

NAAG Gazette

A Newsletter of the National Association of Attorneys General

DECEMBER 2010

Attorneys General Assemble for NAAG Winter Meeting and New AG Orientation

The Florida Attorney General's Office hosted the NAAG New Attorneys General Orientation and Winter Meeting, Nov. 29 – Dec. 2 in beautiful Ft. Lauderdale, Fla. An unprecedented number of newly elected and appointed Attorneys General attended the orientation where they received a warm welcome to NAAG from their colleagues and the NAAG staff. In addition to the traditional presentations from veteran Attorneys General, chief deputies, and NAAG staff on a wide range of practical subjects, the orientation included two panels consisting of members from the Society of Attorneys General Emeritus (SAGE) who provided their wisdom and insights. Without a doubt, the highlight of the two-day orientation was provided by thought-provoking and inspiring presentations by former Attorneys General Michael Turpen and Steve Clark.



NJ Attorney General Paula Dow, left, leads a panel discussion on the chief deputy's role that included Kay Winfree, Maryland chief deputy.

The NAAG Winter Meeting featured discussions on the theme of "Exploring Legal Issues for the New Decade". Guest speakers included Lanny Breuer, assistant attorney general, Criminal Division, U.S. Department of Justice, Commissioner Julie Brill of the Federal Trade Commission, and former Attorney General Mark Earley, now president and CEO of Prison Fellowship. Attorneys General learned about "Badges for Baseball", a juvenile delinquency pre-



Alabama AG-Elect Luther Strange, left, and Arizona AG-Elect Tom Horne at New AG Orientation.

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NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

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NAAG President Roy Cooper, left, presents gifts to outgoing Michigan AG Mike Cox.

Freedom” which was introduced by Attorneys General Martha Coakley (MA) and Jim Hood (MS). Attorney General Hood was featured in the film for his prosecution in Mississippi of Edgar Ray Killen for the 1964 murders of three civil rights workers.

The NAAG Spring Meeting is scheduled for March 7-9, 2011 at the Fairmont Hotel in Washington, DC. Registration materials and meeting information will be available in January.



Oklahoma Attorney General Drew Edmondson, Mississippi Attorney General Jim Hood and Georgia Attorney General Thurbert Baker at the Winter Meeting dinner.

Law Enforcement Takes Action against Caffeinated Alcoholic Beverages



DENNIS CUEVAS

DENNIS CUEVAS, CONSUMER PROTECTION COUNSEL

The Food and Drug Administration (FDA) issued warning letters in November to four companies that manufacture caffeinated alcoholic beverages. These drinks have been the subject of state Attorneys General's ongoing efforts over at least three years to protect young people from the marketing and use of these harmful products. In fact, 18 Attorneys General and the San Francisco City Attorney petitioned the FDA in September 2009, to take action against caffeinated alcoholic beverages.

Receiving the FDA letters were Charge Beverages Corporation for its *Core High Gravity HG Green*, *Core High Gravity HG Orange*, and *Lemon Lime Core Spiked*; New Century Brewing Company, LLC for its *Moonshot*; Phusion Projects, LLC (doing business as Drink Four Brewing Co.) for its *Four Loko*; and United Brands Company Incorporated for *Joose* and *Max*.

The letters warned the companies that the FDA considers the caffeine added to their malt alcoholic beverages to be an "unsafe food additive." A food or beverage that contains an unsafe food additive is considered adulterated and, thus, illegal under the Federal Food, Drug, and Cosmetic Act. "FDA does not find support for the claim that the addition of caffeine to these alcoholic beverages is 'generally recognized as safe,' which is the legal standard," said Joshua M. Sharfstein, M.D., FDA principal deputy commissioner. "To the contrary, there is evidence that the combinations of caffeine and alcohol in these products pose a public health concern."

Simultaneously, the Federal Trade Commission (FTC) informed the same four firms that marketing their seven products may constitute an unfair or deceptive practice that violates the FTC Act. The FTC letters strongly urged the companies to review the way they are marketing their caffeinated alcohol drinks and to "take swift and appropriate steps to protect consumers." "Consumers might mistakenly assume that these beverages are safe because they are widely sold," said David Vladeck, FTC Bureau of Consumer Protection director.

In May 2007, 29 Attorneys General issued a letter to Anheuser-Busch expressing their concern about the company's promotion and sale of its alcoholic energy drink, *Spykes*. In the letter, the Attorneys General discuss how combining caffeinated energy drinks with alcohol poses significant health and safety risks.

In September 2008, 27 Attorneys General issued a letter to MillerCoors, after it decided to introduce *Sparks Red*, an energy drink that contained as much as 8 percent alcohol by volume – a significant increase over the alcohol content found in other alcoholic energy drinks.

