NAGTRI Journal
Emerging Issues for Attorneys General Offices

Volume 1, Number 2
February 2016

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A few weeks ago, the NAGTRI staff asked me to share some thoughts about leadership. While I was flattered, I was also a little intimidated by this opportunity. After all, if you are still reading this article you are probably already in a position of leadership and have formed your own ideas and exercise some of your own hard-earned skills every day. Attempting to give you new insights and new wisdom about leadership seems the height of arrogance. So that is not my purpose in the next few lines. What I intend to do is share with you a few ideas that I gathered during my career in which I enjoyed a ring-side seat watching some of our military’s truly great leaders practice leadership. My hope is that I will inadvertently uncover at least one nugget that you can take with you on your leadership journey.

It’s All about Relationships. Leadership at its core is an art, not science. The art is learning how to relate to, communicate with, and motivate others. We have all heard the phrase “natural born leader.” Well, that really isn’t true. Some people, by the nature of their personality, seem to effortlessly attract others to them in what appears to be a leader-follower relationship. An organizational leader doesn’t rely upon personality alone but upon skills learned, such as empathy, understanding, and motivation. Leaders work very hard on developing such “people skills” and applying them every day. The key take-away is that leadership is a learned skill.

Focus on the Individual. You lead a team, but the focus must be on the individual members. Learn names. This may sound obvious but you would be surprised how many leaders don’t know the first names of their team members. Send a written note—nothing says as much as when you take the time to write a note thanking an individual team member for a job well done. No, not an e-mail—a handwritten note! Always praise in public and counsel in private. And always look for opportunities to praise in public. Next time you begin a staff meeting, pause and thank the junior member who prepared the room for the meeting. The bottom line is, know your people. Know where they are in their careers, know what motivates them, and know what inspires them.

Every Step You Take Demonstrates Your Leadership. As a leader, you are constantly watched. Always keep that in mind and be a living example of calm and confidence. Keeping a cool head projects an awareness of the larger situation and how your actions are interpreted by those around you. The military conditions its members to move toward the sound of gunfire. But the military teaches its leaders to pause before moving, to exercise tactical patience, and allow a situation to develop before reacting. Only raise your voice when it is strategically required. That means you have taken the time to pause and plan what you are going to say before you say it.

You Establish the Vision. The mission of your office or your organization has already been established—and if it hasn’t, you need to talk with your boss! You articulate how your team is going to contribute to accomplishing that mission. That will be your vision for your team. You need to put it in writing and communicate that vision frequently. It needs to be simple, achievable, and measurable.

Learn to Communicate. Over 50 percent of effective communication is listening. Stop right now and look at your computer screen. Where is it? If it is between you and your doorway, it is in the wrong place. You should have to turn away from your computer screen when someone knocks on your door and says, “Boss, you got a minute?” Yes, that means you give up all privacy to your computer screen. But, even more so, it means you are now focused on the person who is talking to you. And remember, you are never too busy to communicate with your team.

Respect Your Team. People work hardest and give the most when they are treated with respect and dignity. You may only have one chance to demonstrate to your team that you value what they do and respect them as professionals. If you are successful in doing that, you will gain their loyalty.
What Happens After Someone Makes a Mistake. This is often cited as the true measure of your leadership. What is your reaction when someone misses a deadline, is negligent in performing a task, or causes embarrassment for the organization? The hardest thing to do as a leader is to take the blame for one of your team member’s mistakes. The corollary, of course, is to give credit to a team member for a success. Remember, your job as a leader is to be a human shield, to protect your people from external intrusions, distractions, and idiocy—and to avoid imposing your own idiocy upon them as well! The next time you learn about a mistake one member of your team has made, take a walk before doing anything. And when you return, take the blame for the mistake yourself and calmly work on a solution.

Lead By Walking Around. You have a flawed and incomplete understanding of what it means to work for you. There is no better way to get a sense of what it means to work for you than to get out of your office and walk around engaging in informal conversations with your team. Routinely circulating among your team in their environment helps shape your knowledge, provides situational awareness of your organization’s climate, and encourages your team to be more open about what is happening.

Final Thought. “The challenge of leadership is to be strong, but not rude; be kind, but not weak; be bold, but not bully; be thoughtful, but not lazy; be humble, but not timid; be proud, but not arrogant; have humor; but without folly.” - Jim Rohn

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NATIONAL ATTORNEYS GENERAL TRAINING AND RESEARCH INSTITUTE
The NAGTRI Journal is published quarterly and is posted at www.naag.org/publications/nagtri-newsletters.php. To submit article ideas, contact Judy McKee at 202-326-6044 or via email at jmckee@naag.org. To receive a free e-mail copy each quarter, contact Laurel Pugliese via email at lpugliese@naag.org.

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State legalization of marijuana is of real concern to employers who strive to maintain productivity, ensure workplace safety, and protect workers’ rights. As marijuana is legalized, usage increases. For example, after marijuana was decriminalized in Colorado, the number of positive workplace drug tests increased by 20 percent between 2012 and 2013, compared to a national average increase of five percent.\(^6\)

This article will explore concerns most commonly faced by employers located in states which have legalized marijuana. The article concludes by providing suggestions for how employers can best navigate this landscape.

**“Zero Tolerance” Policies**

Employers in states in which marijuana has been legalized must first determine whether their workplace is regulated by The Drug Free Workplace Act (the Act).\(^7\) The Act requires that all federal grant recipients and federal contractors\(^8\) adopt a zero tolerance policy at their workplaces and certify to the federal government that their workplaces are drug free. In addition to this certification, these employers generally must:\(^9\)

- Develop and publish for employees a written policy and ensure that employees read and consent to the policy as a condition of employment;
- Initiate awareness programs to educate employees about the dangers of drug abuse, the company's drug workplace policy, any available drug counseling, rehabilitation and employee assistance programs, and penalties that may be imposed on employees for drug abuse violations;

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3. Id.
4. Schedule I drugs are those “with no currently accepted medical use and a high potential for abuse. Schedule I drugs are the most dangerous of all the drug schedules with potentially severe psychological or physical dependence.” Drug Enforcement Administration, Drug Scheduling, available at http://www.dea.gov/druginfo/ds.shtml (last visited Jan. 27, 2016).
9. Id.
• Require that all employees notify the employer or contractor within five days of any conviction for a drug offense in the workplace; and

• Make an ongoing good faith effort to maintain a drug-free workplace.

The Act does not require that employers conduct mandatory drug tests.\footnote{10}{AssureX Global, \textit{supra} n.6 at 8.}

If an employer is not required to comply with the Act, such employer can still institute a zero tolerance policy for those workers in “safety-sensitive” positions. A “safety-sensitive” position, generally, is one in which an employee is responsible for the safety of herself or others.\footnote{11}{Given the large number of occupations that fit within this role, it is very difficult to find one definition of “safety sensitive” that is generally applicable. In fact, not all states specifically define “safety-sensitive.” The EEOC has explained that employers who designate positions as “safety-sensitive” must be able to show that an employee’s inability or impaired ability to perform job-related tasks could result in a direct threat. See Paula Barran, \textit{So Which Positions are Safety Sensitive?} D\textsc{i}C Oregon, May 23, 2008, available at \url{http://djcoregon.com/news/2008/05/23/so-which-positions-are-safety-sensitive/} (last visited Jan. 27, 2016).} Positions that fit into this designation would include those involving driving or the use of machinery, among many others. If such a position requires a commercial driver’s license (CDL), then the employer is mandated to abide by the Omnibus Transportation Employee Safety Act of 1991, which requires that all employers drug test employees whose duties require a CDL.\footnote{12}{AssureX Global, \textit{supra} n.6 at 11.}

Even if an employer is mandated or chooses to adopt a zero tolerance policy under the Act, such employer will still inevitably encounter many of the issues discussed below.

\textbf{A Prelude - Drug Testing}

Marijuana contains a compound known as tetrahydrocannabinol (THC), which metabolizes quickly into a compound that can remain in a user’s body for weeks after marijuana consumption.\footnote{13}{Gabrielle M. Wirth & Cherise Latortue, \textit{Practically Accommodating Medical Marijuana – Not an Impossibility.} Orange County Bus. J., Dec. 10-16, 2012, available at \url{https://www.dorsey.com/newsresources/publications/2012/12/practically-accommodating-medical-marijuana--not} (last visited Jan. 27, 2016).} Certain tests, such as urinalysis, only detect THC metabolites, meaning that these tests cannot indicate impairment, only the presence of the metabolite.\footnote{14}{\textit{Id.}} While blood and saliva tests can provide a more accurate impairment reading, blood tests are more invasive and may violate employee privacy rights and the technology surrounding saliva tests is still new.\footnote{15}{\textit{Id.}}

State law generally regulates when employee drug testing may occur.\footnote{16}{Kayla Goyette, \textit{Legalizing Marijuana: State and Federal Issue: Recreational Marijuana and Employment: What Employees Don’t Know Will Hurt Them,} 50 GONZ. L. REV. 337, 344 (2014).} However, regardless of jurisdiction, there are more constraints placed on public employers than private employers in this realm. Because drug testing is a “search,” public employers must ensure that these searches are reasonable, in accordance with the Fourth Amendment. Usually, this requires that the searches be based upon individualized suspicion of wrongdoing, with “particularized
exceptions to the main rule . . . based on ‘special needs, beyond the normal need for law enforcement.’”

