ISSUES CONFRONTING
THE 1994 GENERAL ASSEMBLY

Prepared by

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FOREWORD

This collection of issue briefs, prepared by members of the Legislative Research Commission staff, attempts to bring into sharper focus some of the major issues which have received considerable legislative attention to date during the interim. The report by no means exhausts the list of important issues facing the 1994 Legislature. Nor are the alternatives in the discussion of each issue necessarily exhaustive.

Effort has been made to present these issues objectively and in as concise a form as the complexity of the subject matter allows. They are grouped for the convenience of the reader into the various committee jurisdictions and no particular meaning is placed upon the order in which they are presented. Because of continuing activity by the legislative committees, a supplement to this publication will be prepared in early December.

Staff members who prepared the reports were selected on the basis of their knowledge of the subject matter and their work with the issues during the 1992-93 interim.

Vic Hellard, Jr.
Director

Frankfort, Kentucky
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OIL AND GAS DRILLING

Prepared by Mary Lynn Collins and Andrew Cammack

Issue

Should there be more controls on oil and gas drilling?

Background

While oil and gas drilling disturbs the earth far less than surface mining, drilling can still cause damage to property and the environment. Permits for oil and gas drilling are issued by the Kentucky Department of Mines and Minerals, which regulates the casing, operation, and plugging of oil and gas wells. Potential pollution through spills or brine disposal is not addressed in the permit process, but is handled separately through the Natural Resources and Environmental Protection Cabinet's Division of Water. There are no reclamation requirements.

A substantial amount of the oil and gas drilling occurring in Kentucky takes place on property where the mineral rights were severed from the estate through the broad-form deed. Surface owners are entitled to compensation for damage caused by drilling operations, but under the broad-form deed, operators are free to enter property of the severed estate and place roads and drilling operations where they wish. A law enacted in 1990 requires oil and gas drillers to give surface owners ten days' notice prior to drilling and to meet with surface owners upon request.

Discussion

Several bills calling for additional restrictions on oil and gas drilling failed to pass the 1992 session, but the Interim Joint Committee on Agriculture and Natural Resources returned to the issue early in the 1992-93 interim. A coalition of citizen groups is pushing to: (1) require reclamation, (2) require water quality testing, and (3) give surface owners of severed estates some say in certain aspects of the drilling operation. Representatives of the oil and gas industry have indicated that they are willing to submit to some additional regulation in the area of reclamation. The committee has asked those on both sides of the issue to get together to work on a proposal for the 1994 session. There may not be a consensus, but there will be one or more proposals offered in the 1994 session. In lieu of a state program, several county fiscal courts have looked at possible regulation of oil and gas drilling.

THE CENTRAL MIDWEST LOW-LEVEL RADIOACTIVE WASTE INTERSTATE COMPACT

Prepared by Daniel J. Risch

Issue

Should Executive Order 93-494, adopting changes to the Central Midwest Interstate Low-Level Radioactive Waste Compact, be ratified by the 1994 General Assembly?

Background

The Subcommittee on Environment of the Interim Joint Committee on Agriculture and Natural Resources received testimony from the Kentucky representative to the Central Midwest Low-Level Radioactive Waste Compact Commission. He explained that Illinois, the only other member state to the compact, recently amended the Illinois version of the compact. The Illinois amendments were made in response to changes in federal law and to clarify and strengthen authority over access to treatment, storage, and disposal facilities.

Recognizing the importance of the compact to Kentucky, the subcommittee communicated to the Governor the subcommittee's support for executive action to review and accept the Illinois changes. Executive Order 93-494 was subsequently executed.

Discussion

In 1984 Kentucky first entered into the Central Midwest Interstate Low-Level Radioactive Waste Compact with Illinois. Federal law and the need to develop regional disposal sites for low-level radioactive waste led to this interstate agreement.

The essential terms of the agreement guarantee for Kentucky access to a low-level radioactive waste disposal site which will be located in and developed by Illinois. Illinois gains control of the siting process and retains control over the use and disposal of nuclear materials within its borders.

In Illinois low-level radioactive waste may include materials discarded by the nuclear power plants within the state, which is one of the largest nuclear power generating states in the country. Kentucky low-level radioactive waste is produced primarily by medical facilities. Kentucky produces less than three percent of the amount of waste generated in Illinois. Nevertheless, access to a disposal site for low-level radioactive waste is essential for Kentucky generators.

An era in the management of low-level radioactive waste ended on January 1, 1993. Authorized by federal law, on that date regional compact commissions began exercising control over waste imports and exports. Wielding this authority, the regions with disposal sites continue to pressure non-sited regions to construct disposal facilities. Consequently, in order to maintain the limited access to other regions' facilities still allowed, the Central Midwest Compact Commission must demonstrate that progress is being made to build its own disposal facility.

A companion concern for the Central Midwest Compact Commission is to gain better control of the stream of low-level waste both into and out of the compact region. Also, a tracking system must be implemented, in order to ensure that radioactive material received by treatment and storage facilities is returned to the state or region where it was generated.

WASTE TIRES

Prepared by Daniel J. Risch

Issue

Should Kentucky's waste tire law be revised?

Background

In recent years Kentucky has struggled to control, in an economical and environmentally safe manner, the generation and disposal of garbage. A law attempting to manage one specific portion of the solid waste stream passed during the 1990 legislative session.

The 1990 law regulates waste tires. The law's goal is to eliminate existing and prevent future accumulations of waste tire piles. A key mechanism in the statute requires that a one dollar fee shall be paid on each new motor vehicle tire sold in Kentucky.

Although no one knows precisely how many tires are bought and discarded each year in Kentucky, a reliable measure used nationwide is that one tire is discarded each year per person within a state. Using this guide, revenue estimates from collection of the waste tire fee ranged between $3.2 million and $3.6 million each year.

The waste tire law anticipated the use of this money to clean up smaller piles of tires, 500 and less, to encourage and help pay for local government cleanup programs, and to stimulate private interests to find uses for waste tire materials.

Discussion

The law has not fulfilled expectations. The problems associated with proper management of waste tires have proven to be as tough and durable as the tires themselves.

The waste tire trust fund has netted the state much less revenue than anticipated. In testimony before the Subcommittee on Environment, Natural Resources and Environmental Protection Cabinet representatives stated that only $850,000 was available for grants to local governments and $375,000 for loans to private interests.

One reason for this shortfall stems from an exemption written into the law. The exemption is available to persons making retail sales of new motor vehicle tires who contract for the lawful disposal of tires. Not only have some retailers utilized this exemption, thus diverting revenue from the fund, but oftentimes the contractors providing disposal service are not legally disposing of the tires.

Another unintended effect of the law has been the creation of large waste tire piles based on speculation that the markets for the materials will improve. Unfortunately, new and profitable uses for waste tire material have not developed fast enough to keep these accumulations from becoming problems themselves.

The 1994 General Assembly may expect to review proposals calculated to end these problems. Possible approaches include limiting the exemption to those who actually reuse the waste tires. Also, regional solutions linked to local solid waste plans may be encouraged.

APPROPRIATIONS AND REVENUE

INSURANCE PREMIUM TAX REFORM

Prepared by Terry K. Jones

Issue

Should Kentucky equalize its insurance premium tax rates?

Background

In the early part of this century, Kentucky began taxing out-of-state insurers doing business in Kentucky. The rates, which with some exceptions remain the same as when initially levied, are either $2 per $100 of premiums received by the insurance company or 2 percent of receipts. While these premium taxes are paid by the insurers, they are assumed to be passed on to the policyholders.

Insurance premium taxes flow into the General Fund. In recent years this source has made a greater contribution to the Fund, reflecting the dramatic increase in insurance premium costs. The state collected $74.3 million in fiscal year 1991-92, and expects revenues to increase as premium growth continues. The revenues, however, appear to be in jeopardy.

Kentucky's insurance premium taxes, which are levied only against out-of-state companies, are threatened by a 1985 U.S. Supreme Court decision (Metropolitan Life Insurance Co., et al. v. Ward, et al.) which addressed a similar taxing mechanism in Alabama. That ruling held the Alabama tax to be unconstitutional in imposing "discriminatory taxes on non-resident corporations solely because they are non-residents." Kentucky, like Alabama, justifies its levy of an insurance premium tax as a means of equalizing the total tax burden between in and out-of-state insurers, given the fact that foreign insurance companies do not pay tangible or intangible property taxes to Kentucky.

At least fourteen out-of-state insurers are currently seeking refunds from the Kentucky Board of Tax Appeals, arguing that Kentucky's law is unconstitutional. The Alabama case has spurred several states with similar laws to equalize their rates. Some states have also paid substantial refunds to out-of-state insurers. However, the Alabama case is not definitive. The U.S. Supreme Court has returned the case to a lower court in Alabama, to allow the state another opportunity to justify the disparity.

Discussion

The litigation involving Kentucky's insurance premium taxes is being held in abeyance by the Board, pending further action on the Alabama case. A final court decision on these cases is unlikely before the 1994 Session. With the Alabama case still in legal limbo, Kentucky's cases could go to the Supreme Court for resolution. To resolve objections to the premium taxes, the tax burden would need to be equalized, either by repealing the taxes now applied only to out-of-state insurers, or by imposing those same rates on the approximately eighteen domestic insurers. In the former case, the state would lose $70 million plus, per year; in the latter case it would gain an estimated $25 million per year.

INCOME TAX STANDARD DEDUCTION

Prepared by Terry K. Jones

Issue

Should Kentucky increase its $650 standard deduction to provide further simplification in the filing of tax returns?

Background

In determining Kentucky taxable income, individuals are allowed to deduct either the Kentucky standard deduction or the total of their itemized deductions, when the amount of their itemized deductions exceeds the standard deduction.

Kentucky's standard deduction was last changed in 1976, when it was increased from $500 to the current $650. This $150 increase allowed approximately five percent of the taxpayers to change from itemizing their deductions to claiming the standard deduction. In 1976, approximately 54 percent of the returns filed reflected the standard deduction, while in 1990, it is estimated that only 35 percent of the returns filed reflected the standard deduction.

By contrast, it is estimated that in 1990, 66 percent of Kentucky's taxpayers claimed the standard deduction on their federal return. The reason for the differences between the number of taxpayers claiming the standard deduction on their Kentucky return versus their federal return is that the federal standard deduction is considerably higher than Kentucky's. However, it should be noted that the tax benefit an individual receives from the lower state standard deduction is comparable to that received from the higher federal standard deduction, since federal tax rates are higher.

Discussion

Increasing the standard deduction not only simplifies the filing of the return by the taxpayer, it also enhances tax compliance and facilitates the processing of the returns by tax administrators. Although increasing the standard deduction is an easy method of producing some desirable results in tax reform, it is not without a cost, which may be considerable.

An analysis of data undertaken during the 1990 session showed that a $1,000 increase in the standard deduction, from $650 to $1,650, would result in a revenue loss in the $50 million range.

INCOME TAX EXEMPTION FOR PRIVATE PENSIONS

Prepared by Pam Lester

Issue

Should private employee pensions be exempt from Kentucky's individual income tax?

Background

When Senate Bill 4, enacted by the General Assembly in 1990, exempted federal pensions from the state's income tax, the stage was set for a demand by private pensioners for the same favorable treatment. The 1990 Session had reacted to the 1989 U.S. Supreme Court decision in Davis v. Michigan Department of Treasury, which decreed that states had to tax federal employees' retirement incomes in the same manner that they taxed their own public employees' retirement incomes. Kentucky had always granted full exemption from its state income tax to the pensions of state employees, including teachers, and local government employees.

No action was taken to resolve the issue by the 1992 Session of the General Assembly, although the private retirees' clamor for equity continued to rise. On March 20, 1992, the Franklin Circuit Court, in Marcum v. Revenue, ruled that the taxation of private pensions and the exemption of public pensions was an unconstitutional scheme. On October 7, 1992, the Franklin Circuit Court awarded private pensioners refunds for tax years 1990, 1991, and 1992, as well as for all subsequent years that the unconstitutional provisions continue to exist. The Kentucky Revenue Cabinet has filed a motion to bypass the Court of Appeals, which was granted by the Kentucky Supreme Court. The case is currently being briefed, and will probably be argued before the Supreme Court in September or October. Ideally, a final decision will be rendered in time for any necessary constitutionally mandated action to be undertaken by the 1994 Regular Session of the General Assembly. A ruling by the Supreme Court in favor of the state, however, will likely do little to resolve the political issue.

Of the forty-one states which impose an income tax on any form of retirement benefits, thirty-one provide full or partial exemptions for public employees. Nineteen of those thirty-one grant either full or partial exemption to private retirement incomes, with fifteen of the nineteen states granting the same exemption for private annuities as granted to public pensions. The remaining four offer a lesser exemption for private retirement pay; none give private retirement incomes a greater exemption.

Discussion

The options available to the General Assembly in dealing with the issue of taxation of private employee retirement income are the same as those considered in the federal retirement income taxation debate. The General Assembly can maintain the status quo, i.e., full taxation of private retirement incomes, it can extend the full exemption granted to public retirement incomes, or it can partially exempt private employee retirement pay. In the last case, the exemption could be expressed in an absolute dollar amount, or in the form of a declining amount based upon the taxpayer's total income. A study entitled Report on Exempting Private Employer Retirement Income from State Taxation, published by the Legislative Research Commission as Research Memorandum No. 462 in December, 1991, presents the costs associated with these and other pension exemption scenarios.

BANKING AND INSURANCE

REGULATION OF SELF-INSURERS

Prepared by Judy L. Fritz

Issue

Should self-insurers, such as the Kentucky Association of Counties (KACo), submit to requests from the Department of Insurance to review their files and records, in order to determine whether they meet the requirements of state law, even if they are exempt from the insurance code?

Background

KRS 304.1-120 allows certain entities to be exempt from the insurance code, thus from regulation by the Department of Insurance. Pursuant to KRS 304.1-120(6), KACo states that it falls into the category of an exempted organization and therefore can not be regulated by the department. It (KACo) is an association-sponsored, self-insurance program comprised of county governments throughout the Commonwealth.

The Department of Insurance recognizes that KACo meets the exemption provision, but states that KRS 304.1-120(6) sets forth a statutory mandate that even exempted associations and organizations must meet. They must comply with the following conditions:

Establishment of a professional or public liability risk management trust fund, to provide adequate coverage for claims made against members of the fund for professional liability or public liability risks;

Establishment of a comprehensive loss prevention and risk management program, coordinated with an effective claims management system for members of the group; and

Filing with the department, on a form to be provided by the department, a certification setting forth the establishment of such a trust fund, the date upon which the trust fund is to become effective, the identify of the members of the trust fund, and a copy of the programs and systems established for the members of the trust fund.

Discussion

KACo has executed inter-local agreements with the counties in the association to create a self-insurance program. KACo submits that the counties, through the inter-local agreements, have access to the records of the association, but that the department does not. The department contends that because self-insurers like KACo must file with them, and certify the establishment of funds sufficient to cover the liability of their members, the department is necessarily responsible for making sure that the association or organization can meet its financial obligations to its members. The department submits that if the self-insureds had to file with the local or county governments, the department would probably not be insistent regarding the review of their financial stability. However, as long as the department is the agency that the self-insureds file with, it will press for review of the records of self-insureds, to determine their solvency.

BUSINESS ORGANIZATIONS AND PROFESSIONS

CHARITABLE GAMING

Prepared by Michael Greer

Issue

What type of regulatory structure and policies should the General Assembly enact to regulate charitable gaming in Kentucky?

Background

According to the North American Gambling Abstract, charitable gaming ranks fourth in terms of total money wagered in the United States, behind casino gambling, state lotteries and horse racing. A trade association report listed the gross U.S. handle for charitable gaming for 1991 at $5.95 billion. Charitable gaming is the second fastest growing form of gambling; first is lotteries. For an eight-year period (1982-89), Gaming and Wagering Business magazine reported a 233% increase in gross handle for charitable gaming, for an annual average increase during the period of 18.73%.

Only four states, Hawaii, Idaho, Tennessee and Utah, do not permit some form of charitable gaming. The most popular game is bingo, permitted in forty-six states and the District of Columbia. Other major types of charitable gaming are raffles (30 states), charity game tickets, or pull tabs (31 states), and casino nights (14 states).

Bingo and charity game tickets are the two big revenue producers. While bingo is legal in more states, charity game tickets actually produce a bigger handle ($2.6 billion for bingo to $3 billion for charity game tickets). Charity game tickets account for 46.2% of the gross handle, for bingo 44.9%, raffles accounting for 3.1%, casino nights, 4%, and other forms of charitable gaming, 2%.

For many years, pari-mutuel wagering on horse racing was the only form of legalized gambling in Kentucky. Over the years attempts were made to legalize bingo, but they ran afoul of Section 226 of the Kentucky Constitution, which prohibited lotteries and gift enterprises. A 1970 bingo bill was ruled unconstitutional by the Court of Appeals, on the grounds that bingo was a game of chance and therefore a lottery, prohibited by Section 226.

In 1980, a different approach was taken to legalizing bingo. A bill was enacted that allowed charitable organizations which met certain tests to use charitable gaming as a defense against any prosecution under the gambling statutes. In 1990, provisions were added that required charitable organizations to register with the county clerk and submit quarterly reports. Restrictions on the conduct of certain gaming activities were also included in the 1990 legislation and strengthened in 1992.

The charitable gaming defense law served as an effective enforcement protection for charitable organizations for about ten years, even though its constitutionality was questioned soon after enactment. Over this period, the amount of charitable gaming being conducted in Kentucky increased rapidly and allegations of improper conduct by non-charities began to appear in the press, increasing the probability of a court challenge.

In 1991, gambling charges were filed against three organizations conducting bingo in Simpson County. The organizations claimed the charitable gaming defense and the Commonwealth Attorney countered by claiming the law to be unconstitutional. In December, 1991, the Simpson Circuit Court rendered a decision which found the charitable gaming defense law unconstitutional, based on case law precedent. The decision was appealed but the appeal was dismissed subsequent to passage of the constitutional amendment allowing charitable gaming.

The Simpson County case did, however, prompt the 1992 General Assembly to address the charitable gaming issue. Legislation was introduced, with the Senate and House initially taking different approaches to resolving the matter. SB 321, as introduced, would have licensed and regulated charitable gaming as a function of the state lottery, while HB 725 proposed a constitutional amendment to permit charitable gaming. HB 725 was enacted and in November, 1992, the voters of Kentucky approved a charitable gaming amendment by a 70 to 30 margin.

The General Assembly also enacted a committee substitute for SB 321 which further strengthened the provisions of the charitable gaming defense law, to serve as interim policy. A provision was included directing the Interim Joint Committee on Business Organizations and Professions to study alternative approaches to regulating charitable gaming. Research work was begun in the summer of 1992 and committee hearings began in September. In November, a report was completed and submitted to LRC in which the committee made five broad policy recommendations concerning charitable gaming.

1. That the Kentucky General Assembly should enact legislation to establish a comprehensive mechanism for regulating charitable gaming in Kentucky, should constitutional Amendment No. Be passed.

2. That an independent regulatory body be created to license charitable organizations to conduct charitable gaming.

3. That a strong enforcement program be included in the enabling legislation.

4. That the regulatory program be adequately funded and self-supporting.

5. That the Governor be urged to put charitable gaming regulation on a special session call.

A working draft of enabling legislation (94 RS BR 160) was completed in February, 1993, and the Subcommittee on Charitable Gaming was created to hold hearings on the draft. Since March, the Subcommittee has been hearing testimony, reviewing written comments, and scrutinizing the draft line-by-line, in order to refine policy provisions and produce a viable piece of legislation.

Discussion

Why should charitable gaming be regulated in Kentucky? There is considerable money involved in charitable gaming, producing an environment attractive to undesirable elements interested in diverting the money for personal gain. There is evidence that this is occurring in states with little or no regulation. A 1992 investigation by the Pennsylvania Crime Commission found that the bingo industry in Pennsylvania had been infiltrated by organized crime, resulting in fraud, misrepresentation, diversion of monies, and racketeering. Similar problems are occurring in other states with weak regulation, resulting in efforts in those states to pass more stringent laws.

Twenty-seven states have systems for regulating charitable gaming. The laws of these states were reviewed in drafting BR 160, with primary focus on eleven of these states. Five of the eleven states, Michigan, Minnesota, Nebraska, North Dakota, and Washington, were reviewed very closely, being states identified by experts as having particularly effective regulatory programs. The remainder of the eleven states included Kentucky's neighbors Illinois, Indiana, and Ohio, as well as New York, Texas, and Wisconsin.

The basic thrust of BR 160 is to assure that only legitimate organizations are allowed to conduct charitable gaming, that gaming revenues are expended for legitimate charitable purposes, and that gaming activities are conducted with honesty and integrity. Specific provisions include definitions of organizations that may participate in charitable gaming, and the types of gaming activities they may conduct. The bill would create an independent, five-member Charitable Gaming Regulatory Commission to license participating groups and regulate the conduct of gaming activities. Special emphasis would be placed on enforcement activities, particularly in the areas of investigation and audits. The commission would be empowered to deal with violations through a broad range of administrative actions, as well as appropriate criminal penalties. Finally, the program designed would be self-supporting through license fees and a fee on charitable gaming receipts, which would be deposited in a revolving fund to be used only for regulating charitable gaming.

What types of organizations should be allowed to conduct charitable gaming? "Charitable organization" is defined broadly in BR 160 as a non-profit entity organized for charitable, religious, educational, literary, civic, fraternal, or patriotic purposes. The definition is narrowed, however, in the license requirements, which state that a charitable organization must be tax exempt under Section 501(c)(3),(4),(8),(10), or (19) of the federal Internal Revenue Code. This is consistent with the laws of other states and essentially the same policy as provided in current law. The IRS has a thorough review process for tax exempt applicants and deference to IRS designations will eliminate costly duplication.

What types of charitable gaming should be permitted? The key to this issue is understanding the types of gaming in which charitable organizations are currently engaged. Three gaming activities are prevalent throughout the state and constitute the major categories of gaming defined: bingo, charity game tickets (pull tabs), and raffles. There are, however, a variety of other types of gaming, making definition somewhat problematic. The approach taken in the bill draft for addressing this is to consolidate these disparate activities into a broad fourth category, defined as "charity fundraising event," and to direct the commission to provide more specific definition through administrative regulations. This category would include such events as fairs, festivals, carnivals, and casino nights.

One issue that developed in the drafting of the legislation was the organizational placement of the commission. Looking at other states' approaches yields no clear direction on assignment of this function. Some states assign it to the Attorney General's Office, some to the Department of Revenue, some to the State Lottery, and some to the Department of Public Safety or Justice. Some states separate the different functions and assign them to several agencies.

While the charitable organizations that testified on the legislation voiced no strong opinion on where to assign the commission, they did generally agree on where not to put it. There was opposition expressed on assignment to the Department of Revenue or the lottery commission, because these agencies are viewed as having a primary mission to raise revenue for the state, which the charitable groups see as incompatible with a regulatory mission. In BR 160, the commission is administratively placed under the Justice Cabinet, for essentially two reasons. First, this placement would facilitate criminal background checks, the conduct of investigations, and training of staff. Equally important, it would emphasize the law enforcement role, which should send a positive message to the public.

