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NATIONAL ATTORNEYS GENERAL TRAINING & RESEARCH INSTITUTE
THE TRAINING & RESEARCH ARM OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
We are pleased to offer this debut issue of the NAGTRI Journal. Since its start in 2008, the National Attorneys General Training and Research Institute (NAGTRI)—a branch of the National Association of Attorneys General (NAAG)—has been dedicated to providing quality training and research to our members. Through the electronic monthly newsletter known as NAAGazette, NAGTRI counsel authored articles on matters of interest for the last seven years. As NAGTRI has developed, matured, and expanded, it became clear that a separate publication dedicated solely to legal analysis and research would be of great value to the NAAG community. Consequently, NAAGazette has been retired and the NAGTRI Journal was conceived as a quarterly publication. Matters pertaining to other topics, projects, and meetings of NAAG interest will be part of a separate NAAG breaking e-news brief that will launch in a few months.

In addition to articles from NAGTRI counsel, the NAGTRI Journal will also include articles written by attorney general staff. We encourage and welcome such staff to submit articles for publication. Please email NAGTRI Deputy Director Judy McKee, jmckee@naag.org, with ideas and suggestions. As we move forward we plan to increase the depth and range of legal issues addressed in this journal and look forward to attorney general staff being part of this process.

Particular thanks go to the Association staff who helped get the NAGTRI Journal off the ground and who will help shepherd its development in the coming years. We truly have an amazing and dedicated staff.

The journal’s goal is to help further the mission of the state and territorial attorneys general. To that end, please always feel free to tell us how we can do better. We look forward to the growth of the NAGTRI Journal, and know that all our members—attorneys general and their staff—will be an integral part of its advancement.

Very Respectfully,

Jim McPherson
NAAG Executive Director
Training Calendar

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

### National

**Legislative Seminar:**
Indiana, IN
November 5, 2015

**Corruption: Prevention and Deterrence:**
Miami, FL
December 7 - 9, 2015

**Persuasive Legal Writing:**
Las Vegas, NV
December 9 - 11, 2015

**Faculty Development:**
Atlanta, GA
January 11 - 12, 2016

**Fundamental Core Leadership Competencies:**
Charlotte, NC
January 20 - 22, 2016

**Train the Trainers:**
Washington, DC
February 4 - 5, 2016

### Mobile

**Human Trafficking for OAG-NV:**
Las Vegas, NV
November 2 - 3, 2015

**Negotiation Skills for OAG-MA:**
Boston, MA
November 9 - 10, 2015

**Management for OAG-VT:**
Montpelier, VT
November 12 - 13, 2015

**Management for OAG-NV:**
Las Vegas and Carson City, Nevada
November 17 - 18, 2015

**Negotiation Skills for OAG-MI:**
Lansing, MI
November 19 - 20, 2015

**Deposition Skills for OAG-IL:**
Springfield, IL
December 2 - 3, 2015

**Legal Writing for OAG-HI:**
Hawaii
December 4, 2015

**Trial Advocacy Training for OAG-IN:**
Indianapolis, IN
December 7 - 10, 2015

**Negotiation Skills for OAG-CA:**
Sacramento, CA
December 8 - 11, 2015

**E-Discovery for OAG-MD:**
Baltimore, MD
December 15, 2015
With the 2015 Supreme Court Term just beginning, most of the focus has been on the affirmative action, “one-person, one-vote,” and compelled union fees cases. Few commentators are discussing federalism and, perhaps, for good reason. At the height of the Rehnquist “Federalism Revolution,” the Court heard cases involving the Tenth Amendment; the scope of Congress’s power under Section 5 of the Fourteenth Amendment; claims that federal statutes exceeded Congress’s Commerce Clause power; and the meaning of the Eleventh Amendment. This Term does not yet have any cases presenting any of those issues—at least not directly.

But the Court is scheduled to hear at least six cases that address the scope of state and federal power. Their contexts vary greatly, from a federal criminal prosecution to an Alaskan who wants to hunt moose on a hovercraft to Nebraska residents selling alcohol in a town that is within the original boundaries of an Indian reservation. Their outcomes will matter greatly to the individual states and litigants involved; and, more importantly to us, will further shape the contours of federal and state relations and power.

**Congress’s Commerce Clause Power: Taylor v. United States**

One of the last major federalism decisions of the Rehnquist Court was *Gonzales v. Raich* (2005), where the Court held that Congress has the power under the Commerce Clause to prohibit two elderly women from growing marijuana and using it themselves for medical purposes in compliance with state law. The Court stated that it has “no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the [Controlled Substances Act],” which comprehensively regulates the interstate illicit drug market.

