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L8056: Seminar on Multistate Litigation and the Role of the Attorney General

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Part I. Introduction

There is a small, hypothetical Midwestern state on the border of Canada, known as East Dakota. East Dakota, like most states, has a traditional constitutional system where the citizens elect the legislature in districts, and have separate statewide elections for the Governor and the Attorney General. The Governor of East Dakota then appoints the members of the various state agencies, ranging from the Commissioner of Insurance to the head of the East Dakota Board of Pharmacy.

Like many states in this country, East Dakota is facing a budget shortfall. The downturn in the economy has left the state with a sizable debt. Adding to the problem, the state’s Medicaid costs, driven up by a weakened agriculture market, are rising. With tax increases not a politically viable option for the current Governor, he decides on a remarkable, but controversial, cost cutting solution. East Dakota will now import drugs from Canada.

The citizens support the idea, but the head of the Board of Pharmacy is outraged, having not been even informed of the plan before it being announced. “Reimportation

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1 State Attorneys General are elected by the citizens in forty-three states. In five others, including New Hampshire, they are appointed by the Governor. Maine’s attorney general is elected by the legislature, and Tennessee’s attorney general is appointed by the state supreme court. See Jason Lynch, Federalism, Separation of Powers, and the Role of the State Attorneys General in Multistate Litigation, 101 Colum. L. Rev. 1998, 2001 (2001).

2 In some states, such as New Hampshire, the board of pharmacy is appointed for terms of different lengths than the Governor. See http://www.state.nh.us/pharmacy/board.html (last visited December 19, 2003).

3 Such lack of communication with the Pharmacy Board is not farfetched. This was the scenario when New Hampshire Governor Craig Benson designed a plan to import Canadian pharmaceuticals. See also “Governor Announces Prescription Drug Plan: Provides Web Access to Canadian Pharmacies”, available at http://www.state.nh.us/governor/pr12_10_03prescription.html (last visited December 19, 2003).
of Canadian drugs is illegal, not to mention dangerous,” the angry agency head states to the press.  

The Attorney General now faces a serious problem. He may not always agree with the Governor, but as the state’s lawyer, he has an ethical duty to represent him. However, he also represents the Board of Pharmacy, who clearly believes such an action to be a violation of state law. Furthermore, the Attorney General has the obligation of enforcing state law, and if the Governor’s actions do indeed break the law, the legislature would expect him to take action.

To add to the conflicting positions of the Governor, the Board of Pharmacy, and the legislature, the Attorney General also has his own interest to consider. The Attorney General of East Dakota, the embodiment of the state’s sovereign legal power, has the additional responsibility of using his broad standing to litigate in the interest of the state’s citizenry. Finally, the Attorney General took an oath to uphold federal law, and federal law clearly forbids drug re-importation. What is an Attorney General to do? More importantly, why does the Attorney General have the power to draw up one legal strategy for all these competing interests, particularly when that legal strategy may have the practical result of defining the state’s ability to procure pharmaceuticals from Canada?

Situations like that in East Dakota are happening with increasing frequency. Illinois, Minnesota, West Virginia, New Hampshire, Michigan, Vermont, Maine, and

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5 This obligation, and the power that is derived from it, is called parens patriae. See generally Michael Debow, Symposium: Tort Liability, the Structural Constitution, and the States: Panel One: State Attorney General Litigation: Regulation Through Litigation And The Separation Of Powers: The State Tobacco Litigation And The Separation Of Powers In State Governments: Repairing The Damage, 31 Seton Hall L. Rev 531 (2001); Louisiana Attorney General Richard Ieyoub and Theodore Eisenberg, Class Actions in the
Iowa, as well as municipalities in Massachusetts, have all began exploring ways to utilize the lower cost of pharmaceuticals in Canada. The Food and Drug Administration [hereinafter F.D.A.] has declared such drugs unsafe and has refused to make legally permissible the actions of state and local governments. On the other hand, the F.D.A. does not seem to be enforcing the law against public actors in the court. Some pharmacy boards, such as in Illinois, have been brought on board, but others have not. Whether or not such re-importation policies violate state and/or federal law, it is up to state Attorneys General in this case to determine the legal policy the state will take in consideration of the various policies in place. Silence from the federal government gives the state Attorney General almost complete legal authority to make a decision that could ultimately decide the matter one way or another.

Part II of this paper will provide a summary of the law’s broad granting of power to state Attorneys General to determine state legal policy, as well as the history and philosophy behind the law. Part III will explain the various options and abilities of the state Attorney General to deal with conflicts between his ethical obligations. Part IV will examine the limits of the power of a state Attorney General in directing legal policy, and explain what abilities state actors have to develop their own legal strategies against the wishes of the state Attorney General. Part V will describe the powers of a state Attorney General to protect or promote state policies that conflict with the federal government.

Gulf Symposium: State Attorneys General, the Tobacco Litigation, and the Doctrine of Parens Patriae, 74 TUL. L. REV. 1859.


8 Rowland, supra.
Finally, Part VI will conclude the paper by going back to the issue of reimportation of Canadian pharmaceuticals and explaining how a state Attorney General can play such a vital role in what appears to be an issue of international trade.

