THE MICHIGAN DEPARTMENT OF ATTORNEY GENERAL:
THE STATUS OF THE LAW AT THE END OF A LEGACY
An Article Cataloging the Responsibilities of the Michigan Attorney General

TABLE OF CONTENTS

INTRODUCTION..................................................................................................................2
I. BACKGROUND..................................................................................................................5
   A. Historical Origins of State Attorneys General.....................................................5
      1. Attorneys General Prior to the American Revolution.................................5
      2. Role Comparison of State Attorneys General and the United States Attorney General.................................................................9
   B. Constitutional Origins of Michigan's Attorney General.....................................13
   C. Michigan Statutory Provisions Governing the Department of Attorney General.................................................................16
      1. The Attorney General Statute ........................................................................17
      2. The Revised Judicature Act............................................................................20
   D. Topical Discussion of Attorney General Duties: A Framework for Analyzing Michigan Cases and Statutes.................................22
      1. Public Policy and Litigation............................................................................23
         a. Consumer Protection and Environmental Protection.............................26
         b. Public Policy Affecting Local Law..............................................................31
      2. Investigation and Prosecution........................................................................35
         a. Investigation...............................................................................................36
         b. Prosecution..............................................................................................37
      3. Statutory Enforcement and Compliance.......................................................39
      4. Interaction with State Agencies....................................................................46

II. DISCUSSION..................................................................................................................50
   A. Separation of Powers...........................................................................................51
      1. The Relationship Between the Attorney General and Judiciary..................52
      2. The Relationship Between the Attorney General and the Legislature........56
      3. The Independent Responsibility of the Attorney General to Act on Behalf of the People........................................................59
INTRODUCTION

As recent history illustrates, state Attorneys General across the country are becoming more visible in the national political arena, and are effectuating policy changes. For example, state Attorneys General have been in the spotlight negotiating the now famous multi-billion dollar tobacco settlement of 1998.1 Such actions by state Attorneys General on the national front evoke inquiry into classic separation of powers concepts.

Because each state is responsible for regulating the duties of its Attorney General,2 analysis of the powers of state Attorneys General is effectively accomplished by examination of individual state systems. Several legal commentators have produced scholarly works discussing the powers and responsibilities of the Attorney General in various individual

---

1 See e.g. Cliff Sherill, Tobacco Litigation: Medicaid Third Party Liability and Claims for Restitution, 19 UNIV. ARK. LITTLE ROCK L.J. 497 (1997) (discussing the tobacco settlement).

2 See U.S. CONST. amend. X (reserving the power to the states).
the status of the law in Michigan.

In 1998, Frank J. Kelley, Michigan's fiftieth Attorney General declined to run for reelection. Although incumbents often leave office without incident, Mr. Kelley's departure may have a significant legal impact on the state of Michigan because Kelley held the office for thirty six years. At the time of his departure from office in December of 1998,

---


4 See <http://www.sos.state.mi.us> (reproducing election results through Bureau of Elections). Jennifer Granholm was elected as Mr. Kelley's successor in November of 1998. See id. Because the Attorney General of the state of Michigan and the United States Attorney General are both women, this paper will refer to the Attorney General using the pro-noun "she" throughout the paper.

5 See Michigan Department of Attorney General, Executive document entitled "Biography of Frank J. Kelley" available from the Executive Division upon request [hereinafter "Kelley Biography"].
Kelley was the longest serving state Attorney General in the United States—having been first appointed and then elected in 1962. Although General Kelley's departure may bring relief to some and sorrow to others, it provides an ideal opportunity for an academic evaluation of the role played by Michigan's Attorney General.

This article will detail the historical development of the Department of the Attorney General of the state of Michigan, and serve as an authoritative legal reference regarding the mandatory, permissive, and prohibitive functions of the Attorney General. First, the paper will provide an historical account of Attorney General functions. The overview will chronicle the development of the office in England, the colonies and the United States. Second, the paper will consider the constitutional origins of the office in Michigan. Third, the article will outline the statutory and caselaw development of Attorney General responsibilities in Michigan. In so doing, the article will propose an analytical framework for examining topical statutes which impose duties upon the Attorney General. Finally, the paper will consider the constitutional appropriateness of policy action by a state Attorney General in the context of the separation of powers doctrine.

6 See id.
I. BACKGROUND

A. Historical Origins of state Attorneys General

1. Attorneys General Prior to the American Revolution

The office of Attorney General currently exists in all fifty states, although the scope and function of each state office varies. The commonality of existence of the office may be explained through historical analysis. Similarly, history provides insight into the divergent policies guiding Attorneys General from different states.

The first Attorney General of record in England was Lawrence del Brok, who served as the King's representative in the thirteenth century. Originally, the English Attorney General was authorized to take legal action in order to protect the interests of the Crown. As the centuries progressed, the powers of the English Attorney General evolved. In the seventeenth century, the Attorney General became more commonly known

8 See NAAG, supra note 7, at 4.
9 See id.
10 See id. at 4-5.
as the legal representative of sovereign interests.\textsuperscript{11} By colonial times, the Attorney General served a dual function--he was a representative of the King, but was also a representative of the people.\textsuperscript{12}

As the new world developed, many of the colonies established an office of Attorney General, beginning with Richard Lee of Virginia in 1643.\textsuperscript{13} Various colonies followed Virginia's lead, and established their own offices of Attorney General.\textsuperscript{14} Interestingly, however, the development of the office from colony to colony was inconsistent.\textsuperscript{15} Because the colonies were composed of diverse persons of varying nationality, the office of Attorney General sometimes represented a combination of ideals drawn from multiple political systems.\textsuperscript{16} Not surprisingly then, the development of the office of Attorney General in the

\textsuperscript{11} See Edminston, supra note 3, at 3.

\textsuperscript{12} See id.

\textsuperscript{13} See NAAG, supra note 7, at 4-5.

\textsuperscript{14} See id.

\textsuperscript{15} See id.

\textsuperscript{16} See id. at 8.
individual states also varies. Thus, although all fifty states have an Attorney General as did their colonial predecessors, the scope and function of the office in each state is not static. Nonetheless, the majority of American states vest their Attorneys General with common law powers derived from England and the colonies.\textsuperscript{17} In most states, including Michigan, these powers remain in effect until modified by the legislature.\textsuperscript{18} Such common law authority can be used as a mechanism for protecting the public interest.\textsuperscript{19}

Caselaw generally holds that the state Attorney General possesses common law powers in addition to those powers delineated by statute or constitution.\textsuperscript{20} Therefore, understanding the powers that existed at common law becomes an important issue for most state Attorneys General. Analyses of attorney General common law powers often begin with \textit{People v. Miner,}\textsuperscript{21} a nineteenth century case which describes the powers of the

\textsuperscript{17} See Edminster, \textit{supra} note 3, at 6, 18-19.

\textsuperscript{18} See id.

\textsuperscript{19} See id.

\textsuperscript{20} See id. at 27.

Attorney General as drawn from English history.\textsuperscript{22} Miner was later summarized by the Mississippi Supreme Court in \textit{State v. Warren}.\textsuperscript{23} As the \textit{Warren} Court pointed out, the common law Attorney General played various roles.\textsuperscript{24} In his capacity as chief legal officer to the Crown, he handled all the criminal and civil matters that came before the Crown.\textsuperscript{25} But further, he had authority to protect the public safety and be a part of actions affecting the general welfare.\textsuperscript{26}

Cases from several states comment expressly on the duties possessed by the Attorney General at common law.\textsuperscript{27} Five basic rules emerge from various state cases and are considered persuasive by the National

\textsuperscript{22} \textit{See generally, Miner}, 2 Lans. 396.

\textsuperscript{23} 180 So. 2d 293, 299 (1965).

\textsuperscript{24} \textit{See generally, Warren}, 180 So.2d 293.