Keeping these requirements and drug testing methods in mind, the rest of this article will examine the interplay between the legalization of marijuana and employment law.

**Medical Marijuana and Disability Discrimination Claims**

The Americans with Disabilities Act (ADA) \(^{18}\) prohibits employers from discriminating against qualified individuals \(^{19}\) on the basis of disability, which is defined as “a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.” \(^{20}\) The ADA prohibits discrimination in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. \(^{21}\) Covered employers \(^{22}\) are required to provide reasonable accommodations to the disabled employee so that the employee can perform essential duties of his job, as long as such accommodations do not impose an undue hardship on the employer. \(^{23}\) According to the Equal Employment Opportunity Commission, an accommodation is generally “any change in the work environment or the way things are customarily done that enables an individual with a

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\(^{19}\) A qualified individual is defined as an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. § 12111(8) (2013). A “reasonable accommodation” may include making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations. 42 U.S.C. § 12111(9) (2013).


\(^{22}\) An “employer” is defined by the ADA as a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each 20 or more calendar weeks in the current or preceding year, and any agent of such person. There are exceptions for the United States, a corporation wholly owned by the government of the United States, or an Indian tribe or a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26. 42 U.S.C. § 12111(1)(5)(A-B) (2013).

\(^{23}\) Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors including (i) the nature and cost of the accommodation needed; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the employer, the overall size of the business with respect to the number of employees, and the number, type, and location of its facilities; and (iv) the type of operation or operations, including the composition, structure, and functions of the workforce, the geographical separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer. 42 U.S.C. § 12111(10) (2013).
disability to enjoy equal employment opportunities."  

Section 12114(a) of the ADA states that a qualified individual with a disability shall not cover any employee or applicant who is currently engaging in the illegal use of drugs, when the employer acts on the basis of such use, and that employers may require that employees behave in conformity with the Drug-Free Workplace Act of 1988. The ADA defines "illegal use of drugs" as the use of drugs, the possession or distribution of which is unlawful under the CSA, but excludes from this definition the use of a drug taken under supervision by a licensed health care professional.

Courts have considered whether the ADA requires employers to accommodate employees' legal use of medical marijuana to treat serious medical conditions. In other words, under the ADA, the question is whether an employer can take an adverse action against an employee simply because of that employee's participation in a state-authorized medical marijuana program or whether the employer must accommodate that employee's use of medical marijuana. In states where statutes are silent on this issue, courts have generally determined that employers are not required to accommodate medical marijuana use under the ADA or under state statutes modeled on the ADA.

For example, in Emerald Steel v. Bureau of Labor and Industries, the Oregon Supreme Court held that an employer does not have a duty to accommodate an employee who used medical marijuana outside of the workplace because marijuana is illegal under federal law. The employee was a drill press operator who was fired after a positive urinalysis for marijuana metabolites. The employee brought suit under Oregon's anti-discrimination statute, which closely paralleled the ADA. The court explained that the two potentially applicable exclusions from the phrase "illegal use of drugs"—the use of drugs authorized by state law and the use of drugs taken under the supervision of a licensed health care provider—do not apply in this case. The employee was not using marijuana under the supervision of a licensed health care professional because his doctor had given him a recommendation rather than a prescription. Additionally, the court found that the CSA preempted the state disability discrimination act, though it did not preempt the statute that legalized the use of medical marijuana.

The Emerald court referenced the case of Ross v. Raging Wire Telecomms., Inc., in which the California Supreme Court reached a similar decision after "finding that, in enacting [its state] medical marijuana law, the voters did not intend to affect an employer's ability to take adverse employment actions based on the use of medical marijuana." The Ross court also found that employers do not have to accommodate their employees' off-site medical marijuana use.

However, some states have enacted laws which speak specifically to medical marijuana accommodation. For example, in New York, a certified patient "shall be deemed to be having a 'disability' under the state's human rights law." Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota, and Nevada also have laws which contain "either anti-discrimination or reasonable accommodation provisions" applicable to employers. For example, in Arizona, Delaware, Minnesota, and Nevada, employers cannot take an adverse employment action based solely on an employee's participation in a medical marijuana program "unless [failing to do so] would violate federal laws or regulations or cause an employer to lose a monetary or license related benefit under federal law or regulations," such as the Drug Free Workplace Act of 1988.

Therefore, in states where there is a duty to accommodate an employee's marijuana use, employers must usually consider the specific needs of the job as well as any applicable completing regulations before acting. Some examples of "reasonable accommodations" in these states might include a modified work schedule that would allow the

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26 Id.
27 230 P.3d 518 (Or. 2010).
28 Id. at 535 (stating that the exclusion under the state statute "for the use of a drug taken under supervision of a licensed health care professional is virtually identical to an exclusion in the definition of illegal drugs found in the ADA").
29 Id.
30 Id. at 533.
31 174 P.3d 200 (Cal. 2008).
32 Emerald Steel, supra note 27 at FN 7, citing Ross, id., at 204.
35 Id.
employee to treat his condition with medical marijuana from home during his normal work hours. However, if the position involved is classified as “safety-sensitive,” employers may be able to assert that there is no accommodation that would not lead to undue harm, as marijuana use by the employee or applicant “may pose a ‘direct threat’ to the health and safety of himself” or another.\textsuperscript{37} Employers might also assert that the ADA, which expressly exempts illegal drug use from coverage, preempts state duty to accommodate laws.\textsuperscript{38}

Whether an employer is in an “accommodation state” or not, he or she must be careful to ensure that adverse employment decisions are made based on the individual’s use of marijuana rather than based on the underlying medical condition, in order to avoid liability under the ADA or a state-specific discrimination statute.

**Marijuana Legalization and Wrongful Termination Claims**

As noted above, many marijuana legalization statutes and initiatives do not explicitly address the use of marijuana at the workplace.\textsuperscript{39} In addition to the discrimination claims discussed earlier in this article, employees who have been discharged on the basis of their marijuana use have also attempted to bring suit against their employers by alleging the tort of wrongful discrimination. In states that do not have specific statutory prohibitions on the termination of an employee for the legal use of marijuana, these claims have failed.

For example, in *Casias v. Wal-Mart Store, Inc.*,\textsuperscript{40} the Sixth Circuit held that Michigan’s medical marijuana statute does not regulate private employment and thus does not prohibit an employer from disciplining an employee for the use of marijuana even when such use is lawful under state law. In *Casias*, a Wal-Mart employee lawfully used medical marijuana and was terminated after a work-related injury required him to undergo a urinalysis test. The *Casias* court held that the plaintiff’s discharge was not wrongful; concluded that, if the Michigan legislature had intended to prevent a private business from engaging in such disciplinary actions, it would have “expressly set forth this ‘far reaching revision’ in the statute.”\textsuperscript{41}

The Washington Supreme Court issued a similar decision in *Roe v. Teletech Customer Care Mgmt.*\textsuperscript{42} In Roe, the plaintiff, who had been discharged on the basis of marijuana use, argued that the Washington medical marijuana statute created an “express civil remedy” and “an implied cause of action for wrongful discharge” on the basis of authorized medical marijuana use.\textsuperscript{43} However, the court found that the law does not prohibit an employer from discharging an employee for the authorized use of medical marijuana as there was no evidence that the voters who were in favor of the medical marijuana law intended for the law “to provide employment protections or to prohibit an employer from discharging an employee for medical marijuana use.”\textsuperscript{44} The court went on to state that the statute does not “proclaim a public policy prohibiting the discharge of an employee for medical marijuana use.”\textsuperscript{45}

The plaintiff in the *Ross* case\textsuperscript{46} also brought a claim for wrongful termination, but the California Supreme Court dismissed this claim, reiterating that the state’s medical marijuana statute “simply does not speak to employment law.”\textsuperscript{47} Therefore, unless a state’s statute explicitly establishes a cause of action for wrongful termination on the grounds of medical marijuana use, it does not seem as though such a claim would survive.

