

NAAG Gazette

A Newsletter of the National Association of Attorneys General

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March 18, 2008

Message from the Executive Director



Jim McPherson

On March 10, I had the privilege of joining the National Association of Attorneys General staff as Executive Director. I am very excited and grateful for the opportunity to work with such a talented group of professionals who are dedicated to providing legal support to the Attorneys General and their staffs serving the people of their states, territories and district.

NAAG's Mission: "To facilitate interaction among Attorneys General as peers. To facilitate the enhanced performance of Attorneys General and their staffs. To foster an environment of cooperative leadership." Those are noble and attainable goals that the NAAG staff works very hard every day to capture.

NAAG employees work across a wide spectrum of subject matter areas to provide cutting-edge training and establish a forum for cooperation and mutual support. We are dedicated to meeting the needs of the Attorneys General and their staffs as they respond to the ever-increasing demands of their clients and constituents. The future holds countless opportunities and it is an honor and a privilege to serve as Executive Director of our association.

NAAG Hosts Annual Spring Meeting in Washington, D.C.

NAAG hosted its annual Spring Meeting, March 3-5, at the Fairmont Hotel in Washington, D.C. More than 40 Attorneys General from across the country attended, as well as representatives from the ranks of trade associations, law firms, federal and state government officials and staff from other interested agencies and associations.

As one of the Association's three national meetings held each year, the Spring Meeting allows Attorneys General to discuss a number of complex legal issues, including cybercrime, Internet safety for children, social networking websites, methamphetamine use, federal legislation and other critical legal areas of interest.

Attorneys General met with President Bush, U.S. Supreme Court Chief Justice John Roberts and U.S. Attorney General Michael Mukasey. They also met with several other key national figures, including U.S. Solicitor General Paul D. Clement and John Walters, director of the White House Office of National Drug Control Policy.



John Walters (far left) meets with Attorneys General



U.S. Solicitor General Paul D. Clement

ALSO IN THIS ISSUE

Recent Competition Advocacy by State Attorneys General	2
NAAG Employee Spotlight	3
When Granddad Goes Missing: The Silver Alert Program	4
Save the Date: Presidential Initiative on Energy	7
National Attorneys General Training and Research Institute (NAGTRI) Hosts Inaugural Appellate Practice Conference	6
NAAG Training Calendar	7
NAGTRI Training Calendar	8

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

EXECUTIVE DIRECTOR
JAMES MCPHERSON

DEPUTY DIRECTOR
CHRIS TOTH

NAAGAZETTE

The NAAGazette is published biweekly and is posted at www.naag.org. To subscribe or for more information, contact Leslie Kershaw at 202-326-6027 or via email at lnelson@naag.org.

EDITOR

ANGELITA PLEMMER
Communications Director

CONTRIBUTORS

ANDREA HAMPTON
Supreme Court & Civil Rights Project
Manager

JAMES MCPHERSON
Executive Director

JUDY MCKEE
End of Life Healthcare Project Coordinator
& Counsel

EMILY MYERS
Antitrust and Special Projects Counsel

DAN SCHWEITZER
Supreme Court Counsel

CREATIVE

LISA JETER
Web Programmer/Designer

PRODUCTION & CIRCULATION

LESLIE KERSHAW
Communications &
Special Projects Assistant

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Recent Competition Advocacy by State Attorneys General

EMILY MYERS, ANTITRUST COUNSEL



As enforcers of state and federal antitrust laws and as chief legal officers of their jurisdictions, Attorneys General have a strong interest in protecting and preserving competition. Competition advocacy is an important part of their antitrust authority. Multistate groups of Attorneys General have filed briefs in several recent proceedings.

Nine West FTC Petition — Twenty-seven states¹ filed a brief opposing a petition filed with the Federal Trade Commission by Nine West Footwear Group, a manufacturer of women's shoes. Nine West's petition sought an end to the injunctive relief provisions of a March 2000 settlement between Nine West and the FTC. The states urged the Commission to deny Nine West's petition.