\textsuperscript{25} \textit{See id. at} 299.

\textsuperscript{26} \textit{See id.}

Association of Attorneys General. First, the Attorney General must act as
the legal representative for the state and state agencies. Second, she is
responsible for controlling the litigation process. Third, she may
intervene in cases which affect the public interest. Fourth, she may
determine the legal policy of the state. Finally, she may prosecute
crimes.

2. Role Comparison of State Attorneys General and the United States
Attorney General

The modern state Attorney General may also have responsibilities
commensurate with the duties of the United States Attorney General. For

28 See NAAG, supra note 7, at 37-38.

29 See generally Martin, 320 N.C. 533, 359 S.E.2d 472 (holding that the Attorney
General has common law powers); See also NAAG, supra note 7, at 37.

30 See generally Knutson, 239 Kan. 663, 722 P.2d 1093 (discussing the Attorney
General's litigation abilities); See also NAAG, supra note 7, at 37.

31 See NAAG, supra note 7, at 37.

32 See id.

33 See id.; See generally, Jimenez, 588 P.2d 707 (discussing the Attorney General's
ability to conduct criminal prosecutions).
example, the United States Attorney General is responsible for overseeing the Federal Bureau of Investigation and the Department of Justice, including both United States Attorneys and United States Marshals.\textsuperscript{34} Similarly, state Attorneys General often conduct criminal investigations, supervise prosecuting attorneys, and enforce the laws of the state.\textsuperscript{35}

Yet, despite the fact that many state Attorneys General perform functions which parallel the responsibilities of the United States Attorney General,\textsuperscript{36} some significant differences often exist between the state and federal offices. The position of United States Attorney General was created by statute in 1789.\textsuperscript{37} The United States Constitution does not mention the Attorney General, however, the Attorney General is considered a department head who is subject to the strictures of Article Two.\textsuperscript{38} The United States Attorney General is appointed as a member of the

\textsuperscript{34} See NAAG, supra note 7, at 11.

\textsuperscript{35} See id.

\textsuperscript{36} See id.

\textsuperscript{37} See id.

\textsuperscript{38} See id.
President's cabinet, and clearly exists as a part of the executive branch.\textsuperscript{39} In many states, however, the office of Attorney General is constitutionally established.\textsuperscript{40} The duties and powers of state Attorneys General are determined by constitution, statute, and common law.\textsuperscript{41} Attorneys General may be either elected or appointed, although the state Attorney General is more commonly elected.\textsuperscript{42} The state Attorney General might serve legislative or quasi-judicial functions in addition to executive functions.\textsuperscript{43} The state Attorney General often possesses broader powers within the state system than does the United States Attorney General in

\textsuperscript{39} See Mich. Const. art. V.; See NAAG, supra note 7, at 10.

\textsuperscript{40} See NAAG, supra note 7, at 15.

\textsuperscript{41} See id. The Michigan Supreme Court has found that state Attorneys General have common law powers commensurate with those duties applicable elsewhere, and that such powers were derived from the law known at the time the United States Constitution was drafted. See generally Groesbeck v. Fuller, 216 Mich. 243 (1921).

\textsuperscript{42} See NAAG, supra note 7, at 15. Alaska, Hawaii, New Hampshire, New Jersey and Wyoming are the only states which do not elect the Attorney General. See id. at 16-18.

\textsuperscript{43} For a discussion of trends in state Attorneys General offices, see NAAG, supra note 7, at pages 11-14.
the federal system.\textsuperscript{44} In fact, the national trend is to continually broaden the powers of the state Attorney General.\textsuperscript{45} Functions typically performed by state Attorneys General include: controlling litigation which impacts the state, acting as chief legal officer, rendering legal opinions, advocating public and legislative change, enforcing laws, and making policy.\textsuperscript{46}

Several cases discuss the broad common law powers typically granted to state Attorneys General. In Michigan, the power to act on behalf of the people is directly derived from the common law, as the modern Attorney General is the successor to the English sovereign's Attorney General.\textsuperscript{47} The broad powers of the Attorney General at common law were notably laid out by the Fifth Circuit in \textit{Florida v. Exxon Corporation}.\textsuperscript{48} The \textit{Exxon} court pointed out that an Attorney General with

\textsuperscript{44} See id.

\textsuperscript{45} See id.

\textsuperscript{46} See id.

\textsuperscript{47} See Am. J. of Legal History 304, 308-309 (1958).

\textsuperscript{48} 526 F.2d 266, 268-69 (5th Cir. 1976).
common law powers has broad autonomy and discretion.\textsuperscript{49} The same concept was applied to Michigan law in \textit{Michigan State Chiropractic Association v. Kelley},\textsuperscript{50} in which the court stated that the Attorney General has common law powers in addition to statutory powers.\textsuperscript{51} Although the idea that the Attorney General retains common law powers was clearly articulated in \textit{Michigan State Chiropractic Association}, it should be noted that the concept was not new.\textsuperscript{52} In 1921, the Michigan Supreme Court had already stated that the Attorney General has broad discretion to determine which matters should be pursued for the public interest.\textsuperscript{53}

B. Constitutional Origins of Michigan's Attorney General

Originally, the Michigan Attorney General was appointed by the Governor.\textsuperscript{54} Since 1850, however, the Attorney General has been a

\textsuperscript{49} See id.


\textsuperscript{52} See id.

\textsuperscript{53} See Mundy v. McDonald, 216 Mich. 444 (1921).


13
constitutionally elected officer. Although the Michigan constitution was significantly revised in 1963, the Attorney General was retained as an elected official at that time, and remains so today. Currently, Article V of Michigan's constitution, which establishes the executive branch of government, specifically discusses the duties of the Attorney General. The Attorney General is also subject to all provisions of the constitution which govern the responsibilities of state officers in general. Currently, the Michigan constitution provides that the Attorney General is one of three single executives heading principal departments of the State. The Attorney General is elected for a four year term at the general election in each alternate, even-numbered year, and is limited to two terms of office.

55 See MICH. CONST. 1850, art. 8, §1 (1850).

56 See MICH. CONST. art. V, § 3 (stating that, "The head of each principal department shall be a single executive. . . . The single executives heading principal departments shall include a secretary of state, a state treasurer, and an Attorney General.")

57 See generally, MICH. CONST. art. III; MICH. CONST. art. V.

58 See MICH. CONST. art. V, § 3.

59 See MICH. CONST. art. V., § 21.
Despite the fact that the Attorney General may be charged with performing quasi-judicial or quasi-legislative functions, the Attorney General is an executive officer who operates in an executive capacity. The Michigan constitution incorporates the classic separation of powers doctrine explicitly in Article III\(^60\) and by reference in Articles IV,\(^61\) V,\(^62\) and VI.\(^63\) For example, the Michigan constitution dedicates a separate article to each of the three branches of government—legislative, executive and judicial. Further, each of the aforementioned articles contains a clause mandating that no member of one branch of government may exercise the

\(^{60}\) See Mich. Const. art. III, §2 (stating "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers belonging to another branch except as expressly provided in this constitution.")

\(^{61}\) See Mich. Const. art. IV, §1 ("The legislative power of the State of Michigan is vested in a senate and a house of representatives.")

\(^{62}\) See Mich. Const. art. V, §1 ("The executive power is vested in the governor.")

\(^{63}\) See Mich. Const. art. VI, §1 ("The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction which the legislature may establish by a two-thirds vote of the members elected to and serving in each house.")
powers reserved to a separate branch of government.\textsuperscript{64} Within the system of checks and balances, the Attorney General serves as a unique executive link between the legislative and judicial branches of government.\textsuperscript{65}

The constitutional status of Michigan's Attorney General was recently reviewed by two federal courts. In \textit{State of Michigan v. C.R. Equipment Sales, Inc.},\textsuperscript{66} and \textit{Humphrey v. Kleinhartd},\textsuperscript{67} the Sixth Circuit stated that the Attorney General has broad authority to prosecute actions on behalf of the people.\textsuperscript{68} These court decisions also stated that the Attorney general has broad common law powers which supplement her statutory powers.\textsuperscript{69}

\section*{C. Michigan Statutory Provisions Governing the Department of Attorney General}

\textsuperscript{64} See supra, notes 48-50.