**Marijuana Legalization and Off-Duty Activity Statutes**

A number of states\textsuperscript{48} prevent employers from discharging or discriminating against employees for “lawful conduct” in which employees participate during nonworking hours. While the language in these statutes varies by jurisdiction, many of the statutes also include exceptions for activities that “affect an individual’s ability to perform job-related employment responsibilities or the safety of other employees,”\textsuperscript{49} or allow exemptions if the employer’s restriction “relates to the fundamental objectives of the organization.”\textsuperscript{50}

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38 Id. at slide 19.
39 While five jurisdictions have now legalized recreational marijuana, only three of these jurisdictions – Alaska, Colorado, and the District of Columbia – explicitly permit employers to prohibit employees’ marijuana use. Jackson Lewis P.C., supra n.37 at slide 13.
40 695 F.3d 428 (6th Cir. 2012).
42 257 P.3d 586 (Wash. 2011).
43 Id. at 594.
44 Id.
45 Id. at 595.
46 Ross, supra n.31.
47 Id. at 930.
While these statutes are fairly straightforward, it is not clear how they apply to the use of marijuana. While such use is “lawful” in the states that have legalized possession of the drug, marijuana possession remains illegal under federal law. In *Coats v. Dish Network, LLC*, Colorado’s Supreme Court held that its state’s lawful activities statute does not protect a worker’s off-duty use of medical marijuana because this activity is not lawful under federal law.

The facts of *Coats* are particularly compelling because the employee was a quadriplegic who, based on the court filings, did not commit any workplace violation other than testing positive for medical marijuana, which he was licensed to use under Colorado state law. Because Colorado’s lawful activity statute did not define “lawful,” the court looked to the ordinary meaning of the word—“permitted by law,” and determined that an activity that violates federal law cannot be lawful under the ordinary meaning of the term “lawful.” The court also held that there was no legislative intent to extend the protection of the lawful activities statute to activity that is illegal under federal law.

The *Coats* case demonstrates the importance of clear, ongoing communication to employees about company drug policies so that employees do not assume that consuming state-legalized marijuana will have no impact their livelihoods.

**Marijuana Legalization and Unemployment Insurance Benefits**

Whether an employee who has been discharged based on a positive drug test for marijuana metabolites is entitled to unemployment benefits will vary by state. For example, in Michigan, an employee who was discharged after lawfully using medicinal marijuana outside of the workplace is not disqualified from receiving unemployment benefits. The same holds true in Illinois, where an appellate court held that an employee is “entitled to unemployment insurance benefits after he was terminated for using illegal, non-medical marijuana outside the workplace,” as the employee was not under the influence while at work and so his recreational use of marijuana did not violate the state’s Unemployment Insurance Act, which prohibits the granting of benefits after “misconduct . . . while in the course of employment.”

These cases stand in contrast to a recent decision in Colorado. In *Beinor v. Industrial Claim Appeals*, the

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51  350 P.3d 849 (Colo. 2015).
52  Id. at 850.
53  Id. at 853.
Colorado Court of Appeals held that an employee who was terminated after testing positive for marijuana metabolites in violation of the employer's zero tolerance policy could be denied unemployment insurance benefits. Notably, this employee, who was hired to sweep a street mall with a broom and dustpan, was using medical marijuana lawfully, outside of working hours. Colorado's statute disqualifies an individual from receiving unemployment benefits after the presence of a controlled substance that was not medically prescribed was found in the individual's system during working hours. The court explained that Colorado's medical marijuana amendment created an exception to criminal prosecution and not a grant to medical marijuana users of an unlimited constitutional right to use the drug in any place or in any manner. The court also distinguished a medical certification which permitted the possession and use of marijuana from a medical prescription.

Marijuana Legalization and Workers' Compensation Insurance

The federal government and all states have enacted workers' compensation laws for individuals injured while at work. The Federal Employees' Compensation Act (FECA) provides for the payment of workers' compensation benefits, including wages and medical benefits, to civilian officers and employees of all branches of the federal government. State law applies to those individuals employed by private companies or state and local government. Each state has a governing board which oversees its workers' compensation system.

The legalization of marijuana has raised two issues with regard to workers' compensation laws. First, are employees who test positive for marijuana after being injured at work eligible to receive workers' compensation? For example, FECA makes clear that employers do not have to continue the regular pay of an eligible employee when the employee's injury "was…

57 Colo. Rev. Stat. § 8-73-108.5(e)(IX.5). The court distinguished an authorization to use medical marijuana from a medical prescription, stating, "[u]nderlying claimant's argument is an assumption that his authorization to use medical marijuana is equivalent to a medical prescription. This assumption is inaccurate. A certificate isn't a prescription. Doctors are prohibited from prescribing marijuana under federal law." Beinor, 262 P.3d at 973.
58 Id. at 976.
59 Id. at 973-74.
61 U.S. Dept. of Labor, Workers Compensation, available at http://www.dol.gov/general/topic/workcomp (last visited Jan. 27, 2016). The federal government has also established workers' compensation programs for energy employees and longshore and harbor workers as well as a black lung benefits plan. Id.
62 Id.
63 Texas allows employers within its state to "opt out" of the workers compensation system but, if the employers choose to do so, they face higher civil liability when an employee is injured at work.
proximately caused by the intoxication by . . . illegal drugs.”

Second, is an employer required to pay for medical marijuana treatments to treat that employee’s injury as part of workers’ compensation? State laws are often constructed similarly to FECA, which covers payment for medical support services, defined as “services, drugs, supplies and appliances provided by a person other than a physician or hospital.”

A few state workers’ compensation boards have addressed these issues. In North Carolina, a carpenter who was injured at work while carrying lumber later tested positive for cannabinoids and opiates but was found to be entitled to workers’ compensation benefits. The employee “accident[ally] misstep[ped]” and “the railing that he attempted to use to steady himself gave way.” The toxicology test at issue did not indicate the levels or concentrations of the drugs and the employer did not present any other “credible evidence” to show impairment, and thus could not demonstrate that the employee had been impaired at the time of his injury.

Courts in Maine and New Mexico have addressed the issue of coverage of medical marijuana treatment and reached opposing conclusions. In Maine, in the case of Noll v. LePage Bakeries, the employee at issue sustained a back injury while making deliveries and requested reimbursement for (1) a medical evaluation for the purpose of obtaining a medical marijuana certificate; (2) medical marijuana; and (3) a vaporizer to use for the administration of the medical marijuana. Maine’s Workers’ Compensation Act (WCA) states that an injured worker “is entitled to reasonable and proper medical, surgical, and hospital services, nursing, medicines, and mechanical and surgical aids, as needed, paid for by the employer.” The employer in Noll argued that such services should not be covered under the WCA, as the employer should not be “complicit in a violation of federal law and subject to the risks of prosecution.”

The employer also cited Maine’s medical marijuana statute in support of its argument, as the statute explicitly states that it may not be construed to require a government medical assistance program or private health insurer to reimburse an individual for costs associated with the medical use of marijuana. The employer argued that it should be considered a “private health insurer” with regard to state law.

The Workers’ Compensation Board agreed with the employer and held that the employee had not met his burden of demonstrating that the employer is not a private health insurer within the meaning of the workers’ compensation and medical marijuana statutes. This would likely be the finding in other states that have similar clauses in their medical marijuana statutes, such as in New Jersey, whose statute states that governmental medical assistance programs and private health insurers are not required to cover the costs of purchasing medical marijuana.

In contrast, the New Mexico Court of Appeals has consistently held that the state’s Workers’ Compensation Act (WCA) authorizes reimbursement for medical marijuana. The WCA requires an employer to provide an employee with reasonable and necessary health care services from a health care provider. Courts have held that medical marijuana treatment is “reasonable and necessary medical care,” calling a physician-issued certification for marijuana “the functional equivalent” of a prescription. The courts have read the WCA together with the state’s medical marijuana statute and determined that the New Mexico legislature’s intent was that medical marijuana treatments be covered under the WCA.

An examination of these recent decisions leads to the conclusion that an employer should take a close look at his state’s workers’ compensation law and read it in conjunction with his state’s medical marijuana law in order to determine what his responsibilities are in terms of coverage of medical marijuana treatment. Additionally, if an employer suspects that an employee was impaired at the time of a work-related injury, he should not rely on a urine toxicology test alone, but should seek other evidence to show impairment, such as surveillance cameras and the statements of other employees.

