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When Social Media Becomes an Oxymoron: Free Speech, True Threats, & “Just Kidding”

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This is the first article in a two-part series.¹

Every state has had a school shooting or an incident where weapons were brought onto campus. While such threats galvanize a community and garner media coverage, the lasting effect is with the public schools: How will the next tragedy be prevented? As Judge M. Margaret McKeown stated in Wynar v. Douglas County School District:²

With the advent of the Internet and in the wake of school shootings at Columbine, Santee, Newtown and many others, school administrators face the daunting task of evaluating potential threats of violence and keeping their students safe without impinging on their constitutional rights. It is a feat like tightrope balancing, where an error in judgment can lead to a tragic result. …But the challenge for administrators is made all the more difficult because, outside of the official school environment, students are instant messaging, texting, emailing, Twittering, Tumblring, and otherwise communicating electronically, sometimes about subjects that threaten the safety of the school environment. At the same time, school officials must take care not to overreact and to take into account the creative juices and often startling writings of the students.³

Depending upon a state’s laws, a public school may be a state agency or a local governmental entity. Notwithstanding what the status might be, public schools operate typically pursuant to legislative enactments, statutory and regulatory. With increased concerns over school security, public schools, in implementing such laws, may find themselves running afoul of constitutional rights of students. This increasingly draws attorneys general into the fray, usually to defend the legislative enactment or to prosecute purported criminal activity. The nearly universal use of social media by students raises important questions as to whether or to what extent public schools may discipline students for such “speech,” especially where the speech occurs off-campus during non-school hours.

Student social media use has resulted in school concerns regarding harassment (particularly, cyberbullying), creation of a substantial disruption or material interference in the school, and a marked increase in what may be termed “true threats,” this latter topic the focus of this article.

Any First Amendment¹ analysis of student speech within a public school context must begin with reference to the U.S. Supreme Court’s four school-speech cases:

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 507-08, 514 89 S. Ct. 733 (1969) (student speech/expressive conduct in a school context cannot be banned absent substantial disruption or material interference with school purposes or the reasonable forecast of same, or the invasion of the rights of others).

Bethel School District No. 403 v. Fraser, 478 U.S. 675, 681, 683, 685-86, 106 S. Ct. 3159 (1986) (student’s sophomoric speech—which contained offensive, indecent, lewd references—was not protected speech and could be regulated because vulgar or indecent speech and lewd conduct in the classroom or school context is inconsistent with the fundamental values of public school education).
From these four cases, lower courts have distilled the following:

1. Public schools have wide discretion to prohibit speech that is vulgar, lewd, indecent, or plainly offensive, even if not obscene (Fraser).

2. If the speech may be considered “school sponsored,” school personnel may censor the speech so long as the censorship is “reasonably related to legitimate pedagogical concerns.” This would apply to any medium of expression controlled by the school (Kuhlmeier).

3. School personnel may censor speech that is “reasonably perceived as promoting illegal drug use” (Morse).

4. A student's free-speech rights within the public school context are not co-extensive with the rights of adults in other settings (Fraser, Kuhlmeier, Morse).

5. For all other student speech (speech that is not vulgar, lewd, indecent, or plainly offensive; does not promote illegal drug use; or is not considered “school sponsored”), the rule of Tinker will apply, and school personnel may not regulate student speech unless such speech would materially interfere or substantially disrupt class work and discipline within the school, or violate the rights of others.
Without reference to a public school, there are also other categories of speech that are not protected at any time:


**Obscenity.** *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607 (1973) (state can regulate the indiscriminate dissemination of obscene materials where these materials depict or describe patently offensive “hard core” sexual conduct, as defined under state law).

**Incitements to Imminent Lawlessness.** *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827 (1969) (state’s criminal code cannot punish mere advocacy or assembly with others to advocate actions that are not incitements to imminent lawless action).

**True Threats.** *Watts v. United States*, 394 U.S. 705, 89 S. Ct. 1399 (1969) (political hyperbole by 18-year-old during discussion does not constitute “true threat” to kill the president).

**Fighting Words.** *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766 (1942) (calling police officer a “damned racketeer” and “damned Fascist” are insulting words likely to provoke the average person to retaliate and thereby breach the peace).

The U.S. Supreme Court’s four student free-speech cases all occurred on a high school campus (or at a school-related activity) and did not involve electronic communications; as a consequence, lower courts endeavor to apply these precedents to circumstances not contemplated by the highest court. Some patterns are emerging.

The metaphorical “schoolhouse gate” in *Tinker* is “not constructed solely of the bricks and mortar surrounding the school yard,” especially in the Internet age. “Nevertheless, the concept of the ‘school yard’ is not without boundaries and the reach of school authorities is not without limits.” Two tests are emerging to assess whether a public school may discipline a student for off-campus electronic speech that does not occur during school hours or through the use of school equipment—the “Nexus” test and the “Reasonable Foreseeability” test.

### The “Nexus” Test

This test is derived from the Fourth Circuit’s holding in *Kowalski v. Berkeley County Schools.* This test “looks for a sufficient nexus between speech and the school[.]” In *Kowalski*, a high school student created a MySpace discussion group where she and over two dozen students from the high school engaged in a series of increasingly disparaging remarks about another student, including lewd references using the targeted student’s picture. Although Kowalski deleted the discussion group after the targeted student discovered it, the damage had been done. The targeted student was mortified that fellow classmates could write such things about her. She filed a complaint of harassment with the high school and found it impossible to attend school in the immediate aftermath. Kowalski, who was suspended for this activity, argued her speech was protected from school discipline because it took place at home, after school, through personal means. The court disagreed, finding that there was a sufficient nexus between Kowalski’s speech and the school. The participants were mostly high school classmates of the targeted student, the discussion group was named after the targeted student, it was foreseeable the dialogue would reach the school and did reach the school, the “group thread was understood by the victim [to be] an attack ‘made in a school context,’” and there was an impact in the school environment (the impingement on the right of the targeted student to a safe, secure learning environment).

### The “Reasonable Foreseeability” Test

This test arises from the Eighth Circuit’s holding in *S.J.W. v. Lee’s Summit R-7 School District,* where twin brothers created a blog directed at the school. This test “asks whether it was reasonably foreseeable that the off-campus speech would reach the school” and “create a risk of a substantial disruption.” The students’ blog contained “racist content as well as sexually degrading comments about specifically identified female classmates.” Even though the brothers told only six school friends about their blog, there were no privacy settings. “[W]hether by accident or intention, word spread quickly” about the blog’s content in the high school. According to the court, it was reasonably foreseeable the blog content might reach the school because it was “targeted” at the school and specific students, the content was likely to cause a substantial disruption, and the content did, in fact,
result in a substantial disruption, meriting long-term suspensions for the brothers.

These tests are not bright-line in any sense but depend upon a number of factors, especially upon what sort of potentially proscribed speech is at issue. For “true threats,” the more immediate concern of school officials, there are two necessary elements: (1) the speaker intends his communication to put his target or targets in fear for their safety; and (2) the communication is likely to actually cause such fear in a reasonable person similarly situated to the target. As with most student speech, whether a statement is a threat is an objective question. The speaker's subjective frame of mind is not particularly relevant. For “true threats” that affect schools, there are other considerations, especially where the statement occurred off-campus and not during school hours or on school equipment.

The courts are increasingly analyzing such disputes to determine whether the off-campus electronic speech is a “true threat” or the student really was “just kidding,” as they so often represent. Some of the areas the courts are scrutinizing:

- Was the threat sufficiently precise?
- Was the threat directly communicated to the intended person(s) or communicated in such a fashion as to ensure the target would receive the threat?
- Was there a significant passage of time between the communication and the receipt of the threat by the targeted person?
- Does the student have the ability to carry out the threat?
- Is state law sufficiently clear so as to put a student on notice that his communication could be considered a “true threat?”

Under the Court’s decision in Watts, the challenged speech must constitute a “true threat” and not merely political hyperbole or idle chatter. The speaker must intend to communicate to another a “serious expression” of an intent to commit an act of unlawful violence to a particular individual or group of individuals. However, “[t]he speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protects individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.” A reasonable recipient of such a statement would have to interpret the challenged speech as a serious expression of an intent to harm another. It is not necessary that the speaker communicate the threat directly to the targeted individual or group; communication to a third party may be sufficient.

While courts in recent years have displayed considerable deference towards public school districts in addressing threatening speech or other student expression that may be disruptive, they have also been more circumspect of late, declining to accept the utterance of “Columbine” as sufficient justification or defense to challenges by students claiming violations of their free-speech rights under the First Amendment.

**True Threat Present**

**Violent Speech and Expression**

As noted supra, there is no bright-line analysis for determining whether a student’s seemingly violent expression (written, drawn, or spoken) is intended as a creative exercise or poses a “true threat.” There likely is not such a bright-line; instead, there will have to be a case-by-case analysis to assess the reasonableness of the actions of school administrators in disciplining students for such speech. Context and the known history of the student do play a role. The Wynar case, discussed below, has proven influential in the area of assessing whether social media communications constitute a “true threat” to a school.

In Landon Wynar v. Douglas County School District, et al., the school district found the student’s off-campus speech posed a threat to the safety and security of the school and its students. Landon Wynar was a high school sophomore. He collected weapons and ammunition and owned various rifles. He communicated regularly from home with his friends via instant messaging through MySpace, a social networking website that allows its members to engage in real-time dialogue through various means. Landon often wrote about weapons, World War II, and
Adolph Hitler, whom he once referred to as “our hero.” He also expressed degrees of alienation. His MySpace messages became increasingly violent and disturbing. Some messages centered on a school shooting to take place on April 20 (Hitler’s birthday and the date of the Columbine massacre). He wrote about hit lists, a desire to “get the record” for school shootings, a girl who would be the first one he would kill, raping other students, and the perceived ineptness of the Virginia Tech shooter.

These escalating comments alarmed Landon’s friends. Two of them approached a football coach, who, in turn, took them to the principal who was shown print-outs of his messages. Law enforcement was then contacted. Two police deputies talked with the reporting students and viewed the print outs. They then met with Landon who was subsequently taken into custody. School officials met with Landon while he was in custody and asked him if he wanted his parents present during this meeting. Landon declined to have his parents present. He admitted authorship of the MySpace messages, but he claimed these were meant to be jokes. School officials obtained a written statement from Landon. He was suspended from school for 10 days.

The school board charged Landon with violating a state statute that provides that a student will be considered a “habitual discipline problem” if there is written evidence the student threatened another pupil, teacher, or school employee. Under a companion statute, a student considered a “habitual discipline problem” must be suspended or expelled for at least a semester. The school board convened a hearing. At the conclusion, the school board found that Landon was a “habitual discipline problem” and expelled him from school for 90 days.

Landon sued his school district and several of its personnel, asserting that his First Amendment free-speech and Fourteenth Amendment due-process rights were violated. The federal district court granted the school district’s Motion for Summary Judgment, and Landon appealed to the Ninth Circuit.

First Amendment Defense

Although noting that the U.S. Supreme Court had not yet addressed whether or to what extent its existing student free-speech cases would apply to student speech occurring off campus, the court nevertheless held that, under Tinker, the school district did not violate Landon’s First Amendment rights. His messages “threatened the safety of the school and its students” and “interfered with the rights of other students.” It was “reasonable for school officials to forecast a substantial disruption of school activities.”

Although acknowledging that Tinker did not involve off-campus speech and noting reluctance to adopt an approach that would essentially negate the relevance of the geographic origins of the student speech at issue, it concluded: “[T]he location of the speech can make a difference, but that does not mean that all off-campus speech is beyond the reach of school officials.” Other Circuit Courts have applied Tinker to off-campus speech to varying degrees and with some variations in the analysis. Some other Circuit Courts have left open the question whether Tinker applies at all.

One of the difficulties with the student speech cases is an effort to divine and impose a global standard for a myriad of circumstances involving off-campus speech. A student’s profanity-laced parody of a principal is hardly the same as a threat of a school shooting, and we are reluctant to try and craft a one-size-fits-all approach. We do not need to consider at this time whether Tinker applies to all off-campus speech such as principal parody profiles or websites dedicated to disparaging or bullying fellow students. These cases present challenges of their own that we will no doubt confront down the road. Nor do we need to decide whether to incorporate or adopt the threshold tests from our sister circuits, as any of these tests could be easily satisfied in this circumstance. Given the subject and addressees of [Landon’s] messages, it is hard to imagine how their nexus to the school could have been more direct; for the same reasons, it should have been reasonably foreseeable to [Landon] that his messages would reach campus. Indeed, the alarming nature of the messages prompted [his] friends to do exactly what we would hope any responsible student would do: report to school authorities. Here we make explicit what was implicit in LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001): when faced with an identifiable threat of school violence, schools may take disciplinary action
in response to off-campus speech that meets the requirements of *Tinker*.