\textsuperscript{65} See Discussion section, infra, at pages 50-63.


\textsuperscript{67} 157 FRD 404, 405 (W.D. Mich. 1994).


Statutory law defines the duties of the Attorney General in many ways. Statutes govern the actions of the Michigan Attorney General in three primary forms: (1) through the Attorney General Statute,\(^70\) (2) via the Revised Judicature Act,\(^71\) and (3) by the incorporation of Attorney General duties into statutes which control a variety of independent issues.\(^72\) This portion of the paper will discuss each of these categories.

1. The Attorney General Statute

\(^70\) See Mich. Comp. Laws §§14.28 - 14.301 (providing generally that the Attorney General shall represent the state before the Supreme Court in all matters of state interest, shall legally represent specified state officers, shall oversee prosecutors, and shall protect the public interest).

\(^71\) See Mich. Comp. Laws §§ 600.908 - 600.6452 (discussing both permissive and mandatory actions of the Attorney General).

\(^72\) Three additional types of statutes implicate the Attorney General in a secondary fashion, and are omitted from this study on the grounds that they have only a minor impact on the duties and responsibilities of the Michigan Attorney General. The first type of these omitted statutes merely names the Attorney General as an officer of a board or commission. The second class of statutes requires a third party to provide notice to the Department of Attorney General. The final class of omitted statutes involves actions in which the Attorney General advises another state official but has no authority to initiate action of her own initiative. The Attorney General Statute, See Mich. Comp. Laws §14.28, and the Revised Judicature Act, Mich. Comp. Laws §600.908 will be examined individually, below. Examination of topical statutes will be reserved for discussion in conjunction with supporting caselaw, found in subsection D, infra.
The Attorney General Statute is perhaps the most representative catalog of Attorney General responsibilities. Generally, as the chief legal officer of the state, the Attorney General is responsible for prosecuting and defending actions involving a state interest. By virtue of the office, the Attorney General is actively involved in the affairs of the state. For example, the Attorney General renders opinions on all questions of law submitted by state officers. Additionally, the Attorney General renders legal advice to state agencies and officials, and must defend actions against the Governor, Secretary of State, Treasurer, and Auditor General upon request.

The Attorney General is permitted to be involved with some local affairs as well. For example, she is charged with supervisory responsibility


74 See Mich. Comp. Laws §14.28; See generally, In re Watson, 293 Mich. 263 (1940) (holding that the Attorney General, personally or through agents, may intervene in any criminal prosecution and that prosecutors are supervised by the Attorney General); People v. Karalla, 35 Mich.App. 541, 543-44 (stating that the Attorney General's statutory power is in addition to his common law power).


over all of Michigan's prosecuting attorneys. This authority is intended to investigate the records of townships and school districts, and impose penalties as a result of an unfavorable investigation. The Attorney General Statute also permits the Attorney General to oversee the administration of charitable trusts, and the activities of public safety fund raising organizations.

In the courtroom, the Attorney General must appear before the Supreme Court as the people's representative in all matters of state interest. She may further intervene in any action, at any stage of a proceeding, in order to protect a right or interest of the state or of the people. In this capacity, the Attorney General is able to protect the rights of individuals and the state.

---

77 See Mich. Comp. Laws §14.30 (mandating that the Attorney General supervise and work with prosecutors).


80 See Mich. Comp. Laws §14.251 (granting the Attorney General the authority to administer the Act through appropriate proceedings).


state's legal interests through the litigation process.\textsuperscript{83}

2. The Revised Judicature Act

The Revised Judicature Act,\textsuperscript{84} [hereinafter "RJA"] is a second statute governing the Attorney General's courtroom duties. The RJA discusses both mandatory and permissive functions which must be followed by the Attorney General in court.\textsuperscript{85} Under the RJA, the Attorney General must represent the state in all matters before the court of claims,\textsuperscript{86} must represent the state in partition proceedings brought against the state, must bring warranted actions in quo warranto, and must take steps to distribute corporate assets when awarded a quo warranto judgment.\textsuperscript{87} The list of

\textsuperscript{83} See Christensen, \textit{supra} note 3, at 302-03.

\textsuperscript{84} See \textsc{Mich. Comp. Laws} §600.908 et. seq.

\textsuperscript{85} See \textit{id}.

\textsuperscript{86} In practice, limiting court of claims suits to representation by the Attorney General confers significant power upon the Attorney General. This is so because, by inference, corporations and other bodies politic are barred from appearing before the court.

\textsuperscript{87} See \textsc{Mich. Comp. Laws} §600.4501 (stating that the Attorney General shall bring an action in quo warranto "when the facts clearly warrant."); \textsc{Mich. Comp. Laws} §600.4531.
permissive functions under the RJA is more extensive. Under the RJA, the Attorney General may file actions: (1) to recover forfeited property or place a lien on property subject to forfeiture, (2) against another state to recover taxes legally due to Michigan, (3) to abate a public nuisance, and (4) to suspend, revoke or enforce the powers of corporate officers.

The RJA further provides that the Attorney General has the power to state objections concerning a grant of immunity in an attorney disciplinary proceeding before the Supreme Court. Finally, the RJA gives the

---


89 See Mich. Comp. Laws §600.4541.

90 See Mich. Comp. Laws §600.4703.

91 See Mich. Comp. Laws §600.2915

92 See Mich. Comp. Laws §600.3805 (allowing the Attorney General to seek equitable relief).

93 See Mich. Comp. Laws §600.3605.

Attorney General the status of a creditor in estate administration, and the right to petition for the appointment of guardians for minors and disabled persons.

D. Topical Discussion of Attorney General Duties: A Framework For Analyzing Michigan Cases and Statutes

In Michigan, the state government is organized such that the Department of Attorney General is responsible for many of the State's legal affairs. In fact, the Department consists of more than forty legal divisions, each of which specializes in a specific area of law. Thus, a complete analysis of the Department of Attorney General requires inquiry into a variety of subject areas. As such, this portion of the paper will categorically discuss each area of law impacting the responsibilities of the Attorney General.

95 See Mich. Comp. Laws §600.6452 (permitting the Attorney General to take action in the court of claims).

96 Three minor statutes govern court procedure in addition to the RJA: (1) Judges Retirement Act, Mich. Comp. Laws §38.2207 (stating that the Attorney General shall serve as legal counsel for the judges retirement board); The Juvenile Code, Mich. Comp. Laws §712A.13b (empowering the Attorney General to contest and order setting aside adjudication); and Mich. Comp. Laws §720.201 (providing for the appointment of a public administrator form the Attorney General's office.)

97 See NAAG, supra note 7, at 364-65; See also Kelley Biography, supra note 5.
Attorney General. The legal rules derived from caselaw and statute are logically divisible into the following categories: (1) public policy and litigation, (2) investigation and prosecution, (3) statutory enforcement and compliance, and (4) interaction with state agencies. These categories are similar in nature to the categories adopted by the National Association of Attorney General that were discussed above. The target the primary types of functions performed by the Michigan Attorney General and allow for a fluid examination of the broad array of statutes and cases that confer duties upon the Attorney General.