Unanswered Questions

The state legalization of a drug that remains illegal under federal law has created uncertainty in various areas of

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67  Id. at 736.
68  Id. See also Desert Valley v. Hurley, 96 P.3d 739 (Nev. 2004). In Nevada, there is a presumption that an employee workplace injury is caused by intoxication if an employee fails a toxicology test but this presumption is rebuttable. 69  2015 ME Wrk. Comp. LEXIS 145 (2015).
71  Noll, supra note 69, at *5.
72  Id. at *10-11.
76  Id. at 978. See also Maze v. Riley Industrial et al., 347 P.3d 732 (N.M. Ct. App. 2015).
law. Employment law is no exception. While courts have begun to provide a framework for analyzing these issues, much is still unclear. For example, if an employer in a non-legalization state employs an individual who lives in a neighboring state which has legalized medical marijuana and such an employee has a certification to use marijuana to treat a medical condition, what law controls?

Additionally, questions remain regarding the use of medical marijuana during leave granted by the federal Family and Medical Leave Act (FMLA)\(^ {77} \) or a state equivalent. FMLA provides eligible employees\(^ {78} \) with up to 12 weeks of unpaid leave each year\(^ {79} \) when these employees are unable to work due to a serious health condition or to care for certain qualified family members. The FMLA also entitles these employees to return to the same job that they left, or an equivalent, at the end of the leave period.\(^ {80} \) What would be the result when an employee returns from FMLA leave to a zero tolerance work place and has lawfully used medical marijuana as part of treatment for a serious medical condition? If such an employee fails a drug test and is discharged pursuant to the zero tolerance policy, the employer may face a claim that the job termination was in retaliation for that employee’s taking leave, which would be in violation of the FMLA.\(^ {81} \)

### Conclusion

The regular use of marijuana on or near the workplace can lead to a loss of productivity and an increase of workplace accidents. Employers have a duty under the Occupational Health and Safety Act of 1970 to “maintain conditions or adopt practices reasonably necessary and appropriate to protect workers on the job.”\(^ {82} \)

While employers strive for a productive and safe workplace, they must also ensure that they do not violate the rights of their employees in the process. Here are a number of other steps that employers can take to ensure that they are operating within the guidelines of the applicable law:

**Know your law.** Be familiar with your state’s marijuana statutes as well as any other statutes that may be applicable to your employees and you, such as human rights laws, workers’ compensation laws, and other laws referenced in this article. Ensure that your state allows “for cause” drug testing of an employee if you reasonably suspect impairment.\(^ {83} \)

**Know your obligations.** Are you mandated to follow the Drug Free Workplace Act of 1988? Are your employees in “safety-sensitive” positions? Have you entered into a collective bargaining agreement (CBA) with a union? If so, is there a clause about drug testing? Is there a clause about firing for “just cause”? Does a positive marijuana test constitute “just cause” or is more needed to prove impairment at work?\(^ {84} \)

**Know your rights.** While the law is still developing in this area, it appears that you can decide against hiring a prospective employee if he or she is a medical marijuana user and your state’s law does not explicitly call for an accommodation. However, you do not have the right to make an adverse employment decision based on that individual’s underlying condition.

**Make sure your employees know your policies.** Draft clear policies about substance use and publicize them. Be clear about what you mean by “zero tolerance”\(^ {85} \) and identify those positions which are classified as “safety sensitive.”\(^ {86} \) Don’t be vague—include policies specifically relating to marijuana, including off-duty use of marijuana, so that all employees are clear as to how to stay in compliance.\(^ {87} \)

Undoubtedly, courts will continue to address these issues. However, until the law surrounding legalized marijuana is well-settled, it is important to be well-versed in your state’s developing law and to educate your employees.

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\(^ {78} \) U.S. Dept. of Labor, Wage and Hour Division, FMLA Frequently Asked Questions, available at [http://www.dol.gov/whd/fmla/fmla-faqs.htm](http://www.dol.gov/whd/fmla/fmla-faqs.htm) (last visited Jan. 27, 2016). The FMLA applies to all public agencies and local education agencies as well as private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year, including joint employers and successors of covered employers. Id.

\(^ {79} \) Id.

\(^ {80} \) Id.


\(^ {83} \) AssureX Global, supra n.6 at 8.

\(^ {84} \) Filisko, supra n.2 at 3.

\(^ {85} \) Klenner, supra n.36.

\(^ {86} \) Worth et al., supra n.13 at 2.

\(^ {87} \) Phillips et al., supra n.82 at 463.
Several interesting decisions were issued by federal and state courts last year regarding the authority of attorney general offices. They address a variety of issues including the extent of the subpoena power under a state’s consumer protection laws, the validity of an attorney general opinion, how cases should be styled, when an attorney general can intervene in an action, and other issues that interpret state law concerning the duties and responsibilities of the office.

Two decisions were issued in Arizona in the last six months. One involved the authority of the attorney general in regard to the representation of the Arizona Game and Fish Department. The plaintiffs filed suit against the department to escape penalties imposed against them for the taking of big game. When the attorney general filed a motion to dismiss, the plaintiffs alleged that only the Maricopa County attorney could represent the department. The trial court agreed and disqualified the attorney general.

Arizona statutes provide that “[E]ach county attorney shall prosecute and defend on behalf of the state, in all courts of the county, all actions, criminal or civil, arising under this title in which the state, [state game and fish] commission member, or [state game and fish] department employee is a party thereof.” A.R.S. § 17-103. However, A.R.S. § 41-192 authorizes the attorney general to “[b]e the legal advisor of the departments of this state and render such legal services as the departments require.” The attorney general argued that this statute impliedly repeals the authorization of the county attorneys. In Harris v. Brain, the appellate court found that, even if there were no implied repeal of section 17-103, that statute does not limit or prohibit the attorney general from representing the department under the attorney general’s general statutory authority. The court held, “[T]he attorney general’s decision to undertake the representation (with full consent of the Department) is entitled to deference.”

The other Arizona case involved the authority of the attorney general to investigate fair housing complaints under state law and recover attorneys’ fees against a municipal corporation. The City of Tempe sought a preliminary injunction and a declaratory judgment that the attorney general could not investigate a fair housing complaint made against a municipal corporation.

At the trial level, the court held that the attorney general did not abuse his discretion or act arbitrarily and capriciously by declining to dismiss the complaint, without an investigation, against Tempe under the Arizona Fair Housing Act. The trial court also found that the attorney general is mandated to conduct an investigation, and “Tempe thwarted the investigation,” such that it could not “now complain that the [AAG] abused his discretion by not dismissing the complaint when the investigation [was] not complete.” The trial court dismissed Tempe’s complaint and awarded the state $108,090 in attorneys’ fees. Tempe appealed.

The appellate court upheld the trial court’s ruling, holding:

Based upon this statutory and regulatory framework, the [attorney general] was within its discretion to continue the investigation beyond receipt of the documents provided by Tempe. It is the [attorney general’s] duty to investigate all complaints, and that duty cannot be circumvented by a respondent who simply denies the claim and unilaterally declares it resolved on the basis of the limited information the respondent chooses to provide. Tempe has shown no arbitrary or capricious action by the attorney general.

It also upheld the award of attorneys’ fees despite Tempe’s argument that its complaint was not a lawsuit within the meaning of the relevant statute. The appellate court disagreed, stating: “It is clear the filing of Tempe’s complaint seeking declaratory and special action relief in the superior court initiated an adversary proceeding, or lawsuit, against the attorney general” and, therefore, the attorney general, as the prevailing party, was entitled to fees.

In Mississippi, a federal court addressed the extent of the attorney general’s investigative authority under the state’s

Consumer Protection Act. The Mississippi Attorney General’s Office launched an investigation against Google for not removing from its website obnoxious, tasteless, and criminal content posted by third parties. As part of that investigation, the office issued a 79-page subpoena to Google. In response, Google brought an action in federal court, alleging that the subpoena coupled with public statements by the attorney general regarding an intention to bring legal action against Google, violated Google’s right under the Communications Decency Act, the First, Fourth, and Fourteenth Amendments, and other federal statutes. Google sought an injunction to ban the attorney general from enforcing the subpoena as well as instituting any civil or criminal proceedings addressing Google’s making third-party content accessible to Internet users.

Finding that there was federal question jurisdiction, the court then turned to a discussion of whether Younger abstention should apply. In Younger v. Harris, the Supreme Court held that federal courts must abstain from exercising jurisdiction over an action brought by an indicted state criminal defendant seeking to enjoin the pending state criminal case against him. With respect to civil actions, the doctrine only applies, for purposes of this case, to certain “civil enforcement proceedings.” The issuance of a subpoena does not amount to a civil action or criminal action, but is rather an investigative tool, so abstention was not appropriate. The court also noted that Younger abstention does not apply when a state court proceeding was brought in bad faith or for the purpose of harassing the federal plaintiff. The court concluded that the attorney general’s public statements stating his intent to take legal action against Google and his issuance of a 79-page subpoena after Google declined to fulfill certain requests showed evidence of bad faith.

