The sale, possession, use or transportation within Wisconsin by unauthorized persons of aerosol or nonpressurized spray devices intended for personal self-protection, which achieve their effectiveness by causing sufficient bodily discomfort to render a potential assailant harmless, is prohibited. 57 Atty. Gen. 10.

## CHAPTER 165.

### Department of Justice.

**165.015 History:** Stats. 1967 s. 14.53 (4), (5), (5a), (9), (10), (11); 1969 c. 259 s. 21; 1969 c. 276 ss. 47, 481; Stats. 1969 s. 165.015.

On examination of municipal bonds see notes to 67.02; on representation of the state in workmen's compensation cases see note to 102.62; and on restraining unauthorized transactions see notes to 268.02.

It is the duty of the attorney general to defend an action against the school land commissioners in their official capacity. Orton v. State, 12 W 510.

Where requested to do so by the governor it is the duty of the attorney general to assist in the prosecution of a criminal case in the trial court. Emery v. State, 101 W 627, 78 NW 145.

An action in the circuit court to enjoin the continuance of a public nuisance must be instituted by the proper law officer of the state, and that court has no power to authorize a private relator to act as such officer. State ex rel. Hartung v. Milwaukee, 102 W 509, 78 NW 756.

The policy which precludes a nonofficial attorney from appearing for the state in a criminal case, except by special appointment, does not apply to habeas corpus proceedings. He may appear on the side of the state by request of the proper officer, but not at public expense. State ex rel. Durner v. Huegin, 110 W 189, 85 NW 1046.

The attorney general can interfere on behalf of the state only when authorized by statute. State v. Milwaukee E. R. & L. Co. 136 W 179, 116 NW 900; State ex rel. Haven v. Sayle, 168 W 159, 169 NW 310.

The attorney general has no common-law powers or duties. He must find his authority in the statutes when he sues in the circuit court in the name of the state or in his official capacity. State v. Snyder, 172 W 415, 179 NW 579.

Where the pleadings and record do not show that the attorney general was authorized to prosecute a claim under 14.53, Stats. 1927, to recover a sum of money, the state may not counterclaim for the sum. Clas v. State, 196 W 430, 220 NW 185.

See note to 990.001, citing Union F. H. S. Dist. v. Union F. H. S. Dist. 216 W 102, 256 NW 788.

No conflict will arise in discharge of duties of the attorney general from his advising both the civil service commission and the secretary of state on questions relative to removal of a state employe. The civil service commission is not a court authorized to determine disputed questions of fact. 13 Atty. Gen. 175.

It is not the duty of the attorney general to examine proceedings preliminary to issuance of public utility mortgage bonds or certificates issued by municipalities under provisions of municipal law. 14 Atty. Gen. 499.

The attorney general should avoid advising unofficially with reference to matters administered by another department of the state. 20 Atty. Gen. 378.

The attorney general does not render opinions upon questions involved in litigation. 24 Atty. Gen. 115.

Requests for opinions of the attorney general made under 14.53 (4), Stats. 1949, should be confined to questions involving the state superintendent's powers and duties when a present necessity for action is combined with an ambiguity in the law requiring clarification by interpretation or construction. 39 Atty. Gen. 41.

**165.055 History:** 1857 c. 101; R. S. 1858 c. 10 s. 58; R. S. 1878 s. 162; 1887 c. 300; Ann. Stats. 1889 s. 162; 1897 c. 355; Stats. 1898 s. 162; 1907 c. 500; 1913 c. 627; 1913 c. 772 s. 6; 1913 c. 773 s. 91; 1917 c. 622 s. 48; Stats. 1917 s. 14.52; 1965 c. 279; 1969 c. 276 s. 43; Stats. 1969 s.165.055.

**165.065 History:** 1947 c. 421; Stats. 1947 s. 14.525; 1959 c. 599; 1965 c. 66 s. 8; 1969 c. 276 s. 43; Stats. 1969 s. 165.065.

**165.07 History:** 1969 c. 276 s. 485; Stats. 1969 s. 165.07.

**165.08 History:** 1923 c. 240; Stats. 1923 s. 14.531; 1965 c. 66 s. 9; 1969 c. 276 s. 48; Stats. 1969 s. 165.08.

**165.09 History:** 1959 c. 64; Stats. 1959 s. 14.53 (13); 1969 c. 276 s. 47; Stats. 1969 s. 165.09.

**165.10 History:** 1969 c. 384; Stats. 1969 s. 165.10.

**165.25 History:** Stats. 1967 s. 14.53 (1), (2), (3), (5m), (6), (8), (12); 1969 c. 158 s. 3; 1969 c. 252 s. 7; 1969 c. 276 ss. 46, 486, 487, 619 (1); Stats. 1969 s. 165.25.