Another issue that was discussed during the drafting process was whether "bingo halls" should be permitted to operate. There has been adverse publicity about bingo halls in Louisville and there was a sense initially that bingo halls should not be allowed. Testimony revealed, however, that many small charities would not be able to engage in charitable gaming without these facilities, which fostered a more favorable view toward them. Bingo halls, called "charitable gaming facilities" in the draft, would be allowed to operate, but they would be licensed and their operation strictly regulated, to assure that gaming revenues are not diverted for private gain. One lingering issue in this area is how to determine what constitutes reasonable rent for this type of facility.

A related issue is whether workers at gaming activities should be paid workers or volunteers. When the charitable gaming defense law was enacted, workers were to be volunteers, who could receive no compensation, other than tips. The permission for tips was deleted in 1992, because one of the alleged abuses was that gaming proceeds, disguised as tips, were being diverted to compensate workers. Most of the states reviewed do permit some form of minimal compensation. The argument for compensation is that small organizations have difficulty recruiting sufficient volunteers and that a person should receive some compensation for his or her time. The argument against compensation is that with compensation comes a host of employee-related obligations which are costly and with which many organizations, particularly small ones, may have difficulty complying. In addition, there is a general feeling that charitable gaming should promote the principle of volunteerism.

There are several issues surrounding the funding mechanism for the proposed regulatory program. There is general agreement that it should be self-funding and derived from a combination of license fees and a gaming activity fee, as it is in other states. But specific rates have been difficult to pin down, due to a lack of reliable data on the number of organizations conducting charitable gaming in Kentucky and the amount of money involved. BR 160 allows the commission to establish license fees by regulation, not to exceed maximum levels contained in the bill. It also levies a 6% fee on adjusted gross receipts (gross receipts minus prizes) for all charitable gaming activities. Rates ranging from 1% or 2% of gross receipts to 6% of net receipts have been suggested.

How much money will be needed to adequately fund an effective regulatory program? Again, not having reliable data makes this difficult to estimate, but some insight can be gained by looking at budget data from other states. Expenditures reported for administration and enforcement in 1991 average $1.2 million per year for the 27 states that regulate charitable gaming. A comparison using budget data from Nebraska produced an annual budget projection of approximately $3.5 million. One state agency presented budget estimates of $1.9 million for the first year and $1.2 million for each subsequent year, based on its own experience in administering a regulatory program. While these figures are soft, they do provide a reasonable range within which an acceptable budget might fall.

RIVERBOAT AND CASINO GAMBLING

Prepared by Vida Murray

Issue

Should the General Assembly legalize riverboat or casino gambling in the Commonwealth of Kentucky?

Background

Gambling in some form is legal in every state but Hawaii and Utah. According to LaFleur's 1991 North American Gambling Abstract, Americans spent over $139 billion, or 3.7 percent of their per capita disposable personal income, wagering on gambling in 1990. Of this amount, approximately 69 percent of the total "handle" was spent on casino gambling, followed by state lotteries, horse racing and charitable gaming accounting for 14.4 percent, 10.2 percent, and 4.0 percent of the handle respectively. In contrast, the gross revenue (consumer losses) from wagering was $22.7 billion in 1990. State lotteries ranked first with gross gaming revenues of $9.7 billion, which amounts to approximately 42.8 percent of the total gross gaming revenues, followed by casino gambling with $7.8 billion, or 34.4 percent of the total, horse racing, with $2.8 billion, or 12.4 percent of the total, and charitable gaming, with $1.3 billion, or 5.7 percent of the total.

The extent of gambling in the United States is further illustrated by figures comparing the amount Americans spend annually on wagering with what they spend on other forms of entertainment. In 1990 more than $14 billion was spent on admission to specified spectator amusement, with $5.2 billion and $5.5 billion being spent on motion picture theaters and legitimate theaters and operas, respectively. In short, Americans spent more than four times as much on legalized gambling as they did on movie tickets.

Casino gambling has grown steadily since 1989, when only Nevada and New Jersey had legalized casino gambling. Since then, a growing number of states have legalized some form of casino gambling. In addition, South Dakota passed a bill permitting land-based casino gambling in Deadwood. Since then Colorado has approved casino-style gambling in three mountain towns, (Central City, Blackhawk, and Cripple Creek) and North Dakota has established casino gambling in Roland Township.

One of the fastest growing forms of casino gambling is riverboat gambling. In 1990, Iowa, the first state to pass riverboat gambling legislation, launched its first riverboats. Illinois quickly followed, launching its first riverboat in September 1990. Illinois has since added five more boats to its fleet. Mississippi was the next state to approve riverboat gambling, followed by Louisiana and Missouri in 1991. Just recently the Indiana Legislature approved riverboat gambling, authorizing five boats on the Ohio River, five on Lake Michigan and one on Lake Patoka. Ohio and West Virginia have also considered legislation permitting riverboat gambling.

Riverboat gambling is controlled by federal law and state statute. Under applicable federal law, riverboat gambling is permitted only if state law expressly authorizes that type of gambling. Interstate travel from an authorizing to a non-authorizing state is permitted, as long as the gambling equipment remains unused when in the non-authorizing state. The cumulative effect is that a riverboat from another state, engaged in interstate travel, may travel in, dock in, or pick up passengers in Kentucky, as long as no gambling takes place while the vessel is in Kentucky waters.

Another recent but fast growing form of gambling is Indian gaming. The federal Indian Gaming Regulatory Act of 1988 permits local tribes to establish gambling activities to assist tribes in becoming financially self-sufficient. Because state laws are generally unenforceable on Indian lands without congressional authorization and/or tribal consent, Native American tribes in some states are able to engage in high-stakes casino gambling, even though similar activities are prohibited on nontribal lands. Some states are now involved in lawsuits, in resistance to this policy. To date, Native American tribes in 17 states have casino and bingo operations.

Court decisions to date allow casino-type gambling on tribal lands, even if state policy does not permit such gambling. For instance, casino-type gambling on tribal lands has been upheld even though nontribal entities in that same state were unable to engage in casino-type gambling, since other forms of gambling in the same federally-defined class, such as pari-mutuel wagering and the lottery, were allowed. However, Kentucky is one of 19 states that do not have such tribal lands; gambling cannot be established on new Indian land unless the Secretary of Interior and the Governor determine that the gaming is in the best interest of the tribe and is not detrimental to the surrounding community.

Section 226 of the Kentucky Constitution forbids "lotteries and gift enterprises". This provision, which has been in effect since the adoption of the 1891 Constitution, has historically been read as prohibiting all forms of gambling except pari-mutuel wagering on horse racing. Consequently, for years, wagering on horse racing was the only legal form of gambling in Kentucky, except for brief periods in 1970 and during 1980-1992, when legislation permitting bingo and providing a defense to charitable organizations being prosecuted for operating games of chance were in effect, respectively. This, however, has changed. In 1988, Section 226 was amended, to permit the establishment of the State Lottery, and again in 1992 the conduct of charitable gaming was authorized, if regulated by the Legislature.

With the advent of riverboat gambling in Metropolis, Illinois, and speculation that Jeffersonville and Evansville will soon have riverboat gambling, riverboat and casino gambling will become important issues for the 1994 General Assembly.

Discussion

There is substantial evidence that the influx of new forms of gambling attracts customers away from older, established forms of gambling. A recent study by the University of Louisville on the impact of intra-state wagering, a state lottery, and casino gambling on pari-mutuel horse racing in New Jersey found that casino wagering had a substantially negative impact on race track wagering and attendance. This study found a 35% decline in live racing handle as a result of casino gambling, with tracks located in close proximity to casinos experiencing an even larger drop. The study is corroborated by the testimony of the General Manager of Bluegrass Downs that there has been a decline in the track's handle since the opening of riverboat gambling in Metropolis. In a similar vein, the gross lottery proceeds for the nation from 1980 to 1990 grew at an average annual rate of 21.5 percent, far exceeding the growth of the general economy. However, in 1990, the growth rate diminished as the pool of lotteries grew. To counter this decline lotteries have established games with higher takeout rates and payoffs, and more favorable odds. Arguably, neither lottery nor racing revenues will maintain their high level of performance as new types of gambling compete for the gambling dollars. This is particularly noteworthy for states that are increasingly relying on gambling revenues to balance budgets or finance program growth.

The negative impact of casino gambling on horse racing in Kentucky is of particular concern since, according to an industry-funded study, the equine industry is responsible for 80,000 jobs and more than $5 billion of the state's annual economic output. The proliferation of riverboat gambling in other states has caused the racing industry to consider defensive options. One track has announced plans to invest in an Indiana riverboat, while another has an interest in developing a land-based casino. An industry representative appearing before the Interim Joint Committee on Business Organizations and Professions proposed track-based casinos as a means of counteracting the predicted losses from riverboats.

Proponents of casino gambling have emphasized its potential for stimulating tourism and economic development. For instance, the approval of water-based gambling in Illinois was largely to aid the state's economically troubled areas. A tourism official from Paducah reported that revenue for hotels/motels, restaurants, gas stations, and other tourism-related businesses have shown substantial increases since the riverboat casino at Metropolis began operating. Opponents, on the other hand, point to the rapid growth and subsequent decline of riverboat gambling in Iowa as evidence that the benefits from casino gambling will also subside as competition increases. Moreover, these critics point to Atlantic City as an example of gambling's inability to revitalize an area.

Proponents and opponents alike agree that casino gambling in a few states will spur its growth in other states. They predict that the domino effect experienced in the growth of the lottery will likewise take effect in casino gambling, particularly in neighboring states. Furthermore, opponents feel that in the absence of other attractions, the growth of the areas with casinos will become short-lived, as tourists opt for the casinos closest to their home. Opponents assert that the social costs of casino gambling are high arguing that the legalization of casino gambling will lead to greater gambling excesses, consume income the poor should dedicate to basic needs, devalue the importance of the American work ethic, and attract organized crime. These critics also stress that gambling is a regressive tax that impacts lower income individuals disproportionately. Gambling proponents assert that government should not be paternalistic, and they question whether it is feasible to impose taxes that will provide the state and locality the same return that gaming does.

Various options have been discussed for minimizing the negative effects casino gambling in the neighboring states will likely have on the horse racing industry or the lottery. Options include permitting casino gambling under the direction of the State Lottery, permitting racetracks to operate casino gambling, making the lotteries and pari-mutuel wagering more attractive to consumers, and authorizing a study on the impact of casino gambling on the state's economy. These options are integrally related and will likely turn on whether casino gambling legislation can be enacted with or without a Constitutional Amendment. Proponents have argued that the Lottery Amendment is broad enough to encompass casino gambling if operated as part of the lottery and for the benefit of the Commonwealth. Opponents respond that Kentuckians voting for the lottery merely intended to approve the playing of lotto-type games. They support this contention by noting the strong language in the last subsection of Section 226, which prohibits all lotteries and gift enterprises not expressly permitted.

In July, 1993, the Interim Joint Committee on Business Organizations and Professions asked for an Attorney General's opinion on the constitutional question. In that opinion (OAG 93-58), the Attorney General notes that the power conferred upon the General Assembly to establish and regulate the lottery does not extend to the licensing and regulation of casino gambling. Moreover, the Attorney General opines that Kentucky voters, in approving the lottery, did not intend to approve casino gambling. Looking at lotteries from a historical and legal perspective, the Attorney General concludes that casino gambling is a lottery, that its effects are what the framers of the Constitution intended to prevent when proscribing lotteries, and that it is sort of scheme Section 226 prohibits.

In a recent Lexington-Herald poll, Kentuckians favored casino gambling by a 53 percent to 46 percent margin. Approximately three-fourths of those Kentuckians queried said the question of casino gambling should be placed on the ballot in the form of a constitutional amendment. Ninety-three percent of those polled indicated that it was "very important" or "somewhat important" that a local option be available if casino gambling were legalized; however, 57% percent of the respondents said that they would vote against casino gambling in their community, with a slightly larger number indicating that they would not gamble at a casino in Kentucky. Of the 46 percent voting against casino gambling, reasons cited, in order of frequency, included fear of organized crime, immorality, lack of positive effect on the economy, inability of the state to regulate, and financial harm to the racing industry. Some minor differences were noted between urban and rural areas: fewer people in urban areas were opposed to casino gambling, and fewer said they would vote against casinos in their community.

REGULATION OF HORSE RACING

Prepared by Michael L. Meeks

Issue

Should the Kentucky General Assembly amend the racing laws to provide for more equitable regulation of horse racing in Kentucky?

Background

The Kentucky Racing Commission was originally created in 1906 to "regulate racing of running horses... and was intended to foster the industry of breeding thoroughbred horses." In response to mounting concern over the future of other breeds of horses, the General Assembly in 1950 created the Trotting Commission, to oversee harness racing much the same as the Kentucky Racing Commission regulated thoroughbred racing. In 1968, the Kentucky Quarter Horse Commission was established; it was later granted authority over Appaloosa and Arabian horse racing.

In 1974, the Trotting Commission was renamed the Kentucky Harness Racing Commission. In 1986, it was given authority over Standardbred, Quarter horse, Appaloosa, and Arabian horse racing, and the Quarter Horse Commission was abolished. In 1992, the General assembly passed House Bill 749, which consolidated the Kentucky Harness Racing Commission and the Kentucky Racing Commission.

The 1992 legislation was an omnibus revision of the horse racing laws in Kentucky. The Kentucky Racing Commission now consists of eleven commissioners appointed by the Governor. In making these appointments, the Governor is directed to secure broad representation within the horse industry, to include the appointment of seven members broadly representative of the thoroughbred industry; three members broadly representative of the standardbred, quarter horse, Appaloosa, or Arabian industries; and one member from the public at large, who shall have no financial interest in the business or industry regulated. These members are appointed for initially staggered terms of four years.

The control of the Kentucky Racing Commission by thoroughbred interests has created a perception of unfair treatment for the harness industry. Decisions made by the commission have been criticized as being detrimental to harness racing, leading to allegations that thoroughbred interests are trying to put harness racing out of business in Kentucky.

In May of 1993, a bill was prefiled, which had the primary purpose of providing equity in the regulation of horse racing. This bill, BR 240, would create a Kentucky Council on Pari-mutuel Wagering, to replace the Kentucky Racing Commission as the state regulatory authority for racing and wagering. The council would consist of 6 disinterested public members, appointed from each Congressional district, and confirmed by the Senate. The Kentucky State Racing Commission and the Kentucky Harness Racing Commission would be recreated with the same composition and industry representation as existed prior to enactment of the 1992 legislation. These commissions would serve in an advisory capacity to the council with regard to policy matters affecting the various breeds of horses. In addition, BR 240 would repeal authorization for licensure of simulcast and off-track betting facilities in Kentucky.

The Interim Joint Committee on Business Organizations and Professions Committee heard testimony from the bill sponsor at its July meeting and will take additional testimony from the horse racing industry and other interested individuals at an August meeting in Prestonsburg.

Discussion

Major racing jurisdictions throughout the United States regulate horse racing using a variety of methods. In California, Illinois, Maryland, New Jersey, and New York, both thoroughbred and harness racing is regulated by a central racing board or commission. In Florida, the Division of Pari-mutuel Wagering in the Department of Business & Professional Regulation is responsible for the regulation of thoroughbred and harness racing. Only in the State of Pennsylvania are there two separate authorities regulating thoroughbred and harness racing. By far, the most popular method of regulating horse racing is through a centralized board or commission that regulates both thoroughbred racing and standardbred racing.

The need to maintain two separate commissions to regulate the various breeds of horse racing in Kentucky was questioned for many years, even prior to the enactment of House Bill 749 in 1992. One of the primary reasons for consolidating the old Kentucky Racing Commission and the old Harness Racing Commission was to create a more efficient and effective method of regulating the entire horse racing industry in Kentucky. In many ways, the old State Racing Commission and the old Harness Racing Commission were similar. Among other things, each commission: licensed racing associations, racing officials, horses, jockeys and drivers, trainers, owners, apprentices, and agents; awarded racing dates; conducted investigations on objections and complaints; regulated purses, stakes, and awards; regulated equine drug testing; and authorized pari-mutuel wagering. A more efficient regulatory body could potentially save many valuable state dollars, reduce duplication of administrative services, and produce more revenue for the State.

Another reason for consolidating the Kentucky State Racing Commission and the Harness Racing Commission was to streamline the procedure for issuing intertrack wagering dates. Currently, only tracks licensed as of July 15, 1992, may participate in intertrack wagering and only if the track is licensed in the county as of that date. On or before November 1 of each year, the commission shall meet and award intertrack wagering dates to all tracks for the succeeding year. The commission may award, in a county containing more than one track, sixty percent of intertrack wagering dates to tracks of the same breed, and forty percent of intertrack wagering dates to tracks of other breeds. Previously, each commission awarded separate dates and if the commission could not agree on dates, an arbitrator was appointed.

Options available to Kentucky relating to the structure of the regulatory body that governs horse racing include:

1. Realigning the current Kentucky Racing Commission membership to insure that the thoroughbred and harness interests are equally represented;

2. Repealing the 1992 legislation and recreating the two commission systems as they existed prior to 1992;

3. Creating an independent public member body, consisting of member with no ties to the horse racing industry, as is proposed in BR 240; or

4. Granting jurisdiction over horse racing to another agency of state government.

One tangential issue raised by BR 240 is off-track betting, the authorization for which would be repealed by BR 240. HB 749 authorized simulcast facilities (off-track betting parlors), with the proviso that no facility be built within 50 miles of a licensed race track. Soon after HB 749 became effective, four thoroughbred tracks formed a consortium to build simulcast facilities. This effort has resulted in an operational facility in Corbin, a soon-to-be-opened facility in Maysville, and plans for facilities in other parts of the state including Ashland and Hazard in eastern Kentucky.

At the same time, certain harness interests have been planning relocation to eastern Kentucky as a way of escaping direct competition from thoroughbred racing in other parts of the state. Riverside Downs in Henderson has been granted approval to move to Ashland, and another group has requested a license for a track in Prestonsburg, Kentucky. The competition between the two industries has not, therefore, ceased but appears to have changed locations. The sponsor of BR 240 told the Interim Joint Committee on Business Organizations and Professions that, in his opinion, live racing is more important to the economy of Kentucky than simulcasting and should be given priority. He indicated, however, that simulcasting, if used properly, could be beneficial to racing in Kentucky and he would be flexible on the off-track betting issue.

Another issue may be the continued funding of the Breeder's Award Fund, which was created in 1992 to provide bonuses for horse breeders. The Breeder's Award Fund is funded primarily from off-track betting revenues. If authorization for off-track betting is abolished, as proposed by BR 240, funding for the Breeder's Award Fund would also be terminated. One option for continued funding with existing revenues would be to reallocate the money in the development funds so that breeders would receive a portion.

The Kentucky Thoroughbred Development Fund was created in 1978 to supplement purses for Kentucky-bred winners. The Kentucky Thoroughbred Development Fund is funded by .75% of the pari-mutuel handle. In July, 1990, the amount of funding from the intertrack wagering handle increased from .75% to 2%, which doubled the amount of revenue generated. In 1989, the year prior to this increase, the fund generated a little over $2.9 million. In 1991, the first full year after the increase, fund revenues increased to $5.7 million. Under current law, this money is awarded to owners as purse supplements. Some states distribute the money among owners, breeders, and even stallion owners.

LIMITED LIABILITY COMPANY

Prepared by Yair Riback

Issue

Should Kentucky enact legislation to authorize the formation of businesses as limited liability companies?

Background

Kentucky law recognizes two main organizational structures for businesses: corporations and limited partnerships. Close derivatives of these include the professional service corporation (PSC), and the S corporation, which differ slightly from corporations in regard to stock issuance and management.

In 1988, Wyoming enacted legislation creating a new form of business organization, the limited liability company (LLC). As many as 25 states have since enacted some version of this legislation and about 20 other states are considering it.

There is interest in Kentucky in enacting legislation permitting limited liability companies. A joint committee of the Kentucky Bar Association and the Kentucky Society of Certified Public Accountants has been researching the issue. Representatives appeared before the Interim Joint Committee on Business Organizations and Professions in March, 1993, to brief members on the limited liability company concept. They also indicated they were in the process of developing enabling legislation and hoped to return to the committee with a bill draft before the end of the interim.

Discussion

The two basic organizational options that are provided in Kentucky law apparently do not adequately meet the needs of many small and medium-sized companies. These are businesses that are too large to function as a limited partnership but are not large enough to take full advantage of the corporate structure. The Limited Liability Company concept combines elements of a limited partnership and corporation to provide a third organizational option that would appear more suited to a growing number of small and medium-sized companies.

While the Limited Liability Company (LLC) is not intended to replace corporations or partnerships, it combines the advantages of each. It combines the structural flexibility of a partnership with the liability protection of a corporation. The LLC is formed as an unincorporated business entity where neither the partners nor the managers are personally liable for its obligation. However, professionals who organize their service/business as a LLC still remain liable for their professional performance.

A major advantage of an LLC is the manner in which it will be treated for federal and state income tax. Unlike corporations, which are subject to taxation on the corporate level, the LLC is taxed on the business owner's level. Such benefits, however, depend upon IRS's determination that the LLC does not have more than two of the five corporate attributes recognized by IRS.

The following chart compares the different methods of business organization with regard to the five corporate attributes and taxation.

COMPARISON AMONG DIFFERENT FORMS (
BUSINESS ORGANIZATIONS

	CORPORATION[1]	S CORPORATION	PROFESSIONAL SERVICE CORPORATION (PSC)	LIMITED PARTNERSHIP	LIMITED LIABILITY (
LIMITED LIABILITY	Yes	Yes	Yes[2]	Yes, as to the initial partners[3]	Yes[4]
TRANSFERABILITY OF INTERESTS	Yes	No	No	No	No, unless set fort agreem
CENTRALIZED MANAGEMENT	Yes, by board of directors	Yes, by board of directors	Yes, by board of directors	General partner manager, limited partners can't participate in management	No, unless specifie organiza
CONTINUITY OF LIFE	Yes	Yes	Yes	No	No, unless specifie organiza
STOCK	Yes	Yes, but one class of stock	Yes	No	No, certificate of
TAXATION	Double tax	Single tax	Double tax unless S Corporation	Single tax at partner level	Single tax at pa

[1]Has four major attributes: limited liability; transferability of interests; centralized management; and continuity of life.

[2]Professionals organized as PSC are liable for their professional performance.

[3]At least one partner should be liable for obligations.

[4]Professionals organized as LLC are liable for their professional performance.

CITIES AND LOCAL GOVERNMENT

MUNICIPAL INSURANCE PREMIUM TAXES

Prepared by Jamie Jo Franklin

Issue

Should cities be limited in their ability to levy municipal insurance premium taxes?

Background

Since 1942 , Kentucky cities have had the authority to collect insurance premium taxes from insurance companies for the privilege of doing business within a city. More recently, counties were given this same authority (KRS 91A.080). The fees or taxes are based on the amount of premiums collected by insurance companies issuing policies within the taxing jurisdiction. The companies collecting the tax are allowed to retain a portion of the proceeds as a collection fee. This collection fee can be either 15% of the tax collected and remitted to the government or 2% of the premiums subject to the tax, whichever is less. Premiums on workers' compensation policies or employee accidental death or injury policies are exempt from taxation. Insurance companies whose policies are taxed are required to remit the tax to the levying government within 30 days after the end of each calendar quarter. The Kentucky Department of Insurance is charged with promulgating the administrative regulations governing the collection, reporting and remittance of the tax by the insurance companies.