Fast forward to 2009. David Anthony Taylor participates in two robberies of drug dealers, who are perfect targets because they rarely run to the police to report crimes. He and his cohorts recover one marijuana cigarette, some jewelry, $40 in cash, and three cell phones. The federal government prosecutes Taylor under the Hobbs Act, which makes it a federal crime to commit a robbery that “in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce.” 18 U.S.C. §1951(a). The Supreme Court has held that the phrase “affects commerce” in the Act reflects Congress’s intent to exercise “the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause”—which means that every Hobbs Act prosecution raises a constitutional question. The question here is whether Taylor’s robberies “affect commerce” such that Congress has the constitutional power to make the robberies a federal crime.

The Fourth Circuit held that they do, relying in part on *Raich* and its recognition that Congress can regulate conduct that, “in the aggregate, impacts interstate commerce.” The United States, defending that decision, asserts that the Hobbs Act authorizes prosecutions of robberies that target “businesses that trade in out-of-state goods” “where the robbery depleted [the businesses’] assets.” As Taylor argues in his petition, “if allowed to stand, the Fourth Circuit’s decision will turn the Hobbs Act from a narrowly tailored criminal statute targeted at punishing interstate robbery to an expansive federal regime that criminalizes at the national level all robberies involving illegal drugs.” Indeed, under the federal government and Fourth Circuit’s logic, robbery of any commercial enterprise would likely be a federal crime.

**The States’ Sovereign Immunity: Franchise Tax Board of California v. Hyatt**

State sovereign immunity was one of the major battlegrounds of the Rehnquist Federalism Revolution. Most of the cases addressed Congress’s efforts to make states liable when they (or their agents or officers) violated federal laws. The Rehnquist Court held that Congress cannot take away the states’ sovereign immunity and force them to appear before federal courts when they allegedly violated federal laws; and that the same is true when Congress tries to force states to
appear before state courts and federal administrative tribunals when they allegedly violate federal laws. Yet the Rehnquist Court left untouched *Nevada v. Hall* (1979), which held that a state may be haled into the courts of another state, on a state-law claim, without its consent. In December, the Roberts Court will address the scope and continuing vitality of *Nevada v. Hall*.

Gilbert Hyatt, a onetime California resident, has earned hundreds of millions of dollars in licensing fees on certain technology patents. The California tax authorities audited Hyatt after he reported that he lived in California for three-quarters of 1991, but reported only 3.5 percent of his total taxable income on his California return. Several years later, Hyatt turned around and filed suit in Nevada state court against the California Franchise Tax Board asserting that it committed a variety of torts against him during the audits, including intentional torts. Among other defenses, the Tax Board argued that the Full Faith and Credit Clause requires Nevada courts to apply a California law under which a public entity or employee is absolutely immune from liability for acts performed during tax assessments. The Nevada courts refused to apply the California law, and U.S. Supreme Court affirmed. On remand, the Tax Board asked that the Nevada courts at least treat it the same way a Nevada state agency would be treated. And Nevada law imposes a $50,000 cap on tort damages against a Nevada state agency (for actions accruing before 2007). The trial court declined to do that, a full trial was held, and a jury awarded Hyatt more than $490 million. The Nevada Supreme Court cut back on that to an extent, finding that some of Hyatt's tort claims failed as a matter of law. But it upheld the more than $1 million in damages for fraud, remanded for retrial on emotional distress damages, and—most relevant for current purposes—concluded that Nevada's “policy interest in providing adequate redress to Nevada citizens” overrides “providing [the Tax Board] a statutory cap on damages.”

The U.S. Supreme Court agreed to review two questions presented by the Tax Board. The first is whether principles of comity mandate that Nevada treat California's Tax Board the same way it would treat Nevada's Tax Board (or any other state agency). If the Court rules for the Tax Board on that ground, while leaving *Nevada v. Hall* otherwise untouched, it would take some of the sting out of *Hall*. But the larger action is in the second question, which asks the Court to overrule *Nevada v. Hall*. In the Tax Board's view, *Nevada v. Hall* “runs contrary to the intent of the Framers, the constitutional structure, pre-*Hall* sovereign immunity decisions, and the subsequent better reasoned sovereign immunity jurisprudence” of the Rehnquist Court. Among other things, *Hall* “refused to 'infer[ ]' sovereign immunity 'from the structure of our Constitution,'” but later “decisions, by contrast, have repeatedly recognized sovereign immunity as a 'fundamental postulate[ ]' implicit in the constitutional design.” Forty-four states joined an amicus brief supporting the Tax Board's contention that *Hall* should be overruled.

**Who Controls Alaskan Land?: Sturgeon v. Masica**

One might not think that a case addressing the interaction of the Alaska National Interest Lands Conservation Act (ANILCA) and National Park Service Organic Act regulations implicates important federalism interests. Nor would one think that the desire of a moose hunter (John Sturgeon) to track moose via a hovercraft would produce an important federalism case. Yet *Sturgeon v. Masica* involves both and, yes, addresses a core federalism issue: whether the federal government or a state possesses regulatory power over wide swaths of land.

