MEMO TO ATTORNEYS GENERAL – ELECT

To: All Attorneys General-Elect
From: James E. Tierney, Esq., Attorney General of Maine (1980-1990) and Director of the National Attorneys General Program at Columbia Law School.
Re: Overview of the Powers and Duties of the Office of State Attorney General
Date: November 20, 2008

I. OFFICE OF THE STATE ATTORNEY GENERAL

1. History: The roots of the Office of State Attorney General go deep into the core of Anglo/American jurisprudence.


2. Selection: 43 state attorneys general and the Attorney General of Guam are elected statewide for four years terms with all being able to serve at least two terms. Five attorneys general (New Hampshire, New Jersey, Wyoming, Hawaii and Alaska) are appointed by the Governor as are the attorneys general of Puerto Rico, American Somoa, the Virgin Islands, the Northern Marianas. The Attorney General for the District of Columbia is appointed by the Mayor. The Attorney General of Maine is elected by a secret ballot of a Joint Session of the Legislature and serves a maximum of four two year terms. The Attorney General of Tennessee is selected by the Supreme Court of Tennessee and serves for eight years.

    Source: 1 AJS State Attorney General Sections 2-4, Marshall at 2451-2452.

3. Structure: The office of state attorney general is mentioned in virtually all state constitutions. The jurisdiction of the offices of state attorneys general varies significantly and is defined by statute, case law, common law and custom.


II. COMMON LAW POWERS OF THE OFFICE OF ATTORNEY GENERAL

In an absence of a federal or state statute to the contrary, most state attorneys general possess common law powers. This means that for many jurisdictions the precise powers and duties of an attorney general are not specifically defined by statute but rather evolve over time.


    See also: Shevin v. Exxon Corp., 526 Fed. Reporter 2d, 266-269 (5th Cir.).

III. CONTROL OF LITIGATION

In the absence of federal or state statute or case law to the contrary, the state attorney general has the legal ability to control state litigation. The primary client is the state as a whole and not the individuals holding particular positions. Because state agencies sometimes take conflicting positions, attorneys general are often exempt from some sections of the state rules of professional responsibility.


IV. OPINIONS

While almost all attorneys general have the authority to issue legal opinions, the frequency and the impact of those opinions vary among the states. Although not generally binding upon the courts, an Attorney General’s official opinion nonetheless has an important bearing on the construction and interpretation of a statute. An official opinion of the Attorney General is especially persuasive when subsequent legislative action appears to confirm the opinion.

*See generally:* Ross and Myers at 75-80, James E. Tierney, “Opinions” in “Pass It On - the Newsletter of the Public Lawyer Section of the ABA, October/November 1995”;


V. U.S. SUPREME COURT AND APPELLETTE PRACTICE/AMICUS CURIAE

The decisions of the United States Supreme Court and a state’s appellate courts have an extraordinary impact on the ability of attorneys general to enforce state laws and defend the conduct of government officials. Most attorneys general believe their truest legacy is their impact on appellate court decisions. For this reason, attorneys general devote significant resources to appellate practice.

According to the Rules of the United States Supreme Court, any state or territory through its attorney general is able to file an amicus brief with the Court as a matter of right and without consent of any party. This unique authority has resulted in attorneys general’s filing briefs - often in a coordinated and multistate manner - on a wide variety of issues. An amicus brief from a number of states urging the Court to grant review in a case tells the Court that a case is of nationwide importance, which is one principal criterion for granting certiorari.

Developing positions before the United States Supreme Courts and other federal appellate courts is so important that most attorneys general now have a State Solicitor (or a person with a different title who serves that role), whose responsibility to ensure high quality and consistency of positions before appellate courts as well as the amicus process.

*NAAG Supreme Court Counsel:* Dan Schweitzer
VI. MULTISTATE INITIATIVES

With the centralization of the economy and the increased efficiencies that cooperation among attorneys general produces, the last twenty years has seen the rise of multistate reports, investigations, litigation and settlements. Beginning in the areas of antitrust and consumer protection, these initiatives are now commonplace in other areas of attorney general jurisdiction.


For student papers analyzing many of these initiatives, see: “A.G. Library, National State Attorneys General Program, Columbia Law School;” available at http://www.stateag.org

For an outstanding analysis of how these cases work in practice, see: Sally Peacock, “How the Household Settlement Uncorked a Law Enforcement Bottleneck,” Fall 2003 (“A.G. Library”)

For most recent legal analysis of the authority of attorneys general to retain outside counsel, see: State of Rhode Island: Lead Industries Association, Inc, et. al., Rhode Island Supreme Court, July 1, 2008 (Section III).

VII. AREAS OF FUNCTIONAL RESPONSIBILITY

1. Antitrust: Virtually all states grant antitrust authority to state attorneys general. Furthermore, federal law gives explicit authority to all state attorneys general to enforce federal antitrust law. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, a 1976 Amendment to the Clayton Act, state attorneys general are able to represent natural persons as parens patriae and therefore recover damages.