Part II. The Powers of the State Attorney General

“[T]he straw man is the old high school civics class notion that it is the Legislature where policy is made and that the executive branch, whether the governor or in this case the Attorney General, merely executes that policy or… enforces the law. All of us know that in reality that’s not true….We do not simply defend law suits that are filed against the state; We do not simply answer requests for opinions; we do not simply initiate legal actions when we are requested to do so by other state officials that we serve.

I want to suggest to you we are policy makers. The law is after all policy. The law is a series of value judgments and principles, and when we respond for instance to a request for an opinion, we are making policy. Even in defending actions against our states, we are often policy makers, at least to the extent that we set priorities for which of those defenses are most important to us, who we assign in our offices to handle those various cases, and what involvement we have ourselves in that litigation."

- Former Connecticut Attorney General Joseph Lieberman

As the above quotation indicates, it is difficult at first to understand the full scope of the role of the state Attorneys General. Even those well versed in the law may restrict their view of the Attorney General to their understanding of the traditional ethics of the attorney-client relationship. However, the Attorney General’s duties vis a vis his state

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9 Id.
10 See fn 3, supra.
clients are a different matter than the duties of representation for a private lawyer, a nongovernmental public interest lawyer, or even a government lawyer whose client is an agency.

Thus, since the powers and duties of an Attorney General are not the same as any other lawyer, it is important to understand the scope of his position. At the common law, the Attorney General’s powers and duties revolve around five principles. The first principle is that the Attorney General has the duty to appear for and to defend the state and state agencies. The second is that the Attorney General retains control over all litigation, including appeals. The third is that the Attorney General has the right to intervene in legal proceedings on behalf of the public interest. The fourth is that the Attorney General has the power to decide state legal policy. The final principle is that the Attorney General has the authority to prosecute criminal activity absent any express legislative restriction.

These common law principles are generally construed fairly broadly. For instance, at common law Attorneys General have the ability to initiate action on behalf of the citizenry without authorization of a state agency. They have the power to appeal a

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13 Tierney Article, id. at 9.
15 Id.
16 Id.
17 Id. at 38.
18 Id.
19 Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 274 (5th Cir. 1976).
case against the wishes of their state clients.\textsuperscript{20} They have exclusive authority to represent state clients\textsuperscript{21} and otherwise control the direction of cases,\textsuperscript{22} although this may be abridged by statute to allow some state officers to require the attorney general to initiate an action.\textsuperscript{23} Furthermore, as agents of their state constitutions, they may sue state agencies by challenging the constitutionality of a statute.\textsuperscript{24} In other words, Attorneys General have the broad power to dictate when and how the state institutes legal actions.\textsuperscript{25}

The history of the state Attorney General to enforce broad action dates back to pre-revolutionary British law.\textsuperscript{26} In England, only the King’s attorney could obtain standing in the name of the sovereign, unless there was explicit authorization otherwise.\textsuperscript{27} Furthermore, the King’s attorney was the de facto legal advisor to the crown.\textsuperscript{28}

In the United States, the position of Attorney General predates the Constitution by over 140 years, to 1643 in Virginia.\textsuperscript{29} Colonial Attorneys General enjoyed, at least legally, the same rights as King’s Attorneys, including the standing to bring both civil and criminal suits.\textsuperscript{30} In Pennsylvania, colonial Attorneys General even had standing

\begin{itemize}
\item \textsuperscript{20} Feeney v. Commonwealth, 373 Mass. 359, 367-68 (1977); State ex rel. Igoe v. Bradford, 611 S.W.2d 343 (Mo. Ct. App. 1980).
\item \textsuperscript{22} Battle v. Anderson, 708 F.2d 1523, 1529 (10th Cir. 1983) “[T]he Oklahoma Attorney General represents the defendants herein and that his views must prevail when a conflict with Department's counsel surfaces.” See also State ex rel. Derryberry v. Kerr-McGee Corp., 516 P.2d 813 (Oklah. 1973).
\item \textsuperscript{23} Wis. Stat. § 14.11, “The governor....may require the attorney general to institute and prosecute any proper action or proceeding thereof.”
\item \textsuperscript{24} Ross at 45. See People ex rel. Salazar v. Davidson, 2003 Colo. LEXIS 941.
\item \textsuperscript{25} Lyons v. Ryan, 780 N.e.2d 1098, 1104-05 (Ill. 2002)
\item \textsuperscript{26} The history of the King’s Attorney, the predecessor of the state Attorney General, dates back to 1461. See Ross at 30. See generally Roscoe Pound, THE SPIRIT OF THE COMMON LAW (1921); J.L.J. Edwards, THE LAW OFFICES OF THE CROWN (1964).
\item \textsuperscript{27} Scott Van Alstyne and Larry J. Roberts, The Powers of the Attorney General in Wisconsin, 1974 Wis. L. Rev. 721, 724. The idea is elaborated at pages 733-39.
\item \textsuperscript{28} Id. at 724 fn. 17.
\item \textsuperscript{29} Ross at 6.
\item \textsuperscript{30} Id.
\end{itemize}
under *parens patriae* principles, and were given the legal authority to stand against the Governor.\(^{31}\) In sum, colonial Attorney Generals were not just state legal officers but “served as a balance to the actions of the other three branches of government.”\(^{32}\)

After the development of federalism and the use of state constitutions, the role of the state Attorney General became codified by all 50 states, generally in the state constitution but sometimes by statute.\(^{33}\) The role of the state Attorney General was generally defined by the common law powers derived from the position of the King’s attorney in England,\(^{34}\) but some states did not provide the state Attorney General with common law powers, restricting them to specifically enumerated abilities.\(^{35}\)

By the 1950s, the state Attorney General developed the common law responsibility of not just representing state officials but also maintaining a general duty to the public at large.\(^{36}\) Although the Attorney General was part of the executive, it was not required to follow the legal position of the Governor. At the common law, the Attorney General was an independent voice within the executive branch.\(^{37}\) This position was articulated in the *Shevin* decision of the Fifth Circuit in 1976, which also affirmed the state’s authority to bring actions under common law as well as codified state law.\(^{38}\)

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\(^{31}\) *Id.* at 8. For a definition of *parens patriae*, see fn 5.