As a general matter, the National Park Service regulates activities in national parks. But Alaska has a unique history and is governed pursuant to a unique body of law. As Alaska and Sturgeon tell the story, Congress enacted ANILCA in 1980 to obtain a balance between “scenic, natural, cultural, and environmental values” of Alaska's lands and those lands' role in serving “the economic and social needs of the State of Alaska and its people.” Toward that end, the statute added more than 43 million acres to the national park system in Alaska by creating new national parks and expanding existing parks. This new national park land was designated as the “conservation system unit” or CSU. Critically, “millions of acres of land previously set aside for the economic and social needs of the Alaskan people” are in land “located within the physical boundaries of CSUs.” “Essential to ANILCA's compromise was Congress’s assurance that” that land “would not be subject to federal regulatory control and management.” ANILCA addressed that concern in §103(c), which provides that only federal land “shall be deemed to be included as a portion of” a CSU, and no lands owned by the state, a Native Corporation, or a private party “shall be subject to the regulations applicable solely to public [i.e., federal] lands within such units.”

To Alaska and Sturgeon, §103(c)'s meaning is clear: state, Native Corporation, and private lands “within the boundaries of the ANILCA conservation system units are not part of those units and may not be managed as though they are” — such as by imposing the National Park Service's ban on the use of hovercrafts on rivers. However, the Ninth Circuit agreed with the National Park Service that the phrase “no lands . . . shall be subject to the regulations applicable solely to public lands within such units” means that only Park Service regulations that apply solely to CSUs are covered. Park Service regulations that “appl[y] to all federal-owned lands and waters administered by the NPS nationwide” are outside the provision's scope.
Sturgeon notes that “the regulatory disposition of more than 19 million acres of Alaskan land” will be resolved by this case. In the words of Alaska’s amicus brief, the Ninth Circuit’s decision “diminishes Alaska’s sovereignty and thwarts its ability to address the needs of its citizens.” That court’s “reasoning scorns Alaska’s constitutional and statutory right to control its resources” and “perversely transform[s] a provision designed to respect and promote Alaska’s sovereignty into a tool for undermining it.” Suffice to say, the Park Service’s brief in opposition strongly disagrees with those assertions. It states that the Ninth Circuit “correctly rejected petitioner’s remarkable assertion that the NPS cannot enforce any park regulations on the navigable waters within national parks in Alaska, by virtue of ANILCA Section 103(c).” It adds that this provision, supposedly so important, is “‘buried’ in the ‘maps’ section of ANILCA”; and that its interpretation of the provision is entitled to *Chevron* deference.

**State Power on (Former) Indian Reservation Lands: Nebraska v. Parker**

The fundamental division of governmental power in our country is between the federal government and the states. But a third sovereign sometimes comes into play: Indian tribes. States possess diminished regulatory power within Indian reservations. And so the question sometimes arises: What are the boundaries of a reservation? More particularly, did a federal law opening up reservation lands for sale to non-Indians diminish the boundaries of the reservation? The Court will take that issue up in *Nebraska v. Parker*, which addresses “[w]hether the original boundaries of the Omaha Indian Reservation was diminished following passage of the Act of August 7, 1882,” a surplus land act.

As one might expect, the Court has developed a framework for assessing when surplus land acts diminish reservations. In *Solem v. Bartlett* (1984), the Court held that courts should look at the statutory language, “events surrounding the passage of” the act, and “events that occurred after the passage of” the act. As to the first factor, the Court has held that, when an act explicitly says a tribe will “cede” lands for a “fixed-sum payment,” a nearly “insurmountable” presumption of diminishment arises. But what happens when a surplus land act does not contain that language? In this case, Nebraska acknowledges that the first two *Solem* factors are ambiguous, but maintains that it should prevail under the third factor (post-enactment events). It asserts that the land in question (the western part of the Omaha Indian Reservation) “never possessed any Indian character”; has had a non-Indian population of more than 98 percent since at least 1900; and has been subject to state, not tribal, jurisdiction during all that time. This could prove an important case on the division of state and tribal authority on lands that were part of original reservations but are now populated almost exclusively by non-Indians.
Preemption: Gobeille v. Liberty Mutual Insurance Co.

As a practical matter, preemption may be one of the most important federalism issue for state attorney general offices. The one preemption case on the Court’s docket so far—Gobeille v. Liberty Mutual Ins. Co.—involves Employee Retirement Income Security Act (ERISA) preemption, which is a distinct body of preemption law. Still, the case raises this key federalism question: whether a federal statute displaces a state law enacted by a state legislature to address a pressing social problem.

Vermont law requires healthcare payers to provide claims data and related information to a state healthcare database, which collects information to assist the state’s health care policy. At least 10 other states have similar databases in place and five more states are creating them. Liberty Mutual provides health care for about 80,000 employees, retirees, and their families—including 137 Vermont residents—through a self-funded plan administered by Blue Cross Blue Shield of Massachusetts. Liberty Mutual ordered Blue Cross not to report information on its beneficiaries and, instead, filed suit in federal district court alleging that ERISA preempts Vermont’s law as applied to its third-party administrator. The Second Circuit agreed with Liberty Mutual, holding that ERISA preempts state laws dealing with the core statutory concerns of “reporting, disclosure, and fiduciary responsibility.”