1. Public Policy and Litigation

Various Michigan statutes create public policy which is carried out by the Attorney General. The Attorney General must act as a minister of public policy because she is charged with enforcing the laws as enacted by

---

98 One legal commentator described the significant role a state Attorney General may play in public policy and litigation as follows:

"On the surface, [the] facts would suggest that the Attorney General in his role as litigator has little effect on the public policy of the state. In fact, however, the Attorney General as litigator can substantially affect public policy. This ability stems from his influence as a lawyer over the conduct of the litigation he handles on behalf of his clients [the people], his discretion in accepting cases for litigation, and his authority to initiate litigation on behalf of the state or its citizens."

Christensen, supra note 3, at 311.
Further, the ability of the Attorney General to protect the public interest is reinforced by her common law powers. Often, the Attorney General enforces legislation by filing lawsuits which may be either criminal or civil in nature. In some instances, the Attorney General is statutorily compelled to file lawsuits. Additionally, the Attorney General and prosecuting attorneys are the only parties officially responsible for bringing suits to protect the public interest.

99 See generally MICH. COMP. LAWS §14.28.

100 See Edminsten, supra note 3, at 35; see also Christenson, supra note 3, at 301 (stating, "Attorneys General in most states, particularly when the office is created by state constitution, have the inherent power to initiate litigation to protect or promote the interests of the state or its citizens.")

101 Statutes which require the Attorney General to file suit under certain circumstances include the following: MICH. COMP. LAWS §4.427; MICH. COMP. LAWS §14.28; MICH. COMP. LAWS §14.251; MICH. COMP. LAWS §21.47; MICH. COMP. LAWS §38.2207; MICH. COMP. LAWS §141.431; MICH. COMP. LAWS §324.4110; MICH. COMP. LAWS §423.277; MICH. COMP. LAWS §450.5007; MICH. COMP. LAWS §554.352; MICH. COMP. LAWS §600.450; 1 MICH. COMP. LAWS §750.155. Through litigation, the Attorney General is able to protect the public interest by enforcing the laws. See Edminsten, supra note 3, at 16-17.

which affect public policy when enforced by the Attorney General include consumer protection\textsuperscript{103} and environmental protection\textsuperscript{104} programs, nuisance control measures\textsuperscript{105}, the enforcement of charitable trusts\textsuperscript{106}, estate administration\textsuperscript{107}, and parens patriae suits\textsuperscript{108}. Other specific areas in which the Attorney General may or must initiate litigation include:

\textsuperscript{103} See \textit{e.g.}, The Consumer Protection Act, MICH. COMP. LAWS §445.903 et. seq.

\textsuperscript{104} See MICH. COMP. LAWS §324.1701 et. seq. (stating that the Attorney General may bring suit where a violation occurred or is likely to occur in the future).

\textsuperscript{105} See \textit{e.g.} MICH. COMP. LAWS §324.311 (allowing the Attorney General to enjoin the operations of an enterprise that discharges waste water).

\textsuperscript{106} See MICH. COMP. LAWS §14.251; MICH. COMP. LAWS §14.278; MICH. COMP. LAWS 554.352.

\textsuperscript{107} See MICH. COMP. LAWS §700.81 (allowing the Attorney General to get involved with intestacy cases); MICH. COMP. LAWS §700.316 (involving independent probate matters).

\textsuperscript{108} See \textit{supra}, note 75.
agriculture, banking and finance, anti-trust, insurance, labor, and commerce.

a. Consumer Protection and Environmental Protection

In Michigan, as in other states, the Department of Attorney General statutes which confer this duty upon the Attorney General include: The Michigan Aquaculture Development Act, MICH. COMP. LAWS §286.883; The Pet Shops, Animal Shelters, and Dog Pounds Act, MICH. COMP. LAWS §287.339b; The Animal Industry Act, MICH. COMP. LAWS §287.715; The Comminuted Meat Act, MICH. COMP. LAWS §289.590; The Michigan Ginseng Act, MICH. COMP. LAWS §290.781.

See MICH. COMP. LAWS §493.12c (dealing with small business loans); MICH. COMP. LAWS §493.107 (regarding credit cards); MICH. COMP. LAWS §493.112 (regarding credit cards); MICH. COMP. LAWS §487.1209 (dealing with business and industrial development); MICH. COMP. LAWS §487.2601 (regarding consumer finance); MICH. COMP. LAWS §487.914 (regarding checks and money orders); MICH. COMP. LAWS §445.1824 (regarding credit services); MICH. COMP. LAWS §445.1861 (regarding consumer finance).

See Anti-trust Act, MICH. COMP. LAWS §445.776.


See MICH. COMP. LAWS §39.501 (involving violations of the occupational code); MICH. COMP. LAWS §423.237 (involving municipal police and fire departments).

See MICH. COMP. LAWS §445.814 (regulating advertisements); MICH. COMP. LAWS §445.1773 (relating to unwanted faxes).
has been actively involved in two areas which particularly affect the public interest—consumer protection and environmental protection.\footnote{For a discussion of ways various state Attorneys General have expanded their powers through the initiation of consumer protection and environmental protection programs, see Matheson, supra note 3, at 2-3; see also Thornburg, supra note 3, at 363, 374.} General Kelley established Michigan's Consumer Protection Division, and since that time, the Attorney General has been a consumer watchdog.\footnote{See Kansas v. Utilicorp United, Inc., 497 U.S. 199, 218 (1990) (stating that state Attorneys General may bring actions on behalf of injured consumers); see also Kelley Biography, supra note 5.} Statutorily, the Attorney General derives her consumer protection powers from the Consumer Protection Act.\footnote{See Mich. Comp. Laws §445.903 et. seq.} Of late, one common consumer problem is the receipt of unsolicited commercial telecommunications. Although many telecommunications practices are governed by federal law, in Michigan, the Attorney General may issue cease and desist orders with regard to unsolicited faxes,\footnote{See Mich. Comp. Laws §445.1773.} and can enjoin false advertising practices.\footnote{See Mich. Comp. Laws §445.814.} Other areas in which the Attorney General may seek
injunctive relief include: the transfer of bulk goods,\textsuperscript{120} the sale hazardous substances,\textsuperscript{121} home improvement transactions\textsuperscript{122} and franchise investments,\textsuperscript{123} and the regulation of collection practices.\textsuperscript{124}

Michigan's Environmental Protection Division was also established by General Kelley, and has since served as a model for programs in other states.\textsuperscript{125} Currently, the Michigan Department of Attorney General handles environmental concerns through its Environmental Protection Division as well as its Natural Resources Division.\textsuperscript{126} In general, the duties of the Attorney General are defined by the state's broad environmental

\textsuperscript{120} See Mich. Comp. Laws §445.869.
\textsuperscript{121} See Mich. Comp. Laws §266.456.
\textsuperscript{125} See Kelley Biography, supra note 5.
\textsuperscript{126} See id.
protect the Great Lakes,\textsuperscript{143} sand dunes,\textsuperscript{144} and wetlands.\textsuperscript{145} Finally, the Attorney General helps ensure compliance with Michigan's wildlife protection statutes.\textsuperscript{146}

b. Public Policy Affecting Local Law

The Attorney General also affects public policy on matters that often arise at the local level.\textsuperscript{147} Issues such as domestic relations, education, labor, property and probate are tangentially affected by statutes that which are enforced by the Attorney General. Each of these topics is discussed below.

\textsuperscript{143} See Mich. Comp. Laws §324.32713.

\textsuperscript{144} See Mich. Comp. Laws §324.35310.

\textsuperscript{145} See Mich. Comp. Laws §324.30315.


The Attorney General has limited involvement with domestic relations matters. She is permitted, however, to step in when a support enforcement agency fails to fulfill its duties,\textsuperscript{148} when a prosecutor fails to adequately represent the obligee in a support action,\textsuperscript{149} or to appeal what the Attorney General believes to be an erroneous support order.\textsuperscript{150} She is also charged with the determination of whether another state is a reciprocal state under the Revised Uniform Reciprocal Enforcement of Support Act.\textsuperscript{151}

As with many local issues, the Attorney General has little mandatory involvement with education.\textsuperscript{152} She does, however, have the power to

\textsuperscript{148} See Uniform Interstate Family Support Act, MICH. COMP. LAWS §552.1314.