In this case, the messages could be interpreted as a plan to attack the school. The messages were written by a student with access to weapons (and apparently had once brought a gun to school). His messages were brought to the attention of school authorities by other students. Under *Tinker*, public schools may restrict speech that may reasonably forecast a substantial disruption or material interference with school activities or impinge upon the rights of other students to be secure and to be let alone. It was reasonable for school officials to interpret the messages as a real risk and to forecast a substantial disruption, particularly when one considers Landon's background, his fascination with previous school shootings, his stated desire to set the record for murdering other students, and his choice of a date (April 20), which “implicitly invoked another horrific mass school shooting—the massacre at Columbine.” The court noted that, unlike the parody of the principal in *J.S. ex rel. Snyder v. Blue Mountain Sch. District*, which, although exceptionally crude, “was so outrageous that no one took its content seriously,” Landon’s “MySpace messages should have been taken seriously and apparently were.” It does not matter whether Landon was joking; it was reasonable for the school district to proceed as though he were not.

The court noted that few courts have addressed the “impingement or invasion of the rights of other students” prong of the *Tinker* analysis and stated its agreement with the Third Circuit which opined in *Saxe v. State College Area School District*, that it is insufficient to find that the student speech at issue is merely offensive to some listener.

Whatever the scope of the “rights of other students to be secure and to be let alone,” *Tinker*, 393 U.S. at 508, without doubt the threat of a school shooting impinges on those rights. [Landon's] messages threatened the student body as a whole and targeted specific students by name. They represent the quintessential harm to the rights of other students to be secure.

**Fourteenth Amendment Due Process Defense**

Turning to Landon's Due Process argument, the court noted that state law does provide a right to a publicly-funded education. Accordingly, Landon had a property interest in his public education and was entitled to due process before he could be suspended. In this case, the court concluded that Landon received adequate due process before both his 10-day suspension and 90-day expulsion. He received adequate notice prior to his 10-day suspension. Before the decision to suspend him for 10 days, he received appropriate notice. Prior to the hearing before the school board concerning expulsion, Landon received written notice of the charges against him and a list of possible witnesses; was allowed to be represented by counsel; had the opportunity to present evidence; and was allowed to cross-examine witnesses. He was not denied his due process rights.

The court also rejected Landon's assertion that the school district failed to provide adequate notice that his off-campus speech could result in disciplinary action, including expulsion. The student handbook, which is distributed at the beginning of the school year, warns students that they could face disciplinary sanctions for engaging in behavior that could be considered “intimidating, harassing, threatening, or
The student handbook does not employ geographic limitations for such conduct.

In this case, the school officials correctly evaluated the potential safety threat. Thus, summary judgment in favor of the school district was affirmed.

In another case involving possible “true threats,” the federal district court in the Eastern District of Pennsylvania reviewed the suspension of a 15-year-old high school student, A.N. A.N. and two friends created a private, anonymous account on Instagram, a social networking website, which they named “upperperkiscool.” A.N. characterized the account as a “vigilante” group designed to “make fun” of others. He wished to remain anonymous so he did not use his real name and used a photograph of another child as his profile picture. The followers of the private Instagram group were predominately students at A.N.’s high school.

On Dec 4, 2016, around 8:00 p.m., A.N. posted a “mash-up” of two videos to the Instagram account. He merged *Evan*, a video intended to draw attention to potential signs of school violence, with lyrics from a song titled “Pumped Up Kicks” by a group called Foster the People. In the *Evan* video, one of the main characters in the first part of the video (Evan) signs a yearbook with “See you next year.” The lyrics from the song contain references to guns and bullets, exhorting the listener to run if the listener wishes to remain alive.

The mash-up used only a portion of *Evan*—a scene where students are all signing yearbooks in the gymnasium when a silhouetted student appears in the doorway, drops a duffel bag, and cocks a semiautomatic rifle. The video fades to black as students begin screaming and running. A.N. overlaid the lyrics to “Pumped Up Kicks” to this portion of the clip. No specific reference is made to his high school and, other than the lyrics, there is no specifically threatening language. When he posted this to the Instagram account, he added the following take-off on Evan’s yearbook statement: “See you next year, if you’re still alive.”

After the anonymous posting, other students viewing it (45 during the two hours it was available) expressed concerns that this might be a threat. One student contacted A.N. directly to see whether he intended the post to be a threat. A.N. said it was not a threat and removed it from the Instagram account. A.N. also deleted the mash-up video from his personal devices as well. Two parents also saw either the video or a screenshot. One emailed the high school principal, while the other called the state police.

The state police contacted the high school principal and left a voicemail around 2:00 a.m., alerting him that a threat may have been made against the school on an anonymous Instagram account. The principal returned the call “within minutes.” The state police sent the principal a screenshot. The principal then notified the superintendent. The principal also read the email from the other parent, expressing alarm at the video. The principal tried to identify the student from the photograph A.N. used for his profile, but this proved unsuccessful.

The superintendent and state police worked through the night, but it was not possible to determine whether the threat was real because the poster was anonymous and the picture used was not of A.N. Finally, early in the morning of December 5, 2016, the superintendent cancelled all classes in the school district. The superintendent also notified all schools and parents of the circumstances, including the superintendent’s concerns that she could not
determine whether the threat was real or who might be the intended targets.

Around 6:30 a.m., A.N. emailed the superintendent. He did not use this opportunity to alleviate her concerns nor confess that he was responsible. Rather, he seemed to be taunting her. He acknowledged the “issue at hand” that resulted in the cancellation of classes “was serious,” and that it was his understanding that persons who viewed the video “became reasonably scared.” A.N. later admitted that he “intentionally mislead” the superintendent. The superintendent forwarded A.N.’s email to the state police. As a result, the state police paid a visit to A.N.’s home. After a preliminary investigation (all traces of the video had been erased by then), they closed the case, determining that A.N. had not committed a crime of making terroristic threats. Not so the school. It suspended A.N. pending expulsion. He was not allowed to enter school grounds or attend a school function without permission. Prior to this incident, A.N. had never been subject to school-based discipline.

On December 15, 2016, A.N. through his parents sued the school district and its personnel, asserting the school district’s discipline violated his right to free speech. He sought emergency injunctive relief that would have required the school to readmit him. He also sought a discontinuance of his suspension and a prohibition against the school to prevent his expulsion.

The court held that A.N. was not entitled to injunctive relief and that Tinker did not protect A.N.’s speech in this instance. While the speech did occur off-campus, school personnel could reasonably conclude the speech constituted a true threat against the school, and that his speech could—and did—cause a substantial disruption to the school and the entire district.

The court observed that, although the Supreme Court has not applied Tinker to off-campus speech, other circuit courts of appeal have done so. The federal district court elected to follow the majority and apply Tinker to A.N.’s off-campus speech. The court rejected A.N.’s contention that, if a disruption did occur, it was not because of his speech. He argued that it was the “mischaracterization” of his speech that caused the disruption, adding that the reaction by school personnel was not reasonable:

While A.N. attempts to argue that others mischaracterized his speech, the facts do not support such a conclusion. Any “mischaracterizations” arose after the perceived threat existed and stemmed from A.N.’s choices pertaining to the mash-up, including posting the video from an anonymous account, using a profile picture of an unknown child, posting on an Instagram page directed at School District students.28

To the court, it did not matter what A.N.’s subjective intent was when he posted the video. The mash-up video post did, in fact, create a substantial disruption to the school environment and it was reasonable for the school district to forecast a substantial disruption. The court also determined that it did not matter, in this case, that no school personnel had actually viewed the video; it was sufficient that others viewed it and notified school personnel.

Considering the totality of the circumstances, and the facts as outlined above, [the superintendent] and the School District officials’ fear of disruption was significant and not remote because, at the very least, there was a suggestion of a school threat from an unknown source over the internet in a forum consisting predominately of Upper Perkiomen school district students.29

The court held that A.N.’s First Amendment rights were not violated and A.N. did not meet his burden to obtain injunctive relief.

Threats To School Personnel

Threatening school personnel can have serious repercussions. It is not uncommon for states to have laws that not only specifically address such threats but provide for enhanced sanctions, making what might be a misdemeanor offense a felony count. Courts tend to view threats to school personnel as constituting a substantial disruption or material interference under a Tinker analysis. The following cases are representative.

parents’ home computer, he created an icon on his IM profile that showed a pistol firing a bullet at the teacher’s head with blood splattering as a result. Below the drawing were the words “Kill Mr. VanderMolen.” The student did this even though he recently had been instructed that the school would not tolerate threats or any other acts of violence. The icon was available for viewing by his IM “buddies” for three weeks. A classmate informed the teacher who, in turn, informed the principal. The student indicated the icon was a joke and that he had no violent intent. He was suspended for one semester. His parents appealed, claiming the suspension violated the student’s First Amendment rights. The court upheld the student’s suspension. “Even if [the student’s] transmission of an icon depicting and calling for the killing of his teacher could be viewed as an expression of opinion within the meaning of Tinker, we conclude that it crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk [of] materially and substantially disrupting the work and discipline of the school.”

Bell v. Itawamba County School Board, et al., 799 F.3d 379 (5th Cir. 2015) (en banc), cert. denied., 136 S. Ct. 1166 (2016). The rap on rap songs is that they are frequently obscene, lewd, indecent, vulgar, misogynistic, racist, and replete with gross grammatical errors, all of which serve to define this genre. Taylor Bell composed a rap about two coaches at this high school and the wife of one of them, incorporating just about all the criteria for “rap.” He posted it to Facebook, which was accessible to about 1,300 “friends,” but he also published it on YouTube where the audience could be, essentially, unlimited. The rap contained racist lyrics and potentially defamatory remarks about the coaches, suggesting they engaged in sexual improprieties with female students. The song also indicated the coaches were “going to get a pistol down” their mouths. School officials accused Bell of making threats and false allegations of improper conduct. He was disciplined for engaging in conduct that constituted “harassment and intimidation of teachers and possible threat against teachers.” The court upheld the discipline, finding that, although Bell devised his rap outside of school, his publishing it to Facebook and YouTube to reach an unlimited audience (as well as fellow students) resulted in a substantial disruption or material interference with the school. There is no First Amendment right to knowingly make a comment that reasonably could be perceived as a threat of violence to school employees. Students’ free speech rights are tempered by the school’s legitimate interest in maintaining order. The rap song did cause a material interference or substantial disruption, and—by publishing it to an unlimited audience—it was reasonably foreseeable that this would occur, especially with the allegations of improper conduct and the threats of violence.

J.S. v. Bethlehem Area School District, 807 A.2d 847 (Pa. 2002). An eighth grade student created a threatening website directed at his algebra teacher, explaining “Why she should die” and seeking contributions to hire a hitman. The website badly frightened the teacher as well as several students and parents, so much so that the teacher was unable to resume her teaching responsibilities. The Pennsylvania Supreme Court found the website “created disorder and significantly and adversely impacted the delivery of instruction,” such that the school district was justified in punishing the student for his off-campus expressive conduct.

True Threat Not Present

Although the courts have been particularly deferential to public schools in addressing threatening behavior of students, the Internet concept of the “school yard” is not, as one court noted, “without boundaries and the reach of school authorities is not without limits.” Sometimes the Internet speech could not reasonably be construed as a “true threat.” In such cases, common sense should prevail.

Braeden Burge v. Colton School District 53, 100 F. Supp.3d 1057 (D. Or. 2015). Braeden was a 14-year-old eighth grade student in the middle school. He received a “C” in his health class, which resulted in his being grounded by his mother. On his personal Facebook page, he vented his frustration to his “friends,” indicating he wanted to “start a petition” to get his health teacher fired, adding “she’s the worst teacher ever.” After some exchanges with his friends and the copious use of “HAHAHAHA,” he wrote “Yah aha she needs to be shot.” His mother, however, daily monitors Braeden’s Facebook page (as well as the Facebook pages of her other children). She told him to delete the entire post, which he did. The comments were deleted within 24 hours of their creation.

There is no dispute he posted these comments from his home computer when school was not in session. The postings were restricted to his “friends.” His health teacher is not one of these “friends” and
could not have viewed his comments. Braeden never communicated a threat to his health teacher, did not believe she would be shot, and never intended to start a petition.

Six weeks later, a parent of another middle school student anonymously put a print-out of the comments in the principal’s mailbox. The principal called Braeden to the office and spoke to him about the posts and school policy. The principal also called his mother, who indicated she had already taken care of this, adding that this was not a school matter since it occurred outside of school. Nevertheless, the principal gave Braeden three and one-half days of in-school suspension. The lawsuit followed.

The federal district court was more interested in what the school did not do rather than what it did do. While the principal did speak with Braeden, neither the principal nor anyone else on behalf of the school investigated to see whether Braeden had access to guns or other weapons, did not contact the police, and did not consider whether he needed a referral for counseling. In addition, no one inquired of his other teachers whether they were aware of any untoward Facebook postings by Braeden of a similar nature nor did they inquire to see whether he made any subsequent postings of a similar nature.