ERISA preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” Finding that statutory text “unhelpful,” the Supreme Court has held that ERISA preemption must be guided by ERISA’s underlying objectives and purposes. Vermont argues that its law does not have the necessary “connection with” ERISA plans because the law does not “interfere[] with any of ERISA’s core objectives.” ERISA’s reporting requirements are designed to “protect plan beneficiaries” “by preventing mismanagement of funds and failure to pay benefits.” Vermont maintains that its “collection of after-the-fact health care claims information from all payers, including third party administrators of self-insured ERISA plans, in no way intrudes on these areas of federal concern and regulation.” Vermont adds that ERISA plans are subject to myriad state reporting requirements: Can it be that ERISA “Plan-run hospitals would not have to report infections, mortality, or other public health data” required by state law? Or that “[d]ay care centers run by ERISA plans could not be required to report on attendance, safety measures, or teacher qualifications”?


Federal law divides responsibility over the electricity and gas markets by giving the federal government responsibility over the wholesale market and the states responsibility over the retail market. While the line between wholesale and retail may appear simple in the abstract, it is sometimes blurry in practice. As the Court stated last year in a case involving the gas market, the notion that “there is, or should be, a clear division between areas of state and federal authority” is no more than a “Platonic ideal.” That sometimes leaves state and federal regulators, and the entities they regulate, fighting over whether one sovereign or the other is overstepping its bounds. Which brings us to FERC v. Electric Power Supply Association (consolidated with EnerNOC, Inc. v. Electric Power Supply Association).

Because the retail demand for electricity typically does not respond to price increases in the wholesale market, the Federal Energy Regulatory Commission (FERC) has encouraged the development of “demand response”—“a reduction in the consumption of electric energy by consumers from their expected consumption in response to an increase in the price of electric energy.” Demand response is generally accomplished by “an aggregator that automates demand-side flexibility for business and consumers and bids their aggregated reductions as a block into wholesale markets.” To eliminate barriers to potential demand-response providers, FERC issued the rule at issue, which requires FERC-created Regional Transmission Organizations and Independent System Operators to compensate such providers using the same methodology they use to compensate generators.

The D.C. Circuit struck down the rule, holding (among other things) that “[d]emand response… is part of the retail market” and thus is beyond FERC’s regulatory authority. FERC counters that “the practices at issue here—payments by wholesale-market operators for demand-response commitments—affect wholesale rates” in a “substantial and direct” way. And “if a practice directly affects wholesale rates, FERC has the authority—and duty—to ensure that the practice is just and reasonable.” In the challengers’ view, however, “FERC cannot expand its own jurisdiction at the expense of the States’ exclusive jurisdiction by asserting a need to regulate a ‘direct effect’ on wholesale rates that FERC has created by inviting retail customers into the wholesale markets.”
Evidentiary Foundations for Government Attorneys

ORDERS START IN NOVEMBER!

Evidentiary Foundations for Government Attorneys from the National Attorneys General Training and Research Institute offers litigators a greater understanding of the process of laying a proper and sufficient evidentiary foundation. Written by trial lawyers for trial lawyers, the manual serves as a guide to laying the proper foundation for admissibility of a wide variety of forms of evidence and types of testimony. It goes beyond simple predicate questions by also providing an explanation of the legal concepts relating to each sample direct examination.

The foundations are divided into topical sections for ease of reference and are meant to be adapted to address variances that might be encountered. Each evidentiary foundation, when appropriate, contains a reference to the Federal Rules of Evidence and relevant case law or other reference, a brief explanation and outline of areas for inquiry, and an example of a direct examination. Some examples incorporate specific situations to better illustrate how the examination might be conducted.

Manuals start shipping in November.
The following cases affecting the powers and duties of state attorneys general were decided in the last several months.

**CALIFORNIA**

**Representation of State Agencies by Attorney General**


Plaintiff, an employee of the state Department of Industrial Relations (DIR), sued DIR for violations of the Fair Housing and Employment Act and breach of contract. Attorneys from the DIR Legal Unit answered the complaint. Plaintiff sought to disqualify the Legal Unit on the grounds that state statutes require that the attorney general represent DIR and that the Legal Unit had conflicts of interest precluding it from representing the defendants. The attorney general had authorized the Legal Unit to represent the defendants. The trial court denied plaintiff’s motion and plaintiff appealed.