Discussion

Currently, insurance premium taxes on one or more lines of insurance have been enacted by 299 of Kentucky's 440 cities. Every city of the first through fourth classes has enacted the tax, as have most cities of the fifth class. The tax rates range from a low of 2% to a high of 14%. The average range for the largest number of cities falls between 5% and 6%. It is estimated that for 1991, the tax yielded approximately $89,345,000 for city general funds. General funds are usually spent for operating local governments and providing such basic services as garbage collection or police and fire protection.

The Kentucky League of Cities (KLC) in a recent survey found that the percentage of general fund revenues represented by the insurance premium tax ranges from 3% to 67% of a community's annual revenues. The higher percentages were usually found in cities with too small an economic base to make occupational taxes feasible or those cities that do not have sufficient property tax revenues as a result of the limitations imposed by HB 44 and the Homestead Exemption.

During every session of the General Assembly since 1990, bills have been introduced which would have capped or severely restricted the tax rates which could be imposed by local governments. The supporters of the proposals have often included the insurance companies, as well as proponents of health care reform. Insurance companies argue that the tax collection is difficult to administer, and have urged the General Assembly to take steps to address their concerns. The proponents for health care reform point out that a tax on health care insurance is a hidden cost which inflates the final cost of health insurance policies for many Kentuckians.

On the other side of the argument, the 1991 KLC survey points out that 165 cities do levy a tax on insurance policies which generates approximately $17,870,000 annually. These funds would be a significant loss for cities if they were prohibited from levying this type of tax. Many of the mayors surveyed by KLC regarding the potential loss of this tax indicated that there most assuredly would have to be a loss of city services or possibly an elimination of municipal personnel, in order to balance already limited budgets.

LOCAL GOVERNMENT ETHICS

Prepared by John Schaaf

Issue

Should the General Assembly enact a statutory local government ethics law?

Background

The 1992 General Assembly created the Task Force on Governmental Ethics to make a comprehensive study of Kentucky's ethics laws and recommend improvements.

In December, 1992, the Task Force approved a bill draft proposing standards of conduct which would apply to a wide range of state and local government officials. In a February, 1993 special session, the General Assembly adopted a new Code of Legislative Ethics and added statutes to the Executive Branch Code of Ethics, but did not include local governments in the new law. It was generally understood by all parties that the issue of local government ethics would be studied during the remainder of the interim and that any necessary legislation could then be considered by the 1994 General Assembly.

Shortly after the special session, the Interim Joint Committee on Cities and Local Government, along with the Interim Joint Committee on Counties and Local Government, began working with local government organizations to develop a proposal for a code of ethics for local governments and their officials.

Discussion

In response to increased public concern, state and local governments around the nation have recently enacted or strengthened ethics guidelines for public officials.

For example, Kentucky's new Code of Legislative Ethics amends statutes originally written in 1976, and creates new statutes to establish a comprehensive code of conduct addressing such issues as nepotism, financial disclosure and post-term lobbying. In addition, an independent Legislative Ethics Commission has been appointed to monitor the implementation of the new law.

The Kentucky League of Cities (KLC) and the Kentucky Association of Counties (KACo) have each submitted proposals for local government ethics laws to legislative committees.

KLC recommends that the General Assembly enact a law containing a code of conduct, a financial disclosure requirement, and provisions on nepotism. The League also recommends establishment of the Kentucky Local Government Ethics Commission, which would have jurisdiction over all local government officers and employees not subject to the jurisdiction of a local ethics board. Under the KLC proposal, cities and counties, individually or jointly, could establish a local ethics code which would be required to be at least as stringent as the statutory code. The officers and employees of a local government with its own code would be subject to the jurisdiction of a local ethics board.

Similarly, KACo's proposal recommends that the state's Department of Local Government have jurisdiction to "govern and guide" the conduct of local government officers who are not otherwise regulated by a locally-promulgated code of ethics.

The proposals of both organizations would put limits on the ability of local officials and members of their immediate families to have business transactions with their local government.

Both groups also suggest restrictions on the employment of an official's family members in the official's agency or an agency over which the official has management authority.

KLC and KACo also recommend provisions on financial disclosure by local officials. KLC would require elected officials, candidates, management personnel, and those with procurement authority to annually file a disclosure statement setting forth financial and business information. KACo would require disclosure by local officials only if the official had a private interest in a matter pending before the local government.

In summary, organizations representing city and county governments have recommended that the General Assembly authorize local governments to enact their own codes of ethics or be subject to oversight from Frankfort. They propose several issues which should be addressed in the local government's code of ethics, but they are not in complete agreement as to the extent of the requirements which should be set forth by the General Assembly.

The affected committees have not yet taken a final position on any of these submitted proposals but are continuing to consider them, along with comments and recommendations from various state officials and other interested parties.

THE COORDINATION OF STATE GOVERNMENT HOUSING EFFORTS

Prepared by Peter J. Clayton

Issue

Should the General Assembly coordinate state government efforts to provide affordable housing?

Background

Housing development has become an intricate web of regulatory, social, and economic concerns. Government agencies assess the impact that the housing industry has on the environment and ensure that construction standards are sound. Private agencies, along with government agencies, seek to provide assistance to people who cannot afford adequate housing. And the construction of housing stimulates many other kinds of economic development: infrastructure (roads and sewers), manufacturing (furnishings and building supplies), and general business services.

Federal, state, and local governments each encourage the development of affordable housing, defined as housing for which individuals pay no more than 30% of their total household income. This encouragement often comes through tax breaks, block grants, or mortgages with low interest rates, and specific support services are often considered essential for the success of housing initiatives. Each of these methods helps to increase the housing supply, but strained budgets at all levels of government sharply limit the resources that can be provided.

Discussion

Kentucky's General Assembly has worked over the years to put mechanisms in place to help people in need of adequate affordable housing. The Kentucky Housing Corporation (KHC), established in 1972, issues mortgage revenue bonds to finance low-interest loans, allocates federal housing dollars, and administers such programs as the Affordable Housing Trust Fund. In addition to the work of the KHC, the state's Community Development Block Grant Program makes a limited amount of funds available for housing on an annual, competitive basis, subject to state and federal guidelines. While these and other programs seek to meet people's housing needs, no statewide housing policy exists to guide these efforts or to direct the expenditure of limited resources.

In 1992, an estimated $163,833,000 was allocated through federal, state, and local resources to meet housing needs in the Commonwealth. Given current economic conditions, an increase in state funding for housing would be difficult. The coordination of existing efforts throughout the state could provide a means to more effectively use housing dollars. However, the structure of statutory provisions to coordinate housing efforts could affect the autonomy and flexibility of state government agencies. One entity may need to be given lead authority in order to ensure accountability.

COUNTIES, SPECIAL DISTRICTS, AND LOCAL GOVERNMENT

LEGAL STANDING FOR NONPROFIT RURAL FIRE DEPARTMENTS

Prepared by William Wiley

Issue

How should rural nonprofit volunteer fire departments be given legal standing to provide fire protection services?

Background

Legislative enactments by the 1992 General Assembly have made significant improvements in state support for rural volunteer fire departments. HB 365 set a guaranteed level of $5000 in annual state grants for any department maintaining training and minimum equipment standards, initiated a ten million dollar revolving low-interest loan fund for equipment purchases, and provided for state-funded hepatitis B inoculations for firefighters. But a persistent problem relating to the legal standing of many rural departments remains to be solved. The majority of small rural fire departments are nongovernmental entities, most created as nonprofit corporations under KRS Chapter 273. Many do not possess even this limited degree of legal standing. Instead they are undertakings of civic clubs or loose associations of neighbors. KRS 95A.262 recognizes these departments as "operated and maintained on a nonprofit basis in the interest of the health, safety, prosperity, and security of the inhabitants of the Commonwealth," and thereby they are entitled to workers' compensation coverage and the other forms of financial support already discussed. But there is no statutory mention of the fire chief and his authority to direct operations at the scene of a fire, there is no statutory authority to use water from any source, and no authority to enter private property when the owner or tenant is not present. Certainly there is no governmental immunity from suit by a person aggrieved by the outcomes of a firefighting effort.

An attempt was made in 1990 HB 515 to create a certification program for nonprofit departments. This bill failed to win passage, for reasons other than the certification proposal. In 1992, HB 354 would have required every nonprofit department to become a fire district, under the provisions of KRS Chapter 75. This bill also failed, primarily over resistance to the taxing authority which a fire district enjoys. The task remains to find a method for giving legal authority and protection to nonprofit fire departments, which are the only source of fire protection to much of rural Kentucky.

Discussion

Any method for giving legal standing to the rural fire departments which now operate without such protection must accommodate to the time constraints of those who volunteer their services, and to the reluctance of rural citizens to take on additional tax burdens.

One proposal being considered by the Interim Joint Committee on Counties and Local Government would provide recognition and certification of rural fire departments by the state Commission on Fire Protection Personnel Standards and Education. Only four types of departments would be eligible for recognition and certification: KRS Chapter 75 fire protection districts, KRS Chapter 95 municipal departments, KRS 67.083 county departments, and KRS Chapter 273 nonprofit corporations. Any department which was not one of these four would have to change its status in order to be recognized and receive state aid. One would expect that the fire departments which are social clubs or something less would become nonprofit corporations under KRS Chapter 273 in order to comply with the statute. In order to be recognized and certified a department would have to do what it now does to receive state aid: have a minimum number of members, a chief, some firefighting apparatus, and training for the firefighters.

By becoming a recognized and certified department, a KRS Chapter 273, nonprofit corporation would win designation as the only fire department authorized to protect its designated area, with the power to enter mutual aid agreements with other departments. It would also have the authority to secure water supplies from any source, and be granted all the rights identified in the Kentucky Revised Statutes for other fire departments. Each recognized and certified department would have a chief, with the legal authority to order the evacuation of the scene of a fire or other disaster, take charge of all fire ground operations, control department personnel while on duty, and control firefighting equipment.

The KRS Chapter 273 nonprofit department would incur some minor obligations for its new legal standing. It would be required to submit an annual report to the Secretary of State and a copy to the Commission on Fire Protection Personnel Standards and Education. It would also be required to prepare an annual financial statement for the commission. The department would also file a map of its boundaries with the commission and with the county clerk.

There appears to be a consensus among rural firefighters and members of the Interim Joint Committee on Counties and Local Government that nongovernmental fire departments need legal identity as they continue to provide their public services. In past sessions this need has been one of many related to rural fire protection which have competed for attention. Since significant improvements were made in 1992 toward providing financial aid to rural departments, there may be more opportunity to focus in 1994 on the need for legal standing.

ECONOMIC DEVELOPMENT

DEVELOPMENT FINANCE

Prepared by Gordon F. Mullins

Issue

Should the General Assembly establish a capital access program incorporating private financial institutions to broaden the range and availability of risk capital for small and medium-sized businesses?

Background

The question often asked is, where do struggling, but promising businesses and entrepreneurs find financial capital at critical stages in their companies' growth and development? In response to this often expressed need, the 1988 General Assembly enacted House Bill 19, which created and established The Commonwealth Venture Capital Fund. At the time, in the opinion of some economic development experts, a state supported venture capital fund would provide fledging entrepreneurs with a source of risk capital at the earliest and often most critical stage of development. Unfortunately, after several years of attempting to implement the fund, it was the opinion of the management company that had been selected to manage the fund and others, that the legislation contained technical problems severely restricting the ability of the fund management to attract commitments for investments in the fund, including, but not limited to, statutory provisions restricting investments by the fund to in-state projects. The 1992 General Assembly incorporated several technical corrections to the venture fund statute in House Bill 89 and Senate Bill 316; however, since passage no further action by the state has been taken. As a result the fund has never been funded and implemented.

During the 1992-1993 interim, the Interim Joint Committee on Economic Development received testimony indicating that , if the fund is to become operational, legislative changes may be required , including removing the limitation on investments and removing public sector appointees from the governing panel.

A larger problem is a perception by some that the purpose of the venture capital fund is jobs' development. Venture capital investments are normally limited to potentially high-growth firms that promise a high rate of return, and such investments are often limited to small or medium-size businesses that have a proven record. Obviously, the reality of what venture capital does, is viewed more narrowly than some people's perceptions of the function of venture capital in economic development.

Statements by representatives of the Kentucky Science and Technology Council have noted the need for "seed capital" to provide risk capital to promising entrepreneurs at the earliest stages of business development, a period of development when prototype products are created, initial market analyses are performed, business plans are developed, and management teams are assembled. Another level of financing often found lacking in private markets is "mezzanine" financing, providing equity, long-or-short-term debt, or royalty and sales participation to small and medium-sized high-growth companies that do not promise enough return to attract venture capital financing.

Obviously, the functions, stages, and types of risk financing often critical to the development of small and medium-sized businesses must be understood, especially in relation to the functions and objectives of state supported jobs' development programs, including such incentives as tax credits and low interest loans. During the 1990-91 interim, the Special Subcommittee on Economic Development Structure and Programs examined many of these programs and recommended: restructuring and realignment of state government development finance programs, including the Kentucky Development Finance Authority, the Kentucky Rural Economic Development Authority, and the Commonwealth Venture Fund; granting the Kentucky Economic Development Partnership authority to initiate seed-stage financing programs to assist innovative growth-oriented, emerging, and small Kentucky firms; granting the Partnership board authority to provide matching grants to Kentucky industries and universities through an applied research and development finance program to promote applied research of strategic importance to Kentucky's economy; and authorizing the board to provide financial assistance to Kentucky exporters through the financing of accounts receivable, letters of credit and loan guarantees. All of these recommendations were incorporated in House Bill 89, enacted by the 1992 General Assembly.

Several other economic development finance programs, specifically geared to revitalizing the state's manufacturing base and to encouraging the growth of high technology service sector employment, by combining project support with bond funds, state tax credits, and employee assessments, also were enacted in 1992. Combined with these programs and authorized new initiatives, state government now also offers assistance through loan guarantees by the U. S. Farmers Home Administration, the U. S. Economic Development Administration, and the Commonwealth Small Business Development Corporation.The U. S. Small Business Administration programs include small business loans, loan guarantees, international trade loans and export revolving line of credit loans, contract, seasonal line of credit and pollution control loans.

Experience indicates that state-supported projects are sound investments with limited risk. Usually state loans are available for fixed asset financing, business start-ups and expansion. Combined with private and other public financing, the Cabinet for Economic Development assisted or participated in over one-hundred and eighty-seven development finance projects during the last fiscal year, including approximately twenty economic development bond pool projects, fifty-eight Kentucky Economic Development Finance Authority projects, ten Commonwealth Small Business Development Corporation projects, thirty Kentucky Jobs Development Authority projects, one Industrial Revitalization Authority project, twenty-seven Kentucky Industrial Development Authority projects, and thirty-seven Kentucky Rural Economic Development projects (the project number count is high since a singular development may include multiple funds, each counted as a project). This is a good record, but some people testifying before the Interim Joint Committee on Economic Development during the 1992-1993 interim still suggest that regardless of the numerous state economic development finance incentives available to businesses, risk capital is still not readily available (especially at critical stages of development) for many promising small and medium-sized businesses.

Since banks are one of the most important sources of debt capital for small businesses, any state investment strategy should consider ways to give banks more flexibility and incentive to make somewhat riskier loans to businesses than conventional bank loans. Over 300 commercial banks provide business loans and related services to Kentucky businesses.

Discussion

Realizing that financial capital is a necessary but insufficient supply factor to many economic development proposals, many experts maintain that public policies governing public economic development investments should include private capital financing. Belden H. Daniels and Thierry Gibert, in "Learning from Experience: Nine Lessons for Successful Development Finance in the 1990s", presented to the Southern Development Finance Summit, September 9-10, 1992, Charleston, South Carolina, state that "private sector suppliers provide all forms of capital to all markets to varying degrees most of the time. Nonetheless, capital market barriers, or inefficiencies, prevent these private suppliers from meeting all the needs of all profitable, growing firms all the time." They go on to say that those capital market barriers (referring to private suppliers of capital in Chicago) include: insufficient competition, high information and transaction costs, risk aversion, market prejudice, and government principles. They note that "the task of state development finance initiatives is to identify capital market barriers to private capital supply, and then remove those barriers through solutions that can only succeed in the market place."

The Capital Access Program in Michigan is recognized by some authorities as a model concept in giving banks a flexible and non-bureaucratic tool to make business loans that are riskier than conventional loans, but in a manner consistent with safety and soundness. The program has permitted banks in Michigan the ability to make loans to over 1600 Michigan companies since 1986. Loans have averaged about $50,000, and have ranged from $750 to $1.5 million. The program has built in incentives for banks to manage the risk without the state's intervention in reviewing the bank's lending analysis. In Michigan the administration of this program requires only one professional staff person, and less than $3.8 million in state funds.

Michigan's CAP is based on a portfolio insurance concept instead of loan-by-loan guarantees. Each bank participating in the program has a special reserve fund to cover losses from a portfolio of loans. Although the reserve is owned by the Michigan Strategic Fund, each bank participating in the program has its own separate earmarked loss reserve. Under the program, the borrower pays a premium of from 1 1/2 % to 3 1/2 % of the loan amount, the bank matches that, and the MSF matches the combined total. The bank may recover the cost of its payment from the borrower through the pricing of the loan by increasing the interest rate or by charging a fee. The bank may recover any long-term losses from the portfolio reserve fund. The private institutions' approach provides new tools for existing private institutions, such as banks, and provides for the establishment of new types of private financial intermediaries. This approach leverages public resources with private capital and leaves the financing decisions to the private sector.

The Michigan approach also pioneered the development and implementation of BIDCOs (business and industrial development corporations), specialized BIDCOs, including rural and minority BIDCOs, seed and venture capital, and community development bank holding companies designed to promote neighborhood stabilization and revitalization.

Another approach is the creation of a bank holding company containing private and not-for-profit organizations designed to achieve public sector goals. The Southern Development Bancorporation, created and established in 1988 in rural Arkansas, is the premier example. Since 1988, the company has lent or invested over $6 million in equity investments, commercial debt, seed capital debt and investments and micro enterprise self-employment debt.

Discussions with officials in the Cabinet for Economic Development indicate that decisions have not been made about what, if any, risk capital or other economic development finance legislation may be proposed for consideration by the 1994 General Assembly. Cabinet legislative proposals apparently will reflect recommendations of the Kentucky Economic Development Partnership, based upon the results of the strategic planning process recently implemented by the Partnership pursuant to directives of House Bill 89 (1992).

INVENTORS' ASSISTANCE

Prepared by Mary Yaeger

Issue

Should the General Assembly establish an inventors' assistance program, bringing together inventors and potential investors as a means of increasing Kentucky's economic base through the creation of new products and processes?

Background

State economic development strategies include a number of initiatives to increase investment in the economy of Kentucky. One such strategy is the infusion of investment capital into start-up businesses that have potential for high growth. The Cabinet for Economic Development currently operates the Kentucky Investment Capital Network (ICN) through a partnership with the Louisville/Jefferson County Office of Economic Development. The program matches Kentucky Entrepreneurs, through a computer service, with informal investors, venture capitalists, and investment firms interested in small business start-ups and early stage financing. However, ICN has not directly targeted inventors, which leaves a gap in the state support provided this group.

Inventors are an important part of broadening the economic base, since their efforts increase industrial diversification, expand employment opportunities, provide a financial basis for an improved tax base, and generate new products and processes for national and international consumers. Kentucky is particularly in need of inventors, as it ranks 43rd in the nation for new firms and 48th in the number of scientists and engineers in the workforce. This lack of opportunity causes Kentucky's educated mathematicians, scientists and engineers to leave the state, and limits the Commonwealth's economic potential.

Discussion

In 1990 the Oklahoma legislature enacted the Inventors Assistance Act. It based the need for such a program on the belief that an estimated "95% of all inventions are never authoritatively considered primarily because inventors are unfamiliar with the business environment or financial structure necessary for implementing their proposals."

Oklahoma has enacted legislation to encourage and assist inventors throughout the country, and internationally, to submit proposals for review. Upon acceptance of the inventor's proposal, this program provides assistance in patent searches, marketing, product research, development, financing, business counseling, manufacturing and distribution.

The inventors with approved proposals enter into contracts with the Oklahoma Department of Commerce and receive services to develop their products. In exchange, the Department receives a fee of not more than 10% of all royalties from the product for 10 years. The inventor also agrees to research, develop, manufacture, package and distribute the product from Oklahoma if possible.

The legislation also includes income tax incentives: royalties earned by an inventor are exempt from income tax for 7 years, if produced in the state; and the instate manufacturer is eligible for a tax credit. In addition, the manufacturer may exclude 65% of the cost of depreciable property purchased and utilized directly in manufacturing the product.

The Oklahoma State Treasury maintains a separate revolving fund for operating the program and caps administration costs at 5% of the total fund amount.

In a highly competitive economic market, innovative and creative efforts are essential to growth. The Kentucky General Assembly may consider an inventors' assistance program a useful part of a state economic development strategy.

WORKFORCE TRAINING

Prepared by Mary C. Yaeger

Issue

Should the General Assembly enact legislation that provides a system of quality, life-long learning, promoting globally competitive workplaces that can provide a sustainable and secure economy for Kentuckians?

Background

The industrial requirement for a high performance work organization requires employees with a mastery of academic, vocational, human relations and management skills. Since 80% of the workforce for the year 2000 is already part of the labor pool, employee education, retraining and retooling is essential to a flourishing economy.

Kentucky's low rate of adults who have graduated from high school, high rate of poverty, lower than national rate of participation in the labor force; and the future demands for workers in mid-level technical occupations point to the need for effective educational and workforce training programs. At least thirteen government agencies and programs provide millions of dollars for workforce training initiatives. Nevertheless, no uniform strategic process for accomplishing a clearly articulated goal has been designed or implemented. No performance-based benchmarks have been established to assess the attainment of training goals, nor has the efficiency of the current delivery systems' ability to meet business needs been reviewed.

Discussion

Kentucky has been selected as one of five states (from among 21 competing states) to participate in the two-year Investing in People project. The project is sponsored jointly by the National Conference of State Legislatures and Jobs for the Future, Inc., and is funded by the DeWitt Wallace-Reader's Digest Fund. The Investing in People project team includes six legislators, representatives from the Workforce Development Cabinet, Economic Development Cabinet, Department of Education, the University of Kentucky Community College System, local government, local economic development agencies, and the business sector.

The project's goal is to promote economic development in the participating states through a wise investment in human capital. Through an understanding of Kentucky's existing workforce, industries, educational providers and economic potential, and awareness of model approaches in the United States and in Europe, the team members hope to offer alternative strategies to the General Assembly.

Various approaches are being discussed by this group, the Governor's Commission on Quality and Efficiency in State Government, the Interagency Commission on Educational and Job Training Coordination, the State Chamber of Commerce, and appropriate Cabinets:

1. Creating business-government partnerships to provide workforce training that is consumer driven and high performance based;

2. Creating youth and adult apprenticeship programs as a means of providing "seamless" life-long learning opportunities;

3. Providing a higher standard of workforce preparedness by developing a workforce competency certification process;

4. Providing technical training standards and programs for adults and youth in selected growth industries;

5. Providing incentives for businesses that participate in training partnerships; and,

6. Eliminating unnecessary gaps and overlaps in existing education and training programs, by: refocusing the mission of major service providers, utilizing a shared strategic plan; developing one-stop shops for industry to access training resources; and enabling the transferal of educational credits from one educational system to another.