NAAG Antitrust Counsel: Emily Myers.


NAAG Contact: Dennis Cuevas

3. Charitable Trusts: All but five state attorneys general are involved in the regulation of charitable trusts. While the jurisdiction varies, attorneys general generally represent the beneficiaries of charities when allegations arise that the trustees of charities are in violation of their fiduciary duty. Some states have extensive authority including supervising non-profit accounting and receiving annual reports.

4. Civil Rights: Civil Rights enforcement authority for state attorneys general varies widely. In twenty-six states, the attorney general has explicit statutory authority to enforce civil rights legislation in specific areas, including employment, housing, public accommodations, and lending. Seven other states have general statutory prohibitions against discrimination thereby authorizing protection of all legal rights otherwise created by statute or constitution. In nineteen states, the attorney general has no explicit independent authority in the area of civil rights although civil rights issues often arise when enforcing other laws, e.g. consumer protection, RICO or environmental laws.

Source: “Civil Rights Enforcement Authority of State Attorneys General: An Overview,” by the Wisconsin Department of Justice (1986).

NAAG Civil Rights contact: Andrea Hampton

5. Criminal Law: While all state attorneys general are perceived by the public as the state’s “chief law enforcement officer,” the reality is that criminal jurisdiction varies widely among the states. In some states (Alaska, Delaware and Rhode Island), the attorney general is the sole criminal prosecutor. In most states (Arizona, New Jersey, Maine, Iowa, Massachusetts), the attorney general has areas of concurrent and supervisory criminal jurisdiction with local prosecutors. Many states also have responsibilities in handling criminal appellate matters. Sixteen states have access to statewide grand juries and many have state RICO statutes. In a few states (Arkansas, Connecticut and Tennessee), attorneys general have virtually no criminal jurisdiction.


6. Environmental Law: Protection of the environment is an important component of the responsibilities of every attorney general. In all but a handful of states, the attorney general is charged with enforcing and prosecuting both civil and criminal violations of state environmental laws. In this capacity, the attorney general usually represents state regulatory agencies. In many states the attorney general also has independent authority to enforce state laws and to use the common law without the involvement or acquiescence of a state regulatory agency. Attorneys general also represent states and state agencies when sued by third parties challenging state laws on specific state administrative actions (such as the grant or denial of a permit). Attorneys general may also initiate or defend litigation under federal law. They often work with other Attorneys General to comment on federal legislative or regulatory proposals or appear as amicus curiae in cases of importance.


NAAG Contact: Barbara Cotter

7. Bankruptcy: Defendants in state enforcement actions frequently seek relief by filing bankruptcy. Moreover, the states collect many different forms of financial obligations. Thus, bankruptcy issues cut across most aspects of law enforcement ranging from collecting taxes, delinquent student loans, and child support tax liability, to prosecuting environmental and consumer protection violations, to suing on the state’s commercial contracts. Attorneys general have responded by developing in-house bankruptcy expertise and by occasional retention of outside bankruptcy counsel.


NAAG Bankruptcy Counsel: Karen Cordry

8. State Defensive Litigation: Much of the work of the Offices of the Attorneys General is taken up with prosecuting claims for the state’s citizens, but the offices are also charged with defending the state from litigation, ranging from suits filed by
prisoners to employment discrimination suits to school financing disputes. Such matters are of vital interest to the states, not only for the costs that may be imposed on the state’s taxpayers through such litigation, but also because of its potential impact on how the state carries out its legislative and administrative functions. Most Attorney General offices, accordingly, have created one or more special units to specialize in representing the state in such litigation and asserting the various substantive and procedural defenses available to the state. For the last three years, NAAG has conducted training sessions for those lawyers who specialize in defensive litigation.

NAAG Contact: Karen Cordry

9. Medicaid Fraud: The offices of 41 of the attorneys general contain their state’s Medicaid fraud units that are authorized to prosecute both criminal and civil cases arising from the Medicaid program. The National Association of Medicaid Fraud Control Units (NAMFCU) serves as a forum for the nationwide sharing of information concerning the problems of Medicaid fraud. It also improves the quality of Medicaid fraud investigations and prosecutions by conducting training programs. The Executive Director of the Association is housed at NAAG Headquarters in Washington, D.C.

Sources: Medicare-Medicaid Anti-Fraud and Abuse Amendments of 1977, Public Law 95-142; Ross and Myers at pp 321-344-308

NAAG Medicaid Fraud Contact: Barbara L. Zelner

10. Labor Law: Most attorneys general enforce their state wage and hour and prevailing wage laws.


11. Securities Law: While only five attorneys general (New York, New Jersey, Maryland, Delaware, South Carolina) have complete jurisdiction in the area of securities law, most attorneys general have the responsibility to represent the securities administrator or agency in enforcement actions.


See also: Bureau of Investor Protection and Securities, Office of the Attorney General of New York. North American Securities Administrators Association (NASAA) is an organization that is made up of all state securities administrators.