California statutes provide that “the attorney general has charge, as attorney, of all legal matters in which the State is interested” and “shall ... prosecute or defend all causes to which the State, or any State officer is a party in his or her official capacity.” Only a few specified agencies may employ legal counsel other than the attorney general “in any matter in which the agency is interested or is a party.” Although this is the default rule, the court concluded that there is statutory authority for the attorney general to give delegate representation, in writing, to another person or entity. The attorney general did so in this case, and the Legal Unit’s representation of DIR was proper. The fact that the delegation did not occur at the outset of the case does not prevent the attorney general from delegating this authority.

The plaintiff alleged that the Legal Unit lawyers had a conflict of interest because she had been formerly employed at a unit within DIR. The court found that the Legal Unit’s attorneys “had no personal knowledge of any incidents involved in this case.” Therefore, the plaintiff did not have any “confidential or fiduciary relationship” with the Legal Unit, and, thus, no attorney-client relationship existed. Even if the plaintiff had standing to disqualify counsel, the court found that there were no grounds for such disqualification. The plaintiff noted that the attorney general has a conflict with DIR and the state because she has been adverse to them in other proceedings, but the court held that those proceedings had nothing to do with this case, and disqualification was not appropriate.

**ILLINOIS**

**Authority of Attorney General in Qui Tam Action**


The Illinois Court of Appeals reaffirmed the common law powers of the attorney general in the context of a qui tam proceeding that the attorney general dismissed. A law firm filed a qui tam action against online retailer QVC, alleging that it had improperly failed to collect sales tax on shipping and handling charges. QVC began collecting sales tax on its shipping and handling charges, but did not collect taxes for sales made earlier. The state intervened in the case and moved to dismiss the action. The law firm alleged that the state had made a deal with QVC and sought discovery of communications between the state and QVC. The court allowed the deposition of the QVC executive responsible for the decision to start collecting taxes on the shipping and handling charges, who denied there was any communication with the state. The court dismissed the action and the law firm appealed.

The court of appeals described the attorney general’s role in qui tam proceedings. The state may intervene, but, if the state decides to dismiss the action, it may do so notwithstanding the objections of the initiator of the suit, provided that the initiator has an opportunity to be heard on the motion. Citing its earlier decision in *State ex rel. Beeler, Schad & Diamond v. Burlington Coat Factory Warehouse Corp.*, 369 Ill. App. 3d 507, 860 N.E.2d 423, 307 Ill. Dec. 769 (2006), the court held:
At its core, the issue here is whether the decision to proceed with a qui tam action should be made by the executive branch or by the judicial branch. Only the Attorney General is empowered to represent the state in litigation in which it is the real party in interest. Legislation can add to the powers of the Attorney General but it cannot reduce the Attorney General’s common law authority to direct the legal affairs of the state. If we interpret section 4(c)(2)(A) of the Act to require judicial review of the Attorney General’s decision to dismiss an action, we give the court veto power over the state’s decision to dismiss, essentially usurping the Attorney General’s power to direct the legal affairs of the state and putting that power into the hands of the court.

MAINE

Relationship Between Governor and Attorney General With Regard to Representation of State Agencies.


The Maine Department of Health and Human Services (DHHS) applied for an amendment to the state’s Medicaid plan in 2012. The state submitted a request to the federal government and sought to speed the federal government’s action by filing an action in the Court of Appeals for the 1st Circuit. A new attorney general was then elected by the Maine legislature. The new attorney general refused to provide further representation to Maine DHHS in connection with its administrative proceeding before the federal government. Maine DHHS’s application for an amendment was denied and Maine DHHS requested legal representation from the attorney general in connection with an appeal of that decision. The attorney general refused representation but authorized retention of outside counsel, with a cap on legal fees. Maine DHHS filed an appeal, using outside counsel, and the attorney general intervened in the case to oppose Maine DHHS. The appeal was denied and Maine DHHS wished to petition for certiorari to the state Supreme Court. The attorney general sought billing records and an estimate of the cost of petitioning for certiorari. The attorney general then authorized outside counsel for that petition.

Maine law permits the governor to request an advisory opinion from the individual justices of Maine’s Supreme Judicial Court upon a “solemn occasion” presenting “important questions of law.” The governor sent a letter requesting an Opinion of the Justices on two questions: 1) “If the Attorney General refuses to represent a State agency . . . in a lawsuit, must the Executive Branch still obtain the Attorney General’s permission to hire outside counsel to represent the agency in the suit?” And 2) “If the Attorney General intervenes to oppose a State agency in a lawsuit, must the Executive Branch still allow the Attorney General to ‘direct’ that litigation by limiting the duration of representation or capping the fees that may be paid?”

The court first discussed whether the governor’s questions presented a “solemn occasion” which would allow the court to provide an advisory opinion. The court declined to answer the first question, concluding that it was not a “solemn occasion” because there was no exigency in the circumstances. The court held:

[G]iven the current structure of Maine’s government, there is always the potential for differing positions in litigation. We are, however, unaware of any occasion upon which the Executive Branch—either the Governor or any state agency—has been denied approval to employ private counsel when the Attorney General declined to provide representation. Specifically, the information provided by the parties indicates that there has been no occasion on which this Attorney General has denied a request to obtain private counsel submitted by this Governor or the Executive Branch under his authority.