Turning to the standard of review for the issuance of a preliminary injunction, the court found that Google is likely to prevail on the merits of its claim under the Communications Decency Act, the First and Fourth Amendment, and its claim of preemption under the Federal Copyright Act, the Digital Millennium Copyright Act, and the federal Food, Drug, and Cosmetic Act. It also found that there was a substantial threat of irreparable harm should the injunction not be issued and that the issuance of the preliminary injunction would not “significantly thwart” the attorney general’s ability to investigate and enforce violations of Mississippi’s consumer protection laws. The court, therefore, granted Google’s motion for the issuance of a preliminary injunction.

A Missouri court addressed the question as to whether the attorney general may avoid a subpoena in an employment case. The plaintiff in this case was fired from his job as an investigator at the Missouri Attorney General’s Office. He sued the office, alleging age and disability discrimination and sought to depose the attorney general. Instead, the deputy chief of staff appeared and was deposed; he testified that the attorney general had no direct involvement in or firsthand knowledge of the plaintiff’s termination. At trial, the plaintiff again subpoenaed the attorney general; at the request of the attorney general’s office, the court quashed that subpoena. Before the trial began, the plaintiff asked the court to require the attorney general to testify, noting that, under Missouri statutes, the attorney general may appoint and fix the compensation of investigators like the plaintiff, who serve at the pleasure of the attorney general. The plaintiff argued that the attorney general had illegally delegated this authority and that he should be required to explain that delegation. The court declined to issue the subpoena, and the attorney general’s office prevailed on all claims. The plaintiff appealed.

90 Google, Inc. v. Hood, 94 F. Supp. 3d 584 (S.D. Miss. 2015)
On appeal, the plaintiff argued that 1) he had a right to call any witness to meet the issues raised in the pleadings, 2) the subpoena was not unreasonable or oppressive, and 3) the trial court precluded him from presenting evidence necessary to prove the issues he raised. The attorney general's office answered that the plaintiff did not have a compelling need for the attorney general's testimony and had suffered no prejudice from the court's decision. The appeals court cited past decisions involving discovery from "top-level" employees which limited pre-trial discovery because of the unnecessary annoyance, burden, and expense "where [p]ersons lower in the organization may have the same or better information." The court held that the attorney general's office had shown good cause for quashing the trial subpoena because the attorney general was not involved in the employment decisions regarding the plaintiff and did not have information about plaintiff’s claims. Therefore, requiring the attorney general to testify at trial "would substantially impede his ability to perform his duties as Attorney General for the State of Missouri." Finally, the attorney general's testimony about his delegation of hiring and firing authority could not have helped the plaintiff prevail on his discrimination claims.91

In a second Missouri case, the court answered the question regarding the right of the attorney general's office to intervene in a case regarding removal from the sex offender registry. A registrant on the Missouri sex offender registry petitioned the court for removal from the registry, providing copies of the petition to the local prosecutor. The state statute does not require that notice be sent to the attorney general. The court held a hearing, at which the local prosecutor appeared but did not offer any argument in opposition to the petition. The court granted the petition. The attorney general received a copy of the court's order two months later. The attorney general filed a motion to intervene as a matter of right on behalf of itself and the Missouri State Highway Patrol, seeking to set aside the order. The court denied the attorney general's motion to intervene, and the appellate court affirmed that denial. The attorney general then appealed to the Missouri Supreme Court.

The attorney general argued that the court erred in overruling his motion to intervene because, pursuant to Rule 52.12(a), the office has the unconditional statutory right to intervene when a statute confers such a right, citing Mo. Rev. Stat. § 27.060 as conveying that right. The statute provides:

The attorney general shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; and he may also appear and interplead, answer or defend, in any proceeding or tribunal in which the state's interests are involved.

The defendant first argued that the attorney general's intervention was not timely. The court disagreed, holding that section 27.060 expressly states the attorney general may appear in "any proceeding or tribunal," and that there is no restriction on the time in which the attorney general may appear and defend in an action where the state's interest is involved. The court next held that the attorney general has an unconditional right to intervene in this matter. The court noted that the Missouri attorney general has both statutory and common law powers, and, while his common law powers are not limitless, they can only be restricted by a statute enacted specifically for the purpose of limiting that power. In this case, "[t]he plain language of the statute only limits the attorney general's power to appear, defend, and interplead so long as the state's interests are involved. The state has an interest in a circuit court's judgment ordering the removal of a sex offender's name from Missouri's sex offender registry." Finally, the court addressed the defendant's argument that the state was already represented in the case by the local prosecutor. The court held that the plain language of the statute does not extinguish the attorney general's right to appear in a proceeding in which the state is represented by a local prosecutor. It stated that, if the legislature had wished to impose that limit, it would have done so.92

In a third case from Missouri, the issue confronting the court was whether a Civil Investigative Demand (CID) under the state consumer protection statute could be served in light of the Electronics Consumer Privacy Act (ECPA), 18 U.S.C. §2701 et seq. The Missouri attorney general served a CID on Charter Communications, Inc., in connection with an investigation of possible violations of Missouri's consumer protection laws by one of Charter's customers. The CID sought basic subscriber information and “non-content” information within the meaning of the ECPA. Under the terms of the act, that type of information is subject to production pursuant, to among other things, an “administrative subpoena authorized by a Federal or State statute.” The trial court determined that the CID was not authorized by the ECPA and was, therefore, not enforceable. The attorney general appealed.


92 Dunivan v. Missouri, 466 S.W.3d 514 (Mo. 2015).
The court of appeals described the ECPA, noting that, in this civil case, the only way the attorney general could obtain basic subscriber information under the ECPA was through “an administrative subpoena authorized by a Federal or State statute.” Missouri’s CID authority was patterned on the provisions of the federal Antitrust Civil Process Act. The court examined decisions interpreting that act and noted that courts have analyzed CIDs as administrative subpoenas because the attorney general, although not an administrative agency, is performing an administrative function in enforcing the Missouri consumer protection laws. Turning to the argument that the CID violates Article I, Sec. 15 of the Missouri Constitution (equivalent to the Fourth Amendment of the U.S. Constitution), the court held that the issuance of CIDs would constitute a search of Charter’s records, but that the search was reasonable for four reasons: 1) The Missouri statute authorizing CIDs allows pre-compliance judicial review; 2) the CID complied with the authorizing statute; 3) the CID sought information relevant to the administrative inquiry and 4) the CID was not too indefinite or too broad. The court thus ordered Charter to comply with the subpoena.

In another case regarding the subpoena authority of an attorney general’s office, a New York court addressed whether a subpoena could be issued to third parties in a charities investigation. The New York Attorney General’s Office investigated the Friends of the Fighting 69th, Inc. (Friends), a New York non-profit corporation that purported to support the Manhattan-based New York Army National Guard 69th Infantry Regiment. After the non-profit failed to file required forms with the Internal Revenue Service and after the attorney general received several complaints about mishandling of contributions, the office issued a subpoena to a former director of the organization who was no longer involved with the charity. The former director failed to appear for his scheduled investigatory examination, and the attorney general’s office filed suit to compel his appearance. The defendant argued that, because he was no longer involved with the charity, he did not fall within any of the categories of persons or entities who are subject to the control of the attorney general.

The court granted the motion to compel the former director’s testimony. The court stated that, under the New York Non-Profit Corporation Law, “the Attorney General is responsible for the supervision of not-for-profit corporations, which is in addition to his common law parens patriae authority to protect the public interest in charitable property.” According to the court, the attorney general has broad investigatory powers in connection with this authority:

The attorney general, his or her assistants, deputies or other such officers as may be designated by him or her, are empowered

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to subpoena any trustee, agent, fiduciary, beneficiary, institution, association or corporation or other witness [emphasis in original].

In light of these broad powers, the court granted the attorney general’s petition to compel the former director’s appearance. 94

The question in an Ohio case was whether collection efforts on behalf of a state agency must be brought in the name of the attorney general or in the name of the agency represented by the attorney general. The Ohio Department of Health (ODH) enforces the state’s Smoke-Free Act, which prohibits smoking in public places and places of employment. If an establishment is a repeat offender under the Act, ODH must issue a written proposed finding of violation and a proposed civil fine. Although the defendant in this case did not contest the fine or appeal its imposition, neither did it make payment. After 45 days, as permitted by the law, ODH referred the matter to the attorney general to begin the collection process, which was brought in the name of ODH. The defendant then sued, challenging the action on the grounds, among other things, that only the attorney general could obtain an order from the court to collect unpaid fines and that ODH was authorized only to enforce equitable remedies.