OVERSIGHT OF STATE TAX CREDITS GRANTED FOR ECONOMIC DEVELOPMENT INCENTIVES

Prepared by Ed Sergent

Issue

Should a Legislative committee be assigned the responsibility of providing oversight for the granting of state tax credits as economic development incentives?

Background

In the course of its review of state debt financings, the Capital Projects and Bond Oversight Committee provides legislative oversight of economic development bonds issued to provide loan, grant, and interest reduction incentives to businesses locating or expanding in Kentucky. The state also grants substantial tax credit incentives to many such companies, in accordance with legislation enacted by the 1988 and 1992 sessions of the General Assembly. No committee provides oversight for economic development incentives programs that do not involve the sale of bonds.

The Capital Projects and Bond Oversight Committee has had reservations about the magnitude of the tax credits granted under Kentucky Rural Economic Development Authority (KREDA) legislation. The Committee has reviewed KREDA bonds since 1989. Its concern has grown since the 1992 session, with the advent of additional tax credit incentive programs, such as the Jobs Development, Industrial Development, and Industrial Revitalization programs.

The economic development statutes permit the granting of tax credits as incentives for the creation and maintenance of jobs in the state. The Economic Development Cabinet enters into agreements with companies, on behalf of the Commonwealth. The agreements define the incentive packages that will be provided by the state, as well as the companies' requirements for creating and maintaining jobs in the state. The concern is that there is no limit on the tax credits that may be awarded as incentives, nor is there a requirement for legislative oversight of the amount and nature of the tax credits.

Discussion

The Kentucky Rural Economic Development Authority (KREDA) and other economic development programs, including the Kentucky Jobs Development Authority (KJDA), the Kentucky Industrial Development Authority (KIDA), and the Kentucky Industrial Revitalization Authority (KIRA), provide state tax credits for companies to locate in Kentucky or to expand operations.

The Capital Projects and Bond Oversight Committee has requested that the Appropriations and Revenue Committee and the Economic Development Committee consider whether legislation should be developed for consideration by the 1994 General Assembly to require legislative oversight of the granting of tax credits. While this does not appear to the Capital Projects and Bond Oversight Committee to be a task within its jurisdiction, the Committee feels strongly that a concerted effort should be made to track the tax credits granted and determine what impact they actually have on the economic growth of the Commonwealth.

EDUCATION

EDUCATION REFORM

Prepared by Sandra Deaton

Issue

How will the General Assembly continue to support the Kentucky Education Reform Act?

Background

The Kentucky Education Reform Act, adopted by the 1990 session of the General Assembly, is the most comprehensive and innovative public school restructuring effort in the nation. The Act totally revised all of Kentucky's public education statutes affecting governance, finance and curriculum. The following summarizes the major changes in each of the three areas since 1990.

Governance: The State Board for Elementary and Secondary Education was abolished and reconstituted. The new membership includes representation of the seven Kentucky Supreme Court regions, four members who represent the state at-large, and the executive director of the Council on Higher Education as a nonvoting member. The members are gubernatorial appointees confirmed by the Senate and the House of Representatives. The new board employed a Commissioner of Education, who was recommended by a special selection committee, thereby replacing the elected Superintendent of Public Instruction. The Commissioner, according to law, reorganized the Department of Education, including the establishment of eight regional service centers that have the primary purpose of helping local school districts with professional development activities.

At the local level the law imposed anti-nepotism requirements on local school board members, superintendents, and principals. Hiring responsibilities, for the most part, were removed from the board and given to the superintendent. The most drastic departure from the old governance structure was the implementation of school-based decision making, through a six-member school council that includes parents, teachers and the principal. By July 1, 1996, every school must have a school council, unless exempted by the state board. Currently, more than half the schools have implemented either school-based decision making or participatory management.

Finance: Support Education Excellence in Kentucky (SEEK) is the new school finance system that balances available dollars among school districts, so that all students have equal access to a quality education. The new funding approach is already narrowing the funding differences among districts. During the 1990-92 biennium, the most recent period for which figures are available, the gap in total available revenue between the wealthiest 20% of the school districts and the poorest 20% of the school districts narrowed by 44%. During that same period the total revenue per pupil increased from $3,444 to $4,498, helping Kentucky to improve in the national ranking of per-pupil spending from 42nd to 39th.

Curriculum: The General Assembly established the goals schools must achieve to be successful and created several new initiatives to assist them. The purpose of the new system is to require a higher level of education for all students, who will be measured primarily by an assessment program that requires them to demonstrate what they have learned. In 1991-92, students completed the first round of assessments, which were used to establish a school's base-line and its threshold for improvement. Scores for the 1992-93 school year and 1993-94 school year will be averaged to determine progress toward the thresholds. By early 1995, successful schools will receive rewards and sanctions will be placed on unsuccessful schools.

A preschool program for four-year old children at-risk of school failure and three- and four-year old children with disabilities has been established in every school district. Other new programs include a primary school for children below the fourth grade, a system of family resource and youth service centers, extended school services for children who are not meeting their educational goals, expanded professional development activities for educators, and extensive administrative and instructional technology capabilities.

The structural components will be in place by the 1995-96 school year, but it will take a generation to determine whether the General Assembly successfully changed Kentucky's culture by providing an efficient and effective system of schools. Until that time the General Assembly will have to decide how it will uphold its original commitments to financially and philosophically support the Reform Act for the length of time necessary to see positive change.

Discussion

The Kentucky Education Reform Act (KERA) provided total systemic change. It has been described as a "recipe," as opposed to a "menu," because each ingredient is necessary if the system is to provide all Kentucky students an equal opportunity to obtain a world-class education. The legislation was also unique in that it included tax law revisions to help raise the necessary revenue for the new programs. Since 1990, elementary and secondary education has received approximately a 40 percent increase in new state and local money.

In the meantime, Kentucky state government has reduced the biennial budget four times, and there seems to be little likelihood of substantial revenue increases in the 1994-96 biennium. Local school districts were exempt from the first three budget reductions because of the strong commitment to the success of KERA by the legislative and executive branches. However, many people question whether the money will be available to increase KERA's funding at the same rate that was originally envisioned. Local school administrators advocate protecting SEEK if funds are limited, while others lobby for full funding of specific programs. The General Assembly will need to consider alternatives and appropriate funds in a manner it determines will best move KERA forward .

FIVE-YEAR-OLD STUDENTS AND THE PRIMARY PROGRAM

Prepared by Bonnie Brinly

Issue

Should the General Assembly exclude five-year-old students from the primary program?

Background

The Kentucky Education Reform Act of 1990 established the primary program as the part of the elementary school program in which children are enrolled from the time they begin school until they are ready to enter the fourth grade. The program reflects the conclusion of current research on nongraded programs and student retention. Barbara Nelson Pavan's analysis of the research comparing graded and nongraded programs since 1967 showed that students in nongraded groups performed better on academic achievement measures in 58% of the studies, or as well as graded groups in 33% of the studies.

The primary program is expected to eliminate the sense of failure felt by a substantial number of children who are retained in the early grades. Research shows that retention in grade, at best, has no positive effect on academic achievement and, more frequently, it correlates highly with decreased student achievement in the later years of school. In the Kentucky class that entered Kindergarten in 1986, nearly 22% failed at least one grade by the end of the third grade.

The primary program has been phased in since the passage of the Education Reform Act in 1990. Legislative changes made in 1992 require the program to be fully implemented for all elementary students not in the fourth grade by the beginning of the 1993-94 school year. The changes also allow special consideration for students attending part time, the five-year-olds. The Department of Education describes minimal inclusion of five-year-olds as placing some of these students in a single age grouping for a period of time during the first semester. After this, they are in activities with primary children of different ages at least two times per week. No length requirement is placed on these sessions.

Discussion

Since the beginning, the Kentucky Education Association and individual teachers have expressed concern about the full inclusion of five-year-old students in the primary program. Included in the list of barriers identified by state primary leaders were these: scheduling and transportation problems of half-day attendance; inadequate teacher training in the developmental characteristics and appropriate curriculum for five-year-olds; negative attitudes of some parents, teachers, and administrators; a lack of adequate funds for classroom supplies; a lack of full-time aides, since, prior to 1990, a full-time aide was required for each kindergarten class; and inadequate facilities.

Supporters of continuing the program as it is believe the obstacles can be overcome by training, collaborating with teachers who have been successful, using more flexible scheduling practices, and focusing on the continuous progress of each student, as opposed to serving age groups. The principle of continuous progress allows more time for a student to learn a concept, if needed, or permits a student to progress more rapidly. Five-year-olds learn a lot about adapting to the school environment from watching their older classmates and many are ready for more challenging activities.

HIGHER EDUCATION

Prepared by Donna Weaver

Issue

Should the General Assembly take action to address the problems resulting from recent budget reductions at the state universities?

Background

In 1990, the General Assembly approved a budget that would have provided a substantial increase in funds for higher education. However, subsequent revenue shortfalls have resulted in budget reductions. Reductions in state support to the institutions for general operations totaled $31 million in 1991-92 and $27 million in 1992-93. In addition, the Governor asked universities to reserve 2% for a contingency plan, which amounts to $12 million. Ultimately, these reductions total approximately $70 million.

University presidents and the Council on Higher Education report that these reductions are making it extremely difficult for higher education to meet its responsibilities. In order to absorb the budget cuts, universities have taken such measures as salary and hiring freezes, elimination of vacant positions, reduction of professional development, cancellation or deferment of minor capital and maintenance projects and equipment purchases.

For the students, budget cuts result in larger class sizes, higher student fees, reduced library expenditures, and fewer class offerings. In addition, students are facing higher tuition rates and increased competition for underfunded student financial aid programs. At statewide public hearings sponsored by the Council on Higher Education earlier this year, students testified that they cannot afford the proposed tuition increases. Council members have defended the increases as necessary to offset, in part, the impact of budget cuts and to help maintain the quality of higher education programs.

Further complicating the funding issue is a substantial growth in student enrollment. In the past five years enrollment at Kentucky's public higher education institutions has increased nearly 28%, and if the new reform efforts mandated by the Kentucky Education Reform Act meet expectations, an even higher percentage of students will be prepared to enter Kentucky institutions of higher education in the future.

Discussion

In 1994, the General Assembly will have to address the pleas of the higher education community for increased funding. These last several years have been characterized by some higher education advocates as the most difficult time ever experienced by higher education. They report that colleges and universities have been given increased responsibilities with decreasing resources. Consequently, students are facing statewide tuition increases, minimal program offerings, and decreased availability of federal and state scholarship aid, grants, and work study programs.

Just as the General Assembly addressed the quality of elementary and secondary education in 1990, it may need to now assess its commitment to the funding of higher education. Due to budgetary constraints, universities must be prepared to justify budget requests and spending practices to the legislature and public, and demonstrate greater accountability of limited funds.

ELECTIONS AND CONSTITUTIONAL AMENDMENTS

PUBLIC FINANCING FOR CAMPAIGNS FOR GOVERNOR AND LIEUTENANT GOVERNOR

Prepared by Rob Williams

Issue

Should the General Assembly modify the manner in which slates of candidates for Governor and Lieutenant Governor qualify for public funding?

Background

During the 1992 Regular Session, the General Assembly enacted far-reaching reforms in the area of campaign finance, including a system of partial public financing of campaigns for slates of candidates for Governor and Lieutenant Governor. As originally introduced, Senate Bill 221 provided that a slate of candidates for Governor and Lieutenant Governor that had agreed to abide by the $1.8 million per election spending limit would qualify for public matching funds at a two for one ratio, when the slate had received a minimum of $300,000 in qualifying contributions of $500 or less, and would continue to receive matching funds for up to $600,000 in qualifying contributions received in each election. The primary and regular elections are considered separate elections under campaign finance law. However, during Senate committee deliberations on the bill, the minimum threshold qualifying amount for the primary was changed to $600,000, while the threshold qualifying amounts of at least $300,000 up to $600,000 were retained for the regular election. The House further modified the qualification mechanism to provide that a qualifying slate of candidates who had raised the threshold amount in qualifying contributions would not receive a transfer of public funds unless an opposing slate had also raised the threshold amount. This change became known as "the Patton amendment." When efforts to reinstate the original qualifying amounts failed on largely a party-line vote in both the Senate and the House, and efforts to delete the requirement that two opposing slates must qualify before either would receive matching funds failed in the House, SB 221 passed, with the provisions of "the Patton amendment" and the higher primary threshold qualifying amount intact.

During the special session on legislative ethics earlier this year, the Senate deleted "the Patton amendment" in its version of the ethics bill, SB 7, substituting instead a prohibition against a slate's receiving matching funds if it was not participating in a primary or was unopposed in a primary or regular election, but that language was not included in the free conference committee report on SB 7.

Discussion

The crux of the debate on providing access to matching funds for slates of candidates for Governor and Lieutenant Governor centers on the disparity in the numbers of registered voters of the majority and minority parties in Kentucky politics. There are two-and-a-half times as many voters registered as Democrats in Kentucky as there are registered Republicans. Compared to other minor party registrations, the Democrats enjoy an even larger advantage in voter registration. This is significant because registered voters are more likely to contribute to political campaigns than those who are not affiliated with a political party.

Those who advocate leaving the matching fund qualifications as they are make the following arguments:

• A slate of candidates should only receive public matching funds if it is a legitimate contender for its party's nomination in the primary and has opposition that is more than token in nature. One way to judge whether a candidacy is legitimate is by the amount of campaign funds that can be raised from the citizenry for that candidacy.

- If a slate of candidates has no serious opposition in the primary, it shouldn't have an easier time qualifying for public funding, since the slate would not need the additional matching funds to defeat token opposition.

- If the Senate language proposed to replace it in SB 7 were adopted, a "straw" slate of candidates could enter the race to help a more legitimate slate qualify for public funding.

- Making it too easy to qualify for matching funds in the primary could have an adverse effect on the amount of funds set aside for the public financing program and could result in reduced matches for all other slates of candidates who have more serious competition in the primary than other slates.

Those who advocate changing the current structure for qualifying for matching funds make the following arguments:

- The minority party is at such a political disadvantage, given the relatively small numbers of registered Republicans in this state, that it will be hard pressed to raise the current qualifying amount for just one slate of candidates for the party's nomination, especially with the contribution limit lowered from $4,000 to $500, so the prospect of two or more slates raising the qualifying amount, so that all that qualify may receive matching funds, is especially unlikely.

- Even if a minority party slate of candidates has no serious competition in the primary, a number of majority party slates of candidates will likely qualify for matching funds in the primary, so a minority party slate that can raise the qualifying amount and is the presumptive party nominee needs the matching funds to counter the name recognition and exposure that a majority party slate has garnered as a result of being eligible for matching funds. The minority party slate that is the presumptive nominee of its party really has as its opposition the majority party nominee rather than any other slate of its own party which might oppose it in the primary.

- The current mechanism for being eligible for matching funds unjustly preserves the partisan advantage that the majority party holds in the political process in Kentucky.

- Whether a slate of candidates qualifies for matching funds should be determined only on that slate's ability to raise campaign funds, rather than on that slate's and another slate's ability to raise money or the party's ability to field more than one slate that can raise the qualifying amount to receive matching funds.

- With the limited time period allowed for raising funds for the primary, it should be easier to qualify earlier in the campaign to "jump-start" a campaign, rather than requiring a slate to raise the permissible maximum of private contributions before being eligible to receive matching funds. In this way, more slates that might generally be considered token opposition could become more formidable opponents if their campaigns were boosted with matching funds earlier in the campaign.

Taking the foregoing arguments into account, the General Assembly could be presented with the following options:

- Retaining the current system of qualifying for matching public funding.

- Amending the current qualification mechanism to make the qualification thresholds the same for the primary and the regular election.

- Amending the current qualification mechanism to permit funds to be matched on the basis of each slate's ability to raise funds without regard to other slates' fundraising capabilities.

- Amending the current qualification mechanism to set different, more easily attainable threshold levels for matching funds throughout the campaign.

- Amending the current qualification mechanism to prevent unopposed slates from receiving matching funds.

MOTOR-VOTER REGISTRATION

Prepared by Rob Williams

Issue

What changes in the laws must the General Assembly make to comply with the mandates of the National Voter Registration Act of 1993?

Background

The National Voter Registration Act of 1993 requires that, by January 1, 1995, states must permit a person to register to vote in elections for federal office when he or she applies for a driver's license, public assistance, or disability services, and at other governmental offices and Armed Forces recruitment offices. This proposal was first submitted to Congress in 1988, and had been enacted and vetoed twice before gaining final approval this year. The stated purposes of the "Motor-Voter" Act are to increase the numbers of eligible persons who are registered to vote, to enhance voter turnout in elections, to ensure that accurate and current voter registration rolls are maintained, and to protect the integrity of the electoral process. Though the requirements of the Act apply only to elections for federal office, unless a state uses separate voter registration rolls and ballots for state and federal elections (which Kentucky doesn't), an applicant for a driver's license or governmental service who desires to register would also be registered to vote in state elections.

Permitting an applicant for a driver's license to register to vote as part of the application process was first tried in Michigan in 1973. Ten years later, North Carolina became the second state to require it. Since 1983, eight other states and the District of Columbia have implemented the program. Voter registration has increased in all of these jurisdictions and most have also seen an increase in voter turnout, though not at the same rate as registration has increased. The Motor-Voter Act extends the voter registration requirements to a number of other governmental offices in addition to drivers' licensing agencies, so the effects on registration, and hopefully turnout, are expected to show an even greater increase with the wider implementation effort. In those states which do not have a centralized voter registration network and do not regularly update their voter registration rolls on a statewide basis, motor-voter registration has also served as an automatic address change for voter registration purposes if a driver's license applicant has moved but has not notified his voter registration office. This has helped ensure that a voter is eligible to vote in the correct county and precinct, reducing the incidence of ineligible votes cast and the need for making changes in the registration rolls on election day, where permitted.

Legislation was introduced during the 1992 Regular Session to meet the requirements of the Motor-Voter Act, as they were proposed then, but HB 857 saw no committee action.

Discussion

Kentucky's voter registration laws are generally considered to be fairly liberal and the maintenance of the voter registration rolls is progressive compared to that of many other states, so Kentucky's laws are already in substantial compliance with some of the requirements of the Motor-Voter Act relating to mail registration and purges of ineligible voters. Most of the law changes that will be necessary relate to requiring that a voter registration application be made a part of the application for a driver's license, and making mail voter registration applications available at other governmental and non-governmental agencies and transmitting those completed voter registration applications to the county clerks for processing in a timely manner.

The requirements of the Motor-Voter Act and legislative action which is needed to comply are as follows:

• Driver's license applications must include an application for voter registration. The voter registration application cannot require information that duplicates the information required in the primary application, except for a second signature and information that would be necessary to prevent duplicate voter registrations or information which is necessary to assess an applicant's eligibility to register to vote. Any change of address on a primary application will be considered as a change of address for voter registration purposes also, unless the applicant states on the form that the change of address is not for voter registration purposes. The voter registration application portion of the form must also contain the voter registration eligibility requirements (including citizenship), an attestation that the applicant meets all the requirements, the applicant's signature, penalties for filing a false application, and information regarding the confidentiality of the application. Completed voter registration applications must be sent to the appropriate county clerk not later than ten days after their acceptance, except that voter registration applications accepted within five days before the day voter registration closes before an election must be sent to the appropriate county clerk not later than five days after the date of acceptance. Voter registration laws and statutes regarding information which must be contained on driver's license applications will need to be amended to satisfy these requirements.

• The Federal Election Commission must design a uniform mail voter registration form for use by the states. Each state must designate "voter registration agencies" in the state, which must make the mail registration form available with their application for services to their clients and offer assistance in completing the mail registration at the place of business or at a disabled person's home. Voter registration agencies must also provide a form to the client that asks whether the client wishes to register to vote. The form used by public assistance offices must also include a statement that the choice to register or not will not affect the client's eligibility for benefits or services. All agency forms must include a portion for the client to request assistance in registering to vote and to file a complaint if the client believes that agency personnel have unduly interfered with his or her right to register or decline to register, to register in private, or to freely choose his or her political affiliation.

The voter registration agencies must include all governmental offices that provide public assistance (food stamps, AFDC, WIC, and Medicaid), offices that provide state-funded programs primarily engaged in providing services to the disabled, and Armed Forces recruitment offices. The state may also designate other state and local government offices, such as public libraries, public schools, city and county clerks' offices, revenue offices, unemployment insurance offices, hunting and fishing license offices, marriage license offices, and other offices which offer services to the disabled. Federal government offices and non-governmental offices may also be designated as voter registration agencies, with the agreement of those offices. These designations and duties may be spelled out in the voter registration statutes, or a grant of authority to the Secretary of State or the State Board of Elections to designate these agencies by administrative regulation or interagency agreement could be enacted.

• The state must notify each applicant for voter registration of the disposition of his or her application. This requirement would need to be added to our law.

• The Motor-Voter Act also requires that states regularly purge their voter registration rolls to exclude ineligible voters, though voters may not be removed solely because they have not voted recently. Kentucky law already provides the basic mechanisms for doing this, though some minor changes may be necessary to comply with provisions requiring the use of postage-paid notices to voters who may have moved since the last election and permitting voters who have moved to change their voter registration address on election day and vote at their old precinct if otherwise eligible.

• Voter registration records and all supporting documentation of their accuracy, including a description of purge activities that are undertaken, must be retained by the state for two full years, rather than the 22 months now permitted under state and federal law.

The Motor-Voter Act did not provide any funding to the states for implementing the changes in law that will be necessary to comply with its mandates, except for reduced postal rates for any mailings that are required by the Act.. At this point, it is not clear what the Motor-Voter implementation will cost the Commonwealth, but the Congressional Budget Office has estimated that the states will incur costs of $20 million per year for five years to provide additional employees, training, and related expenses.

The State Board of Elections has begun its planning for implementation of the provisions of the Act, in coordination with the Circuit Clerks and the Cabinet for Human Resources. One difficulty which will need to be resolved is that, at present, applications for drivers' licenses are automated and applicants do not complete an application by hand. The requirement that a voter registration application be made a part of the driver's license application may pose the largest difficulty in complying with the provisions of the Act.

Another related requirement that must be met once the implementation procedures are finalized is that the plan must be submitted to the Department of Justice for preclearance of procedures which affect the hours and places voter registration is permitted, to ensure compliance with the Voting Rights Act as well as the Motor-Voter Act.

CAPS ON NEGLIGENCE AWARDS FOR NON-ECONOMIC DAMAGES

Prepared by Rob Williams

Issue

Should the General Assembly amend Section 54 of the Constitution of Kentucky to limit the amount which may be recovered for non-economic and punitive damages in lawsuits for injuries resulting in death or injury to person or property?

Background

The mid-1970s and early 1980s saw medical malpractice premiums soar nationwide. Physicians began ordering that more medical tests and procedures be performed, in an attempt to insulate themselves from malpractice liability. Some experts contend that the extra tests and paperwork add as much as $27 billion a year to the nation's health costs. The increased costs of insurance and defensive medical practices, some claim, amount to 20% of a physician's costs, and most often the increased costs are passed on to the patient. In an attempt to address these crises, many states have enacted tort reform measures, including limits on the amount which may be recovered in malpractice cases for non-economic losses, such as pain and suffering, incurred as a result of malpractice resulting in a wrongful death or personal injury.