Where the attorney general upon request of the state treasurer refuses to commence an action upon a bond given by a state depository, private counsel may be employed to prosecute the action in the name of the state. State v. Pederson, 135 W 31, 114 NW 828.

In an action on the bond of a state treasurer where it was alleged that certain creditors of a trust company have been injured by the wrongful surrender of securities by such treasurer, the state treasurer could request the attorney general to bring such an action or if he refused so to do, the creditors could bring an action themselves using the name of the state. State ex rel. Sheldon v. Dahl, 150 W 73, 135 NW 474.

In a mandamus action brought by the attorney general in his own name, in his official capacity, on behalf of the state, to compel the state treasurer to honor warrants for the payment of salary of the president of the University of Wisconsin, the failure to allege in the petition that the attorney general was duly authorized by the governor under 14.53 (1), Stats. 1939, to bring the action was a defect relating to a matter of pleading, not a matter of substantive law, and the defect was waived by the defendant's failure to raise the ques-

tion of the attorney general's authorization in the trial court in accordance with well-established rules of pleading, and in the circumstances the question is not before the supreme court on appeal. (State v. Snyder, 172 W 415, distinguished.) Martin v. Smith, 239 W 314, 1 NW (2d) 163.

14.53 (1), enacted by the legislature of 1849, contemporaneous with the adoption of the state constitution, and continued to the present day, is a constitutional interpretation which is conclusive, as against a contention that the constitutional function of the district attorney is such as to preclude prosecution of proceedings in trial courts by the attorney general. State v. Coubal, 248 W 247, 21 NW (2d) 381.

See note to sec. 3, art VI, citing State v. Woodington, 31 W (2d) 151, 167, 142 NW (2d) 810, 818.

The attorney general, although devoid of common-law or statutory power to prosecute or defend actions generally (except in the supreme court), is empowered under 14.53 (1), Stats. 1965, to do so in any court when requested by the governor or either branch of the legislature. State ex rel. Beck v. Duffy, 38 W (2d) 159, 156 NW (2d) 368.

It is the attorney general's duty to appear for the board of control, on direction of the governor, in opposition to the release of persons committed to the home for the feebleminded. 2 Atty. Gen. 689.

The attorney general does not prepare criminal complaints or informations for district attorneys. 3 Atty. Gen. 209.

What fees may be retained and what paid into a county treasury by the clerk of court, county judge, county clerk, register of deeds and register in probate is too broad a question to be answered in detail by the attorney general. 10 Atty. Gen. 1030.

Request of a district attorney for opinion of the attorney general as to construction of statutes relating to administration of subject matter committed by law to state agencies, as distinguished from county agencies, cannot properly be complied with. 12 Atty. Gen. 546.

The attorney general does not give opinions as to what results will follow from a future violation of law. 13 Atty. Gen. 139.

The attorney general should not advise a district attorney that an offense will not be committed upon a statement of facts in which dairy and food laws are involved. 13 Atty. Gen. 143.

The attorney general declines to advise a district attorney in regard to election of town supervisors. 13 Atty. Gen. 251.

The attorney general is authorized to advise a district attorney only on matters pertaining to his office. 13 Atty. Gen. 568.

An action by the attorney general on request of the governor may be brought for damages for loss of fish caused by failure of a power company to operate its dam properly. 18 Atty. Gen. 653.

A county judge acts in a judicial capacity under ch. 142, in passing upon applications for hospitalization of needy persons, and hence neither the district attorney nor the attorney general is his official advisor. 20 Atty. Gen. 937.

**165.50 History:** 1969 c. 276 s. 489; Stats. 1969 s. 165.50.

**165.51 History:** 1933 c. 487 s. 4; Stats. 1933 s. 200.03 (11); 1959 c. 659 s. 79; 1969 c. 276 s. 517; Stats. 1969 s. 165.51.

**165.55 History:** Stats. 1967 ss. 200.19 (1), (2), (4), 200.20 (1), (1m), (2), (3), 200.21 (1), (2), (3), 200.22, 200.23, 200.24, 200.25; 1969 c. 87 s. 32; 1969 c. 276 ss. 490, 521, 522, 523, 524m, 525, 526, 527, 528; 1969 c. 392 s. 58; Stats. 1969 s. 165.55.