With respect to the second question, the court found that there was a solemn occasion appropriate for an advisory opinion. The court limited its review only to situations in which the attorney general intervenes to oppose a state agency in a lawsuit. The court found that this question was appropriate for an advisory opinion because the attorney general had sought information on billing and time estimates before approving outside counsel and that could have been understood by the executive branch as directing their litigation strategy.

Turning to that question, the court noted that there is no question as to whether the attorney general may oppose the executive branch in litigation. The court held, however, that “once the Attorney General approves the employment of private counsel for a state entity and opposes that entity in litigation, the Attorney General is no longer appearing for the state entity and therefore is no longer authorized to direct or manage that entity’s litigation or strategy.” Specifically, “Simply put, it is our opinion that the Attorney General cannot formally oppose the Executive Branch’s litigation position and, at the same time, direct the Executive Branch’s litigation through fiscal or other periodic review of the Executive Branch’s private counsel.”
**MASSACHUSETTS**

**Attorney General’s Authority Over Charities**  

A group of students at Harvard University challenged the investment of Harvard’s endowment in stocks of companies that produce fossil fuels. The students alleged mismanagement of the funds given to the University to further its charitable purposes. The attorney general moved to dismiss the complaint on the grounds that plaintiffs did not have standing.

The court found that “authority to enforce the application of charitable funds in Massachusetts normally rests with the attorney general.” There is one exception to this rule, where private citizens can assert claims that a public charity is mismanaging assets, “but only where the plaintiff asserts interests in such organizations which are distinct from those of the general public.” The court described the case in which this right was recognized. In that case, a family who had donated land for a church sought to recover the land when the diocese decided to close the church. The court held that this interest was “specific and personal enough to give them standing” to challenge the church’s use of the assets. In the present case, however, the plaintiffs have no interests different from any other students at Harvard, and the plaintiffs’ status as Harvard students did not “endow them with personal rights specific to them that would give them standing to charge Harvard with mismanagement of its charitable assets.” In discussing the attorney general’s authority over charities, the court cited approvingly language from an early case: “Nor can it be doubted that such a duty can be more satisfactorily performed by one acting under official responsibility [that is, the Attorney General] than by individuals, however honorable their character and motives may be.”

**PENNSYLVANIA**

**Special Prosecutor May Be Appointed to Investigate Attorney General**  

The supervising judge of a statewide grand jury determined that an investigation was warranted into potential breaches of grand jury secrecy and appointed a special prosecutor to investigate and prosecute any violations. The grand jury eventually recommended filing of criminal charges against the attorney general. The attorney general filed a *quo warranto* action with the state Supreme Court seeking to quash the appointment of the special prosecutor. The attorney general argued that there is no Pennsylvania statute that authorizes appointment of a special prosecutor for an investigating grand jury, and, under the state’s
Investigating Grand Jury Act, only local district attorneys, the attorney general or the attorney general’s designee are authorized to serve as “attorney for the commonwealth.” She also argued that, under the Commonwealth Attorneys Act, only the attorney general may convene and conduct a statewide investigating grand jury. Thus, the appointment of a special prosecutor by the judicial branch was a violation of separation of powers, and such appointments had been strongly disapproved in the past.

The special prosecutor argued that a grand jury supervising judge has plenary power to supervise the proceedings of the investigating grand jury and appoint a special prosecutor and pointed to Supreme Court decisions supporting a “strong judicial hand” supervising grand jury proceedings, particularly in situations where there is an alleged breach of grand jury secrecy.

The court concluded that the special prosecutor’s appointment was valid. First, the court noted that the attorney general’s appearance and testimony before the grand jury did not waive her right to challenge the special prosecutor’s authority. Government employees do not need to suffer contempt in order to preserve a challenge to a subpoena in a grand jury proceeding. Turning to the substance of the case, the court noted that the Investigating Grand Jury Act gives supervising judges the “substantial responsibility of maintaining the required confidentiality of grand jury proceedings, on pain of contempt sanctions.” In addition, supervising judges “enjoy general powers required for or incidental to the exercise of jurisdiction.” Based on these powers, the court concluded that the appointment of a special prosecutor in this situation was authorized. The court noted that the special prosecutor had submitted the grand jury presentment to the elected district attorney. However, since the question was not before the court on the ability of the special prosecutor to actually prosecute the criminal case, the court did not state an opinion on this issue.

With respect to separation of powers concerns, the court held that a court must have an independent role in defending its own authority, particularly with regard to contempt. The court stated, “although we recognize that there are legitimate concerns arising out of a judicial appointment of a special prosecutor, we follow the approach of the United States Supreme Court and the many other jurisdictions which have found such appointments proper as an essential means to vindicate the courts’ own authority.”