His health teacher was upset about the postings, but she did not miss any days of teaching because of it. She was not enthusiastic about having him back in her class, but accepted the school’s decision to return him to her class. There were no problems for the rest of the school year.

The court, noting that Tinker involved in-school expressive conduct and not off-campus speech, nonetheless applied the “substantial disruption/material interference” Tinker standard, as other courts have done, notably in the Wynar case discussed above.

Braden’s comments, the court found, “did not cause a widespread whispering campaign at school or anywhere else. No students missed class and no [middle school] employees, including [the health teacher] missed work.” The school’s failure to take basic investigatory steps indicated that it was not taking the comments seriously.

Braeden was, thus entitled to summary judgment on his First Amendment free-speech claim against the school district.

North Carolina v. Joshua Mortimer, 542 S.E.2d 330 (N.C. Ct. App. 2001). Following the Columbine shootings on April 20, 1999, schools throughout the country were on alert for possible copycat crimes. On May 4, 1999, a screen saver on one of the school’s computers displayed the following: “The end is near.” The screen saver was created by Mortimer, a student at the school. Although the investigating detective testified that he believed the screen saver to be a prank, the student was charged and convicted of
communicating a threat. The appellate court reversed, finding that the statement “the end is near” does not communicate a threat to injure a person or property. In fact, the court noted. There is no way to ascertain what was meant. No one at trial could testify as to what the statement meant, although, given the proximity to the Columbine tragedy, the statement could have been interpreted that the author meant to bomb the school. The court found, however, that it was not a reasonable inference to come to such a conclusion beyond a reasonable doubt.

What We Can Learn From These Cases?

Under existing case law, there seems to be some consensus when it comes to analyzing off-campus social media speech by students that may pose a “true threat” to the student’s school.

- Out-of-school statements by a student are constitutionally protected and not punishable by school authorities unless the statements are “true threats,” are reasonably calculated to reach the school environment, and are so egregious as to pose a serious safety risk or other substantial disruption the school environment.

- A student’s off-campus online expression of opinion that is non-violent, non-threatening, and non-defamatory may not be subject to school disciplinary action even when targeted to a school audience.

- “Substantial disruption” means more than mere embarrassment, offense, or inconvenience; the concept is not determined on a subjective basis.

- A student’s social media communications that are not accessible to the public are generally protected from intrusion by school authorities, the same as a conventional letter.

- “Just Kidding” is rarely a justifiable excuse or reason. Whether social media comments constitute a “true threat” is determined on an objective basis, not a subjective one.

When analyzing whether a student’s off-campus statement constitutes a “true threat,” there are several factors that may come into play:

- What is the student’s disciplinary history?
- What is the student’s ability to carry out the threat? Is the content of the threat fanciful or does the student actually have access to weapons or otherwise have the ability to carry out the threat?
- What is the student’s social media history (before and after the incident giving rise to the school’s concern)?
- What is the anticipated reaction of the intended audience (where the threat is to the general school population)? Can a substantial disturbance or material interference be reasonably forecast?
- What is the reaction of the target (where the threat is directed at a specific person or group)?
- What is the effect on the target?
- Was the threat sufficiently precise?
- Was the threat directly communicated to the target or was the threat communicated in such a fashion so as to ensure the target received the threat?
- Was there a significant passage of time between the communication of the threat and receipt of the threat by the target?
- Is state law or school policy sufficiently clear so as to put a student on notice that the content of a communication could be considered a “true threat?”

APPENDIX

For Your Reference: Social Media Sites

1. Facebook—Apart from the ability to network with friends and relatives, the user can also access different Facebook apps to sell online and can even market or promote your business, brand, and products by using paid Facebook ads. 1.59 billion users per month.

2. WeChat—Similar to WhatsApp. A user can text, call, and share media. 697 million users per month.
3. **Instagram**—Users can post videos and photos, follow and like other photos and videos as well as use filters when you upload multi-media. 400 million users.

4. **SnapChat**—This is an image messaging platform. Users can chat with friends through text or through photos that disappear after a set amount of time. 200 million monthly users.

5. **WhatsApp**—Messaging app that lets users text, chat, and share media. They can also share voice messages and video whether with individuals or groups. 1 billion users per month.

6. **QQ**—This is an instant messaging app. It can be used to send texts, video calls, and voice chats. It also has a built in translator. Popular in China. 853 million users per month.

7. **QZone**—Used to share photos, watch videos, listen to music, and write blogs. 640 million monthly users.

8. **TUMBLR**—Owned by Yahoo! A user can find and follow things that you are interested in and post anything, including multi-media. 550 million monthly users.

9. **Twitter**—Allows users to post short messages. One can also promote their business. 320 million monthly users.

10. **Google+**—Users can stay in touch with friends by sharing photos, videos, links, and so on. One can also promote their business. 300 million monthly users.

11. **Skype**—Users can connect with people through voice calls, video calls, and text – to include group calls. Skype to Skype calls are free. 300 million monthly users.

12. **VIBER**—Available in 30 languages and users can text and use voice messaging as well as share photos and videos and audio messages. 249 million monthly users.

13. **Pinterest**—Users can share photos and visuals as well as bookmark things one likes. It is used primarily for DIY projects, travel, recipes, and so forth. 100 million monthly users.

14. **LinkedIn**—Designed for professional users. Available in 20 languages, and allows users to connect with other professionals or businesses. 100 million monthly users.

15. **Reddit**—Users can submit content and vote for the content posted. The voting determines whether your content moves up or down and the site is organized by areas of interest. 100 million monthly users.

16. **Foursquare**—Users can search in the local area and find places to go with friends or family: food, entertainment, etc. 40 million monthly users.

17. **Myspace**—Music focused social media site that allows users to network with friends with blogs, photos, videos, personal profiles and so on. 20 million monthly users.

18. **YouTube**—Largest video sharing site. Users can upload and share videos as well as comment on them. Users can create a channel and upload original content.

19. **Vine**—Users can upload short videos that can then be viewed, shared and commented on by other users.

20. **Flickr**—Users can share photos and is used by photographers to manage and share their work.

**Endnotes**

1 Part I addresses school security issues and social media. Part II, which will appear in the next *NAGTRI Journal*, will address the non-security issues involving student social media use.

2 728 F.3d 1062, 1064 (9th Cir. 2013).

3 See, e.g., Porter v. Ascension Parish School Board, 393 F.3d 608 (5th Cir. 2004), cert. denied., 544 U.S. 1062, 125 S. Ct. 2530 (2005), which involved a student's violent drawing of the destruction of his school he created when he was a freshman. His younger brother inadvertently took it to school two years later because he needed a sketch pad for class. The school's
punishment abridged the student’s First Amendment free-speech rights ("Private writings made and kept in one's home enjoy the protection of the First Amendment, as well as the Fourth. For such writings to lose their First Amendment protection, something more than their accidental and unintentional exposure to public scrutiny must take place.").

4 “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

5 Searches of electronic devices under the Fourth Amendment and other non-security issues will not be discussed in this article. The general court consensus is that the reasonable suspicion/reasonable scope requirements arising under New Jersey v. T.L.O., 469 U.S. 325 (1985), would apply to searches of student cell phones and other electronic devices. This is source material for another article.


8 696 F.3d 771 (2012).


10 Context and listener reaction are important. In Watts, id., a conviction for threatening the president was reversed. The statement was directed at forced conscription (“If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J.”). No reasonable listener would have interpreted these remarks as an actual or true threat on the president.


12 See, e.g., D.J.M. v. Hannibal Public School District #60, 647 F.3d 754 (8th Cir. 2011) (court upheld suspension of student who, through Instant Messaging with friends, indicated he would obtain a gun and shoot certain classmates and then commit suicide; friend knew D.J.M. had access to a gun and was distraught; school did not have to wait for actual disruption but could act because student’s speech constituted “true threats,” which are not afforded First Amendment protection). Also see Wynar v. Douglas County School District, 728 F.3d 1062 (9th Cir. 2013) (school could suspend student based upon reasonable forecast of substantial disruption based on violent social media comments he made, including threats to the school and specific students as well as a desire to “get the record” for school shootings).

13 728 F.3d 1062 (9th Cir. 2013).

14 Id. at 1068.

15 Id. at 1069.

16 650 F.3d 915 (3rd Cir. 2011) (en banc).

17 Id. at 921,.

18 728 F. 3d at 1071.


20 728 F.3d at 1072.


22 Landon made much of the fact that no witnesses testified to any disruption that occurred at school because of his MySpace messages. The court pointed out that, under Tinker, there need not be an actual disruption, just a reasonable forecast of a substantial disruption or material interference. “Tinker does not require actual disruption before a school can impose discipline.” The court also noted that Landon’s speech may have also been considered “true threats,” which would not be entitled to any First Amendment protection at all, but the Court declined to so find because this dispute could be resolved through application of Tinker. The court also noted that, while a separation from school attendance for more than 10 days might require a more formal process, there were no specific procedures detailed by either the Supreme Court or federal courts with jurisdiction in this district.


24 The court relied upon an on-line dictionary to define “mash-up” as “something created by combining elements from two or more sources.” Id. at 393, n. 1.

25 Id. at 394. A.N. stated that he created the mash-up because he believed Evan deserved ridicule.

26 Apparently, the photo A.N. used was of another child in the community. Later in the opinion, the court wrote that “[a]n innocent child and his family were awoken in the middle of the night by the police out of concern that he posted the threat.” Id. at 399.

27 228 F. Supp.3d at 399, n. 9 (collected cases).

28 Id. at 400.

29 Id.

30 Indiana not only requires the specific reporting of such an offense, see IND. CODE § 20-33-9 et seq., but also bumps up such an offense from a Class A misdemeanor to a Level 6 felony if the threat is communicated to “an employee of a school or school corporation.” IND. CODE § 35-45-2-1(b).

31 494 F.3d at 38-39.

32 See also O.Z. v. Board of Trustees of the Long Beach Unified School District, et al., 2008 WL 4396895 (C.D. Cal., September 9, 2008) where a middle school student was disciplined for her violent video depicting the death of one of her teachers, even though it occurred during a school vacation. It was uploaded to YouTube and, as a consequence, was not private speech. It did not matter that O.Z. meant this to be a joke.


34 Thanks to Weston Nicholson for compiling this list. Weston is completing his first year of law school. I needed someone under 30 years of age to do this.
On Jan. 17, 2017, Josh Shapiro was sworn in as the 50th Pennsylvania attorney general. Since his first day in office, Attorney General Shapiro has championed an ambitious agenda to restore the integrity of the office, which was significantly damaged by the actions of the previously elected attorney general. Attorney General Shapiro quickly and effectively re-established the missions and priorities of the agency and worked diligently on correcting many ills, both internal and external, that the office had suffered in recent years.

A key part of Attorney General Shapiro’s integrity agenda was to create the position of chief integrity officer (CIO). From the start, he clearly communicated the message that ethics and integrity are central to all we do. Attorney General Shapiro said he believed the CIO should quite literally be integral, that is, consulted on major and minor operational issues when appropriate.

Defining the Position

As the attorney general’s office (AGO) has never before had an integrity officer, we looked to define it by reviewing the roles filled by integrity officers in other institutions; mostly in medical and academic settings. Such positions do exist, are few (but growing) in number, and are notably on the rise in government. From venue to venue they vary in scope and complexity, but at their core, most integrity officer positions consistently involve two core functions: (1) handling more traditional tasks such as reporting, auditing, and investigating ethical or operational noncompliance; and (2) assessing, maintaining, and engaging in education to actively promote a culture of ethical awareness.

For both budgetary and operational reasons, the CIO in Pennsylvania’s AGO serves as chief of the Office of Professional Responsibility (OPR). Logically, the CIO is responsible for the activities of the Office’s Internal Affairs and background investigation units and oversees an excellent staff of nine employees. In this capacity, the CIO reports to our first deputy attorney general. Importantly though, in all matters related to cultural change, including creation and delivery of ethics training for our agency, he reports directly to the attorney general.

In addition, Attorney General Shapiro said up front that he wanted his integrity officer to serve as a person to whom staff can go to talk when they feel aggrieved or unsure about certain situations in the office. As an institution, the AGO is steeped in the “chain of command” tradition and, thus, already had typical avenues of redress for internal concerns and complaints. The CIO does not supplant these functions, but rather is available as a confidant for some employees who prefer to seek direction more discreetly.

It is natural to avoid one’s normal chain of command when the issue exists within that chain. Some staff are unsure whether they may want to pursue a formal grievance or complaint and, perhaps, need to talk things through. We promote the integrity officer as this additional resource because we understand there is value in having the conversation and fostering a greater spirit of cooperation while avoiding unnecessary confrontation.