In their letters, state Attorneys General point to several studies and research that shows when combined with alcohol, the caffeine and other stimulants in the energy drinks do not improve alcohol's negative effects on motor coordination skills and cognitive skills, but rather reduce consumers' subjec-



NICK FEMYER

Nick Femyer had little time to settle in at NAAG before he began preparing for an intellectual property training held by NAAG's National Attorneys General Training and Research Institute. As the paralegal for the

Consumer Protection and Antitrust projects, his duties include providing logistical support for conferences, coordinating conference calls, handling sign-on letters and drafting and editing the bi-weekly *Consumer Protections Report*.

After joining NAAG in August, Nick has quickly adjusted to his new position. He assists the Consumer Protection chief counsel in accomplishing the goals of the project, which include improving the enforcement of state and federal consumer protection laws by state Attorneys General as well as supporting multistate consumer protection enforcement efforts.

"I enjoy working on consumer protection issues that include preventing fraud and holding companies accountable for their practices," said Nick. "I hope to become more aware of these issues and how they are solved."

Prior to joining NAAG, he was a program assistant at a DC lobbying firm. This Indiana native is a self-proclaimed political junkie who is considering attending law school in the future.

A graduate of American University, Nick majored in political science and completed a minor in public administration before graduating cum laude. He is an avid moviegoer and owns an extensive movie collection. He also enjoys cooking—especially Italian and Mexican dishes.

tive perception of alcohol intoxication.

Caffeine's "masking effect" allow drinkers to stay awake longer and consume more alcohol than they would be able to tolerate, thereby reaching poisonous and even lethal, alcohol blood content levels. Media reports of the "blackout in the can" phenomenon illustrate the deaths and hospitalizations of young people with lethal alcohol poisoning. For example, in October, nine students from Central Washington University were hospitalized with excess blood alcohol levels ranging from .12 to .35 after drinking caffeinated alcoholic beverages at an off-campus party. Recently, 23 students from Ramapo College in New Jersey were hospitalized for alcohol intoxication.

Consumption of alcohol and energy drinks by young people is often associated with heavy drinking and more frequent drinking. It also results in a high prevalence of alcohol-related consequences, including being taken advantage of sexually, riding with an intoxicated driver, being physically hurt or injured, or requiring medical treatment.

As a result of the letters and other ongoing efforts initiated by state Attorneys General, MillerCoors Brewing and Anheuser-Busch halted the production of their alcoholic energy drinks.

Despite these successful efforts, smaller drink manufacturers continued to introduce alcoholic energy drinks packaged in larger volume containers (up to 23.5 ounces) and containing a higher percentage of alcohol (up to 12 percent). The recent federal law enforcement efforts are a first step in addressing these smaller manufacturers.

In addition to law enforcement efforts to crack down on caffeinated alcoholic beverages, other actions have been taken to restrict or ban their availability. Four states – Michigan, Oklahoma, Utah, and Washington, have banned caffeinated alcoholic beverages, and seven more – Arkansas, Kansas, Massachusetts, Oregon, Pennsylvania, New Jersey, and North Carolina—are considering banning the product. Distributors and retailers in Connecticut and New York have agreed to voluntarily stop selling caffeinated alcoholic beverages, while Pennsylvania has asked distributors to voluntarily end sales. Montana has reclassified the drink as distilled spirits, reducing their availability and increasing their taxes, while Virginia has required retailers to place caffeinated alcoholic beverages with beer and wine and not with energy drinks.



D.C. Voters Want to Elect their Attorney General



BLAIR TINKLE

BLAIR TINKLE, GENERAL COUNSEL AND CONGRESSIONAL LIAISON

In Washington, D.C., the Attorney General is currently appointed by the mayor. That appointment power is contained in the D.C. Home Rule Charter which governs much of how the city operates.

A little publicized ballot question put before D.C. voters in the Nov. 2 election asked

whether the D.C. Home Rule Charter should be amended to allow for the election of the D.C. Attorney General, giving the power to appoint that office to the voting residents of D.C., rather than the mayor.

Currently, the Attorney General is popularly elected in 43 states and Guam, and is appointed by the governor in five states (Alaska, Hawaii, New Hampshire, New Jersey and Wyoming) and in the jurisdictions of American Samoa, Northern Mariana Islands, Puerto Rico, and the Virgin Islands. In Maine, the Attorney General is selected by secret ballot of the legislature and in Tennessee, by the state supreme court.