Section 54 of Kentucky's Constitution prohibits the General Assembly from passing any law limiting the amount which may be recovered in lawsuits for injuries resulting in death or for injuries to person or property. This provision was first included in Kentucky's 1891 Constitution, and Kentucky is one of five states that have such a constitutional restriction. About half of the states that do not constitutionally prohibit limits on recovery for damages have statutory limits on the amount of damages which may be recovered for non-economic losses.

Kentucky's first attempt at tort reform came in 1975 with the passage of a package of medical malpractice legislation, including a limit on physicians' liability and creation of a patient compensation fund, which would pay malpractice awards, using general fund moneys if necessary. However, this part of the law was declared unconstitutional by the Supreme Court of Kentucky and was repealed in 1984.

In 1987, the Special Commission on Constitutional Review recommended that Section 54 be amended to prohibit the limitation of amounts which may be recovered for economic loss, including medical expenses, property damage, and lost earnings arising from actions resulting in death, or personal or property injuries, but to allow amounts which may be recovered for non-economic loss, punitive damages, and other non-monetary damages to be limited by law. The Special Commission ranked this recommendation fifth highest among its 77 proposals for constitutional revision. The 1988 Kentucky Insurance and Liability Task Force recommended the repeal of Section 54 and the creation of a new statute to limit the awarding of punitive damages to cases involving death or injury to person or property in which the evidence is clear and convincing that the harm done was the result of conduct which was oppressive, fraudulent, or malicious. The Task Force's recommendation regarding punitive damages was enacted in 1988 and is codified as KRS 411.184 and 411.186.

Legislative proposals have been introduced over the past several sessions to amend Section 54, but none have seen any meaningful action. The Governor included the issue in his call for a special session relating to health care, which was held earlier this year, and a concurrent resolution was introduced in the Senate expressing the General Assembly's intent to limit non-economic losses to $250,000, by amending the Constitution during the 1994 regular session; however, no action was taken on the subject during the special session. Similar cap proposals have also been advanced in recent years at the federal level.

Discussion

While the Section 54 prohibition on limiting civil damage awards applies to any wrongful death, personal injury, or property damage negligence action, the focus of the debate on the issue has centered on medical malpractice awards, their impact on the cost and availability of malpractice insurance, and the increasing costs associated with the practice of defensive medicine by litigation-shy health care providers. While no suggestion has been made to limit economic losses that result from malpractice, such as medical expenses and loss of earnings, many states have limited awards for such non-economic losses as pain and suffering, mental anguish, inconvenience, emotional distress, loss of society and companionship, loss of consortium (marital relations), injury to reputation, humiliation, and destruction of the parent-child relationship, relying on the argument that jury awards for such losses go beyond "fair compensation," for which the health care provider should not be liable to an unlimited degree.

While acknowledging that no single reform measure would be a panacea for health care affordability, proponents of amending the Constitution to permit the General Assembly to limit awards for non-economic losses argue that a legislatively imposed limit on the amount recoverable for such subjective losses would reduce the incentive for contingency fee lawyers to pursue questionable malpractice claims, and lessen the perceived need for the defensive practice of medicine with all its attendant costs. They assert that it would also enhance access to and availability of many medical services which have been lost as health care providers have backed away from higher risk medical practices and procedures. Further, they maintain that a cap on non-economic damages would still permit a level of awards sufficient to deter negligence, compensate patients for any deficiencies in economic damages, and reduce the variance in insurance risk pools. They also argue that caps on non-economic damages reduce the range of potential liability outcomes because the monetary value of such non-economic damages as pain and suffering may be a complete unknown, so insurance companies charge inflated premiums to compensate for the uncertainty of possible liability. Proponents of capping non-economic damages point to a 1987 poll conducted by Hamilton, Fredrick, and Schneiders, a Washington, D.C. consulting firm, in which 64% of Kentuckians surveyed favored placing a $250,000 limit on recovery for non-economic loss and 86% agreed that if a person can recover 100% of his or her economic loss, there should be some limit on how much they can recover for emotional pain and suffering.

Opponents of amending Section 54 to limit non-economic damages focus on the preservation of victims' legal rights to be compensated fully for their losses. They argue that the current jury system is the best way to decide this very subjective issue. They maintain that arbitrarily setting a limit legislatively, with no information about the specifics of a case, is irresponsible and does an injustice to the injured plaintiff, who may be disfigured or disabled for life, or have the quality of his or her life, both singly and with family members, diminished dramatically as a result of a health care provider's negligence. They also assert that limiting non-economic damages would only help doctors and their insurance companies, who are better able to handle the financial burden of malpractice, at the patient-plaintiff's expense. Another argument put forth by opponents of non-economic damage limits is that the fear of malpractice suits makes doctors render better medical care and that the practice of defensive medicine will reduce the numbers of malpractice claims based on a physician's failure to diagnose an existing medical malady.

Results of studies regarding the impact of limits on awards for non-economic losses indicate that the cost of malpractice insurance premiums do not necessarily fall after non-economic loss recovery limits are enacted. While California and some other states have seen dramatic decreases in premium costs, and even decreases in the growth of health care costs overall, nine other states have seen increases of from 15% to 50% in premium costs even with the limits in place. According to data compiled by the Kentucky Trial Lawyers Association, Kentucky's malpractice insurance premiums more than doubled between 1985 and 1989, and have decreased slightly since then, with more significant increases evident in certain specialty areas, but they are not excessive when compared to those in some of the states with limits on recovery for non-economic losses.

Study results also vary as to the impact non-economic loss limits have on the practice of defensive medicine by health care providers who order additional procedures and tests in an attempt to protect themselves against malpractice claims. While 53% of Kentucky doctors surveyed by the University of Louisville's Urban Studies Center indicate that their practice of medicine has become more defensive, there is no data available in Kentucky which would indicate that they would alter that practice if awards for non-economic losses were limited, since awards for economic losses could still be had against them. There is general agreement that limiting non-economic damages has a greater impact when instituted in conjunction with other tort reform measures.

In 1991, there were 232 malpractice cases against Kentucky doctors closed, either as a result of a dismissal for failure to bring the action within the statute of limitations, settlement of the case out of court, or decision by a jury that the practitioner was or was not medically negligent. Of those cases, 77 resulted in no recovery for the plaintiff patient. A total of $21 million was paid either in settlements or judgments in the remaining 155 cases, for an average award of $138,148. However, only 21 of the 155 resulted in judgments or settlements in excess of $100,000, and there were only three awards in excess of one million dollars.

ANNUAL SESSIONS

Prepared by Rob Williams

Issue

Should The General Assembly propose to amend the Constitution of Kentucky to allow for annual rather than biennial legislative sessions?

Background

As provided by Section 36 of the Kentucky Constitution, the General Assembly convenes in regular biennial session for up to sixty days in even-numbered years. Over the past several years, the legislative agenda has ballooned with complex issues, thus increasing the workload of the General Assembly and constraining the amount of time and attention which can realistically be given any particular subject matter. While the interim committee system and the odd-year organizational session have enabled the legislature to deal somewhat more efficiently with issues, many contend that there is still insufficient opportunity to adequately address problems facing the Commonwealth.

Kentucky's legislature is not alone in attempting to meet the demands of an expanded legislative agenda. During the 1940's, only four state legislatures met in annual sessions. Within twenty years, the number had increased to twenty, and by the mid-1970's, forty-two states held annual sessions. As of 1993, all state legislatures except seven -- Arkansas, Kentucky, Montana, Nevada, North Dakota, Oregon, and Texas -- meet annually.

In 1969, a proposal which would have allowed the General Assembly to meet annually for sixty days was placed before the voters, but the amendment was rejected. Four years later, the electorate was asked to amend the Constitution to allow the legislature to meet annually for not more than forty-five days, but again that proposal was defeated. An amendment proposed in 1990 to permit the General Assembly to call itself into extraordinary session, rather than relying on the Governor's sole authority to do so, was also rejected by the voters.

Discussion

The arguments traditionally advanced for and against annual sessions were revived in 1991 as the General Assembly met in the longest extraordinary session since 1936, and more recently as the General Assembly was called into extraordinary session three times in 1993, with another extraordinary session possible later this year. Since 1971, there have been fourteen special sessions, including nine in the past twelve years. The frequency with which the need for special sessions has arisen has prompted proponents of annual sessions to argue that it has become obvious that the needs of the Commonwealth simply cannot be adequately addressed on a biennial basis. Also, proponents point to the logjam of bills which has historically occurred at the end of regular sessions as another indication that the current session schedule is unrealistic. Others argue that private and public counterparts of the General Assembly, such as corporate boards and public commissions, meet more frequently than the legislature, although they deal with a limited subject matter.

Students of government and others contend that annual sessions would promote the system of checks and balances in a democratic government by giving the legislative branch a more proactive, rather than reactive, role, by allowing them to take action on something closer to a full-time basis. Also, it is argued that budget matters could be more effectively handled if the legislature met annually, and moreover, despite increased operating costs, money could be saved through annual sessions, as the General Assembly would be enabled to give more thorough study to proposals and related costs.

Opponents of annual sessions maintain that the more time the legislature spends in session, the more bills would be introduced, thus creating the same problem with end of session logjams which now occurs. Also, they point to the interim committee system as adequate opportunity for the development of proposals and study of issues by the legislators. One of the major arguments against annual sessions is that the benefits would be outweighed by the additional expenses incurred as a result of meeting yearly. Still another argument is that the laws would change too frequently and would cause confusion in the courts and among the public. Finally, others maintain that an annual session schedule would be too burdensome for agencies in preparing to present programs to the General Assembly.

ENERGY

CABLE TV REGULATION

Prepared by Linda Kubala

Issue

Should the state regulate Cable Television?

Background

From humble beginnings as community antenna services in small communities, cable television has grown into a powerful media industry. About 11,000 cable systems serve over 60 million households nationwide. The industry once limited to providing better TV reception and more broadcast channels now provides cable-only channels and exclusive programming. Many of the small, independent systems have been consolidated into large, multi-state firms which also control related businesses, such as programming and satellite networks.

Governmental regulation of cable television also has evolved. Before passage of the 1984 Cable Communications Act, regulation was a matter of state law. In most states, as in Kentucky, cable TV franchising and regulation were left to local governments. Several states, however, regulated cable systems as public utilities, and others established statewide cable television commissions.

The 1984 Cable Communications Act de-regulated most aspects of the Cable TV industry. It removed the authority of local and state governments in all but a few areas. Localities kept the right to franchise systems, and to enforce certain basic consumer protection laws, but could not regulate rates or programming. The law was supposed to bring competition into the industry, improve programming and access, and lower rates. Instead, rates increased much faster than the consumer price index, and customers complained increasingly about poor service and unresponsive operators.

In response to consumer complaints, Congress passed The Cable Television Consumer Protection and Competition Act of 1992, granting franchising authorities and the Federal Communications Commission (FCC) renewed authority to regulate cable systems.

The new law envisions a major enforcement role for state and local entities regarding cable rates and customer service, following guidelines developed by the FCC. The act also expands opportunities of communities to renegotiate franchises with cable TV systems when they come up for renewal, in light of technological, financial, and legal changes.

The 1992 Cable TV Act does not mandate any state action. It does, however, give the General Assembly the opportunity to restructure cable TV regulation in Kentucky if it wants to. Present regulation is solely a local matter, not covered by any Kentucky statute, but instead conducted under the authority of Sections 163 and 164 of the Kentucky Constitution. The General Assembly could transfer some or all of this authority to a state agency, such as the Public Service Commission. Bills to this effect have been introduced in past sessions. Other options include development, at the state level, of technical capabilities to assist the local regulators.

Discussion

Thirteen states or territories presently regulate Cable TV rates and services at the state level. These are New York, New Jersey, Delaware, Connecticut, Vermont, Rhode Island, Massachusetts, Hawaii, Alabama, Minnesota, West Virginia, Puerto Rico and the Virgin Islands.

Kansas, enacted state regulation this year, while Oklahoma and Arizona confirmed local jurisdiction over cable systems. Some states also franchise all systems, but local franchising and state regulation coexist in others.

A number of states have placed cable TV under the jurisdiction of their utility regulatory agency, and treat them much like other utilities, while others create a separate commission or board for cable television. In Kentucky, the Public Service Commission already regulates the rates and service of gas, electric, telephone, water and sewer companies, and could be directed to regulate cable systems as well. This might reduce the cost of handling the new state function, relative to creating a new agency. Additional funding would be required in any event. The Public Service Commission is funded indirectly by levies on the gross receipts of the regulated public utilities.

A decision to establish state control over cable TV systems presumes that local governments are unable or unwilling to exercise this authority in an optimal manner. The size of some cable companies, which serve dozens of separate communities, argues for some state oversight role. Also, cable systems are poised to play an increasing role in sophisticated telecommunications. Some Kentucky communities do not want the job of regulating their cable systems, and support state regulation. On the other hand, many Kentucky communities have a history of effective, responsive oversight of cable television franchises, and can be expected to oppose state preemption of their authority. Questions of community standards and access are distinctly local, and local regulation allows variety and creative solutions.

The General Assembly might want to consider a scheme of optional state regulation, where the state assumes authority only at the option of the local franchising authority. This way, localities which don't want to tackle the complex procedural requirements and heated controversies of regulating their cable providers can opt for state regulation. Those with established cable television commissions can continue to exercise local control. If state regulation is optional, the state might exact part of the franchise fee from local governments which opt to let the state regulate their systems.

Whether or not the state assumes a regulatory role in this field, it may want to develop standards for franchises, and technical assistance to local governments negotiating franchise renewals. Many of the local cable television franchises in the state are currently up for renewal, due to the constitutional 20-year limitation on franchises.

GAS PIPELINE SAFETY

Prepared by Mary Lynn Collins

Issue

Should the state regulate safety aspects of municipal gas systems?

Background

Pursuant to the Natural Gas Pipeline Safety Act of 1968, as amended in 1979, the U.S. Department of Transportation (DOT) has jurisdiction over both interstate and intrastate natural gas pipelines. A state may assume safety and enforcement responsibilities over intrastate facilities if state law provides regulatory control at the state level. In addition, a state may act as an agent for DOT for interstate pipelines and for intrastate facilities that the state has no regulatory control over. As an agent, a state monitors and inspects facilities but turns over any suspected violations to DOT for enforcement action. The 46 states participating in the federal pipeline safety program receive in federal grants up to 50% of the costs incurred to carry out a pipeline safety program.

Even though Kentucky's utility regulatory agency, the Public Service Commission, does not regulate and has no legal jurisdiction over municipal utilities, the commission inspects city-owned gas utilities and reports possible safety violations to DOT. However, DOT wants states to assume enforcement responsibilities over all intrastate facilities, including municipal utilities. Only four states that participate in the federal safety program, Kentucky, California, Pennsylvania, and Virginia, still lack full safety and enforcement jurisdiction, but DOT is applying pressure to change that.

In the Spring of 1992, DOT told the Kentucky Public Service Commission that it could no longer act as its agent for the 12 interstate pipelines that crisscross the state, because no legislative action had been taken and no guarantees made that the Public Service Commission would assume full safety jurisdiction over intrastate facilities by the end of 1994.

DOT's funding formula for allocation to the states will in the future penalize states without safety and enforcement jurisdiction. However, the penalty does not so far appear to be sizable. Based on the allocation formula proposed for 1994, Kentucky would incur no more than a 5% loss in federal funds because of its failure to take regulatory control of safety aspects of municipal gas utilities. To put this in perspective, in State Fiscal Year 1991-92, Kentucky expended $326,000 in its pipeline safety program, $153,000 of which was federal funds.

Discussion

In order for Kentucky to regain its federal agent status over interstate pipelines and maintain maximum federal funding, the 1994 General Assembly would have to authorize and direct the Public Service Commission (or another state agency) to begin regulating safety aspects of municipal gas utilities. Many believe the presence of a large number of interstate pipelines within state borders makes it imperative for the state to continue an active role in ensuring the safety of those lines, particularly since many of those lines were built in the 1950's. DOT has no more than 26 inspectors to cover the entire country. Kentucky's Public Service Commission inspectors are closer to the pipelines and can get to the scene of any accident or reported incident quicker than federal inspectors can. Having federal agent status gave Kentucky the flexibility to step in and increase inspections of pipelines after a series of interstate pipeline accidents occurred in 1986.

On the other hand, municipal gas utilities may not welcome new regulation, even if it is limited to safety issues. It could mean more reporting, new requirements, and possibly additional costs for the municipals. The Public Service Commission, which regulates rates as well as safety and service aspects of privately-owned natural gas utilities, is funded through assessments against the utilities it regulates. Taking on new enforcement responsibilities would increase costs at the Commission.

To alleviate the fear of some municipal utilities that safety regulation will eventually lead to control of rates, the General Assembly might also consider the option of the Public Service Commission and the state Attorney General's Office sharing jurisdiction. The Public Service Commission could continue to monitor and inspect municipal gas utilities but turn over any possible violations to the Attorney General's Office for enforcement action.

HEALTH AND WELFARE

HEALTH CARE REFORM

Prepared by Dianna McClure

Issue

Should the General Assembly enact health care reform legislation?

Background

For the past two years Kentucky has witnessed a spirited debate on the need for health care reform, the timing of it, and the varying approaches toward reform. In l992 the Governor established a 48-member Task Force on Health Care Access and Affordability and a 28-member Commission on Health Care Reform. The Task Force held a series of town forums throughout the Commonwealth and concluded by proposing incremental reform actions. The Commission was charged with developing draft legislation for consideration during a Special Session to be called by the Governor. No draft legislation was developed by the Commission. Instead, in September of 1992, the Governor issued a plan, Kentucky Health Care Reform, the elements of which were later included in 93 HB 4 and 93 SB l. The Governor issued a call for a Special Session on Health Care Reform for May 10, l993. The Senate and House adjourned Sine Die on May 27, having enacted 93 HB l, which created a Kentucky Health Care Data Commission; replaced certain Medicaid provider taxes with a new health care provider tax effective July l, l993; and imposed a tax on hospital gross revenues to partly finance a disproportionate share program for hospitals participating in the Medicaid program and providing indigent care.

Further, since no agreement had been reached on the Governor's health care agenda contained in House Bill 4 or Senate Bill l, the provisions of House Bill l created a 25 member Task Force on Health Care Reform. The membership consists of the Senate President, the Speaker of the House of Representatives, 18 other leaders in the Senate and House, and 5 members to be appointed by the Governor. The Governor subsequently appointed himself as one of the five executive branch members. The statutory charge to the new Task Force on Health Care Reform is to review all legislation relating to health care reform and other related issues which were pending before the Second Special Session and to develop comprehensive health care reform legislation. The Task Force was mandated to submit an initial progress report to the Legislative Research Commission and the Governor's Office no later than September 1, 1993. The Task Force held its first meeting on June 9, and divided its membership into three subcommittees: Access, Cost Containment, and Finance and Medicaid Review. Each of the subcommittees has held meetings throughout the summer.

Discussion

Some persons believe the states should wait for the President and U.S. Congress to act on health care reform before undertaking major state reform. This position is based on the President's announced intent to provide a uniform comprehensive health benefits package for all Americans. Others believe it will be years before comprehensive federal action will occur and that in the meantime 36 million Americans will be without coverage. Other persons point out significant federal constraints to state level reform. These constraints include the long wait for federal approval through waivers for any changes in the financing or delivery systems which involve the Medicaid or Medicare programs. In addition, the federal l974 Employee Retirement Income Security Act (ERISA) protects employer-sponsored self-insured plans from state regulation.

Some persons think Kentucky should practice health care cost containment measures before attempting to raise additional revenues to finance coverage for additional populations.

Others are concerned that because Kentucky is bordered by seven states and 51 percent of Kentucky's population reside in border counties, any significant coverage of new populations, regardless of cost containment actions, could result in inmigration of high risk uninsurable residents from other states. For some, this factor supports the argument that Kentucky should wait for federal action affecting coverage of high risk populations in all states.

Some think Kentucky should engage in what is called health insurance reform by requiring risk-adjusted statewide community rating, portability of insurance to prevent job lock, and prohibition of denial of insurance based on preexisting conditions, or at least setting a time limit on such denial.. Others think health insurance reform should be limited to creating high-risk insurance pools or plans for uninsurable persons. In addition, concern has been raised that health insurance reform initiatives could cause additional cost shifting. For example, the young low users of health insurance could pay a higher premium cost for high users, such as the older population, if a pure statewide community rating system were required. Still others say that a risk-adjusted community rating system with universal coverage is the only way to stop the inequity of major cost shifting.

Some persons think that immediately increasing coverage for uninsured persons will not ensure access to health services, because there has been a long standing disequilibrium in the number of family practitioners compared to specialists being trained in medical schools. It has thus been suggested that caps be placed on the number of specialist residency slots funded within medical schools. Others think that the use of alternate practice settings, such as local health departments for ambulatory care, or creating linkages between hospitals with low bed occupancy and local health departments, or the expansion of prescriptive privileges to other health care professionals, such as advanced registered nurse practitioners, could help meet the new demand for services.

Some think that health care reform should focus on controlling health care costs through placing restrictions on the volume of health services provided. Some cost control proponents suggest prohibitions against providers who own or have stock in laboratories or other medical services from self-referral of their patients. Others recommend that cost containment occur through tort reform such as voluntary arbitration or mediation. Some practitioners think they have driven up health service costs because they must order many diagnostic tests due to patient demand and their fear of later litigation if there is a negative treatment outcome. Some think that consumers drive up health care expenditures because they do not know what health services cost and/or because those who are insured or otherwise covered do not care what health services cost since they do not have to pay for them. They recommend consumers be required to participate in additional cost sharing such as through co-payments for services such as non-emergency use of hospital emergency rooms. Other proponents of cost containment think that cost and quality issues must be addressed concurrently through the development and implementation of practice parameters which can yield treatment outcome data. Treatment outcome data can be used by consumers to make choices among health care professionals. They also can be used to make cost conscious choices among treatment alternatives.

Another strategy suggested for health care reform is to slow the rate of increase of certain health care costs by setting charge rates for hospitals and other health care providers. An alternative recommendation is to create what are termed health purchasing alliances or health insurance purchasing cooperatives that set criteria for standard health benefit plans and negotiate health plan premium rates. Employers who pay a portion of the health insurance premium for their employees would continue that practice, with the employee being able to choose among the plans offered under the alliance. Employers who do not choose to pay a portion of the premium would have to inform their employees that coverage is available for purchase through a health purchasing alliance. Health plans under this approach are intended to be more affordable and accessible.

The Health Care Reform Task Force and its subcommittees are faced with a number of different approaches to health care reform. They are sometimes termed market reform, or managed competition, or regulatory reform. They may be undertaken singly or in combination. The Task Force will make choices based upon study and recommendations by the Subcommittees on Access, Cost Containment, and Finance and Medicaid Review.

CHILD FATALITY REVIEW TEAMS

Prepared by Susan Lewis Warfield

Issue

Should the General Assembly enact legislation to create a system of statewide review of child fatalities?