Candidly, it is interesting to note as well that many times staff might not want something to come to the attention of the front office. But if the same or similar matters surface in multiple places within the agency, the CIO’s bird’s eye perspective can help to address and correct more systemic problems, large or small, that might not otherwise come to light for some time.
Assessing Institutional Integrity

From my first days on the job, I set out to assess just how deeply the AGO was adversely affected by the recent scandal. Some employees were ready and eager to talk, while others were predictably very guarded. In my first few months, I walked through our headquarters in Harrisburg and visited all 13 additional satellite offices, meeting and talking with many, many staff and learning the scope of the internal trauma from the previous administration.

It is important to acknowledge that the agency suffered great internal damage to both its mission and morale. It also suffered externally from a dramatic decline in reputation, resulting in our natural partners in law enforcement becoming significantly less eager to work with the AGO. These dynamics greatly derailed many collaborative relationships, but the agency’s resilience has far outpaced the weighty burden of scandal.

In fact, the bulk of what the Pennsylvania AGO was, is, and continues to stand for, has remained solidly intact, thanks to its very dedicated employees. The overwhelming majority of employees were, of course, not at fault for the scandal. It was, as the Journal of Leadership Education has observed in similar dynamics from other organizations, “top officials” who “abused their power and privileges, manipulated information ... and put their own interests above those of their employees and the public ...” Admirably, through this adversity, the truly hard-working employees of the AGO, day-in and day-out, maintained their ideals and stayed true to the agency’s mission. This is the strong foundation of the AGO, and this is what has most impressed me in my first 16 months here. We have incredibly dedicated and talented employees at all levels who genuinely embody what is best in public service.

The CIO Dynamic at Work

As chief integrity officer, I would be remiss if I did not start by recognizing my own excellent staff who tirelessly offer their efforts, talents, and candor in our mutual pursuit of institutional integrity. Their professional commitment to excellence is highly praiseworthy and their support is that much more appreciated!

As CIO, I am involved in a wide array of AGO work and consulted and involved somewhat regularly in the more routine administrative issues which arise or processes which occur within the agency. I weigh in on matters raised by Attorney General Shapiro and his senior staff, by the Criminal and Civil Divisions, by the Human Resources office, by the Equal Employment Opportunity officer, and by our Public Protection and Education & Outreach Divisions. I have as much regular interaction with our Human Resources and Information Technology staff as with our Agent Command and Executive Office. In this sense, the CIO truly is integral in AGO operations.

More traditionally, I have discussed and advised colleagues on how best to proceed in dealing with litigation opponents whose actions bordered on professional misconduct. We take our responsibility to self-police the profession very seriously, of course. And, as you would expect, I am also available to advise staff on ethical conflicts as they arise and have excellent consultants at hand in our Civil and Consumer Protection divisions with whom I have healthy, in-depth ethics discussions.

As integrity officer, I also review policy initiatives and actively provide input on both form and substance. Many sets of eyes look over our policy initiatives and having a working knowledge of legislative drafting has definitely come in handy. At times, the matters we discuss lead to assessments of not just whether the agency can do something in a given way, but whether the agency should do something in a given way.

Early on, we reviewed and changed our internal procedures to address shortcomings of previously adopted practices. In one instance, we created an important check-and-balance procedure for certain computer access whereby we have ensured that no single person can exploit the privilege of gaining computer email access without the appropriate verification from a second authority.

In another, we corrected what seemed like a small deficiency, but was equally important from an integrity standpoint. The AGO had asked certain employees to complete signature cards for necessary fiscal functions of the agency, but it had never really explained the fiduciary relationship these employees were entering. We now communicate the AGO’s policy regarding delegation of signatures and the nature of the stewardship and responsibility being undertaken by those who sign more clearly and succinctly to our
employees so that they clearly understand the legal and ethical parameters of their important roles.

**Promoting the Cultural of Integrity**

On May 2, 2017, I had the privilege of addressing the entire AGO attorney corps (200 employees). With the attorney general and his executive staff in attendance, I proposed a program I believed would best build progressively towards restoring institutional integrity from within. As an institution, the AGO has not been alone in dealing with recent scandals. Other Pennsylvania institutions, legislative, judicial, and corporate, have also suffered through scandal and the trauma which inevitably followed. Scandals “present an opportunity for a system to confront its weaknesses and take corrective action.”

So setting about to restore our institutional integrity, we are learning from steps others have taken and are actively implementing a progressive agenda.

That program has included: a mutual pledge to our ideals embodied in a Code of Conduct, a productive re-evaluation of policies, encouragement of greater internal reporting, and instituting “preventive maintenance” by requiring full attendance at mandatory ethics sessions, along with active oversight for achieving full compliance.

A basic tenet of our ethics training acknowledges that we incorporate this into our culture, not because we are unethical, but rather to continually raise our collective level of ethical awareness. I continually emphasize that we talk about concepts that most of us know and understand and ideals we have adopted and hold sacred, but about which we may not speak very often.

Since May 2017, we have held 45 separate training sessions, covering topics on public service, restoring institutional integrity, portions of the Sarbanes-Oxley Act and U.S. Sentencing Guidelines for ethics programs, the Pennsylvania State Ethics Act and AGO’s Gift Ban Policy (including improper influence & impermissible honoraria), and considerations relating to cheating and being “always on.” The next series of educational sessions will cover communication, accountability, greater reputation, and assistance programs such as the Pennsylvania State Employees’ Assistance Program (SEAP), and Lawyers Concerned for Lawyers (LCL). The latter part of this presentation is an affirmative step we can take in furtherance of the ABA House of Delegates’ recent adoption of its Lawyer Well-Being Resolution this past February.

In addition to regular classes for staff, the integrity officer conducts a program at every incoming New-Agent Orientation. And, beginning in May of this year, we are instituting a mandatory one-hour ethics session required of every newly hired AGO employee.

**Plans for Automation**

The AGO is a complex and interdependent agency. Often, scheduling challenges from investigations and court dates will prevent an entire satellite office from being present at the first class of a new training session. We are planning to institute an automated delivery program so ethics training can occur at the employee’s convenience. Our I.T. department fortunately has the groundwork to build an agency-appropriate ethics training library in an online environment (SharePoint software application) which is already partially utilized by the agency.

The online environment already includes documents of interest to various personnel factions within the agency (agents/administrative/attorneys) to promote sharing of relevant printed matter to each group. When it is complete, it is will house a video library both on required topics to be viewed by a given deadline and on “elective” topics which can be perused as desired. Computer coding will track when videos are begun and completed for compliance purposes. Then, an updated “transcript” of all online ethics programs completed will be available to the employee and to the CIO on demand to verify individual and agency-wide compliance.
Even though we are moving to this automated environment, I will always plan to deliver some classes in person. Although this means many more trips to different parts of our very large Commonwealth, I have found there is great value in meeting and reconnecting with as much of our staff as possible in person. Staying visible has helped to reinforce that ethics and integrity remain a high priority for Attorney General Shapiro.

The emphasis on top-down ethical leadership started on day one and has been crucial to our success. We are building our program and reinforcing our emphasis on ethics and integrity with sound decision-making, substantive education, active listening, and promoting accountability.

And as I have advised our staff on multiple occasions, we are repairing and building AGO’s institutional reputation, like we build our personal reputations: each day, every day.

**Endnotes**

1 Former Pennsylvania Attorney General Kathleen Kane was indicted in August 2015 on nine criminal counts including perjury, abuse of office, and obstruction of justice. She was convicted a year later on all charges, resigned from office, and was sentenced to 10-23 months of state incarceration which sentence, as of this writing, remains on appeal.


3 My sincere thanks to Executive Deputy Attorney General Jonathan Scott Goldman, Chief Appeals Deputy Attorney General James Barker and Senior Deputy Attorney General John Abel, Esq. with whom I confer regularly on legal conflict matters small and large. Attorney Abel is a co-author of the PA Ethics Handbook published by the Pennsylvania Bar Institute in cooperation with the PA Bar Association’s Committee on Legal Ethics and Professional Responsibility.


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**Training Calendar**

A wide variety of courses are available for professional development and management leadership to NAAG membership. Details, including registration, for all courses may be found at [www.naag.org/nagtri/nagtri-courses.php](http://www.naag.org/nagtri/nagtri-courses.php)

**National Courses**

- National Forensic Science Symposium: Washington, D.C. | August 7 - 10, 2018
- Deposition Skills: Charlotte, N.C. | September 5 - 6, 2018

**Mobile Courses**

- Legal Writing for OAG-CT: Hartford, Conn. | June 21, 2018
- Overdose Death Investigation and Prosecution Training for OAG-WI: Milwaukee, Wis. | June 26, 2018
- Legal Writing for OAG-PA: Harrisburg, Pa. | July 10, 2018
- Overdose Death Investigation and Prosecution Training for OAG-NC: Raleigh, N.C. | July 18, 2018
- Advanced Trial Techniques and Investigative Skills for OAG-DE: Wilmington, Del. | August 7 - 9, 2018
What McDonnell v. United States Means for State Corruption Prosecutors

AMIE ELY, DIRECTOR, NAGTRI CENTER FOR ETHICS & PUBLIC INTEGRITY


AMIE ELY

This is the first article in a two-part series.

Introduction

In late June 2016, the U.S. Supreme Court reversed the federal bribery conviction of former Virginia Gov. Robert “Bob” McDonnell, finding that prosecutors had not proven that the favors he did for a businessman who plied him with over $175,000 worth of gifts, cash, and loans were “official acts” under the federal bribery statute. For his part, the businessman—Jonnie Williams—provided about $175,000 worth of goodies to induce his benefactor’s kindly exercise of discretion.

In the 18-plus months since that decision, McDonnell has led to reversals of several federal cases in which local and state officials were charged with offenses similar to those alleged against the former governor. It has also been cited by prosecutors to support their decisions not to bring some federal charges and to dismiss at least one state case. Because McDonnell has made federal bribery prosecution more challenging, it has created opportunities for state public integrity prosecutors to fill the void when federal prosecutors cannot or choose not to prosecute corrupt local and state officials. Along with these potential new opportunities, however, state prosecutors should be aware that McDonnell may have an impact on their own prosecutions and they should be prepared to deal with that from the beginning stages of an investigation to the final stages of trial. While a number of editorials, opinion pieces, and law review articles have examined McDonnell’s impact on the federal prosecution of local and state officials, comparatively little ink has been spilled about what the case means for prosecutors in state courts. This piece seeks to begin filling that gap by examining McDonnell and its two state court progeny. It will also offer several practical steps to reduce the chance a state corruption case is imperiled by McDonnell.

Part II of this piece, which will be published in a future edition of the NAGTRI Journal, will look more closely at whether McDonnell is likely to apply to state corruption cases and suggest some possible responses to “McDonnell motions” in state cases.

McDonnell and Its Progeny

The Supreme Court’s Decision

McDonnell was found guilty by a jury after a trial that revealed, as the Court characterized them, “tawdry tales” about how he had used the power of the governor’s office to benefit a businessman’s nicotine-based dietary supplement.

For his part, the businessman—Jonnie Williams—provided about $175,000 worth of goodies to induce his benefactor’s kindly exercise of discretion. Williams’s gifts ranged from a Rolex watch for the governor, to a ball gown for the governor’s wife (and later co-defendant), to tens of thousands of dollars in cash and loans for the McDonnells and their children. In exchange for those gifts, McDonnell did things like hosting parties for Williams at the governor’s mansion, so Williams could pitch his tobacco supplement, and encouraging other state officials to meet with Williams and conduct scientific studies that could have legitimized his product.

At trial, during his appeal, and before the Supreme Court, McDonnell argued that the actions he allegedly took to benefit Williams were not “official acts”; in his
view, that definition was limited to “acts that ‘direct…
a particular resolution of a specific governmental
decision’ or that pressure another official to do so.”

The government responded that the statute should
be read as it was written: “‘official act’ is “any decision
or action, on any question or matter, that may at any
time be pending, or which may by law be brought
before any public official, in such official’s official
capacity,” which it argued “therefore encompasses
nearly any activity by a public official.”

The Supreme Court adopted an “official acts”
definition for the federal bribery statute similar to
that proposed by the defense. In its analysis, the
Court applied two standard principles of statutory
interpretation—“a word is known by the company it
keeps” (noscitur a sociis) and “statutory language is not
superfluous”—to construe the statute narrowly and
announce a new definition of what acts prosecutors
would be required to prove to convict an official of
bribery. The Court held that, for the purpose of the
federal bribery statute:

“[O]fficial act” is a decision or action on a
“question, matter, cause, suit, proceeding or
controversy”…[that] must involve a formal
exercise of governmental power that is
similar in nature to a lawsuit before a court, a
determination before an agency, or a hearing
before a committee. It must also be something
specific and focused that is “pending” or “may
by law be brought” before a public official.

Applying its construction of the statute, the Court
concluded that arranging meetings, hosting events,
making phone calls, and contacting other government
officials were not, without more, “official acts.”
Because the jury instruction given at trial permitted the jury to
convict McDonnell if it concluded that he had merely
arranged a meeting, hosted an event, made a phone
call, or contacted other officials on the businessman’s
behalf, the Court reversed his conviction.