In dissent, Justice Todd expressed concern about the separation of powers in this case, stating that the majority’s opinion vests “the traditionally separate roles of advocate prosecutor and neutral supervising judge in one branch of government.” She would instead support appointment of a special master in this situation, which would “preserve and fully vindicate the integrity of the confidentiality of grand jury proceedings and accords respect to the enumerated powers of our sister branches of government.” She characterized the appointment of a special prosecutor, who not only may conduct an inquiry, but may use the grand jury to obtain a presentment and prosecute, as unprecedented.

**SOUTH CAROLINA**

**Attorney General’s Authority Under Consumer Protection Law**


The South Carolina attorney general filed suit against Janssen, a pharmaceutical manufacturer, alleging that the company engaged in deceptive acts and practices in the marketing of its antipsychotic drug, Risperdal. The state argued that Janssen had failed to reveal that Risperdal had a higher risk of causing diabetes than some other anti-psychotic drugs. The jury held for the state, finding that Janssen’s actions were willful violations of the state’s Unfair Trade Practices Act (SCUTPA). The court issued an order assessing civil penalties of $327 million. Janssen appealed.

Among other issues, Janssen argued that the state failed to show that Janssen’s unfair and deceptive conduct had an adverse impact within South Carolina. The court rejected this argument, noting that there is no injury-in-fact showing required in an action brought by the attorney general. Instead, the law allows the attorney general to recover $5,000 per violation for willful acts. The state must prove only that the defendant’s actions had the tendency to deceive, not that there was actual deception or adverse impact on the marketplace.

Janssen also argued that the civil fine violated its First Amendment right to free speech. The court held that the jury had found Janssen’s speech unfair and deceptive. Because commercial speech is not protected by the First Amendment if it concerns unlawful activity or is misleading, Janssen’s speech here was not protected.

Janssen also challenged the $325 million in penalties. The SCUTPA allows the attorney general to recover $5,000 per violation of the statute. The attorney general argued that each sample box with a deceptive label, each deceptive letter to a doctor, and each follow-up sales call by a Janssen representative was a separate SCUTPA violation. Janssen argued that the penalty was excessive. The appellate court agreed with the state that Janssen’s deception was substantial and longstanding. However, because the medical community had been alerted to the risks of diabetes from anti-psychotic drugs in general, the court found that the deception had little
impact on prescribing physicians. After reducing the time period and the penalty amount per occurrence (but agreeing with the trial court as to the number of occurrences), the court awarded a civil penalty of $136 million for the state's claims. Addressing Janssen's claims that the penalty was an excessive fine under the Eighth Amendment, the court stated, “the penalty awards per violation are within the range set by the legislature in enacting SCUTPA. Accordingly, the penalty award is not grossly disproportionate to Janssen's pattern of unfair and deceptive behavior, and, thus, we hold that the award does not violate the Excessive Fines Clause of the South Carolina or the United States Constitution.”

Finally, the court specifically addressed an amicus brief from the South Carolina Chamber of Commerce which characterized the penalties as “Overt hostility toward business.” The court stated,

[T]he implication is that South Carolina stands alone in arbitrarily singling-out Janssen for what amounts to nothing more than an aggressive marketing strategy. That is simply not the case. Because of its deceptive conduct in the marketing of Risperdal, Janssen has been the subject of litigation throughout the country…. When viewed objectively, Janssen over the course of many years consciously engaged in lies and deception in the marketing of Risperdal. Thus, the suggestion that the Attorney General of South Carolina stands alone in pursuing amorphous and subjective claims against Janssen is without merit. Surely the Chamber desires a legal system that honors the rule of law and one which does not insulate businesses from liability for unfair and deceptive practices.

TEXAS

State Seeking Civil Penalties Is Not Claiming Damages Under State Medical Malpractice Statute


A dementia patient at an assisted living facility run by the defendant was unsupervised and left the facility through a door whose alarm had been broken for a year. The patient was found dead shortly thereafter. The attorney general sued the defendant, seeking civil penalties, injunctive relief and attorneys’ fees under the state's Deceptive Trade Practices Act (DTPA) (on the grounds that the defendant misrepresented the services being offered) and the Assisted Living Facility Licensing Act (ALFLA) (on the grounds that the defendant violated the minimum standards for assisted living facilities). The state sought penalties for up to $10,000 for each day a violation of ALFLA occurred and $20,000 per violation of DTPA. The defendant moved to dismiss the case on the grounds that it was a health care liability claim under the Texas Medical Liability Act (TMLA) and that the state had failed to file an expert report as required by that act. The trial court dismissed the case and the attorney general appealed.