\(^{32}\) Tierney Article at 8.

\(^{33}\) Ross at 8-10.


\(^{35}\) *Id.* at 748-749, fn. 148. “The seven states to deny the Attorney General common law powers are Arizona, Indiana, Iowa, Louisiana, New Mexico, South Dakota, and Wisconsin.”


\(^{37}\) The State ex Rel. Lamb b. Cunningham, 83 Wis. 90 (1892).

\(^{38}\) *Supra* fn 19.
Today, the common law in most states give the Attorney General extensive control over if and how the state pursues litigation.\textsuperscript{39}

There are several reasons why the state Attorney General is given such broad control of the state’s legal policy. For one, most Attorneys General are elected by the people, and thus are empowered democratically by the choice of the people to affect legal policies.\textsuperscript{40} Another consideration is that the state Attorney General is best able to prioritize the use of limited state legal resources.\textsuperscript{41} Without giving the Attorney General the power to control the scope and size of their caseloads, the office may incur expenses far beyond what the state budget could allow. Third, and perhaps most importantly, the state Attorney General has an ability to balance all the various state interests, where an individual state official may have only the ability to consider a very narrow position.\textsuperscript{42}

As the Massachusetts’ Supreme Court stated about the Attorney General:

"He also has a common law duty to represent the public interest. . . . Thus, when an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency. To fail to do so would be an abdication of official responsibility." It would also enervate the Legislature's clearly articulated determination to allocate to the Attorney General complete responsibility for all the Commonwealth's legal business. To permit the Commission and the Personnel Administrator, who represent a specialized branch of the public interest, to dictate a course of conduct to the Attorney General would effectively prevent the Attorney General from establishing and sustaining a uniform and consistent legal policy for the Commonwealth.\textsuperscript{43}

\textsuperscript{39} See Feeney, supra. See also State ex rel. Allain v. Mississippi Pub. Serv. Comm’n, 418 So. 2d 779 (Miss. 1982).
\textsuperscript{40} Comments of former Texas Attorney General Jim Mattox, NAAG meeting, at 23-24.
\textsuperscript{41} Comments of former New York Attorney General Bob Abrams, Id. at 29-30. See also Amicus Curiae brief of Georgia Attorney General Thurbert E. Baker, South Dakota Attorney General Lawrence E. Long, et. al., in support of respondent in Salazar, supra.
\textsuperscript{42} Id. See also Feeney, supra.
\textsuperscript{43} Feeney, id. at 365-66 (citations omitted).
Thus, absent any restrictions, the state Attorney General is given broad discretion in enforcing the legal rights of both the state and the people as a whole under the common law. The legal history of the United States has concentrated this power over time into the Attorney General’s office, in part because practical considerations require this type of consolidation. The result has made the state Attorneys General’s offices into such powerful actors that they have been referred to as “the fourth branch of government” in the balance of powers at the state level.44

Part III. Resolving Conflicts of Interest of the State Attorney General

On occasion, interests that are typically represented by the state Attorney General come into conflict with each other. In criminal cases, the Attorney General’s ability to control criminal prosecutions that he or she has the power to press, either at common law or through state statute, trumps any consideration of an accused state official’s relationship with the Attorney General’s office. However, the problem of client conflict in civil cases, although rare, is one that states have been required to consider. In particular, state legal systems have been forced to reconcile two major types of conflicts of interest in the Attorney General’s office.45 One is when two state officials that the Attorney General represents find themselves on opposite sides of a legal dispute. The

45 Ross divides conflicts into five types. However, for the general point of this article, I shall only discuss the first two she outlines. The remaining three conflict-types involve board representation, which is not of consideration in this article. See Ross at 45.
second is when the Attorney General on his or her own behalf, representing either his or her own office or the people of a state, enters into a legal dispute against a more traditional client.\textsuperscript{46}

Although an officer-officer dispute is the more common of the two, it is still rare. The importance of maintaining good relationships with other state actors has required cooperation as a means of good governance. However, on some occasions two state actors will come across in legal conflict either because they have conflicting statutory mandates or inconsistent policies. States have utilized several different strategies in dealing with such a situation when the Attorney General’s office is the legal representative of both parties. Many states allow for the Attorney General to simply represent both sides in the conflict.\textsuperscript{47} Internal barriers provide Assistant Attorney Generals representing specific clients a large level of independence.\textsuperscript{48} For the most part in these cases, state Attorneys General are still given the right to veto the legal advice or opinions of their clients or of the Assistant Attorneys General who represents them.\textsuperscript{49}

However, certain states prevent some of the overreaching implications of conflict of interest. In California, the court ruled that that an Attorney General’s powers are subject to the will of the Governor.\textsuperscript{50} Thus, the Governor could remove the state Attorney General from representing any executive agency, should a conflict of interest rise. Minnesota allows for the Attorney General to represent both sides of a conflict, but

