosecutions. The demonstrated necessity for empowering the Attorney General to intervene or supersede in certain instances should outweigh any hypothetical objections to such authority.

The representation of the Commonwealth, and the advising of its political subdivisions, constitutes, broadly speaking, the practice of public as distinguished from private law, although the Department is intimately and often involved in financial, contractual, revenue, realty, tort and other commercial or quasi-private legal activities and transactions of state business. Experience, practice and expertise in this field is as important to the general welfare as it is in the various fields of private practice—if not more so—bearing in mind the nature of the public trust of the office, the vast amounts of public moneys involved, and the right of the people, under our form of government, to an ever-improving administration of justice, the uniform enforcement of state laws, and a government of laws rather than of men.

No mention should be necessary, in such a view of the office, to call attention here to the importance of a proper protection of the professional nature of the duties of the office and the imperative necessity of merit system protection for all professional and clerical staff members. Only by such a system, which the

office is now enjoying for the first time in its history, can standards be sufficiently raised, security in the professional discharge of duties so assured, and a career service established as to both attract and retain the services and experience of those best qualified to represent and protect the interests of the individual citizen within the rule of law