Background

In Kentucky, there were nearly 22,000 children identified as victims of abuse and neglect by the Department for Social Services in Fiscal Year 1991. Of these children, 17 died as a result of the maltreatment. These children were more likely to be white males under the age of five, and were just as likely to have died as a result of neglect as physical abuse. In fiscal year 1992, the number of deaths due to abuse and neglect increased to 24 children. Seventy-five percent were children under the age of six.

In 1992, there were 807 child deaths (birth to 17) statewide. Injuries are cited as the cause for over 30% (243); 10% (82) sudden infant death syndrome (SIDS); and the remaining 60% (482) other causes. According to the 1993 Kids Count Data Book, published by the Annie E. Casey Foundation, Kentucky is one of only eight states that have experienced an increase in the number of child deaths between 1985 and 1990.

Over 35 states have established panels to review data on child fatalities. By analyzing this data, intervention strategies and risk assessment measures can be developed which may prevent the deaths of other children. To formulate useful strategies, conclusions must be based on sound data. Accuracy in determining the cause of death can be improved by using a multidisciplinary investigation approach at the local level.

Discussion

Currently there is no single agency in Kentucky that is required or authorized to evaluate the information available on child fatalities. Sources which can be used in this evaluation include death certificates, child abuse reports, autopsy reports, Uniform Crime Reports, and legal and medical records. However, a researcher from a Kentucky university compared CHR data available in Vital Statistics with Department for Social Services information and found only one case of fatal child abuse that she was able to cross-reference in both offices. The inconsistency was attributed to different definitions used by each department. A statewide review panel could recommend common definitions and reporting requirements.

Kentucky Cabinet for Human Resources officials indicate in a recently developed "Child Fatality Handbook" that the state death statistics probably underestimate the incidence of fatal child abuse. Some deaths may be incorrectly diagnosed and reported as SIDS, accidental injury, or a cause other than abuse. Two years after implementing a statewide system of review, Missouri officials found the number of confirmed cases of death from child abuse and neglect nearly doubled. By accurately determining the cause of death for Kentucky children, efforts to prevent future deaths can be improved. Perpetrators can be brought to justice if criminal actions are discovered and steps can be taken to protect other children both in the home and in the community.

Improving the investigation of child fatalities is one way to increase the accuracy of the cause of death findings. Using a multidisciplinary team approach to investigation is proving to be effective in other states. Local officials, including law enforcement, prosecutors, social services, and coroners, share information and use the expertise of each professional on the team to conduct coordinated investigations. The team approach can result in improved communication and more complete information on which to base decisions. Similar teams are being used effectively in the investigation of child sexual abuse.

For abuse and neglect fatality cases, reviewing data on each death can allow a state review panel to assess the protection system's response to child abuse and neglect situations. A profile of perpetrators can be developed and used to guide professionals in making decisions. Preventable accidents that result in a child fatality can be studied and, when trends are identified, educational and awareness efforts can be initiated. Missouri launched a public awareness campaign after determining that 41% of the preventable accidental deaths in the state occurred when the child had no direct adult supervision.

After receiving a $20,000 grant from the U.S. Department of Health and Human Services, the Cabinet for Human Resources has taken steps to develop a method to review child fatalities. In one year, CHR has written an investigation guide and made a presentation at the Kentucky Coroners' Conference, focusing on the development of local multidisciplinary teams. A model protocol, which can be adapted by communities, has been distributed and technical assistance is being provided by staff from the Department for Social Services. There are twelve teams forming in the state, with a target operational date of January 1994. In addition, the Child Protective Specialists in the DSS Central Office conduct an internal review of all child fatality reports which involve families with which the department has had contact. This initiative has provided a solid foundation for further development of the concept of child fatality review in Kentucky.

Should the General Assembly decide to address the issue of reviewing child fatalities in order to improve prevention and intervention initiatives, alternatives to be considered include creating a panel to review the records of child fatalities reported statewide and encouraging the development of local multidisciplinary teams to investigate child fatalities.

JUDICIARY

ADOPTION

Prepared by Norman W. Lawson, Jr.

Issue

Should private adoptions through attorneys be eliminated?

Background

Proposals were made to the 1992 General Assembly to eliminate private attorneys from the adoption process, but the resulting bill did not pass. The entire matter is again being discussed between private attorneys, child placing agencies, the Cabinet for Human Resources, the Interim Joint Committee on Judiciary, and other interested persons. At this writing, there is no general agreement between the parties, a new bill draft.

Discussion

Some circuit judges, social workers, adoptive parents, and others feel that adoptions should be done only by and through the Cabinet for Human Resources or licensed child-placing agencies. Many of the licensed child-placing agencies are associated with social service programs of church or related organizations. Placements, whether through the Cabinet or through licensed child placing agencies, stress the social work approach, and lawyers are used in the process strictly for preparing legal papers with regard to the adoption. For many years, however, the Cabinet for Human Resources has permitted private attorneys who have been approved by the Secretary for Human Resources to engage in bringing prospective adoptive parents together with prospective birth mothers. This practice has increased to the point where a large percentage of adoptions are handled in this manner. Allegations have arisen that prospective birth mothers are being paid vast sums of money, are being given vehicles or are subjected to other unlawful inducements to give up their children for adoption. These allegations are refuted by the attorneys, who say that they pay only for the birth mother's normal expenses relating to the pregnancy and that the same expenses are either paid for or provided by the licensed adoption agencies. The attorneys contend that they may be able to locate adoptable children for their clients more rapidly than can the cabinet or social agencies. Many parties agree that the adoption process takes too long, and all parties in recent hearings on the proposals for legislation have supported streamlining the process and reducing the time from application to adoption.

VIOLENT OFFENSE SENTENCES

Prepared by Norman W. Lawson, Jr.

Issue

Should sentences for various types of crimes, such as violent offenses or child abuse, be lengthened?

Background

Legislation has been proposed or passed in most recent sessions of the General Assembly to increase the amount of time which violent offenders, child abusers or others must serve before parole from 20% of total sentence to 30%, and increase from six to eight years, and then twelve years, the time which must be served on a life sentence. Legislation was passed to specify that violent offenders serve 50% of their sentence prior to being eligible for parole. This resulted in 50- and 75- year terms, in order to lengthen the sentence and to provide parole eligibility at 25 years or more. A recent Kentucky Supreme Court decision has limited the sentences with 50% parole eligibility to the length of time for parole with a life sentence (12 years), thus permitting earlier releases on parole and vitiating the use of lengthy sentences to deny parole.

Discussion

Proponents of the legislation wish to keep dangerous felons separated from society for as long as possible. The original proposals were for 50% on a term of years and 12 years or more on a life sentence. They cite a 2 % decrease in violent crime and also feel this would have a deterrent effect on serious assaultive crimes.

Opponents of the legislation cite prison overcrowding and the costs of new prison construction and operation, and suggest that other felons, primarily career criminals, such as burglars and thieves, must be let out early to accommodate the longer sentences for the violent offenders. They also feel that excessively long sentences do not aid rehabilitation, but hamper it, thus compounding the crime problem.

DETERMINATE SENTENCING

Prepared by Norman W. Lawson, Jr.

Issue

Should the General Assembly replace the present method of indeterminate sentencing with determinate sentencing, which would eliminate parole?

Background

The present method of sentencing felons in Kentucky utilizes a maximum sentence which is determined by a court or jury, but which relies on a parole board to let various felons out of prison before their sentence has been fully served. Determinate sentencing would provide for a flat sentence which must be fully served, and from which there is no parole. In modified form, as introduced in the 1970's, the provisions would have included "good time" provisions, which would have let prisoners out much earlier if they behaved well during incarceration. These proposals might also be accomplished by sentencing guidelines which would narrowly restrict sentences by judges and juries. Determinate sentencing, with the elimination of parole and sentencing guidelines, has been in use in the Federal Courts for some time now. There is presently a move in Congress to eliminate the Federal Sentencing Guidelines. The Guidelines have been opposed by many federal judges, who feel that the Guidelines do not provide for compassion or flexibility in sentencing and result in unduly lengthy sentences. Various other groups oppose the Guidelines, not only because of the length of sentences, but because of vastly increased federal prison construction activity and the cost of operating federal prison facilities.

Discussion

Proponents of such legislation feel it would help eliminate sentencing disparity, since everyone committing the same crime would receive the same flat rate sentence. They proposed that it would allow for ease of sentence determination, and they point out that the cost of the parole board and cost of supervising parolees would be eliminated.

Opponents suggest that lengthy flat rate sentences increase prison overcrowding, generally have resulted in longer sentences, require additional prison construction, threaten incentive to participate in educational and industrial programs (particularly if sentences would have been lengthened), and reduce discretion by judges and juries.

PRISON OVERCROWDING

Prepared by Norman W. Lawson, Jr.

Issue

Should statutes and penalties be revised so as to reduce prison overcrowding?

Background

Since the adoption of the penal code in 1976, the General Assembly has defined many new crimes. It has also mandated that lengthy prison terms be the primary penalty for crimes committed with firearms, crimes involving violent offenses, offenses against children, and crimes by career criminals. This legislation, according to corrections cabinet officials, has contributed to prison overcrowding.

Discussion

Proponents of alternative approaches to reducing prison overcrowding state that imprisonment has been over-utilized as a means of dealing with crime, and that other options, such as intensive supervision probation, restitution, and home incarceration, have been under-utilized or ignored. Many of these persons favor increasing the felony theft limit (increased from $100 to $300 in 1992), decreasing or eliminating the prison option for nonviolent offenses; and taking similar measures to force reduction of the prison population. One approach enacted in 1992 was to have many Class D felons serve their sentences in county jails. Proponents worry that too few counseling, drug and alcohol rehabilitation programs are available statewide, even though they cost less than incarceration and may lessen the chance of recidivism.

Opponents of alternative approaches to prison overcrowding cite continuing increases in crime, particularly in repeat property crime and drug offenses which are nonviolent, as an indication that the persons who commit these crimes must be separated from society and that prison is the primary means of accomplishing this mission. These persons believe that probation, alternative to incarcerations, prison boot camps and other similar remedies, particularly for repeat offenders who have committed property offenses, do not work, and that they depreciate the seriousness of theft and burglary as crimes. Many of these persons feel that constructing new prisons is the best answer to the problem of prison overcrowding.

LABOR AND INDUSTRY

TWENTY-FOUR HOUR COVERAGE

Prepared by Linda Bussell

Issue

Should the Kentucky workers' compensation law and other sections of the Kentucky Revised Statutes be amended to permit or mandate implementation of twenty-four hour medical coverage for injuries or diseases, whether they occur on the job or off the job?

Background

There is no official definition of twenty-four hour coverage. Simply defined, the term refers to the concept of merging or integrating employee benefit programs or components of those programs into a single coverage for medical or indemnity benefits, or both. For example, a twenty-four hour coverage approach could merge the medical and indemnity components of health insurance, disability insurance, and workers' compensation insurance. Another approach could integrate only the medical components of different lines of insurance, such as workers' compensation, or auto, with health insurance. Many other combinations are possible. In Kentucky, the concept of twenty-four hour coverage has been discussed in the context of merging the medical components of workers' compensation, auto, general liability, and homeowners insurance with general health insurance. It has also been discussed in the context of rolling the medical components of workers' compensation into general health insurance. During the recent Extraordinary Session of the General Assembly on health care reform, several legislative proposals authorized pilot projects on twenty-four hour coverage.

Although twenty-four hour coverage is currently a very popular and much debated issue, it is by no means a new issue. It has been discussed and debated in various contexts in the U.S. since at least the seventies, and it has long been a standard feature of the universal health care systems in many other countries, such as Canada, Germany, and England.

No state has enacted legislation which requires twenty-four hour coverage, but several have enacted legislation that authorizes or mandates pilot projects. California and Oregon are currently conducting pilot projects. Most of the state activity has focused on integrating medical benefits only.

In addition to the state activity, several national organizations are monitoring and studying twenty-four hour coverage. The National Association of Insurance Commissioners (NAIC) established a working group to monitor state activity in the area of twenty-four hour coverage. The National Conference of State Legislatures (NCSL) is administering a $3.5 million grant from the Robert Woods Johnson Foundation to fund pilot projects on twenty-four coverage. Oregon's pilot project is being funded by a grant from the Robert Woods Johnson Foundation. The International Association of Industrial Accident Board and Commissions (IAIABC), an international association of workers' compensation administrators, and the NAIC formed a joint committee to study the twenty-four hour coverage issues. In addition, reports indicate that the President's Task Force on Health Care Reform is considering a twenty-four hour coverage plan which would integrate the medical components of workers' compensation and auto insurance.

The overall objective of a twenty-four hour coverage approach is to reduce or control health care costs. Rising health care costs and the large number of uninsured people have made health care reform a major issue on the federal and state levels. From 1985 through 1989, health care costs have increased at an estimated annual rate of approximately nine percent. Workers' compensation health care costs have been identified as the largest cost driver in the workers' compensation programs in most of the states. Reports indicate that workers' compensation health care costs have surpassed the growth in general health care costs, 1985 through 1989, by approximately thirty-five percent. Studies indicate that annual workers' compensation costs exceed well over two percent of the total payroll for all industries nationwide. According to a national workers' compensation ratemaking organization, healthcare costs in Kentucky are the leading cost driver in the workers' compensation system, with approximately fifty-five percent of each benefit dollar attributable to those costs.

Discussion

Twenty-four hour coverage is a highly controversial subject in this country. The controversy emanates primarily from arguments over whether the various employee benefit programs can be merged successfully to achieve workable and efficient twenty-four hour coverage. Opponents argue that the differences in the programs are too diverse and incompatible to allow a successful merger, while proponents argue that a successful merger is indeed possible and would benefit consumers of insurance greatly.

The major opponent of twenty-four hour coverage is the insurance industry. For example, most segments of the property-casualty insurance industry strongly oppose merging the medical components of workers' compensation and auto insurance with general health insurance, which is being considered at the federal level, and stress the importance of maintaining "primacy" of the different coverages. The property-casualty insurance carriers maintain that, among other problems, the loss of primacy would result in a loss of claim control; destroy the experience-rating features of the rate-making process; eliminate incentives for employers to maintain safe workplaces; erode the exclusive remedy aspect of workers' compensation insurance; and, if implemented at the state level, would probably violate the Employee Retirement Income Security Act (ERISA), which preempts state regulation of most employee health benefit programs.

Proponents contend that twenty-four hour coverage, in most forms, would significantly benefit consumers of insurance. These benefits, proponents contend, would result primarily from administrative cost savings which would result from eliminating the duplication of administrative functions of the different insurance coverages; reduced medical costs which would result from the elimination or reduction of cost-shifting; and, from the reduction of litigation expenses which occur from disputes regarding causation and over which coverage has liability for a given event.

Interest in the twenty-four hour coverage concept has increased almost simultaneously with the concern over rising health care costs, and the debate over both issues will likely continue as most states and the federal government continue to grapple with the health care issue.

SELF-INSURANCE GUARANTY FUNDS

Prepared by Linda Bussell

Issue

Should the workers' compensation law be amended to create a guaranty fund for self-insured employers?

Background

In addition to private insurance, employers in the Commonwealth may maintain their statutorily mandated workers' compensation coverage through self-insurance. An employer may be individually self-insured or self-insured through a self-insurance group if the employer or the group meet certain financial standards and requirements. Currently, there are approximately 240 individual self-insured employers and 12 self-insurance groups. Self-insurance accounts for approximately thirty percent of the total workers' compensation insurance premium in the Commonwealth.

Individual self-insurance has been an option available to employers for almost as long as the workers' compensation law has been in affect. The group self-insurance option, however, has only been available since 1978. During recent years, more and more employers have exercised their option to self insure. The primary reasons for the dramatic increase in self-insurance include escalating insurance premiums, lack of available and affordable insurance, and the employer's desire for more control over claims, premiums, and medical expenses.

During recent years, there has been growing concern over the large number of insurance carriers that have become insolvent and the corresponding burden that has placed many state insurance guaranty funds in jeopardy. Likewise, concern over the self-insurance insolvencies has resulted in the creation of self-insurance guaranty funds in several states. Currently, 23 states have created self-insurance guaranty funds.

Discussion

Legislation to create a self-insurance guaranty fund has been somewhat controversial in other states and would likely be so in Kentucky. The funding mechanism of a guaranty fund is, of course, the usual focus of the controversy.

Basically, a guaranty fund may be pre-funded, or self-insured employers may be assessed when an insolvency occurs. The latter method is generally preferred by the self-insured employer community.

In Kentucky and most other states, the Workers' Compensation Board, rather than the Department of Insurance, regulates self-insurance. The Board has prepared legislation that would establish separate guaranty funds for individual self-insurers and for the self-insurance groups. The legislation will be presented to the 1994 General Assembly. It would assess an initial amount to establish the fund. Thereafter, assessments would be made whenever an insolvency occurred and the surety arrangements required to be maintained by each self-insured employer and self-insurance group were exhausted.

WORKERS' COMPENSATION:
ASSIGNED RISK PLAN
Prepared by Linda Bussell

Issue

Should the insurance code be amended to restructure the Kentucky Workers' Compensation Insurance Plan (KWCIP) and to repeal or modify the prior approval requirement of rates charged by the KWCIP?

Background

The Kentucky Workers' Compensation Insurance Plan (KWCIP) is the residual market mechanism for workers' compensation. In workers' compensation insurance, a residual market mechanism is typically the market of last resort or a high risk pool. Employers who cannot secure private insurance coverage or who cannot qualify financially to be self-insured are placed in the residual market mechanism. In Kentucky, that mechanism is the KWCIP, but it is generally referred to as the assigned risk plan.

Most states have assigned risk plans and these have been growing dramatically over the past several years. The growth has been both in the number of employers covered, and in the percentage of the total insurance market. In Kentucky, approximately thirty percent of the workers' compensation insurance market is occupied by the KWCIP. Similar growth has occurred in other states.

KWCIP MARKET SHARE (%)

1984	8.1%
1985	10.7%
1986	15.4%
1987	20.9%
1988	21.1%
1989	23.7%
1990	25.3%
1991	29.3%
1992*	30.9%

Source: NCCI

**1992 estimated*

Several reasons for the dramatic growth have been offered by the National Council on Compensation Insurance (NCCI), a national ratemaking organization and manager of the KWCIP in Kentucky and residual market mechanisms in most other states. The number of workers' compensation claims has risen drastically. Workers' compensation health care costs have risen at a much faster rate than those in general healthcare and they are considered to be the largest cost driver in the workers' compensation system. Litigation and attorney involvement in workers' compensation claims have steadily increased. The growth of self-insurance has removed a large percentage of the better risks from the insurance market. These cost drivers and others contribute to the overall financial problems that plague the workers' compensation system generally and the residual market mechanism specifically.

Theoretically, rates charged employers in the KWCIP and other residual market mechanisms are higher than those charged employers in the voluntary market. One reason for this is that voluntary market rates are based on competitive rating and therefore don't require prior approval by the Commissioner of Insurance, unless they exceed twenty-five percent. Conversely, the rates charged employers in the KWCIP may not increase without prior approval from the Commissioner of Insurance. The insurance industry contends that the KWCIP rates have been artificially suppressed and are too low because of the prior approval requirements and political pressure. Nevertheless, the KWCIP rates have increased significantly over the past few years. The KWCIP provides coverage for both coal and non-coal (industrial) classes, but the two are treated separately for ratemaking purposes.

KWCIP Rate Changes-1989-1993

	Industrial	Coal
1/1/89	+11.9	---
11/14/91	+26.5	---
7/1/92	+21.6	---
5/13/93	---	+42% (Pending)
7/1/93	+17.6% (Pending)	

Source: Kentucky Department of Insurance

There are approximately 250 insurance carriers writing workers' compensation in Kentucky, and 10 of those write the coverage for the KWCIP. These carriers are authorized a thirty percent servicing fee for providing the coverage. If the rates approved by the Commissioner of Insurance for the KWCIP are insufficient to cover the losses, the other workers' compensation insurance carriers are assessed to cover the deficit. These assessments are made annually and have increased significantly over the past five years. The assessments have threatened the stability and solvency of several insurance carriers and resulted in higher premiums for employers insured in the voluntary market.

Discussion

Although there has been much discussion in Kentucky about the problems of the KWCIP, currently there is no consensus on possible solutions. The NCCI contends that removal of the prior approval requirement would allow rates to fluctuate according to the forces of the marketplace, just as rates do for the voluntary market. The NCCI also contends that major cost control reforms are necessary before the overall costs of workers' compensation will decline. Others, however, express concern over relinquishing approval authority for KWCIP rates and feel that the Commissioner of Insurance should, at least, retain modified prior approval authority over these rates.

There is also some interest in restructuring KWCIP by requiring all workers' compensation insurance carriers to participate. Supporters of this type of restructuring contend that there is no incentive for the current limited number of servicing carriers to aggressively monitor or control the losses of the KWCIP employers, and therefore, other insurance carriers are required to subsidize those risks and losses. The NCCI is scheduled to conduct a pilot project in Connecticut, Nebraska, Alabama and South Carolina designed to depopulate the residual market mechanisms in those states. The pilot project, which is scheduled to begin in January, 1994, will offer all licensed workers' compensation insurance carriers, rather than just the servicing carriers, an opportunity to write a percentage of the residual market. According to the NCCI, initial interest by the insurance carriers has been significant.

Other states are also exploring ways to solve their residual market problems. Within the past few years, Texas and Rhode Island have created competitive state funds, which function as state-operated insurance carriers, in an effort to depopulate their residual market mechanisms.

STATE GOVERNMENT

REDISTRICTING LAWSUIT

Prepared by Joyce S. Honaker

Issue

What is the status of litigation concerning the current state representative and senatorial districts ?

Background

The Kentucky General Assembly's redrawing of state senatorial and representative districts is governed by federal constitutional and statutory laws, state constitutional law, and court interpretations of them. U.S. Supreme Court interpretations of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, are the basis for the principle of "one person, one vote," that is, the requirement for substantially equal population among state legislative districts. The federal Voting Rights Act prohibits any change in a state's election system and procedures, including the redrawing of its legislative districts, to be done in a manner that discriminates against racial and language minorities.

Section 33 of Kentucky's Constitution sets forth the state constitutional requirements for state legislative redistricting:

> The first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight Senatorial Districts, and one hundred Representative Districts, as nearly equal in population as may be without dividing any county, except where a county may include more than one district, which districts shall constitute the Senatorial and Representative Districts for ten years. Not more than two counties shall be joined together to form a Representative District: Provided, In doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated. At the expiration of that time, the General Assembly shall then, and every ten years thereafter, redistrict the State according to this rule, and for the purposes expressed in this section. If, in making said districts, inequality of populations shall be unavoidable, any advantage resulting therefrom shall be given to districts having the largest territory. No part of a county shall be added to another county to make a district, and the counties forming a district shall be contiguous.

In December, 1991, suit was filed in Campbell Circuit Court, challenging the House and Senate redistricting plans enacted in the December, 1991, Extraordinary Session. The suit, filed against the State and Campbell County Boards of Elections and not the General Assembly, alleged that the redistricting plans excessively split counties, in violation of Kentucky Constitution Section 33. The Attorney General, representing the State Board of Elections, first sought and received Court of Appeals and Supreme Court review of the issue of whether a state legislative redistricting lawsuit could be brought in a circuit other than Franklin County and whether the State Board of Elections was the proper defendant in such a suit. The Court of Appeals ruled for the defendant in April, 1992, and the plaintiff appealed. In February, 1993, the Kentucky Supreme Court ruled that suit could be brought against the State Board of Elections and in a circuit other than Franklin County.