The state fire marshal is under no more obligation to inform a witness of his privilege as respects self-accusation than is a coroner or examining magistrate; and the mere fact that the statute appeared to empower him to punish for contempt makes no difference if no claim of privilege was made and no coercion was used. State v. Lloyd, 152 W 24, 139 NW 514.

Reports to the state fire marshal by investigators into origin of fires are not open to public inspection. State ex rel. Spencer v. Freedy, 198 W 388, 223 NW 861.

A deputy state fire marshal, examining accused under oath, was not bound to advise him as to the constitutional right to refuse answers. Rohlfs v. State, 202 W 54, 231 NW 266.

A book used by a deputy state fire marshal in making notes of fire investigations is privileged and cannot be subpoenaed in an action on a fire policy. Such privilege cannot be waived by the deputy but only by the state fire marshal. Gilbertson v. State, 205 W 168, 236 NW 539.

The state fire marshal or his deputy may not detain a witness in custody and confine him for the purpose of preventing him from communicating with others. Geldon v. Finnegan, 213 W 539, 252 NW 369.

All information and physical evidence obtained by the state fire marshal and his deputies in investigating fires is privileged from disclosure in civil cases. The state fire marshal is the only one authorized to waive the privilege. When he or his deputies are subpoenaed they must respond by appearing in court, and the trial court should conduct a preliminary examination to determine whether the privilege has been waived in whole or in part. The state fire marshal should waive the privilege whenever he can safely do so in order to prevent injustice to private litigants. The privilege does not apply when evidence is needed by the state in criminal prosecution. 40 Atty. Gen. 34.

The U.S. supreme court decision in Jencks v. United States, 353 US 57, modified by the act of Congress creating 18 U.S.C., sec. 3500, is a rule of federal procedure, is not binding on state courts and does not affect the statutory privilege of the state fire marshal pursuant to 200.21 (2). 46 Atty. Gen. 309.

**165.58 History:** 1969 c. 276 s. 491; Stats. 1969 s. 165.58.

**165.59 History:** 1957 c. 555; Stats. 1957 s. 200.15 (2) (d); 1969 c. 276 s. 519; Stats. 1969 s. 165.59.

**165.60 History:** 1945 c. 374; Stats. 1945 s.

14.426; 1949 c. 17 s. 1; Stats. 1949 s. 73.035; 1951 c. 400; 1953 c. 424, 631; 1955 c. 696 s. 17A; 1969 c. 276 s. 338; Stats. 1969 s. 165.60.

**165.70 History:** 1963 c. 319; Stats. 1963 s. 14.526; 1965 c. 571; 1969 c. 141; 1969 c. 154 s. 362b; 1969 c. 252 ss. 8, 37; 1969 c. 276 s. 44; 1969 c. 384; 1969 c. 424 s. 26; Stats. 1969 s. 165.70.

By virtue of 14.526 (1), Stats. 1963, the attorney general has a legitimate interest in investigating complaints of criminal conduct if, in his opinion, the investigation is warranted. State v. Woodington, 31 W (2d) 151, 142 NW (2d) 810, 143 NW (2d) 753.

**165.75 History:** 1947 c. 509; 1947 c. 614 s. 27; Stats. 1947 s. 165.01 (1), (2), (3); 1951 c. 696; 1955 c. 204 s. 67; 1957 c. 465; 1967 c. 291 s. 14; 1969 c. 234 ss. 1, 7 (1), (2); 1969 c. 276 ss. 476, 493; 1969 c. 466 ss. 7, 11 (1), (2); Stats. 1969 s. 165.75.

The state crime laboratory board is not authorized to establish an investigative unit as a part of the laboratory's functions. 45 Atty. Gen. 41.

**165.76 History:** 1947 c. 509; Stats. 1947 s. 165.01 (6), (7); 1949 c. 405; 1955 c. 204 s. 68; Stats. 1955 s. 165.01 (6), (7), (8); 1957 c. 465, 672; 1959 c. 454, 659; 1963 c. 224; 1965 c. 163; 1967 c. 43; 1967 c. 291 s. 14; 1969 c. 234 s. 2; 1969 c. 276 s. 478; 1969 c. 466 s. 8; Stats. 1969 s. 165.76.

On charge back to counties for work done by the state crime laboratory as affected by ch. 454, Laws 1959, see 48 Atty. Gen. 271.

**165.78 History:** 1947 c. 509; Stats. 1947 s. 165.03; 1961 c. 272; 1969 c. 234 s. 7 (3); 1969 c. 276 s. 483; Stats. 1969 s. 165.78.