\textsuperscript{46} Id.
\textsuperscript{47} Ross at 45-50; See Conn. Comm’n on Special Revenue v. Conn. Freedom of Information Comm’n, 387 A.2d 533 (Conn. 1978), EPA v. Pollution Control Bd., 372 N.E.2d 50 (Ill. 1977). See also A.B.A. Model Rule 1.10, which notes that “the rule of imputed disqualification of all members of a law firm does not apply to the Office of the Attorney General”.
\textsuperscript{48} Comments of James Tierney in interview (“Most offices of Attorneys General have adopted written guidelines outlining the ethical responsibilities of assistant attorneys general when they face conflicts between state agencies.”)
employs the traditional theories of agency to judge the application in individual cases.\textsuperscript{51} West Virginia has statutory rules requiring the Attorney General to provide legal representation to all clients with the same type of duties that “resemble those traditionally exercised by private attorneys for private clients.”\textsuperscript{52}

Assuming the state Attorney General is not disqualified or limited by the applicable state rules, he or she has several options in controlling the dispute. One possibility is to simply go ahead and litigate both sides. A second is to appoint outside counsel for one or both of the parties. Alternatively, a state Attorney General could mediate the dispute through his office, or, if both parties are under gubernatorial control, through the office of the Governor. Another option is to act as judge himself by issuing an advisory opinion that is binding on state agencies for all practical purposes. A final option is to control the litigation for the sake of public policy, perhaps to develop precedent under the law.\textsuperscript{53}

The second type of client conflict that may develop for a state Attorney General is when the Attorney General, through his own broad standing, tries to oppose a traditional state client.\textsuperscript{54} This type of conflict is exceedingly rare. The state Attorney General who would pursue such a lawsuit generally would do so under one of two theories. The first

\textsuperscript{49} See generally Feeney, supra. See also Ch 435, 1988 ACTS OF ASSBY., modifying VA. CODE §2.1-121.
\textsuperscript{50} People ex rel. Deukmejian v. Brown, 29 Cal.3d 150, 158 (1981).
\textsuperscript{51} Schmidt v. Independent School Dist. No. 1, 349 N.W.2d 563, 568 (Minn. App. 1984), quoting Matthews v. Eldridge, 424 U.S. 319, 333 (1976) “the fundamental requirements of due process is the opportunity to be heard at a meaningful time in a meaningful manner”; but see Richview Nursing Home v. Minnesota Dept’ of Pub. Welfare, 354 N.W.2d 445, 460 “As long as the decision-maker remains unbiased, due process is not offended. In contrast to Schmidt, the risk of bias here was not great.
\textsuperscript{52} Ross at 50-51.
\textsuperscript{53} Id. See also Ex Parte Weaver, 570 So.2d 675 (Ala. 1990). Note that controlling the legal proceedings for the purpose of creating precedent may create certain ethical questions about whether the interest of the client or the interest of furthering legal policy should be the paramount concern of the State Attorney General, but Feeney seems to represent the view that the Attorney General is the best determiner of the more important interest.
is that the state actor is violating the state’s laws and constitution. The second is as a representative of the people in a common law or statutory parens patriae suit. Such uses of power on fellow state actors are fairly controversial if not authorized by statute and past practice, and thus the prudent Attorney General will only do so over the most important controversies, such as the Colorado redistricting battle or a severe violation of the Social Security Act affecting half a million people. In this type of client conflict, the general rules stated earlier in this part apply generally. However, the nature of the state Attorney General’s broad power under the majority rule creates a problem. Because an Attorney General is acting on his or her own accord, he or she is by nature asserting a legal position that he or she views as valid on its own terms. Thus, the Attorney General, in the common case, will issue an advisory opinion, and then sue in court to enforce the opinion against the will of the agency. Although the right of the Attorney General to sue his traditional clients under state law is generally construed broadly unless a statutory exception as listed earlier in this part controls, the court will generally not allow the Attorney General to control the litigation unless safeguards protect the right of the defendant to be heard. It might be presumed when the Attorney General is standing for him or herself (or the state in general) in a case against a state

54 Ross at 45. See, e.g., Frohnmayer v. State Accident Ins. Fund, 294 Or. 570, 660 P.2d 1061
55 “Many state Attorneys General routinely appear before state agencies on behalf of consumers in the area of utility and insurance rate hearings. Virtually all Attorneys General prosecute administrative violations in front of boards that are represented on other matters by the Attorney General.” Interview with James Tierney.
57 See generally Ross at 45-50.
58 Interview with James Tierney.
officer, allowing the Attorney General to control the litigation on both sides would pose too great a risk of conflict.\textsuperscript{61}

Ultimately, the resulting system is designed to give state actors a minimum threshold of access to the court, but to balance that with a presumption that the state Attorney General has the power to resolve legal conflicts through his or her office. Absent other law, the Attorney General is the elected legal policymaker of the state, which comes with powerful legal and practical benefits. Thus, it is clear to see why there is a reluctance to remove that power from the Attorney General’s office even when it seems to upset traditional views of the attorney-client relationship. Considering the parties at interest here are state governments rather than private clients, this gives the Attorney General some power to make policy as well as legal strategy; however, considering the elected nature of the office of Attorney General in most states, this is actually a positive result. It allows the citizenry, who may not understand the more complex principles of modern jurisprudence, to select a lawyer for the state based on easy to understand outcomes.\textsuperscript{62}

Regardless, even though the state Attorney General is given such a broad range of powers, there are legal and practical limits to these powers. A state Attorney General may have the power to define the state’s legal power broadly, but there are a variety of tools applied by the courts to keep the Attorney General from unreasonably abusing their discretion.