In support of its decision to construe the
statute narrowly, the Court recognized concerns—
including those lodged by a number of amici—that
an overly broad view of the statute could criminalize
interactions between officials and their constituents
that were harmless, or even a positive part of the
political process. It also cited principles of federalism:
as sovereigns, states have “the prerogative to regulate
the permissible scope of interactions between state
officials and their constituents,” and the Supreme
Court warned against interpreting federal laws in a
manner that involves federal prosecutors in “setting
standards” of “good government for local and state
officials.”

In the end, while some of the things McDonnell
did for the businessman fell outside of the Court’s
narrowed “official acts” definition, the Court concluded
that others might not. As some things the ex-governor
allegedly did were still potentially “official acts,” they
could be still proscribed under the new, narrowed
construction of the federal bribery statute.

The Court thus remanded the case for the Fourth
Circuit to decide, in the first instance, how to apply
the Court’s new definition to things McDonnell did
that could be “official acts,” including, potentially: (1)
making a decision on or taking an action to initiate
a research study, or even narrowing down a list of
potential research topics; (2) “using his official position
to exert pressure on another official to perform an
‘official act’”; or (3) “using his official position to provide
advice to another official, intending or knowing that
this advice would form the basis for that official to
perform an official act.” The Court also noted that the
government need only prove that McDonnell agreed
to do something that qualified as an official act—not
that he actually did so—and that the agreement did
not need to be explicit or include a description of what,
precisely, McDonnell intended to do to carry out his
end of the bargain.

Finally, the Court noted that even ministerial acts
it concluded were insufficient,
standing alone, to be official acts (hosting an event,
setting up a meeting, making a phone call) could
be evidence of an agreement to take an official act,
should those ministerial acts reveal that McDonnell
was attempting to pressure or advise another official
on a pending matter.

Before any decision was issued by the Fourth
Circuit, however, the government dismissed the
charges against McDonnell and his wife.

Selected Progeny

As of April 4, 2018, McDonnell has been cited 102
times in federal decisions, including by every federal
circuit court, and in nine state court decisions across
seven states.
To oversimplify, there are essentially three different views about the scope of McDonnell, which are reflected in decisions by courts across the country and in the writings of commentators and academics. One view reads McDonnell narrowly, as a case about the interpretation of one federal bribery statute. The second reads the case broadly, as a warning about the dangers of sweeping statutes and the need to rein in prosecutors who seek to apply those statutes in ways not contemplated by the legislature, particularly in cases involving public officials. And the third potential reading is somewhere in the middle: perhaps McDonnell may apply to other statutes that are quite similar to the federal bribery statute construed by the Court.

Several state decisions, and some federal decisions, cite McDonnell for unremarkable principles of statutory construction. Other cases have applied the new “official act” definition to reverse federal prosecutions where courts instructed jurors using a pre-McDonnell official act definition.

In six state court opinions, McDonnell is cited for general principles that are untethered from any focus on corruption. Three of those five cases cite McDonnell for the proposition that a statute cannot be construed by relying upon “the assumption that the government will use it responsibly.”

Two other state cases involve the prosecution of government officials; those cases warrant a close look.

**Commonwealth v. Veon (Pennsylvania, 2016)**

In Veon, the Pennsylvania Supreme Court cited McDonnell—arguably in *dicta*—when it reversed the conviction of Michael Veon, a member of the Pennsylvania House of Representatives. Veon was charged with, *inter alia*, violating a statute that criminalized conflicts of interest by prohibiting officials from “leveraging the authority of their offices for ‘private pecuniary benefit.’” The court instructed the jury that “private pecuniary benefit” included “intangible political gain such as garnering favorable publicity, obtaining free publicity, enhancing standing in the community, or the like.” The jury convicted Veon at trial.

The Pennsylvania Supreme Court defined its task as determining if the conflict of interest statute “extends to what the trial court referred to as ‘intangible political gain.’” After examining the use of the word “pecuniary” in other state statutes, the court concluded that it required some form of a money benefit. It characterized the McDonnell decision as “a recent case presenting some of the same concerns that we confront here,” and quoted its pronouncement that “a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.” The court wrote:

The trial court’s jury instruction here made of the statute a meat axe, finding (or creating) a conflict of interest on every dais, at each parade, and at every ribbon-cutting, given that the very nature of seeking to satisfy one’s constituents and secure re-election all but requires the taking of official action to secure intangible political gains. This criminalization of politics is a bridge too far.

The Pennsylvania Supreme Court concluded that the jury charge was erroneous, as the jury could have convicted Veon if it found that he received a benefit that was only “political in nature.” As a result, it vacated the sentence imposed for his conflict of interest count and remanded for a new trial on that count.

**Commonwealth v. Degnan (Massachusetts, 2017)**

In Commonwealth v. Degnan, the Appeals Court of Massachusetts affirmed the conviction of Leonard Degnan, the former chief of staff of the mayor of Lawrence, Mass. Degnan was accused of bribery-related crimes for threatening to “rip up” a contract with the city’s waste services provider if it did not “donate” trash trucks to Tenares, a city in the Dominican Republic.
Testimony at trial revealed that Degnan told the waste company’s general manager that the mayor would not honor a contract the waste company signed with the previous administration unless the company donated “a couple of trucks” to Tenares. The company’s general manager believed that if he went to the police or refused to donate the trucks, the multi-million contract would be voided. As a result, the general manager requested that his company donate one trash truck, which was repainted and given new tires at the mayor’s request, and then shipped to the Dominican Republic.

Prosecutors charged Degnan with violating the state bribery statute, which required, *inter alia*, proof that “[a] municipal employee . . . or a person selected to be such an employee . . . directly or indirectly . . . corruptly . . . solicit[ed] . . . anything of value for . . . any other person or entity, in return for . . . being influenced in his performance of any official act or any act within his official responsibility.” As that statute “tracks a cognate Federal statute,” the court considered both Massachusetts case law and case law interpreting the parallel federal statute—the federal bribery statute. As a result, the court concluded that the prosecution had to prove a quid pro quo—that is, that the defendant solicited the bribe knowing that it would be given to induce him to violate his official duty. It cited *McDonnell* for a narrow proposition: “In determining whether the defendant agreed to be influenced in the quid pro quo exchange, ‘[t]he jury may consider a broad range of pertinent evidence, including the nature of the transaction.’”

The court concluded that the evidence sufficed to prove that the defendant had corrupt intent: he clearly conditioned the survival of the Lawrence waste management contract on the “donation” of a trash truck to Tenares.

Turning to whether the prosecution proved that the “quo” was an “official act” or an “official responsibility,” the court concluded that a decision to terminate a city contract would be an official act—but not one that was in the defendant’s authority as city manager. But no matter: the contract was, the court found, in the defendant’s “official responsibility” as that included working with vendors and advising the mayor on large contracts. “Put another way, the defendant had the requisite authority to be able to make good on his agreement to influence the mayor’s treatment of the trash contract.” As a result, the court affirmed Degnan’s convictions.

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**Steps that May Reduce the Likelihood of “McDonnell Problems” in State Corruption Cases**

There are very good arguments that *McDonnell* simply does not apply to state cases, some of which we will discuss in the next article in this series. *McDonnell’s* citation by the Pennsylvania Supreme Court in *Veon*, however, suggests that the prudent prosecutor should consider taking steps to minimize *McDonnell’s* potential impact during the investigation, while making charging decisions, and when suggesting jury instructions and verdict forms. Here are some of the ways that state prosecutors might reduce the chance that *McDonnell* will imperil their cases.

**During the Investigation**

To help inoculate a case against later *McDonnell* motions, prosecutors should strongly consider guiding the investigation. This is perhaps most important and useful in cases involving proactive tools like confidential informants, cooperating witnesses, or undercover law enforcement officers—which I will refer to as “undercover work.” Prosecutors can help ensure that the “ask” by the undercover “briber” is for something that is an “official act”—or its equivalent...
under their state’s bribery statute. This approach is akin to ensuring that a confidential informant asks a firearms trafficking target to provide guns that function in a state case where only operable guns are criminalized.49

Of course, there are other benefits, beyond addressing McDonnell, to involving prosecutors in investigations. Prosecutors who supervise undercover work can ensure it is conducted in a manner consistent with constitutional and any relevant statutory requirements. This supervision can guard against the invasion of attorney-client, legislative, or other privileges more likely to be at issue in cases involving public officials. It can also reduce the chance the investigations are imperiled because methods used to obtain evidence run afoul of the directives enunciated in, for example, Massiah50 or Garrity.51

Prosecutors’ involvement in investigations is uncontroversial, if not expected, at many U.S. Attorney’s Offices; indeed, it is required by Federal Bureau of Investigation guidelines for cases involving undercover work.52 It is also encouraged by the American Bar Association’s Standards on Prosecutorial Investigations.53 As some state and local prosecutor’s offices do not have a tradition of prosecutors being involved in investigations,54 however, they may not be comfortable taking a more proactive approach to investigations, even if that approach will result in stronger cases. But, increasingly—particularly in corruption units and other units that handle complicated cases—state and local prosecutors work hand-in-hand with their law enforcement partners. Many attorney general offices have in-house investigators; some are embedded in the same unit as the prosecutors and others are in a separate investigations unit. State and local prosecutors also work with a variety of federal, state, and local investigative bodies.

That said, prosecutors should be aware that, while they have absolute immunity under federal law for “quasi-judicial” activities like evaluating the sufficiency of evidence and preparing for grand jury or trial, they are entitled to only qualified immunity for actions they take during an investigation.55 They should also ensure that they do not become directly involved themselves in subterfuge,56 or unintentionally disqualify themselves by becoming a necessary witness in their own case.57 Finally, they should research their state’s Rules of Professional Conduct—particularly Rule 8.4(c), but also potentially Rules 3.8, 4.1, and 4.2—to ensure those rules have not been construed to prohibit prosecutors from directing undercover work.58

When Considering Charges

Particularly in states where the bribery statutes contain language similar to the federal bribery statute’s official act definition, prosecutors should consider if there are broader conduct allegations that also can be included in their charging instruments.

Two cases construing the same Massachusetts statute are instructive. In Degnan, as discussed above, Massachusetts state prosecutors charged the defendant both with committing “official acts” and with exercising his “official responsibility” as part of a bribery scheme. Given that the Massachusetts “official acts” bribery statute is patterned after the federal bribery statute, and courts there look to federal cases construing the federal analogue when interpreting the state statute, the case may well have fallen prey to McDonnell had the defendant been charged only with committing “official acts.” Instead, the court concluded that the defendant’s actions (threatening to cancel the contract) easily fell within his “official responsibility,” as the state statute defined it.

United States v. Tavares shows what can happen when prosecutors allege only that a defendant committed an “official act” in violation of the state bribery statute. In that case, the First Circuit reversed a federal racketeering case in which prosecutors alleged, as predicate acts, that the defendants violated the same Massachusetts statute at issue in Degnan by committing “official acts” in exchange for benefits.59 The First Circuit—following Massachusetts law that instructed them to look to courts’ interpretations of the federal bribery statute—concluded that the government failed to prove the state statute’s “official act” element, as the Supreme Court defined it in McDonnell.60 As a result, Tavares’s conviction was reversed.

So, the takeaway from Degnan and Tavares: prosecutors should look carefully at their bribery statutes when drafting charges, particularly if those statutes either mirror the federal bribery statute and/or case law directs them to look to the interpretation of the federal bribery statute when construing their state’s bribery statute. If there is a chance that what the defendant agreed to do in exchange for an illicit benefit is not an “official act” and your state’s bribery
statute also criminalizes a broader range of conduct, charge those broader conduct allegations if the facts warrant them.

Another option, if the facts support them, is to consider including charges other than bribery, as McDonnell’s broader themes about the danger of “criminalizing politics” were primarily concerned with interactions between an official and his constituents.

When Drafting Jury Instructions

The opportunity to protect against a case being reversed on McDonnell grounds does not end when the charges are filed. In cases where the state statute mimics the federal bribery statute, prosecutors should make sure that the jury instructions correctly reflect the limitations imposed by the Supreme Court. In cases where state statutes criminalize a broader range of conduct, prosecutors should submit jury instructions that accurately define the elements of that broader statute.

Using Massachusetts as an example, if the defendant is charged under both “official act” and “official responsibility” sections of a statute, make sure that the jury instructions include both sections, with the “official act” instruction mirroring the Supreme Court’s ruling in McDonnell and the “official responsibility” instruction reflecting the broader definition in the state statute.

When Considering the Verdict Form

Prosecutors should also consider whether to request a special verdict form in some cases. If there are multiple potential “official acts,” some of which could be invalidated if McDonnell was applied to your state statute, a special verdict form might avoid a retrial by providing a clear record for an appellate court to consider.