The 2000 settlement resolved FTC claims that Nine West had engaged in retail price maintenance with certain dealers. The FTC settlement was entered at the same time as a settlement between Nine West and the Attorneys General of all 56 states and jurisdictions. The states obtained injunctive relief, the provisions of which have now expired, and \$34 million which was distributed *cy pres* to women's health, educational, vocational and safety programs.

Nine West filed a petition with the FTC seeking to modify its settlement with the FTC by eliminating all remaining injunctive provisions in the settlement. Nine West argued that the Supreme Court's decision in *Leegin v. PSKS, Inc.*, ___ U.S. ___, 127 S. Ct. 1205 (2007), would allow Nine West to "take actions to maintain retail prices." According to the petition, Nine West does not want to be prevented from "fixing, controlling or maintaining the retail price of women's footwear, as well as coercing or pressuring any dealer to maintain, adopt or adhere to any resale price."



The states argued that the Supreme Court's *Leegin* decision does not make resale price maintenance *per se* legal, but rather, subjects it to "rule of reason" analysis. In fact, the Court suggested that lower courts should develop "fair and efficient" tests to determine which restraints are anti-competitive. The states suggested that the appropriate "fair and efficient" test was articulated by the Commission, and affirmed by the D.C. Circuit, in *In re PolyGram Holding, Inc.*, 2003 WL 21770765 (F.T.C.), *aff'd*, 416

¹ New York, Alaska, Arkansas, Connecticut, Delaware, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, Washington and West Virginia.



Hedda Litwin is not your average computer geek. In fact, her speech, often peppered with words like botnet, zombie, pharming, comsec, phreaking, honeypot and spoofing, demonstrates an extraordinary understanding of computers and the dangers that confront children and adults each time they log on.

Since 2003, the New York city native has worked as NAAG's Cybercrime Counsel, introducing assistant attorneys general across the country to the dark side of computer use. To date, through a joint effort with the University of Mississippi School of Law, NAAG has trained 650 prosecutors and civil enforcement attorneys.

"Cybercrime is any crime that's facilitated by the use of a computer or electronic device," Hedda explained. "It's an important issue for Attorneys General because it affects all of their citizens."

When people shop online, they're vulnerable to cybercriminals. Children can unwittingly make themselves easy targets for online predators. GPS devices can be used to spy on people or stalk them in their daily lives. And even cell phones are becoming increasingly popular venues for spam.

"I see a lot more creative uses of the computer and other devices to commit crimes and we're seeing a lot more sophistication in the criminals than we used to see," Hedda said.

As an undergraduate at Vassar, Hedda planned on a career in broadcast journalism and had no idea that she would become a pioneer in the fight against cybercrime. Her first job out of college was working as an advisory systems engineer for the IBM Corporation. Initially hired by NAAG as the assistant health care enforcement counsel, she also worked under various grants focusing on crime victims' rights and violence against women.

Prior to NAAG, she worked for the U.S. Department of Justice Section on Disability Rights. But now, the University of Miami Law School graduate works daily with industry experts, federal agencies and Attorneys General offices to find new ways to defeat spam, stop online fraud and prevent the distribution of child pornography. Her project is also an integral part of the National Attorneys General Training and Research Institute (NAGTRI).

Hedda publishes a cybercrime e-newsletter, which features Attorneys General initiatives, case law, legislation and other news of interest. Other resources include a "how to" manual on establishing a cybercrime presence in Attorneys General offices; a national list of cybercrime experts who are available at any time to help law enforcement; and a manual on prosecuting digital evidence cases that will be available later this spring. In conjunction with NAAG, the University of Mississippi School of Law also published a special edition of their law review, which focused on fourth amendment issues related to cybercrime.