\textsuperscript{60} Schmidt, \textit{supra} at 568; Superintendent of Ins., \textit{id}. But in State ex rel. McLeod v. McInnis, 295 S.E.2d 633 (S.C. 1982), the General Assembly was represented by an Assistant Attorney General despite the Attorney General’s action as plaintiff in challenging the constitutionality of a state law.

\textsuperscript{61} \textit{Id}. 
Part IV. The Limits of the Power of the State Attorney General

A state Attorney General’s powers, although broadly defined, may be limited by both legal and practical applications. Legal limits include both statutory and common law restrictions on the actions of an Attorney General as well as legal alternatives for state actors adversely affected by an attorney general’s legal position. Practical limits include non-judiciable ethical obligations of the state Attorney General, public perception of the power of the Attorney General, and the need for reciprocity of cooperation between the Attorney General and state actors in order to maintain effective public policy.

While an Attorney General has broad discretion in determining the legal policy of the state, that limit is not absolute. Already discussed is one of the fundamental limitations of the power of the Attorney General. There, most courts will clearly limit the power of the Attorney General to enter into litigation where he or she cannot faithfully represent the state client in any meaningful way.63 A state Attorney General’s power is also restricted in certain jurisdictions, either by providing the governor with veto power over legislation,64 by requiring the Attorney General to base an attack against a state official in state law or action on a competing, state-based claim,65 by wholesale exclusion of the Attorney General providing representation of both sides of a legal


\footnotetext{63}{Schmidt, supra.}

\footnotetext{64}{Deukmejian at 157-58, State ex rel. Haskell v. Houston, 21 Okla. 782 (1908) (distinguished in Garrett v. State, 113 Okla. 63 (1925) to create a similar scheme as to the California rule).}
dispute,\textsuperscript{66} by imposing traditional views of attorney-client relationships upon the office of the Attorney General,\textsuperscript{67} or by requiring by statute for the Attorney General to press certain claims at the behest of the Governor.\textsuperscript{68} However, these are all minority rules only applicable in a few states each.

Even without the protection of the minority rules, a state agency can take certain legal actions to protect it from adverse legal positions of the state Attorney General. For one, a state official who cannot persuade his own Attorney General to act can request another state’s Attorney General, or the federal government, to take action. Thus, when the head of the Board of Pharmacy of Arkansas was informed that the Attorney General believed a local online pharmacy distributing Canadian drugs was not violating a state law, he waited until the Oklahoma Attorney General as well as the federal government pursued courses of action that ultimate shut down the offending pharmacy.\textsuperscript{69} Another, perhaps less effective, course of action, is for the state agent to act on its own accord by sending out warning letters\textsuperscript{70} or using whatever quasi-judicial power it has to issue fines or discipline licensed professionals.\textsuperscript{71} Finally, a state agent could “go nuclear” by persuading the legislature to impose rules or limit funding in order to prevent the Attorney General’s actions.\textsuperscript{72} This is a real and severe threat, as the state Attorney General’s office is usually funded through both the legislature and through “billing” state

\textsuperscript{67} Motor Club of Iowa v. Dept. of Transp., 251 N.W.2d 510 (Iowa 1977).
\textsuperscript{68} C.R.S. § 20-1-102, \textit{See} Witcher v. District Court, etc., 190 Colo. 483 (1976).
\textsuperscript{69} Based on conversations with Arkansas board of Pharmacy. \textit{See also} Kirstan Conley, \textit{Drug Depot Offers Cheaper Reimports}, \textit{ARK. DEMOCRAT-GAZETTE}, March 9, 2003 at 21.
\textsuperscript{70} Misti Crane, \textit{More Opting to Buy Drugs from Canada}, \textit{COLUMBUS DISPATCH}, Sept, 17, 2003, at 1A; Jeff Swiatek, \textit{State is Examining Drug-Ordering Stores; Services: Which Facilitate Ordering Lower-Cost Meds from Canada, Get Warnings}, \textit{INDIANAPOLIS STAR}, Oct. 10, 2003, at 1C.
\textsuperscript{71} Tony Leys, \textit{Patrons Unlikely to Face Charges over Iowa Pharmacy’s Web Sales}, \textit{DES MOINES REGISTER}, Sept. 21, 2003, at 1A.
officials for work done. A rogue state Attorney General may soon find himself to be a rebel without a budget.

However, fights between state officials and the state Attorney General are rare, often mitigated or prevented outright by practical considerations. Even when an Attorney General holds vastly different beliefs than a Governor or appointed state agency heads, the Attorney General is unlikely to consistently pick battles with other state officials.\textsuperscript{73}

In five states, the Governor appoints the Attorney General, which in itself would considerably mute conflict between the executive powers of the state and the legislative role of the Attorney General.\textsuperscript{74} Even among the forty-five other states, an Attorney General’s political accountability to those who elected him or her requires him or her to attempt cooperation when practically possible. The public has an expectation that an Attorney General will use his or her discretion in an impartial and nonpartisan manner.\textsuperscript{75} A public face-off of political muscle between two state officials will generally get unfavorable press, particularly from the other side, which makes cooperation a more successful political strategy.\textsuperscript{77} Furthermore, cooperation leads to a greater chance for a result that all state officials, including the Attorney General him or herself, can present to their electorates.