\textsuperscript{149} See MICH. COMP. LAWS §780.183.

\textsuperscript{150} See MICH. COMP. LAWS §780.175.

\textsuperscript{151} See MICH. COMP. LAWS §780.174 (dealing with support orders).

\textsuperscript{152} See C.R. Equip. Sales, 898 F.Supp. 509, 513-14. The educational arena provides one illustration of the impact the Attorney General can have by virtue of her duty to bring suits in the court of claims. Claims ex contractio and ex delicto against state universities may be brought in the court of claims where universities are defended by the Attorney General.
enforce the Contracts and Grants to Colleges Disclosure Act,\textsuperscript{153} and she serves as legal advisor to the state Tenure Commission.\textsuperscript{154} Further, an action by the Attorney General opens the door for the State Board of Education to compel school districts to employ proper accounting procedures.\textsuperscript{155}

Labor is a third traditionally local issue in which the Attorney General becomes statutorily involved. The Attorney General impacts the state's labor forces in two primary ways. In the first instance, the Attorney General may become involved in compulsory arbitration of labor disputes between governmental employees and agencies.\textsuperscript{156} Assistance of the Attorney General may be requested when parties refuse to testify or resist subpoenas.\textsuperscript{157} The Attorney General will then intercede and invoke the assistance of a circuit court, which will in turn compel compliance with

\textsuperscript{153} See Mich. Comp. Laws §390.1233 (notifying the state of grants).

\textsuperscript{154} See Mich. Comp. Laws §38.131.

\textsuperscript{155} See Mich. Comp. Laws §380.1281.

\textsuperscript{156} See Mich. Comp. Laws §423.237.

\textsuperscript{157} See id.
issued subpoenas.\textsuperscript{158} In the second instance, the Attorney General enforces the Michigan Occupational Code,\textsuperscript{159} and is permitted to file formal legal proceedings in order to ensure compliance.\textsuperscript{160}

Next, although the Attorney General is largely uninvolved in probate matters, she does have some powers relating to estate administration.\textsuperscript{161} Primarily, the Attorney General has the ability to petition a court for the admission of a will to probate thirty days after the death of a testator,\textsuperscript{162} and also has the ability to contest the assertion of rights where it appears that the decedent died intestate.\textsuperscript{163}

Finally, the Attorney General is vested with the power to enforce

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item See id.
\item See Mich. Comp. Laws §700.145.
\end{enumerate}
\end{footnotesize}
various acts designed to protect personal property\textsuperscript{164} and the exchange of real property.\textsuperscript{165} For example when the state enters into a contract to exchange public with private lands, it is the responsibility of the Attorney General to verify whether the land to be received by the state carries good title.\textsuperscript{166} Similarly, when the state conveys land, the Attorney General approves the deed to be transferred by the state.\textsuperscript{167} If the state has mistakenly transferred defective title, then it is the Attorney General's responsibility to certify that the transferee has good title so that the purchaser may obtain a valid deed from the state.\textsuperscript{168}

2. Investigation and Prosecution

As the chief law enforcement officer of the state, the Attorney


\textsuperscript{165} See generally, Evans Products Co. v. Fry, 307 Mich. 506 (1943)(stating that the Attorney General has a duty to protect the state's interest in abandoned property under the laws of escheat).

\textsuperscript{166} See Mich. Comp. Laws §324.2105.

\textsuperscript{167} See Mich. Comp. Laws §324.2132.

\textsuperscript{168} See Mich. Comp. Laws 322.551.
General is responsible for dealing with criminal violations.\textsuperscript{169} The Attorney General carries out her law enforcement functions both by supervising the state's prosecuting attorneys and by conducting investigations. Investigations may take place in association with civil statutory violations, or alternatively, in the criminal arena.

\textbf{a. Investigation}

By statute, the Michigan Attorney General is responsible for investigating several issues which affect the public health.\textsuperscript{170} Protection of the public health involves enforcement of environmental statutes which guard against the contamination of livestock and agricultural products\textsuperscript{171} as well as pollution of the state's natural resources.\textsuperscript{172} Additionally, however, the Attorney General monitors compliance with the state's public assistance laws. The Attorney General works in conjunction with various

\textsuperscript{169} See MICH. COMP. LAWS § 762.3.

\textsuperscript{170} See generally the Public Health Code, MICH. COMP. LAWS §333.1299 et. seq.

\textsuperscript{171} See the Testing, Condemnation and Disposal of Livestock Act, MICH. COMP. LAWS §287.76; The Animal Industry Act, MICH. COMP. LAWS §287.715; The Fluid Milk Act, MICH. COMP. LAWS §288.24b; The Manufactured Milk Act, MICH. COMP. LAWS §288.103k; The Comminuted Meat Act, MICH. COMP. LAWS § 289.590.

\textsuperscript{172} See MICH. COMP. LAWS § 324.1701.
state departments to oversee the administration of social welfare programs in the state of Michigan and has the power to investigate the abuse of the various processes.\textsuperscript{173} Generally, she enforces laws which involve indigent persons,\textsuperscript{174} Medicare,\textsuperscript{175} health care fraud,\textsuperscript{176} adult foster care facilities,\textsuperscript{177} and abortion services.\textsuperscript{178}

\textbf{b. Prosecution}

In the criminal realm, the Attorney General will often rely on the services of prosecuting attorneys. Yet, because the Attorney General has supervisory authority over the state's prosecutors,\textsuperscript{179} the Attorney

\begin{itemize}
\item \textsuperscript{173} See Mich. Comp. Laws § 400.610.
\item \textsuperscript{174} See Mich. Comp. Laws § 400.11f.
\item \textsuperscript{175} See Mich. Comp. Laws § 400.610.
\item \textsuperscript{176} See Mich. Comp. Laws § 752.1003.
\item \textsuperscript{177} See Mich. Comp. Laws § 400.730.
\item \textsuperscript{178} See Mich. Comp. Laws § 400.109e.
\item \textsuperscript{179} See Mich. Comp. Laws § 14.30; See also Watson, 293 Mich. 263 (1940).
\end{itemize}
General plays many roles with regard to criminal prosecution.\(^{180}\) For example, if it is impossible to determine where in the state a felony occurred, the Attorney General may prosecute the action.\(^{181}\) She also has the authority to deputize certain law enforcement officers from other states in cases involving the extradition of fugitives.\(^{182}\) Additionally, the Attorney General may petition a court to convene a grand jury,\(^{183}\) may testify before a grand jury,\(^{184}\) and may provide information to the grand jury regarding any cognizable matter.\(^{185}\)

Finally, the Attorney General has limited responsibilities after a crime has been prosecuted. She is responsible for investigating the monetary affairs of prisoners and must seek reimbursement from each.

\(^{180}\) See generally, People v. Foster, 377 Mich. 233 (1966) (stating that the Attorney General is the exclusive representative of the people when a criminal case is before the Supreme Court on appeal).

\(^{181}\) See Mich. Comp. Laws § 762.3.


\(^{183}\) See Mich. Comp. Laws § 676.75.

\(^{184}\) See Mich. Comp. Laws § 676.20.

\(^{185}\) See Mich. Comp. Laws § 767.22.
prisoner who has sufficient funds to pay for 10% of the state costs associated with imprisonment.186 Similarly, when a criminal defendant is convicted and profits from his crime, the Attorney General may petition the court to order forfeiture of all proceeds relating to book royalties and the like.187

3. Statutory Enforcement and Compliance

With respect to certain business related activities, the Attorney General also has administrative duties. In these situations, the Attorney General enforces statutory filing requirements and monitors compliance with procedural guidelines. These duties arise in three primary contexts: (1) monitoring compliance with insurance regulations, (2) enforcing charitable trusts, and (3) overseeing the establishment and operation of business organizations.