According to the latest tallies at press time, DC voters approved the ballot initiative to make the DC Attorney General an elected position, starting with the 2014 election. However, it is not a done deal, as there is a required congressional review by both the U.S. House of Representatives and Senate of amendments to D.C.'s Home Rule Charter.

Specifically, the Charter states that it "may be amended by an act passed by the Council and ratified by a majority of the registered qualified electors of the District voting in the referendum held for such ratification. The Chairman of the Council shall submit all such acts to the Speaker of the House of Representatives and the President of the Senate on the day the Board of Elections and Ethics certifies that such act was ratified by a majority of the registered qualified electors voting thereon in such referendum."

Once received, the House and Senate have 35 days to review and approve or disapprove of the referendum by Joint Resolution, otherwise the referendum becomes law in the absence of congressional action.

There has been no indication yet by either the House or Senate leaders as to anticipated congressional action.

111th Congress Concludes with Several NAAG Victories

BLAIR TINKLE, GENERAL COUNSEL AND CONGRESSIONAL LIAISON

It is a wrap for the 111th Congress this month (2009-2010) and while it had one of the lowest numbers in history of passed bills signed into law, the state Attorneys General supported several federal initiatives that became public law, including a NAAG legislative priority that took seven years.

During the 111th Congress, 51 Attorneys General signed on to three letters—one to the U.S. House of Representatives, one to the U.S. Senate and another to the president—supporting the Prevent All Cigarette Trafficking Act (PACT Act), designed to curb youth access to tobacco and enforce against tax evasion in the sale of tobacco products over the Internet. This issue was a NAAG priority in Congress since 2003. The bill was signed into law (P.L. 111-154) on March 31, 2010.

In addition, 42 state Attorneys General signed on to several letters supporting the “Secure and Responsible Drug Disposal Act of 2010,” that allows states and private entities to operate responsible drug take-back programs. The legislation was signed into law on Oct. 12, 2010.

As Congress deliberated over Wall Street reform, 39 Attorneys General sent a letter to key members stating that while Attorneys General individually hold a wide variety of views on the optimal structure of regulatory reform,

Congress should provide states with concurrent authority to enforce federal law and to allow states to enforce their own consumer protection laws. That is, do not preempt the states. The “Dodd-Frank Wall Street Reform and Consumer Protection Act” (the Act; P.L. 111-203) was signed into law July 21, 2010, and preserved state laws that were more stringent and gave state Attorneys General authority to enforce federal consumer financial protection laws and regulations. The newly created Consumer Financial Protection Bureau may only preempt when state laws are inconsistent with the Act.

Also, the new Act, while not eliminating current preemptions of state actions against national banks and thrifts, does codify a standard by which state actions are tested to determine preemption shifting the presumption regarding preemption in favor of state banking regulations. Consumer financial protection will be the focus of the NAAG Presidential Initiative Summit that will take place in April 2011 in Charlotte, lead by North Carolina Attorney General and NAAG President Roy Cooper.

However, not all legislation affecting state Attorneys General was completed in the 111th Congress and the Attorneys General will again be working with the 112th Congress when it convenes in January, to address such issues as consumer protection and law enforcement funding.



SAVE THE DATE

 National Association
of Attorneys General

SPRING MEETING

MARCH 7-9, 2011

WASHINGTON, DC

SAVE THE DATE

NAAG PRESIDENTIAL
INITIATIVE SUMMIT

**America's Financial Recovery:
Protecting Consumers
As We Rebuild**

APRIL 11-12, 2011

CHARLOTTE, N.C.



NAAG Convenes Fourth Triennial Conference To Discuss Tobacco Master Settlement Agreement



WILLIAM LIEBLICH, DEPUTY CHIEF COUNSEL, TOBACCO PROJECT

NAAG convened the Fourth Triennial Conference on Oct. 19 in Memphis, Tenn., held pursuant to the tobacco Master Settlement Agreement (“MSA”). Section VIII (a) (2) of the MSA provides that “NAAG will convene . . . one major conference every three years for the Attorneys General

of the Settling States, the directors of the [American Legacy] Foundation” and representatives of the tobacco companies that are parties to the MSA (“Participating Manufacturers”), and that the conference’s purpose “is to evaluate the success of this Agreement and coordinate efforts by the Attorneys General and the Participating Manufacturers to continue to reduce Youth smoking.”

Previous conferences were held in 2001 in Overland Park, Kan.; in 2004 in Burlington, Vt.; and in 2007 in Seattle, Wash. This year’s conference was hosted by Tennessee Attorney General Robert E. Cooper, Jr., and Arkansas Attorney General Dustin McDaniel, who serves as NAAG Tobacco Committee co-chair. New Mexico Attorney

General Gary King and Vermont Attorney General William H. Sorrell participated as well. Also present were state health department and tobacco control officials; representatives of federal agencies; representatives of other organizations involved in public health and tobacco control, including the American Legacy Foundation; and representatives of the Participating Manufacturers.