**165.79 History:** 1947 c. 509; Stats. 1947 s. 165.04; 1951 c. 319 s. 215; 1951 c. 696; 1961 c. 298; 1969 c. 234; 1969 c. 255 ss. 32, 64; 1969 c. 276 s. 484; 1969 c. 392 ss. 57w, 59; 1969 c. 466; Stats. 1969 s. 165.79.

**165.80 History:** 1947 c. 509; Stats. 1947 s. 165.05; 1969 c. 276 s. 484; Stats. 1969 s. 165.80.

**165.81 History:** 1951 c. 696; Stats. 1951 s. 165.06; 1969 c. 276 s. 484; Stats. 1969 s. 165.81.

**165.83 History:** 1969 c. 234; 1969 c. 392 s. 60; Stats. 1969 s. 165.83.

**165.84 History:** 1969 c. 234; Stats. 1969 s. 165.84.

**165.85 History:** 1969 c. 466; Stats. 1969 s. 165.85.

**165.86 History:** 1969 c. 466; Stats. 1969 s. 165.86.

**165.87 History:** 1969 c. 466; Stats. 1969 s. 165.87.

## CHAPTER 167.

### Safeguards of Persons and Property.

**167.07 History:** 1913 c. 317; Stats. 1913 s. 1636b; 1923 c. 291 s. 3; Stats. 1923 s. 167.07; 1945 c. 33.

**167.10 History:** 1929 c. 357; Stats. 1929 s. 340.70; 1931 c. 386; 1947 c. 369; 1949 c. 522, 643; 1953 c. 334; 1955 c. 696 s. 75; Stats. 1955 s. 167.10; 1957 c. 172, 265; 1959 c. 168; 1959 c. 660 s. 56; 1959 c. 664; 1969 c. 274.

**Revisor's Note, 1959:** Ch. 168 (Bill 339-A.), laws of 1959, authorizes agricultural producers to obtain a permit to use fireworks to protect crops from predatory birds and animals. Unless 167.10 (4) is amended as shown above, such producers could not buy the fireworks from a Wisconsin seller, nor could the seller sell to him. [Bill 719-S]

In granting a permit under 167.10 (2) for a display of fireworks, the mayor of a city acted as an arm of the state pursuant to a power granted to him by the state to carry out its public policy declared by the statute, and he did not act as an agent of the city, and hence the city is not liable for damages sustained through a fire caused by explosion of the fireworks. Flynn v. Kaukauna, 241 W 163, 5 NW (2d) 754.

A sale of Smith's automatic machine gun and Smith's rapid fire machine gun does not violate 340.70 (2), Stats. 1931. 21 Atty. Gen. 434.

**167.11 History:** 1963 c. 211; Stats. 1963 s. 167.11; 1969 c. 276 s. 584 (1) (b).

**167.12 History:** 1905 c. 296 s. 1; Supl. 1906 s. 1636—131; 1909 c. 373; 1911 c. 466 s. 1; 1923 c. 291 s. 3; Stats. 1923 s. 167.12.

The seller is not liable for an injury to an employe of the purchaser if the machine, when sold, was equipped as required by law. Deruso v. International H. Co. 157 W 32, 145 NW 771.

A manufacturer's failure to furnish a sufficient safety device was not the proximate cause of injury where the guard was not on the machine at the time of the accident. Elder v. Algoma F. & M. Co. 200 W 471, 229 NW 64.

Where the plaintiff, a farm hand, was sent by the defendant, his employer, to a neighboring farm to do work in exchange for work previously done for the defendant by the neighboring farmer, and was injured while feeding a corn shredder on the neighboring farm at the direction of the neighboring farmer, it was the neighbor who was "using" and "operating" the shredder when the plaintiff was injured, and hence the defendant was absolved from liability for the plaintiff's injuries. Redman v. Hobart, 248 W 508, 22 NW (2d) 532.

167.12 is inapplicable where, as here, a driven machine is involved which feeds itself by its own power as it cuts and proceeds against the stalks while the operator sits on the seat of the tractor and operates the machine by a system of levers. Frei v. Frei, 263 W 430, 57 NW (2d) 731.

167.12 has no application to a tractor-drawn corn picker. Haile v. Ellis, 5 W (2d) 221, 92 NW (2d) 863, 93 NW (2d) 857.

**167.13 History:** 1909 c. 373; Stats. 1911 s. 1636—131m; 1913 c. 773 s. 47; 1923 c. 291 s. 3; Stats. 1923 s. 167.13.

A complaint of a farm hand, suing his employer for injuries sustained in feeding a corn shredder, and alleging that no competent person was solely in charge to oversee and attend