Two statutes govern Attorney General involvement in insurance regulations. The first is the Nonprofit Health Care Corporation Act (hereinafter "NHCCA").188 Under the NHCCA, health care corporations must


188 See Mich. Comp. Laws § 550.1202
submit their articles of incorporation, amendments and bylaws to the Department of Attorney General. The Department is then responsible for verifying compliance with the NHCCA. If the Commissioner notifies the Attorney General of corporate NHCCA violations, the Attorney General may then seek compulsory disclosure of the corporation's books and records, and may bring an action for equitable or declaratory relief. The Attorney General also has the power to appeal any action or determination of the Commissioner.

The second major statute governing the Attorney General's

189 See id.


insurance-related duties is the Insurance Code of 1956.\textsuperscript{197} Under the Insurance Code, the Attorney General works in conjunction with the insurance commissioner to prosecute insurance violations.\textsuperscript{198} The Attorney General is responsible for reviewing and certifying the articles of incorporation submitted by certain insurers,\textsuperscript{199} recovering fines for non-compliance with the insurance code,\textsuperscript{200} and taking appropriate action when an alleged crime has been committed.\textsuperscript{201} Additionally, the Attorney General serves as legal counsel for the insurance commissioner\textsuperscript{202} and for the Multiple Employer Welfare Arrangement Security Fund.\textsuperscript{203}


\textsuperscript{198} See Mich. Comp. Laws § 550.228.

\textsuperscript{199} See Mich. Comp. Laws § 500.5020 (dealing with the coordination of benefits and the organization of insurers); Mich. Comp. Laws § 500.5214 (dealing with corporate powers and procedures).


\textsuperscript{201} See Mich. Comp. Laws §500.228.


\textsuperscript{203} See Mich. Comp. Laws § 500.708
Another key area in which the attorney is responsible for monitoring statutory compliance relates to charitable trusts.\textsuperscript{204} Three statutes govern the Attorney General's power to enforce charitable trusts: The Supervision of Trustees for Charitable Purposes Act (hereinafter the "Supervision Act"),\textsuperscript{205} the Charitable Trustees Powers Act (hereinafter the "Powers Act"),\textsuperscript{206} and the Gifts, Grants, Bequests, & Devises for Public or Charitable Purposes Act, (hereinafter the "Gift Act.").\textsuperscript{207} The Supervision Act provides that the Attorney General is the representative of the people with respect to charitable trusts.\textsuperscript{208} In such capacity, the Attorney General keeps a registry of charitable trusts,\textsuperscript{209} promulgates rules and regulations.


\textsuperscript{205} See Mich. Comp. Laws § 14.251 et. seq.

\textsuperscript{206} See Mich. Comp. Laws § 14.278.

\textsuperscript{207} See Mich. Comp. Laws § 554.352.


regarding the filing of trust reports, and institutes proceedings to secure compliance. Under the Powers Act, the Attorney General may force compliance with a trust, or may effectuate a change in the instrument governing a charitable trust. The Attorney General may proffer consent for a trustee to change the terms of a trust, or alternatively, the Attorney General may relieve a trustee from compliance with restrictive provisions of the trust.

Finally, the Attorney General enforces the laws governing business entities. The Attorney General has the statutory power to dissolve various types of business organizations that have been procured through fraud, willfully exceed their lawful authority, or which repeatedly and willfully

210 See id.


conduct business unlawfully.\textsuperscript{216} Types of business organizations subject to such dissolution by the Attorney General include: limited partnerships,\textsuperscript{217} profit and non-profit corporations,\textsuperscript{218} and limited liability companies.\textsuperscript{219} The Attorney General additionally has the power to ensure that foreign business organizations are properly registered and operate under a certificate of authority.\textsuperscript{220} In Michigan, the Attorney General may even become involved in the affairs of a religious or ecclesiastical organization which has committed fraud or deception.\textsuperscript{221} In such cases, the Attorney General may apply for a receiver of the religious

\textsuperscript{216} See infra, notes 186 - 191, and accompanying text.


\textsuperscript{221} See Mich. Comp. Laws §450.180. But note that, as with many state agencies, in many situations the Attorney General faces roadblocks when religious organizations are involved. For one example, see generally, In re Estes Estate, 207 Mich.App. 194 (1994), which found that religious organizations are exempt from trust enforcement if their property is held by religious officers. See id.
organization's property.\textsuperscript{222}

A variety of banking and financial statutes also impact the Attorney General. Often, banking statutes vest the Attorney General with the authority to institute actions to recover delinquent payments and actual damages.\textsuperscript{223} Sometimes, the Attorney General is even permitted to institute criminal actions or impose fines.\textsuperscript{224} Some statutes grant the Attorney General broader powers. For example, under the Savings and Loan Act of 1980,\textsuperscript{225} when the Financial Institutions Bureau appoints a bank conservator, it may request that the attorney General institute proceedings to compel conservatorship or dissolve the association.\textsuperscript{226} The

\textsuperscript{222} See id.

\textsuperscript{223} See Credit Services Protection Act, MICH. COMP. LAWS §445.1824; Credit Reform Act, MICH. COMP. LAWS §445.1861; Sale of Checks Act, MICH. COMP. LAWS §487.914; The Michigan Business and industrial Development Corporation Act (BIDCO), MICH. COMP. LAWS §487.1209; Consumer Financial Services Act, MICH. COMP. LAWS §487.2601; Small Business Loan Act, MICH. COMP. LAWS §493.12c; MICH. COMP. LAWS §493.107; and MICH. COMP. LAWS §493.112.

\textsuperscript{224} Such is the case under both MICH. COMP. LAWS §445.1628, and the Debt Management Act, MICH. COMP. LAWS §451.433.

\textsuperscript{225} See MICH. COMP. LAWS §491.1002.

\textsuperscript{226} See id.
Attorney General works with the Commissioner pursuant to the Mortgage Brokers, Lenders, and Services Lending Act. It allows the Attorney General to institute actions, file complaints, procure cease and desist orders, and recover fines when the Act is violated. Similarly, the Attorney General works with the Insurance Commissioner to recover reimbursement for the state from banks insured by action of the Commissioner.

4. Interaction with State Agencies

Some statutes mandate interaction between the Department of Attorney General and other state agencies. For example, various agricultural statutes affect both the Department of Agriculture and the Department of Attorney General. Under the agricultural statutes, the

230 See id.
powers of the Attorney General arise in one of three ways. First, the Attorney General is empowered by statute to institute a suit of her own initiative. Second, the Department of Agriculture may request that the Attorney General collect fees on its behalf. Third, an affirmative duty may be imposed upon the Attorney General. These affirmative duties include: enforcing the laws administered by the food and drug commissioner, instituting civil action against parties responsible for contaminating livestock, and bringing a criminal or civil suit against


234 Statutes in this category include the Testing, Condemnation and Disposal of Livestock Act, MICH. COMP. LAWS §287.76 and the Animal Industry Act, MICH. COMP. LAWS §287.715.

235 Examples of these statutes include: The Fluid Milk Act, MICH. COMP. LAWS §288.24b; and the Manufacturing Milk Act, MICH. COMP. LAWS §288.103k.