Discussion

On June 10, 1993, the Campbell Circuit Court heard oral arguments and testimony in the case of <u>Fischer v. State Board of Elections.</u> In the hearing, the plaintiff challenged not only the frequency with which counties are divided by the House and Senate districts, but also the General Assembly's power to redistrict more than once every ten years, following the decennial U.S. Census of population, except by court order. Counsel for the defendant noted that the federal district court, in an unpublished 1971 Kentucky redistricting decision, Upton v. Begley, later cited in Hensley v. Wood, 329 F. Supp. 787 (1971), ruled that the prohibition against splitting counties in Section 33 of the Kentucky Constitution was unconstitutional to the extent that it prevents compliance with the "one person, one vote" mandate of the U.S. Constitution.

While the plaintiff offered two bills, SB's 125 and 126, introduced in the 1992 Regular Session, as evidence that federal equal population standards could be met while splitting fewer counties than the current redistricting plans, he did not seek to have those plans substituted for the current ones. Rather, he seeks a declaration that the current plan is unconstitutional and an order that would necessitate an attempt to revise the districts to split fewer counties while achieving federal "one person, one vote" standards.

By July 8, the plaintiff and defendant had submitted final post-trial briefs to the court. Regardless of the outcome of the case in the circuit court, the decision will probably be appealed.

STATE'S CONTRIBUTION RATE TO STATE RETIREMENT SYSTEMS
Prepared by Barri Christian

Issue

What is the status of the controversy concerning state retirement system contribution rates?

Background

On April 27, 1993, the Board of the Kentucky Employees' Retirement System (KERS) and the State Police Retirement System (SPRS) filed suit against executive and legislative officials regarding the definition of an "actuarially sound" state contribution rate for the two retirement systems.

The controversy began in November, 1991, when the Board's actuary recommended an increase in the fiscal year 1993 contribution rate of KERS-nonhazardous from 7.65% to 8.66%, KERS-hazardous from 15.05% to 17.55%, and SPRS from 19.57% to 21.84%. Although this recommendation was presented to the 1992 General Assembly during the budget process, the General Assembly adopted the Governor's recommendation in its 1992-94 budget bill (HB 468) and froze the state contribution rate for both fiscal years at the fiscal year 1992 level. State agencies have been paying the lesser rate since July 1, 1992. The difference in the Board rate and that established in the budget bill is estimated to be $23 million.

Discussion

The suit filed by the Board seeks to determine who has the ultimate authority to set the state contribution to its employee retirement system--the Board or the General Assembly.

State law says that the Board has the authority to set the contribution rates and it establishes a contract for retirement benefits between the state and its employees. The Board contends that this contract cannot be violated. However, Armstrong v. Collins, 709 S.W. 2d 437 (1986), provides that the Budget bill may suspend or modify existing statutes, including those related to retirement contribution rates.

The suit is pending in Franklin Circuit Court.

GOVERNOR'S COMMISSION ON QUALITY AND EFFICIENCY

Prepared by Joyce S. Honaker

Issue

What is the status of the work of the Governor's Commission on Quality and Efficiency?

Background

In March, 1993, the Governor established a 55 - member Commission on Quality and Efficiency to develop recommendations to improve state government's efficiency and the quality of its services. The members are drawn from both the public and private sectors. A consultant, KMPG Peat Marwick Government Services, is managing a study of these matters, which is being conducted for the Commission by seven work teams of loaned state employees and private sector analysts, working under the guidance of committees composed of commission members. The topics assigned to the committees and work teams are fiscal management, government operations, human resource management (state personnel), human services, public safety, technology, and workforce training.

The work teams' research efforts have included a survey, interviews and public forums to solicit state employees' comments and recommendations for improvements in state government operations. Approximately 32.5% of the 40,000 employees who received the written survey responded.

Discussion

As of July 15, the full Commission had met twice to review the findings of the work teams and to give further direction. The Commission will hold its final meeting September 9-10, after which its final report will be drafted.

Among the possible recommendations the Commission was considering in mid-July were to:

- Establish methods to assess what state programs and services should be privatized;
- Reform and consolidate the five state personnel systems;
- Create procedures for overseeing state boards and commissions;
- Institute strategic planning and performance-based budgeting in state government;
- Develop improvements in office space acquisition and management and in state purchasing and procurement activities generally; and
- Consolidate the operation and management of the Commonwealth's voice, data and video networks.

The Commission will forward its recommendations to the Governor by November 1, 1993. At its July 13 meeting, the Governor instructed the Commission to include in its November 1 report drafts of any legislation necessary to implement the final recommendations.

UNIFORM ADMINISTRATIVE HEARING PROCEDURES

Prepared by Michael Greer

Issue

Should the Kentucky General Assembly enact legislation to establish uniform administrative hearing procedures for state agencies?

Background

The need for standardizing procedures for the conduct of certain aspects of government administration emerged with the proliferation of government programs during the Depression. Passage of uniform legislation was delayed by World War II, but in 1946 a federal administrative procedures act (APA) was adopted. The two major areas of procedures standardized by this act were rule making (promulgation of administrative regulations) and adjudicatory proceedings (conduct of administrative hearings).

That same year, the Commission on Uniform State Laws drafted and published a model state administrative procedures act. Since 1946, 47 states have adopted uniform administrative procedures, 31 of which are based on the model APA. Texas, Pennsylvania, and Kentucky are the only three states which have not adopted an administrative procedures act, although Kentucky does not have uniform rule making.

Kentucky enacted legislation in 1974 that created a uniform procedure for promulgating administrative regulations. During the 1974-75 Interim, the Interim Joint Committee on State Government prepared and prefiled companion legislation based on the model APA, which would have established uniform hearing procedures among state agencies. House Bill 137 ran into widespread opposition from affected agencies and failed.

Other efforts to standardize hearing procedures were undertaken during the 1984-85 Interim by the Subcommittee on Occupations and Professions of the Interim Joint Committee on Business Organizations and Professions. The Subcommittee perceived a need to standardize procedures for licensing boards, to assure that due process was being provided. A bill was drafted, 86 BR 971, patterned after HB 137 from the 1976 Session.

After the subcommittee became aware that Kentucky did not have an APA, application of the legislation was expanded to include all state agencies. With the expanded coverage, however, came increased opposition, and BR 971 was not introduced in the 1986 Session. Opposition was not, however, as widespread as in 1976. In fact, some agencies saw the benefits of having uniformity and supported the legislation.

The subject of uniform hearing procedures arose again in 1988, when the General Assembly passed HCR 114, directing a comprehensive study of the administrative hearings process. Research on the study was completed during the 1990-91 Interim, and published as Research Memorandum No. 461. A report on the study was made to the Subcommittee on General Government of the Interim joint Committee on State Government, which resulted in the prefiling of legislation (SB 14). Late in the 1992 session, another version of the administrative hearings legislation (HB 858) was introduced in the House, but neither bill passed.

Discussion

Is there a need for uniform administrative hearing procedures in Kentucky? The answer to this question is somewhat complicated and depends on what needs are considered essential.

The fourteenth amendment to the U.S. Constitution guarantees citizens due process of law. With regard to administrative hearings, courts have consistently recognized three basic due process elements: (1) A person must be afforded a fair hearing. (2) A person must be given timely notice and an adequate statement of charges. (3) A person must be afforded the right to appear either in person or with counsel to present evidence.

The courts, however, however, been rather liberal in interpreting due process and have allowed government agencies a high degree of flexibility in providing due process in hearings. In addition, there is no court-directed requirement that uniform procedures be employed. Finally, no data reviewed for the present survey indicated that Kentucky agencies are not providing basic due process. Need cannot therefore be based on a documented absence of due process in current hearing procedures.

During the course of the present research, a computer search of Kentucky laws revealed 450 different hearing processes, encompassing over a thousand statutes. Of these, 265 were executive branch hearings, 7 legislative, 57 judicial, and 121 related to various local government jurisdictions. The hearing procedures established in these statutes are substantially different, ranging from single provision basic due process requirements to complex, trial-like processes containing most of the elements of the model APA.

The need for uniform hearing procedures must therefore be based on desirability of having uniformity and the benefits that would result. The primary benefit would be to establish a consistent standard that would provide equal treatment of individuals in the hearing process throughout state government. This was voiced as an important issue by members of the State Government Committee in support of the 1992 legislation. Additional benefits include standardized training, greater agency cooperation, enhanced oversight and reporting, and potential savings over the long term. Finally, a uniform law would permit significant statutorial housekeeping and could result in the repeal of several hundred statutes.

Several concerns are raised by affected agencies regarding the desirability of a uniform act. The first one is cost. Some agencies argue that establishing uniformity will cost more than can be justified by the benefits. Proponents claim that, while there will likely be some initial conversion costs, savings over the long term should be offsetting.

Another issue is the perceived expansion of hearing rights. In testimony on the subject in 1985, agencies expressed a concern that uniform legislation would extend hearing rights to areas not now covered. Section 2 of SB 14 stated that the legislation applied only to procedures and did not confer on a person a right to hearing not expressly provided by law. It was the sense of those involved in the drafting that the right to a hearing is a policy decision that either the legislature or courts must make with regard to each government program or activity. There is also a matter of budgeting for additional and undeterminable hearing costs which would occur if the act were to attempt to determine broadly when hearings rights are to be granted. In the area of hearing rights, SB 14 differed from the model APA, which does attempt to redefine hearing rights.

Exemptions to any proposed uniform hearings law will be an issue. Many agencies will request exemption on the grounds that their hearings are unique and that imposition of uniform procedures would be impractical, even unreasonable. There were two avenues for seeking exemption contained in SB 14. The first allowed the Attorney General to approve exemptions on a provision by provision basis, in order to conform to federal law or to assure that due process would be afforded. The requesting agency, however, would have to promulgate an alternative procedure consistent with the intent of the uniform act.

The second avenue was for categorical exemptions for entire hearing processes to be specified in statutes. To accomplish this, SB 14 contained a delayed effective date and language in the enactment section instructed agencies to petition the Legislative Research Commission for exemption during the Interim following passage of the bill. If approved, an exemption would be included in conforming legislation to be passed in the next General Assembly. Both the uniform procedures and conforming amendments would therefore become effective at the same time. This would give agencies ample opportunity to make their case for exemption and it would hopefully allow the initial debate to be focused on the efficacy of uniform procedures without the distraction of interagency politics.

Centralization of hearing functions will also likely be an issue. Centralized hearings was one recommendation that came out of the comprehensive study of state government organization that was conducted in 1988-89, and it was considered during preparation of the uniform hearings legislation. The model APA contains a provision which consolidates hearing functions in one agency, but of the 47 states that have uniform procedures, only nine have centralized hearings. Even in these nine states and in the federal government, a majority of hearing processes are not consolidated, because of exemptions granted. There is also some research evidence that indicates that centralized hearings maybe more costly. Finally, there appears to be little support for centralized hearings, and in fact, there is a possibility of significant opposition from agencies. In SB 14, the hearing function was to remain in the respective agencies, as now provided by law.

There were two tangential issues that were raised in the administrative hearing study which may deserve further research. The first concerned uniform hearings for local government. The proposed legislation pertained only to state agencies, but with 121 local hearing processes being identified, additional consideration might be given to extending application to local government agencies. The other issue related to complaint handling and investigative procedures. These processes are often preliminary to the hearing process and some believe uniform procedures in these areas would complement uniform hearings and should result in improved overall enforcement efforts.

THE ADMINISTRATIVE REGULATION PROCESS
Prepared by Joseph Hood and Thomas Troth

Issue

Should some provisions of KRS Chapter 13A relating to administrative regulations be amended?

Background

In LRC v. Brown, Ky., 664 S.W. 2d 907 (1984), the Kentucky Supreme Court held that while the General Assembly may delegate authority to review administrative regulations promulgated by agencies of the executive branch to a subcommittee of LRC, it could not delegate its authority to suspend or to nullify an administrative regulation. During the 1984 Regular Session of the General Assembly, KRS Chapter 13A was enacted, in order to comply with the opinion of the court.

In 1986, HB. 310, codified as KRS 13A.345, was enacted to provide that all administrative regulations in effect would lapse on the effective date of legislation enacted by the 1988 General Assembly. Any administrative regulation desired by an agency to be enacted, into statute was to be submitted as a legislative proposal. Some 2800 regulations were proposed.

The 1988 General Assembly repealed KRS 13A.345 effective March 16, 1988. In that 1988 Regular Session, the General Assembly amended KRS Chapter 13A to provide for review of administrative regulations by interim joint committees after initial review by the Administrative Regulation Review Subcommittee.

The 1988 amendments to KRS Chapter 13A provided that an administrative regulation to which an objection has been made by a legislative committee shall expire unless it is enacted into statute at the Regular Session following such objection. The 1988 amendments also established detailed drafting and filing rules.

The 1990 General Assembly enacted HB 855 to clarify some questions which had arisen because the 1988 legislation was two separate enactments, using different terms. The 1990 legislation also addressed several drafting and filing requirements. There were no amendments to the statute in the 1992 session.

Discussion

Questions have been raised concerning some provisions of KRS Chapter 13A.

(1) Should the administrative procedure for the review of administrative regulations by the appropriate jurisdictional committee be amended?

The review process of KRS Chapter 13A covers a great number of agencies, and one complaint heard from agency personnel is that the entire process takes too long. One suggestion to streamline the process relates to the routine review of regulations by jurisdictional committees.

It is difficult to both shorten the time required when a jurisdictional committee does a review after the Administrative Regulation Review Subcommittee reviews an administrative regulation and also give adequate public notice of the review.

One alternative would be to delete the automatic review by the jurisdictional committee. In addition to the automatic review, the statute now permits a jurisdictional committee to call up any administrative regulation in its jurisdiction at any time for purposes of review as to compliance with KRS Chapter 13A. If this provision were retained, not every administrative regulation would have to be automatically reviewed by the jurisdictional committee, but the committee would have the authority to review any regulation within its jurisdiction upon its own choice. However, experience shows that legislators are very interested in the review of administrative regulations by jurisdictional committees. The jurisdictional committee is the one with legislative expertise in the subject, and the knowledge of the intricacies of the issue to be regulated. It is an opportunity for oversight and communication with agency personnel. The consequence of deleting automatic review of jurisdictional committees would be to shorten the time period required for the promulgation of an administrative regulation, but lessen legislative oversight.

(2) Should the statutes establishing deadlines for accepting comments and for the filing of the statement of consideration be amended?

The evolvement of KRS Chapter 13A has been the result of a continual attempt to improve the procedure. Over each two-year period questions have arisen concerning procedural deadlines. KRS 13A.270 requires an agency to hold a public hearing on a proposed administrative regulation not less than twenty days nor more than thirty days following publication of that administrative regulation in the administrative register, unless the agency chooses to cancel the public hearing because no written notice of intent to attend was received at least five days before the scheduled hearing date. The question that has arisen is the allowable or acceptable agency "cut off" date for receiving comments from the public which must be addressed in a statement of consideration, when no request has been received for a public hearing and the public hearing has been canceled.

KRS 13A.270(4) requires the agency to immediately notify the regulations compiler if a hearing has been canceled and if it has received comments that should be considered. Some agencies believe they no longer need to accept any comments after that notification. However, KRS 13A.280(1) states: "following the scheduled hearing date, the administrative body shall give consideration to all written and oral comments received, whether at the hearing or otherwise...." Some agencies believe they should accept comments received through the published date of the canceled hearing.

The statute could be amended to specify that the cut-off date for accepting comments is at the close of the hearing or at the close of business on the date the public hearing would have been held had it not been canceled. This may delay agencies from completing the statement of consideration when a hearing is canceled, but allows comments to be considered that are received within the five-day period between cancellation and the scheduled hearing date.

There is also a strict time limit for the filing of a statement of consideration. KRS 13A.280(2) requires the agency to file by 12 noon on the 15th day following the scheduled hearing date a statement of consideration, giving consideration to all written and oral comments received whether at the hearing or otherwise. The present statute allows sufficient time for most administrative regulations to be adequately considered in the statement of consideration. However, when a complex, lengthy, or very controversial administrative regulation, or a "package" of administrative regulations is presented, there is no mechanism for extending the time for preparing the statement of consideration.

The time requirements could be tiered to allow additional time, based on a scale reflecting the number of comments received. The present time requirements are there to keep the procedure moving, to avoid deliberate delays. Some may argue that tiering could cause further delays. Others may argue that additional time is needed to adequately address numerous comments.

(3) Should the statutes governing Quadrennial Review be amended?

Under the current statutory scheme all administrative regulations promulgated by executive agencies must be reviewed by the appropriate jurisdictional subcommittee over a four-year period. This requirement is called "Quadrennial Review". KRS 13A.346, relating to quadrennial review, provides that:

> each jurisdictional subcommittee shall review the administrative regulations which the Legislative Research Commission deems to be in its jurisdiction within [a four year period.] The subcommittee shall schedule its review of such administrative regulations so that it has completed one-half (0.5) of its work during the first two (2) year period.

The Legislative Research Commission informs each jurisdictional subcommittee of the administrative regulations "it shall review" during the four-year period. The subcommittee then holds public meetings to consider the administrative regulations. The subcommittee must give at least fourteen days' notice to the executive agency and inform the agency of the time, date, place, and subject matter of the hearing. If the subcommittee finds any administrative regulation deficient, the subcommittee must submit a report of its finding to the Legislative Research Commission no later than November 30 of odd-numbered years. Administrative regulations found deficient during quadrennial review shall be effective "only until the effective date for acts of the next succeeding regular session of the General Assembly, on which date they shall expire." KRS 13A.347(4). Administrative bodies that wish to continue the effective date of an administrative regulation beyond the date on which the deficient administrative regulation is to expire shall prepare legislation proposing enactment of the administrative regulation into statute by the next regular session of the General Assembly. KRS 13A.347(5).

Questions have been raised concerning whether the provisions of KRS Chapter 13A relating to "Quadrennial Review" should be amended or remain in their present form.

Some executive agencies have questioned the necessity for Quadrennial Review because the vast majority of administrative regulations go through the ordinary promulgation process every four years.

In 1990, after the provisions for quadrennial review were enacted, the General Assembly amended KRS 13A.290(7) to allow a jurisdictional subcommittee to call up an existing administrative regulation for review at any time. KRS 13A.290(7) provides in pertinent part that:

> [A] subcommittee may also review an existing administrative regulation and make a determination as provided by KRS 13A.030(2) and (3) [i.e., find the administrative regulation deficient]. Notice of the time, date, and place of the meeting shall be placed in the legislative calendar....KRS 13A.290(7).

The Kentucky General Assembly may want to address whether Quadrennial Review of administrative regulations serves the functions envisioned by the General Assembly when the provisions were passed, or whether KRS Chapter 13A should be amended to delete or otherwise modify the requirements relating to "Quadrennial Review".

(4) Should amendments to conform the Kentucky Revised Statutes to KRS Chapter 13A be enacted?

When KRS Chapter 13A was first enacted no amendments to conform existing statutory law to the provisions of KRS Chapter 13A were adopted. Existing statutory law often refers to "rules and regulations," "policies and procedures," or other "forms of action" which are prohibited by the provisions of KRS Chapter 13A. The only permissible way for an administrative body to "prescribe law or policy...procedure...practice...or affect private rights or procedures available to the public..." is through the promulgation of an administrative regulation. KRS 13A.100(1).

The General Assembly could adopt conforming amendments to KRS Chapter 13A to clarify all references in the Kentucky Revised Statutes that relate to administrative regulations. Alternatively, if the General Assembly chooses to leave the provisions of the Kentucky Revised Statutes relating to the promulgation of administrative regulations as they currently exist, inconsistencies in a statutory provision could be challenged in a court of law. The court could base a reconciliation of the conflict upon standard rules of statutory construction and intent of the General Assembly.

(5) Should a federal-style comment period (intent to promulgate hearing) be required?

Regulated entities and members of the public have approached the subcommittee about the possibility of requiring a federal-style comment period (intent to promulgate hearing) before an administrative body promulgates an administrative regulation in a given area.

The federal government requires executive agencies to publish a notice in the Federal Register whenever the executive agency intends to file a regulation. Pursuant to 5 USC 553(b), the notice shall include the time, place, and nature of the public rule making proceedings, and "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 USC 553(b)(3). There is no set time period for comment before an administrative regulation is filed. Each executive agency may choose its own time period for allowing public comment.

This notice of intent to regulate allows affected entities and the public at large to submit comments to the executive branch of government before an administrative regulation is filed. A notice of intent to regulate and hearing before an administrative regulation is filed allows input into the regulatory process before the actual regulatory language is drafted. This procedure is often called "negotiated rule making".

KRS 13A allows public comment on administrative regulations through the public hearing process after an administrative regulation is filed. The public also has the opportunity to submit comments at the hearing of the Administrative Regulation Review Subcommittee and at the hearing held before the standing jurisdictional committee.

Certain executive agencies have expressed concern that a public comment period before an administrative regulation is filed would result in a lengthier promulgation process.

The General Assembly may want to consider whether KRS Chapter 13A should be amended to require a federal-style comment period (intent to promulgate hearing) or whether the hearing process after an administrative regulation is filed allows for sufficient comment by the public and regulated entities.

STRINGENCY OF STATE AND FEDERAL REGULATIONS

Prepared by Thomas Troth

Issue

Should the apparent conflict in KRS Chapter 13A relating to whether state administrative regulations may be more stringent than federal requirements be resolved?

Background

Questions have arisen concerning the interpretation of three provisions of KRS Chapter 13A and whether those provisions require that state administrative regulations be "no more stringent than federal law or regulations", or allow an administrative body to promulgate more stringent standards, as long as the provisions are justified.

Discussion

KRS 13A.120(1) provides that when administrative regulations are required by federal law, the administrative regulations "shall be no more stringent than the federal law or regulations."

KRS 13A.2264(5), relating to incorporation by reference of federal regulations, provides that if an administrative regulation imposes "standards...that are stricter than...federal regulation..." a summary of the action shall be attached.

KRS 13A.245(3), relating to the preparation of the federal mandate analysis comparison, provides that if a state administrative regulation "imposes additional requirements or responsibilities on the regulated entities than is required by the federal mandate...a written statement justifying the imposition of stricter standards, requirements or responsibilities...." shall be included.

Some individuals and entities regulated by executive agencies have argued that there is a conflict between the provisions of KRS 13A.120(1), KRS 13A.2264(5) and KRS 13A.245(3).

The case of Franklin v. Natural Resources & Environmental Protection Cabinet, 797 S.W.2d 714, (Ky. Ct. App. 1990), may provide some guidance in reconciling this conflict. In the Franklin case the Court of Appeals struck down a hearing procedure in the Natural Resources and Environmental Protection Cabinet that was more stringent than the federal hearing procedure. The court stated that the state hearing procedure in 405 KAR 7:090(4) violated KRS 13A.120(1).

In the 1994 Session of the Kentucky General Assembly the legislature could amend the provisions of KRS Chapter 13A relating to federal standards and legislatively reconcile the possible conflict, or it could leave the provisions of Chapter 13A alone and rely on the courts to further reconcile any perceived conflict.