The court overruled a prior decision in which it had held that the attorney general must bring a suit in his own name, rather than that of the agency, to collect overdue fines. The court analyzed the relevant statute, which provided, “if the amount is not paid within forty-five days after payment is due, the officer, employee, or agent shall certify the amount due to the attorney general.” The defendant argued that this language required the transfer of the debt to the attorney general, but the court held that the statute merely makes the office of attorney general (OAG) the attorney for ODH and, therefore, tasked with making efforts to collect the amount due. “The statute does not specify in whose name suit must be brought and, therefore, does not prohibit the OAG from captioning the case in ODH’s name.” In this case, “the OAG as counsel for ODH may file a collection action naming ODH as plaintiff.” 95

An interesting case arose out of an Oklahoma attorney general’s opinion regarding the use of a sales tax by a county board. The voters of Canadian County, Okla., through a referendum, approved a third of a cent sales tax “to be used for financing, construction and equipping of a juvenile delinquents detention facility and juvenile justice facilities in Canadian County, including design, construction, expenses, operations, equipment and furnishings.” Since the tax has been in effect, the revenue has been used for juvenile facilities and a variety of juvenile programs and services in Canadian County. After questions were raised about the use of the tax revenue for programs and services, rather than just for the juvenile justice facilities, the attorney general issued an opinion that the referendum did not authorize use of the tax for the funding of programs, salaries, and expenses related to operation of the juvenile bureau or even certain aspects of the physical facilities. In view of the opinion, the Board of County Commissioners stopped using the revenue for that purpose. Some citizens of the county challenged the Board’s actions and sought a declaratory judgment seeking to find the opinion invalid and not a legal basis for the Board to cease using proceeds from the tax to fund the ongoing juvenile programs and services. The trial court issued a temporary restraining order and the Board appealed.

The Oklahoma Supreme Court noted that Oklahoma statutes authorize a county to impose a sales tax through a referendum procedure. The statute states, “The county shall identify the purpose of the sales tax when it is presented to the voters.” The court found that the citizens’ injury was a direct result of the attorney general’s opinion. “An Opinion of the Attorney General is binding on those officials affected by it,” but the attorney general’s opinion is not binding on a court. In this case, the court examined the resolution approved by the voters, including the language stating that the measure was an emergency one “by reason of said County being without adequate funds with which to furnish required public services.” The court also cited an earlier attorney general opinion for the proposition that “a reasonable measure of flexibility is allowed in a statement describing how tax proceeds will be spent, as long as the general purpose of the proposition is approved by the voters.” In light of this prior opinion and the testimony of local public officials as to the intentions of the drafters of the referendum, the court held that the citizens were entitled to a temporary restraining order, thus freeing the Board to continue funding the programs out of the tax revenues. 96

A final decision, out of Texas, addressed the question of whether an assistant attorney general (AAG) was protected under the state’s Whistleblower Act. A Texas AAG alleged that two senior attorneys in her section sought to coerce her to commit perjury regarding her interactions with a judge. She refused. The attorney general’s policy requires an employee to report a potential criminal violation to his or her

96 Edwards v. Board of County Commissioners, 2015 OK 58 (Okla. 2015).
division chief, who must then refer it to the OAG's Office of Special Investigations for further action. Under that policy, employees may not launch their own investigation or, absent exigent circumstances, refer a criminal violation to outside law enforcement and may be disciplined for not following the policy. The AAG reported the matter to her division chief, was assured that there would be an investigation, and was told not to discuss the matter. She alleged that she was eventually fired in retaliation for her report.

The state's Whistleblower Act creates an exception to the state's sovereign immunity and allows suit by "a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority." Tex. Gov't Code § 554.002(a). An appropriate law enforcement authority is defined as one that the employee "in good faith" believes can regulate under or enforce the law alleged to be violated or investigate or prosecute a violation of criminal law. The trial court found that the AAG could invoke the Whistleblower Act, and the court of appeals affirmed. The attorney general appealed.

The Texas Supreme Court, citing earlier cases, overruled the lower courts.

An authority's power to discipline its own or investigate internally does not support a good-faith belief that it is an appropriate law-enforcement authority... Instead, the authority must have outward-looking powers. “[I]t must have authority to enforce, investigate, or prosecute violations of law against third parties outside of the entity itself, or it must have authority to promulgate regulations governing the conduct of such third parties.”

In addition, a policy requiring reports to supervisors within the agency is not sufficient for a good-faith belief that the employer is an appropriate law enforcement authority. According to the court, “Although such a policy permits employees to reasonably believe reports will be sent to an appropriate law-enforcement authority, it provides no reason to believe the reported-to supervisors are appropriate authorities.”

The court held that the AAG's report to her division chief did not fit the criteria for protection under the Whistleblower Act. She had no reason to believe that her division chief would be able to investigate the report as a crime, nor did the division chief have the authority to "regulate under or enforce the law alleged to be violated." The AAG argued that this interpretation gave employees in the attorney general's office no safe way to report criminal violations because, under the policy, they would risk discipline for contacting a law-enforcement authority. The court found that the Whistleblower Act would protect an employee in those circumstances and that the OAG policy cannot do what the act prohibits by disciplining an employee in those circumstances.

The AAG also argued that the OAG handles some criminal law matters and, thus, is an appropriate law-enforcement authority. The court disagreed, stating, “[T]he authority of some OAG divisions to investigate or prosecute crime does not transform the entire OAG into an appropriate law-enforcement authority. . . . An entire agency does not become an appropriate law-enforcement authority merely because some divisions have such power.” The AAG's report did not meet the requirements of the Whistleblower Act, and the state was therefore immune from suit. 97

There are few tasks more daunting to a lawyer than being asked to write, for the first time, a U.S. Supreme Court brief. You know that, whether it's a petition for certiorari, a brief in opposition, a merits brief, or an amicus brief, your product will be read by Supreme Court Justices and could eventually affect the law throughout the entire nation. You therefore want it to be as well written as possible.

The most obvious way to accomplish that is to research the legal issue thoroughly, devise creative and persuasive arguments, and craft a well-organized, well-reasoned, and engagingly written brief. That's what you hope to prepare, of course, in every case regardless of the court; but it's particularly expected in the Supreme Court.

That isn't enough, though. The U.S. Supreme Court, like most other tribunals, has its own traditions, customs, and practices that are well known to regular practitioners but not to outsiders. If you want your brief to be as effective as possible, you want it to conform to those traditions, customs, and practices. Failing to follow them might not be as off-putting as typos; but they equally tell the reader — the justice or clerk — that you don't truly know how the game is played there.

As NAAG Supreme Court counsel for the past 20 years, I have had the opportunity to read literally thousands of Supreme Court briefs. This guide is an effort to pass along insights I have thereby obtained on the "style" of these briefs. Most briefs filed with the Court are nicely written and follow the Court's protocol. Others, however, do not—including some written by state attorney general offices. I have seen virtually every mistake a brief writer can make, on both substance and style. My goal in this series of articles is to point out common mistakes of style so that, at the very least, your briefs will adhere to the Court's conventions. Let's begin at the beginning: the cover page and Question Presented.

The Cover Page

Don't worry; we won't be spending much time on this. For the most part, what goes on a cover page of a Supreme Court brief is obvious and can be gleaned from looking at virtually any brief filed with the Court by the U.S. Solicitor General's office or an experienced Supreme Court practitioner. What can go wrong? A few things, actually.

But let's start with what the cover page should look like. Here's a properly executed cover page in a recent merits brief filed by the Michigan Attorney General's office:

No. ________

In the Supreme Court of the United States

MICHIGAN GAMING CONTROL BOARD, RICHARD KALM, GARY FOST, DARYL PARKER, RICHARD GARRISON, BILLY LEE WILLIAMS, JOHN LESSENAU, AND AL EINSTEIN, PETITIONERS

v.

JOHN MOODY, DONALD HARMON, RICK RAY, AND WALLACE MILLMURRAY, JR.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Simple enough, or so it would seem. And yet over the years I have seen many errors on cover pages. Here are some things to remember:

1. Do not include the state bar numbers of any of the attorneys listed on the cover page. Your state courts might want them, but the U.S. Supreme Court does not.

2. Do not include, across from the signature block, an additional block saying “Please serve: [name, address].”

3. Do not place at or near the top of the page the words “October Term 2015” (or whatever Term you think it is). The Court used to require that the cover page set out the Term, but eliminated that requirement when it realized that no one could figure out what to write in the summer, when the Court is in recess but the Term is not officially over.

4. Do provide the email address of the counsel of record; do not provide a fax number (who faxes things anymore?). See Supreme Court Rule 34.1(f).

5. In a capital case, the words “Capital Case” appear above the Question Presented; they do not appear on the cover page.