F.3d 29 (D.C. Cir. 2005). Under the *Polygram* test, a court asks whether the harm to consumers is obvious, in which case the restraint is deemed "inherently suspect." If so, then the defendant has the burden of providing a plausible and cognizable justification.

In this case, the determination by the states, in connection with their 2000 settlement, that consumers were overcharged by approximately \$45 million, makes the restraint "inherently suspect." The states argued that Nine West should therefore be required to prove that its vertical price fixing caused retailers to provide actual enhanced value or services; that the enhanced value or services increased demand for its shoes; and that the increased demand from that value or those services was greater than the decreased demand caused by the higher price that consumers paid. Even if Nine West had made such a showing, the Commission should still consider whether a less restrictive alternative could accomplish the same ends.

The Commission will consider Nine West's petition in the next several months.

Cipro Federal Circuit Appeal — Another multistate brief was filed by 38² states in support of appellants in *In re Ciprofloxacin Hydrochloride Antitrust Litigation*, an appeal to the Federal Circuit. The case involved allegations that defendants sought to exclude competition in the market for ciprofloxacin (an antibiotic) by extensive material misrepresentations to the Patent Office and use of the fraudulently obtained patent to bring baseless litigation. The district court dismissed Count V of the complaint, which alleged violations of state antitrust and consumer protection laws, on the grounds that federal patent law preempts state-law claims resting entirely on patent law and alleging conduct before the Patent Office. The lower court also suggested that the same claims should be dismissed for lack of standing, apparently applying federal law to determine standing. Each of these rulings would hurt state Attorneys General efforts to protect competition and recover damages for consumers and for the state.



The states' brief argued that the claims were state antitrust law claims, based upon the Supreme Court's decision in *Walker Process Equip. Co. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965). *Walker Process* claims, like those in the complaint, are predicated on allegations of fraud on the

patent office and sham litigation, but they do not challenge the patent itself. Instead, the plaintiff "seeks damages and equitable relief for the resulting harm to and overcharges in the ciprofloxacin market. The underlying fraud on the Patent Office and the sham litigation are merely vehicles by which that market was wrongfully monopolized."

²Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming

(Continued on page 4)

(Continued from page 3)

Turning to preemption, the states noted that there is no explicit preemption of state antitrust law by federal patent law, nor is there “field” preemption, since state antitrust law and federal patent law have preexisted from the inception of state antitrust laws. There is also no “conflict” preemption, which occurs when a party is unable to comply with both federal and state law requirements. In this case, federal patent law prohibits patent fraud, and state antitrust law prohibits anticompetitive monopolization of markets through patent fraud.

The states also argued that the district court had improperly limited remedies granted to state citizens under state law. “Preempting state antitrust laws that grant consumers a right to sue parties who perpetrate patent fraud and engage in sham litigation, deprives consumers injured as a result of these antitrust violations of remedies to recover overcharges expressly given them by their states.”

In dicta, the district court questioned “whether consumers may bring state-law monopolization claims against a monopolist that enforced a fraudulently-obtained patent to preserve its monopoly.” The states’ brief argued that the court was wrong on two counts: state law, not federal law, governs standing to sue on state antitrust law claims, and federal antitrust law, if correctly applied, would permit consumer standing in this case.

When Granddad Goes Missing: The Silver Alert Program



JUDY MCKEE, END OF LIFE HEALTH CARE PROJECT COORDINATOR AND COUNSEL

I’ll never forget the date – May 12, 2000. I had taken the day off from work at NAAG to finish all of the arrangements for our daughter’s wedding that was to take place in a week. The last fitting for our dresses; a final number to be given to the caterer; a check to be mailed to the florist; an appointment with our pastor; a start on the seating chart; final arrangements as to where all of the family members were going to stay. My husband and I were also looking forward to the bitter-sweet experience of watching our son’s final appearance that night as a pitcher for his high school baseball team.

And then came the telephone call from my mom. My dad, whose dementia – after having suffered a stroke some five years previously – was getting progressively worse, had somehow located the car keys that I had urged be carefully hidden. He was gone and so was the car.