\textsuperscript{72} See Aaron Snow, \textit{Multistate Rulemaking} (2003), at 17, fn. 76. On file with Author.

\textsuperscript{73} See Tierney Article at 15, fn. 52. See also NAAG meeting at 4, 13-14, 16.

\textsuperscript{74} Scott Matheson, Jr., \textit{Constitutional Status and Role of the State Attorney General}. 6 J. LAW & PUB. POL’Y 1, 28 (1993) “This arrangement would diminish the problems of constitutional stalemate, accountability, and divided loyalty”.

\textsuperscript{75} In Maine, the Attorney General is elected by the legislature; but they may be unwilling to re-elect an Attorney General who is politically embarrassing, and that Attorney General still may have to consider the results of his actions if he plans on running for an office elected by the people regardless.

\textsuperscript{76} Comments of former Indiana Attorney General Linley Pearson, NAAG Meeting, at 11-12.
Beyond simple political consideration are other reasons that prevent the state Attorney General from using his or her broad power without the cooperation of state officials. The Attorney General must deal with his or her state clients on a long-term relationship. Attorney Generals thus must consider the effects of their action on the present case on their ability to represent traditional clients on other matters. A state client that feels it has been “betrayed” by adverse action from the Attorney General’s office will be disinclined to fully cooperate in the future, making the job of serving that state actor a difficult task. The client can also try to negatively influence the budget of the Attorney General, either by lobbying the legislature or by declining to use the Attorney General’s office adequately on the traditional fee-for-service basis.

Even more than that, state Attorneys General are usually ethical and serious people. James Tierney described the most common practical test as former New York Attorney General Bob Abram’s “puke test”; that is, if the state official’s actions are acceptable enough that one can even plausibly be comfortable defending the client’s action, the Attorney General should faithfully defend the client’s actions. This means that only in the rare cases that either are so controversial an Attorney General cannot in good conscious support the state official’s actions (such as in a redistricting battle or a major civil rights issue), or when two state officials are at odds and reconciliation is

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77 Comments of former Michigan Attorney General Frank Kelley, id. at 2-4. See also Matheson at 19 “Political pressures and the threat of impeachment would likely prevent wholesale refusal to provide legal services”; also note the threat of legislative restrictions to state Attorneys General play here as well.
78 Kelley, id. at 4. For math aficionados, one could look at both the Attorney General and the State Client in a repeat-action strategy game, where the single-action Nash equilibrium may be uncooperative but the long term equilibrium is cooperative.
79 James Tierney stated that the puke test was that you defend the state action so long as doing so does not make you want to puke. You must assist your client to the best of your abilities, but that does not require violating rule 11 by making misrepresentations to the court. Interview with James Tierney (January 10, 2004).
80 Interview with James Tierney.
impossible, will an Attorney General find his or her office at odds with a state agency client in a non-criminal case.

As a serious attorney, an Attorney General will try to maintain a level of trust with his state clients even when he or she disagrees with the client’s actions. Although the attorney-client relationship is much different from one in the private sector, the thoughtful state Attorney General is not willing to abandon the principles of fair representation and will often try to remove even the slightest image of conflicts of interests if he or she can help it.81

Part V: The Role of the Attorney General When Conflicting with Federal Law

When a state Attorney General takes his oath of office, he not only vows to uphold state law but also the laws of the United States. However, sometimes state law, either those laws promulgated by other state officials or legal policy pushed by the state Attorney General him or herself, can conflict either directly or indirectly with federal policies. The Attorney General then has to make a decision as to how best to reconcile the schism between the two policies. An Attorney General, of course, can take no action. He also has some power to gain standing on the basis of upholding federal law, and he can even use the power of the office to contest the application of the federal policy against the state policy.

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81 “We gave him a choice of any lawyer on my staff or he could hire outside counsel and we would pay for his outside counsel,” former Mississippi Attorney General Ed Pittman, NAAG Meeting at 34.
If state Attorneys General decide to contest the state action as a violation of federal law, they first must achieve standing in the court. They can do this in three different ways at the common law. The first is to use their parens patriae powers to represent the citizens of the state.\footnote{Alfred L. Snapp & Son v. P.R., 458 U.S. 592 (1982). \textit{See generally} Ieyoub, \textit{supra}. Snapp v. Puerto Rico (citation)} A second is to use their position as legal advisor to try to get the state actors to amend the law, particularly by using advisory opinions.\footnote{Comments of Bob Abrams, NAAG Meeting at 30.} A third is to assist an independently brought claim by submitting amicus curiae.\footnote{Ross at 86, 91.} Through these three tools, Attorneys Generals will have very broad power to challenge state action when it conflicts with federal action if they so choose.