After analyzing each of the applicable statutes, the court concluded that “the State, acting in its sovereign capacity seeking civil penalties, rather than damages, is not a claimant subject to the expert report requirement under the TMLA, and the TMLA does not apply to the case.” The court explained that its conclusion was supported by the different aims of the statutes at issue. The DTPA and the ALFLA are designed to protect consumers and residents of assisted living facilities, and “The police power is a grant of authority from the people to their governmental agents for the protection of the health, the safety, the comfort, and the welfare of the public.” The TMLA, on the other hand, was designed to “make health care in Texas more available and less expensive by reducing the cost of health care liability claims.” The court also noted that the substantive and procedural requirements of the statutes are very different, from the limitations period to causation. The court concluded, “Stated otherwise, the imposition of the TMLA's requirements on the State acting in its sovereign capacity would significantly undermine the State's legislatively imposed duties under other statutory schemes to protect its citizens.”

WASHINGTON

Representation of State Agencies


An employee of a state college taught a class at the state penitentiary and was injured at the penitentiary when a guard accidentally hit her with a metal door. She was paid workers’ compensation benefits by the Washington Department of Labor and Industry (DLI). Washington statutes authorize actions against third person tortfeasors for one who receives workers’ compensation. The statutes provide, “If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided …the injured worker … may elect to seek damages from the third person.” If the worker does not seek damages, DLI may file a claim on the worker's behalf. In this case, the worker did not pursue a claim and DLI hired an outside attorney and filed a claim against the Department of Corrections (DOC). DOC, represented by an assistant attorney general, moved for summary judgment on the grounds that the state college where the worker was employed and the DOC are branches of the same entity, so the DOC guard and the injured worker were employed by
the same employer. The district court agreed and DLI and the injured worker appealed. An assistant attorney general appeared for DLI and moved to dismiss the appeal and to disqualify the private attorney retained by DLI. The injured worker objected and moved to disqualify the Attorney General's Office based on a conflict.

The court of appeals first held that the attorney general had never claimed to represent the injured worker, but rather, only DLI. Turning to the potential conflict between representing DLI and DOC, the court found that the attorney general is authorized by numerous statutes to represent state agencies in litigation and stated,

A private law firm would be precluded from representing competing interests in the same lawsuit, such as the interests held here by DLI and DOC. ... Ethical rules and case law treat the State Attorney General's Office differently, however. To the extent that the attorney general is not a party to an action or personally interested in a private capacity, the attorney general may represent opposing state agencies in a dispute.

The court did not decide the case on this basis but, rather, on the grounds that the injured employee does not have standing to assert a conflict of interest that does not involve her. The conflict here, if any, is between the state agencies. Only a party who has been represented by the conflicted attorney has standing. The court dismissed the appeal.
International Fellows Author Papers on Innovative Prosecutorial and Crime Fighting Strategies

The National Attorneys General Training and Research Institute (NAGTRI) held its annual International Fellows Program from May 30 – June 7, 2015. After a very competitive process, NAGTRI selected and hosted 23 Fellows from around the globe, with attorneys from Australia, Bermuda, Brazil, Canada, Cook Islands, Denmark, El Salvador, Ireland, Mali, Mexico, Nepal, South Africa, Taiwan, Timor-Leste, Uganda, Ukraine, United Kingdom, and the United States. The Fellows heard and met with leaders in the criminal justice and law enforcement fields, such as George Kelling, PhD, who co-developed the Broken Windows Theory, David O’Keefe from the Manhattan District Attorney’s Office, Deputy Attorney General Sally Quillian Yates from the U.S. Department of Justice, U.S. Supreme Court Clerk Scott Harris, and U.S. Sen. Kelly Ayotte.

The theme for the 2015 class was “Innovative Prosecutorial and Crime Fighting Strategies.” The fellows broke into four smaller groups, each addressing one of the following issues within the larger topic:

- How prosecutors may assist to reduce, investigate and prosecute crime given the increasing global nature of criminal activity.
- Fundamental ways prosecutors may work in the community to reduce crime.
- How prosecutors may assist in lessening recidivism rates when offenders are released from prison back into the community.
- How prosecutors can protect and enhance public confidence in the judicial system and the prosecution office.

The small groups allowed the fellows to learn from one another about their laws, their jurisdictions, the nature of their individual jobs, and the challenges each of them faced. Working together to develop a paper, the fellows in these small groups bonded both professionally and personally. In New York, they presented their findings at the New York University School of Law before an esteemed panel of prosecutors, all of whom are leaders in the field of creative prosecutorial techniques: Ronald Goldstock, Commissioner with the Waterfront Commission of the New York Harbor; Heather Pearson, Assistant District Attorney with the New York District Attorney’s Office; and William E. Schaeffer, Chief of investigations with the Brooklyn District Attorney’s Office.

The fellows, whose jurisdictions ranged from large developed nations to small island nations, recognized that there were differences in their duties and their systems of justice. However, no matter the jurisdiction and no matter from a civil law or a common law nation, they came to recognize that they had common goals: seeking justice and upholding the rule of law.

The completed papers may be accessed using this link.