“How long?” I asked.

“I don’t know,” sobbed my mom. “I heard him get up and then I fell back asleep.”

“Call the police,” I said. “I’ll be right over.”

A report on the Alzheimer’s Association’s website notes that nearly 60 percent of people with Alzheimer’s disease will wander; up to 70 percent of wanderers do so repeatedly. According to this report, research estimates that more than 127,000 critical wandering incidents occur each year.¹ Close to half of those citizens who are not found within 24 hours will become seriously injured or will die. A 2003 article in the *Journal of Advanced Nursing* described wandering as one of the most challenging behaviors to manage in folks with dementia.²



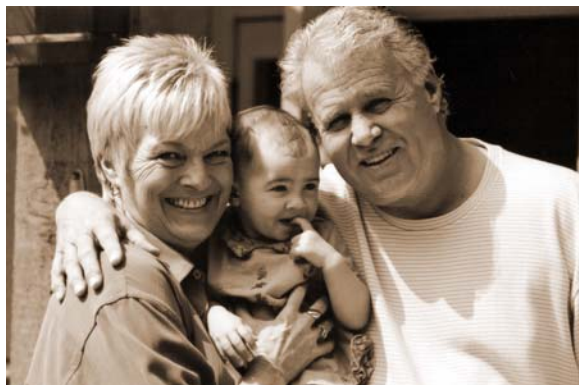
The Alzheimer’s Association offers and supports a Safe Return program, a nationwide registry and proactive search-and-locator service.³ This program has helped in the safe return of more than 8,000 people

¹Available at <http://www.alz.org/advocacy/2006program/5a.asp>.

²C.K. Lai and D.G. Arthur, “Wandering Behaviour in People with Dementia,” 44 *J. Adv. Nursing* 173–82 (2003).

³See http://alzheimers.about.com/od/givingsupport/a/safe_return.htm?p=1.

since 1993. Government funded, it operates 24/7 with a toll free crisis line. The program provides identification jewelry, wallet cards and clothing labels with a toll free 800 number on them. There is a registration fee of \$40.



But neither I nor my mother was aware of the program before we experienced that excruciating day of waiting and worrying. Even if I had known about Safe Return, it would have been difficult for me to convince our mom that she should sign my dad up for it since there had been no prior wandering issues. In fact, as I quickly learned after I arrived at my parents' house, my mom had not even changed where she placed the car keys. "I really didn't think that he would try to drive the car; it's been almost six years," she said, looking both guilty and defiant at the same time.

The local police came fairly quickly. They took information about the car and a picture of my dad and promised to send out information to the rest of the local police force. They would keep us informed. If he had not been found by the evening, they would put information out on the local radio and television stations. We were fortunate. For some local police, it is the policy that a person must be gone at least 24 hours before officials will act.

The hours inched by with excruciating slowness. My 90-year-old mother was devastated and sat in stony silence, refusing to eat or drink and silently weeping. My emotions wavered from love and compassion for her to anger that she hadn't taken my advice. I was tortured

with worry for both my dad's safety and for the safety of others on the road. When we had received no news after nearly three hours, I called the police contact and asked if the state police and the police from neighboring jurisdictions could be contacted. Unfortunately, however, my dad had disappeared seven years too early. There was then no way that local police could initiate a Virginia-wide alert for a wandering senior citizen.