However, the ability of the state Attorney General to protect state action from federal preemption is somewhat limited. When the state action directly violates federal law, and the federal government decides to enjoin the state, the Attorney General’s abilities are limited to arguing the merits of the case.\footnote{\textit{See} Raich v. Ashcroft, U.S App. LEXIS 25317 (9th Cir. 2003), where California Attorney General’s office submitted an amicus curiae (successfully) arguing that F.D.A. regulation of medicinal marijuana was not proper under the Commerce Clause of the United States Constitution. Also it is worth noting that the state Attorney General is of course free to try and informally persuade the federal government from enforcing the federal law against the state.} As an alternative, the Attorney General or other state actors can act peripherally to undermine the state action. For instance, when Massachusetts tried to protect the labor rights of undocumented immigrants against the Immigration and Naturalization Service’s policy of deporting undocumented aliens who report labor rights violation, the Attorney General refused to divulge information relating to undocumented workers who filed complaints with his office.\footnote{John Hirsch, \textit{How State Attorneys General and Multistate Action Can Regulate Sweatshops and Prevent Violations of Worker’s Rights}, 20-22 (2002). On file with Author.} When such conflicts occur, the state often can appeal to their own interests in
protecting the public interest to prevent conflicting laws from eviscerating the state action. For instance, when the state of New York created a needle exchange program targeted towards heroin addicts at risk of HIV, the court enjoined police officers from making arrests at the point of exchange using the drug residue within the used needles. While cases where the federal and state law conflict directly, federal law trumps by necessity, but courts give great deferential to the presumption that both the state and federal laws are valid. Thus, even under a view of federalism that puts the bulk of regulation under the supervision of the federal government, the states are given wide latitude to institute their own regulations.

VI: The Effect of the Powers and Duties of the State Attorney General on Re-importation of Canadian Pharmaceuticals

The reason that state Attorneys General have such influence over the issue of Canadian pharmaceuticals stems from the role of the state as drug purchaser, as well as the state’s responsibility to represent the private interest of its people. States play an important role in the purchasing of drugs for their citizens. All states purchase drugs for employees under health care plans. In addition, twenty-six states have some form of drug purchasing plan to assist certain sectors of the population (usually age or income)

87 Roe v. City of New York, 232 F. Supp.2d 240 (S.D.N.Y. 2002), Doe v. Bridgeport 198 F.R.D. 325 (D. Conn. 2001). These were both cases where the enjoined prosecutors were acting under state law, but the court also used federal Constitutional principles protecting against self-incrimination. See id. at 253.
88 Gibbens v. Ogden, 22 U.S. 1 (1824).
89 Railroad Com. Of Texas v. Pullman Co., 312 U.S. 496 (1941)
90 Francis B. Palumbo, The Role of the State as a Drug Purchaser, 56 FOOD DRUG L.J. 267, 270-72 (2001).
91 Id. at 271-72.
92 Id. at 276-77.
with drug purchases. Finally, states also share a relationship with municipalities, who also purchase drugs for their own local government employees and for assistance programs that support local residents.

Beyond the direct purchasing interest of the state is the private interest of the state’s citizens. While the federal government also considers these people’s interest while developing federal legislation, the state also shares a protective interest in both the safety and economic well-being of their citizens. Thus, states may desire to take actions in order to make drug purchasing either cheaper or safer. This can be done either by strengthening prohibitions on re-importation of Canadian pharmaceuticals or by implementing plans to assist in re-importation. It is unsurprising that states which have taken hard lines against reimportation (such as Oklahoma) have not received much attention. From the public eye, as they are just enforcing the status quo. The states that have gone the other way garner more press. Furthermore, the budget shortfalls among the states have further encouraged stances that are more aggressive in order to lower overall drug costs. Some times this has been done with the support of a state’s pharmacy board, others times this has not.

With that in mind, states have taken actions on several fronts. As mentioned, several states have begun to consider plans to purchase their drugs from Canadian sellers. This is not the only action that has been taken. Maine has studied the

93 Id. at 271.
95 Fn. 5, supra.
96 See generally Ieyoub, supra.
97 John Goetz and Donald Lund, What the Law Allows, PHARMACEUTICAL EXECUTIVE, Aug. 1, 2000, at 76.
98 Fn. 6, supra.
100 Fn. 6, supra.
possibility of directing their board of pharmacy to regulate the safety of Canadian pharmacies. 101 Minnesota has begun to build a coalition to bring antitrust charges against GlaxoSmithKlein for restricting sales to Canada in a manner designed to prevent re-importation of Canadian drugs. 102 State Attorneys General have varied from state to state on their willingness to allow private storefronts selling re-imported drugs to operate inside the state. 103 Some Attorneys General are even facilitating the re-importation of Canadian drugs despite direct FDA disapproval. 104 At first glance, this would be shocking. As U.S. Senator John McCain of Arizona once stated about state Attorneys General, “Who in the hell do they think they are?” 105 However, what is ultimately going on here is no different from what is going on in securities fraud or antitrust: state Attorneys General are regulating in areas where the federal government has failed to act in an adequate manner. 106

Furthermore, despite the international aspect of the pharmaceutical question, this really is not much different from another key area where the states have regulated in an area that would traditionally be controlled by federal health concerns: state tobacco litigation. 107 There, the government had set forth a coherent system of regulation, involving minimum age regulations, restrictions on advertising, and label and warning standards. However, the system was wholly inadequate, particularly in terms of the