236 See MICH. COMP. LAWS §289.7

237 See The Animal Industry Act, MICH. COMP. LAWS §287.715
persons responsible for introducing infectious diseases into animals.\textsuperscript{238}

Second, the Attorney General also has the duty to work with the Department of Corrections in matters relating to correctional facilities. In conducting investigations, the Attorney General has access to the records and reports of probation officers.\textsuperscript{239} The primary involvement of the Attorney General arises under the State Correctional Facility Reimbursement Act.\textsuperscript{240} Pursuant to the act, the Attorney General is responsible for enforcement of the act, and for conducting investigations and legal proceedings.\textsuperscript{241}

A third example involves gambling in the state of Michigan. Pursuant to the Michigan Gaming Control & Revenue Act,\textsuperscript{242} the Attorney General has the power to inspect casinos, prosecute criminal violations, and

\textsuperscript{238} See The Testing, Condemnation, and Disposal of Livestock Act, Mich. Comp. Laws §287.76.

\textsuperscript{239} See Mich. Comp. Laws §791.229.

\textsuperscript{240} See Mich. Comp. Laws §800.403.

\textsuperscript{241} See id.

\textsuperscript{242} See Mich. Comp. Laws §432.204a.
assist the Gaming Control Board with oversight functions.\textsuperscript{243}

As a final example, the Attorney General works with the Michigan Public Service Commission to procure appropriations for and enforce the Utility Consumer Representation Fund.\textsuperscript{244} The Attorney General also oversees laws regulating motor vehicle carriers,\textsuperscript{245} railroads\textsuperscript{246}, gas lines,\textsuperscript{247} and river improvements.\textsuperscript{248}

Michigan courts have also recognized the unique role the Attorney General plays in relation to state agencies. The judiciary has noted that the Attorney General should be treated somewhat differently than a private attorney so that she may enforce the laws while avoiding conflicts of interest. For example in Attorney General v. Public Service Commission,\textsuperscript{249}

\begin{itemize}
\item \textsuperscript{243} See id.
\item \textsuperscript{244} See Mich. Comp. Laws §460.6m.
\item \textsuperscript{245} See Mich. Comp. Laws §479.13.
\item \textsuperscript{246} See Mich. Comp. Laws §462.441.
\item \textsuperscript{247} See Mich. Comp. Laws §483.162.
\item \textsuperscript{248} See Mich. Comp. Laws §485.104.
\item \textsuperscript{249} 429 Mich. 248 (1987).
\end{itemize}
the court found that the Attorney General's office was the proper representative of the Public Service Commission, but that the Attorney General could appeal a rate-fixing scheme nonetheless.\textsuperscript{250} \textit{In House Speaker v. Governor,}\textsuperscript{251} the court found that, in certain instances, unrelated assistants of the Attorney General could represent the plaintiff and the defendant simultaneously.\textsuperscript{252} Similarly, by acting through different assistants, the Attorney General may appear as counsel for different state agencies.\textsuperscript{253}

\section*{II. DISCUSSION}

The number of statutes empowering the Attorney General, and the number of cases upholding her authority illustrate the important role that the Attorney General plays in Michigan's governmental system. The Background section of this paper attempted to illustrate the functions that the Attorney General actually performs in the state of Michigan, and indicated the statutory bases for the Attorney General's authority. The Discussion section will take the next step, and discuss whether the role of

\textsuperscript{250} See id.

\textsuperscript{251} 443 Mich. 560 (1993).

\textsuperscript{252} See id.

the Attorney General in the state of Michigan is appropriate.

A. Separation of Powers Issues

At first glance, it may seem difficult to separate the executive functions of the Attorney General from her quasi-judicial and quasi-legislative functions because she is charged with multi-faceted responsibilities. Upon closer inspection, however, it becomes evident that the Attorney General is an executive officer who clearly operates within the executive branch of government. Therefore, before examining whether the Attorney General exceeds her executive authority, it is useful to consider the nature of that authority. In the federal government, the United States Attorney General is an appointee who assists the President, who in turn has the duty to "take care that the laws be faithfully executed." Similarly, the Michigan Attorney General, though elected, helps the Governor execute the laws of the state. In fact, the Michigan constitution contains an identical provision to the United States Constitution. Because the Michigan Attorney General is a constitutionally elected executive officer, however, her duties are more

254 See Mich. Const. art. V.

255 See U.S. Const., art. II, §3.

expansive than those of the federal Attorney General. The Michigan Attorney General must additionally comply with the executive requirements of Article V of the Michigan constitution, and be accountable to the people of Michigan. Because the Michigan constitution mandates that no member of one branch of government may infringe upon the powers reserved to a separate branch of government, the Attorney General must perform her duties in a fashion which will not impermissibly violate the separation of powers doctrine. Thus, an analysis of Attorney General functions requires that the scholar remember the purposes behind the separation of powers doctrine--including the "preservation of political liberty and government efficiency." Although one could argue that some of the powers of the Attorney General appear to infringe upon the duties and responsibilities of other branches of government, this paper will demonstrate that the Attorney General serves unique and necessary functions anticipated by and fundamental to the governmental structure in Michigan.

1. The Relationship Between the Attorney General and the Judiciary

257 See id.

258 See Background section, supra, at pages 5-50.

259 Matheson, supra note 3, at 6.
Opinion writing by the Attorney General is the most obvious example of an activity which closely parallels a judicial function. In Michigan, it is the duty of the Attorney General to serve as legal counsel for state agencies and officials. In this capacity, the Attorney General, with the assistance of her staff, authors both formal and informal opinions. These opinions, though persuasive, technically do not have the force of law as they do in some other jurisdictions. As a practical matter, however, it should be noted that opinions of the Attorney General are highly regarded and are often followed. The informal binding nature of Attorney General opinions flows from the fact that the Attorney General is charged with the duty of advising state officers. As such, when a state officer solicits advice from the Attorney General, the officer is requesting a


263 See Christensen, supra note 3, at 326-333.

264 See id.
prescriptive course of action.\textsuperscript{265} Some courts will even use the act of requesting an Attorney General opinion as evidence that the state officer attempted to act appropriately.\textsuperscript{266}

Although it could be argued that the Attorney General should limit the use of formal opinions to avoid encroaching upon judicial power, the argument is unpersuasive.\textsuperscript{267} First, the purpose behind an Attorney General opinion is distinguishable from the functions served by a judicial opinion. While judicial opinions are precedential in nature, Attorney General opinions are largely advisory. Judicial opinions are the product of a system which addresses cases already placed in controversy based on the past actions of the parties involved.\textsuperscript{268} Attorney General opinions, conversely, are designed to prevent transgressions from occurring. Often, the Attorney General may advise an official regarding the status of the law.

\textsuperscript{265} See id.

\textsuperscript{266} See id.

\textsuperscript{267} In \textit{LaFountain v. Attorney General}, 200 Mich.App. 262, 264 (1993), the Michigan Court of Appeals found that the Attorney General did not violate the separation of powers doctrine by issuing an opinion regarding direct ballot access issues, even though a state board relied on it. The court found that the rendering of the opinion infringed neither upon court powers, nor upon legislative powers. See id.

\textsuperscript{268} See \textit{Kelley Biography}, supra note 5.
and prescribe a course of action that should be taken in order to avoid illegality. As such, the Attorney General also protects the public interest by enforcing the laws— as she was elected to do. The advisory nature of Attorney General opinions is thus logically consistent with the Attorney General's executive duty to enforce the laws as written.

Furthermore, the ability of the Attorney General to issue formal opinions is separate and distinct from the duty of the judiciary to issue opinions. Michigan law clearly states that judges are not bound to follow Attorney General opinions. Also, through the publication process, Attorney General opinions are subject to review as secondary sources. In fact, judges are free to declare the opinion of the Attorney General invalid. Thus, a judge who believes that an Attorney General was politically motivated or simply incorrect will not be bound by the opinion of the Attorney General, but judges may otherwise find confirmation and value in Attorney General opinions. Some have even argued that the

---

269 See Christensen, supra note 3, at 333.

270 See supra, note 216.

271 See Christensen, supra note 3, at 328.

272 See id.
separate opinion of the Attorney General may prove useful because, as an
elected official charged with monitoring the legal policy of the state, the
Attorney General's role requires, "the exercise of sound legal judgment
coupled with the sensitivity to the political and social needs of the people
of the state." 273 Overall, then, judges may disregard the drawbacks as well
as reap the benefits of Attorney General opinions.