Virginia has now remedied that situation. In the 2007 legislative session, the Commonwealth, on the urging of Attorney General Bob McDonnell, passed the Virginia Senior Alert Program⁴, which became active on July 1. The legislation established a mechanism to issue a state-wide alert when an over 60-year-old person with a cognitive impairment has been reported missing. The program uses a variety of methods to get information out concerning the missing person: the Emergency Network System, the Virginia Criminal Information Network; the Virginia Missing Person Information Clearinghouse; and even the public utilities' communication system.⁵ When coupled with North Carolina's Silver Alert system⁶, police officials from a two-state area can be on the alert for a missing senior citizen.⁷

A Silver Alert program was also signed into Texas law in 2007. According to one article, nearly 800 Texas senior citizens go missing from their homes and nursing facilities every year.⁸ The Texas legislation requires that the missing person be at least 65 and domiciled in Texas. Ohio, Pennsylvania and West Virginia are among the states considering passing Silver Alert statutes in this legislative session. Colorado's statute provides for a state-wide alert whenever a person with cognitive disabilities or a senior over the age of 60 is missing and it is determined that there is a credible threat to that person's well-being.⁹ Oklahoma's H.R. 1075 became effective on June 7, 2007. Once the Silver Alert is activated in Oklahoma, the system automatically gives other law enforcement agencies and the media descriptions of the missing person and where the person was last seen. Silver Alerts are also broadcast through the NOAA weather radio system. Michigan extended its Amber Alert program to include senior citizens in 2001 and Illinois' Silver Alert program was activated in 2006.¹⁰

With the Amber Alert system already active in each state, the addition of a "Silver" or "Senior" Alert easily utilizes processes already established. As is the case with abducted children, the earlier an alert can be posted, the more likely it is that the missing senior citizen will be found and be returned safely to his or her home. However, there is some concern that extending the Amber Alert system to seniors will vitiate the program. New York's governor vetoed legislation passed in 2005 citing that consideration.

⁴VA. CODE § 52-34.5

⁵For more information on the Virginia Senior Alert Program, visit <http://www.vasenioralert.com>.

⁶N.C. GEN. STAT. § 143B-499.8 (2007).

⁷One of the Virginia police officials I contacted while researching this article opined that the system should include anyone of any age with a cognitive impairment instead of being limited to those over 60.

⁸See <http://missingchildprevention.wordpress.com/2007/03/07/silver-alert-or-amber-alert>

⁹COLO. REV. STAT. § 24-33.5-415.8 (2007).

¹⁰20 Ill. Rev. Stat. § 2605/2605-375 (amended by 2007 HB 194).

(Continued on page 6)

(Continued from page 5)

As for my father, we were incredibly lucky. He was found, parked on the side of a busy highway, out of gas, three hours south of our home. Police took him to a local hospital; we were notified by telephone that he had been found after a tow truck driver located his wallet in the car. It had been an exceedingly long and difficult 11 hours. Hopefully, as states pass legislation similar to the Silver Alert statutes, other families will be spared the agony we experienced on that Friday in May and more seniors will be returned safely to their homes and loved ones.

SAVE THE DATE



Presidential Initiative On Energy

May 5-7, 2008
Coeur d'Alene Resort
Coeur d'Alene, Idaho

For information and registration,
contact: Paula Cotter, (202) 326-6250
pcotter@naag.org

NAGTRI Hosts Inaugural Appellate Practice Conference



The National Attorneys General Training & Research Institute (NAGTRI) launched its first training seminar

and inaugural Appellate Practice Conference March 5-6, at the Fairmont Hotel in Washington, D.C. More than 80 state attorneys from 38 states, the District of Columbia and the U.S. Virgin Islands attended the conference. The focus of the day-and-a-half meeting was to provide advice and techniques for improving the attendees' brief writing and oral advocacy skills. Presenters included current and former state solicitors general, appellate attorneys in the U.S. Department of Justice, state and federal court judges and private practitioners.

One of the highlights of the conference was a presentation of video clips from actual oral arguments in state supreme courts, which were used to show techniques that work and techniques that definitely don't work. Another highlight was a session that analyzed the writings of U.S. Supreme Court Chief Justice John Roberts (while in private practice) to show what makes an appellate brief effective. And still more lessons were taught by panels of experienced appellate lawyers providing their knowledge and insights, often using their past cases as concrete examples for the audience.