CLARIFICATION OF THE COMMONWEALTH'S RESPONSIBILITY FOR PRIVATE PURPOSE DEBT ISSUED BY STATE AUTHORITIES

Prepared by Ginny Wilson

Issue

Should the Commonwealth clarify the amount of fiscal responsibility it is willing to assume for private purpose debt issued by state debt authorities? To the extent that the Commonwealth does assume some fiscal responsibility for the private purpose debt issued by a state debt authority, should the General Assembly exercise an associated amount of control over how much debt that authority may issue?

Background

The Commonwealth has established two types of state debt-issuing authorities. The first type includes those which issue bonds to fund public projects. Examples are the State Property and Buildings Commission, which issues bonds to fund construction and renovation of state buildings, construction of state parks and other projects of state government; and the Kentucky Turnpike Authority, which issues bonds to fund the construction of state roads. The second type of state debt-issuing authority includes those which issue bonds to fund projects owned by private entities. Examples are the Kentucky Rural Economic Development Authority (KREDA), which issues bonds to fund loans to private firms; and the Kentucky Housing Corporation, which issues bonds to purchase mortgage loans made to private home buyers.

The Debt Capacity Task Force had been concerned that a clear distinction had not been made between the Commonwealth's fiscal liability for the bonds issued by the two types of state debt authorities, so it recommended, and the 1990 General Assembly approved, a resolution directing the Legislative Research Commission to study the issue. That study concluded that some uncertainty does exist on the part of investors and policy makers concerning the degree to which the state would be fiscally liable in the event that a state private purpose debt-issuing authority could not make a regularly scheduled debt service payment.

Additionally, the statutes governing three private purpose state debt-issuing authorities (Kentucky Housing Corporation, Kentucky Student Loan Corporation, and Kentucky Infrastructure Authority) include a "moral obligation pledge." This pledge does not **require** the General Assembly to appropriate funds to any of these three authorities if they cannot make a regularly scheduled debt service payment, but it signals a strong intent to make such an appropriation. The LRC study concluded that a failure on the part of the General Assembly to honor the moral obligation pledge for one of these three authorities would cause market investors to question the Commonwealth's commitment in honoring all debt obligations, and could raise the cost of borrowing for all state authorities. Thus, the debt of these three authorities represents an indirect claim on the state budget. Yet, the authorities do not have to have prior authorization from the General Assembly to issue bonds.

Discussion

The key distinction between the two types of state debt authorities is the regular source of funds used for debt service. Public purpose authorities, such as the State Property and Buildings Commission and the Kentucky Turnpike Authority, make all regularly scheduled debt service payments from state funds appropriated by the General Assembly. Private purpose authorities, such as KREDA and the Kentucky Housing Corporation, make regularly scheduled debt service payments from loan repayments made by the private entities which take advantage of the programs offered by those authorities. No state funds are appropriated.

However, there appears to be some uncertainty among investors who purchase state private purpose bonds and among members of the General Assembly about whether, and, if so, under what circumstances, the General Assembly **would** make an appropriation of state funds if a private purpose state debt authority could not make its regularly scheduled debt service payments. Clarification of the General Assembly's intentions in this regard before any such problem were to develop would reduce any negative market spillover effects on Kentucky public purpose debt from bond investors who might feel they had been misled regarding the amount of state backing for private purpose bonds. A clarification would offer some protection to state policy makers from those who would use the uncertainty about the market's reaction to press for a state appropriation.

Regarding the three authorities whose debt is subject to the moral obligation pledge, the central question is whether the amount of oversight exercised by the General Assembly is consistent with the amount of fiscal liability it bears for their debt. At present, all of the debt outstanding from the Kentucky Housing Corporation and the Kentucky Student Loan Corporation is guaranteed by federal agencies. This debt should represent no fiscal liability to the state. However, there is no provision in the statutes requiring prior authorization from the General Assembly before the authorities may issue nonguaranteed debt, if they should choose to do so in the future.

The third authority whose debt is subject to a moral obligation pledge is the Kentucky Infrastructure Authority, which is composed of five bond-funded loan programs that assist local governments to fund their public infrastructure needs. The moral obligation pledge applies to one of the KIA's five programs - the Governmental Agencies Program; however, the pledge is included in the general provisions governing the Authority and could be misconstrued to apply to other existing or future KIA funding programs.

LONG-TERM PLANNING FOR OFFICE SPACE NEEDS IN FRANKLIN COUNTY

Prepared by Pat Ingram

Issue

How should Kentucky state government address its long-term office space needs in Franklin County?

Background

In a July 1993 presentation to the Capital Planning Advisory Board (CPAB), Department for Facilities Management representatives reported that the Commonwealth of Kentucky currently occupies 29 state-owned office facilities in Franklin County, with a total of 2,272,857 square feet of space, and that the Commonwealth also has 59 installations of leased office space in Franklin County, with a total of 1,153,356 square feet of space. It was further noted that these facilities are so spread out across the county that "the many locations have resulted in a continued erosion of communication within and between agencies."

Capital improvements plans submitted to the CPAB for the 1992-98 planning period also reflect a need for "space consolidation" by various agencies (including the Revenue and Natural Resources Cabinets), in order to improve the efficiency and effectiveness of both service to the public and internal agency operations. Lease consolidations are generally proposed as the short-term solution to these problems, with construction of a new state office building in Franklin County anticipated as the longer-range solution.

Similar needs identified in 1991 (during the 1990-96 planning process) resulted in a CPAB recommendation that a 700,000 square foot office building be constructed in Frankfort. Such a facility was requested by the Finance Cabinet in the 1992-94 budget, but was not authorized. The 1992-98 capital improvements plan submitted by the Finance and Administration Cabinet again proposes the construction of a 700,000 square foot office building in Frankfort, at a cost of $101.0 million.

Discussion

In determining how to address long-term planning for state government's office space needs in Franklin County, a major factor is whether the current approach of leasing from private owners should be continued, or whether the construction of a new building, by the state, is warranted. The financial implications of both approaches will also be major considerations. (For example, at the time of its 1991 recommendation, CPAB indicated that "the present value cost of building a state-owned facility in Franklin County is approximately $5.0 million less than the present value cost of leasing the space, given current lease rates and current economic conditions.")

Various alternatives may also be considered within the leasing approach--for example, leases with the option to purchase, or other means of establishing longer-term leases, which might result in lower rates.

ENERGY EFFICIENCY IN STATE FACILITIES

Prepared by Mary Lynn Collins and Pat Ingram

Issue

Should the Commonwealth undertake a new program to address energy management and conservation in state-owned and leased facilities?

Background

Kentucky state government, which spends over $40 million annually to heat and cool 50 million square feet in state government-owned buildings, could significantly reduce its use of energy and divert the money saved to much-needed state services. Technology is changing so rapidly that buildings built only ten years ago could benefit significantly from certain energy purchases and retrofit measures. The state Division of Energy, in the Natural Resources and Environmental Protection Cabinet, estimates that the state could save $10 million a year in energy bills by making cost-effective energy improvements. This estimate is based on documented energy savings realized in the energy conservation program for schools and hospitals that the state Energy Division administers with federal funds. Energy improvements undertaken in that program produce on average 25% in energy savings. However, no comprehensive program is currently in place to accomplish such energy savings in other existing facilities.

In addition, the state does not systematically consider energy efficiency in new buildings it constructs or facilities it leases. While new construction of state facilities must meet a minimum energy code, the state does not require architects to design energy efficiency into new state buildings. Nor are actual energy costs considered before the state evaluates bids and enters into lease contracts.

At least twelve states have created programs to reduce their energy use, and more states are currently looking at the issue. State officials from both Montana and Iowa state governments testified at legislative committees this interim about their states' comprehensive energy efficiency programs. Both of these states use bonds to finance extensive energy retrofits.

The National Energy Policy Act of 1992 gives states an additional incentive to consider financing energy efficiency in government facilities. That legislation authorizes up to $1,000,000 to each state that can demonstrate a commitment to improve energy efficiency of government facilities. In order to qualify, a state must have an established energy program that includes a revolving loan fund for financing energy improvements in both state and local government facilities.

Various legislative committees, including the Special Subcommittee on Energy and the Budget Review Subcommittee on Economic Development, Natural Resources, and Tourism, worked on the issue this interim. The Capital Planning Board, which received technical assistance from the National Conference of State Legislatures, has indicated that it believes energy management in state buildings should be addressed in the 1994 Session and is currently formulating recommendations. In addition, the issue is under consideration by the Governor's Commission on Quality and Efficiency.

Discussion

The 1992 Budget Bill directed the Natural Resources and Environmental Protection Cabinet to evaluate an energy conservation program for state facilities. The cabinet completed a draft plan which calls for an energy efficiency unit to be located in the Department for Facilities

Management. The proposed program unit, to be composed of five staff members, would have two major tasks: (1) identify and complete low cost and no cost energy measures, including promotion of energy awareness among state employees and training building maintenance and operations staff; and (2) oversee more extensive energy retrofits where cost estimates indicate a payback from savings within five years or less.

If the General Assembly decides to fully implement the program, issues of funding administrative overhead, engineering analyses, and energy retrofits must be addressed. As proposed, the plan would take eight years to complete and cost $58 million. Possible funding sources include: (1) General Fund appropriations, (2) revenue bond issues; and (3) energy performance contracting. While in the long run the least costly approach would be General Fund financing, current budget problems make this option unlikely. Although concern about the state's bonded indebtedness makes the second option difficult, a revenue bond issue could probably be structured to use energy savings to create a positive cash flow within the first year. The last option, performance contracting, is a relatively new mechanism that government at all levels is increasingly using to make comprehensive energy improvements in public facilities. Under energy performance contracting, a private energy service company typically installs the equipment and completes all retrofit work, maintains the equipment and provides financing. In most cases, energy savings are guaranteed with the fee for services based on actual value of the reduced energy realized. A key advantage to the financing is that there are no up-front costs to the user. A disadvantage of performance contracting is that the client, in this case the state, would have to give up some control of the energy systems, since the contractor will maintain and monitor the equipment.

Rather than tackle a comprehensive energy program, the General Assembly could choose to focus on low-cost energy measures (estimated to save $4 million annually) and/or fund an energy retrofit demonstration in one or several buildings. In addition to any action regarding energy management in buildings now owned by the state, the General Assembly may also look at various actions to reduce energy use in new construction, leased properties, equipment purchases, and even the state motor pool.

TOURISM DEVELOPMENT

STRATEGIC TOURISM PLANNING

Prepared by Linda Kubala

Issue

Should the General Assembly require preparation of a strategic plan for tourism development?

Background

Tourism is an important, and growing, sector of Kentucky's economy. The state, mainly through the Tourism Cabinet, is involved in tourism in two ways. First, several agencies, notably the Department of Parks and the Department of Fish and Wildlife, manage state facilities which support tourism and convention business. Secondly, the travel development and advertising functions market Kentucky locations and Kentucky businesses to travelers.

Interest in developing a comprehensive planning process for tourism is not new. Planning efforts have long been required to be eligible for specific federal funds, such as outdoor recreation grants. In 1989, the Tourism Cabinet proposed to develop a master plan, including a comprehensive inventory of potential sites and projects. This effort was not funded. One component of Governor Jones' campaign platform was to encourage long-range planning for tourism development.

Proponents of a formal planning process point out that without a comprehensive, strategic planning process for tourism, each agency and each local community or region tends to develop its own plan, without regard for its impact on other agencies or communities. Funding decisions almost certainly can be improved if they are made on the basis of established priorities and guidelines, so that limited funds can be used where they are most effective. Adherence to an established, multi-year planning process also could increase continuity from one administration to the next. More stable state programs would make planning easier for private tourist businesses, and a formal process, well designed, could allow these businesses to have more input into the state policies which affect them.

On the other hand, critics of a mandated planning effort for tourism development can point to numerous unsuccessful state government planning efforts of the past. The cost and effort to prepare a plan are wasted if the product is not implemented, or if the process is not continued. Even if the desirability of strategic planning by state government for tourism were unquestioned, not all would agree that this effort should be mandated by the General Assembly.

Discussion

Strategic planning activities are not easily pigeonholed; a plan to develop tourism must of necessity consider transportation, education, outdoor recreation, economic development, and many other areas. A mandated tourism development planning process should consciously coordinate with required planning in these areas as well, efforts such as the Statewide Capital Improvements Plan, six-year transportation plan, or policy development by the new Long-Term Policy Research Center. If requirements for the various planning activities are flexible and oriented towards outcomes, overlapping efforts can enhance rather than hinder each other.

In particular, the 1992 legislation which created the Economic Development Partnership requires extensive strategic planning and coordination in the field of economic development. Tourism Development arguably is an important aspect of economic development, and should be a part of those planning efforts from the beginning. Steps might be taken to ensure that the tourism industry, and the state Tourism Cabinet, are fully represented in the economic development planning process.

Effective strategic planning is an ongoing process. In designing a planning process for tourism development, one would need to consider the scope of desired planning; how to open the process to public input and include local tourist agencies, private business, and citizens as participants; how to translate a plan into action; and how to alter the priorities as circumstances change.

ARTS AND HERITAGE TOURISM
Prepared by John Buckner, Ph.D.

Issue

Should the General Assembly develop legislation to mandate the promotion of arts and heritage tourism by the Tourism Cabinet?

Background

Tourism is an increasingly important sector of state economies throughout the nation. Last year, tourism contributed approximately $340 billion to the U.S. economy and, as a result, competition for tourists is particularly fierce between states. As with most states, in Kentucky the Tourism Cabinet attempts to attract tourists through four general methods. First, the Cabinet advertises Kentucky attractions in a wide variety of national and regional mediums. These advertisements typically showcase the most popular tourist attractions; put differently, they do not attempt to segment markets or target narrowly-construed niche markets. Secondly, the Tourism Cabinet leverages local tourism-related advertising by providing matching funds. These advertisements, however, are usually designed to showcase a locality's overall appeal to tourists. Thirdly, and related to the previous method, the Cabinet encourages regional cooperation by providing up to $65,000 per region for advertising if a region can raise $16,250 for tourism-related advertising. Finally, the Cabinet is engaged in an on-going public relations effort that is designed to obtain favorable coverage of the state's tourism appeal at no cost to the Cabinet. Such efforts might include obtaining favorable reviews by travel writers or luring movie companies to film in the state. Each of these approaches, however, is lacking in the ability to segment the overall tourism market so that marketing approaches can be better targeted toward more receptive audiences interested in specific products.

In regard to market segmentation analysis, much of the recent literature on arts tourism (e.g., art shows, music and drama festivals, and museums) and heritage tourism (e.g., historic preservation areas, museums, battlefields, historically notable buildings, genealogical resources) argues that these areas are frequently overlooked or underdeveloped by state tourism offices. The data suggest that states wanting to enhance their tourism revenues would do well to consider designing and marketing arts and heritage tourism programs, for three basic reasons.

First, tourist profiles show a growing trend toward families taking shorter but more frequent trips. Largely because of financial considerations, the traditional family vacation - a two week "tour" of distant states by automobile - is now the exception rather than the rule. Instead, more families are now taking shorter (three to four days) and more numerous trips to closer locations. One implication of this trend is that states which have a variety of tourist attractions can better hold this type of tourist.

Second, tourist profiles tend to find a greater number of persons looking for "meaning" in their lives. In the context of tourism, what this means is that trips centered around historical and cultural locations have experienced a growing popularity among younger age groups. For example, in a survey conducted by the National Trust for Historic Preservation, 40% of visitors to historic houses were between the ages of 21-35, with over 70% of the visitors being female - a decided shift from past demographic surveys.

Finally, visitor surveys and psychographic-demographic data demonstrate that arts and heritage tourists tend to be younger, better educated, and have higher median incomes than visitors to mainstream attractions. The data also suggest that arts and heritage tourists tend to have higher trip-related expenditures than other tourist subgroups. For this reason, if all other variables are held constant, states can be expected to witness a higher than average return-on-investment for advertising dollars directed toward arts and heritage tourists.

An enhanced programmatic approach toward arts and heritage tourism has been put into practice in a number of states. In Montgomery, Alabama, a city in which tourists spend approximately $300 million per year, African-American tourists have been heavily recruited since 1983, when the state published a brochure highlighting African-American heritage attractions. Since the program's inception, over 100,000 brochures have been sent across the nation and state tourism officials have worked to alert the press, tour agencies, and tour-bus companies to the city's black heritage attractions. According to city officials, for every $1 spent on promoting black heritage attractions, $25 is returned in direct, tourism-related expenditures, while the average for all other advertising promotions is $1/$16. For many experts in tourism, African-American tourism is the "sleeping giant" of the industry.

In Charleston, South Carolina, the Spoleto Festival, begun in 1977, now averages over 125 performances per year, with over thirty world premieres and twenty U.S. premieres. Yearly attendance regularly approaches 100,000 visitors, with over 37% coming from outside of South Carolina and Georgia. Surveys indicate that over 80% of festival visitors stay for four days or more, with approximately 30% staying for seven or more days. South Carolina's Department of Parks, Recreation and Tourism has calculated that the Spoleto Festival has a direct economic impact of almost $12,000,000 and an indirect economic impact of $46,000,000. Moreover, the department reported that 6% of visitors to the state who did *not* attend the festival cited it as a reason for taking their vacation in South Carolina. According to state tourism officials, the Spoleto Festival has increased the state's visibility as a travel destination.

Discussion

Proponents of arts and heritage tourism argue that states should develop appropriate programs on two counts. First, mainstream state tourism programs and marketing approaches are far too diluted to e effective, particularly in a time in which virtually all states are competing for tourism dollars. Instead, states would be better served in identifying and promoting their unique resources by targeting a greater percentage of their advertising dollars at specific niche markets, and by reaching out to tap underserved tourist subgroups.

Secondly, proponents argue that arts and heritage tourism are fast-growing markets that are largely overlooked by many states. In this context, proponents argue that states that begin immediately to develop and market arts and heritage programs will reap the greatest rewards.

Critics of this approach, however, contend that the front-end costs are too great and that the long-term results are difficult to project. Moreover, they argue that arts and heritage tourism must be seen as tangential to the overall mission of state tourism offices - this being the promotion of the state's general tourist appeal - and that arts and heritage tourism should be seen as niche markets, albeit viable. Finally, in an era of severely limited funding for state tourism offices, financial constraints largely preclude such offices from taking on new responsibilities. In this context, arts and heritage tourism, which typically has higher front-end costs and longer lead times than most other tourism products require, tends to be too expensive for most states to pursue effectively.

Should the General Assembly decide to mandate the development of arts and heritage tourism, there are two readily identifiable methods that are being used in other states that warrant consideration. First, to insure that the promotion of these areas is conducted in an on-going, continuous manner, several states have earmarked a specified percentage of a state's tourism budget for expenditure in arts and heritage tourism. Critics of this method argue that earmarking funds would serve to retard the ability of tourism officials to address optimally and flexibly the changing needs of state tourism. Proponents of this method argue that earmarking funds is the best way to insure continuity between administrations. The second method calls for incorporating into the mission statement of state tourism offices language that reflects a commitment by the state to developing and promoting arts and heritage tourism. Proponents of this method argue that it allows flexibility for state tourism offices while providing a clear direction for programmatic action. Critics, however, contend that mission statements are too easily ignored and usually fail to bind state tourism offices to the intent of a legislature.

TRANSPORTATION

LOSS OF DRIVER'S LICENSE FOLLOWING DRUG OFFENSE CONVICTION

Prepared by Kathy A. Campbell

Issue

Should the General Assembly adopt legislation to revoke the driving privilege of persons convicted of a drug offense, even if the offense did not involve the use of a motor vehicle?

Background

Section 333 of the federal "Department of Transportation and Related Agencies Appropriations Act of Fiscal Year 1991" requires states to enact legislation by October 1, 1993, to revoke the driving privilege of any person convicted of a drug offense. The offense does not have to involve a motor vehicle--any drug related-conviction requires the revocation of a person's driving privilege. Section 333 does permit states to be exempt from the mandate if they enact a binding resolution, signed by the Governor, that expresses the state's opposition to the law, and asserts that the state currently has adequate laws governing the conviction of drug offenses.

Discussion

Beginning in federal fiscal year 1994, any state that has not adopted a binding resolution or has not adopted legislation to revoke the driving privilege of persons convicted of drug offenses, will have ten percent of the state's annual share of federal highway funds withheld. The Federal Highway Administration has estimated that Kentucky will lose the following federal highway funds if the General Assembly does not enact legislation to comply with Section 333:

FEDERAL FISCAL YEAR	HIGHWAY DOLLARS WITHHELD
FY 1994 (Begins October 1, 1993)	$9.4 Million
FY 1995 (Begins October 1, 1994)	$9.6 Million
FY 1996 (Begins 10/1/95) and each year thereafter	$19.3 Million

A legislative proposal (Senate Bill 305) to mandate the revocation of drivers' licenses for drug-related convictions failed to pass during the 1992 Regular Session of the General Assembly. A review of compliance with the federal mandate by surrounding states follows:

Tennessee: In 1991 the state adopted a binding resolution (SIR 106) to exempt Tennessee from the federal mandate. The Federal Highway Administration objected to some of the language of SJR 106 as enacted, and the state is currently redrafting the resolution to comply with federal concerns.

Ohio: The legislature recently passed an omnibus crime bill that included the federal drug conviction mandate.

Indiana: The legislature has a bill pending to adopt the federal drug conviction mandate.

West Virginia: The legislature has not taken any action to address the federal mandate.

HEAVY VEHICLE USE TAX

Prepared by Jerry Deaton

Issue

Should the General Assembly adopt legislation to exempt semitractor trailers registered over 55,000 lbs from the vehicle usage tax?

Background

KRS 138.460 requires payment of a 6% use tax on every motor vehicle registered in Kentucky, except those exempted by KRS 138.470. In the case of trucks over 10,000 lbs. gross weight, the tax is levied upon 90% of the retail price of the vehicle. The income generated from this tax on vehicles registered at a weight over 55,000 lbs. (semitractor trailers) amounts to around five million dollars each year.

Discussion

During the 1992-93 Legislative Interim, the Subcommittee on Vehicle Regulation and Commercial Transportation heard testimony from numerous trucking firms based in Kentucky. These groups are concerned that trucking firms which operate primarily in Kentucky are forced to locate their main office in bordering states which do not collect a use tax. The Kentucky Motor Transport Association gave evidence of 23 companies with over 3,000 trucks that had relocated to other states. They stated their additional concern that the remaining few Kentucky companies may be forced to move to a border state in order to remain competitive.

Currently, Kentucky ranks forth in the amount of taxes collected on heavy trucks. In addition to the use tax, Kentucky is one of only two states east of the Mississippi that collects a third structure tax (Weight Distance). Of the states bordering Kentucky, Virginia is the only state that does not exempt large trucks from a use tax. As a result, trucking firms are choosing to relocate primarily in Tennessee, Indiana, and Ohio.

If the General Assembly should choose to exempt this class of vehicles from the use tax, the net loss to the road fund would be approximately $5,000,000.00 annually. KMTA and the Transportation Cabinet have discussed options such as an increase in the heavy fuels tax that would allow the exemption to take place with no loss to the road fund. On a more positive side, KMTA has suggested that the state tax base would eventually benefit from this exemption, due to additional trucking firms choosing to locate in Kentucky.