2. The Relationship Between the Attorney General and the
Legislature

At times, it may seem as though the Attorney General is effectively
"legislating" public policy. For example, the Michigan Department of
Attorney General established Consumer Protection and Environmental
Protection Divisions under General Kelley. 274 Similarly, state Attorneys
General were propelled into the spotlight for taking on Big Tobacco. 275
When examining the interplay between the Attorney General and the
legislative branch, the question becomes, "How is the Attorney General
effectuating change?" The answer reveals that the Attorney General is in
fact performing the functions assigned to her by the legislature rather than

273 See Christensen, supra note 3, at 339.

274 See Kelley Biography, supra note 5.

275 See supra, note 1, and accompanying discussion.
usurping legislative power.

The Attorney General is responsible for enforcing Michigan's laws. The Attorney General and her assistants enforce Michigan laws in various ways. One mechanism for upholding the law is embodied in the opinion writing function discussed above. A second obvious method for enforcing Michigan law is through the prosecution of individuals who break established laws. A third enforcement technique is the filing of civil lawsuits. Changes may be effectuated when the Attorney General files either a criminal or civil lawsuit against an individual, but the changes are the product of the judicial system rather than of unilateral action by the Attorney General.

Because litigation is tied to the faithful execution of state law, it is appropriately managed by an executive officer. When the legislature retained the Attorney General as a constitutional officer in 1963, the role of the Attorney General as litigator was clearly established. It can be logically inferred, then, that the legislature deemed the Attorney General's power to be significant and important. In her executive capacity as the "state's attorney", the Attorney General can impact public policy by


277 See supra pp. 52-56.
initiating litigation as well as by refusing to litigate.\textsuperscript{278}

Such litigation power is appropriately vested in the Attorney General for several reasons. First, because the legislature creates the laws to be enforced and the judiciary may invalidate such laws, the ability to enforce the laws provides a classic check and balance. Second, as the state's attorney, the Attorney General is ethically bound to take actions which are in the best interest of her client-- the state.\textsuperscript{279} Similarly, the Attorney General is legally bound to appropriately balance the conflicts that may exist between the state and the sovereign public.\textsuperscript{280}

Further, it should be noted that the Attorney General has a duty to serve the public that originated at common law, and which has been extended by action of the legislature. At common law, the Attorney General was initially responsible for representing the interests of the sovereign state.\textsuperscript{281} As time progressed, however, the attorney developed the ability to take actions classified as "parens patriae" or "parent of the

\textsuperscript{278} See Christensen, \textit{supra} note 3, at 311.

\textsuperscript{279} See Thornburg, \textit{supra} note 3, at 380-81.

\textsuperscript{280} See \textit{id}.

\textsuperscript{281} See \textit{supra}, notes 7-29, and accompanying discussion.
country."\textsuperscript{282} Under the parens patriae power, the Attorney General was granted the authority to take actions for the protection and benefit of the people. Under modern law, the parens patriae power of the Attorney General is expressly conferred by legislative grant.\textsuperscript{283} Today, when an Attorney General takes action on behalf of a state agency or official, it correlates with the common law sovereign duties of the office.\textsuperscript{284} When the Attorney General enforces laws or files suit to protect the public interest, the Attorney General is implementing public policy established by the legislature in much the same way that a common law Attorney General would protect the people by carrying out the public welfare initiatives established by the crown.\textsuperscript{285}

3. The Responsibility of the Attorney General as an Executive Officer

Finally, it is important to consider the position of the Attorney General as a unique executive office. Although the Governor of the state of Michigan heads the executive branch, the constitution provides that the

\textsuperscript{282} See id.

\textsuperscript{283} See id.

\textsuperscript{284} See generally, Matheson, supra note 3.

\textsuperscript{285} See id.
Attorney General is elected rather than appointed. As an elected official, the Attorney General has independent accountability to the public. Thus, the electorate acts as an additional "check" on the power of the Attorney General. When she crafts her decisions, the Attorney General must therefore consider the existing law of the state, the impact on state agencies and the effect on the public interest.

Further, a "check and balance" function exists within the executive branch itself. When the Attorney General of a state is constitutionally elected, the powers of the Attorney General may only be taken away by constitutional amendment. Thus, although the legislature may add and subtract statutory duties, the core functions of the office of Attorney General may not eliminated.286 Similarly, the Governor cannot modify the duties of the Attorney General in the same way as he controls department heads because the constitution serves as a barrier. As one legal commentator noted, "[C]ertainly the existence of an elected Attorney General without political allegiance or administrative accountability to the Governor and state agency officials and with investigative and prosecutorial authority constitutes a check and balance feature of the

286 See McGinley, supra note 3, at 758.
executive branch.\textsuperscript{287}

Thus, the relationship between the Attorney General and the Governor is unique. On one hand, the Attorney General is charged with the responsibility of providing legal advice to the Governor. But, at the same time, the Attorney General is sworn to impartially uphold the law in a fashion which may place the Governor's authority in check.\textsuperscript{288} For example, if the Governor or a department head becomes involved in a legally controversial issue, it is the Attorney General who determines whether the action should be litigated.\textsuperscript{289}

B. The Attorney General in an Essential Role

Given the interaction between the three branches of government, and the interaction between the executive officers in Michigan, the Attorney General holds an interesting position. Although some critics argue that the Attorney General, in performing her duties, infringes upon the legislature or the judiciary, closer inspection of Michigan law clearly reveals that the functions of the Attorney General are actually executive in nature. In fact, examination of the Attorney General's advisory, litigation,

\textsuperscript{287} See Matheson, supra note 3, at 10.

\textsuperscript{288} See McGinley, supra note 3, at 755-56.

\textsuperscript{289} See Christensen, supra note 3, at 311.
and parens patriae responsibilities reveals that the Attorney General is a gap-filler performing functions necessary to the enforcement of the laws of the state. The advice of the Attorney General plays a key role in the decision making process followed by state officials.290 Further, the Attorney General helps ensure that state agencies, whose administrators are often not elected, remain accountable to the public.291 Finally, the Attorney General protects the public interest by bringing suits against violators of the law and by prosecuting crimes. By fulfilling all of these functions, the Attorney General can help guarantee consistency in the legal policy of the state and will be forced to do so responsibly since she is checked by legal, ethical, and political considerations.

As the preceding paragraphs indicate, the Attorney General of the state of Michigan is in a unique position. Her actions fall squarely within the system of checks and balances which characterizes the separation of powers doctrine. The Attorney General's opinion writing power is checked by the power of the judiciary to declare an opinion inaccurate. The policy making authority of the Attorney General is derived from a legislative grant of authority, and is tested by the judiciary when laws are enforced in

290 See Thornburg, supra note 3, at 358.

291 See id. at 359.
the court system. Within the executive branch itself, the Attorney General is charged with advising executive officials and agencies appropriately, and yet the Attorney General must also be accountable to the public at large. Overall, the Attorney General is in a position to provide consistency in the implementation of Michigan law, and is forced to act appropriately by virtue of her position within the governmental structure.

CONCLUSION

In 1998, Michigan elected a new Attorney General for the first time in several decades. The role of the Attorney General has unquestionably expanded over the past thirty years, however, it has done so in an appropriate fashion. Because the Attorney General is constitutionally empowered to uphold the law of the state, and because her duties are expanded by legislative grant, the position is able to change with the changing needs of the state. Further, because the Attorney General advocates public policies in a judicial forum, her actions are appropriately checked by the judiciary. Overall, the modern Attorney General is a constitutional officer who protects state agencies and protects the public, while holding a unique and necessary position in state government.

JENNY McNITT