6. The fourth component of the cover page (after the case name) is what Rule 34.1(d) calls “the nature of the proceeding and the name of the court from which the action is brought.” At the certiorari stage, it should say (for example), “On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.” At the merits stage, delete “Petition for”; it should read “On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.” Many a counsel has forgotten to delete those two words when they prepared the merits brief.

One final pointer. The fifth component of the cover page is the name of the document. These should be: “Petition for a Writ of Certiorari”; “Brief in Opposition”; and “Brief for the Petitioner [Respondent].” Reply briefs at the merits stage are generally called “Reply Brief for the Petitioner”; at the cert stage, I have seen well-regarded practitioners put “Reply Brief”; “Reply Brief for the Petitioner”; and “Reply to Brief in Opposition.” (Some folks say “Brief for Petitioner”; others say “Brief of Petitioner. Either way is fine. And some folks say “Brief for the Petitioner”; others leave out the word “the,” so it reads “Brief for Petitioner.” Again, either way is fine.)

Multi-state amicus briefs are a bit trickier to name. Some begin, “Brief of [or for] the States of _____ as Amici Curiae in Support of Petitioner [Respondent].” Others begin, “Brief of Amici Curiae States of _____ in Support of Petitioner [Respondent].” (The difference, for those of you who haven’t had your coffee yet, is the placement of the words “Amici Curiae.”) Either way is fine. Also, some multi-state amicus briefs list on the cover page the names of all the states that join the brief; others list only the name of the lead state, followed by the number of additional states that join (e.g., “Brief of Amici Curiae State of Michigan and 19 Other States in Support of Respondents”). Again, either way is fine, though I’m partial to the former approach.

Enough of cover pages. On to . . .

**Question(s) Presented**

The Question Presented section is a very important part of a cert petition. Typically, it is the first thing the Justices and their clerks read and generates that all-important first impression. Justice Brennan reportedly said that he knew immediately after reading the Question Presented whether he would vote to grant certiorari.

At the merits stage, crafting this part of the brief is less important. The petitioner is stuck with the question(s) he or she wrote at the cert-stage; and the Court rarely cares if or how respondent recasts it. Nonetheless, the questions presented can matter greatly to counsel at the merits stage because they demarcate the issues before the Court. Many a counsel has had to explain at oral argument why a particular argument she is making is “fairly subsumed” within the question presented.

With all that said, my goal here is not to explain how to write a first-rate question presented. This is a guide on style. A bit of what follows may bleed into substance, but my focus will remain on how the Question Presented section should look. Here is an example of a properly written Question Presented section, from Utah’s successful cert petition in Utah v. Strieff:

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QUESTION PRESENTED

Should evidence seized incident to a lawful arrest on an outstanding warrant be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful?

That seems, once again, simple enough. But inexperienced Supreme Court practitioners are quite skilled at finding ways to write this section in ways that don't conform to Supreme Court style.
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1. The natural place to start is with the section’s name. It is “Question[s] Presented.” That’s it. It is not “Question Presented for Review.” If you are the respondent, it is not “Question Presented (restated)” or “Counterstatement of Question Presented.”

And don’t underline the heading “Question Presented” (or any of the other main headings of the brief, such as Statement of the Case, Summary of Argument, Argument, and Conclusion).

2. Please, please, please do not put the questions in all caps. Sentences written in all caps are very hard to read; and it is simply not the accepted style at the Supreme Court. Reading the following gives judges a headache:

   SHOULD EVIDENCE SEIZED INCIDENT TO A LAWFUL ARREST ON AN OUTSTANDING WARRANT BE SUPPRESSED BECAUSE THE WARRANT WAS DISCOVERED DURING AN INVESTIGATORY STOP LATER FOUND TO BE UNLAWFUL?

3. A few words on numbering the questions. First, if you are presenting only one question, do not place the number “1” before it. Second, if you are presenting multiple questions, they should be listed as Arabic 1, 2, etc., not Roman I, II, etc.

4. If you are citing a case, provide the full citation (e.g., “Whether Nevada v. Hall, 440 U.S. 410 (1979), which permits a sovereign State to be haled into the courts of another State without its consent, should be overruled.”).

5. Don’t place any footnotes in the Questions Presented. I’ve seen briefs, for example, that refer to “Miranda” warnings in the body of the question and insert a footnote that contains the full cite to Miranda v. Arizona. No. Either give the full cite to Miranda in the body of the question or simply say “Miranda,” knowing that everyone will understand what that means.

A few other matters of style don’t come down to right and wrong, but personal preference.

1. Many cert petitions include in the question a reference to a circuit split. For example, a recent, successful cert petition presented the following question:

   Under federal employment discrimination law, does the filing period for a constructive discharge claim begin to run when an employee resigns, as five circuits have held, or at the time of an employer’s last allegedly discriminatory act giving rise to the resignation, as three other circuits have held? [Emphasis added.]

   Some practitioners prefer including circuit-split language of that sort; others do not. Both ways are acceptable.

2. The “Whether” vs. “Does” debate. A recent question presented to the Court was, “Whether the First Amendment bars the government from demoting a public employee based on a supervisor’s perception that the employee supports a political candidate.” The question could easily have been rephrased as, “Does the First Amendment bar the government from demoting a public employee based on a supervisor’s perception that the employee supports a political candidate?”

   Either way is fine. My only suggestion is that if you use the “Whether” approach, do not end the sentence with a question mark; use a period. (That’s because the sentence is implicitly saying, “The question presented is whether the First Amendment bars . . . .” That’s not a question; it’s a statement about what question is being presented.)

3. The question should be worded exactly how you want it to appear in the merits brief, if cert is granted. That means, among other things, that you should not begin the question with phrases such as, “Should this Court grant certiorari to . . . .” or “Should this Court resolve a conflict between . . . .” Phrases like that make no sense at the merits stage.

4. Many excellent Questions Presented begin with a prefatory paragraph or two before setting out the actual question(s). The Court is quite used to receiving questions in that form and is fine with them. A few caveats, though.

   First, not every case requires a prefatory statement. As in the Utah example, straightforward criminal procedure issues don’t need much of a set-up. (By contrast, petitions based on lower court failures to apply AEDPA usually do.) If you don’t need one, don’t include one. In the Supreme Court, as in all courts, less is usually more.

   Second, a prefatory statement is not a Summary of Argument. Its goal is to provide the background information that allows the reader to understand the issue being presented. If the question concerns the meaning of a complicated
statutory provision, it is often helpful to describe that provision first. For example, the successful cert petition in Jesinoski v. Countrywide Home Loans, Inc. presented the following question:

**QUESTION PRESENTED**

The Truth in Lending Act provides that a borrower “shall have the right to rescind the transaction until midnight of the third business day following ... the delivery of the information and rescission forms required under this section ... by notifying the creditor ... of his intention to do so.” 15 U.S.C. § 1635(a). The Act further creates a “[t]ime limit for [the] exercise of [this] right,” providing that the borrower’s “right of rescission shall expire three years after the date of consummation of the transaction” even if the “disclosures required ... have not been delivered.” Id. § 1635(f).

The question presented is:

Does a borrower exercise his right to rescind a transaction in satisfaction of the requirements of Section 1635 by “notifying the creditor” in writing within three years of the consummation of the transaction, as the Third, Fourth, and Eleventh Circuits have held, or must a borrower file a lawsuit within three years of the consummation of the transaction, as the First, Sixth, Eighth, Ninth, and Tenth Circuits have held?

Having said that, I am seeing more and more argumentative prefatory paragraphs in cert petitions filed by experienced practitioners. My view is that, just as a Statement of the Case should be non-argumentative but subtly suggest to the reader that your position is correct, so can a Question Presented section. But the Question Presented section is generally not the place to argue your case directly. An exception is where the petition's core argument is that the lower court decision directly conflicts with a U.S. Supreme Court decision. Your Question Presented might then describe the Supreme Court decision in a prefatory paragraph, describe the lower court decision, and then ask “whether, in holding X, the state supreme court decision directly conflicts with this Court's decision in Y.”

*Third*, if possible keep the Question Presented section to one page. Although the Court does not bar Question Presented sections that hit a second page, it disfavors them.

*Fourth*, after the prefatory discussion, add the sentence, “The question presented is:” It can come at the end of the prefatory paragraph(s) or come (as in the earlier example) in a stand-alone paragraph. Either way, that’s the proper transition from background material to the actual question being presented.

That’s all for now. Next time, the Statement of the Case.

In 2004, the attorneys general of the 50 states and the District of Columbia, led by the Oregon attorney general, settled litigation with Warner-Lambert Company, LLC, a subsidiary of Pfizer, Inc. The litigation related to allegations that Warner-Lambert conducted an unlawful marketing campaign for the drug, Neurontin.