The conference focused on recent federal legislation that has altered the landscape of tobacco regulation. The Family Smoking Prevention and Tobacco Control Act of 2009 granted the U.S. Food and Drug Administration (“FDA”) broad authority to regulate tobacco products, while the Prevent All Cigarette Trafficking (“PACT”) Act, enacted earlier this year, placed significant new restrictions on the sale of tobacco products over the Internet, including the requirement that all such sales comply with the laws of the state in which the purchaser resides. Both statutes have created opportunities as well as challenges with regard to federal - state cooperation on tobacco control.

Attorneys General Cooper and McDaniel opened the conference by emphasizing the benefits to the states and their citizens of federal and state measures to reduce smoking. Lawrence Deyton, M.S.P.H, M.D., director of the FDA’s Center for Tobacco Products, spoke about the FDA’s new authority from the perspective of those charged with implementing it. Dr. Deyton was followed by Maggie Mahoney, deputy director of the Tobacco Control Legal Consortium, who described the effect of the Tobacco Control Act on federal preemption of state tobacco control laws and regulations, including the policy options the Act opens up for state and local governments. Danny McGoldrick, vice president for research at the Campaign



Arkansas Attorney General Dustin McDaniel gets the final Triennial speaker panel assembled.

for Tobacco-Free Kids, illustrated the impact that the MSA and the FDA's actions under the Tobacco Control Act have had on the marketing of tobacco products and some of the regulatory challenges that remain for the FDA as well as state and local governments under the new legislative framework.

Attendees then heard from several presenters who provided updates on subjects addressed at previous Triennials. That included the most recent data on trends in youth tobacco use, which indicate that reductions in youth smoking rates have reached a plateau in recent years, that youth use of other tobacco products such as smokeless tobacco is increasing, and that additional efforts are required in order to bring about further reductions.

Attorney General Sorrell and Cheryl Heaton, PhD, American Legacy Foundation president and chief executive officer, both discussed the changing landscape of tobacco control and emerging opportunities for the Attorneys General.

Jonathan Polansky, a consultant to the University of California, San Francisco, Center for Tobacco Control Research and Education provided an update on efforts to reduce or eliminate smoking depictions in movies to which youth have access, a subject in which numerous Attorneys General have taken an interest over the past 10 years because of the well-documented effect of such depictions on youth smoking initiation.

Finally, a panel of experts on the PACT Act provided information concerning that legislation from a variety of perspectives. This included describing the dangers to public health historically posed by Internet sales of tobacco products, the efforts that had previously been made to restrict such sales, and the need for a federal solution that culminated in passage of the PACT Act. State efforts to prevent illegal Internet sales were recounted, along with the challenges still remaining after the PACT Act enactment. Federal officials from the Bureau of Alcohol, Tobacco, Firearms and Explosives chronicled past and present federal enforcement efforts and explained how the Act provides the government new tools to address the issue of Internet sales. Lastly, José Luis Murillo, Jr., vice president and general counsel of Altria Client Services, Inc., discussed the ways in which the PACT Act allows for enhanced enforcement of both state laws and other federal statutes, and assists Altria in its efforts to prevent counterfeiting and contraband sales of its brands.

The next conference will be held in 2013.

NAGTRI Schedule



Depositions and Negotiations

January 9-13, 2011

Ft. Lauderdale, FL

Contact: Dennis Cuevas, dcuevas@naag.org

Intellectual Property Rights Training

January 19-20, 2011

Austin Marriott South Hall; Austin, TX

Contact: Dennis Cuevas, dcuevas@naag.org

Civil Rights Seminar

February 1-2, 2011

Westin Grand; Washington, DC

Contact: Dan Schweitzer, dschweitzer@naag.org

Computer Forensics

February 7-9, 2011

Hyatt Regency; Savannah, GA

Contact: Hedda Litwin, hlitwin@naag.org

Technology Trends: Doing More with Less

February 8-10, 2011

Westin Beach Resort; Ft. Lauderdale, FL

Contact: Scott Messing, smessing@naag.org

E-Discovery

February 10-11, 2011

Boston, MA

Contact: Bill Malloy, wmalloy@naag.org

Advanced Leadership and Management

February 23-24, 2011

Rhode Island

Contact: Bill Malloy, wmalloy@naag.org

Intellectual Property Rights Training

February 28 - March 1, 2011

Los Angeles, CA

Contact: Dennis Cuevas, dcuevas@naag.org