Using McDonnell as an example, the Supreme Court noted that there were aspects of McDonnell’s conduct that may well have represented his promise to commit “official acts,” under its new definition, in exchange for the businessman’s gifts. Had federal prosecutors invited the jury to find what act(s) McDonnell agreed to complete to help the businessman in exchange for his gifts, the Court may have been able to determine if any particular act found by the jury was an “official act.”

Of course, special verdict forms also carry some risks: courts are not always open to them; they may also confuse the jury, increase the length of deliberations, and make it more likely that the jury cannot come to a verdict. So prosecutors should think carefully about whether to use special verdict forms in cases in which there are several potential “official acts”—or the equivalent under your state statutes—that include actions that might no longer be valid if McDonnell was applied to your statute.

Conclusion

McDonnell has undoubtedly affected federal prosecutors’ abilities to charge the federal bribery statute in certain cases. Its federalism underpinnings may also mean that it applies more broadly to federal cases in which state and local officials are targets.

This potential reduction in the breadth of the federal anticorruption apparatus means that state prosecutors should consider ensuring that the laws in their states are enforced against corrupt officials who might have been subject to federal prosecution in the past. Prudent state prosecutors can take some commonsense steps at nearly every phase of their cases to try to guard against the likelihood that, if it is applied by the courts in their states, McDonnell imperils their conviction.

In the next article, we will look more closely at the likelihood that state courts will conclude that McDonnell applies to state corruption statutes.
Endnotes


2 Throughout this piece, I will refer to 18 U.S.C. § 201, which sets forth the “official acts” definition the parties chose to apply to the Hobbs Act (18 U.S.C. § 1951) and Honest Services Fraud (18 U.S.C. § 1346) charges in McDonnell’s case, as the “federal bribery statute.” I do this for ease of reference, even though that appellation better fits, and could just as easily refer to, 18 U.S.C. § 666.


7 See, e.g., Editorial Board, McDonnell Case Reveals the Supreme Court’s Squishy Corruption Standard, Wash. Post, June 27, 2016, https://www.washingtonpost.com/opinions/the-supreme-courts-squishy-corruption-standard/2016/06/27/144541a6-3ca4-11e6-a66f-aa6c1883b6b1_story.html?utm_term=.1f5fd44571c0 (describing McDonnell as “a narrow and exceptionally permissive interpretation of what constitutes actual corruption” that will “give comfort to other ethics-scoring politicians . . .”).

8 See, e.g., Editorial Board, McDonnell Case Reveals the Supreme Court’s Squishy Corruption Standard, Wash. Post, June 27, 2016, https://www.washingtonpost.com/opinions/the-supreme-courts-squishy-corruption-standard/2016/06/27/144541a6-3ca4-11e6-a66f-aa6c1883b6b1_story.html?utm_term=.1f5fd44571c0 (describing McDonnell as “a narrow and exceptionally permissive interpretation of what constitutes actual corruption” that will “give comfort to other ethics-scoring politicians . . .”).

9 See, e.g., Editorial Board, McDonnell Case Reveals the Supreme Court’s Squishy Corruption Standard, Wash. Post, June 27, 2016, https://www.washingtonpost.com/opinions/the-supreme-courts-squishy-corruption-standard/2016/06/27/144541a6-3ca4-11e6-a66f-aa6c1883b6b1_story.html?utm_term=.1f5fd44571c0 (describing McDonnell as “a narrow and exceptionally permissive interpretation of what constitutes actual corruption” that will “give comfort to other ethics-scoring politicians . . .”).

10 See, e.g., Editorial Board, McDonnell Case Reveals the Supreme Court’s Squishy Corruption Standard, Wash. Post, June 27, 2016, https://www.washingtonpost.com/opinions/the-supreme-courts-squishy-corruption-standard/2016/06/27/144541a6-3ca4-11e6-a66f-aa6c1883b6b1_story.html?utm_term=.1f5fd44571c0 (describing McDonnell as “a narrow and exceptionally permissive interpretation of what constitutes actual corruption” that will “give comfort to other ethics-scoring politicians . . .”).

11 Id. at 2373 (quoting McNally v. United States, 483 U.S. 350, 360 (1987)).

12 Id. at 2370-71, 2375.

13 Id. at 2371.

14 Id.


18 See, e.g., Tavares, 844 F.3d 46 (reversing federal racketeering conviction); Silver, 864 F.3d 102 (reversing federal Hobbs Act and honest services fraud conviction); United States v. Ferriero, 866 F.3d 107 (3d Cir. 2017) (affirming federal racketeering conviction).


23 Id. at 439-40.

24 Id. at 440.

25 Id. at 438.

26 Id. at 437 (citing 65 Pa. CONS. STAT. § 1103(a)).

27 Id. at 440.

28 Id. at 440-41.

29 Id. at 437 (citing 65 Pa. CONS. STAT. § 1103(a)).

30 Id. at 445-47.
Id. at 447 (quoting McDonnell v. United States, 136 S.Ct. 2355, 2373 (2016) (quoting United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 408, (1999))). In applying the Supreme Court's exhortation so broadly, the Pennsylvania Supreme Court untethered it from limitations in the opinion where it was announced, United States v. Sun-Diamond. In Sun-Diamond, the Supreme Court narrowly construed an anti-gratuity statute, 18 U.S.C. § 201(c)(1)(A), as it was part of an interwoven regulatory mix of statutes and regulations that set forth various ethical requirements that officials—on pain of anything from a small fine to federal prison—were bound to follow. The Pennsylvania Supreme Court did not describe a similar ecosystem of ethics for legislators—and, perhaps tellingly, the Pennsylvania State Ethics Commission filed an amicus brief arguing that the statute should be read to apply to Veon's conduct.

People v. Longshore, 86 N.Y.2d 851, 852 (NY Ct. App. 1995), (“Although the statute is silent on the point, it is now accepted that to establish criminal possession of a handgun the People must prove that the weapon is operable”).

Massiah v. United States, 377 U.S. 201 (1964) (prohibiting the government from eliciting statements from a defendant after his Sixth Amendment right to counsel has attached).

Garrity v. New Jersey, 385 U.S. 493 (1967) (holding that statements compelled from an official during the course of an internal investigation cannot be used to prosecute that official).


Upon initiating and throughout the course of any undercover operation, the SAC or a designated Supervisory Special Agent shall consult on a continuing basis with the appropriate Federal prosecutor, particularly with respect to the propriety of the operation and the legal sufficiency and quality of evidence that is being produced by the activity.

ABA Standard on Prosecutorial Investigations 2.3 (ABA 2014) (directing prosecutors to consider potential benefits and risks of using or advising the use of undercover techniques during a criminal investigation).

See, e.g., Mark Osley, The (Very Informal) Mike Freeman Statement, MINN. STAR TRIB., Dec. 18, 2017, http://www.startribune.com/the-very-informal-mike-freeman-statement/465051513/ (describing a process where investigators alone "develop a case and then bring it to the prosecutor in the hopes that the prosecutor will accept the case and pursue a conviction").


The Ohio Supreme Court disciplined a prosecutor who himself “went undercover” to create fake Facebook accounts and communicate with potential alibi witnesses for a defendant he was prosecuting. Disciplinary Counsel v. Brockler, 145 Ohio St. 3d 270, 271-73, 48 N.E.3d 557, 559-60 (Ohio 2016).

Model Code of Prof’l Conduct 3.7 (AM. BAR ASS’N 1983).

Consumer Protection 101 Training

This two-day course from NAGTRI’s Center for Consumer Protection is titled “Consumer Protection 101” and teaches attendees about federal and state consumer protection laws and important consumer case law. The course also instructs on how a consumer protection case begins, the subtleties of pre-litigation discovery, enforcement actions, multistate investigations and working groups, the anatomy of a consumer settlement, and ethics in regard to undercover investigations and dealing with defense counsel.

This is NAGTRI’s newest training and was held for the first time in Atlanta, Ga., for 37 attendees from AG offices around the country in February. The training will be an annual event.

NAGTRI provides a number of different training platforms for the benefit of AG offices. In addition to providing mobile trainings and webinars, NAGTRI also provides national trainings, such as Consumer Protection 101, that bring in national faculty to provide training for practitioners from many AG offices, giving participants a chance to network with colleagues. Course listings can be found here.

NAGTRI FACULTY AND STAFF AT THE INAUGURAL CONSUMER PROTECTION 101 TRAINING IN ATLANTA, GA.
Recent Powers and Duties Decisions

New York and Massachusetts—Attorney General Subpoena Authority—Several recent decisions, from a federal district court in New York and from the Massachusetts Supreme Judicial Court, discussed the breadth of attorney general investigatory powers. In each case, the court dismissed Exxon Mobil’s attempt to stop state officials from using compulsory process in investigations.

The attorneys general of Massachusetts and New York sought documents from Exxon Mobil (Exxon) about Exxon’s “historical knowledge of climate change and its communications with interest groups and shareholders regarding” climate change. The subpoena from the New York attorney general and the civil investigative demand (CID) from the Massachusetts attorney general were issued in connection with investigations into deceptive and fraudulent acts in violation of state law. The types of documents sought included research and internal communications concerning climate change, marketing, advertising and public relations materials about climate change, communications with other energy companies and affiliated interest groups, and public statements its officers have made about climate change.

Federal case: Exxon filed a federal suit in Texas against the Massachusetts attorney general several months after receiving the CID, later adding the New York attorney general. The complaint alleged that the CID and subpoena were part of a conspiracy “to silence and intimidate one side of the public policy debate on how to address climate change.” Exxon cited a press conference held by the attorneys general in New York at which both indicated that they were investigating potential fraud by Exxon in “a troubling disconnect between what Exxon knew, what industry folks knew, and what the company and industry chose to share with investors and with the American public.” Exxon argued that the AGs’ “overtly political tone,” and comments on public “confusion” relative to climate change showed that their intent is to chill dissenting speech and that they are retaliating against Exxon for its speech about climate change. Among other causes of action, Exxon alleged violations of its free speech rights under the First Amendment, its right to be free of unreasonable searches under the Fourth Amendment, and its due process rights under the Fourteenth Amendment. Exxon sought a declaratory judgment that the attorney general investigations violated its constitutional rights and an injunction halting or limiting the investigation. The federal suit was transferred to New York. The attorneys general moved to dismiss on the grounds, among others, of personal jurisdiction, res judicata, and failure to state a claim.

Exxon also filed suit in Massachusetts Superior Court to set aside the CID and disqualify the Massachusetts attorney general from the investigation. The state court complaint relied on the same factual allegations as the federal suit and claimed that the Massachusetts subpoena violated the state constitution’s protections for free speech and was arbitrary and capricious, and further alleged that Exxon was not subject to personal jurisdiction in Massachusetts. The Massachusetts attorney general cross-moved to compel Exxon to comply with the subpoena. The Massachusetts superior court denied Exxon’s petition and granted the attorney general’s motion to compel. The court found that Exxon was subject to personal jurisdiction by virtue of its control over its franchisees operating in the state. The court also found that the attorney general had provided sufficient grounds upon which to issue the CID. With respect to the attorney general’s remarks at the press conference, the court said, “These remarks do not evidence any actionable bias on the part of the Attorney General: instead it seems logical that the Attorney General inform her constituents about the basis for her investigations.” The court also declined to disqualify the attorney general.
In the federal case, the district court first discussed whether it had personal jurisdiction over the Massachusetts attorney general. The basis for the claim was the attorney general’s attendance at the news conference in New York that formed the basis for Exxon’s claims of bias. The court stated that whether a single meeting could form the basis for jurisdiction depends on “the significance of the meeting to the claim and the relationship between the meeting and the wrongful act.” Exxon alleged that the attorneys general formalized a “conspiracy” against Exxon at the news conference and that the event served as a “kickoff” for the actions taken against Exxon. The court found that these allegations were sufficient to satisfy the minimum contacts requirement and also indicate that jurisdiction over the Massachusetts attorney general is reasonable. Although the court stated that it was “mindful of the affront to state sovereignty posed by haling a state official into federal court . . . in another state,” courts have recognized that an out-of-state law enforcement officer’s “established relationship with forum state officials” can be sufficient to establish personal jurisdiction, and that relationship was established here.

The Massachusetts attorney general also argued that the Massachusetts superior court decision to enforce the subpoena is preclusive of the claims in this case. The court found that there was no issue preclusion because the standard applied by Massachusetts courts in cases seeking to set aside subpoenas is a good cause standard, a “significantly heavier burden of persuasion” than the preponderance of the evidence standard applied in the Second Circuit.