As part of the Settlement Agreement, the attorneys general received funds for a Consumer and Prescriber Education Grant Program in the amount of $21 million. A special committee was created by state attorneys general to approve individual grants to support this program. The Oregon Department of Justice was then designated to receive the funds and enter into grant contracts to implement grants approved by the special committee. All grants awarded were to involve projects relating to prescriber and consumer education regarding drug information, drug marketing, and the conditions for which drugs are prescribed.

In July 2015, the National Association of Attorneys General (NAAG) received a grant totaling $2.1 million to implement several projects in accordance with the grant program. Through its National Attorneys General Training and Research Institute (NAGTRI), NAAG is developing projects that specifically address prescription opioids. These projects are designed to assist attorneys general in their efforts to use evidence-based approaches to reducing opioid use and abuse in their states.

The anticipated NAGTRI projects are as follows:

- A multi-day conference in partnership with the Association of State and Territorial Health Officials (ASTHO). This conference will have panel discussions and breakout sessions pertaining to drug trends, drug marketing, consumer education, and the prescribing practices of opioids. After the conference, a best-practices publication will be prepared which will highlight the best-evidence practices discussed throughout the conference. The conference will be held this fall in Washington, D.C.

- A sponsored panel presentation at the National RX Drug Abuse Summit which is hosted by Operation UNITE, a Kentucky-based non-profit that works to decrease illegal drug use through education, community empowerment, and the efforts of law enforcement. The panel will focus on the best practices for prescribing extended release long-acting opioids,
effective communication with patients, prescription drug monitoring programs, and ways for prescribers to collaborate with attorneys general to address concerns in their jurisdictions. The conference is scheduled for March 28 – 31, 2016, in Atlanta, Ga.

- Conducting Opioid Abuse Consumer Protection and Enforcement trainings. These training courses are designed for attorneys general legal staff, investigators, consumer advocates, and other allied professionals. They will provide an overview of issues relating to prescription opioid abuse including education and prevention, tracking and monitoring, enforcement, and treatment. The trainings will be delivered as two national courses and three state-level courses each year for a period of five years. At press time, trainings were scheduled for March 16 – 17, 2016 in New Orleans, La., and on June 16 - 17, 2016 in Salt Lake City, Utah.

- Development of an advertising toolkit that can be used by the attorney general community to educate their constituents about the drug disposal options in their areas, including the environmental hazards of improper disposal. This toolkit will be able to be adapted and branded by each attorney general office. The materials will be available this summer.

- Development of an advertising toolkit with materials designed to educate consumers about informed decision-making regarding use of prescription opioids, prescription drug abuse, medication safety, generic prescriptions, and questions consumers may want to ask their physicians about prescription opioids. These educational materials will be developed as leaflets, community presentations and web-based content. All materials will be able to be adapted and branded by each attorney general office, and will be available this summer.

- Offering an updated report on state and federal criminal charges brought against doctors as a result of their prescribing of controlled substances from 2006 to the present. The final research report will be published in spring 2017.

For more information about these NAGTRI projects, please contact Joanne Thomka, NAGTRI program counsel, at jthomka@naag.org or 202-326-6269.

Training Calendar
A wide variety of courses are available for professional development and management leadership to our membership. Details, including registration, for all courses may be found at www.naag.org/nagtri/nagtri-courses.php

**National**

**Opioid Abuse Consumer Protection and Enforcement Training:** New Orleans, LA
March 9 - 11, 2016

**Reducing Recidivism and Improving Public Health Through Effective Mental Health Programs:** Tampa, FL
March 14 - 15, 2016

**National Energy Training:** Charlotte, NC
March 17 - 18, 2016

**Complex Civil Litigation:** Providence, RI
April 5 - 8, 2016

**Elders Affairs:** Chatanooga, TN
April 12 - 13, 2016

**Mobile**

**Negotiation Skills for OAG-CT:** Hartford, CT
February 22 - 23, 2016

**Management for OAG-CA:** San Diego, CA
February 24 - 25, 2016

**Intellectual Property Theft Training Seminar:**
Raleigh, NC
March 4, 2016

**Trial Advocacy for OAG-NC:** Raleigh, NC
March 7 - 10, 2016

**Management for OAG-AR:** Little Rock, AR
March 16 - 17, 2016

**Negotiation Skills for OAG-OH:** Columbus, OH
March 21 - 22, 2016
Motion to Admit Exhibit #1 Granted: NAGTRI’s Evidentiary Foundations Manual

All of us need a little help sometime, not only when learning something new, but also when we are experienced and facing a tough adversary. This can be especially true in the fast-paced arena of advocating the admission of evidence at trial. Regardless of the level of experience, it is important that both attorneys and witnesses be thoroughly and adequately prepared. An important part of that preparation includes knowledge of what questions to ask of each witness together with an understanding of why such questions are important.

In an effort to provide attorney general staff and other government lawyers with practical tools they can use in their everyday practice, the National Attorneys General Training and Research Institute (NAGTRI) recently released its Evidentiary Foundations for Government Attorneys manual. This manual was developed with the assistance of a panel of experienced litigators who shared their expertise and knowledge. The effort was spearheaded by Mark Neil and Francesca Liquori, two of NAGTRI’s program counsel and both experienced trial attorneys. Published late last year, it is the newest publication of its kind and the first in almost 20 years.

Written by trial lawyers for trial lawyers, this manual will equip litigators with a better understanding of the process of laying a proper and sufficient evidentiary foundation, an essential skill in the courtroom. The manual serves as a guide to laying the proper foundation for admissibility of a wide variety of forms of evidence and types of testimony. Its goal is to provide the attorney and witness with a better understanding of the process of admitting various types of evidence. The materials are not intended to be used as a script but rather, serve as a guide of how an attorney might craft his or her own examinations of a witness. The manual goes beyond simple predicate questions by also providing an explanation of the legal concepts relating to each sample direct examination.

The foundations are divided into topical sections for ease of reference and are meant to be adapted to address variances that might be encountered. The major sections cover general evidence forms; business records; maps, diagrams and models; email; social media; identification; audio and video; electronic surveillance; expert and opinion witnesses; medical; insanity and mental health; traffic; and testimonial issues. Each evidentiary foundation, when appropriate, contains a reference to the Federal Rules of Evidence and relevant case law or other reference, a brief explanation and outline of areas for inquiry, and an example of a direct examination. Some examples incorporate specific situations to better illustrate how the examination might be conducted.

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About the Authors

Jim McPherson has been NAAG executive director since 2007. In 2006, he completed a distinguished career in the U.S. Navy retiring as a two-star rear admiral. Highlights of his career include assignments as a trial attorney, senior prosecutor, senior defense attorney, and commanding officer at Naval Legal Service and Trial Service Offices; staff judge advocate assignments in the United States, overseas, and afloat; and legal counsel to the vice chief and chief of naval operations. Mr. McPherson’s first flag assignment was as the deputy judge advocate general and commander, Naval Legal Service Command. In 2004, he was appointed by the president and confirmed by the U.S. Senate as the U.S. Navy’s 39th judge advocate general, an appointment he held until his retirement.

Francesca Liquori until recently was a program counsel for the National Attorneys General Training and Research Institute (NAGTRI), a branch of the National Association of Attorneys General (NAAG). She departed NAAG Feb. 12 to work in the criminal division of the U.S. Department of Justice.

Emily Myers is NAAG antitrust and powers and duties chief counsel and has been with NAAG since 1993. She is the editor of NAAG’s third edition book, “State Attorneys General Powers and Responsibilities” and the author of chapters on state antitrust enforcement in American Bar Association and state bar publications. As antitrust counsel, Emily assists states in their multistate activities and maintains the NAAG Multistate Litigation Database, a comprehensive database of state antitrust cases since 1990.

Dan Schweitzer is director and chief counsel for the NAAG Center for Supreme Court Advocacy and has worked at NAAG for 20 years. The Center staff conducts moot courts for state attorneys who argue in the Court, edits 45-50 state briefs each Term, facilitates communication among the states on amicus briefs, and holds annual training programs.

Joanne Thomka is a NAGTRI program counsel who joined the NAAG staff in October 2015. Before coming to NAAG, she served as the director of the National Traffic Law Center (NTLC) of the National District Attorneys Association (NDAA). The NTLC provides technical assistance, legal research and training support to prosecutors, law enforcement and other traffic safety professionals across the country. Prior to NDAA, she was a senior assistant district attorney for the Onondaga County District Attorney’s Office in Syracuse, N.Y. She was the bureau chief of the DWI Unit. The DWI Bureau is responsible for the prosecution of all alcohol-related crimes and all vehicular fatalities. Joanne was previously a member of both the Special Victims and Violent Felony Bureaus within the Onondaga County District Attorney’s Office.