The mission of NAGTRI is to provide high quality, responsive, and innovative training to America's Assistant Attorneys General and to provide intellectually adept research on issues of concern and interest to the NAAG membership.

2008 National Association of Attorneys General Calendar

Southern Regional Meeting

March 19-20
Biloxi, MS
Contact: Nick Alexander
(202) 326-6259
nalexander@naag.org

MSA Issues Seminar

April 1-3
Denver, CO
Contact: Erjona Fatusha
(202) 326-6006
efatusha@naag.org

State Defensive Litigation

April 9-11
Savannah, GA
Contact: Karen Cordry
(202) 326-6025
kcordry@naag.org

NAAG Consumer Protection Seminar

April 27-30 (April 28 Open Day)
Washington, DC
Contact: Dennis Cuevas
(202) 326-6019
dcuevas@naag.org

Public Information Officers (PIO) Seminar

April 28-30
Seattle, WA
Contact: Angelita Plemmer
(202) 326-6047
aplemmer@naag.org

NAMFCU Global Case Training

April 29-May 1
Phoenix, AZ
Contact: Barbara Zelner
(202) 326-6035
bzelner@naag.org

Presidential Initiative On Energy

May 6-7
Coeur d'Alene Resort, Coeur
d'Alene, Idaho
Contact: Paula Cotter
(202) 326-6250
pcotter@naag.org

Chief Deputies Seminar

May 13-15
Santa Fe, NM
Contact: Chris Toth
(202) 326-6021
ctoth@naag.org

NAAG Summer Meeting

June 17-19
Providence, RI
Contact: Jeffrey Hunter
(202) 326-6264
jhunter@naag.org

State Solicitors and Appellate Chiefs Conference

June 17-19
Providence, RI
Contact: Dan Schweitzer
(202) 326-6010
dschweitzer@naag.org

NAMFCU Practical Skills

June 24-26
Denver, CO
Contact: Barbara Zelner
(202) 326-6035
bzelner@naag.org

NAMFCU Annual Training Program

September 7-11
Lake Tahoe, NV
Contact: Barbara Zelner
(202) 326-6035
bzelner@naag.org

Bankruptcy From A Government Perspective

Seattle, WA
September 21-24
Contact: Karen Cordry
(202) 326-6025
kcordry@naag.org

Consumer Protection Meeting

October 25-29
San Antonio, TX
Contact: Dennis Cuevas
(202) 326-6019
dcuevas@naag.org

NAAG Winter Meeting

December 2-5, 2008
Marriott Harbor Beach, Ft. Lauderdale, FL
Contact: Jeffrey Hunter
(202) 326-6264
jhunter@naag.org

2008 NAGTRI Training Calendar

The National Attorneys General Training and Research Institute (NAGTRI) was created in 2007 as part of a long-term vision for an organized research and training program. Courses, taught by a diverse national faculty, will cover a broad array of topics for Attorneys General staff. The directory below provides a listing of NAGTRI courses that will be offered in 2008.

Eastern Region Trial Practice Training

March 16-20

New York, NY

Contact: Dennis Cuevas

202-326-6019

dcuevas@naag.org

Deposition/Negotiation Training

June 8-12

Chicago, IL

Contact: Dennis Cuevas

202-326-6019

dcuevas@naag.org

Evidentiary Issues Training

May 8-9

Austin, TX

Contact: Dennis Cuevas

202-326-6019

dcuevas@naag.org

Western Region Trial Practice Training

June 22-27

San Diego, CA

Contact: Dennis Cuevas

202-326-6019

dcuevas@naag.org

Electronic Discovery Best Practices

May 13-15

Oxford, MS

Contact: Hedda Litwin

202-326-6022

hlitwin@naag.org

Ethical Issues for Government Attorneys (Train the Trainer)

May 29-30

Indianapolis, IN

Contact: Jeffrey Hunter

202-326-6264

jhunter@naag.org