The court did find, however, that Exxon’s claims against Massachusetts were barred by res judicata, which bars re-litigation of claims that could have been raised in a previous proceeding, whether or not those claims were actually litigated. The court held that the claims in Exxon’s federal case “could have and should have been raised” in the Massachusetts case, so the claims are precluded. Claims are the same for res judicata purposes if they are “transactionally related” to the claims in the earlier proceeding. In this case, the facts alleged by Exxon are the same for each proceeding, even though some different causes of action are included. Thus, the court granted the Massachusetts attorney general’s motion to dismiss on claim preclusion grounds.
Turning to the argument that Exxon failed to state a claim, the court found that the heart of Exxon’s case is that “each of the constitutional torts it has asserted requires a plausible inference that the AGs acted not based on a good faith belief that Exxon may have violated state laws, but to retaliate against Exxon for, or to deter Exxon from, speech that is protected by the First Amendment.” Exxon’s claims are based on the press conference, at which Exxon argued that the attorneys general “evinced their intent to discriminate against other viewpoints regarding climate change.” The court held:

The fact that Schneiderman believes climate change is real—so does Exxon apparently—and advocates for particular policy responses does not mean the NYAG does not also have reason to believe that Exxon may have committed fraud. The latter depends on the separate question of what the NYAG believes Exxon knew, when it knew it, and whether what it knew differs from what it has publicly said.

Similarly, the court stated, “Healey’s statement suggests that she believes Exxon may have made false statements to its investors and the public and may have committed fraud.”

Exxon also argued that a common-interest agreement among the attorneys general was evidence of “concealment of their political agenda.” The court noted that the preamble to the agreement states that the AGs share an interest in “ensuring the dissemination of accurate information about climate change,” and characterized this as “an admirable goal of a public official with which few would quarrel” rather than evidence that the attorneys general were willing “to violate First Amendment rights to carry out [their] agenda.” The court also noted, “Accurate information is the lifeblood of our democracy—not a goal that suggests skullduggery.”

Finally, the court determined that concerns expressed by other state attorneys general and by a congressional committee about Massachusetts and New York’s investigation were not germane.

Indeed, if the fact that elected Republicans criticize investigations conducted by elected Democrats (and vice versa) were to be evidence that the criticized investigations are improperly motivated political hit jobs, law enforcement at the state level will be drawn to a screeching halt by what amounts to a heckler’s veto. The court granted the motions to dismiss, with prejudice. **Exxon Mobil Corp. v. Schneiderman, No. 1:17-02301 (S.D.N.Y. Mar. 29, 2018).**

**Massachusetts Supreme Court:** Exxon appealed the Massachusetts trial court’s decision (discussed above) and the Massachusetts Supreme Judicial Court transferred the case on its own motion from the appellate court. A few days after the federal court ruling discussed above, the state Supreme Court concluded that there was personal jurisdiction over Exxon with respect to the attorney general’s investigation and affirmed that lower court’s order denying Exxon’s request to set aside the civil investigative demand and disqualify the attorney general.

The court agreed with the trial court that the court’s jurisdiction over Exxon satisfied both the Massachusetts long-arm statute and the due process requirements of the Fourteenth Amendment. Although Exxon’s general activities in Massachusetts were not sufficient to create general jurisdiction, the court determined that the attorney general is authorized to investigate any conduct she believes may violate Chapter 93A of the Massachusetts General Law (G.L. 93A), which prohibits “unfair methods of competition” and “unfair or deceptive acts or practices in the conduct of any trade or commerce.” G.L. 93A is a statute of “broad impact” and the court held that what constitutes a prohibited practice requires a case-by-case analysis. The attorney general alleged that Exxon knew about “the impact of fossil fuels on both the Earth’s climate and the value of the company” but failed to disclose to customers and investors. The CID sought information about what Exxon knew about these matters. The court found that both the Massachusetts long-arm statute and due process were satisfied because Exxon’s agreement with its franchisees in the state included Exxon control over its franchisees’ advertising and that advertising was a focus of the CID.

Turning to Exxon’s substantive challenge to the CID as overbroad and burdensome, the court stated that the attorney general’s authority to investigate under G.L. 93A is broad, but there are some limits: the party challenging the CID has the burden of showing that the information requested is not described with reasonable particularity, is not relevant, or is an
excessive amount. The state Supreme Court found that the CID appropriately described the requested material. The court disagreed with Exxon that historic documents from as far back as 1976 were irrelevant, holding, “A document created more than four years ago is, of course, still probative of Exxon’s present knowledge on the issue of climate change, and whether Exxon disclosed that knowledge to the public.” The court also found that the CID did not request excessive amounts of material, especially since “Exxon has already complied with a request for similar documents from New York’s attorney general.” The court also addressed Exxon’s claims that the attorney general’s issuance of the CID was pretextual and thus was arbitrary and capricious. The court held that “The Attorney General’s belief that Exxon’s conduct may violate G.L. 93A is all that is required under G. L. c. 93A, § 6 (1).”

The court next reviewed Exxon’s request for disqualification of the entire office of the attorney general, based on her remarks at a press conference (described above). Exxon alleged that the attorney general’s remarks violated Massachusetts rules of professional conduct prohibiting a lawyer from making prejudicial statements to the public regarding an ongoing investigation. The state Supreme Court upheld the lower court’s refusal to disqualify the attorney general, stating “The Attorney General is authorized to investigate what she believes to be violations of c. 93A. . . . As an elected official, it is reasonable that she routinely informs her constituents of the nature of her investigations.”

Finally, the Supreme Court affirmed the trial court’s denial of a stay of this litigation until the federal court litigation was completed. The court stated, “In denying Exxon’s request, the judge reasoned that the Superior Court is better equipped than a Federal court in Texas to decide a matter pertaining to Massachusetts’s primary consumer protection law. [citation omitted] Exxon argues that this constitutes an abuse of discretion, and contends, somewhat remarkably, that there “is good reason to question the premise” that Massachusetts courts are more capable than out-of-State courts to oversee cases arising under c. 93A.” The Supreme Court noted that the legislature had designated Massachusetts Superior Court as the forum for challenging a CID, and stated, “It should go without saying that Massachusetts courts, which routinely hear c. 93A claims, are better equipped than other courts in other jurisdictions to oversee such cases.” Exxon Mobil Corporation v. Attorney General, No. SJC-12376 (Mass. Apr. 13, 2018).

Mississippi—Attorney General Is Part of Executive, Not Judicial Branch: The Mississippi Supreme Court, addressing an unusual challenge to an arrest and indictment, analyzed whether the attorney general is an officer of the judicial or executive branch of state government. Smith was arrested and indicted for capital murder, among other crimes. He filed a civil action against the Mississippi attorney general for a writ of quo warranto, declaratory judgment, and a writ of prohibition, based on the legal theory that the attorney general was a judicial officer, precluded from carrying out any law enforcement or prosecutorial duties. The trial court held that the attorney general is within the executive branch of government, and Smith appealed.

The Supreme Court noted that the offices of the attorney general and the state’s district attorneys are created in Article 6 of the Mississippi Constitution, entitled “Judiciary.” The court, relying on established case law, explained that the constitution’s article titles are “a mere facility of convenience,” which carry no more weight than the section numbers. Although the court acknowledged that it had never before addressed the question in a case where a litigant has challenged the attorney general’s ability to discharge his prosecutorial duties, the court held, “the Office of Attorney General, under our Constitution, is a component of the executive branch. That the office
is located within the article entitled ‘Judiciary’ is of no consequence.” Smith v. Hood, 2018 Miss. Lexis 83 (Miss. Mar. 1, 2018).

New York—Attorney General’s Charities Regulation
Not a Violation of First Amendment Rights: Non-profit organizations organized under both Internal Revenue Code sections 501(c)(3) and 501(c)(4) are required to submit a Form 990, including a list of the organization’s donors, addresses, and amounts of their donations. The Internal Revenue Service (IRS) must keep this information confidential. New York’s non-profit regulations, promulgated by the attorney general, require non-profits soliciting donations in New York to submit Form 990 to the state. Those filings are only reviewed by the attorney general’s charities section.

The plaintiffs are two non-profit organizations, a 501(c)(3) and a 501(c)(4), who espouse specific political views. They have submitted the Form 990 each year since 2005, but have never included the list of donors. The attorney general accepted their submissions until 2013, when the attorney general’s office began serving deficiency notices on the organizations. Although the attorney general has not done so, he is authorized to levy fines of $100 per day for the deficiencies and to revoke their solicitation privileges in New York.

Turning first to plaintiffs’ First Amendment claims, the court determined that the appropriate level of analysis was “exacting scrutiny,” under which there must be a “substantial relation” between the disclosure requirement and a “sufficiently important governmental interest” where the strength of that interest is “commensurate with the seriousness of the burden on First Amendment rights.” In this case, the court agreed with the attorney general as to the “importance of the government’s interests in ensuring organizations that receive special tax treatment do not abuse that privilege and of its interest in preventing those organizations from using donations for purposes other than those they represent to their donors and the public.” In this case, “we see no reason to believe that this risk of speech chilling is more than that which comes with any disclosure regulation,” and the same information has already been provided to the IRS.

With regard to the plaintiffs’ claims that the regulations are unconstitutional as applied to them, the court acknowledged that someone might hesitate to advance a cause if they knew a state officer will see their action. “But totalitarian tendencies do not lurk behind every instance of a state’s collection of information about those within its jurisdiction.” Because the disclosure is limited by statute to the attorney general’s charities division, the court refused to find that the mere possibility that the donor information would be revealed by the attorney general was insufficient to outweigh the attorney general’s need for the information. The court stated that the only harm alleged by plaintiffs is “a bare assertion that the attorney general has a vendetta against” the plaintiffs and rejected the plaintiffs “as applied” claims.

The court also rejected plaintiffs’ claim that the regulations constituted a prior restraint. The court noted that the argument appears to be that the attorney general has the discretion to withdraw permission to solicit in New York if they do not comply with the filing requirements. The court described this as a facially content-neutral law which only constitutes a prior restraint when it “(1) disallow[s] that expression unless it has previous permission from a government official and (2) vest[s] that official with enough discretion that it could be abused.” In this case, the court noted that the withdrawal of permission to solicit is a remedial, rather than ex ante measure, and “we cannot view the Attorney General’s discretion to determine which groups receive deficiency notices or face penalties for failing to file Schedule B as anything but a necessary manifestation of the need to prioritize certain enforcement efforts over others.” Citizens United v. Schneiderman, No. 16-3310 (2d Cir. Feb. 15, 2018).

Ohio—Attorney General’s Common Law
Powers: The operators of a charter school were sued for alleged self-dealing, breach of fiduciary duty, and other misuse of both federal and state public funds.
The state department of education and the attorney general filed an intervening complaint. The defendants challenged the attorney general’s authority to press the state’s claims.

The court held that the attorney general may bring these claims. Ohio statutes authorize the attorney general to bring these types of claims when the state auditor requests the action. In addition, that attorney general has common law standing to pursue the claims because he is seeking to recover public property. The statute authorizing this type of claim does not restrict the attorney general’s common law standing, because any such restriction must be explicitly stated by the legislature. In this case, there is no language limiting the attorney general’s standing, and “statutory reinforcements of specific areas of the Attorney General’s common law standing are not limitations on his general standing.” Sun Bldg. Ltd. Partnership v. Value Learning & Teaching Acad., 2018 Ohio Misc. Lexis 2 (Hamilton Cty. Ct. Comm. Pleas, March 26, 2018).

West Virginia—Protection of Attorney General CID Materials from FOIA Disclosure: Two hospitals in Huntington, West Virginia, agreed to merge. The West Virginia Attorney General’s Office and the Federal Trade Commission (FTC) both investigated the merger for potential anticompetitive effects. In the course of the investigation, the FTC transferred some of the documents it received to the attorney general. The West Virginia Antitrust Act provides, “The attorney general shall not make public the name or identity of a person whose acts or conduct he investigates pursuant to this section or the facts disclosed in the investigation, but this subsection does not apply to disclosures in actions or enforcement proceedings pursuant to this article.” The attorney general and the parties also executed a confidentiality agreement under which the documents received by the attorney general would not be disclosed and would be used only for law enforcement purposes. The attorney general eventually filed an Assurance of Voluntary Compliance, through which the merger of the hospitals was approved.

The transaction was opposed by Steel of West Virginia (Steel) which made a Freedom of Information Act (FOIA) request to the attorney general’s office for all public records and correspondence relating to the merger. The attorney general declined to provide a number of documents because they were subject to the “investigatory exemption” of the West Virginia Antitrust Act. Steel filed a complaint to enjoin the
attorney general from withholding the documents on the grounds that there was no basis for withholding them and that the attorney general must produce an index of the documents justifying their withholding. The attorney general produced the index which was reviewed by the court, and the attorney general also sent to the FTC the portion of the index describing the documents it had received from the FTC. The FTC wrote a letter to the court, stating that the documents it provided to the attorney general had been provided upon the attorney general’s certification that the material would remain confidential and be used only for law enforcement purposes.