101 Conversations with Office of Maine Attorney General (Nov. 29th, 2003).
103 See Leys, supra (“Federal and state authorities say such charges are rarely pursued”). But see Conley, where the Oklahoma Attorney General sued for an injunction, and see Tony Coleman, Judge OKs Store’s Access to Canadian Drugs, CHARLESTON DAILY MAIL, Nov. 4, 2003 at P1C, where the state Attorney General sued for an injunction and lost against an online pharmacy.
104 Appleby, supra.
106 See Comments of Elliot Spitzer at Columbia Law School, Dec. 5, 2003 (Forthcoming); see generally Lynch, supra.
overall health costs, and the state, which had to pick up the costs of under-regulation, took independent action. With Canadian drugs, many states see the problem of government over-regulation and are taking actions to deal with the negative impact on the states not felt by the federal government.108

It is important to note that the F.D.A. regulates re-imported drugs due to concerns over safety rather than economic impact. Outside of Congress granting additional authority, safety regulation is the F.D.A’s only mandate.109 Thus, the state actions are not really a question of interfering in the federal government’s role as foreign trade regulator, but simply coming to a separate conclusion in terms of the safety of reimported drugs.110 Here, because of the history of using state pharmacy boards to complement the role of the F.D.A., it is difficult to say that field preemption should be read so strongly into the drug distribution network that it leaves the state no power to regulate as well.111 Ultimately, the danger of an abuse of power by the state Attorneys General is no larger here than in any of the other modern areas, such as antitrust, where states have begun to regulate through the state Attorney General's office.

Reimportation of pharmaceuticals is exactly the kind of place where state regulation is most effective. Here, there is a federal government whose regulation in the

107 Fn 62, supra.
108 Appleby, supra. “The government has staked out a position it cannot defend.” (Comments of private attorney Jim Czaban.
110 Warren Wolfe, Canada Pharmacies Worry About Supply: They Say they Can’t Handle a Big Rush of U.S. Orders, but Small-Scale Imports Probably Will Continue, STAR TRIBUNE, Dec. 22, 2003, at 1B. “I think we can do a better job of assuring safety of these [Canadian] drugs than the F.D.A. has been able to do with the domestic mail-order pharmacies.” (Comments of Minnesota Human Services Commissioner Kevin Goodno).
111 See Pullman, supra.
area is incomplete at best considering the lack of enforcement, and a variety of conflicting legal interests exist within the states.\textsuperscript{112}

The states may have the power to regulate, but that does not fully explain how the power gets concentrated in the hands of the states’ Attorneys General. That reason has to do with the power of the Attorney General to resolve legal conflicts between state actors.\textsuperscript{113} A state Attorney General’s responsibility is to develop a coherent legal strategy that represents the values of all his or her clients, including the public at large.\textsuperscript{114} He or she, as seen in the medicinal marijuana, undocumented worker, and needle exchange programs, does not need to look exclusively at federal policy to do so.\textsuperscript{115} Even in areas where a federal action has taken some initiative of regulation, the state is given a presumption of dual sovereignty under the federalist system delineated by \textit{Pullman}.\textsuperscript{116, 117}

When the Attorney General’s clients are all aligned, his discretion fails to become an issue. However, in the issue of Canadian drugs, where there are a variety of official and \textit{parens patriae} interests that must be weighed and balanced, and the conflict of laws require a judicial resolution, the state’s power to form policy has traditionally rested in the hands of state Attorneys General.\textsuperscript{118}

This is not to say that the state Attorney General himself can simply dictate the legal policy when it comes to Canadian pharmaceuticals. As mentioned, there are several practical considerations that require the Attorney General to protect the interests of all his clients, even those with whom he may disagree. State law may limit his or her power.

\textsuperscript{112} See Part I, \textit{supra}, as well as fn. 103, \textit{supra}.
\textsuperscript{113} See Part II, \textit{supra}.
\textsuperscript{114} \textit{Id}.
\textsuperscript{115} See Part V, \textit{supra}.
\textsuperscript{116} \textit{Id}.
\textsuperscript{117} \textit{Supra}, fn. 89.
Custom may provide those whose positions the Attorney General opposes a level of access to the courts. Practical considerations must be taken into account. The result is that the actions that the state Attorney General ultimately takes will be restrained and will likely represent the public view of the law in this instance.119

Part VII: Conclusion

The state Attorney General, “the fourth branch of government”, is the lawyer who ultimately represents the people of his state. The example of Canadian pharmaceuticals is simply the re-enforcement, and not the perversion, of this key role the Attorney General plays in the federalist system of checks and balances developed in the United States. In the Federalist system, the state is given broad power to implement and develop legal and regulatory systems that can have a broad impact on public policy. The state Attorney General, who has an important function in guiding the legal policy of the state, therefore develops a key role in a variety of public policy issues.

Such impact has already been felt in other areas of the law in which regulation and enforcement of current statutory and common law traditionally regulated at the federal level has been developed at the state level. Although generally the previous actions of state Attorneys General in guiding public policy have been in enforcing under-enforced statutory law and common law principles, the actions and powers of state Attorneys General in the pharmaceutical reimportation issue show that this is not the practical limit of the modern powers of state Attorneys General. Today, state Attorneys

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118 See Part III, supra.
General can and do use their common law and statutory powers and discretion to regulate at all levels of federal policy when there is a gap in either the federal law or its practical application. Such a result is not an illegal power grab by the Attorneys General but simply the practical result of the modern Federalist system of regulation combined with the unique role of the state Attorney General in creating legal policy for their state.

119 See Parts III and IV, supra.