The court ordered the attorney general to unseal the entire index, as a sanction for having disclosed a portion to the FTC, and ordered production of 89 documents. This order was appealed to the state Supreme Court. The Supreme Court held that the statutory exemption in the West Virginia Antitrust Act is incorporated into the West Virginia Freedom of Information Act, and reversed the order directing production of the 89 documents, stating, “A denial of the full import of the Attorney General’s statutory exemption would place investigations of illegal conduct under the Antitrust Act at a disadvantage and would be contrary to the public’s interest in the enforcement of the law.”

The Supreme Court also reversed the court’s order unsealing the index of documents prepared by the attorney general. The Supreme Court found that the release of the portion of the index to the FTC was permitted because the state Antitrust Act states that the attorney general “may cooperate with officials of the federal government and the several states in the enforcement of this article.”

Finally, the court addressed the attorney general’s argument that the lower court incorrectly concluded that the West Virginia Health Care Authority Act exempts the transaction from the state antitrust laws. That statute went into effect in March 2016, after the transaction at issue here had been approved by the attorney general. The statue is intended to provide state action immunity for consolidations of health care providers if those consolidations are approved by the West Virginia Health Care Authority. The court held that this statute was prospective, rather than retrospective, in effect, and that the attorney general’s “duties of confidentiality in securing information regarding the merger predate the 2016 statutes.”

Relationship between Attorney General and Local Prosecutor: Three cases, in Michigan, New York, and Virginia, addressed the relationship between attorneys general and local prosecutors with respect to post-conviction criminal matters.

In Michigan, three juveniles were convicted of first-degree murder and other offenses 25 years ago and were sentenced to life in prison without parole. The judge presiding over their trials and sentencing is now a Michigan county prosecutor in the same county. After the Supreme Court decided, in *Miller v. Alabama*,¹ that life without parole for juvenile offenders violates the Eighth Amendment, the Michigan legislature established a procedure for resentencing juveniles to whom the decision applied. Under that procedure, if the prosecutor failed to seek resentencing, the affected defendant would be sentenced to a term of years. In this case, the prosecutor's office sought resentencing of the defendants to life without parole.

The defendants filed motions to disqualify the prosecutor and her entire office, alleging that, as the judge in the prior proceedings, she had a conflict of interest that raised constitutional concerns, and that her motions requesting life without parole for them should be struck (meaning they would receive a term of years). The prosecutor requested that the attorney general appoint a special prosecutor, pursuant to Michigan law. The attorney general took over the case (as he was permitted to do under state law), and decided not to withdraw the prosecutor's motions for mandatory life sentences. The trial court concluded that, although the prosecutor had essentially conceded that she was disqualified, the attorney general had the authority to re-evaluate the prosecutor's motions, which need not be struck. The defendants appealed.

The court of appeals analyzed the statute under which the attorney general may appoint a special prosecutor or act as the prosecutor himself. The statute provides that “the attorney general may elect to proceed in the matter.” When the attorney general took over the cases, he did so “for purposes of going forward or continuing the existing cases . . . . The procedural history of the case up to that point in time was not wiped out by the transfer of prosecutorial power from the prosecutor to the attorney general.” The attorney general became vested with all of the powers of the prosecuting attorney and had the authority to withdraw the previously filed motions. “The attorney general decided to proceed on the same course as the prosecutor. Defendants, therefore, have received the unbiased and unconflicted review that they demand.” *People v. Hayes*, 2018 Mich. App. Lexis 950 (Mich. Ct. App. Mar. 27, 2018).

In New York, the State Police investigated alleged drug trafficking at the Rensselaer County Jail. The investigation led to a broader investigation of misuse of funds by officials of the correction officers' union, the Sheriffs's Employees Association of Rensselaer County (SEARCO). The Rensselaer county district attorney recused himself from the investigation, which was taken over by the U.S. attorney for the district. After the federal authorities determined that the defendant's actions did not constitute federal offenses, the New York Attorney General's Office reviewed the files and told the investigator that a formal request was required for the attorney general to take over the prosecution. The request was made in 2015. The defendant was indicted on four counts and moved to dismiss the indictment on several grounds, including that the attorney general's office lacked jurisdiction. The county court declined to dismiss the indictments, and defendant appealed.

The appellate court noted that the New York attorney general has prosecutorial power only “when specifically authorized by statute.” In this case, New York's Executive Law states, “upon the request of the head of any department, authority, division or agency of the state,” the attorney general may prosecute illegal activity that falls within the authority of the requesting officer. In this case, the superintendent of the State Police had sent a letter asking the attorney general to review and, if appropriate, prosecute the SEARCO matter. The fact that the attorney general's office had previously reviewed the files and informed the investigators in the case that a referral was required did not negate this request. *People v. Rogers*, 157 A.D.3d 1001; 69 N.Y.S.3d 384 (N.Y. App. Div. 2018).

In Virginia, a convicted murderer, Brown, petitioned for a writ of actual innocence 40 years after he was convicted of murder. The trial court ordered post-conviction DNA testing by the state Department of Forensic Science (DFS) laboratory, which was inconclusive. Brown then sought testing by another lab, and the Commonwealth's attorney did not object to the request. Brown based his petition for a writ of actual innocence on the testing done by the private laboratory. The Virginia Attorney General's Office moved to dismiss Brown's petition on the grounds that 1) his petition relied on testing not performed or certified by DFS, as required by statute, and 2) even the
private lab results did not provide sufficient evidence of actual innocence under Virginia law.

Among other things, Brown argued that the attorney general’s office is estopped from making the statutory argument because the Commonwealth’s attorney had not objected to the testing by the private laboratory. The court held:

It is also irrelevant that the Attorney General and the Commonwealth’s Attorney disagree on this issue. They are separate constitutional officers and are entitled to their separate opinions. ... The Attorney General and the Commonwealth’s Attorney each have distinct, although at times complementary, responsibilities... The duty to represent the Commonwealth in petitions for writs of actual innocence rests exclusively with the Attorney General.


Endnotes

Approximately one in ten Americans over 60 has experienced some form of elder abuse. Some estimate that as many as five million elders are abused each year, and those numbers are only going up. In one year alone, reports of financial exploitation in Oregon increased by nearly 20 percent and represented almost half of all abuse investigations conducted by the state.

Fighting these types of abuses has been a priority of mine for nearly 15 years and I am pleased to continue the fight with Oregon Attorney General Ellen Rosenblum. She shares my passion for protecting older Oregonians. In 2012, when I began working for Attorney General Rosenblum at the Oregon Department of Justice, we decided it would be my mission to prevent financial harm to older Oregonians. My work involves all aspects of this mission:

- Creating financial education campaigns that target vulnerable Oregonians;
- Coordinating and hosting speaking engagements and other events to increase safeguards and public awareness to prevent financial harm to vulnerable Oregonians, especially seniors;
- Serving as a liaison among the Oregon Department of Justice, federal, state, and local government entities and officials, tribes, community organizations, advocacy groups, and members of the media; and
- Working with the attorney general and the Oregon Department of Justice to prevent and address financial harm that affects vulnerable Oregonians.

To serve our mission, I have created educational tools aimed at combating elder abuse, especially financial exploitation. Attorney General Rosenblum and I both know that well-informed Oregonians are more likely to recognize fraud and less likely to become victims. We also know these scams can be hard to track and prosecute.

Because education is so critical, we have a number of resources available for consumers, including:

- A searchable online consumer complaint database called Be InFORmed.
- Scam Alerts sent via email, our website, and Twitter to more than 15,000 Oregonians.
- A toll-free complaint hotline that is staffed five days a week with some of the most knowledgeable volunteers in the state.
- An easy to remember website—[www.oregonconsumer.gov](http://www.oregonconsumer.gov)—with numerous consumer protection materials available for free. Some examples of these materials include:
  - The latest campaign, “Just Hang Up!” was released on World Elder Abuse Day to educate Oregonians about imposter scams and fraudulent phone calls.
  - Our most popular handout, the “Six Signs It’s a Scam.”
  - Top Ten Consumer Tips to Protect You and Your Family.
  - A “Wise Giving Guide” to help consumers make smart donations to non-profits.

To ensure the materials are easily read by older adults, all of our handouts are written for an eighth grade reading level, in accordance with the
National Institute on Aging’s guide for older readers, and reviewed by a non-profit called Elders in Action for true readability.

I also plan speaking engagements to address the need for more safeguards and public awareness activities to prevent financial harm to vulnerable Oregonians. Every week I am in a different city, talking to a different group of Oregonians. And every day, I hear stories from our most vulnerable residents about a wide variety of scams and frauds, which further galvanizes my passion for this work.

I realize I am just one person and Oregon is a big state, and I cannot be everywhere at once. That is why I also dedicate time to creating and nurturing partnerships with all of the different constituencies which interact with, and can play a role in, helping us protect seniors. Through these partnerships, I am able to share complaints, coordinate investigations, and disseminate information to the public. Our partners give us a bigger voice with which to share information and keep Oregonians safe.

In fact, one of the most successful partnerships we have is with AARP Oregon and related state agencies. Since October 2013, we have worked with AARP Oregon, the Oregon Department of Business and Consumer Services, the Federal Trade Commission, Senior Health Insurance Benefits Assistance Program (SHIBA), the Oregon Construction Contractors Board, and the Senior Medicare Patrol to co-host educational programs where seniors and others learn about how to stay safe from fraud and scams. These “Scam Jams” are held in multiple locations across the state three times a year and typically draw between 100 to 500 attendees for each program.

Every fall, I also plan and host Oregon Attorney General Ellen Rosenblum’s Annual Elder Abuse Conference. Nearly 200 members of law enforcement, district attorneys, deputy district attorneys, U.S. attorneys serving in Oregon, Adult Protective Services, medical professionals, and individuals employed by the federal, state, or local government attended last year’s conference. Attendees can choose from a wide-variety of workshops taught by professionals with expertise in myriad fields related to elder abuse prevention. Last year’s most popular workshop—“Is it Abuse? Or Are They Just Old?”—was presented by a physician board certified in internal medicine, geriatrics, hospice, and palliative medicine.
Perhaps my most important work is the work I do “behind the scenes” at the Oregon Department of Justice. Internally, I work collaboratively with all nine divisions, 1,300 employees and 26 states offices of the Oregon Department of Justice to ensure we are doing everything we can to protect older Oregonians from abuse.

The passion with which the Oregon Attorney General’s office has focused on protecting our state’s older adults has contributed to the effectiveness of our work with our partners in this endeavor. The office is recognized as being a zealous advocate and expert in dealing with those issues that affect our older residents and, as such, can bring different professionals together at key parts in our investigation and handling of cases. This strengthens our response and those of other partner state agencies to improve and protect the lives and property of Oregon’s older adults.

To expand our protection efforts, in 2015, we worked closely with the legislature to approve the funding for one permanent full-time elder abuse resource prosecutor and two permanent full-time investigators who provide the critical investigative support needed to look into the complaints received and to find the evidence needed to bring cases against those who would abuse our most vulnerable citizens. Ten organizations, including AARP, Legal Aid, the Oregon State Bar, and the Alzheimer’s Association, all voiced their support for the new positions, and the Oregon Legislature listened. In March 2016, the Oregon Department of Justice’s elder abuse unit began to take shape, making Oregon the third state in the country to have a statewide prosecutor devoted exclusively to elder abuse work.

These positions have increased Oregon’s capacity to stop elder abuse by providing training, technical assistance, and legal expertise to district attorneys, law enforcement, and others who work with older Oregonians. The relationships we have been building with our partner organizations were key to this legislative victory and appropriation. Beyond this legislative success, these organizations have been instrumental in our efforts and key partners in the fight to end elder abuse. Another key partnership is with the Social Services Fraud Work Group, which meets monthly. The work group—in existence since 2011—is multidisciplinary and comprised of more than 30 federal, state, and local agencies working fraud cases in the field of social services. At each meeting, members of the work group share tips and work collaboratively to fight social services fraud. The success of the work group has inspired the creation of two additional work groups, one in Alaska and another in Washington State. We are pleased to serve as a model and a resource for elder abuse programs other states.

Elder abuse is, tragically, a growing epidemic in Oregon and across the nation. I have been incredibly lucky to be able to work with the Oregon attorney general, who shares my passion for this important work, to prevent it, address it, and hold perpetrators accountable.
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**Eric S. Fillman** was sworn in on Jan. 17, 2017, as the first chief integrity officer for the Pennsylvania Attorney General’s Office. Fillman advises the attorney general and executive staff on matters of ethics and integrity; plans, creates and delivers ethics training to 800+ agency employees; and heads the Office of Professional Responsibility, handling background and internal affairs investigations. Fillman’s prior public service of 29 years as staff member in the Pennsylvania General Assembly includes 20 years as leadership legal counsel, seven of which he served as counsel to the Bipartisan House Committee on Ethics, and nine years as a research analyst. His legislative service was interrupted only by a 2-year opportunity to serve as deputy general counsel to the Pennsylvania governor. He is a graduate of Philadelphia’s La Salle University (BA, Political Science, 1980) and Widener University’s Commonwealth Law School (JD, 1993, Harrisburg).

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